

HONOURABLE SRI JUSTICE A.RAMALINGESWARA RAO

SECOND APPEAL No.531 of 2016

JUDGMENT:

1. The appellant is the plaintiff in O.S.No.1194 of 2000 on the file of the I-Additional Junior Civil Judge, Ongole. He filed the said suit for declaration of title and for consequential permanent injunction against the defendants. His case was that defendants 4 to 8 are the legal representatives of the 1st defendant. The plaint scheduled property is 7 ¼ gadies of vacant site in 48.33 square meters with terraced building. Originally, along with the plaint scheduled property another equal 7 ¼ gadies of site belongs to one Pullamsetti Subbamma and she has only one daughter by name Pothuri Venkata Subbamma, who is the paternal grandmother of the plaintiff. The said Pothuri Venkata Subbamma has two sons by name Koteswara Rao and Venkata Rao. The said Venkata Rao is the 3rd defendant in the suit. The plaintiff is the only son to the said 3rd defendant. Originally, the said Pullamsetti Subbamma executed a registered settlement deed dated 05.10.1963 conveying the entire property of 14 ½ gadies along with the terraced building to her only daughter P.Venkata Subbamma with life interest and thereafter the vested remainder to her sons. The said P.Venkata Subbamma died on 05.10.1996 and consequent to her death, the 3rd defendant and his brother Koteswara Rao became the absolute owners to the 14 ½ gadies of property along with terraced building. They divided the said property into two equal shares and the father of the plaintiff, who is the 3rd defendant, took possession of his half share. Due to differences between the plaintiff and the 3rd defendant, they

effected oral partition in the year 1998 and the plaintiff is in possession and enjoyment of the plaint scheduled property that fell to his share. At that stage, the plaintiff came to know in the month of August 1999 that the plaint scheduled property is being put to sale and on enquiry he came to know that the 3rd defendant and his mother executed a registered mortgaged deed in favour of the 2nd defendant in respect of the plaint scheduled property for the money borrowed by them. Since the said amount was not paid, the 2nd defendant filed O.S.No.647 of 1996 against the 3rd defendant after the death of the 3rd defendant's mother. The 2nd defendant obtained preliminary and final decrees in the said suit. Consequent to the proceedings in E.P.No.9 of 1999, the plaint scheduled property was brought to sale. The plaintiff filed the suit stating that the 3rd defendant and his mother have no alienable rights in the plaint scheduled property and they are not competent to alienate the property by way of mortgage. Accordingly, the plaintiff filed a claim petition in E.A.No.1166 of 1999 and the same was dismissed on 13.11.2000 without conducting proper enquiry. The sale certificate was issued to the 1st defendant. When the 1st defendant filed E.P. for delivery of possession and delivery warrant was entrusted to the Amin, the above suit was filed.

2. The defendants filed a written statement denying the averments made in the plaint. They stated that the suit scheduled property belongs to the 3rd defendant and his mother. The mother was having life interest and the 3rd defendant was having vested remainder. Both of them validly executed a mortgaged deed in favour of the 2nd defendant. After the death of the mother of the 3rd defendant, the 3rd defendant became the absolute owner of the

suit scheduled property. When the 3rd defendant failed to redeem the mortgage, he induced the plaintiff and got filed the suit. The claim application in E.A.No.1166 of 1999 filed by the plaintiff was dismissed and when no appeal was preferred against the said dismissal order, the same has become final and as such it is not open to the plaintiff to file the present suit.

3. Basing on the above pleadings, the following issues were framed by the trial Court:

1. Whether the plaintiff is entitled to the declaration of title as prayed for?

2. Whether the plaintiff is entitled to permanent injunction as prayed for?

3. To what relief?

4. During trial, the plaintiff examined P.Ws.1 and 2 and got marked Ex.A1. The defendants examined D.Ws.1 and 2 and got marked Exs.B1 to B7.

5. After considering the oral and documentary evidence, the trial Court by its judgment and decree dated 31.07.2007 dismissed the suit with costs. Challenging the said judgment and decree, the plaintiff filed A.S.No.79 of 2008 before the Court of V-Additional District Judge, Ongole. The learned V-Additional District Judge dismissed the said appeal by judgment and decree dated 05.02.2011. While dismissing the appeal, the lower appellate Court observed that the 3rd defendant, who is the father of the plaintiff, remained silent in the case and the plaintiff, in his cross-examination, deposed that he does not know whether his paternal grandmother and his father mortgaged the property covered under Exs.A1 to the 2nd defendant and his evidence also showed that the property was delivered to the 1st defendant under due process of law. It was also observed that the plaintiff, in his cross-

examination, admitted that he filed E.A.No.1169 of 1999 to raise the attachment against the scheduled property and the same was dismissed as not maintainable. It was further observed that the plaintiff has not adduced any evidence to show that the scheduled property fell to his share in partition between him and his father, who is the 3rd defendant in the suit. The lower appellate Court also came to the conclusion that the suit is not maintainable without asking for cancellation of the decree passed in the mortgage suit.

6. In view of the concurrent finding of fact recorded by both the Courts below, this Court finds no ground to interfere with the same and does not find any substantial question of law to admit the Second Appeal.

7. The Second Appeal is accordingly dismissed at the stage of admission. No order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

A.RAMALINGESWARA RAO, J

22-07-2016

Gsn