

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1221 of 2012

JUDGMENT:

This second appeal is filed by the unsuccessful plaintiff assailing the judgment and decree dated 14.11.2011 in A.S.No.50 of 2006 on the file of the Court of Senior Civil Judge, Kandukur, wherein whereby the decree and judgment dated 07.08.2006 in O.S.No.242 of 1999 passed by the Principal Junior Civil Judge, Kandukur, dismissing the suit filed by the plaintiffs for partition, was confirmed,.

2. Heard the learned counsel for the appellants and perused the material available on record.

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

4. The facts leading to filing of the second appeal are briefly as follows:

One Surisetty Satyanarayana hails from Kothapatnam village. The said Satyanarayana got ancestral property in Kothapatnam village and he sold the same in the year 1964. Thereafter, he shifted his family to Singarayakonda and started jaggery business. Plaintiff Nos.1 and 2 and second defendant are sons and the first defendant is the wife of said Satyanarayana. The said Satyanarayana purchased house property in Singarayakonda with the joint family income under an agreement of sale dated 30.06.1978 and obtained a regular sale deed on 11.05.1988. The first plaintiff's marriage was performed in the year 1970, second plaintiff's marriage was performed in the year 1978 and the second defendant's marriage was performed in the year

1990. Satyanarayana died on 14.03.1999. After the death of Satyanarayana, plaintiffs 1 and 2 requested the defendants 1 and 2 for partition of the suit schedule property, for which they did not agree. Hence the suit for partition.

5. Second defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the suit schedule house is the self-acquired property of Satyanarayana, who in turn, executed a registered will bequeathing the suit schedule property in favour of his wife, i.e., defendant No.1. The first defendant executed a registered settlement deed bequeathing the plaint schedule property to the second defendant. The second defendant is the absolute owner of the suit schedule property. Either the plaintiffs or the first defendant had no right whatsoever in the suit schedule property. The daughters of late Satyanarayana are not referred in the plaint. So, the suit is bad for non-joinder of necessary and property parties. Hence, the suit may be dismissed.

6. During pendency of the suit, the first plaintiff died and his legal representatives were brought on record as plaintiffs 3 to 5. Pending suit, the first defendant died and defendants 3, 4 and 5, who are the daughters of Satyanarayana were brought on record.

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

1. Whether the plaintiffs are entitled to 10/16th shares in the suit schedule property as prayed in the plaint?
2. Whether the plaintiff is entitled for mesne profits?
3. To what relief is the plaintiffs are entitled?
4. Whether the plaintiffs are entitled to 98/168 share in the suit schedule property as prayed in the plaint?

8. To substantiate the case, the second plaintiff examined himself as P.W.1. P.W.2 is the paternal uncle of P.W.1. No documents were marked on behalf of the plaintiffs. On behalf of the defendants, defendant Nos.1 and 2 examined themselves as D.Ws.1 and 2 and got marked Exs.B1 to B6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the suit schedule property is the self-acquired property of late Satyanarayana and that the suit is not maintainable for non-impleading of daughters of late Satyanarayana and accordingly dismissed the suit. The unsuccessful plaintiffs being aggrieved by the judgment and decree dated 07.08.2006, preferred the appeal in A.S.No.50 of 2006 on the file of the Senior Civil Judge, Kandukur. The first appellate Court, after reappraising the oral and documentary evidence afresh, arrived at a conclusion that the plaintiff schedule property is self-acquired property of Satyanarayana and the suit is not maintainable for non-impleading of the daughters of the Satyanarayana and dismissed the appeal. Hence, the present second appeal by the unsuccessful plaintiffs.

9. The learned counsel for the appellants-plaintiffs strenuously submitted that the trial Court as well as the first appellate Court failed to consider that late Satyanarayana purchased the suit schedule property with the joint family nucleus. He further submitted that the Courts below have not appreciated the testimony of P.W.2, who is none other than the own brother of late Satyanarayana. **Per contra,** the learned counsel for the defendants/respondents submitted that this Court shall not interfere with the concurrent finding of fact recorded by the Courts below in view of Section 100 CPC. He further submitted that the findings recorded by the Courts

below are supported by oral and documentary evidence. Basing on the submissions made by both the counsel, the question of law that arises for consideration in this appeal is as follows:

“Whether late Satyanarayana purchased the suit schedule property with joint family nucleus and income of the joint family?”

10. To substantiate argument, learned counsel for the respondents has drawn the attention of this Court to the decision in **RAM SAKHI DEVI (SMT) v. CHHATRA DEVI AND OTHERS**¹ the Hon’ble apex Court held at paragraph No.9 as follows:

“9. Yet again in **Roop Singh V. Ram Singh**² this Court has expressed that the jurisdiction of a High Court is confined to appeals involving substantial question of law. Para 7 of the said judgment reads:

“7. It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, the fact-findings courts after appreciating the evidence held that the defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by the two courts below were based on proper appreciation of evidence and the material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. (Thakur Kishan Singh V. Arvind Kumar)³. Hence, the High Court ought not to have interfered with the findings of fact recorded by both the Courts below.”

¹ (2005) 6 SCC 181

² (2000) 3 SCC 708

³ (1994) 6 SCC 591

11. In **NAVANEETHAMMAL v. ARJUNA CHETTY**⁴ the Hon'ble Apex Court held at paragraph No.10 as follows:

10. This Court, time without number, pointed out that interference with the concurrent findings of the courts below by the High Court under Section 100, CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to replace the findings of the lower Courts."

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

13. The following admitted facts can be culled out from the pleadings of both parties.

One Surisetty Satyanarayana who originally native of Kothapatnam village, migrated to Singarayakonda and worked as a clerk for some time, thereafter, started his own business in Jaggery. The plaintiff Nos.1, 2 and defendant No.2 are the sons, defendant No.1 is the wife and defendants 3, 4 and 5 are the daughters of Satyanarayana. The said Satyanarayana purchased the suit schedule house under an agreement of sale dated 30.06.1978 and he obtained a regular sale deed on 11.05.1988, vide Ex.B1. Satyanarayana died on 14.03.1999. During the lifetime of Satyanarayana, he executed a will in favour of the first defendant on 22.04.1996 bequeathing the suit schedule property. The first defendant in turn executed a settlement deed in favour of the second defendant on 03.04.1999 under Ex.B3.

14. The entire controversy revolves around the nature of property covered under Ex.B1 registered sale deed dated 11.05.1988. In order to succeed the suit, the plaintiffs have to establish that late Satyanarayana purchased the suit schedule property with joint family

⁴ AIR 1996 Supreme Court 3521

nucleus or joint family income. The second plaintiff got examined himself as P.W.1 and P.W.2 is the paternal uncle of P.W.1. As per the testimony of these two witnesses, Satyanarayana sold his ancestral property at Kothapatnam under Ex.B4 registered sale deed dated 12.08.1966 and purchased the suit schedule property with that money.

15. The oral testimony of P.Ws.1, 2 and D.W.1 coupled with Ex.B4 reveals that Satyanarayana sold the property for a consideration of Rs.5,000/-, out of which he received only Rs.3,000/-. As per the testimony of D.W.1, those Rs.3,000/- was spent by Satyanarayana for the welfare of his children. It is not in dispute the Satyanarayana is having three sons and three daughters. A perusal of the record also reveals that Satyanarayana worked as a clerk in different shops and thereafter he started his own business in Jaggery. A perusal of the record reveals that the Satyanarayana purchased the property in the year 1988. Satyanarayana purchased the property nearly 22 years after the sale of the property at Kothapatnam. Except the oral testimony of P.W.1, there is no other documentary evidence to prove that Satyanarayana along with plaintiffs No.1, 2 and D.W.2 carried on the business. Except the self-serving testimony of P.Ws.1 and 2, there is no other documentary evidence to establish that late Satyanarayana purchased the suit schedule property with the joint family income. The plaintiffs are not disputing the will dated 22.04.1996-Ex.B.2 and registered settlement deed dated 03.04.1999-Es.B.3. As per the recitals of these two documents, late Satyanarayana purchased the suit schedule property with his own earnings. Any amount of oral evidence contrary to the recitals of a registered document is of no avail. Unless and until a contrary is

proved, the Court can *prima facie* place reliance on the recitals of a registered document. No positive evidence was produced before the trial Court to establish that late Satyanarayana purchased the plaint schedule property with the joint family nucleus. In the absence of such positive evidence, it is not possible for the Court to arrive at a conclusion that the suit schedule property is ancestral property of Satyanarayana and plaintiffs 1, 2 and defendants 1 and 2. The logical conclusion arrived at by the courts below on this aspect is on correct lines viewed from factual or legal angle.

16. The trial Court made an observation that the suit is not maintainable for non-impleading of the daughters of late Satyanarayana. Learned counsel for the appellants submitted that the daughters of late Satyanarayana were brought on record as defendants No.3 to 5 during pendency of the suit. A perusal of the record reveals that defendant Nos.3 to 5 were brought on record as legal representatives of the first defendant. There were not brought on record in their individual capacity, i.e., as coparceners. This Court carefully scrutinised the pleadings in the plaint. For the reasons best known, the plaintiffs did not mention in the plaint that defendant Nos.3 to 5 are the daughters of Satyanarayana. This itself indicates the intention of the plaintiffs. In a suit for partition, all coparceners or members of the joint family are necessary and proper parties, without whose presence, the lis cannot be adjudicated properly. No partition suit is maintainable without impleading the members of the joint family or coparceners. In the instant case, the daughters of Satyanarayana were not originally shown as defendants in their individual capacity in the main suit. It is not in dispute that the daughters are also entitled for share in the joint family or ancestral

property. Merely because defendant Nos.3 to 5 were brought on record as legal representatives of first defendant will not cure the initial legal defect. Viewed from this angle also, the suit is not maintainable. Both courts concurrently held that the plaintiffs failed to establish that late Satyanarayana purchased the suit schedule property with joint family nucleus or income derived from the joint family earnings. If the findings of the courts below are based on no evidence or based on evidence, which is not legally admissible, those findings can be termed as perverse and liable to be set aside. In the instant case, the findings recorded by the Courts below are supported by evidence much less legally admissible evidence. Therefore, I am unable to accede to the contentions of the learned counsel for the appellants that the findings recorded by the Courts below are perverse. The first appellate Court is the fact finding final Court.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB**⁵, while dealing with the scope of Section 100 of CPC, the Hon'ble apex Court held at paragraph No.16 as follows:

16. ... 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. ...

18. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the point raised by the learned counsel for the appellants-plaintiffs will not fall within the ambit of Section 100 of

⁵ (2010) 13 SCC 216

C.P.C. There is no question of law much less substantial question of law in this appeal.

19. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

9th November, 2017

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