

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Miscellaneous Appeal Nos.516 and 517 of 2017

ORDER :

The self-same appellant Gutha Krishnamurthy in both the Civil Miscellaneous Appeals is the 1st respondent in both the appeals viz; A.S.No.38 and 46 of 2014 on the file of the VI Addl.District Judge, Anantapur at Gooty and the plaintiff in O.S.No.45 of 2010 on the file of the learned Junior Civil Judge, Tadipatri of Anantapur District. The suit O.S.No.45 of 2010 filed by him on 25.02.2010 was for the relief of declaring right and title of the plaintiff over the plaint schedule property of Ac.3.98cents of Ammaladinne Village of Pedda Pappur Mandal of Tadipatri Sub Registry of Anantapur district within the boundaries described therein in viz; Sy.Nos.129-A1 of Ac.0.82cents, Sy.No.129-B2 of Ac.0.78cents, Sy.No.129-C1 of Ac.1.21cents and Sy.No.129-D1 of Ac.1.17cents and also for consequential delivery of possession of the property by canceling sale deed,dt.01.03.2016 by declaring said sale deed as void with a consequential intimation to the Sub Registrar, Tadipatri u/ sec.31 of the Specific Relief Act and for the costs of the suit.

2. There are originally three defendants in the suit by names Kothala Kallolla Kullayappa, Kallola Naga Lakshamma and APSFC Anantapur branch represented by its Branch Manager respectively. The D.2 among them is the vendee from D.3 in realization of the secured debt under the provisions of the SFC Act. The 4th defendant-G.Surya Kantha @ Suramma, was added as per the orders in I.A.No.285,dt.13,dt.17.02.2014 during pendency of the suit. One late Nagabhushanam-husband of D.4 was no other than brother of plaintiff and they are sons of one late Narayana. As per the plaint averments late Narayana purchased the plaint schedule property which is locally called as Kunti Molakala Chenu from Gurram Kondappa,

under registered sale deed dt.02.09.1968 for consideration and came into possession with absolute right and while so enjoying with possession and right died and among his two sons by names G.Krishna Murthy-plaintiff and G.Nagabhushanam-husband of D.4 who succeeded the property while enjoying as owners, divided their properties and the suit schedule property fell to the share of plaintiff and the plaintiff therefrom with own right as owner enjoying the property by raising crops and also obtained pattadar passbook and revenue title deed in the year 2004 from mutation of name of the plaintiff in revenue records to knowledge of one and all including D.1 and D.2. Four months prior to filing of the suit, the plaintiff came to know that the D.3-APSFC brought the suit schedule property to sale through public auction to recover the loan amount contracted by D.1 from D.3 to purchase truck as the same was mortgaged as security by D.1 with D.3 and in that auction D.2 stood as highest bidder. The plaintiff suspects that there was collusion between D.1 and D.4-elder brother of plaintiff Nagabhushanam in creating equitable mortgage without right and the D.3 having not properly verified by scrutiny of the documents sanctioned the loan and obtained mortgage in the transaction which is void and not binding on the plaintiff for plaintiff has no knowledge about the so called sale and execution and registration of sale deed,dt.25.02.2006 by D.3 in favour of D.2 and D.2 not taken physical possession as it is with plaintiff under the sale deed and thereby gets no legal title pursuant to the so called sale deed.

3. The written statement of D.3 shows that D.1 availed term loan of Rs.2,81,000/- and soft loan of Rs.50,000/- from D.3 as per loan application dt.19.06.1989 and the loans were sanctioned vide letters of intimation dt.10.07.1989 and on G.Nagabhushanam S/o Narayana of Ammaladinne village expressed his willingness to mortgage his property as security to the loan sanctioned to D.1 and submitted the original registered sale deed

dt.02.09.1968 standing in his name besides No.10-1 account, adangal and sworn affidavits stating that he owned property that was devolved on him and except himself no other legal heir of his father Narayana got any right and the same was therefrom accepted as security and said Nagabhushanam-guarantor executed memorandum of deposit of title deeds confirming creation of equitable mortgage in favour of D.3 on 18.08.1989 and also the deed of hypothecation executed by D.1 on even date and as failed to repay despite legal notice dt.16.11.1995 by managing to return unserved, D.3 called tenders for sale of the mortgaged property published notice thrice in Eanadu Telangana Daily newspaper on 15.09.1988, 18.12.1999 and 30.09.2005. D.2 filed tender to purchase the property of said Nagabhushanam that was mortgaged in favour of D.3 and D.3 confirmed sale as per letter dt.13.10.2005 and handed over the possession to D.2 under cover of notification on 12.01.2006 and executed registered sale deed on 25.02.2006 in favour of D.2 and also handed over the original sale deed for the property dt.02.09.1968 FMB copy, 10-1 Account, adangal and E.C.No.1693/89 sent by registered post with acknowledgment due on 28.11.2008. The plaintiff was never in possession and enjoyment of the suit property and the suit is barred by non-joinder of necessary parties and the plaintiff has no cause of action.

4. The written statement of the D.2 in same lines of D.3 who while denying the plaint averments submits that the plaintiff was never in possession and enjoyment of the suit property and he managed to create the so called revenue records for suit purpose and the D.2 became the highest bidder in the public auction conducted on tender process and duly executed sale deed and handed over possession and since then the D.2 in possession as owner and also applied to the authorities to mutate in the revenue records her name and mutations were carried out and she obtained pattadar passbook and title deed pursuant thereto except D.2 none can get

any right, possession or interest or enjoyment over the property and she is a bonafide purchaser for consideration and in possession and enjoyment and thereby suit is liable to be dismissed.

5. The 4th defendant as referred supra subsequently added is wife of mortgager Nagabhushanam, of the suit schedule property in favour of the D.3-APSF. Consequent to the impleadment, plaint was amended by saying the plaintiff and his brother Nagabhushanam divided long ago and Nagabhushanam and his wife-D.4 have no subsisting right over property which fell to the share of the plaintiff and the so called sale in favour of D.2 is null and void. During trial from the evidence of P.Ws. 1 to 3 including the plaintiff and D.Ws. 1 and 2, the D.2 and one I.Govinda Rao and with reference to the Exs.A.1 to A.11(Ex.A1-pattadar passbook, Ex.A2-registrarration copy of sale deed executed by D.3 in favour of D.2,dt.25.02.2006, Ex.A3-registration copy of sale deed in the name of plaintiff's father dt.02.09.1968, Ex.A.4-office copy of legal notice, dt.28.10.2009, Ex.A5-office copy of rejoinder notice,dt.19.11.2009, Ex.A6-served postal acknowledgment of D.2, Ex.A.7-unserved registered postal cover,dt.06.11.2009 addressed to D.1, Ex.A8-served postal acknowledgment of the D.2,Ex.A9-served postal acknowledgment of the rejoinder notice on D.3,Ex.A10-served postal acknowledgment of rejoinder notice of D.2 and Ex.A11-served postal acknowledgment of rejoinder to D.1), X.1 to X.10(Ex.X1-authorisation letter issued by the Tahasildar, Peddapappur, Ex.X2 to X4-true copies of 1(B) Register for fasli 1422,, Ex.X5 to Ex.X10--true copy of adangal for fasilies 1417, 1418,1419,1420,1421 and 1422 respectively and Ex.B.1 to B.22(Ex.B1-true extract of 1(B) namuna dt.05.06.2010 issued by the Tahasildar, Peddapappur, Ex.B2-true copyof adangal No.3 for fasli 1419 in respect of land in sy.No.129-A, Ex.B3 to B5-true copies of adangal for fasli 1419 in respet of lands inSy.Nos.129-B, 129-B,C and D, Ex.B6-original registered sale deed,dt.25.02.2006 executed by

the D3 in favour of D2, Ex.B7-10-1 account standing in the name of Nagabhushanam for fasli 1396 in respect of total extent of suit survey numbers, Ex.B8-adangal for fasli 1398 standing in the name of Nagabhushanam, Ex.B9—application of Financial Assistance by the D1, dt.19.06.1989, Ex.B10 and B11-letters of D3 to D1, Ex.B12-letter addressed by G.Nagabhushanam to D3, Ex.B13-sworn affidavit, dt.18.08.1989 of G.Nagabhushanam, ExB14-Memorandum of deposit of title deed, dt.18.08.1989 executed by G.Nagabhushanam, ExB15-deed of Hypothecation, dt.18.08.1989, Ex.B16-notice, dt.16.11.1995, ExB17-unserved postal cover, dt.18.11.1995 addressed to G.Nagabhushanam, ExB18-tender, dt.05.10.2005 submitted by D2, Ex.B19-sale confirmation letter, dt.13.10.2005 issued by D.3, Ex.B20-letter dt.28.11.2008 addressed to D.2 by D.3, Ex.B21-postal acknowledgment and ExB22-Panchanama, dt.12.01.2006. The trial Court having framed three issues viz:-1) Whether the plaintiff is entitled for declaration of title over the suit schedule properties, 2) Whether the plaintiff is entitled for cancellation of the sale deed, dt.25.02.2006 declaring the sale deed as void document, and 3) to what relief, decreed the suit.

6. Aggrieved thereby, the D.2 filed A.S.No.38 of 2014 and the D.3-APSFC filed A.S.No.46 of 2014 on the file of the learned V Addl. District Judge, Gooty, and the learned Judge, by separate judgments on 29.08.2016 allowed in part both the appeals by setting aside the trial Court's decree and judgment, dt.17.09.2014 and remitted back to the trial Court with a direction to frame additional issue as to whether there is a partition of family property between the plaintiff-Gutha Krishna Murthy and his younger brother Gutha Nagabhushanam as pleaded by the plaintiff and if so, whether Late Gutha Nagabhushanam was absolute owner of total extent in suit Survey Numbers as on the date of creating equitable mortgage confirmed by Ex.B.14-memorandum of depositing title deed, dt.18.08.1989

with a direction to give an opportunity to both the parties to adduce any additional evidence and to dispose of the matter afresh by giving clear finding of all the issues and also additional issues.

7. Same is impugned in the present two Civil Miscellaneous Appeals though originally filed as if a second appeal and later so far as CMA No.516 of 2017 against the A.S.No.38 of 2014 from original number S.A.No.62 of 2017 converted to CMA No.516 of 2017 and the other matter against the A.S.No.46 numbered as CMA No.517 of 2017.

8. The contentions in the grounds of the two miscellaneous appeals common practically impugning the said remand order of the lower appellate Court in both the appeals maintained respectively by D.2 and D.3 supra arising out of different findings of the same judgment, by the appellant/plaintiff herein are that the lower appellant Court having formulated points 1 to 5 in para-10 of the judgment as “1) *Whether the plaintiff-R 1 has right and title over the plaint schedule property? if so, plaintiff is not entitled to decree for declaration of his title to said property?* 2) *Whether the plaintiff/R 1 is entitled for cancellation of sale deed, dt.25.02.2006?* 3) *Whether the matter is required to be remitted back to trial Court for fresh disposal as argued by counsel appearing for D2/ appellant?* 4) *whether the trial Court failed to appreciate oral and documentary evidence brought on record in proper perspective and committed any mistake in decreeing the suit in the aforesaid manner and the decree and judgment of trial court is liable to be set aside and* 5) *To what relief?*” went wrong in remanding the matters with no such need.

9. It is also contended that in spite of sufficient material and evidence on record the remanding by the first appellate Court to the trial Court with a direction to frame additional issues tantamounts to not discharging its duties by the lower appellate Court, instead of deciding the

appeals on merits in its remanding the matter so erroneously and liable to be set aside the remand orders therefrom. It is also the contention that remanding the matter to trial Court once again to frame additional issues and lead evidence gives life to prolong the litigation which cannot be allowed to continue. The lower appellate Court should have seen that mere entries in revenue records will not confer title on the property in the absence of pattadar passbook and revenue title deed for relying on adangal copy. The D.3 is wrong in enforcing its right as per hypothecation deed, dt.18.08.1989 and to proceed to sell the property of the husband of the 4th defendant without following the procedure contemplated by the APSFC Act, 1959 as the property sold is to none other than the wife-D.2 of the D.1-principal debtor and the lower appellate Court should have considered the fraud played by D.2 and D.3 and thereby the remand order is liable to be set aside with a direction to the lower appellate Court to call for the records to decide the appeals on own merits afresh.

10. The counsel for the appellant/plaintiff reiterated the same in the course of common hearing of the two appeals. Whereas, the learned counsel for D.1 to D.3 supported the lower appellate Court's remand judgment and decrees supra. The Apex Court in *Syeda Rahimunnisa Vs. Malan Bi(dead) by Legal Representatives*¹ observed on the facts on title dispute between the appellants and respondents that the trial Court decreed the suits of appellants and dismissed the suits of respondents and the first appellate Court confirmed those findings. Whereas, in second appeal High Court reversed those findings and remanded to the trial Court to *de nova* trial is impropriety when the High Court in second appeal is to frame substantial questions of law involved if any and questions formulated if any for no substantial questions for no case made out in second appeal to remand and it is failure to exercise proper jurisdiction by High Court

¹ (2016) 10 SCC 315

u/ sec.100 CPC, in not framing substantial questions of law and thereby the remand judgment held liable to be set aside. In also saying on facts concurrent findings of fact arrived by trial Court and lower appellate Court should not have been re-opened by the second appellate Court in the absence of perversity and that too by remanding the matter to the trial Court with no basis. It is the settled principle of law that each case depends upon own facts and what is to be placed reliance is the principle of law laid down to follow to the extent serves as precedent for even little change in the factual matrix may tilt result with application of that principle and law even at times that cannot be ignored by the Courts in referring to the previous expressions and considering the binding nature of the same.

11. A reading of the entire judgment, mainly concentrated on the non-framing of the substantial questions of law by dealing with the two second appeals of the High Court and without existence of substantial question of law by its formulation, entertaining and that too in remanding; for not any principle laid down of no remand can be made in any case at all, but for to say it depends upon the facts and circumstances of each case and within the scope of law envisaged by Order XLI Rules 23 to 25 CPC. It is also observed particularly at para-36 on the scope of remand that in order to claim remand of the case, it is necessary for the appellant to first raise a plea and make out a case on remand on facts and the power of appellate Court to remand contains in Order XLI Rules 23, 23-A and 25 CPC wherein it is obligatory to record reasons as to why it has taken recourse to any one of the 3 Rules of the Order XLI in remanding the case to the trial Court and in the absence of any ground to state why remand order is otherwise called for and in the absence of any finding if at all to give of the requirement of the remand, there was no justification in remanding the case to the trial

Court instead of deciding appeals on merits was the principle of law laid down by the Apex Court in *Syeda Rahimunnisa Supra*.

12. In fact, from this coming to the material on record as to justification or not of the remand of the matter by the lower appellate Court in both the appeals, the D.4 did not contest anywhere much less by filing any written statement or coming to witness box for giving evidence but for mainly by D.2 and 3 and so far as the two appeals of them before the lower appellate Court, the grounds urged are that the trial Court erred in relying the evidence of P.W.3. Exs.X.2 to X.10 and B.7 and B.8 which show G.Nagabhushanam-husband of D.4 as pattadar and enjoyer of the total extent i.e. Ac.7.86cents in the suit survey numbers including the plaint schedule property and by the time X.2 to X.10 covering fasilies 1417 to 1422 of the years 2007 to 2012, they were already sold in favour of D.2 by the D.3 under Ex.B.6 dt.25.02.2006 and no reliance could have been placed thereby on X.1 to X.10 and the crux required that was failed to consider by the trial Court is as on the date of creating equitable mortgage by D.4 in favour of D.3 on 18.08.1989 what is his right, title and possession over the property with reference to Exs.B.14 and B.15 and in the absence of evidence of plaintiff in this regard, the trial Judge went wrong in decreeing the suit by even ignoring Exs.B.6 to B.8 from which should have been dismissed the suit claim. The plaintiff's so called pattadar passbook was obtained under Ex.A.1 of 1994, whereas equitable mortgage was created prior to that by the plaintiff's brother Nagabhushanam in 1989 and in the absence of credible evidence about the alleged partition taken place prior to 1989, there could be no credence on the Ex.A.1 to rely by the trial Court. P.W.3 P.Gopal Reddy deposed that they prepared Ex.1-B Register and entered names in 10-1 Account and adangal and when Ex.B.7 and B.8 for fasili 1398 itself shows the name of late Nagabhushanam as pattadar and enjoyer for entire extent and the same should have been reflected in the

said 1-B register to rely and the same was ignored by the trial Judge and the evidence on record when shows only G.Nagabhushanam is the absolute owner with exclusive possession and enjoyment of the total extent of the survey numbers and mortgaged the same as security for repayment of the loan availed by D.1 from D.3 and for realization of which for non-payment when brought to sale and purchased by D.2, the plaintiff should have non-suited by dismissing the suit claim.

13. The lower appellate Court in its judgments respectively while remanding the matter observed the fact that husband of D.4 by name G.Nagabhushanam and the plaintiff by name G.Krishna Murthy are sons of G.Narayana and G.Narayana purchased the total extent of the lands covered by Sy.Nos. 129-A,B,C and D of Ammaladinne village under registered sale deed dt. 02.09.1968 is not in dispute and it is also not in dispute of Nagabhushanam after death of G.Narayana being one of his two sons, mortgaged the suit property in favour of D.3-APSFC and for the loan availed by the D.1 cannot be disputed and D.3 for non-payment of the loan brought property to sale wherein D.2 became the auction purchaser under Ex.B.6 sale deed dt.25.02.2006 also borne by record. What the plaintiff in support of his claim as P.W.1 stated as nothing new and P.W.2 G.Nagappa of that village stated after death of G.Narayana, his two sons viz; plaintiff and late Nagabhushanam, divided the properties orally and enjoying the shares and P.W.3 VRO of Ammaladinne village pursuant to X.1-authorization produced X.2 and X.10 saying having made enquiry entered the name of the plaintiff as half shareholder of the suit property on 22.06.2009 and entered name of D.2 having collected for the suit property at request of the Manager of APSFC. P.W.1-plaintiff admitted of not filed any document to show that the suit property fell to his share in the partition. Ex.B.7-10-1 account and B.8-Adangal show that was handed over by Nagabhushanam and Mortgaged property as per the evidence of D.W.2 and D.3 in the name of

G.Nagabhushanam and from B.12 letter addressed by G.Nagabhushanam to D.3, Ex.B.13-notarized sworn affidavit of Nagabhushanam handed over to D.3 and Ex.B.14-memorandum of deposit of title deeds executed by Nagabhushanam and the 10-1 account and adangal shows Nagabhushanam as owner and enjoyer being pattadar for the lands. Therefore, as urged by the D.2-appellant in one of the two appeals, it is necessary to frame additional issue on the aspect of alleged partition and allotment of plaint schedule to the plaintiff and to remand the matter back to trial Court by setting aside the decree and judgment of the trial Court with a directions to give opportunity to plaintiff and contesting defendants to adduce further evidence on the additional issue and to dispose of the matter afresh.

14. Even from the lower appellate Court's two remand judgments impugned in the two Miscellaneous Appeals concerned, there is no observation of any further evidence is required on record but for saying additional issue if any to be formulated as to alleged partition and allotment of plaint schedule property to the plaintiff in said partition with G.Nagabhushanam. In fact, the P.W.1-plaintiff in his evidence in cross-examination deposed that there is no document to show the alleged partition. Even D.2 or D.3 in the grounds of their respective appeals not sought for remand, if at all therefrom for the lower appellate Court any remand required by formulating the additional issue referred supra was whether there was partition of the family properties between the plaintiff and his brother late Nagabhushanam and whether the plaint schedule property which is half of the total extent of the survey numbers fell to his share and if not Nagabhushanam is absolute owner of the entire extents in creating equitable mortgage in favour of the D.3. Practically but for if at all any specific direction to record any further oral evidence, there could be no need of remand for the lower appellate Court of both the appeals. Thereby the lower appellate Court from the evidence on record should have

formulated the three issues mentioned in the operative portions of its judgments respectively formulated the same and if necessary record any oral or documentary evidence as additional evidence if at all required in its discretion to the extent necessary for the effective delivery of the judgment as contemplated by Order XLI Rule 27(1)(B) CPC and dispose of both the appeals as practically the remand of the two appeals by setting aside trial Court's judgment will serve no purpose but for giving further life to litigation.

15. Accordingly and in the result, both the appeals viz; C.M.A.Nos.516 and 517 of 2017 are allowed by setting aside the respective judgments, dt.29.08.2016 in A.S.No.38 and 46 of 2014 of the lower appellate Court impugned herein and by restoring two appeals to the file to decide the appeals from the evidence on record if necessary by taking any additional evidence from the scope of Order XLI Rule 27 CPC and give fresh disposal on own merits by re-appreciation of the oral and documentary evidence on fact and law on record from entire matter is at large being the ultimate fact finding court as the first appellate Court.

16. Consequently, the miscellaneous petitions, pending in these two Criminal Petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:29-12-2017

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