

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1405 OF 2012

JUDGMENT:

This Second Appeal is filed by the unsuccessful plaintiff assailing the decree and judgment dated 16.04.2012 in A.S.No.28 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.95 of 2009 on the file of the Court of the Principal Junior Civil Judge, Kothapeta, dismissing the suit filed by the plaintiff for declaration 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:

The plaintiff, Potnuri Bhagyavathi and Pothula Krishnamma are the daughters of Lakshmanudu and Raghavulu. The plaintiff and her sisters have settled their undivided interest in the family property wherein each sister got 3/4th share i.e. Ac.0-10 cents each out of total extent of Ac.0-40 cents and the remaining Ac.0.10 cents fell to the share of their father Lakshmanudu. The plaintiff and her sisters are equally entitled to Ac.0-10 cents, which is the subject matter of the suit after the death of their father. After the death of Lakshmanudu, the plaintiff and her sisters entered into a partition list on 27.01.2006 in respect of the suit schedule property. The first defendant is not the daughter of Lakshmanudu

through his second wife Nagarathnam. The first defendant, claiming herself as daughter of Lakshmanudu through his second wife Nagarathnamma, sold away the suit schedule property in favour of the second defendant under a registered sale deed dated 15.07.2009. Hence the suit for declaration. The first defendant remained *ex parte*. The second defendant filed written statement *inter alia* contending that the first defendant is the daughter of Vara Lakshmanudu and his second wife Nagaratnam. The two sisters of plaintiff, Bhagyavathi and Krishnamma, executed a settlement deed dated 17.09.2005 in her favour to an extent of 2/4th of undivided share i.e., an extent of Ac.0.20 cents. The plaintiff suppressed the said fact and filed the present suit for declaration. The suit is not maintainable for non-impleading of the sisters of the plaintiff. The first defendant, being absolute owner of the suit schedule property, executed a sale deed in favour of this defendant on 15.07.2009.

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

- (i) Whether the plaintiff is entitled for cancellation and annulment of the registered sale deed dated 15.07.2009?
- (ii) Whether the plaintiff is entitled for declaration that the registered sale deed dated 15.07.2009 is void document?
- (iii) Whether the suit is bad for mis-joinder and non-joinder of necessary parties to the suit?
- (iv) To what relief, if any, is the plaintiff entitled for?

5. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.4 were marked. On behalf of the defendants, DWs.1 to 5 were examined and Exs.B.1 to B.8 were marked.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is not entitled for the relief of declaration and the suit is not maintainable for non-joinder of the necessary and proper parties and consequently dismissed the suit. Feeling aggrieved by the decree and judgment of the trial Court, the plaintiff preferred A.S.No.28 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 not entitled for the relief of declaration and dismissed the appeal. Hence, the second appeal.

7. The learned counsel for the plaintiff/appellant submitted that the courts below ought to have drawn an adverse inference against the first defendant. He further submitted that the finding recorded by the courts below, so far as Ex.B.7-study certificate is concerned, is perverse and hence liable to be set aside. **Per contra**, the learned counsel for the defendants submitted that the plaintiff herself admitted the right of the first defendant over the suit schedule property and that aspect was rightly considered by the courts below. He further submitted that there is no substantial question of law in this second appeal and hence liable to be dismissed.

8. 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.B.7 Study Certificate.

9. 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. 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.)

10. The learned counsel for the plaintiff 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

¹ (2010) 13 SCC 216

² AIR 1999 SC 1441

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.

11. The learned counsel for the defendants 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 and another**³. 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.

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

13. 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 who is the mother of Vara Lakshmanudu. After the death of the mother of plaintiff, Lakshmanudu married one Nagaratnam. The said Subbamma, during her life time, executed a settlement deed creating a self interest in favour of her son Lakshmanudu and vested remainder in favour of the plaintiff and her sisters and also children of Lakshmanudu and Nagaratnam. Lakshmanudu died in the year 1981. The sisters of the plaintiff executed a settlement deed in favour of the plaintiff bequeathing an extent of Ac.0.20 cents. In all, the plaintiff is entitled to Ac.0-30 cents out of the total extent of Ac.0-40 cents. The entire controversy revolves around whether the

³ AIR 2011 SC 3234

first defendant is the daughter of Lakshmanudu and Nagaratnam or not.

14. It is the case of the plaintiff that the first defendant is not the daughter of Lakshmanudu and Nagaratnam. Even as per the admitted case of the plaintiff, her two sisters executed a settlement deed – Ex.A.1 in her favour. In Ex.A.1, it is categorically mentioned that the plaintiff and her sisters are entitled to Ac.0.10 cents each. As per the recitals of Ex.A.1, the other Ac.0.10 cents belongs to the first defendant. As per the recitals of Ex.B.1 gift deed dated 25.06.1961 Subbamma executed a gift deed in favour of Vara Lakshmanudu creating a life interest and vested remainder in favour of daughters of Vara Lakshmanudu through his first wife and second wife. The recitals of Ex.B.1 clearly reveal that Lakshmanudu married Nagaratnam by the time of execution of Ex.B.1 by Subbamma. As per the recitals of Ex.A.1, the plaintiff and her sisters got right to an extent of Ac.0.10 cents each only. The remaining Ac.0.10 cents were left over to the children of Lakshmanudu and Nagaratnam. As per the testimony of PWs.2 and 3, the first defendant is the daughter of Lakshmanudu and Nagaratnam. A perusal of Exs.B.2 and B.3 reveals that Nagaratnam paid tax in respect of the suit schedule property. Ex.B.4-Adangal copy also shows that Nagarathnam was in possession and enjoyment of the suit schedule property. It is an admitted fact that the first defendant executed a sale deed in favour of the second defendant on 15.07.2009, which is the subject matter of the present suit. If really the first defendant was not the daughter of Lakshmanudu and Nagaratnam, what prompted them to execute settlement deed Ex.A.1 on 17.09.2005 in respect of

Ac.0.30 cents out of Ac.0.40 cents of land? Ex.A.2 is the partition list dated 27.01.2006 in respect of Ac.0-10 cents of land. As per the recitals of Ex.A.2, the plaintiff and her sisters have orally partitioned this property long back and in acknowledgement of the previous partition, the partition list was prepared on 27.01.2006. There is no mention about Ex.A.1 settlement deed in Ex.A.2 partition list. As rightly observed by the courts below, the possibility of creating Ex.A.2 partition list, in order to overcome the laches on the part of the plaintiff, cannot be ruled out completely. A perusal of Ex.A.4, which is the copy of the plaint in O.S.No.81 of 2009, reveals that the plaintiff filed a suit against the first defendant herein claiming 3/4th share out of Ac.0-40 cents in R.S.No.80 of 2001 of Devarapalli village. As per the recitals of Ex.A.4, the first defendant is entitled to 1/4th share out of Ac.0-40 cents. If really, the first defendant was not the daughter of Lakshmanudu and Nagarathnam, what prompted the plaintiff to file the suit against the first defendant claiming Ac.0-30 cents only out of Ac.0-40 cents? By filing O.S.No.81 of 2009, the plaintiff admitted that the first defendant is the daughter of Lakshmanudu and Nagarathnam. The oral testimony of D.Ws.2 to 5 clinchingly establishes that the first defendant is the daughter of Lakshmanudu and Nagarathnam. It is a settled principle of law that admitted facts need not be proved. As observed supra, the plaintiff herself admitted that the first defendant is the daughter of Lakshmanudu and Nagarathnam. Ex.B.7 is the Study certificate of the first defendant, wherein her father's name is shown as Lakshmanudu. The courts below considered Ex.B.7 as a piece of evidence in support of the stand of the first defendant. The courts

below have not discarded the stand of the plaintiff solely basing on Ex.B.7. The findings of the courts below are based on totality of the facts and circumstances of the case. In such circumstances, merely because the first defendant did not contest the matter, that itself is not a valid ground to draw adverse inference against the first defendant, more particularly, in view of the admissions made by the plaintiff as well as the recitals of Ex.A.1 and Ex.B.1.

15. The second defendant is the competent person to speak about the recitals of sale deed Exs.A.3 and B.5. The Court can place *prima facie* reliance on the registered sale deed unless and until a contrary is proved. By examining D.W.1 and marking Ex.B.5, the second defendant 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 second defendant.

16. The next question that falls for consideration is whether the first defendant is the daughter of Lakshmanudu and Nagaratnam or not?

17. As per the testimony of D.W.1, the first defendant is the daughter of Lakshmanudu and Nagaratnam. As per the recitals of Ex.B.7 study certificate, the first defendant is the daughter of Lakshmanudu. If the entire case of the second defendant based on Ex.B.7 only, then he has to examine a person who issued Ex.B.7. Apart from Ex.B.7, the second defendant placed reliance on other documents to 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.B.1? Except the first defendant, no one is claiming as daughter of Lakshmanudu and Nagaratnam. There is no recital in Ex.A.1 that Lakshmanudu was not having children other than the plaintiff and her sisters. It is not in dispute that the plaintiff 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 plaintiff to file a suit against the first defendant. This admitted fact itself negates the contention of the plaintiff 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 plaintiff and her two sisters and the first defendant is entitled to Ac.0.10 cents of land each, in view of the Ex.B.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 second defendant. In a suit for declaration, the plaintiff may succeed or fail basing on strength and weaknesses of his or her case. The plaintiff cannot seek declaration basing on the laches or lacunae on the part of the defendants. In the instant case, the plaintiff failed to prove that the first defendant is not the daughter of Lakshmanudu and Nagaratnam. Both the Courts below concurrently held that the first defendant is the daughter of

Lakshmanudu and Nagaratnam. 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.B.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.

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

19. 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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