

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.381 OF 2007

JUDGMENT:

Defendant Nos.4,5 and 6, who are the successful parties in O.S.No.5 of 1999 on the file of Principal Junior Civil Judge, Proddatur, and lost their claim in A.S.No.51 of 2002 on the file of II Additional District Judge, Kadapa at Proddatur preferred the present appeal under Section 100 of Code of Civil Procedure (for short, hereinafter, referred to as "C.P.C.") challenging the decree passed by the first appellate Court granting declaratory relief in respect of item No.1 of schedule property declaring that the plaintiff is the owner of the schedule property.

For the sake of convenience, the parties to the appeal will be referred hereinafter throughout the judgment as arrayed before the trial Court.

The plaintiff filed suit for declaration of title of item Nos.1 and 2 of schedule property and for perpetual injunction against his two brothers contending that the properties of the Hindu undivided coparcenary consisting of three brothers, who partitioned their undivided joint family property about 40 years prior to filing of the suit. Since then they are enjoying their share of property allotted to them. After partition, the plaintiff purchased the schedule property with his own funds, but his brothers – defendant Nos.1 and 2 started interfering with the possession and enjoyment of the schedule property by the plaintiff contending that it is Hindu undivided joint family property, thereby they are entitled to claim right over the same while denying the exclusive right of the plaintiff in the schedule property. The plaintiff was dispossessed from the

schedule property during the pendency of the suit, hence he suitably amended the plaint seeking declaration of title to property and also recovery of the possession of item No.1 of the plaint schedule property.

Defendant Nos.1 and 2 filed written statement admitting the relationship between the plaintiff and defendants while denying the alleged partition that took place about 40 years ago as contended by the plaintiff in the plaint while contending that one C.Pedda Subbireddy, another brother, is residing at a different place after separating from the joint family. It is contended that the plaintiff and the defendant Nos.1 and 2 continued as members of Hindu undivided joint family till 1964.

Item No.1 of the plaint schedule property was purchased with the joint family funds, but in the partition took place in 1964 the plaintiff relinquished his right over the suit lands receiving cash of Rs.20,000/-. Thus, the plaintiff ceased to be a member of the joint family and in view of payment of Rs.20,000/- towards his share in the property, he is no more entitled to claim any right in the property. The payment was made under an agreement of relinquishment dated 31.03.1978 executed by the plaintiff in favour of the defendants. Hence, in view of the agreement of relinquishment of his share, the plaintiff is not entitled to claim any right in the property. Item No.2 of the schedule property was purchased even while they are continuing as members of the Hindu undivided Joint family, which was allotted to them and they in turn sold the same to Akula Bala Ramaiah and Akula Lakshmiah of Gaddamvaripalli Village and about 15 years

thereafter, the said purchasers resold the same to defendant Nos.1 and 2 after partition.

They also contended that in view of partition between the plaintiff and defendant, the defendants became absolute owners of the plaint schedule property and the plaintiff is not entitled to claim any relief of declaration of title, recovery of possession and consequently, permanent injunction restraining the defendants from interfering with his possession and enjoyment of the property.

Based on the above pleadings, the trial court framed the following three issues and additional issue for trial:

- (1) Whether the plaintiff is entitled for declaration of title to suit schedule property?**
- (2) Whether the plaintiff is entitled for permanent injunction as prayed for?**
- (3) To what relief?**

Additional Issue:

- (1) Whether the plaintiff is entitled for the recovery of possession of item No.1 of the plaint schedule from D.3 to D.6?**

During trial, on behalf of the plaintiff P.Ws.1 to 3 were examined and marked Exs.A.1 to A.14. On behalf of the defendants, D.Ws.1 to 4 were examined and marked Exs.B.1 to B.21

Upon hearing argument of both the counsel, the trial Court dismissed the suit.

Aggrieved by the decree and judgment of the trial Court, the plaintiff filed A.S.No.51 of 2002 before the II Additional District Judge, Kadapat at Proddatur. The said appeal was allowed on 16.02.2006.

The decree and judgment passed by the first appellate Court in A.S.No.51 of 2002 was challenged before this court in S.A.No.605 of 2006.

This Court by its judgment dated 28.09.2006 allowed the second appeal, remanding the matter to the first appellate Court for fresh consideration and disposal directing to frame a separate point touching on the reliefs of declaration of title and recovery of possession.

On remand, the first appellate Court by its judgment dated 23.01.2007 decreed the suit in part declaring the right of the plaintiff for item No.1 of plaint schedule property and granted other consequential relief of recovery of possession and permanent injunction, while dismissing the claim for item No.2 of schedule property.

Aggrieved by the decree and judgment passed by the first appellate Court in A.S.No.51 of 2002, the present appeal is instituted challenging the decree in respect of item No.1 of the schedule property granted by the first appellate Court on various grounds.

The main contentions raised in the memorandum of grounds of appeal are that the first appellate Court did not consider the revenue records Exs.B.7 to B.15 and presumption that the pattadar passbooks are issued under Section 6 of A.P. Record of Rights in Land Act, 1971 and the first appellate Court without considering the oral evidence of D.Ws.1 to 4 and documentary evidence Exs.B.7 to B.8 in particular, granted a decree in favour of the plaintiff for item No.1 of plaint schedule property while disbelieving the claim of the plaintiff regarding item No.2, as the

same is without any basis and such reversal of judgment by the first appellate Court is erroneous and formulated the following substantial question of law:

“Whether the judgment of the lower appellate Court in which the judgment and decree of trial Court in O.S.No.5 of 1999 is reversed in respect of item-1 of the suit schedule property is sustainable in law when the lower appellate Court being final court in appreciation of evidence failed to consider the oral evidence of DWs 1 to 4 and the documentary evidence Exs.B7 to B15, B17 and B18 and the presumption under Section 6 of A.P. Rights in Land Pattadar Pass Books Act 1971?”

The appeal was admitted basing on ground Nos.4, 6 and 7A by order dated 26.11.2007, but at the time of hearing learned counsel for the respondents contended that the Court has to formulate substantial question of law and decide the same by affording an opportunity to both parties. This Court formulated the following substantial questions of law:

- (1) Whether the judgment of the first appellate Court in A.S.No.51 of 2002 is in consonance with Rule 31 of Order XLI of the Code of Civil Procedure, 1908?***
- (2) Whether the Judgment of the first appellate Court in A.S.No.51 of 2002 is perverse due to non consideration of the documentary evidence and oral evidence?***

During hearing Sri L.J.Veera Reddy, learned counsel for the appellants/defendants contended that the first appellate Court did not appreciate the evidence in proper perspective thought it is the duty of the first appellate court to come to an independent conclusion by applying its mind to the facts and evidence on record in view of the Order XLI Rule 31 C.P.C. and the judgment of the first appellate Court is not in conformity with the Order XLI Rule 31 C.P.C. Therefore, on this ground the judgment of the first appellate Court is liable to be set aside.

Learned counsel for the appellants/defendants further contended that there is presumption under Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971 that the entries made in the pattadar passbooks and title deeds are presumed to be true and correct until the contrary is proved or until it is otherwise amended in accordance with the provisions of the Act, but the first appellate Court did not consider this contention, ignoring the statutory presumption under the Act disbelieved the case of the defendants and erroneously decreed the suit for item No.1 of schedule property. When the defendants established that the plaintiff purchased the property in other village with the amount he received from the defendants i.e. Rs.20,000/- by executing a relinquishment deed dated 31.03.1978, this fact was not considered by the first appellate Court at all, but passed a decree adopting erroneous approach, thus committed a serious error, which warrant interference of this court in the second appeal while exercising power under Section 100 of C.P.C. and placed reliance on “**Doodhnath and Anr. v. Deonandan represented by L.Rs. and Ors.**”¹ and “**Ashok Kumar v. Basantilal and Ors**”²

Learned Senior Counsel Sri M.R.K.Chowdary appearing for the plaintiff/respondent contended that the jurisdiction of this Court under Section 100 of C.P.C. is limited to substantial questions of law and when the defendants are unable to point out any illegality in the judgment, which give raise to substantial questions of law, the appeal cannot be admitted, but this Court

¹ AIR 2006 All 3² AIR 1985 MP 179

admitted the appeal in a casual manner without looking at substantial question of law, but based on grounds urged before this Court. Therefore, the judgment of the first appellate Court is totally inconformity with Order XLI Rule 31 of C.P.C., that apart presumption under Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971 is only a rebuttal presumption and when the suit is filed seeking declaration of title to immovable property, the presumption will disappear and it has no effect on the rights of the parties. Finally, it is contended that the appreciation of the evidence will depend upon the circumstances of the case and the first appellate Court has considered the material on record and passed appropriate judgment by complying Order XLI Rule 31 of C.P.C. and in substance it is sufficient, but mere contending that it is not inconformity with Order XLI Rule 31 C.P.C. and the judgment is perverse is not sufficient to set aside the judgment and decree of the first appellate Court since it obligates the defendants, who filed the second appeal to demonstrate how it is perverse and what was not considered and what was not complied by the first appellate Court, in the absence of such material before the Court, the decree passed by the first appellate Court cannot be interfered with by this Court while exercising jurisdiction under Section 100 of C.P.C. and placed reliance on “***Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor***”³, “***Sheel Chand v. Prakash Chand***”⁴, “***Panchugopal Barua and others v. Umesh Chandra Goswami and Others***”⁵, “***Kshitish Chandra Purkait v. Santosh Kumar***

³ AIR 1999 SC 867

⁴ (1998) 6 Supreme Court Cases 683

⁵ (1997) 4 Supreme Court Cases 713

***Purkati and others*⁶, “*Sir Chunilal V.Mehta and sons Ltd. v. Century, Spinning and Manufacturing Co.Ltd* ⁷”, “*Komatireddy Buchi Reddy v. Pannala Narsimha Reddy @ Bal Reddy*⁸”, “*Achintya Kumar Saha v. M/s.Nanee Printers and others*⁹”, “*G.Amalorpavam and others v. R.C.Diocese of Madurai and others*¹⁰” “*Irruvuru Ramachandra Reddy @ Chandraiah and others v. Koppala Bhushanam*¹¹” and “*Vegesna Ratnamma v. Chinta Venkateswarlu*¹²”**

In Re SUBSTANTIAL QUESTION NO.1:

The main contention of the learned counsel for the appellants/defendants is that the judgment of the first appellate Court is not in conformity with Order XLI Rule 31 of C.P.C., according to him the first appellate Court has to frame points for determination and record reasons for conclusions on each point independently, but in the first appeal the first appellate Court did not frame even an appropriate point for consideration, but framed the point as follows:

“Whether the plaintiff is entitled to declaration and injunction as prayed for?”

On the basis of the point for consideration framed by the first appellate Court, it is contended that the defendants pleaded relinquishment of title of the plaintiff by receiving Rs.20,000/- under agreement of relinquishment dated 31.03.1978 and the same was disputed by the plaintiff, in such case the first appellate

⁶ AIR 1997 Supreme Court 2517 (1)

⁷ AIR 1962 Supreme Court 1314 (1)

⁸ 2011 (4) ALD 770

⁹ AIR 2004 Supreme Court 1591

¹⁰ (2006) 3 Supreme Court Cases 224

¹¹ 2006 (6) ALD 140

¹² 2008 (1) ALD 113

Court is expected to frame a point for determination regarding the relinquishment of right of the plaintiff on receipt of Rs.20,000/- and execution of the agreement to relinquish his share. But the first appellate Court did not frame any point on this specific contention, but framed omnibus point for determination, apart from that though the suit was initially filed for relief of declaration of title and perpetual injunction, as the defendants dispossessed the plaintiff during pendency of the suit the plaintiff claimed recovery of possession of the property, but no point for consideration was framed with regard to the entitlement of the plaintiff to recover possession of the property. Therefore, the point for consideration framed by the first appellate Court is not in accordance with law and even it is in utter violation of the direction issued by this Court in operative portion of judgment in Second Appeal No.605 of 2006. On this ground the judgment of the first appellate court is liable to be set aside.

Order XLI Rule 31 of C.P.C. prescribed certain requirements of judgment in the first appeal and the same are extracted hereunder for better appreciation.

Order XLI Rule 31 of C.P.C: Contents, date and signature of judgment: The judgment of the appellate Court shall be in writing and shall state-

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

There is State amendment to Order XL1 Rule 31 of C.P.C.
and it is as follows:

“31. The judgment of the Appellate Court shall be in writing and shall state –

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein:

Provided that, where the Presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.”

The State amendment is almost identical to first part of Order XLI Rule 31 of C.P.C., but proviso is added to Rule 31, which enable the Presiding Judge, if specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open court and the transcript of the judgment so pronounced shall be signed by the Judge. But the proviso to Order XLI Rule 31 of C.P.C. as per Andhra Pradesh amendment is irrelevant for purpose of deciding the real controversy.

In view of the requirement under Order XLI Rule 31 of C.P.C. the first appellate Court Judge has to frame points for determination and record reasons for every conclusion, as required by Order XLI Rule 31 of C.P.C. Consequently, failure to frame appropriate point for determination and failure to answer the point for determination is apparently an error. But the law declared by the Apex Court regarding the substantial question of law is on different footing.

Sri M.R.K.Chowdary, learned senior counsel for the respondent/plaintiff contended that when a finding of fact recorded by the Court is against the weight of evidence is a question, which will remain in the realm of appreciation of evidence does not call for question of law much less any substantial question of law to exercise jurisdiction under Section 100 of C.P.C., but here the dispute is with regard to non-compliance of procedure under Order XLI Rule 31 of C.P.C., but that would not give rise to any substantial question of law as contended by Sri M.R.K.Chowdary, learned senior counsel, since the first appellate Courts in its judgment discussed each and every contention with reference to evidence, complying the mandate of Order XLI Rule 31 of C.P.C. in substance and mere failure to frame a point touching the recovery of possession by itself would not vitiate the judgment of the first appellate Court as the same is based on total appreciation of the facts and evidence and consciously passed decree for recovery of possession though no point for determination was framed by the first appellate Court. Therefore, the judgment of the first appellate Court cannot be found fault.

The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 C.P.C. has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the

appellate court should comply with all the requirements of Order 41 Rule 31 C.P.C. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court, there is substantial compliance with the provisions of Order 41 Rule 31 C.P.C. and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective contention and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC as held in ***G.Amalorpavam and others v. R.C.Diocese of Madurai and others*** (referred supra).

The same view was expressed by the Division Bench of this Court in “**Gorrella Durga Vara Prasada Rao v. Indukuri Ram Raju and others**”¹³

As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact as held in “**Madhusudan Das v. Narayanibai**”¹⁴ .

The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact as held in “**Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh**”¹⁵ Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

Applying the same principle to the present facts of the case though point for determination framed by the first appellate Court is not inconsonance with the direction issued by this Court in

¹³ 2002 (2) ALT 589 (D.B.)

¹⁴ (1983) 1 SCC 35

¹⁵ AIR 1951 SC 120

Second Appeal No.605 of 2006, but the Presiding Officer of the first appellate Court dealt with each and every contention including right of the plaintiff to recover the possession with reference to defence set by the defendants regarding relinquishment of share of the plaintiff by executing relinquishment deed. In such case, non compliance of Order XLI Rule 31 of C.P.C. would not give rise to substantial question of law since the judgment of the first appellate Court is inconformity with requirement of Order XLI Rule 31 of C.P.C. as the first appellate Court re-appreciated the oral and documentary evidence and came to a different independent conclusion than the conclusion arrived at by the trial Court and reversed the findings of the trial Court while granting a decree for declaration in respect of item No.1 of schedule property by recording independent reasons as to why he did not believe the defence of the defendants and differed with the findings recorded by the trial Court. Therefore, such independent appreciation of evidence applying its judicial mind by the first appellate court recording a finding thereon is substantial compliance.

Yet Sri M.R.K.Chowdary, learned senior counsel for the respondent/plaintiff drawn the attention of this Court to a judgment rendered in “**Irruvuru Ramachandra Reddy @ Chandraiah and others v. Koppala Bhushanam**” (referred supra) and “**Vegesna Ratnamma v. Chinta Venkateswarlu**” (referred supra) to contend that on account of strict adherence to Order XLI Rule 31 of C.P.C. the judgment of the first appellate Court is not vitiated, merely because point for determination framed by the Court does not cover the entire controversy and when the first appellate court by appreciating the entire evidence

came to independent conclusion assigning its independent reasons is sufficient compliance. In ***Irruvuru Ramachandra Reddy @ Chandraiah and others v. Koppala Bhushanam*** (referred supra) this Court relying on the Division Bench Judgment of this Court rendered in ***Gorrella Durga Vara Prasada Rao v. Indukuri Ram Raju and others*** (referred supra) and held that Order XLI Rule 31 of C.P.C. mandates that the judgment of the appellate Court shall state the points for determination. Such a course would entail in a systematic and compartmentalized discussion, touching on the various controversies. However, by its very nature, this procedural requirement is not so mandatory, as to vitiate the judgment, on the sole ground that its compliance was not ensured.

In other judgment rendered in ***Vegesna Ratnamma v. Chinta Venkateswarlu*** (referred supra) this Court expressed a similar view, which does not require repetition.

Learned counsel for the appellants contended that the first appellate Court did not advert to rival contentions and failed to re-appreciate the entire evidence based on the contentions raised both in the written statement and argument before the Court and failed to frame appropriate points for determination as required under Order XLI Rule 31 of C.P.C. and failed to record reasons for the points for determination vitiates the entire judgment and decree as it is not in compliance of requirement under Order XLI Rule 31 of C.P.C. and he placed reliance on the judgment of the Apex Court rendered in ***H.Siddiqui (Dead) by LRs. v.***

R.Ramalingam¹⁶ wherein it was held that the High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of the Code of Civil Procedure, 1908.

Learned counsel for the appellants/defendants relied on “**Doodhnath and Anr. v. Deonandan represented by L.Rs. and Ors.**” (referred supra) and “**Ashok Kumar v. Basantilal and Ors**”, (referred supra) but they have no application to the present facts of the case.

However, in view of substantial compliance of Order XLI Rule 31 of C.P.C. by the first appellate Court, no substantial question of law would arise. On this ground, the judgment and decree of the first appellate Court requires no interference. Accordingly, the question is answered in favour of plaintiff and against defendants.

In Re SUBSTANTIAL QUESTION NO.2:

One of the contentions raised by the counsel for the appellant is that the judgment of the first appellate Court is perverse as there is a presumption under Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971. As per Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971 every entry in the record of rights shall be presumed to be true until the contrary is proved or until it is otherwise amended in accordance with the provisions of this Act. According to the same, a statutory presumption is to be drawn regarding the genuineness of entries therein, but this question was not answered by the first appellate Court in the entire judgment. Apart from that the plea of relinquishment of right of plaintiff on receipt of Rs.20,000/- by

¹⁶ (2011) 4 Supreme Court Cases 240

executing agreement of relinquishment was not at all considered by the first appellate Court. Therefore, non consideration of specific plea raised before the first appellate Court vitiates the entire judgment as it is perverse.

Perversity is not defined anywhere in the Act. But perversity in the judgment means passing a decree without considering the evidence, without adverting to the material on record, points raised and contentions urged before the Court or passing decree and judgment based on extraneous material or based on inadmissible evidence. In the present case, the contentions of the counsel for the appellants/defendants is two fold as referred above.

Undoubtedly, there is a presumption under Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971 as to the correctness of the entries in record of rights. According to Section 6 of the Andhra Pradesh Record of Rights in Land Act, 1971 every entry in the record of rights shall be presumed to be true until the contrary is proved or until it is otherwise amended in accordance with the provisions of the Act. Thus, the said statutory presumption is only a rebuttal presumption in view of the specific language used in the section i.e. “until the contrary is proved or until it is otherwise amended”; that itself indicates that such presumption can be rebutted by adducing evidence.

Presumption under Section 6 of the Act is only a rebuttal and it is only for limited purpose as to establish prima-facie possession and title to the property and it is not a document of title.

In view of the principle laid down in “**Satish Mutually Aided Cooperative Housing Society Ltd. v. Yamjala Malla**

Reddy and Ors¹⁷ and **“P.Veerabhadrappa Setty v. Polliki Chandrahas¹⁸”** based on the record of rights, the ownership of the defendants cannot be accepted.

Undisputedly, the item No.1 of the property was purchased by the plaintiff and the document is also registered in his name and unless it is proved that it was purchased with the joint family nucleus, it is difficult to hold that the item No.1 of the schedule property is joint family property, at the same time, there is no bar to possess any property independently by any member of the joint family. But the onus is on such person pleading that the plaintiff has purchased the property with joint family income while continuing as member of the joint family.

In the present facts of the case, the plaintiff is able to establish that he has purchased the property after separating from the joint family in the year 1961. The first appellate court disbelieved the plea of relinquishment of right based on the evidence Ex.B.16. Ex.B.16 is the declaration signed by the plaintiff with regard to item No.2 of the schedule property declaring that the defendants are owners of the item No.2 of suit schedule property and there is a reference about partition that took place 20 years prior to execution of Ex.B.16. Therefore, partition might have taken place in the year 1961 and it supports the plea that the plaintiff separated from the defendants and ceased to be the member of the joint family either in the year 1960 or 1961. Ex.B.16 supports the contention of the plaintiff and it is improper to believe the contention of the defendants that in the year 1964

¹⁷ (2013) 9 SCC 28

¹⁸ 2014 (2) ALT 607

plaintiff received Rs.20,000/- and relinquished his right. Admittedly, item No.1 of the plaint schedule property was purchased in the year 1961, in such case when partition took place either in 1960 or 1961 as per Ex.B.16 and item No.1 of the plaint schedule property was purchased only after division from joint family and the same would not form part of estate of the joint family. Item No.2 also purchased subsequent to alleged partition either in 1960 or 1961 as per Ex.B.16. But still the plaintiff declared that the defendant Nos.1 and 2 are in possession and they are the owners of the property by executing Ex.B.16. On the strength of Ex.B.16, the first appellate Court concluded that the plaintiff abandoned his right in item No.2 of the plaint schedule property and denied the relief of declaration of title for item No.2 of the plaint schedule property. Hence, on the ground of non consideration of pattadar passbooks and tile deeds, the decree of the first appellate Court cannot be set at naught on the ground of perversity. Exs.B.12 and B.15 are the proceedings issued by the Tahsildar for splitting up of joint pattas. In the absence of any specific deed of partition, it is difficult to accept the contention of the defendants that the plaintiff continued as member of the joint family till 1964. On this ground, this Court cannot reverse the judgment of the first appellate Court.

Learned counsel for the appellants/ defendants would further contend that when the plaintiff executed relinquishment agreement, it is for him to disprove the alleged relinquishment on receipt of Rs.20,000/- but this contention cannot be accepted for the reason that the defendants set up the agreement of relinquishment executed by the plaintiff in favour of defendant

Nos.1 and 2 on receipt of Rs.20,000/-, when a particular fact is within the exclusive knowledge of the defendants, the initial onus of proof is upon them under Section 106 of Indian Evidence Act. Strangely, though the defendants pleaded execution of agreement of relinquishment, they did not produce the same before the trial Court to substantiate their contention. When an agreement is reduced into writing, such transaction has to be proved by producing the same before the Court i.e. by producing document itself as primary evidence, but the defendants have not adduced any evidence to prove the contents of agreement of relinquishment. Hence, the plea of relinquishment of share by the plaintiff by receiving Rs.20,000/- is not accepted by the first appellate Court rightly, but the trial Court did not look into the various aspects regarding proof of particular fact and committed an error. When the trial Court committed such a serious error in dismissing the suit in toto without appreciating the evidence on record, the first appellate Court is justified in interfering with the judgment of the trial Court. Therefore, the alleged perversity in appreciation of evidence is not based on any material and unless it is established that the first appellate Court did not consider the specific piece of evidence while deciding the appeal, it would not give rise to substantial question of law.

Learned counsel for the appellants though contended that the judgment of the first appellate Court is perverse unable to substantiate his contention drawing the attention of this Court as to what was not considered by the first appellate Court while appreciating the evidence on record. In any view of the matter, the contention of Sri M.R.K.Chowdary, learned senior counsel, that

unless it is demonstrated that a particular piece of evidence was not considered, a substantial question of law cannot be framed, based on mere allegation that the judgment of the first appellate Court is perverse. In support of his contention, he placed reliance on a judgment rendered by the Apex Court in “**Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor**” (referred supra), wherein it was held that whether a finding of fact reached by Courts below is against the weight of evidence or not is a question which will remain in the realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law, which can enable the High Court in second appeal to upset such a finding of fact.

In “**Sheel Chand v. Prakash Chand**” (referred supra) the Apex Court while analysing the scope of Section 100 of C.P.C. more particularly regarding jurisdiction of the Court in Second Appeal held that the jurisdiction of the High Court to entertain a second appeal after the 1976 Amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. The question formulated by the Single Judge of the High Court, strictly speaking is not even a question of law, let alone a substantial question of law. The existence of a “substantial question of law” is the sine qua non for the exercise of jurisdiction by the High Court under the amended provisions of Section 100 C.P.C. The High Court unjustifiably interfered with pure questions of fact while exercising jurisdiction Under Section 100 CPC. It was not proper for the High Court to have reversed the concurrent findings of fact while exercising jurisdiction Under Section 100 CPC. That apart,

the High Court did not even notice, let alone answer the question of law which had been formulated by it at the time of admission of the second appeal. There is no reference to the question of law in the impugned order and it appears that the High Court thought that it was dealing with a first appeal and not a second appeal Under Section 100 CPC. The findings of fact recorded by the two courts below were based on proper appreciation of evidence and the material on the record. There was no perversity, illegality or irregularity in those findings. The findings, therefore, did not require to be upset in a second appeal Under Section 100 CPC. IN the said Judgment, the Apex Court relied on “**Panchugopal Barua v. Umesh Chandra Goswami**” (referred supra), wherein the Supreme Court discussed the scope of Section 100 of C.P.C. and on analysis of law laid down by the Supreme Court in various judgments, it is clear that the jurisdiction of this Court under Section 100 of C.P.C. is limited.

In “**Kshitish Chandra Purkait v. Santosh Kumar Purkati**” (referred supra) it was held that proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on Court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 C.P.C. should always be borne in mind. We are sorry to state that the above aspects are seldom borne in mind in many cases and second appeals are entertained and/or disposed of, without conforming to the above

discipline. If the principle laid down in the above judgment to the present facts of the case, it is the duty of the Court to formulate substantial question of law and afford an opportunity to both the Counsel to address on this question.

In the present facts of the case, this Court reformulated the substantial question of law though the appeal was admitted by this Court on 26.11.2007 based on the ground Nos.4, 6 and 7-A raised in the memorandum of grounds of appeal. After reformulating the substantial questions of law, this Court afforded an opportunity to both the counsel to address on the substantial questions. Therefore, the parties are not deprived of any right to address on the substantial questions reformulated by this Court.

Sri M.R.K.Chowdary, learned senior counsel appearing for the respondent – plaintiff drawn the attention of this court as to what is the test to be applied to find out substantial questions of law placing reliance on **Sir Chunilal V.Mehta and sons Ltd. v. Century, Spinning and Manufacturing Co.Ltd.** (referred supra), in the said judgment the Apex Court relied on “**Raghunath Prasad Singh v. Deputy Commr. of Partabgarh**¹⁹” held that the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and, substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally, settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in

¹⁹ AIR 1927 PC 110

determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

If the same test is applied to the present facts of the case, none of the questions formulated by this Court afforded any ground to interfere with the findings recorded by the first appellate Court.

As discussed above, the first appellate Court recorded convincing reasons for the independent conclusions arrived at by it since the trial Court did not consider the evidence in proper perspective more particularly the evidentiary value of various documents and unsubstantiated plea of execution of agreement of relinquishment by the plaintiff in favour of the defendants and committed an error. Hence, the question is answered accordingly.

In view of my foregoing discussion, I find no ground to interfere with the findings of the first appellate Court. Consequently, the second appeal deserves to be dismissed.

In the result, the second appeal is dismissed without costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Date:17.10.2016
Ksp

It is brought to notice of the Court after pronouncement of judgment that the respondents deposited some amount, as directed by this Court to the credit of the suit, but subject to the result of the appeal.

The plaintiff – respondent is permitted to withdraw the amount after expiry of time allowed for filing SLP.

JUSTICE M. SATYANARAYANA MURTHY

Date:17.10.2016
Ksp

