

THE HON'BLE SMT. JUSTICE ANIS

SECOND APPEAL No. 606 OF 2016

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC'), is directed against the judgment and decree, dated 26.02.2016, passed in A.S.No.193 of 2013 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad, whereunder and whereby the judgment and decree, dated 15.04.2013 passed in O.S.No.915 of 2007 on the file of the I Senior Civil Judge, City Civil Court, Hyderabad, were confirmed by dismissing the appeal.

2. The appellant is the defendant No.1, while respondents 1 to 3 are the plaintiffs and the respondents 4 and 5 (not necessary parties to the present appeal as per the Memorandum of Second Appeal) are the defendants 2 and 3 before the trial Court. For better appreciation of facts, the parties are hereinafter will be referred to, as they are arrayed before the trial court.

3. Heard both the learned counsel for admission of second appeal.

4. The learned counsel for the appellant/defendant No.1 argued that both the Courts below have grossly erred in not even giving any finding with regard to the contention raised

by the appellant that the suit is not maintainable due to payment of insufficient court fee and paid the fixed court fee by claiming joint possession. Therefore, the learned counsel for the appellant prayed this Court to formulate the following substantial question of law:

“Whether the Courts below were not bound to reject the Suit on the ground of insufficient Court fee even after the plea was specifically taken?”

It is also argued by the learned counsel for the appellant that framing of the above substantial question of law is necessary because the trial Court as well as the first appellate Court failed to frame any issue or point while deciding the present case. The learned counsel by relying upon the unreported judgment of the Madras High Court in *M.Paneerselvam Vs. Susseela and others*, argued that in the said judgment, two substantial questions of law were formulated and out of that, one is with regard to Tamil Nadu Court Fees and Suit Valuation Act, 1958, and therefore, this Court should frame the question of law formulated by the appellant as substantial question of law in the present appeal.

5. On the other hand, the learned counsel for the respondents/plaintiffs argued that at no point of time in the trial Court as well in the first appellate Court, any issue or point was framed with regard to court fee and both the Courts

below gave concurrent finding that the suit schedule property is a matruka property, and therefore, the plaintiffs are in joint possession of property. The learned counsel further argued that the plaintiffs rightly paid the fixed Court Fee of Rs.200/- under Section 34 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 and now the appellant cannot raise the plea that the plaintiffs paid insufficient Court Fee, and prayed the Court to dismiss the Second Appeal at the stage of admission as there is no substantial question of law involved in this case.

6. Now, the point that would arise for consideration in this appeal is whether the appellant has made out any point to frame the substantial question of law in this appeal?

7. **POINT:**

A perusal of the record shows that the respondents/ plaintiffs filed suit in O.S.No.915 of 2007 for partition and separate possession of the suit schedule property comprising of a house and two mulgies admeasuring 159.12 Sq. yards situated at Ahapura, Hyderabad. The appellant/first defendant filed Written Statement and stated that his father executed a Will in his favour bequeathing the suit schedule property, as such the said property is not a matruka property and that the plaintiffs are not in joint possession of the said property. The trial Court categorically held that the suit schedule property is a matruka property and the first

defendant failed to establish the fact that the property was bequeathed to him under Ex.B.10 Will. Aggrieved by the judgment of the trial Court, the first defendant filed A.S.No.193 of 2013 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad. In the appeal also, the appellant failed to put forth his case and the first appellate Court held that the trial Court rightly disbelieved Ex.B.10 Will by giving cogent reasons and the appellant/first defendant failed to establish Ex.B.10 Will.

8. The learned counsel for the appellant argued that in the written statement as well as in the appeal grounds before the first appellate Court, they have taken a plea regarding the court fee, but both the Courts failed to decide the said issue, and therefore, it is a substantial question of law in the Second Appeal.

9. Admittedly, during the course of trial, the appellant/first defendant failed to raise before the trial Court to frame an additional issue regarding the payment of deficit court fee and the suit was not properly valued, but no steps have been taken before the trial Court as well as in the first appellate Court. The learned counsel for the appellant filed a copy of the appeal grounds in A.S.No.193 of 2013 and argued that they have raised the said plea. As per the copy of the appeal grounds filed in A.S.No.193 of 2013, Para 17 reads as under:

“That a relief for partition and separate possession valued at Rs.15,20,690/- each respondent/plaintiff share comes to $7 \times \frac{1}{48} =$ Rs.2,21,767/- and total value of respondents No.1 to 3/plaintiffs comes to Rs.6,65,301.87 and $\frac{3}{4}^{\text{th}}$ of which comes to Rs.4,98,976.40 on which they paid court fee of Rs.200/- is paid under Sec.34 of A.P.C.F. and S.V. Act, as per averments of their plaint and an amount of Rs.200/- is paid in original suit and as such Rs.200/- is paid in this appeal suit towards court fee under Sec.49 of A.P.C.F. & S.V. Act, which is sufficient.”

Even during the course of hearing of appeal also, the appellant never raised this issue to be decided by the first appellate Court.

10. Regarding the payment of court fee and suits valuation in a partition suit, the allegations in the plaint alone to be considered for determination of the court fee. For ascertaining the court fee payable on plaint, the terminology used in the plaint is relevant. The plaint averments have to be taken for the purpose of court fee. Further, the question of court fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either the pleas in the written statement or by the final decision of the suit on merits.

11. In the present case, both the Courts below categorically held that the suit schedule property is a matruka property and the appellant/defendant's plea regarding the Will was negatived. If it is a matruka property, it is in joint possession of all the shareholders including the appellant/defendant.

12. The learned counsel for the appellant relied upon the judgment of the Madras High Court in *M.Panneerselvam Vs. Susseela and others*, in which the substantial question of law was already framed when the matter was posted for disposal. In the said case, basing on the judgment of the Hon'ble Apex Court, it was decided as follows:

“No purpose, however, is served by attempting to enumerate exhaustively all possible cases of prejudice which might come under Section 11 of the Suits Valuation Act. The jurisdiction that is conferred on appellate courts under that section is an equitable one, to be exercised when there has been an erroneous assumption of jurisdiction by a subordinate court as a result of over-valuation or under valuation and a consequential failure of justice. It is neither possible nor even desirable to define such a jurisdiction closely, or confine it within stated bounds. It can only be predicated of it that it is in the nature of a revisional jurisdiction to be exercised with caution and for the ends of justice, whenever the facts and situations call for it. Whether there has been prejudice or not is, accordingly, a matter to be determined on the facts of each case. Therefore, it could be seen that the Apex Court has held that as to whether there has been prejudice or not is a matter to be determined on the facts and circumstances of each case.”

13. Further, the facts in the said case supra is also not relevant to the facts of the present case. Therefore, the appellant now cannot raise the plea that the suit filed by the respondents/plaintiffs is not maintainable due to payment of insufficient court fee as a substantial question of law and thereby failed to prove that there arises any substantial question of law.

14. Accordingly, the Second Appeal is dismissed at the stage of admission. No costs. Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

ANIS, J

APRIL 24, 2017.

Anr



THE HON'BLE SMT.JUSTICE ANIS



SECOND APPEAL No. 606 OF 2016

24.04.2017

Anr