

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.62 OF 2013

JUDGMENT:

This Second Appeal is filed by the first defendant assailing the decree and judgment dated 11.09.2012 in A.S.No.243 of 2006 on the file of the Court of the II Additional District Judge, West Godavari at Eluru, wherein and whereby the decree and judgment dated 24.07.2006 in O.S.No.50 of 2003 on the file of the Court of the Senior Civil Judge, Tadepalligudem, decreeing the suit in favour of the plaintiff 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 first defendant is the husband of the plaintiff. The plaintiff and the first defendant were blessed with four daughters and seven sons viz., Ramadevi, Peddintlu, Yesumani and Mahalakshmi, Sangarao, Ramakrishna, Gangadharam, Veera Raghavulu, Venkateswara Rao, Srimannarayana and Veera Venkata Satyanarayana. Nimmala Gangadharam, the son of the plaintiff and first defendant, purchased the suit schedule property from one Nara Yesu for a valuable consideration of Rs.25,000/- under a registered sale deed dated 24.06.1989. The plaintiff paid the sale consideration from and out of her stridhana money. Gangadharam was in exclusive possession and enjoyment of the property during his lifetime. Gangadharam was unmarried and

died intestate on 07.02.1995. The plaintiff, being the mother of the Gangadharam, is entitled to the suit schedule property. The plaintiff is also entitled to mesne profits. The first defendant set up the second defendant as the tenant of the suit schedule property. The plaintiff and first defendant have been residing separately due to misunderstandings. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that he paid the sale consideration for purchase of the suit schedule property by Gangadharam out of joint family income even though the property was purchased in the name of Gangadharam. The first defendant has been in possession and enjoyment of the suit schedule property from 24.06.1989 to 30.05.2001. The first defendant leased out the suit schedule property to the second defendant on a maktha of 30 bags per year. The first defendant is the absolute owner of the suit schedule property; therefore, the suit is liable to be dismissed. The second defendant filed memo adopting the written statement of the first defendant.

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

1. Whether the plaintiff's son Gangadharam is the owner of the schedule property and the plaintiff succeeded to that property as L.R. of Gangadharam after his death?
2. Whether the defendant purchased the property in the name of Gangadharam out of the family income as alleged in the written statement?
3. Whether the defendant cultivated the schedule land from the date of purchase and leased out to Nimmala Malleswararao as an owner having a right and title over it?
4. Whether the plaintiff is entitled for possession of schedule property as prayed for?
5. Whether the plaintiff is entitled for past profits as claimed in the suit?
6. Whether the plaintiff is entitled for future profits as prayed for?
7. To what relief.

5. Before the trial Court, on behalf of the plaintiff, PWs.1 and 2 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.15 were marked.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court disbelieved the version put forth by the plaintiff and the first defendant so far as the plea of benami transaction is concerned. The trial Court also disbelieved the version that the second defendant is the cultivating tenant of the first defendant. However, the trial Court decreed the suit in favour of the plaintiff on the ground that she, being the sole surviving legal heir as well as Class I heir of Gangadharam. Feeling aggrieved by the decree and judgment dated 24.07.2006, the first defendant preferred A.S.No.243 of 2006 on the file of the Court of the II Additional District Judge, West Godavari, Eluru. The first appellate Court, after reappraising the oral and documentary evidence available on record afresh, arrived at a conclusion that the plaintiff is entitled to the relief sought by her and dismissed the appeal. Hence, the first defendant preferred the present second appeal.

7. During pendency of the appeal, the plaintiff (first respondent herein) died and respondent Nos.3 and 4 were brought on record as legal representatives of the plaintiff.

8. Heard Sri K.Sitaram, the learned counsel for the appellant and Sri S.Subba Reddy, the learned counsel for respondent Nos.2 to 4.

9. The substantial question of law that arises for consideration in this appeal:

Whether the Courts below misconstrued the scope of clause (a) of Sub-Section (3) of Section 4 of the Benami Transactions (Prohibition) Act, 1988?

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

¹ (2010) 13 SCC 216

12. It is not in dispute that the property was purchased in the name of Gangadharam under a registered sale deed dated 24.06.1989. Ex.A.1 is the certified copy of sale deed and Ex.B.1 is the original sale deed. The said Gangadharam is the son of plaintiff and first defendant. Gangadharam died on 07.02.1995 intestate unmarried. The suit schedule property is an extent of Ac.2.43 cents in R.S.Nos.62/2 and 63 of Adavikolanu Village, Nidamarru Mandal, West Godavari District.

13. The second defendant filed A.T.C.No.16 of 2002 for declaration that he is the statutory tenant of the suit schedule property and the same was dismissed. For the reasons best known, the second defendant did not prefer any appeal challenging the decree and order in A.T.C.No.16 of 2002. The decree and order in A.T.C.No.16 of 2002 became final and binding on the second defendant. Therefore, the findings of the Courts below, that the second defendant was not the cultivating tenant of the suit schedule property, are supported by oral and documentary evidence.

14. Learned counsel for both parties have drawn the attention of this Court to Sections 3 and 4 of the Benami Transactions (Prohibition) Act, 1988 (for short, 'the Act'). A perusal of Section 3 of the Act at a glance clearly demonstrates that benami transactions are prohibited. Sub-Section (3) of Section 4 of the Act is an exception to Section 3 of the Act.

15. Learned counsel for the appellant strenuously submitted that both the Courts below failed to consider that the facts of the

case on hand will fall within the ambit of clause (a) of Sub-Section (3) of Section 4 of the Act.

16. Learned counsel for respondent Nos.2 to 4 strenuously submitted that the case of the first defendant (appellant) falls outside the purview of clause (a) of Sub-Section (3) of Section 4 of the Act.

17. Let me consider the facts of the case on hand in the light of Section 4 of the Act.

18. It is not in dispute that the sale deed was obtained by late Gangadharam. PW.1 and DW.1 are interested witnesses, therefore, their testimony has to be scrutinised meticulously so as to eliminate the exaggerations. The first defendant did not adduce any evidence to establish that he earned something out of joint family property. If the property was purchased by the plaintiff with the joint family nucleus, certainly he is entitled to take plea of benami transaction in view of Sub-Section (3) of Section 4 of the Act. Apart from PW.1 and DW.1, the vendor of Ex.B.1 is the competent person to say from whom he received the sale consideration. He is the competent person to speak whether the first defendant paid the sale consideration out of the joint family income or not. For the reasons best known, the first defendant did not choose to examine the vendor of Ex.A.1 and Ex.B.1 to substantiate that he paid the sale consideration out of the joint family nucleus. It is not in dispute that as per the recitals of Exs.A.1 and B.1, the sale consideration was paid by one Sangarao, who is another son of the plaintiff and first defendant and the own brother of late Gangadharam. It is needless to say that no oral

evidence is admissible contrary to the recitals of sale deed in view of Section 91 of the Indian Evidence Act. Section 92 of the Indian Evidence Act permits one of the parties to the agreement to adduce oral evidence contrary to the recitals to the extent the circumstances under which the agreement or sale deed came into existence. As per the recitals of Ex.B.1 registered sale deed, sale consideration was not paid by the first defendant. Any amount of oral evidence contrary to the recitals of registered document is of no avail. The possibility of distortion of the facts by the first defendant in order to suit his claim cannot be ruled out completely. DW.1 (first defendant) in the cross-examination in unequivocal terms deposed that different properties were purchased in the name of his sons for their benefit. In order to take shelter under clause (a) of Sub-Section (3) of Section 4 of the Act, the first defendant has to establish that the property was purchased by him in the name of Gangadharam, with the joint family income or nucleus for the benefit of coparceners of the joint family. There is no evidence much less cogent and convincing evidence to establish that the first defendant purchased the suit schedule property in the name of Gangadharam for the benefit of all the coparceners of the joint family. In the absence of such positive evidence, it is not safe to place reliance on the oral testimony of DW.1. The first defendant miserably failed to prove that the stand taken by him will fall within the ambit of clause (a) of Sub-Section (3) of Section 4 of the Act. 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 considered the scope of Sections 3 and 4 of the Act in

right perspective and granted the relief in favour of the plaintiff. It is needless to say that the plaintiff is the Class-I heir of Gangadharam. Being a Class-I heir, the plaintiff is entitled to succeed the property of late Gangadharam in view of Section 8 of the Hindu Succession Act.

19. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that 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.

21. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 07.11.2017
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T. SUNIL CHOWDARY, J

