

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.432 OF 2015

JUDGMENT:

This Second Appeal is filed, under Section 100 of C.P.C., by the defendants assailing the decree and judgment dated 28.01.2014 in A.S.No.193 of 2008 on the file of the I Additional Chief Judge, City Civil Court, Secunderabad, wherein and whereby the decree and judgment dated 22.09.2008 in O.S.No.860 of 2006 on the file of the III Senior Civil Judge, City Civil Court, Secunderabad, decreeing the suit filed by the plaintiff for declaration and consequential perpetual injunction, was confirmed.

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

3. The averments made in the plaint are briefly as follows: Defendant Nos.1 and 2 are parents and defendant No.3 is the brother of plaintiff. At the time of marriage of plaintiff, the first defendant promised that he will give some property to her. Subsequently the first defendant indebted to several persons. The first defendant executed a gift settlement deed on 17.11.2003 in favour of the plaintiff in respect of the plaint schedule property. Subsequently on 05.05.2006 the first defendant revoked the gift settlement deed executed in favour of the plaintiff. The first defendant also executed another gift settlement deed in favour of defendant Nos.2 and 3 in respect of the plaint schedule property. The first defendant has no right whatsoever either to cancel the gift settlement deed executed in favour of the plaintiff or executed

another gift settlement deed in favour of defendant Nos.2 and 3. Hence, the suit.

4. The first defendant filed written statement admitting the *inter se* relationship *inter alia* contending that the suit schedule property was mortgaged in favour of the bank that itself indicates that the suit schedule property is his self acquired property. The first defendant executed the gift settlement deed in favour of the plaintiff due to harassment and threat of the plaintiff. Subsequently the first defendant revoked the gift settlement deed executed in favour of the plaintiff. Hence, the suit may be dismissed. Defendant Nos.2 and 3 filed a memo adopting the written statement of the first defendant.

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

1. Whether the plaintiff is entitled to declaration that the revocation of the gift settlement deed executed by the first defendant dated 05.05.2006 and gift settlement deed executed by the first defendant on 15.05.2006 in favour of defendant Nos.2 and 3 are void?
2. Whether the plaintiff is entitled to permanent injunction as prayed for?
3. To what relief?

6. To substantiate the case, before the trial Court, the plaintiff examined herself as PW.1 and got marked Exs.A.1 to A.14. To dislodge the case of the plaintiff, the first defendant examined himself as DW.1 and got marked Exs.B.1 and B.2. DW.2 is the wife and DW.3 is the son of the first defendant. DW.4 is one of the attestors of Ex.A.1 gift settlement deed.

7. After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the

trial Court arrived at a conclusion that the first defendant neither has no right whatsoever to revoke the gift settlement deed dated 05.05.2006 nor to execute another gift settlement deed dated 15.05.2006 in favour of defendant Nos.2 and 3; consequently, decreed the suit in favour of the plaintiff by granting relief of declaration and consequential perpetual injunction. Feeling aggrieved by the decree and judgment of the trial Court, the defendants have preferred A.S.No.193 of 2008 on the file of the I Additional Chief Judge, City Civil Court, Secunderabad. The first appellate Court, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the first defendant is not entitled to revoke the gift settlement deed dated 05.05.2006 as well as he is not entitled to execute gift settlement deed dated 15.05.2006 in favour of defendant Nos.2 and 3 and dismissed the appeal. Hence, the defendants preferred the present second appeal.

8. Heard the learned counsel for the appellants-defendants, the learned counsel for the respondent-plaintiff and perused the material available on record.

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

1. Whether the first defendant is entitled to revoke the gift settlement deed dated 05.05.2006 executed in favour of the plaintiff? and
2. Whether the gift settlement deed dated 15.05.2006 executed by the first defendant in favour of defendant Nos.2 and 3 is legally sustainable?

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

11. 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.”

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

13. Defendant Nos.1 and 2 are parents and defendant No.3 is the brother of the plaintiff. The first defendant executed Ex.A.1 gift settlement deed on 17.11.2003 in favour of the plaintiff in respect of the suit schedule property. Subsequently the first defendant revoked the gift settlement deed dated 17.11.2003 under Ex.A.2 on 05.05.2006. The first defendant also executed another gift settlement deed dated 15.05.2006 (Ex.A.3) in favour of defendant Nos.2 and 3 in respect of the suit schedule property. A perusal of the record also reveals that the first defendant executed an agreement of sale in favour of the plaintiff. In the written statement itself the first defendant has taken a plea that he executed a gift settlement deed dated 17.11.2003 (Ex.A.1) in favour of the plaintiff. A perusal of the record clearly reveals that the plaintiff has accepted and acted upon Ex.A.1 gift settlement deed. Once the donee has accepted and acted upon the gift deed, the

¹ AIR 1941 PC 94

donor is not entitled to revoke the same. If any gift deed is obtained by playing fraud or misrepresentation, certainly the donor is entitled to revoke the same by following the procedure as contemplated under law. DWs.2 and 3, who are mother and brother of plaintiff, categorically admitted that they are the attestors of Ex.A.1 gift settlement deed. The first defendant did not choose to revoke the gift settlement deed Ex.A.1 nearly for a period of three years. Admittedly no notice was given to the plaintiff before execution of Ex.A.2 revocation deed by the first defendant. The first defendant has not mentioned specific reasons for revoking of the gift settlement deed Ex.A.1 in his written statement. He simply stated that due to pressure and threat, he executed Ex.A.1 in favour of plaintiff. Except the self-served testimony of DW.1, there is no other cogent and convincing evidence to prove the same. It is a settled principle of law that a person, who pleads fraud in obtaining the document, has to establish the same by adducing cogent and convincing evidence. Absolutely there is no material available on record to establish that the plaintiff obtained Ex.A.1 gift settlement deed by playing fraud on the first defendant.

14. A donor can revoke the gift settlement deed by following the procedure as contemplated under Section 126 of the Transfer of Property Act or by following the procedure as contemplated under Section 31 of the Specific Relief Act. Admittedly, the facts pleaded by the first defendant will not fall within the ambit of Section 126 of the Transfer of Property Act in order to revoke Ex.A.1 gift settlement deed. The first defendant has not filed a suit for declaration as contemplated under Section 31 of the Specific Relief Act seeking for cancellation of Ex.A.1 gift settlement deed.

Admittedly the first defendant has not followed anyone of the procedure as referred supra. To put it in different way the first defendant has not availed the remedy available to him under law. In order to resolve this issue, this Court is placing reliance on the decision in **Yanala Malleshwari v. Ananthula Sayamma**². Relevant Para 26 is extracted hereunder:

“26. It is a misconception that in every situation, a person who suffers injury by reason of a document can file a suit for cancellation of such written statement. Two conditions must exist before one invokes Section 31 of Specific Relief Act. These are: the written instrument is void or voidable against such person; and such person must have reasonable apprehension that such instrument if left outstanding may cause him serious injury. Insofar as Section 34 of the Specific Relief Act is concerned, it is no doubt true that a person entitled to any right as to any property can seek declaration that he is so entitled to such right. Here again, the person who claims the right to property can institute a declaration suit only when the defendant denies or interested to deny the title of the plaintiff. The difference between the two situations is glaring. In one case, *cancellation of deed can be sought in a Court only by a person who executed document and who perceives that such document is void or voidable*. In the other case, even if a person is not a party to the document, he can maintain a suit for declaration.”

15. As per the principle enunciated in the case cited supra, the only remedy available to the first defendant is to file a suit for cancellation of Ex.A.1 gift settlement deed.

16. Without resorting to the procedure as contemplated under law, the first defendant bilaterally cancelled Ex.A.1 gift settlement

² 2006 (6) ALD 623 (FB)

deed, which is not permissible under law. Having regard to the facts and circumstances of the case, the first defendant has no right whatsoever in the suit schedule property with effect from the execution of Ex.A.1 gift settlement deed dated 17.11.2003. In such circumstances, he is not entitled to execute gift settlement deed in favour of defendant Nos.2 and 3. The Courts below considered the oral and documentary evidence and arrived at a conclusion that the first defendant is not entitled to execute a revocation deed Ex.A.2 without following the procedure as contemplated under law. The trial Court granted the relief of declaration and perpetual injunction in favour of the plaintiff basing on the evidence much less legally admissible evidence. The first appellate Court reappraised the oral and documentary evidence available on record and came to a conclusion that the plaintiff is entitled for the relief of declaration and consequential perpetual injunction. The first appellate Court is the fact finding final Court. This Court shall not lightly interfere with the concurrent findings of fact recorded by the Courts below unless the same is contrary to the pleadings or settled principles of law. In the instant case, the findings recorded by the Courts below are based on evidence much less legally admissible evidence.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB**³, 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

³ (2010) 13 SCC 216

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 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, the appeal is liable to be dismissed.

19. In the result, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 15.12.2017
Ivd

T. SUNIL CHOWDARY, J

