

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Second Appeal No.835 of 2016

JUDGMENT:

This appeal under Section 100 of the Code of Civil Procedure (hereinafter, 'the Code') by the unsuccessful 3rd defendant is directed against the decree and judgment dated 24.05.2016 of the learned Judge, Family Court-cum-Additional District Judge, Mahabubnagar, passed in A.S.No.78 of 2012, whereby, the said learned Additional District Judge dismissed the said first appeal filed by the 3rd defendant/appellant and confirmed the decree and judgment dated 30.10.2012 of the learned Principal Senior Civil Judge, Mahabubnagar, passed in O.S.No.274 of 2007.

2. I have heard the submissions of *Sri Bajrang Singh Thakur*, learned counsel for the appellant/3rd defendant (hereinafter, '3rd defendant') at the stage of admission on the limited aspect as to whether the substantial questions being sought to be raised in this second appeal are involved and, if so, whether the second appeal deserves admission for disposal on merits in accordance with the procedure established by law.

2.1 I have perused the material record.

3. The parties in this second appeal shall hereinafter be referred to as plaintiff and the defendants as arrayed in the original suit.

4. The facts, which are necessary to be stated as a preface to this judgment, in brief, are as follows:

The plaintiff brought the suit against the defendants including the 3rd defendant for partition of the house bearing No.13-20 (old No.13-18) situated at Nehru Colony, Shadnagar, Mahabubnagar District, more fully described in the schedule annexed to the plaint, claiming *inter alia* as follows: "The plaintiff is the son, and the defendants 1 and 2 are the wife and daughter of late Shaik

Mohiuddin Farooqui. The said Shaik Mohiuddin Farooqui acquired the suit schedule house and enjoyed it as owner and possessor thereof by paying house tax to the local body and water and electricity consumption charges to the respective departments. After the death of Shaik Mohiuddin Farooqui, the property devolved upon the plaintiff and the defendants 1 and 2, who are his son, wife and daughter. However, the property was mutated in the name of the 1st defendant being an elderly person of the family. The plaintiff is entitled to 14/24th share and the defendants 1 and 2 are entitled to 3/24 and 7/24th shares respectively in the said suit schedule house. However, the defendants 1 and 2 developed ill intentions and started creating troubles for the plaintiff's peaceful enjoyment of the plaint schedule house. Therefore, having found that peaceful co-existence was difficult, the plaintiff demanded the defendants 1 and 2 to cooperate for partition of the suit house as per the predetermined shares. However, the defendants 1 and 2 went on postponing the issue of partition from time to time. While so, on 10.09.2007, the 3rd defendant along with his henchmen came to the schedule property and demanded the plaintiff to vacate the property stating that he purchased the property from the 1st defendant under a registered sale deed. Since the 1st defendant has no right to alienate the property, the alleged sale deed is sham and nominal and not binding on the plaintiff. Hence, the plaintiff filed the suit for partition.

5. The defence in the common written statement of defendants 1 and 2, in brief, is this:

As per the custom in Mohammedans, the husband shall present something either in cash or gold as 'Mahr' (Dower) at the time of marriage. On the death of the husband of the 1st defendant, she had acquired rights in the suit house by way of succession towards Mahr (Dower) due to her. Therefore, she is having every right and title over the suit house. Therefore, her name was also mutated in the Gram Panchayat records as owner of the said house.

Either the plaintiff or the 2nd defendant has no right or title or interest over the plaint schedule house. The plaintiff never resided in the suit house. He is living somewhere else. The share claimed by the plaintiff is not correct. The other allegations that the defendants 1 and 2 developed ill intentions and made co-existence difficult and that the plaintiff demanded for partition and that the defendants 1 and 2 did not extend cooperation for partition and that the 1st defendant without any manner of right sold the property to the 3rd defendant by executing the sale deed and that the said sale deed is sham and nominal are all false. The said allegations are invented for the purpose of the suit. The alienation made under the sale deed by the 1st defendant in favour of the 3rd defendant is very much within the knowledge of the plaintiff and the 2nd defendant and therefore the sale deed is binding on them.

6. The case of the 3rd defendant, in brief, is as follows:

The plaint allegation that he and his henchmen went to the suit property and demanded the plaintiff to vacate the suit house by stating that he purchased the suit house from the 1st defendant under a registered sale deed is false. The court fee paid on the plaint is insufficient as there was no joint possession. The 1st defendant being the owner and possessor of the suit house sold the suit house to this defendant under a registered sale deed and delivered possession. His name was also entered in the Gram Panchayat records, vide Proceedings No.V/ 566/ 06 dated 28.10.2006, and since then, he has been paying the necessary house tax in respect of the suit house. Hence, the suit may be dismissed.

7. Taking into consideration the pleadings of the parties, the trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled to partition and separate possession as prayed for?
2. Whether the plaintiff is entitled to perpetual injunction as prayed for?

3. Whether the 3rd defendant is the absolute owner of the suit schedule house?
4. To what relief?

At trial, the plaintiff was examined as PW1 and exhibits A1 to A4 were marked on his side. Defendants 1 and 3 were examined as DWs 1 and 2. A supporting witness was examined as DW3 on behalf of the third defendant. Exhibits B1 to B10 were marked on the side of the defendants.

8. A perusal of the substantial questions of law would show that the following aspects are adverted to therein: "The plaintiff has no cause of action as the plaintiff failed to demand the defendants 1 and 2 to partition the property prior to the suit. Therefore, the plaint is liable for rejection and hence, the Courts below erred in decreeing such a suit. The defendants 1 and 2 clearly contended in their defence that the 1st defendant is the exclusive owner of the suit schedule property and denied the right, title and interest of the plaintiff in the suit house. The 1st defendant acquired rights of ownership under the law of adverse possession. Therefore, the rights of the plaintiff, if any, in the suit house are extinguished. The 1st defendant sold the suit house to the 3rd defendant/ appellant in the year 2006 under a regular registered sale deed. Hence, the plaintiff lost his rights as well as title over the suit schedule house. The evidence discloses that the plaintiff is not living along with the defendants 1 and 2 in the suit schedule property and that the 2nd defendant is living with her husband at Hyderabad. Since the suit schedule property is already sold much prior to the date of filing of the suit and as the plaintiff is not in possession of the same, the Courts below are not right in decreeing the suit. The 3rd defendant is a *bona fide* purchaser of the suit house for a valuable consideration having purchased the same from the 1st defendant. Thereafter, he gifted the property to his brother through exhibit B10, registered gift deed dated 31.03.2007 and despite such information, the brother of the 3rd defendant was not impleaded though the property was gifted to him by the 3rd

defendant and he is in physical possession of the property. Since the property is mutated in the name of the 1st defendant and as she got the property towards her Mahr or Dower, she is entitled to alienate the property. At the time of execution of the sale deed exhibit B1 by the 1st defendant in favour of the 3rd defendant and its registration in Sub Registrar's office, both the plaintiff and the 2nd defendant were also present and they had knowledge of the said sale deed and hence, the sale deed is binding on the plaintiff and the 2nd defendant."

8.1 The learned counsel for the 3rd defendant having reiterated the above content of the questions raised submitted that the courts below did not properly appreciate the facts and evidence and erroneously decreed the suit and hence the second appeal deserves to be admitted.

9. Dealing with the contentions it is to be first noted that the relationship between the plaintiff and the defendants 1 & 2 is not in dispute. The property originally belonged to late Shaik Mohiuddin Farooqui, who is the husband of the 1st defendant and father of the plaintiff and the 2nd defendant is not in dispute. The plaintiff having claimed that on the death of the father, the property devolved upon him and the defendants 1 and 2, who are his mother and sister, sought partition of the suit house and prayed for allotment of 7/24th share in the plaint schedule house by *inter alia* stating that on the death of the father, the property was mutated in the name of his mother, who is elder person of the family; and that his mother, the 1st defendant, is not entitled to alienate the suit house ignoring his rights and share; and that when troubles were created by defendants 1 and 2 and when co-existence was found difficult, he brought the suit for partition after the defendants 1 and 2 failed despite his request to extend cooperation for partition by amicable means. He reiterated his pleaded case in his examination-in-chief and maintained his stand in the cross-examination. He exhibited exhibit A1, proceedings dated 05.12.1981 of

the Gram panchayat, Shadnagar, exhibit A2, passbook issued by the Grampanchayat, Shadnagar, relating to water consumption charges and house tax, exhibit A3, electricity consumption bill, and exhibit A4, encumbrance certificate. Thus, by adducing necessary evidence, he discharged the initial onus of proof, which is upon him. The 1st defendant in her examination-in-chief reiterated her pleaded defence and stated that there is no other property except the plaint schedule property; and that her husband died about 30 years back; and that by that time, the plaintiff was aged about 7 years; and that Mahr amount will be decided at the time of marriage; and that the Mahr amount will be mentioned in the Nikhanama; and that Rs.500/- was fixed as Mahr at the time of marriage; and that once the same is fixed, it cannot be changed later on; and that the said Mahr is payable at the time of death of her husband; and that the Mahr fixed was waived at the time of death of her husband; and that she is not on talking terms with the plaintiff for the last six or seven years; and that even prior to that period also there were disputes between them; and that after the death of her husband, the plaintiff and the 2nd defendant are also having a share in the suit house; and that the plaintiff demanded a share in the suit property; and that at that time, a quarrel took place; and that thereafter, she left the suit house; and that one year thereafter, she sold the suit house to the 3rd defendant; and that the plaintiff is having two houses; and that some times he resides in the suit house and some times in the new house; and that the plaintiff has not signed the sale deed executed in favour of the 3rd defendant; and that there is no document to show that the suit house is given to her towards her dower. She denied certain suggestions put to her in line with the plaintiff's case. She was not cross-examined by the 3rd defendant.

9.1 The 3rd defendant and his supporting witness reiterated the case of the 3rd defendant. The 3rd defendant, who is examined as DW2, stated that the 1st defendant sold the plaint schedule house to him under exhibit B1, registered

sale deed dated 12.10.2006 bearing Document No.19756 of 2006, and further exhibited exhibit B2, original proceedings No.B/ 566/ 2006 dated 28.10.2006 issued by the Panchayat Secretary, Farooqnagar, Shadnagar, exhibit B3, original ownership certificate No.B1/ 2006 dated 10.10.2006 issued by G.P., Farooqnagar, exhibit B4, original ownership certificate No.B2/ 2006 dt.28.10.2006 issued by G.P.Farooqnagar, exhibit B5, original house tax receipt dated 28.03.2011 for the year 2010-11 issued by G.P. Farooqnagar, exhibit B6, original water tax receipt dated 28.03.2011 issued by G.P., Farooqnagar, exhibit B7, original house tax receipt dated 02.05.2011 for the year 2011-2012 issued by G.P Farooqnagar, exhibit B8, original ownership certificate dated 03.05.2011 issued by G.P., Farooqnagar, exhibit B9, original water tax receipt issued by G.P., Farooqnagar, and exhibit B10, certified copy of gift deed bearing document No.6023 of 2007 dated 31.03.2007. He stated in his evidence that prior to the said purchase made by him, he enquired about the title of the 1st defendant and has also seen the copy of the title deed, which is in her name, and further admitted that the property originally stood in the name of the husband of the 1st defendant and that she has not shown to him any document that she alone succeeded to the property at the time of registration of the sale deed; but, asserted that the children of the 1st defendant are also present at the Sub Registrar's office when the sale deed, exhibit B1, was executed in his favour. He had also stated that he gifted the property under the original of Exhibit B10, gift deed, to his brother and that his brother is a necessary party. DW3 is one of the attesting witness of exhibit B1. He spoke about the execution of exhibit B1, sale deed executed by the 1st defendant in favour of the 3rd defendant.

9.2 Dealing now with the undisputed legal position, it is to be noted that 'Mahr' as defined under Mohammedan Law is a sum of money or other property to which the wife is entitled from the husband in consideration of her marriage. Generally, the said amount would be fixed either before or at the

time of marriage or even after the marriage and can be increased even after the marriage. As per Mohammedan Law, a widow is entitled to retain her husband's property towards her claim for dower, but such a right does not empower her to sell the property or transfer the property by way of mortgage, gift or sale or otherwise. If any such alienation or transfer is made, such alienation or transfer will be valid to the extent of her share, but does not affect the shares of the other sharers and successors of her husband.

9.3 In the case on hand, the 1st defendant clearly stated that she had waived the 'Mahr' (dower amount) at the time of the death of her husband. She had also admitted that the plaintiff and the 2nd defendant are having shares in the suit house and that when the plaintiff demanded for partition, a quarrel ensued with the plaintiff, and that at that time she left the suit house; and that the plaintiff has two houses and he resides some times in the suit house and some times in his new house; and that one year after she left the suit house, she sold the property to the 3rd defendant. It is not the case of the 3rd defendant that the 1st defendant colluded with the plaintiff and the suit for partition was brought at her instance. As already noted, the 3rd defendant has not cross examined DW1, the 1st defendant. Be that as it may, the claim of the 3rd defendant is based on his sale deed. He could not produce any document to show that on the death of late Shaik Mohiuddin Farooqui, the property exclusively devolved upon his wife, the 1st defendant, and that the plaintiff and the 2nd defendant, who are her son and daughter, are not entitled to any shares in the suit house. The specific case of the plaintiff is that there was collusion between the defendants 1 & 2 and the 3rd defendant and that the 1st defendant executed the sale deed in favour of the 3rd defendant ignoring his right and interest and also entitlement to a share in the property.

9.4 Thus, the evidence available on record on careful evaluation reflects that the plaintiff sufficiently established that the suit property originally

belonged to his father and that on the death of the father, the property devolved upon him, his mother and sister, the defendants 1 and 2. Even the 1st defendant does not dispute the said fact. Therefore, in the facts and circumstances of the case, the evidence brought on record is sufficient to safely conclude that the plaintiff is entitled to claim a share along with his sister, the 2nd defendant, in the suit house. The share in the suit house as claimed by the plaintiff and the shares of the defendants 1 and 2, as per the Mohammedan Law are not disputed. Therefore, the sale under registered sale deed by the 1st defendant in favour of the 3rd defendant is not valid and binding on the plaintiff and the said sale deed, exhibit B1, is valid only to the extent of the share of the 1st defendant.

9.5 The learned counsel for the 3rd defendant vehemently contended that since the plaintiff and the 2nd defendant were present in the Sub Registrar's office at the time of execution of exhibit B1, registered sale deed, in favour of the 3rd defendant and as they are having knowledge of the said document, the said sale deed is valid and binding upon the plaintiff and the 2nd defendant. However, such a contention cannot be countenanced in a Court of law. Though, he also contended that the plaintiff could not establish that he is in possession or joint possession of the suit house, the said contention is devoid of merit as the evidence also shows that the plaintiff was and is in possession of the suit house and the 1st defendant also resided in the suit house till she left the suit house after disputes ensued between her and the plaintiff. Coming finally to the contention that the 3rd defendant gifted the property to his brother, and that his brother is a necessary party and that for non-joinder of necessary party, the suit is liable for dismissal, this Court already held that the sale deed of the 3rd defendant is valid only to the extent of the share of the 1st defendant. The law is well settled that no one can convey a better right than what she/he has. Therefore, when the sale deed executed by the 1st defendant in favour of the 3rd defendant is not valid to the extent of the shares

of the plaintiff and the 2nd defendant and when he has no title in respect of the entire suit house, the gift deed executed by the 3rd defendant in favour of his brother is of no avail; as a corollary it must be held that the 3rd defendant's brother is not a necessary party to the suit.

9.6 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 in favour of the plaintiff and against the defendants 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. On an analytical examination of the facts and the evidence brought on record, this Court finds that the Courts below are justified in decreeing the suit of the plaintiff 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.

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

Pending miscellaneous petitions, if any, in this second appeal shall stand closed.

03rd November, 2016
RAR

M. SEETHARAMA MURTI, J