

THE HON'BLE SMT. JUSTICE ANIS

SECOND APPEAL No. 179 OF 1999

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC'), is directed against the judgment and decree, dated 07.10.1998, passed in A.S.No.12 of 1995 on the file of the Senior Civil Judge, Medak, whereunder and whereby the judgment and decree, dated 21.07.1995 passed in O.S.No.63 of 1991 on the file of the District Munsif, Andole at Jogipet, were set aside by allowing the appeal.

2. The appellants are the plaintiffs and the respondents 1 and 2 are the defendants before the trial Court. For better appreciation of facts, the parties are hereinafter will be referred to, as they are arrayed before the trial court.

3. The brief averments made in the plaint are as follows:

Plaintiff No.1 is the wife of defendant No.1. Plaintiffs 2 and 3 are their children. The first defendant is in possession of agricultural land admeasuring Ac.1.08 gts. in Survey No.422/UU situated at Uthloor Village, Shankarampet Mandal. The plaintiffs and the defendant No.1 are enjoying the income arise out of the yields of the suit land. Later, the defendant No.1 neglected the plaintiffs due to bad habits. Then, the first plaintiffs issued a notice to maintain them properly and not to misuse or alienate the suit property, for

which the first defendant agreed. But, the first defendant failed to keep his promise. The plaintiffs came to know that the defendant No.1 has sold away 30 guntas of land out of the suit land in favour of defendant No.2 for a total consideration of Rs.5,100/- through a registered Sale deed bearing Document No.107/90 without the knowledge of the plaintiffs. After knowing this fact, the plaintiffs requested the first defendant to cancel the Sale deed, but the first defendant bluntly refused to accept the same. By virtue of the Sale deed, the defendant No.2 came to the suit land on 18.08.1991. Therefore, the plaintiffs constrained to file the present suit for grant of perpetual injunction.

4. The defendant No.1 remained *ex parte*.

5. The brief averments made in the Written Statement filed by defendant No.2 are as follows:

This defendant put the plaintiffs to prove that they got share in the suit schedule property and they are enjoying the income out of the suit land. He specifically stated that the suit filed by the plaintiffs is in collusion with the first defendant. Further, the first defendant sold away Ac.1.08 gts. to the second defendant and executed the Sale deed by putting the second defendant into possession, but it is incorrect to say that the defendant No.1 sold away 30 guntas out of the suit land for a consideration of Rs.5,100/-. The plaintiffs got knowledge about the sale transaction and

the first defendant sold the property for a legal necessity of the family. It is further stated that since the date of Sale deed, the second defendant has been in possession and enjoyment of the suit schedule property. Therefore, suit for injunction simpliciter is not maintainable against the second defendant and the plaintiffs have no cause of action for the suit. Therefore, prayed the Court to dismiss the suit.

6. Basing on the above pleadings, the following issues have been settled by the trial Court for trial:

1. Whether the plaintiffs are in possession of the suit land on the date of filing of the suit?
2. The document executed by first defendant in favour of second defendant is binding on the plaintiffs?
3. To what relief the parties are entitled?

7. To substantiate the case of the plaintiffs, the first plaintiff herself examined as PW1 and got examined three other witnesses as PWs 2 to 4 and Exs.A.1 to A.4 were got marked. On behalf of the second defendant, he himself examined as DW1 and examined two other witnesses as DWs 2 and 3 and Exs.B.1 and B.2 were got marked.

8. After considering the oral and documentary evidence, the trial Court decreed the suit by granting perpetual injunction in favour of the plaintiff against the second defendant.

9. Aggrieved by the judgment and decree of the trial Court, the second defendant filed A.S.No.12 of 1995 on the file of the Senior Civil Judge, Medak. The first appellate Court, after considering the evidence on record, clearly held that the trial Court has not considered Ex.B.1 Sale deed and Exs.B.2 and B.4 crucial pahanies which reveal the possession of the defendant No.2 on the date of filing of the suit, and set aside the judgment of the trial Court by allowing the appeal.

10. Aggrieved by the reversal judgment of the first appellate Court, the plaintiffs preferred the present Second Appeal.

11. This Court vide its orders dated 26.02.1999, admitted the Second Appeal on the substantial questions of law raised in the grounds of appeal, which are as follows:

“9. Whether the lower appellate court committed an error of law in not formulating the point in adjudicating the appeal, whether the judgment is hit by mandatory provisions under Order 41 Rule 31 of CPC, as held by this Hon’ble Court reported in 1997(4) ALD 258, and judgment in S.A.No.556 of 1993, dt.28-10-1998.

10. Whether the Senior Civil Judge, not committed an error of law in preserving that receiving sale consideration with a registered document following the delivery of possession, contrary to Ex.A.1 and A.3 and own evidence of respondent witnesses?

11. Whether the Senior Civil Judge right in dismissing the suit for injunction filed by the appellant having expressed the doubt about the possession of D1 after receiving the said amount?”

12. The learned counsel for the appellants argued that the suit schedule property admeasuring Ac.1.08 gts. situated in Survey No.422/UU of Uthloor Village, Shankarampet Mandal is an ancestral property. It is further argued that the first

defendant is not the exclusive owner of the suit schedule property and on the other hand the plaintiffs got share in the said property. It is also argued that without the knowledge of the plaintiffs, the first defendant sold away the suit schedule property to the second defendant. It is also argued that the evidence produced by the plaintiffs was not considered by the first appellate Court though the plaintiffs are in possession and enjoyment of the suit schedule property and the income from the said property having been enjoyed by the plaintiffs. Therefore, prayed the Court to allow the second appeal.

The learned counsel in support of his contentions relied on a case-law reported in *Lalta Prasad Vs. Shiam Singh and others*¹, wherein the Full Bench of the Allahabad High Court held as follows:

“It is evident that it would open up grave dangers. A person might be appointed guardian of a minor who was in a position of antagonism to the rest of the family and who would by reason of the rule of law contained in the above case, have the immense power by his or her own will alone of bringing about an immediate alteration of status in a family that might otherwise be quite united. The effect therefore we think of an action brought by a minor through his next friend is not to create any alteration of status of the family because a minor cannot demand as of right a separation; it is only granted in the discretion of the Court when in the circumstances the action appears to be for the benefit of the minor: see *Chelimi Chetty v. Subbanna* ([1918] 41 Mad. 442). There is no intermediate stage and that is the case of a minor who during the pendency of a suit becomes of full age and in that case the provisions of O. 32, R. 12 apply and in the event of a minor who has attained his majority during the pendency of a suit for partition coming to a Court and insisting on his right to continue the action it may very well be that at the moment when he was by reason of having attained his majority, regarded by the law as a person competent to make up his own mind upon the matter it may well be that on his appearing before a Court and electing to proceed with the suit that that election would be deemed to have the same force as at the time attaches to the election of a man of full age who commences an action for partition.”

¹ AIR 1920 All. 116 (F.B.)

The learned counsel further relied on a case-law reported in *Babu Singh and others Vs. Mt. Lal Kuer and others*², wherein the Division Bench of the Allahabad High Court held as follows:

“A member of a joint Hindu family cannot, without the consent of the other members of the family, dispose of his interest by will. He has no such authority. As was observed by the learned Chief Justice in the Full Bench case of *Lalta Prasad v. Sri Mahadeoji Biraiman Temple* (AIR 1929 All 116) (at p. 468 of 42 All.) the karta of a joint Hindu family has no power to make a bequest of the family property, whatever power he may have of making a gift inter vivos, because at the moment of his death his rights pass to the surviving members of the Hindu family and then there is a conflict between the right of survivorship and the alleged right under the will, and the right of survivorship prevails.”

It is also held as follows:

“But as remarked above, Himmat Singh had no authority to dispose of the joint family property by will. It is equally clear that he could not create a charge by will. He had power, with the consent of the other members of the family, or in the case of a family settlement to create a charge by a transfer inter vivos but he could not validly create a charge on the property to come into effect after his own interest had ceased and the successor got the estate by right of survivorship and not as his heir.”

The learned counsel also relied on a case-law reported in *Poochendu Ammal Vs. Minor Jayamurugan*³, wherein the Madurai Bench of Madras High Court held at Para 13 as follows:

“Duty of the lower Appellate Court:

As discussed above, the lower Appellate Court is a final Court of fact and law. While deciding the appeal, which is a statutory one and continuation of the suit, the lower Appellate Court will have to keep in mind its responsibilities and duties. While there is no dispute that any appeal is a re-hearing of the suit and the Court can reappraise and review the entire evidence, it is bound to keep in mind the findings recorded by the trial Court on oral and documentary evidence. It should not forget that the trial Court had an advantage and opportunity of seeing the demeanour of the witnesses and therefore, the findings over the same normally shall not be disturbed. Hence

² AIR 1933 All. 830

³ 2011 Lawsuit (Mad) 2473

until and unless, the approach of the trial Court in its appraisal of the evidence is erroneous, contrary to the well established principles of law, the same cannot be set aside, more so, without giving reasons for the same.”

13. On the other hand, the learned counsel for the respondent/defendant No.2 argued that the defendant No.2 is the lawful owner of the suit schedule property, having purchased the entire extent of Ac.1.08 gts. from defendant No.1 under registered Sale deed after paying valid sale consideration of Rs.5,100/- and since the date of purchase, the second defendant has been in possession of the suit schedule property and that there is a recital about the delivery of the possession in the Sale deed Ex.B.1 and also pahanies clearly establish the fact that the second defendant is in possession of the suit schedule property. It is further argued that the plaintiffs cannot maintain a suit for grant of perpetual injunction and that they are not owners of the property and also they are not in possession of the property. It is also argued that in the plaint, the plaintiffs have not stated that the suit schedule property is an ancestral property and in view of the oral and documentary evidence produced by the defendant No.2, the first appellate Court rightly allowed the appeal, and finally prayed the Court to dismiss the Second Appeal.

The learned counsel in support of his contentions relied on a case-law reported in *Sunil Kumar and another Vs. Ram*

*Parkash and others*⁴, wherein the Hon'ble Sri Justice K.Jagannatha Shetty held at Para 26 as follows:

“I do not think that these submissions are sound. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father – karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right had interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation made by karta, but that right is not inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the Court to grant relief by injunction restraining the karta from alienating the coparcenary property.”

The learned counsel further relied on a case-law reported in *Lal Dass Vs. Raghbir Dass and another*⁵, wherein the Punjab and Haryana High Court held at Para 9 as follows:

“After hearing the respective arguments of learned counsel for both the parties and perusing the records of the case, I am of the opinion that part of the impugned judgment and decree, vide which suit for permanent injunction restraining the appellant from alienating the coparcenary property has been decreed, has to be set aside. It is well settled that no injunction at the hands of a coparcener can be issued against the Karta of the Joint High Family restraining him from alienating the coparcenary property. Even though a coparcener has an interest in the coparcenary property by birth, but he is not entitled to separate possession of the same unless a partition takes place. The Karta of a Joint High Family has a right to manage the Joint Hindu Family property. That right to manage the property also includes the right to sell or mortgage ancestral property if the legal necessity so arises. A coparcener has no right to get an injunction against the Karta. However, he has always a remedy to challenge the alienation

⁴ AIR 1988 S.C. 576

⁵ AIR 2004 P & H 41

of the coparcenary property and set aside the same on the ground that the same was not for any legal necessity or was not an act of good management. The Division Bench of this Court in Jujhar Singh v. Giani Tarlok Singh (supra) has held that a suit filed by a coparcener against the Karta of the Joint Hindu Family restraining him from alienating the suit property is not maintainable. The aforesaid decision was approved by the Hon'ble Supreme Court in Sunil Kumar v. Ram Parkash (supra), wherein it was held as under:-

“It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the Karta. It would be for the Karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted. And it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that a father – Karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the Court to grant relief by injunction restraining the Karta from alienating the coparcenary property... The provisions of Section 38 (Specific Relief Act) have to be read along with Section 41. Section 41 provides that an injunction cannot be granted when a party could obtain an efficacious relief by any other usual mode of proceedings (except in case of breach of trust). The coparcener has adequate remedy to impeach the alienation made by the Karta. He cannot, therefore, move the Court for an injunction restraining the Karta from alienating the coparcenary property.””

14. Now, the point that would arise for consideration in this appeal is whether the appellant proved the substantial questions of law framed by this Court on 26.02.1999?

15. **POINT:**

A perusal of the evidence shows that there is no dispute that the first plaintiff is the wife of the first defendant and the plaintiffs 2 and 3 are their children. There is no dispute with

regard to the ownership of the suit schedule property held by the defendant No.1 before executing the Sale deed in favour of the defendant No.2 under Ex.B.1. Admittedly, the suit schedule property is admeasuring Ac.1.08 gts. in Survey No.422/UU situated at Uthloor Village of Shankarampet Mandal.

16. The main contention of the plaintiffs is that the suit schedule property is an ancestral property inherited by the first defendant, thus the plaintiffs are naturally having right in the suit schedule property and without their knowledge, the first defendant alienated the property on 17.01.1990 to the second defendant and that the plaintiffs are still in possession of the entire suit schedule property.

17. Both the parties adduced oral evidence and also produced the documentary evidence. In the plaint filed by the plaintiffs, it is nowhere whispered that the suit schedule property was the ancestral property inherited by the first defendant. During the course of evidence, PW1 has stated that the suit schedule property is an ancestral property. PWs 1 to 4 in their evidence admitted that the first defendant, who is the husband of PW1, sold away the suit schedule property under a registered Sale deed in favour of second defendant and filed Ex.A.2 certified copy of registered Sale deed and also pahanies.

18. A perusal of the certified copy of registered Sale deed filed by the plaintiffs clearly shows that as on the date of registration of the property, the first defendant delivered the possession of the suit schedule property in favour of second defendant. Further, the evidence of PWs 1 to 4 revealed that second defendant is harvesting the crop in the suit schedule property after its purchase. The another important aspect in this case is that there was a panchayat held in the village regarding the suit schedule property and in that panchayat, the second defendant refused to give half of the suit land to the plaintiffs. This clearly shows that the second defendant is the owner of the suit schedule property having possession of the same.

19. The second defendant examined as DW1. In his evidence, he clearly stated that he purchased the suit schedule land from defendant No.1 under Ex.B.1 and his name is mutated in pahani patrik. A perusal of the evidence of DW1 coupled with Exs.B.1 and B.2 clinchingly prove that the second defendant is the owner and possessor of the suit land and the first defendant delivered the possession to the second defendant under the registered Sale deed.

20. Admittedly, the plaintiffs filed suit for injunction simplicitor and either of the document i.e., Ex.A.1 or Ex.B.1 is not challenged. The documentary evidence filed by the defendant No.2 proves that as on the date of filing of the suit,

the defendant No.2 is in possession of the suit schedule property and on the other hand, the appellant failed to prove their possession of the suit schedule property on the date of filing of the suit. On the aforesaid backdrop, the decisions relied on by the learned counsel for the appellants are not applicable to the facts of the present case, whereas the decisions relied on by the learned counsel for the respondent are aptly applicable to the facts of the present case insofar as the relief of injunction is concerned.

21. Therefore, the first appellate Court rightly considered the evidence on both the sides and allowed the appeal by setting aside the decree and judgment of the trial Court in O.S.No.63 of 1991 dated 21.07.1995. This finding of the first appellate Court needs no interference. Further, the substantial questions of law urged on behalf of the appellants are not tenable and all the submissions made by the appellants are based on the factual aspects. Hence, the Second Appeal is devoid of merit and is liable to be dismissed.

22. Accordingly, the Second Appeal is dismissed. No costs. Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

ANIS, J

MARCH 21st, 2017.

Anr

THE HON'BLE SMT.JUSTICE ANIS



SECOND APPEAL No. 179 OF 1999

21.03.2017

Anr