THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL Nos.396 and 854 OF 2016

COMMON JUDGMENT:

S.A.No.396 of 2016 is filed, under Section 100 of C.P.C., by the defendants assailing the decree and judgment dated 30.11.2015 in A.S.No.9 of 2015 on the file of the Court of the VI Additional District Judge, Markapur, wherein and whereby the decree and judgment dated 31.08.2010 in O.S.No.142 of 2000 on the file of the Court of the Principal Junior Civil Judge, Markapur, granting the relief of declaration and perpetual injunction in favour of the plaintiff, was confirmed.

S.A.No.854 of 2016 is filed, under Section 100 of C.P.C., by the unsuccessful plaintiff assailing the decree and judgment dated 30.11.2015 in A.S.No.10 of 2015 on the file of the Court of the VI Additional District Judge, Markapur, wherein and whereby the decree and judgment dated 31.08.2010 in O.S.No.111 of 2000 on the file of the Court of the Principal Junior Civil Judge, Markapur, dismissing the suit filed by the plaintiff, against the defendant in O.S.No.142 of 2000, seeking perpetual injunction, was confirmed.

2. In the trial Court as well as the first appellate Court, both the matters were heard together and common judgment was delivered. The parties to the appeals, the suit schedule property, the lis involved in both the appeals are one and the same, though the reliefs sought for are different. If declaration suit i.e., O.S.No.142 of 2000 is allowed, consequently the injunction suit i.e., O.S.No.111 of 2000 is liable to be dismissed automatically. In order to avoid confusion and conflict of judgments, this Court is

also inclined to dispose of both the appeals by this common judgment.

3. For the sake of convenience, the parties will hereinafter be referred to as they were arrayed in O.S.No.142 of 2000.

4. The averments made in the plaint are briefly as follows: The first plaintiff purchased the suit schedule property from defendant Nos.1 and 2 under a registered sale deed dated 21.09.1978. Defendant Nos.1 and 2 delivered the suit schedule property in favour of the first plaintiff in pursuance of the registered sale deed. Ever since, the first plaintiff has been in possession and enjoyment of the suit schedule property. When the first plaintiff is taking steps for construction of compound wall, defendant Nos.1 and 3 are interfering with the suit schedule property. Having no other alternative, the first plaintiff filed the suit for declaration and consequential perpetual injunction.

5. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that he did not execute the registered sale deed on 21.09.1978 in favour of the first plaintiff in respect of the suit schedule property. The first plaintiff created sale deed with an intention to deprive his legal rights. This defendant got the suit schedule property in the family partition between himself and his brother. The first plaintiff has not mentioned the correct boundaries of the suit schedule property. The first plaintiff is a stranger to him. This defendant filed O.S.No.111 of 2000 against the first plaintiff seeking perpetual injunction.

6. The first defendant in O.S.No.142 of 2000 filed O.S.No.111 of 2000 against the plaintiffs. The plaint averments made in O.S.No.111 of 2000 are almost identical to the averments made in the written statement in O.S.No.142 of 2000.

7. Basing on the above pleadings, the trial Court in O.S.No.111 of 2000 framed the following issues:

1. Whether defendant No.1 purchased the schedule property under registered sale deed dated 21.09.1978 from plaintiff and his younger brother G.Chinna Venkata Reddy?
2. Whether plaintiff is in possession of plaint schedule property?
3. Whether plaintiff is entitled for permanent injunction?

In O.S.No.142 of 2000, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. Whether the registered sale deed dated 21.09.1978 is forged and fabricated one?
3. Whether the boundaries of the suit schedule property are in correct?
4. Whether the plaintiff filed the present suit to grab the schedule land in O.S.111/2000?
5. Whether the suit is maintainable without relief of declaration of title for the plaintiff over the schedule property?

<u>Additional Issues</u>:

1. Whether suit schedule land is in the possession of plaintiff in this suit?
2. Whether plaintiff is entitled for declaration of title over plaint schedule properties?

8. The trial Court clubbed O.S.No.111 of 2000 and O.S.No.142 of 2000 and recorded evidence in O.S.No.142 of 2000, which is a comprehensive suit. On behalf of the plaintiffs, PWs.1 to 3 were examined and Exs.A.1 to A.3 were marked. On behalf of the

defendants, DWs.1 and 2 were examined and Exs.B.1 to B.6 were marked.

9. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs in O.S.No.142 of 2000 are entitled to the relief of declaration and consequential perpetual injunction; consequently, decreed the suit and the plaintiff in O.S.No.111 of 2000 is not entitled to the relief of perpetual injunction; consequently, dismissed the suit. Feeling aggrieved by the decree and judgment dated 31.08.2010, the defendants in O.S.No.142 of 2000 and plaintiff in O.S.No.111 of 2000 preferred A.S.Nos.9 and 10 of 2015 respectively. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiffs in O.S.No.142 of 2000 are entitled to the relief of declaration and consequential injunction, and the plaintiff in O.S.No.111 of 2000 is not entitled to the relief of perpetual injunction; consequently, dismissed both the appeals. The defendants in O.S.No.142 of 2000 and the unsuccessful plaintiff in O.S.No.111 of 2000 filed the present two appeals.

10. The first plaintiff in O.S.No.142 of 2000 is the first defendant in O.S.No.111 of 2000. The plaintiff in O.S.No.111 of 2000 is the first defendant in O.S.No.142 of 2000. During pendency of O.S.No.142 of 2000, the first plaintiff died and his legal representatives were brought on record as plaintiff Nos.2 to 5; and the second defendant died and his legal representatives were not

brought on record as they are not necessary and proper parties. The third defendant is the son of first defendant.

11. Heard the learned counsel for the appellants, the learned counsel for the respondents and perused the material available on record.

12. The questions of law urged by the learned counsel for the appellants are as follows:

1. Whether Ex.A.1 sale deed dated 21.09.1978 purported to have been executed by defendant Nos.1 and 2 in favour of first plaintiff is legally enforceable? and
2. Whether the findings recorded by the Courts below are perverse?

13. Question Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the questions simultaneously in order to avoid recapitulation of facts and evidence.

14. It is the case of the first plaintiff that he purchased the suit schedule property from defendant Nos.1 and 2 under a registered sale deed dated 21.09.1978. It is the case of defendant Nos.1 and 3 that the first plaintiff in collusion with the second defendant fabricated Ex.A.1 sale deed by impersonation. In a suit for declaration, the plaintiff may succeed or fail basing on strength and weaknesses of his/her case. The plaintiff is not entitled to the relief of declaration basing on the weaknesses of defendant's case. In a suit for perpetual injunction, the plaintiff has to establish that he was in possession of the suit schedule property as on the date of filing of the suit. Once the plaintiff *prima facie* establishes his possession over the suit schedule property, the onus of proof shifts

on the defendant to establish that the plaintiff was not in possession of the suit schedule property at the relevant point of time.

15. As seen from the testimony of PW.1, his father purchased the suit schedule property from defendant Nos.1 and 2 under a registered sale deed Ex.A.1 dated 21.09.1978. As per the testimony of PW.2, the plaintiffs have been in possession and enjoyment of the suit schedule property. As seen from the testimony of PW.3, his father is one of the attestors of Ex.A.1 sale deed. PW.3 identified his father's signature on Ex.A.1. As observed by the Courts below, in the cross-examination of PW.3, nothing is elicited to shake his testimony. As seen from the testimony of DW.1, he got the suit schedule property under an unregistered partition deed Ex.B.1 dated 29.05.1968. Ex.B.3 is the legal notice, Exs.B.4 and B.5 are postal receipts and Ex.B.6 is the postal acknowledgment. There is no much dispute between the parties with regard to Exs.B.3 to B.6. The trial Court as well as the first appellate Court made an observation that Ex.B.1 is an unregistered document; therefore, much reliance cannot be placed on it. The Courts below concurrently held that Ex.B.1 can be used for collateral purpose i.e. to prove the factum of partition between defendant Nos.1 and 2. As per the recitals of Ex.B.1, defendant Nos.1 and 2 inherited the suit schedule property through their father and partitioned the same. As rightly observed by the Courts below, Ex.B.1 can be looked into for collateral purpose of proving the factum of partition. The material placed before the Court clinchingly establishes that defendant Nos.1 and 2 are the owners of the suit schedule property.

16. In order to appreciate the rival contentions, this Court is placing reliance on the decision in **A.L.N.Narayanan Chettiyar v. Official Assignee, High Court, Rangoon[1],** wherein the Privy Council held that "fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture."

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

18. In the written statement, the first defendant has taken a specific plea that the first plaintiff in collusion with the second defendant created Ex.A.1 registered sale deed by playing fraud. The burden of proof lies on the person, who asserts that the particular document was obtained by the opposite party by playing fraud and forgery. A perusal of Ex.A.1 reveals that it bears the thumb mark of defendant Nos.1 and 2. Unless and until a contrary is proved, the Court can place reliance on a registered document.

19. One of the contentions raised by the learned counsel for the appellants is that the Courts below miss-construed Section 63 of the Registration Act, 1908. In order to appreciate the contention of the learned counsel for the appellants, it is not out of place to extract hereunder Section 63 of the Registration Act.

> **"63. Power to administer oaths and record of substance of statements:-**
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> (1) Every registering officer may, at his discretion, administer an oath to any person examined by him under the provisions of this Act.

[1] AIR 1941 PC 94

> (2) Every such officer may also at his discretion record a note of the substance of the statement made by each such person and such statement shall be read over, or (if made in a language with which such person is not acquainted) interpreted to him in a language with which he is acquainted, and, if he admits correctness of such note, it shall be signed by the registering officer.
>
> (3) Every such note so signed shall be admissible for the purpose of proving that the statements therein recorded were made by the persons and under the circumstances therein stated."

20. A perusal of the same reveals that the registering authority made necessary entries on the sale deed at the time of registration. The first appellate Court made an observation that the Sub-Registrar made an endorsement on Ex.A.1 indicating the presence of first plaintiff and defendant Nos.1 and 2. The defendants did not adduce any evidence much less cogent and convincing evidence to establish that the first plaintiff obtained the sale deed by playing fraud or impersonation. The second defendant is none other than own brother of first defendant. The first defendant has not adduced any evidence to establish the disputes, if any, between himself and second defendant. In the absence of such evidence, it may not be possible for the Court to come to a conclusion that the first plaintiff has obtained sale deed by playing fraud. If really the first plaintiff obtained sale deed by impersonation, what prevented the first defendant to send his thumb mark along with the disputed thumb mark on Ex.A.1 to the RFSL for verification? For the reasons best known, the first defendant did not take any steps in that direction. By examining PWs.1 to 3 and marking Ex.A.1, the plaintiffs clearly established that defendant Nos.1 and 2 executed Ex.A.1 sale deed in favour of the first plaintiff in respect of the suit schedule property. As

observed earlier, the defendants failed to establish that the first plaintiff obtained the sale deed by playing fraud or impersonation. On the other hand, Ex.B.1 unregistered partition deed also to certain extent supports the case of the defendants that they are the owners of the suit schedule property at the time of execution of Ex.A.1 sale deed. The trial Court considered the oral and documentary evidence in right perspective and arrived at a conclusion that the plaintiffs proved Ex.A.1 sale deed. The first appellate Court also, on considering the oral and documentary evidence, came to a conclusion that defendant Nos.1 and 2 executed the sale deed in favour of the first plaintiff in respect of the suit schedule property. Once the title is proved by the plaintiff, automatically he is entitled to the relief of declaration. As per the recitals of Ex.A.1 sale deed, defendant Nos.1 and 2 delivered the suit schedule property in favour of the first plaintiff on 21.09.1978. Except the self-served testimony of DW.1, there is no other convincing evidence to prove that he was in possession of the suit schedule property as on the date of filing of the suit. The first defendant has not filed the tax receipts or pahanies to prove that he has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. To establish that the first plaintiff was in possession of the suit schedule property as on the date of filing of the suit, he placed reliance on Ex.A.1 sale deed. As observed earlier, unless and until a contrary is proved, the Court can place reliance on the recitals of registered document. The recitals of Ex.A.1 clearly reveal that the first plaintiff was in possession of the suit schedule property as on the date of filing of the suit. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff in O.S.No.111 of 2000, who is the first defendant in O.S.No.142 of 2000, was not in possession of the suit schedule property as on the date of filing of the suit. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, without being influenced by the findings recorded by the trial Court, came to a conclusion that the plaintiff in O.S.No.111 of 2000 was not in possession of the suit schedule property as on the date of filing of the suit thereby, he is not entitled to the relief of perpetual injunction. Whether the plaintiff in O.S.No111 of 2000 was in possession of the suit schedule property as on the date of filing of the suit is purely a disputed question of fact. This Court shall not lightly interfere with the concurrent finding of fact recorded by the Courts below unless the same is contrary to the pleadings or settled principles of law. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. Viewed from any angle, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the Courts below are perverse and liable to be set aside.

21. In **Municipal Committee, Hoshiarpur v. Punjab SEB**[2], while dealing with the scope of Section 100 of C.P.C., 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

[2] (2010) 13 SCC 216

> 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. … …"

22. 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 questions of law urged by the learned counsel for the appellants will not fall within the ambit of Section 100 of C.P.C. The questions of law raised by the appellants have no substance. Hence, both the appeals are liable to be dismissed.

23. In the result, both the Second Appeals are dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in both the Second Appeals shall stand closed.

T. SUNIL CHOWDARY, J

Date: 22.12.2017
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