

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.464 of 2014

And

Civil Revision Petition No.1992 of 2014

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COMMON JUDGMENT/ORDER:

SA No.464 of 2014 under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the unsuccessful 1st defendant is directed against the decree and judgment dated 31.01.2014 of the learned XIV Additional Chief Judge, Fast Track Court, City Civil Court, Hyderabad passed in A.S.no.211 of 2009.

1.1 C.R.P.No.1992 of 2014 under Section 115 of the Code is directed against the orders of the said learned Judge passed in I.A.no.942 of 2012 in the aforementioned appeal suit filed under Order XLI Rule 27 read with Section 151 of the Code for receiving additional evidence in the first appeal suit.

2. I have heard the submissions of the learned counsel for the appellant/1st defendant ('the 1st defendant', for brevity) and the learned counsel for the plaintiffs/respondents 1 and 2 ('the plaintiffs', for brevity). I have perused the material record.

3. The facts, which are to be stated as a prelude, in brief, are as follows:

The plaintiffs brought the suit against the defendants 1 and 2 including the appellant in this second appeal for granting a preliminary decree for partition of the plaint schedule property and declaration that the plaintiffs are entitled to a 1/4th share in the plaint schedule property bearing SRT No.1010 admeasuring 150 square yards No.7-2-1265 situated at Industrial Housing Colony, Sanathnagar, Hyderabad and for division of the said property into four equal and equitable shares according to the good and bad qualities and to allot one such share to the plaintiffs after converting joint possession into separate possession and also to restrain the 1st defendant from in any

manner encumbering, transferring or alienating the suit schedule property or any portion thereof or from inducting any third parties into possession of the same or from changing the nature of the suit schedule property and for costs. The 1st defendant by filing a written statement resisted the suit. Taking into consideration the pleadings of the parties, the trial Court had framed the following issues for trial:

1. Whether late G.Mallaiah, husband of defendant No.1 sold away the suit schedule property during his life time?
2. Whether late G.Ramaiah father of plaintiff paid consideration for purchase of suit schedule property or from out of the defendant no.1 contribution and jewelery of family?
3. Whether the plaintiffs are entitled for partition of the suit schedule property?
4. To what relief?

At trial, the plaintiffs 1 and 2 were examined as PWs 1 and 2 and exhibits A1 to A3 were marked on their side. The defendants did not adduce any oral and documentary evidence. On merits, the trial Court had decreed the suit of the plaintiffs and granted a preliminary decree holding that the plaintiffs 1 and 2 are entitled to seek partition and claim 1/4th share each in the plaintiff schedule property and gave them liberty to seek the relief of separate possession of their respective shares by way of filing a separate application. The aggrieved 1st defendant had preferred the aforementioned first appeal suit. In the first appeal suit, the 1st defendant had filed an application in I.A.no.942 of 2012. The Court below had dismissed the said application and refused to receive on file the documents sought to be filed by the 1st defendant as additional evidence; and had dismissed the first appeal suit. Therefore, the 1st defendant is before this Court.

3. The case of the plaintiffs, which is relevant for consideration, in brief, is as follows:

‘The plaintiffs 1 and 2 are the daughters of the 2nd defendant-Kistamma and late Ramaiah. The 1st defendant is the wife of the deceased

brother of the plaintiffs by name H. Mallaiah. The plaintiffs' said brother Mallaiah died on 11.06.2000 leaving behind him, his wife (the 1st defendant) and the mother of the plaintiffs (the 2nd defendant), as his legal heirs and successors in respect of his share in the plaint schedule house property. The plaintiffs' father, late Ramaiah, was the absolute owner and possessor of the plaint schedule house property. He had purchased the same from Government of Andhra Pradesh, represented by Commissioner of Labour, *vide* registered sale deed bearing Document no.1498 of 1988 dated 14.03.1988 having paid consideration under the said document from out of his own earnings. Taking advantage of the advanced age of the 2nd defendant, the 1st defendant under coercion and mis-representation got executed the gift deed in her favour on 10.11.2000 even though the 2nd defendant has no right, title and interest to alienate or transfer the suit schedule property to any one. On the death of the father of the plaintiffs in the year 1991, the suit schedule house property devolved upon the plaintiffs, their brother (since died) and the mother (the 2nd defendant) equally as it is his self acquired property. However, to deprive the lawful rights of the plaintiffs in the suit schedule property, the 1st defendant, by playing fraud on the 2nd defendant, had obtained a gift settlement deed and got it registered in her favour. The said gift deed is illegal, void and inoperative in law and it cannot be looked into for the purpose of deciding the rights of the parties in respect of the plaint schedule property. The plaintiffs are having a 1/4th share each in the plaint schedule property. The 1st defendant had filed O.S.no.5343 of 2002 on the file of the Court of the learned V Junior Civil Judge, City Civil Court, Hyderabad against the plaintiffs and the 2nd defendant and had obtained injunction order against the plaintiffs by misrepresenting the facts and playing fraud on the Court. The plaintiffs are contesting the said suit. The said suit is pending. Prior to filing of the above said suit by the 1st defendant, the plaintiffs had requested the defendants to partition the plaint schedule property. The 1st defendant having refused to cooperate for partition had filed the aforementioned suit alleging that the 2nd defendant had

executed a gift deed in her favour. The plaintiffs and the defendants are in joint possession of the plaint schedule property and are receiving income from the same towards their shares through the 2nd defendant, their mother, who became the Kartha of the joint family after the death of their father in the year 1991. The plaintiffs are visiting the suit schedule house during festivals and their mother is presenting them new clothes and also giving cash presents to the husbands of the plaintiffs. Since two years prior to the suit, she is not in a position to present clothes on account of the arrogant behaviour of the 1st defendant, who had kept the 2nd defendant under her clutches. The plaintiffs had learnt that the 2nd defendant had already cancelled the gift settlement deed executed in favour of the 1st defendant after coming to know of the fraud played by the 1st defendant. The 1st defendant is now trying to alienate the suit schedule property to third parties and is negotiating for sale of the said property in favour of third parties. If the 1st defendant succeeds in her illegal attempts, the plaintiffs would be put to serious loss. Hence, the suit is filed for partition.'

4. The 2nd defendant had remained *ex parate*. The relevant pleadings in the written statement of the 1st defendant are as follows:

The relationship between the parties is admitted. The allegation that the husband of the 2nd defendant had paid the entire sale consideration is incorrect. The contribution of this defendant and the contribution in the form of family jewellery are also included in the consideration paid under the sale deed. The allegations that this defendant had coerced the 2nd defendant and high handedly got registered a Gift Deed in her favour on 11.10.2000 are incorrect. The suit schedule property is not available for partition as on the date of the filing of the suit and as such the question of the devolution of the shares on the plaintiffs and the deprivation of their lawful rights does not arise for consideration. Therefore, the suit is not maintainable. The claim for a 1/4th share each by the plaintiffs is unfounded. This defendant has no intention to either grab the suit schedule property or harass the plaintiffs.

OS.no.5343 of 2002 was filed in the name of this defendant, but, the documentation was got done by the 2nd defendant; further the Court expenses were also arranged by the 2nd defendant only. The litigations are the result of the disputes between the plaintiffs and the 2nd defendant. The plaintiffs never requested this defendant to partition the suit schedule property. The entire expenses for the marriages of both the plaintiffs were arranged by late Ramaiah; and, in-fact, the husband of this defendant gave substantial amounts, other gifts and ornaments to them. As such, the plaintiffs are not at all entitled to any reliefs. The market value of the plaint schedule property is more than Rs.3,00,000/-. As such the (trial) Court has no pecuniary jurisdiction to entertain the suit. The suit is misconceived. During the lifetime of Late Ramaiah, he had alienated the suit schedule property in favour of third parties and has received substantial amounts towards the sale consideration. Therefore, the suit schedule property is not available for partition by the time of the filing of the suit. Hence, the suit itself is not maintainable. This defendant's husband had arranged substantial amounts for meeting the marriage expenses of both the plaintiffs. Hence, in lieu of the said expenses incurred by the husband of this defendant, late Ramaiah had permitted him to become independent owner of the suit schedule property. But, the husband of this defendant who is having regard towards his father, had further arranged the amount from outsiders by mortgaging the suit schedule property. The husband of this defendant had repaid the said amount due to the mortgagees and had redeemed the suit schedule property. All the facts are within the knowledge of the plaintiffs. The plaintiffs filed this suit only to harass this defendant. This defendant is not aware of the transaction and its date as the transaction was dealt with by the male members of the family as she is not an educated woman. She had studied upto 3rd standard only. The suit may be dismissed with costs.

5. The leaned counsel for the 1st defendant while reiterating the case of the 1st defendant had *inter alia* contended as follows: "The Courts below ought to have seen that late Ramaiah, during his life time, had already

alienated the suit schedule property in favour of third parties and, therefore, the suit schedule property is not available for partition as on the date of the filing of the suit. The court below ought to have considered IA.no.942 of 2012 filed to receive the documents viz., gift deed dated 10.11.2000, electricity bills, water supply bills, legal heir certificate, registered GPA and the gift deed dated 21.08.1989 which would show that the plaint schedule property is not available for partition. The Courts below ought to have seen that the burden is upon the plaintiffs to prove the existence of the availability of the suit schedule property and as the plaintiffs failed to prove the same, the Courts below ought to have dismissed the suit. The Courts below ought to have seen that late Ramaiah alienated the property and therefore, the provisions of the Hindu Succession Act are not applicable to the present case.”

5.1 While so contending, the learned counsel for the 1st defendant had raised the following questions as the substantial questions of law involved in this second appeal:

- a. Whether the courts below are right in decreeing the suit when the plaint schedule property was already alienated, during the life time of late Ramaiah, to third parties and is not in existence and is not available for partition?
- b. Whether the courts below were in error in not considering the non-maintainability of the suit for partition without seeking the relief of cancellation of gift deed or declaration that the gift deed is an invalid document?
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- c. Whether the Court below was not justified in refusing to receive additional evidence in the first appeal suit by dismissing I.A.no.942 of 2012 filed by the 1st defendant seeking to receive the additional evidence for effective adjudication of the first appeal suit?
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- d. Whether the court below was in error in casting the burden wrongly upon the defendants when the legal burden rested upon the plaintiffs?
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- e. Whether the courts below were in error in not properly appreciating the evidence brought on record?

6. Per contra, the learned counsel for the plaintiffs would contend as follows: 'The courts below have recorded concurrent findings of fact on all the issues involved in the *lis*. All the questions, which are being sought to be raised as substantial questions of law, are neither pure questions of law nor even mixed questions of fact and law. Therefore and in view of the concurrent findings supported by valid reasons recorded by the Court below, the second appeal is liable to be dismissed. In this second appeal, no substantial questions of law are involved. The second appeal cannot be admitted when no such questions are involved. The second appeal is liable for dismissal at the stage of admission.

7. I have carefully perused the pleadings and the evidence brought on record. To begin with though the contention of the 1st defendant is that Ramaiah, during his life time, had disposed of the suit schedule property and that the same is therefore not available for partition, the 1st defendant did not adduce any evidence in support of the said contention. The 2nd defendant had remained *ex parte*. Therefore, the Courts below held that the said contention is not established. The plaintiffs, who are the daughters of Ramaiah, filed the suit against their mother/the 2nd defendant and the 1st defendant, who is their sister-in-law, and are seeking partition of the property by *inter alia* contending that the property is the self acquired property of their father and that on his death, they have become entitled to a 1/4th share each in view of law of succession applicable to the Hindus. The plaintiffs 1 and 2, who are examined as PWs1 and 2, translated their pleaded case into evidence. On adduction of their oral evidence on their side and the marking of exhibits A1 to A3, the initial onus of proof, which is on the plaintiffs stood discharged and the onus to introduce evidence had shifted to the defendants. The 1st defendant did not adduce any evidence in rebuttal. Though it is the case of the 1st defendant that the consideration for acquiring

the property was not exclusively paid by Ramaiah and that the contribution for the sale consideration was also made by her or her husband and also in the form of jewellery, the said contention was not established by her by giving evidence in support of her said contentions. Therefore, in the absence of any evidence in rebuttal adduced by the 1st defendant, the case that is established by the plaintiffs by the evidence that was brought on record had remained unrebutted and unrefuted. The trial Court having considered the oral evidence and the recitals of exhibit A1/the certified copy of the sale deed, believed the version of the plaintiffs as there was no contra evidence brought on record. The courts below had also correctly applied the law that is applicable to the facts of the case.

Section 8 of the Hindu Succession Act, 1956 (for short 'the Act') reads as under:-

General rules of succession in the case of males:-

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:-

- a) firstly, upon the heirs, being the relatives specified in class I of the schedule ;
- b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- c) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- d) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- e) lastly, if there is no agnate, then upon the cognates of the deceased.

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

Section 8 of the Act operates in cases where a Hindu male dies intestate. In such an event, the devolution would be through succession in favour of his class I heirs and in their absence class II heirs and so on. As the plaintiffs had successfully established that the plaint schedule property is the self acquired property of late Ramaiah, the provision of section 8 of the Act gets attracted and operates. Hence, it follows that the plaintiffs 1 and 2 are entitled to a 1/4th share each in the plaint schedule property. Having considered the

pleadings and the evidence brought on record, the trial Court had decreed the suit of the plaintiffs as prayed for. The Court of first appeal having considered the facts correctly and the evidence in proper perspective had confirmed the judgment and decree of the trial Court while refusing permission to the 1st defendant to adduce additional evidence. As per the settled legal position, the application filed by the 1st defendant for adducing additional evidence was rightly taken up for consideration by the Court below while hearing and disposing of the first appeal and not ahead of the first appeal. Be it noted that when the plaintiffs had established that the property is that of their father and that on his intestate death they had succeeded to a share each in their father's property, it follows that the 2nd defendant, who is their mother and who has no exclusive right over her husband's property, cannot convey by transfer or gift to any person the entire property as she was only having a share in the property with the other sharers. Therefore, the Courts below had rightly held that the gift deed, if any, executed by the 2nd defendant in favour of the 1st defendant is not valid insofar as the shares of the plaintiffs in the plaint schedule property. The law is well settled that no one can convey a better title than what he or she has. Therefore, when the gift deed is not valid in respect of the shares of plaintiffs, there is no need to seek cancellation of the deed of gift or a declaration that it is null and void. Further, any alienation by any one sharer ignoring the shares of the other sharers would not be valid and binding on the other sharers. As per settled law, the gift deed would be valid only in respect of the share of the 2nd defendant and therefore, the 1st defendant cannot claim right, title and interest in respect of the entire plaint schedule property by virtue of the gift deed, if any, executed by the 2nd defendant in her favour. I have gone through the judgment of the Court below in the first appeal and also the order in the IA filed for receiving additional evidence, which is assailed in the connected CRP. The 1st defendant had filed the petition to receive as additional evidence the documents viz., the gift deed dated 10.11.2000, the electricity bills, the water supply bills, the legal heir certificate, the registered

GPA and the gift deed dated 21.08.1989 to show that the plaint schedule property is not available for partition. It is not in dispute that the 1st defendant is aware of the said documents even during the pendency of the suit before the trial Court. In spite of the fact that the documents are available with the 1st defendant even by the time the suit was pending before the trial Court, she did not enter into the witness box to give evidence and did file the documents into Court when the suit is pending before the trial Court. The documents were also not confronted to the witnesses examined on the side of the plaintiffs. Further, as per law, the appellate Court is not obliged to receive additional evidence unless the same are required to enable it to pronounce judgment or for any other substantial cause. The court below in the orders impugned in the revision petition held that the documents are not required to enable it to pronounce judgment and that no substantial cause is shown for receiving additional evidence. Thus, a perusal of the order impugned in the revision petition would show that the Court below had assigned valid and proper reasons for rejecting the request of the 1st defendant to adduce additional evidence and the said order more particularly in the light of the fact that the 1st defendant did not adduce any evidence before the trial Court, deserves to be sustained. Therefore, there is no merit in the revision petition or in the contention that the Court below had erroneously refused to receive additional evidence that was sought to be adduced by the 1st defendant/appellant.

8. For the reasons assigned, this Court is satisfied that the concurrent findings of fact, supported by valid reasons, recorded by the courts below on all the issues in favour of the plaintiffs do not brook interference and that the courts below are justified in decreeing the suit of the plaintiffs. The findings of facts recorded by the courts below were based on proper appreciation of evidence and the material facts and there was neither illegality nor irregularity in those findings and therefore, the said concurrent findings do not require to be upset. Further, the existence of a substantial question of law is a *sine qua non* for the exercise of jurisdiction by this court as per Section 100 of the Code. The questions raised strictly speaking are not even questions of law

let alone substantial questions of law.

9. Viewed thus, this Court finds that none of the questions raised are substantial questions and that there is no substance in the questions raised and that therefore, the second appeal is devoid of merit and is liable for dismissal at the stage of admission. 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 is reinforced by the ratio in the decision in **Gurudev Kaur v. Kaki** (AIR 2006 SC 1975). In the case on hand, as this court finds, after careful examination of the pleadings, the evidence and the contentions, that no substantial question of law is involved, this second appeal is liable for dismissal at the stage of admission in view of the narrow compass of Section 100 of the Code of Civil Procedure.

10. In the result, the Second Appeal and the CRP are dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any pending, in the second appeal and CRP shall also stand dismissed.

M. SEETHARAMA MURTI, J

13th April, 2016

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