THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.913 of 2015

ORDER:

This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiffs is directed against the judgment and decree dated 02.09.2015 in A.S.No.102 of 2012 passed by the learned Additional District Judge, Khammam whereby the learned Additional District Judge while dismissing the said first appeal had confirmed the decree and judgment dated 21.03.2012 of the learned Senior Civil Judge, Khammam passed in O.S.No.31 of 2006 filed for partition of house bearing no.8-3-309 along with an open site of an extent of 325 square yards in plot no.136 situated at UPH Colony, Khanapuram Haveli of Khammam Urban Mandal, more fully described in the schedule annexed to the plaint.

2. I have heard the submissions of the learned Counsel for the plaintiffs/appellants and the learned counsel for the 5th respondent-caveator. I have perused the material record.

3. The case of the plaintiffs, in brief, is as follows:

The plaintiffs, who were the minors as on the date of the institution of the suit and who were being represented by their mother and natural guardian, are the children of the first defendant. The second defendant is their grand mother being the mother of the first defendant. One Satyanarayana is the father of the first defendant. The plaint schedule property was assigned vide a patta in Rc.No.C4/1790 dated 09.12.1983 to the said Satyanarayana. During his life time he had constructed an RCC building and the Gram Panchayat had assigned H.No.8-3-309 to the said building. He was in possession and enjoyment of the said schedule property till his death on 03.07.2000. He had left behind him, the defendants 1 and 2, who are his son and wife. On his death, they had succeeded to the schedule property, which is the ancestral property of the plaintiffs and the defendants 1 and 2, who are all members of an undivided Hindu joint family. The schedule property is a coparcenary property. The first defendant was addicted to vices like drinking and playing cards and had ignored the welfare of the family and had neglected to maintain the plaintiffs. The plaintiffs being coparceners are having equal share in the property along with the first defendant. In spite of demands made by the plaintiffs, the defendants 1 and 2 did not partition the property and had postponed the issue of partition. The plaintiffs learnt that the first defendant had borrowed some amount from the third defendant-bank by mortgaging the plaint schedule property and by showing the second defendant as guarantor. While granting loan by accepting the schedule property as security, the third defendant-bank did not follow the due procedure; and, without proper record and in collusion with the defendants 1 and 2, the loan transaction with the 3rd defendant-Bank was created; and, the 3rd defendant Bank, in spite of having knowledge about the involvement of the interests of the minor plaintiffs in the property, had accepted the offer of the suit schedule property by the defendants 1 and 2 as security for the loan, even though there is no consent in that regard on behalf of the plaintiffs. The Bank mortgage loan transaction is not binding on the plaintiffs. The 4th defendant is the Deputy Registrar of Cooperative Societies. In the auction proceedings initiated by the Bank, the mortgaged property was sold for a consideration of Rs.1,73,000/- though the market value was Rs.7,77,500/-. Having come to know of the proposed auction, the natural guardian and the mother of the plaintiffs had made an application stating that the schedule property is not the self-acquired property of the defendants 1 and 2 and that the auction sale may not be confirmed as the property is the ancestral property. The 4th defendant without conducting an enquiry on the said application had confirmed the auction sale proceedings in favour of the 5th defendant-auction purchaser and had passed orders on 15.09.2005. The appeal preferred before the Cooperative Tribunal, Warangal in C.T.A.No.50 of 2005 is pending. The order of the 4th defendant was suspended by the Tribunal. The sale is not binding on the plaintiffs and is illegal and void as the defendants 1 and 2 have no right to create a mortgage over the schedule property, which is an ancestral property and in which the plaintiffs are having a share being coparceners. Hence, the suit for partition is filed.

4. The defendants 1 and 2 filed a defence stating that the suit schedule property is an ancestral undivided Hindu Joint Family property of the family and that there are disputes between the first defendant and his wife and, therefore, the plaintiffs along with the first defendant's wife were residing separately at Khammam and that the father of the first defendant had suffered from chronic Cancer and, therefore, to meet his medical expenditure, the defendants 1 and 2 had borrowed huge amounts from his relatives and friends and that after the death of the father, the first defendant had obtained a loan from the third defendant-bank by mortgaging the suit schedule property and that in the circumstances stated, consent of the plaintiff was not obtained before mortgaging the property to the Bank and that the Bank did not follow the Rules in conducting the auction and that the sale amount realized was far less when compared to the market value and that the property was sold in collusion to the 5th defendant and that the defendants 1 and 2 are ready for partition.

5. The third defendant-bank, while resisting the suit, had contended that the 1st defendant is a dealer of a fair price shop at Khanapuram Haveli and that he had approached the bank for cash and credit loan of Rs.1,00,000/- for running the said shop and that the Mandal Revenue Officer had recommended for grant of the said loan to the first defendant and that the bank after considering the application of the first defendant had sanctioned the loan of Rs.1,00,000/- and that at that time the first defendant had deposited the title deeds relating to the schedule property and that the second defendant, who is none other than the mother of the first defendant, stood as a co-obligator and that at that time both the defendants 1 and 2 had executed a loan agreement along with a letter of guarantee and that accordingly, the suit schedule property was mortgaged and that on failure of the defendants 1 and 2 to repay the said loan, the matter was referred to the 4th defendant-Deputy Registrar, Cooperative Societies and the suit for recovery of money was decreed after due enquiry and that during the course of execution proceedings the Sale Officer had conducted auction sale of the plaint schedule property in accordance with the procedure and rules and also after issuing an auction notice and wide publicity in daily newspapers and that at that juncture, the 1st defendant had approached this Court by filing a Writ Petition and that the same was dismissed and that later the first defendant had filed an Insolvency Petition in I.P.No.30/2001 by showing the bank as one of the respondents and that ultimately the learned Senior Civil Judge, Khammam had dismissed the said I.P. and that in the auction held by the Sale Officer, the 5th defendant who became the successful bidder had paid the sale consideration and that accordingly a registered sale deed was executed in favour of the fifth defendant in respect of the plaint schedule property and that possession of the same was delivered to him and that the first defendant had filed a petition under Rule 52(14) of the Andhra Pradesh Cooperative Societies Rules before the fourth defendant-Deputy Registrar of Cooperative Societies and, after giving notice to the plaintiffs, an enquiry was conducted and that petition was dismissed and that the plaintiffs had approached the Cooperative Tribunal and had obtained injunction order and that, therefore, the suit for partition is not maintainable.

6. The 5th defendant, who is the purchaser of the suit schedule property in the auction sale held pursuant to the execution proceedings filed by the 3rd defendant bank for recovery of the debt due to the bank from the defendants 1 and 2, had filed a defence stating that he became a successful bidder in the auction sale and that he had purchased the schedule property for a valuable consideration and that he is a *bona fide* purchaser and that the suit for partition is not maintainable and is liable to be dismissed.

7. Having regard to the above pleadings the trial Court had framed the following issues for trial:

1) Whether the plaintiffs are entitled for preliminary decree for partition of the schedule property as prayed?
2) Whether the suit is barred by limitation?
3) To what relief?

8. At trial, the first plaintiff, who became a major by that time, was examined as PW1 and exhibits A1 to A3 were marked on the side of the plaintiffs. On behalf of the defendants the officer of the third defendant-bank was examined as DW1 and exhibits B1 to B24 were marked. On merits the trial Court had dismissed the suit *inter alia* holding that the plaint schedule property is neither joint family property nor ancestral property and that it is the self-acquired property of the father of the first defendant and that on the death of the father of the first defendant the property devolved upon the first defendant and his mother, that is, the second defendant and that they have every right to mortgage the property and, therefore, the plaintiffs, who are the children of the first defendant, are not entitled to seek partition.

9. In the first Appeal Suit preferred by the unsuccessful plaintiffs, the Court below had framed the following points:

1) Whether the schedule property is the joint family property of the plaintiffs and defendant Nos.1 and 2 and the plaintiffs are entitled for partition as

prayed for?

2) To what relief?

On merits, the Court below had dismissed the first Appeal Suit and confirmed the decree and judgment of the trial Court. Feeling aggrieved, the plaintiffs had preferred the present second appeal.

10. The learned counsel for the appellants would contend that the suit schedule property was assigned by way of a patta to the father of the first defendant by name Satyanarayana and that during his lifetime he had constructed an RCC building and enjoyed the property till his death and that the said assigned property is the ancestral property of the plaintiffs who are the grand children of the said Satyanarayana and that the plaintiffs being coparceners are entitled to a share in the property and that the defendants1 and 2 have no right whatsoever to mortgage the property ignoring the shares of the plaintiffs in the ancestral property and that the mortgage loan transaction in favour of the 3rd defendant-bank without the consent of the plaintiffs is a collusive transaction and that the auction sale by the Sales Officer of the bank, without following the procedure established by law, is null and void and is not binding on the plaintiffs and that the Courts below are not justified in dismissing the suit and Appeal Suit without adjudicating the issue as to the source of title of the suit schedule property and that the Court below had merely dismissed the Appeal Suit only on the ground that the first defendant with the second defendant as a co-obligant had obtained a loan from the third defendant-bank by mortgaging the schedule property. He would further contend that the Court below, having held that the suit schedule property was admittedly assigned to the father of the first defendant, ought to have noted that such an assigned land is prohibited from being transferred in any manner as per the provisions of the Andhra Pradesh Assigned Lands (Prohibition of Transfers) Act, 1977 (for brevity, 'the Assigned Lands Act') and, therefore, it ought to have further held that the auction sale by the bank in favour of the fifth defendant is void. He had finally submitted that the Court below is not justified in dismissing the first appeal without following the procedure contemplated under Order XLI Rule 31 of the Code and had requested to admit the second appeal.

11. On the other hand the learned counsel for the 5^{th} respondent-caveator would submit that no question of law much less a substantial question of law is raised in the grounds of objection in the Memorandum of the Second Appeal and that both the Courts below have recorded a concurrent finding of fact that the suit schedule property is neither a joint family property nor an ancestral property of the plaintiffs and had also held that the property is the exclusive property of the defendants 1 and 2 and that they are entitled to mortgage the same to the bank while obtaining a loan and that the said concurrent findings of facts recorded after considering the facts accurately and the evidence in proper perspective do not call for any interference and that the sale of the assigned property is not a voluntary sale and that it is an involuntary sale towards the realization of the mortgage debt due to the Co-operative Bank and, therefore, the provisions of the Assigned Lands Act have no application and that the Court below had formulated a comprehensive point and had dealt with all the aspects of the matter and considered all the arguments advanced by both the sides before answering the comprehensive point against the appellants and while concurring with the decree and judgment of the trial Court and that the contention that the procedure contemplated under Order XLI Rule 31 of the Code was not followed by the Court below is not correct and that the Second Appeal, which is devoid of merit, is liable to be dismissed.

12. Now it is to be examined as to whether the questions being sought to be raised as involved are substantial questions of law and, if so, whether such questions are in actuality involved. If this Court comes to the conclusion that no such questions are involved, this appeal deserves to be dismissed at the stage of admission. I have carefully gone through the pleadings and the evidence brought on record. I have noted the submissions.

13. I shall now briefly deal with the contentions in seriatim.

13.1 The first contention of the appellants is that the schedule property was admittedly assigned by way of a Patta to the grand father of the plaintiffs and that, therefore, the said schedule property is an ancestral property of the plaintiffs, their father and his mother, that is, the defendants 1and 2 and, hence, the plaintiffs are also having a share in the property and that the defendants 1 and 2 who are not the exclusive owners of the schedule property are not entitled to mortgage the property to the 3rd defendant Co-operative Bank and that in the facts and circumstances of the case the plaintiffs are entitled to seek partition of the property. In support of the said contention the learned counsel for the plaintiffs had placed reliance on the decision in **Lalitha Pershad (Died) by LRs v. Shamsunderlal (Died) by LRs**[1]. *Per contra,* the contention of the 3rd defendant-Bank and 5th defendant, who had purchased the property in the auction sale held by the Bank, is that the patta property is the separate property of the grand father of the plaintiffs and that on his death it devolved upon his son and wife, the defendants 1 and 2 only, and that the said property, as rightly held by the Courts below, is neither joint family nor coparcenary property and that it was the separate and exclusive property of the defendants 1 and 2 and that they had every right to obtain a loan from the bank by mortgaging the property and that the concurrent findings of fact recorded by the Courts below do not call for interference.

13.2 I have gone through the decision in **Lalitha Pershad (Died) by LRs** (1 supra). In the cited decision, the main issue is about adoption and the incidental question was the question of title and it was mainly contended that by virtue of adoption to his elder paternal uncle, Gopilal's title to suit schedule land is exclusive and therefore, it is neither joint family property nor coparcenery property; further it is alternatively contended that even if adoption is not proved, the defendants cannot claim suit schedule land as the Maharaja had granted patta to the father alone. On facts of that case, the Court had found that there is clinching evidence to show that both the brothers always purchased properties in joint names and that all other persons known to the family considered them as members of joint family and that grant of land is an acquisition by the family and the same was treated as joint family property and that during their life times, the brothers have not partitioned the properties and that they had common kitchen. In this background of facts peculiar to that case and the evidence, it was held in the cited decision that it can be concluded that the family was joint and the properties were joint including the suit schedule properties. A reading of the decision shows that the result turned on the facts of the cited case. Therefore, the decision is not helpful to the plaintiffs.

13.3 The question whether the land assigned under 'D' form patta is an exclusive property of the assignee or not is no longer *res integra*. In the decision in **Gorrela Lagumakkagari Anjappa vs. Gorrela Langamakkagari Narsimhulu**[2] this Court had considered the following substantial question:

> **".....when the "D' form patta is granted in favour of the plaintiff in respect of the schedule mentioned land as per the assignment rules, whether it can be treated as joint family property and the defendants who are the brothers of the plaintiff can claim any rights in the said property?"**
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> And, while answering the said question this Court held as follows:
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> **As per the A.P. Assigned Land (Prohibition on Transfers) Act, 1977 the assigned land has to be enjoyed exclusively by the individual in whose favour the assignment is made and it is not liable for partition between the joint family members. The assigned land may be heritable but it cannot be divisible among the joint family members and it also cannot be alienated as laid down under the various provisions of the A.P. Assigned**

Land (Prohibition on Transfers) Act, 1977.

10. The ownership of the assigned land would be with the Government, the assignee has a mere possessory right. As per the assignment policy under the Act and Rules the assignment shall be in favour of a single person. Therefore, the joint family members getting any right and claiming partition does not arise.

Therefore, the law is well settled that the land assigned has to be exclusively enjoyed by the assignee and during his life time his brothers or children or grand children cannot claim any right in it and cannot seek partition of the property assigned under a patta. Following the settled legal position, this Court finds that the contention of the plaintiffs that the property assigned to the grand father of the plaintiffs is their joint family or coparcenary property cannot be countenanced. As a sequel it must be held that the courts below are justified in holding that the schedule property is neither joint family nor coparcenary property.

13.4 In view of the finding that the plaint schedule property is the exclusive and separate property of the grandfather of the plaintiffs and that it is only heritable and is not liable for partition during the life time of the grandfather of the plaintiffs, the next aspect that requires examination is as to whether the plaintiffs are entitled to claim any share in the exclusive property of their grand father on his intestate death. In view of the provision of Section 8 of the Hindu Succession Act, which deals with general rules of succession in the case of males, the property of a male Hindu dying intestate shall devolve firstly upon the heirs being the relatives specified in clause I of the Schedule. As per the clause I of the Schedule of the Act, the Son and the Widow of such male are heirs in clause I; and, in the presence of a Son, the Son's sons or daughters are not entitled to any share in the property. Hence, in the case on hand, on the intestate death of the Grand father of the plaintiffs, his property devolved upon his surviving son and widow, that is the defendants 1 and 2. Hence, as per the Law Of Succession, the plaintiffs who are the children of the 1st defendant are not entitled to any share in the separate and exclusive property of their late grandfather. Viewed thus, this Court finds that the plaintiffs' contention that they have become entitled to a share in the schedule property on the intestate death of their grand father is devoid of merit and is liable for rejection. Hence, the said contention is accordingly rejected.

13.5 The next contention of the plaintiffs is that since the property is an assigned property, it is not alienable and hence, the auction sale conducted by the Bank is invalid. In fact, there is no need to go into this question as it is already held that the plaintiffs have no right to claim a share in the schedule property. Be that as it may. The evidence brought on record would show that the first defendant is a dealer of a fair price shop and that he had borrowed certain amount from the 3rd defendant bank for running his business and that for granting such a loan, a recommendation was also made by the Mandal Revenue Officer concerned and that at the time of the granting of the loan the second defendant stood as a co-obligant and that the loan was granted after entering into a loan agreement and executing a letter of guarantee and on mortgaging the plaint schedule property by deposit of title deeds. Therefore, the contention of the plaintiffs that the bank loan was obtained for the luxuries of their father or spending on his vices, is not established and it is obvious that such a plea is introduced by the plaintiffs to somehow substantiate their claim for partition. It is an admitted fact that the bank loan was not discharged and that, therefore, the suit of the bank for recovery of the loan was decreed and that in the execution proceedings, orders for sale of the property were issued and that after an auction notice and wide publication in daily newspapers and permission for sale, the sale was conducted and later, the sale confirmation orders were passed and ultimately, a registered sale deed under exhibit B18 was executed in favour of the 5th defendant, who is the auction purchaser. Coming to the validity of the sale, it is trite to note that a Division Bench of this Court had already considered a similar question in the decision in **The Sub Registrar and another v. K.Guruvaiah[3].** The facts of the cited case show that an assignee of land had mortgaged that property in favour of a Bank; and that as the mortgage money was not repaid, the Bank had sold the property after the following the procedure established by law; and that the petitioner therein having purchased the land became the lawful owner of the same; However, when the document relating to the said sale transaction was presented for registration, the Sub Registrar had refused to register the document in view of the instructions of the Government not to register such documents dealing with the transactions in regard to sale of assigned lands; and, as he is obliged to refuse to entertain sale deed for registration on the ground that the assigned lands cannot be alienated. In this factual backdrop, while examining the correctness or otherwise of the decision taken by the Sub-Registrar, the Division Bench of this Court having considered the provisions of the Assigned Lands Act and the relevant provisions of the Indian Registration Act had held that it was open to the original assignees to mortgage the land to a Bank and that the mortgage in favour of the Bank was not an alienation and that there was no restriction with regard to mortgaging the land in favour of the Bank and that the mortgage was valid. It was also held that the provisions of the Assigned Lands Act would not operate as the Bank sold the land after following the due process of law as the mortgage money was not repaid to the bank and that thereby, the purchaser became a lawful owner of the land in question and that the transaction in pursuance of which the land has been purchased by the petitioner was valid and not contrary to the provisions of the Assigned Lands Act. Following the ratio in the decision, I hold that the sale transaction in favour of the 5th defendant is valid and, therefore, the contentions of the plaintiffs to the contra are devoid of merit.

13.6 Two more contentions that are urged are – (i) the court below had not formulated proper points as contemplated under Order XLI Rule 31 of the Code; and, (ii) the Court below had not adjudicated the issue in regard to source of title. On a careful examination of the facts and the evidence and on going through the judgment of the court below, this Court finds that there is no substance in these contentions. As already noted, the Court below had framed a comprehensive point viz., "Whether the schedule property is the joint family property of the plaintiffs and defendant nos.1 and 2 and the plaintiffs are entitled for partition as prayed for?" and had dealt with in its judgment all the grounds taken in the memorandum of grounds of appeal filed before it and gave a decision supported by valid and cogent reasons. Therefore, the contention that the Court below had not followed Order XI Rule 31 of the Code and that the Court below had not adjudicated the issue of source of title is devoid merit; further, the impugned judgment cannot be assailed on a mere procedural defect as there is sufficient compliance of the provisions of law otherwise. The view of this Court finds support from the ratio in the decision in **Gorrela Durga Vara Prasada Rao vs. Indukuri Rama Raju and others**[4]**.**

14. A perusal of the judgments of the Courts below would show that the Courts below, having adverted to the facts accurately and the evidence in a proper perspective, have correctly decided the core issues against the plaintiffs by recording findings supported by valid and cogent reasons. The said concurrent findings of fact, in the facts and circumstances of the case, do not warrant any interference. Further, the findings of the Courts below, in the facts and circumstances of the case, are possible and plausible. Therefore, even if another view may be possible, this Court shall not substitute such a view as it is impermissible. On an analytical examination of the facts and the evidence brought on record, this Court finds that the

Courts below are justified in dismissing the suit of the plaintiffs and that there is no substance in the questions that are being raised as substantial questions of law and that no substantial questions of law are involved and that, therefore, this second appeal is liable for dismissal at the stage of admission in view of the narrow compass of the section 100 of the Code. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. The view of this Court gets reinforced form the ratio in the decision in **Gurdev Kaur vs. Kaki[5].**

15. In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this Second Appeal shall stand closed.

M.SEETHARAMA MURTI, J

28th January 2016
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[1] 2009 (5) ALD 345
[2] 2012 920 ALT 242
[3] 2009(2) ALD 250
[4] 2002 (2) ALT 589
[5] AIR 2006 SC 1975