

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.772 OF 2016

JUDGMENT:

The second appeal, under Section 100 of the Code of Civil Procedure, 1908, is filed challenging the concurrent finding recorded in A.S. No.88 of 2012 by the Principal District Judge, Medak at Sangareddy, affirming the decree and judgment dated 27.02.2012 passed by the Senior Civil Judge, Sangareddy, in O.S. No.113 of 1994, whereby the suit filed by the plaintiffs for declaration of title, to deliver vacant possession of suit schedule property and for consequential permanent injunction restraining the defendants and their men from interfering with the possession of plaintiffs, was dismissed.

For convenience of reference, the ranks given to the parties will hereinafter be referred to as arrayed before the trial court.

It is the case of plaintiffs that during the year 1966, the first plaintiff – Suresh Chandra Shah, who died during pendency of the suit, purchased an extent of Ac.19-33 guntas of land in his name and in the names of his family members. Out of it, he sold five acres of land, through registered sale deed bearing document No.2783/1980 dated 27.11.1980, to one Santhosh Lal Gupta and continued his possession over remaining extent of Ac.14.33 guntas of said land. As per decree dated 30.01.1988 passed in O.S. No.32 of 1987 on the file of Senior Civil Judge, Sangareddy, the said land was partitioned amongst his family members by metes and bounds. The first defendant and his henchmen encroached upon the suit land admeasuring Ac.0.29 guntas. Subsequent to impleading plaintiff No.3, it was pleaded that the first plaintiff

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executed Will Deed dated 04.09.1995 bequeathing his property in favour of his brother-Chandulal Shah and his wife- Prameela Suresh Chandra Shah (second plaintiff). The third plaintiff purchased suit land under GPA-cum-agreement of sale bearing document No.4830/1997 dated 15.10.1997 from Chandulal Shah, who was brother of first plaintiff. As the defendants denied the title of plaintiffs over the schedule property, the plaintiffs filed suit for the aforesaid reliefs of declaration of title, recovery of possession and for consequential permanent injunction restraining the defendants and their men forever interfering with the possession and enjoyment of the property.

The defendants resisted the claim of plaintiffs contending that the vendor of third plaintiff never executed the Will dated 04.09.1985 either in favour of his wife-Prameela Suresh Chandra Shah (second plaintiff) or in favour of his brother, namely, Chandulal Shah, who is not a party to the suit. Chandulal Shah has no locus standi to execute any sale deed in favour of third plaintiff in respect of suit land. During the year 1980, first plaintiff sold an extent of five acres of land in Sy.No.318 i.e. Ac.2.20 guntas each to Niranjana Lal Goel and Santosh Lal Gupta under two different sale deeds. On 13.08.1983 Niranjana Lal Goel and Santosh Lal Gupta sold the said five acres of land to the first defendant through two separate sale deeds and put him in possession and the suit land is part and parcel of said five acres of land. Originally, the deceased-first plaintiff admitted possession of first defendant over the suit land, but filed suit for declaration and

for recovery of possession without any basis and prayed to dismiss the suit.

Basing upon the above pleadings, the trial court framed the following issues and additional issue:

1. Whether the plaintiff is entitled for declaration as owner of suit schedule property?
2. Whether the plaintiff is entitled for the relief of possession of suit schedule property?
3. Whether the plaintiff is entitled for injunction, as prayed for?
4. To what relief?

Additional issue:

1. Whether the plaintiff No.3 is entitled to seek any relief against the defendant in the suit?
2. To what relief?

Additional issue:

1. Whether later Suresh Chandra Shah had executed a Will Deed on 04.09.1995 in favour of plaintiff No.2 and Chandulal Shah in respect of suit schedule property?
2. Whether Chandulal Shah sold the suit land in favour of plaintiff No.3 and if so whether it is legal and valid?

During trial, on behalf of plaintiffs, P.Ws.1 to 3 were examined and Exs.A.1 to A.14 were marked. On behalf of defendants, D.W.1 was examined and Exs.B.1 to B.3 were marked.

Upon hearing argument of both the counsel, the trial court dismissed the suit holding that the plaintiffs miserably failed to establish their title and right over the suit schedule property by producing cogent and satisfactory evidence, more particularly,

GPA-cum-agreement of sale and the Will executed by the first plaintiff in favour of his wife and his brother, which is the basis for claiming title to the property.

Aggrieved by the Decree and Judgment of the trial court, the plaintiffs, being unsuccessful, preferred the appeal before the Principal District Judge, Medak at Sangareddy. The learned Principal District Judge, by judgment dated 02.09.2015 affirmed the finding recorded by the trial court and dismissed the appeal.

Aggrieved thereby, the third plaintiff preferred the present appeal raising several contentions.

The first contention of the third plaintiff, who is appellant herein, is that the suit schedule property is not part and parcel of the property purchased by the first defendant under registered sale deed for an extent of five acres of land and unless it is proved that it is part and parcel of the said five acres, the plaintiffs are entitled to claim declaration of title to the property.

The second contention is that in the absence of contest by defendants 1 and 2, defendants 3 and 4 are not entitled to contest the suit being subsequent purchasers.

The third contention is failure of proof of Will is not fatal to the suit because none disputed execution of Will by the first plaintiff in favour of his brother, and his wife. Therefore, dismissal of the suit by the trial court and affirmed by the appellate court is erroneous and prayed to set aside the decree and judgment of the trial court.

The basis for claiming title to the property is Ex.A.13-certified copy of registered general power of attorney-cum-

agreement of sale bearing document No.4830/1997. It is settled law that an agreement of sale-cum-GPA would not create any interest in the property. A similar question came up before the Apex Court in **SURAJ LAMP & INDUSTRIES PVT. LTD. V. STATE OF HARYANA AND ANR.**¹ wherein the Apex Court categorically held that immovable property can be legally and lawfully transferred/conveyed, only by a registered deed of conveyance. Transactions of the nature of “General Power of Attorney Sales” or “Sale agreement/Will Transfers”, do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immovable property. The Courts will not treat such transactions as contemplated or concluded transfers or as conveyances as they neither convey title nor create any interest in any immovable property and that they cannot be recognized as deeds of title, except to the limited extent of Section 53 of Transfer of Property Act.

If the principle laid down in **SURAJ LAMP**'s case referred to supra, is applied to the present facts of the case, such General Power of Attorney – cum- agreement of sale would not create any interest in the immovable property. Even otherwise according to Section 54 of Transfer of Property Act, agreement of sale would not create any interest in the immovable property and title can be conveyed in immovable property only by executing deed of conveyance or any recognized mode of transfer of property but not by

¹ AIR 2012 SC 206

irrevocable General Power of Attorney – cum – Agreement of sale. Therefore, based on the irrevocable General Power of Attorney – cum – Agreement of sale marked as Ex.A.13, the third plaintiff is not entitled to claim declaration of title over the property and therefore, on this ground alone the plaintiff is disentitled to claim discretionary relief based on Ex.A.13.

The basis for claim by the plaintiffs is Will allegedly executed by brother of the first plaintiff- Suresh Chandra Shah. By virtue of the said Will, Chandulal Shah allegedly succeeded the asset of first plaintiff as a legatee under the Will. Chandu Lal Shah in turn executed Ex.A.13 in favour of third plaintiff, but in the written statement, the defendants denied execution of the Will dated 04.09.1995 in favour of second plaintiff-Prameela Suresh Chandra Shah and additional issue was framed on 24.12.2001, parties went on trial, and the trial court and the appellate court recorded a finding that the Will is not proved by producing primary evidence and by adducing any evidence as required under special rule of evidence under Section 68 of Indian Evidence Act, 1872. Non production of original Will and proof of the same is fatal to the case of third plaintiff, who allegedly claiming title on the basis of Will allegedly executed by the first plaintiff in favour of Chandulal Shah, and his wife Prameela Suresh Chandra Shah. One of the contentions of the counsel for the third plaintiff is that in the absence of denial of execution of the Will, the Will is not required to be proved under Section 68 of Indian Evidence Act, 1872, non production and proof, of Will by P.W.3 as required under Section 68 of the Indian Evidence Act is not fatal.

It is the contention of counsel for the plaintiffs that Will is compulsorily attestable document and required to be proved under Section 68 of Indian Evidence Act and under Section 63 of Indian Succession Act and the documents which are only exempted from proof of attestation are gift deed and mortgage deed and not to the Will. Therefore, the contention of the counsel for the third plaintiff is without any substance and the same is rejected.

The other contention of the counsel for the plaintiffs is that defendants 3 and 4, who purchased the property, during pendency of the suit, are not entitled to contest the suit.

No doubt, defendants 3 and 4 are subsequent purchasers, at best, they are entitled to claim protection as a bonafide purchaser for a valuable consideration without notice to the pendency of the suit or dispute, but when defendants 1 and 2, the vendors defendants 3 and 4, did not contest the suit, they cannot be deprived to claim right over the property and to prove bonafide purchase for a valuable consideration. However, it is a suit filed for discretionary and equitable relief of declaration of title and recovery of possession and consequential relief of permanent injunction under Sections 34 and 38 of Specific Relief Act and when the third plaintiff based his claim under the Will, it is for him to produce the original Will executed by the first plaintiff in favour of his brother-Chandu Lal and his wife-Prameela Suresh Chandra Shah, but the original Will is not produced, obviously, for different reasons known to him and conveniently produced original GPA-cum-agreement of sale - Ex.A.13 without laying any foundation in the pleadings to let in secondary evidence. As such plaintiffs did

not approach the Court with clean hands to claim equitable relief of declaration of title and recovery of possession and consequential perpetual injunction as the plaintiffs claimed equitable relief, he must do equity, but he suppressed the original Will allegedly executed by the first plaintiff in favour of his brother and his wife and it is the basis for claim.

Therefore, on this ground alone the third plaintiff is disentitled to claim any of the relief, equitable and discretionary, under Sections 34 and 38 of Specific Relief Act.

Yet, the counsel for the third plaintiff contended that being the power of attorney holder, the third plaintiff is entitled to claim right over the property but as discussed in the earlier paragraph and by applying the principle laid down in judgment of the Apex Court referred to above, the plaintiff is not entitled to claim declaration of title to immovable property since the power of attorney is not a recognized mode of transfer of immovable property in view of law declared by the Apex Court in **SURAJ LAMP's** case.

Hence, on the strength of the principle laid down in **SURAJ LAMP's** case, GPA-cum-agreement of sale marked as Ex.A.13 is not helpful to the plaintiffs to claim title to the property, therefore, viewed from any angle, the third plaintiff miserably failed to prove his title to the property and both the trial court and the appellate court recorded the fact finding regarding the Will and validity of power of attorney etc., thereby recorded concurrent fact finding and those findings cannot be interfered with by this Court, since the jurisdiction of this Court under Section 100 of CPC is limited to

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a substantial question of law. Even in **DNYANOBA BHAURAO SHEMADE VS MAROTI BHAURAO MARNOR**² the Apex Court 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.

Hence, I find no substantial question of law to exercise jurisdiction under Section 100 of CPC to reverse the concurrent finding recorded by both the trial court and the first appellate court, consequently the second appeal is dismissed at the stage of admission having found no substantial question of law.

Accordingly, the second appeal is dismissed at the stage of admission. No costs.

Miscellaneous petitions, if any, pending in this second appeal, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 14.10.2016
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² (1999) 2 SCC 471