

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.783 OF 1998

JUDGMENT:

Having been unsuccessful before the court of first instance, i.e., District Munsif, Rajam by the decree and judgment dated 30.12.1995 in O.S. No.91 of 1989, and in the appellate court, i.e., Subordinate Judge, Rajam by the decree and judgment dated 28.09.1997 in A.S. No.6 of 1996, the plaintiff preferred the instant Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC').

2. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the trial court in the original suit.

3. Originally, the plaintiff sought perpetual injunction restraining the defendants from unjustly interfering with the possession and enjoyment over the plaint schedule property (suit property) in O.S. No.91 of 1989 on the file of the District Munsif, Rajam. It appears, along with the suit, he made an application under Order 39 Rules 1 and 2 of CPC. As he could not succeed in obtaining temporary injunction and even before the appellate court, he lost the claim for temporary injunction, basing on the observations made by the Courts succinctly that the plaintiff failed to prove his *prima facie* possession

over the suit property, he introduced amendment seeking the reliefs of recovery of possession and consequential perpetual injunction. His case is that he purchased the property from one Kotagiri Seetaramamurthy, who is defendant No.5 herein, on 15.04.1989 for a valid consideration of Rs.11,300/- under a registered sale deed and he was put in possession thereof, who (D.5) said to have got the property by way of gift from his father-in-law – Damera Ramarao towards dowry at the time of marriage in the year 1955. An alternative stand was also taken by the plaintiff that his vendor-defendant No.5 also perfected his title over the suit property by adverse possession. It is according to him, since the date of purchase, he was in continuous possession and enjoyment over the property. It appears, during the pendency of suit, the plaintiff again introduced yet another amendment stating that defendant Nos.3 and 4 have executed a khararunama agreement on 23.01.1970 in favour of defendant No.5 stating that they do not have any right over the suit property and defendant No.5 has been in possession and enjoyment of the same and that defendant No.1 is one of the attestors of the said agreement and, therefore, defendant Nos.1 to 4 have estopped to claim any right in the suit property. Thus, the plaintiff claimed the reliefs of recovery of possession, ascertainment of mesne profits and consequential perpetual injunction.

4. The request was resisted by defendant Nos.1

to 4. Defendant No.1 filed written statement adopted by defendant No.2. The case of defendant Nos.3 and 4 is consistent as regards title over the suit property. Their case has been that the suit property belongs to K.Mangayamma (D.3) and K.Varaprasada Rao (D.4). The father of defendant No.3 late Venkata Surya Rao along with D.Seetarama Murthy jointly purchased Acs.6-50 cents of wet land and Acs.3-50 cents of dry land from Ippili people under a registered sale deed dated 03.04.1950 and subsequently, the said Venkata Surya Rao sold 1/4th of the said property to K.Satyanarayana and others under a registered sale deed dated 28.01.1954. Later, defendant Nos.3 and 4 sold half of the extent of suit property under registered sale deed dated 06.05.1967 to D.Butchi Venkata Rao. The remaining extent constitutes the suit property belonging to defendant Nos.3 and 4. Their common case is that since defendant No.3, who incidentally happens to be the sister of defendant No.1, and defendant No.2 being the son of defendant No.1, since bedridden, and defendant No.3 has been working in Visakhapatnam, the property was entrusted to defendant No.1 to manage and cultivate on their behalf. Their specific case is that defendant No.5, since working as a Surveyor in Survey Department, by exerting his influence, managed the settlement authorities and got registered his name in survey records. Their specific case is that the

alleged khararunama dated 23.01.1970, and rough patta are got-up documents and the inland letters said to have written by defendant Nos.1 and 2, according to them, were never written by them and, thus, they denied the title of the plaintiff and sought to dismiss the claim.

5. With similar allegations, defendant Nos.3 and 4 have filed written statements. Defendant No.5 remained *ex parte*.

6. Learned District Munsif basing on the pleadings originally agitated, framed the following four issues:

"i) Whether the plaintiff is entitled for permanent injunction as prayed for ?

ii) Whether the sale deed dated 15-4-89 is not valid not true and binding on the defendants ?

iii) Whether the Kararunama agreement dt. 23.1.70 is not true ?

iv) To what relief ? "

For the relief of possession originally introduced by way amendment, the following additional issues were framed on 16.07.1992:

"i) Whether the defendants 3 and 4 are in possession of suit schedule land and they have

perfected their possession adversely ?

ii) To what relief ?"

Again on 25.11.1995, the following additional issue was framed:

"Whether the plaintiff is entitled for recovery of possession and mesne profits ?"

7. To substantiate the irrespective claims, the plaintiff, besides examining himself as P.W.1, has examined three more witnesses as P.Ws.2 to 4 and marked Exs.A.1 to A.27; and defendant Nos.1, 3 and 4 examined themselves as D.Ws.1 to 3, respectively, besides examining two more witnesses as D.Ws.4 and 5 and marked Exs.B.1 to B.13.

8. Learned District Munsif mainly analyzing the case of the plaintiff in the light of Ex.A.1-registered sale deed, under which, the plaintiff said to have purchased the suit property from defendant No.5 on 15.04.1989 for a consideration of Rs.11,300/-, Ex.A.2-rough patta said to have issued in his name and Ex.A.4-alleged khararunama said to have executed by defendant Nos.1 and 4 and basing on the evidence of P.W.3-brother of defendant No.1 and the evidence of defendant No.3 as D.W.2 as regards his admission that the signature on Ex.A.4 belongs to his father-in-law, who is defendant No.1, and

by comparing the purported signatures of defendant Nos.3 and 4 on Ex.A.4 with that of the signatures found on vakalat and summons, observing that all the signatures of defendant No.4 are one and the same and also comparing the signatures of defendant No.1 on Exs.A.9 to A.21, which were admitted by defendant No.1 as D.W.1 in his cross-examination, arrived at the finding that defendant No.1 attested Ex.A.4-khararunama agreement and recorded finding that defendant Nos.3 and 4 have executed Ex.A.4 in favour of defendant No.5. However, the learned District Munsif, holding that Ex.A.4 will not confer any right in favour of defendant No.5 in respect of suit property as it (Ex.A.4) is neither sale deed nor gift deed nor agreement of sale and no consideration was passed thereunder and hence, it would not confer any title on defendant No.5 in respect of suit property recorded a finding that the plaintiff cannot derive any title over the suit property under Ex.A.1. This apart, the learned District Munsif also derived probability from the circumstance from the plaintiff's failure to place any evidence in the direction of defendant No.5's father-in-law gifting any property in favour of defendant No.5. Further, basing on the admission made by P.W.2 that by the date of his marriage, the suit property stood in the name of K.Venkata Surya Rao-husband of defendant No.4, derived the probability that the suit property is the self-acquired properties of K.Venkata Surya Rao. Further probabilities

derived by the learned District Munsif even based on the alienations made by defendant Nos.3 and 4 and part of the land in suit survey numbers under Ex.B.4 dated 28.01.1954, whereunder, K.Venkata Surya Rao executed sale deed in favour of K.Satyanarayana and Ex.B.5 dated 06.05.1967 executed by defendant Nos.4 and 5 in favour of Butchi Venkata Rao, as by then, K.Venkata Surya Rao was no more, which properties are covered by the very same survey numbers, and even recorded a finding that defendant No.5, since was working in Survey Department, managed to get his name recorded in survey registers and thereby, dismissed the suit tendering findings on all issues against the plaintiff.

9. When the plaintiff preferred the appeal, the lower appellate court disbelieved the delivery of possession of the suit property by defendant No.5 to the plaintiff under Ex.A.1 observing that Ex.A.1 was dated 15.04.1989 and the cause of action for the suit was shown as having arisen in the month of May, 1989 and the suit was filed in the month of June, 1989. The first appellate court also specifically observed that the plaintiff himself was not certain of his vendor's writing stating that the plaintiff, while claiming title under registered sale deed, still, set up perfection of title by adverse possession by his vendor and derived yet another probability, that the plaintiff has made inconsistent averments in the plaint that his vendor got the suit property under gift at the time of his

marriage towards dowry, which was opposed to public policy. The appellate court extracting certain relevant portions from the evidence of P.W.1 touching acquisition of title by defendant No.5 from his father-in-law and the conduct of the plaintiff when initially filing the suit for perpetual injunction only and when he failed to get temporary injunction before the trial court and before the appellate court amending the plaint for recovery of possession basing on the observations made by both the courts below and other circumstances, from which probabilities were derived in aid of documentary evidence let in by defendant Nos.1 to 4 and held that Damera Rama Rao had no right and title over the suit property and, therefore, the question of defendant No.5 acquiring any right did not arise and consequently, conveying title over the suit property by defendant No.5 in favour of the plaintiff does not arise. The appellate court also found out a strange stand being taken during the course of evidence as P.W.3 for the first time has come up with the story that the husband of defendant No.4 indebted to them a sum of Rs.15,000/- and a part thereof was paid and as the balance could not be paid, the said Venkata Surya Rao has left the land purchased by him, which in its view, is inconsistent with his (P.W.3) own version that in the year 1955 himself and his elder brother gave land to P.W.2 and delivered possession to him, which was not the case of P.W.2, at all. Thus, on reappraisal of evidence, the

appellate court disbelieved the case of the plaintiff and the evidence let in by him and dismissed the appeal confirming the judgment and decree rendered by the learned District Munsif.

10. Aggrieved by the aforesaid judgment and decree passed by the learned Subordinate Judge, Rajam in A.S. No.6 of 1996, the instant second appeal is preferred on the ground that the learned Subordinate Judge failed to formulate distinct points for determination as required under Order 41 Rule 31 CPC, that the learned Subordinate Judge failed to consider Ex.A.4-khararunama executed by defendant Nos.3 and 4 in favour of defendant No.5 admitting the title and possession of the vendor of the plaintiff in which defendant No.1 has signed as an attesor. It is stated that the learned Subordinate Judge failed to appreciate Exs.A.11 and A.12 dated 01.09.1965 and 04.11.1967 addressed by defendant No.1 to the vendor of the plaintiff clearly proving that defendant No.5 was cultivating the suit property on behalf of defendant No.1 and ought to have appreciated the entries in Exs.A.13 to A.19 and ought not to have shirk responsibility in discussing both oral and documentary evidence elaborately being the first appellate court and formulated the following substantial questions of law:

"(a) Whether the judgment of Lower Appellate Court is not vitiated for not framing the points that

arise for determination as required by the Mandatory Provisions of Order 41 Rule 31 C.P.C.

(b) Whether, the Judgment of the Lower Appellate Court is not vitiated for not considering the crucial document particularly Ex.A-4 which are admissions on the part of the defendants 3 and 4 regarding the title and possession of the vendor of the plaintiff.

(c) Whether, the Judgment of the Lower Appellate Court is not vitiated for not considering the Documents Ex.A-1 to A-20."

11. Herard Sri K.V. Subramanya Narusu, learned counsel for the appellant-plaintiff. Despite affording number of chances to respondent Nos.1 to 3-defendant Nos.1 to 3 to get arguments tendered by their learned counsel, there was no representation and the same was not availed of. The instant appeal is dismissed for default on 04.12.2001 against defendant Nos.4 and 5-respondent Nos.4 and 5. Hence, the instant appeal is reserved for judgment.

12. Concerning the first question, whether the judgment of the lower appellate court is not vitiated for not framing the points that arise for determination, as required

under the mandatory provisions of Order 41 Rule 31 CPC, the learned counsel for the appellant-plaintiff has placed reliance on a decision of this Court in **Vadde Anjanappa v. Vadde Hanumantappa and another**^[1].

13. Though, the first appellate court has not distinctly formulated the points for determination, but the point formulated by the appellate court is of vital significance in adjudicating upon the controversy between the parties. The point formulated by the appellate court is thus:

"Whether the sale deed is valued and genuine and whether the agreement is true?"

14. Thus, the appellate court has taken into consideration the effect of Ex.A.1 and its evidential value besides the effect of Ex.A.4, which is termed as khararunama by the plaintiff and, thus, decided the first appeal, dismissing it confirming the judgment and decree passed by the trial court. Therefore, it cannot be said that there has been legal infirmity in the observance of Order 41 Rule 31 CPC. Even the decision rendered by a Single Judge of this Court in **Vadde Anjanappa's** case (supra 1) would not render any assistance for the reason that the point formulated therein was to the effect whether the findings of the learned District Munsif are correct or not. Such has not been the case in the instant first appeal. In

fact, the documents Exs.A.1 and A.4 are crucial for effectual adjudication of controversy between the parties. A comprehensive point was formulated by the appellate court. As there is no merit in the submission of the learned counsel for the appellant that the appellate court has not formulated the points as required by the provisions of Order 41 Rule 31 CPC and, therefore, to remit the matter to first appellate court cannot be acceded to.

15. Concerning the questions of law failure to consider Ex.A.4 and the admissions of defendant Nos.3 and 4 regarding title and possession of the vendor of the plaintiff vitiates the judgment and decree under challenge, it is not as though the appellate court did not resort to reappraisal of evidence on record. The appellate court examined Ex.A.4 in the light of answers given by P.W.3 in his cross-examination including the assertions made by P.W.3 in his chief-examination touching Ex.A.4. Contextual reference even to Ex.A.4 finds place in the judgment rendered by the appellate court and, therefore, it cannot be said that the appellate court completely failed to reassess the evidence on record in relation to Ex.A.4's effect and the oral evidence let in by the plaintiff thereon.

16. Though, concurrent findings have been tendered by the courts below, still, turning to the evidence on record, the source of title of D. Rama Rao father-in-law

of defendant No.5 is not traced out by the plaintiff and no evidence at all is placed by the plaintiff to show that the suit property originally belonged to the said D.Rama Rao. Second, though, defendant No.5 claimed that the suit property was gifted to him at the time of his marriage towards dowry and the very fact that it is not in his evidence that any gift deed executed by defendant No.5's father-in-law in his favour is sufficient to view that no title over the suit property was conveyed to defendant No.5 leaving apart the fact that his father-in-law himself did not have any right or interest over the suit property. When there is no registered settlement conveying title over the suit property in favour of defendant No.5, the question of defendant No.5 conveying absolute rights under Ex.A.1 does not arise. This aspect has been dealt with elaborately by the trial court and even reappraised by the appellate court.

17. On Ex.A.4, the trial court, somehow, tendered a finding that the signature on Ex.A.4 belongs to defendant No.1 and the signatures of defendant Nos.3 and 4 occurring on Ex.A.4 belonged to them by way of comparison of the disputed signatures occurring on Ex.A.4 with that of admitted signatures occurring on the document referred to in the above while advertent to the findings tendered by the trial court. But before tendering such finding, it would have been proper for the trial court to seek opinion of the handwriting expert under Section 45

of the Indian Evidence Act, 1872. Be that as it may, the finding tendered by the trial court that Ex.A.4 can neither be construed as a sale deed nor a gift deed nor agreement of sale, certainly, cannot be upset, as Ex.A.4 is not a registered deed validly conveying any title, or relinquishing any right thereunder and, therefore, that finding cannot be said as perverse so as to warrant interference of this Court. Hence, there is absolutely no merit in the instant second appeal.

18. The Second Appeal is, therefore, dismissed confirming the judgment and decree under challenge passed by the learned Subordinate Court, Rajam, by which, the judgment and decree passed by the learned District Munsif, Rajam was confirmed. There shall be no order as to costs.

19. As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, stand closed.

A. SHANKAR NARAYANA, J

10-06-2016

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