

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1325 OF 2012

JUDGMENT:

This Second Appeal is filed by the defendant Nos.2 to 4 assailing the decree and judgment dated 16.04.2012 in A.S.No.22 of 2011 on the file of the Court of the Senior Civil Judge, Kothapeta, East Godavari District, wherein and whereby the decree and judgment dated 31.03.2011 in O.S.No.17 of 2010 on the file of the Court of the Principal Junior Civil Judge, Kothapeta, decreeing the suit filed by the plaintiff for recovery of possession of the suit schedule property was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal, in brief, are as follows:

One Smt. Subbamma, mother of Vara Lakshmanudu, was the absolute owner of an extent of Ac.0-40 cents in R.S.No.80 of 2001 of Devarapalli village including the suit schedule property. The first defendant is the daughter of Vara Lakshmanudu through his second wife Nagarathnam. Defendant Nos.2 to 4 are the daughters of Lakshmanudu through his first wife by name Raghavulu. The said Subbamma executed a gift settlement deed in favour of Lakshmanudu by creating a life interest in his favour and vested remainder in favour of the children of Lakshmanudu through his first wife and second wife. Vara Lakshmanudu enjoyed the suit schedule property during his life time. After the

death of Lakshmanudu, defendant Nos.3 and 4 executed a gift deed in favour of the second defendant in respect of their Ac.0.20 cents on 17.09.2005. The first defendant executed a registered sale deed on 15.07.2009 in favour of the plaintiff in respect of the schedule property and delivered the possession to him. The second defendant filed a false suit in O.S.No.95 of 2009 and forcibly entered into the suit schedule property and as such the plaintiff is constrained to file the suit for recovery of the possession of the property.

4. The first defendant remained ex parte. The second defendant filed written statement denying all the averments made in the plaint *inter alia* contending that during life time of Lakshmanudu, the suit schedule property was leased out to one Gubbala Satyanarayana. After the death of Lakshmanudu, defendant Nos.2 to 4 leased out the property to the said Satyanarayana. It is the further case of defendant Nos.2 to 4 that Vara Lakshmanudu and Nagaratnam were not blessed with children. Defendant Nos.3 and 4 filed memo adopting the written statement of the second defendant.

5. Basing on the above pleadings, the trial Court framed the following issues:

- (i) Whether the plaintiff is entitled for deliver of possession of the plaint schedule property?
- (ii) Whether the plaintiff is entitled for consequential relief of permanent injunction as prayed for?
- (iii) Whether the first defendant born to the second wife of Varalakshmanudu?
- (iv) To what relief, if any, is the plaintiff entitled for?

6. On behalf of the plaintiff, PWs.1 to 6 were examined and Exs.A.1 to A.8 were marked. On behalf of the defendants, DW.1 was examined and Exs.B.1 to B.3 were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court decreed the suit filed by the plaintiff for recovery of possession of the suit schedule property. Feeling aggrieved by the decree and judgment of the trial Court, defendant Nos.2 to 4 have preferred A.S.No.22 of 2011 on the file of the Court of the Senior Civil Judge, Kothapeta. The learned Senior Civil Judge, after reappraising the oral and documentary evidence available on record, arrived at a conclusion that the plaintiff is entitled for recovery of possession of the suit schedule property and dismissed the appeal. Hence, the second appeal.

8. Heard the learned counsel for both parties.

9. The following substantial questions of law arise for consideration in this second appeal.

1. Whether the courts below committed grave error while not drawing an adverse inference against the first defendant who did not chose to contest the matter?, and

2. Whether the Courts below are not justified in placing reliance on Ex.A.7 Study Certificate.

10. In order to appreciate the rival contentions, this Court is placing reliance on the judgment of the Hon'ble apex Court in **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, wherein while considering the scope of Section 100 of CPC, it was held at paragraph No.16 as follows:

16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court.

¹ (2010) 13 SCC 216

Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari v. Purshottam Tiwari*, (2001) 3 SCC 179; *Sarjas Rai v. Bakshi Inderjit Singh*, (2005) 1 SCC 598; *Manicka Poosali v. Anjalai Ammal*, (2005) 10 SCC 38; *Sugani v. Rameshwar Das*, (2006) 11 SCC 587; *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545; *P. Chandrasekharan v. S. Kanakarajan*, (2007) 5 SCC 669; *Kashmir Singh v. Harnam Singh*, (2008) 12 SCC 796; *V. Ramaswamy v. Ramachandran*, (2009) 14 SCC 216 and *Bhag Singh v. Jaskirat Singh*, (2010) 2 SCC 250.)

11. The learned counsel for the appellants/defendants has drawn attention of this Court to **Vidhyadhar v. Mankikrao and another**². As per the principle enunciated in the case cited supra, if a party to the proceedings intentionally and wilfully abstains himself/herself from entering into the witness box, to substantiate his/her case and offer himself/herself for cross examination by the apposite party, the court can draw an adverse inference, in view of Section 114 of the Indian Evidence Act.

12. The learned counsel for the plaintiff / respondent has drawn the attention of this Court to the ratio laid down in **Mrs. Saradamani Kandappan v. Mrs. S.Rajalakshmi and others** and **Mrs. S.Rajalakshmi and others v. Mrs. Saradamani Kandappan**

² AIR 1999 SC 1441

and another³. As per the principle enunciated in the case cited supra, a person, who is acquainted with the facts of the case, can depose evidence on behalf of the other parties to the proceedings.

13. Let me consider the facts of the case on hand, in the light of the above legal principles.

14. It is not in dispute that an extent of Ac.0.40 cents of land in Survey No.83/1 (old) 80/1 (new) of Davarapalli Village, Davarapalli Panchayat belongs to Smt.Subbamma. Vara Lakshmanudu is the son of said Subbamma. The said Subbamma during her life time executed a settlement deed creating a self interest in favour of Lakshmanudu and vested remainder in favour of the children of Lakshmanudu through his first wife and second wife. After the death of the mother the defendant Nos.2 to 4, Lakshmanudu married Nagarathnam. Lakshmanudu is no more. The sisters of the second defendant executed a settlement deed in her favour bequeathing an extent of Ac.0.20 cents.

15. It is the case of the plaintiff that one Subbamma, mother of Lakshmanudu, was the absolute owner of the suit schedule property. Even as per the testimony of P.Ws.2 to 6, the first defendant is daughter of Vara Lakshmanudu and Nagarathnam. As per the testimony of P.W.1, the first defendant is the daughter of Lakshmanudu and Nagarathnam. As per the recitals of Ex.A.7 study certificate, the first defendant is the daughter of Lakshmanudu. If the entire case of the plaintiff is based on Ex.A.7 only, then he has to examine a person who issued Ex.A.7. Apart from Ex.A.7, the plaintiff placed reliance on other documents to

³ AIR 2011 SC 3234

substantiate his stand that the first defendant is the daughter of Lakshmanudu and Nagaratnam. If really the first defendant is not the daughter of Lakshmanudu and Nagaratnam, what prompted Subbamma, to refer the children of Lakshmanudu through his second wife Nagaratnam in Ex.A.1? Except the first defendant, no one is claiming as daughter of Lakshmanudu and Nagaratnam. There is no recital in Ex.B.1 – settlement deed executed by defendant Nos.3 and 4 in favour of 2nd defendant that Lakshmanudu was not having children other than the plaintiff and her sisters. It is not in dispute that the second defendant filed O.S.No.81 of 2009 against the first defendant claiming 3/4th share out of Ac.0-40 cents in R.S.No.80/2001 of Devarapalli village. If really the first defendant has no right whatsoever in the suit schedule property, what prompted the second defendant to file a suit against the first defendant? This admitted fact itself negates the contention of the second defendant that the first defendant is not the daughter of Lakshmanudu and Nagarathnam. All these facts clearly go to prove that the first defendant is the daughter of Lakshmanudu and Nagarathnam. As observed earlier, the total extent of property owned by the family is Ac.0.40 cents. The second defendant and her two sisters and the first defendant are entitled to Ac.0.10 cents of land each, in view of the Ex.A.1 gift deed. In such circumstances, the first defendant, being absolute owner of the suit schedule property, is entitled to alienate the same to the plaintiff. The material available on record clinchingly establishes that the first defendant is daughter of Vara Lakshmanudu and Nagarathnam. Both the Courts below

concurrently held that the first defendant is the daughter of Lakshmanudu and Nagaratnam.

16. Admittedly, the first defendant did not enter into the witness box. The predominant contention of the learned counsel for defendant Nos.2 to 4 is that the trial Court as well as the first appellate Court ought to have drawn an adverse inference against the first defendant and dismissed the suit.

17. The plaintiff is the competent person to speak about the recitals of sale deed Exs.A.5 and Ex.B.3. The Court can place *prima facie* reliance on the registered sale deed unless and until a contrary is proved. By examining P.W.1 and marking Ex.A.5, the plaintiff proved execution of the sale deed by the first defendant in his favour. In such circumstances, the Court can decree the suit basing on the material available on record. The facts and circumstances of the case do not warrant drawing of adverse inference against the first defendant, thereby to discard the version put forth by the plaintiff.

18. Today this Court dismissed S.A.No.1405 of 2012 filed by the unsuccessful plaintiff in O.S.No.95 of 2009 on the file of the Court of the Principal Junior Civil Judge, Kothapeta, for declaration.

19. The first appellate Court is the fact finding final Court. The findings recorded by the Courts below are supported by oral and documentary evidence. The Courts below have not committed any error while placing reliance on Ex.A.7 study certificate, while considering the other material available on record. The Court can draw an adverse presumption basing on the facts and

circumstances of each case. Mere non-contesting of the suit by the first defendant alone is not a valid ground to draw an adverse inference. The findings recorded by the courts below cannot be termed as perverse as the same were based on evidence, much less legally admissible evidence. There is no question of law much less substantial question of law in this appeal.

20. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 03.11.2017
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