

The Hon'ble Sri Justice S.V.Bhatt

Second Appeal No.296 of 2017

Judgment:

Heard Mr.M.Subba Reddy for appellant and Mr.B.S.Reddy for respondent No.5.

Plaintiffs in OS.No.234 of 2001 in the Court of Principal Junior Civil Judge, Nandyal, are the appellants. The appellants filed the suit for partition and separate possession of 11/80th share in the suit schedule property consisting of Ac.0-73 cents in Survey No.73 at Gajulapalli Village, Mahanandi Mandal, Kurnool District.

The case of the appellants is that the suit schedule property is their ancestral property and 4th respondent herein. The said property was purchased by their predecessor in interest through registered sale deed, dated 16-07-1969. The purchaser died by leaving behind him, his son- Veeranna, the appellants and defendants 1 to 4 as his legal representatives. It is further alleged that upon the demise of Veeranna, the appellants and respondent Nos.1 to 4 have become joint owners and have been using the suit schedule property as

kallam. The demand of appellants for partition was not acceded to and hence, by referring to the refusal, the suit for partition has been filed. It is further alleged that on 26-10-1999, Veeranna through registered sale deed, sold an extent of Ac.0-25 cents in favour of respondent No.5. The appellants challenged the binding nature and legality of sale deed, dated 26-10-1999.

Respondent Nos.1 to 4 remained *ex parte* and respondent No.5 filed written statement and contested the suit. The case of respondent No.5 is that Veeranna in his capacity as Kartha of Joint Family sold an extent of Ac.0-25 cents to him and the sale deed was attested by respondent No.1. The sale transaction is not tainted either by illegality or immorality. According to respondent No.5, the sale transaction was for justifiable family necessities. The 5th respondent claims to have purchased a further extent of Ac.0-25 cents from Veeranna and contends that after several years, the suit has been filed and prays for dismissing the same.

The trial Court framed the following issues for consideration:

(1) Whether the plaintiffs are entitled for the relief of partition of the suit schedule properties as prayed for against the defendant ?

(2) To what relief ?”

On behalf of appellants, PWs.1 and 2 were examined and Exs.A.1 to A.3 were marked. The 5th respondent was examined as DW.1 and Exs.B1 to B3 were marked.

The trial Court, on issue No.1, has referred to the oral evidence and also the partial partition pleaded by the parties and recorded a finding as follows:

“As held by me that the D5 established that he purchased the suit land under Ex.B1 sale deed and he was also put in possession. There is clear recital in Ex.B1 with regard to delivery of possession. There is also recital that the property was sold for the joint family necessity. Therefore, in my humble view the Judgment cited by D5 is fully applicable to the present case facts. Because in that case also, the father as Kartha sold the property for the joint family necessities. The possession was also delivered and the same is recited in the sale deed. First of all Ex.B1 is not tainted with any immorality. If that is the case, I have to hold that Ex.B1 is valid and the same is binding on the plaintiffs and D1 to D4. If that is the situation, I have to further hold that the plaintiffs are not entitled for partition in respect of the entire extent of Ac.0.73 cents. The suit land i.e., Ac.0.25 cents

covered under Ex.B1 has to be excluded. However, the plaintiffs are entitled for partition in respect of the remaining Ac.0.48 cents. Because It is held by me that the plaintiffs are in possession of the remaining Ac.0.48 cents. Therefore, the plaintiffs are entitled for partition and separate possession of 11/80th share in respect of Ac.0.48 cents. Thus, issue No.1 is answered accordingly.”

The suit was decreed in part by ordering partition of Ac.0-48 cents into 80 shares and allotting 11 shares to appellants herein.

The appellants filed AS.No.38 of 2006 before the III Additional District Judge, Kurnool. The learned appellate Judge has framed the following point for consideration:

“Whether the plaintiffs are entitled for partition and separate possession of the schedule properties and whether the judgment under appeal is sustainable or liable to be set aside ?”

Learned Counsel for appellants, having regard to the substantial question of law, on which he argued for admission, has read the operative portion of the judgment of appellate Court.

I have taken note of the consideration of the points framed by both the appellate Court and the trial Court and

also the findings of fact concurrently recorded by both the Courts.

The question canvassed for admission of Second Appeal is, whether non-consideration of the documentary evidence available on record vitiated the judgment under Appeal or not.

Though a question is framed on the above lines, the appellants have to discharge the initial burden on the pleas of partial partition and continuous enjoyment of Acs.0-93 cents of land *etc.* The question argued for admission, is required to be demonstrated with reference to an Exhibit *vis-à-vis* finding recorded by the Courts below.

The findings of fact recorded by the trial Court and appellate Court, by reference to oral and documentary evidence, may or may not sync with appellants' expectation. This Court is conscious to the view *viz.*, that non-consideration or misreading of evidence affecting the findings of fact can be examined in a Second Appeal. Further, this Court, in a Second Appeal, does not reconsider the evidence, unless and until the evidence which ought not

to have been considered is considered or legally impermissible evidence is relied upon by the Courts below. The ground on which admission is sought is not made out.

Having regard to the findings recorded by the Courts below, the Second Appeal fails and it is, accordingly, dismissed. No order as to costs.

As a sequel, Miscellaneous Petitions, pending if any, stand disposed of as infructuous.

Dt: 7th April, 2017
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(S.V.Bhatt, J)