

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

SECOND APPEAL No. 860 of 2017

JUDGMENT :

This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiff is directed against the decree and judgment dated 27.01.2017 of the learned IV Additional District Judge, Tanuku, passed in AS.No.21 of 2014. The learned IV Additional District Judge while dismissing the said appeal had confirmed the decree and judgment dated 07.12.2006 of the learned Senior Civil Judge, Tanuku, passed in O.S.No.73 of 1997 filed for cancellation of the document dated 21.03.1997 executed by 1st defendant in favour of 2nd defendant styling as settlement deed.

2. To adjudicate the *lis* in this Second Appeal, it is necessary to refer to the facts leading to filing of this Appeal. For the sake of convenience, the parties hereinafter will be referred to as arrayed in the original suit.

3. The first defendant is the absolute owner and possessor of the suit schedule property i.e. Acs.2.00 out of Acs.4.73 cents in R.s.No.324/1, Pittalavemavaram Village, Peravali Mandal, West Godavari District; that the plaintiff took the schedule property on lease on a rental of 35 bags or it's value in cash payable on or before 15th January every year and

that the lease is oral; that by virtue of said oral lease, plaintiff is cultivating tenant from 1978-1979 onwards, as such, he got right of preemption and that if the 1st defendant wants to sell the same, he has to sell the same to the plaintiff. When the plaintiff came to know that the 1st defendant wanted to sell the schedule property to the 3rd defendant, without his knowledge, he filed ATC No.18 of 1997 on the file of Special Officer Tenancy, 1st Additional District Munisif's Court, Tanuku for injunction and also to fix the price, in case the 1st defendant wants to sell the property; that he got issued telegram notices to the 1st and 3rd defendants on 09.03.1997; that on 11.03.1997, the defendants filed their vakalath and sought for time for filing counter in the injunction **petition** i.e., in I.A.No.834/1997. The Tenancy Court granted **order** of status quo, which was extended from time to time till 13.06.1997. During subsistence of *status quo* orders granted by the Court below in I.A.No.834/1997, the 1st defendant executed sale deed on 21.03.1997, though it is styled as settlement deed, which is not binding on the plaintiff and that it was created only to defraud the plaintiff of his preferential right to purchase the suit schedule property; that the 1st defendant filed ATC No.28 of 1997 alleging that the plaintiff sublet the subject property to one K.Rathaiah; that the 1st defendant also filed suit in O.S.No.162 of 1997 for recovery of arrears of rent for three

years but the same were dismissed; that during the pendency of the suit, the 1st defendant died intestate on 09.09.2000 leaving behind the defendants 4 and 5 as his nearest legal heirs, as such, they are impleaded in the suit by orders in I.A.No.128 of 2001 dated 30.10.2001 in O.S.No.73 of 1997.

3. The 1st defendant filed written statement denying all the averments in the plaint and contended that he purchased the schedule property from one Thoraga Somaraju on 07.01.1992 and the bargain was settled through the father of the plaintiff namely Venkata Rayudu, who is the brother-in-law of the 1st defendant; that schedule property was given on oral lease on a stipulated maktha of 28 bags of paddy for 1st crop payable by 15th day of January every year and 12 bags of paddy for the 2nd crop payable by 30th April of every year; that when the Government regularized the dalwa crop from 1999 onwards by supplying water, the maktha was enhanced to 30 bags of paddy for first crop and 20 bags of paddy for the 2nd crop on the same terms and conditions and paid till 1993, till the father of the plaintiff fell sick. Thereafter, the plaintiff requested the 1st defendant to allow him to continue the lease on the same maktha and accordingly agreed and paid maktha from 1993-94 Sarva crop. Due to close relationship with the plaintiff, no written lease was executed by this defendant. From 1994-95, the plaintiff committed

default in payment of maktha till 1997 for a period of three years. This defendant filed ATC No.28 of 1997 for arrears of maktha and also filed the suit in O.S.No.162 of 1997. The plaintiff is not cultivating the subject land, but he sublet the suit schedule property to one K.Rathaiah. When this defendant fell sick, the daughter of his wife's sister was looking after his welfare, as such, out of love and affection and due to close relationship, the property was settled by canceling the earlier Will in favour of the plaintiff's brother-in-law, by way of settlement deed in favour of the 2nd defendant; that the suit document in favour of the 2nd defendant is not the sale deed, as no consideration is received, there is no cause of action to file the suit and the same is liable to be dismissed.

4. The 2nd defendant filed written statement adopting the averments in the written statement of the 1st defendant, denied the averments in the plaint stating that she is looking after the welfare of the 1st defendant and out of love and affection and close relationship, the 1st defendant executed settlement deed dated 21.03.1997 and thus the 2nd defendant became the owner and it is not the sale deed and the same is binding on the plaintiff.

5. The 3rd defendant filed written statement contending that the 1st defendant executed settlement deed voluntarily in favour of the 2nd defendant due to close relationship; that he

is not a necessary party; that there is no cause of action against this defendant and also that the plaintiff is not entitled for any relief against this defendant and sought for dismissal of the suit.

6. During the pendency of the suit the 1st defendant died, therefore, his legal heirs are impleaded as defendants 4 and 5, who filed written statement contending that the schedule property is the ancestral property and the 1st defendant died intestate having no issues and thus the settlement deed in favour of 2nd defendant is valid only for 1/3rd right and the defendants are entitled for remaining portion and they are taking appropriate steps seeking for partition of the schedule property and sought for dismissal of the suit.

7. Based on the above pleadings, the trial Court framed the following issues and additional issues:

Issue No.1: Whether the plaintiff is entitled for cancellation of document dated 21.03.1997 executed by 1st defendant in favour of the 2nd defendant?

Issue No. 2: Whether the plaintiff cannot claim right of preemption in view of the sub-tenancy in favour of K.Rattayya?

Issue No.3: To what relief?

Additional issues settled on 04.04.2003:

Addl. Issue No.1: Whether the suit is bad for misjoinder of proper and necessary parties?

Addl. Issue No.2: Whether the 4th and 5th respondents are entitled coparceners right in the schedule property to the extent of deceased 1st defendant?

Addl. Issue No.3: To what relief?

8. Before the trial Court, in order to prove the plaintiff's case, P.Ws.1 to 3 were examined and marked Exs.A1 to A11

and Exs.X1 to X4 were marked through P.Ws.2 and 3. On the other hand, D.Ws.1 to 4 were examined on behalf of the defendants and got marked Exs.B1 to B5.

9. After considering both oral and documentary evidence on either side, the trial Court had ultimately dismissed the suit. As already stated supra, the first appeal preferred by the unsuccessful plaintiff was also dismissed by the appellate Court, confirming the judgment and decree of the trial Court. Hence, the plaintiff filed the present Second Appeal before this Court.

10. Learned counsel for the plaintiff vehemently contended that the 1st defendant in order to defeat the plaintiff's preferential right over the subject property, had executed Ex.A1 in favour of the 2nd defendant. He would contend that the 1st defendant, having received sale consideration executed Ex.A1 in favour of 2nd defendant, as such, it is a sale deed and not a settlement deed. He further submits that he filed ATC No.18 of 1997 when 1st defendant was making efforts to sell the suit schedule property along with injunction petition in I.A.No.834 of 1997 not to alienate suit schedule property, wherein it is specifically stated that the plaintiff is the cultivating tenant of the schedule property, which belongs to the 1st defendant. The 1st and 3rd defendants, having received notices, filed vakalat and took

time for filing counter. Subsequently, the Tenancy Court passed orders of status quo and violating the same, the 1st defendant executed Ex.A1 in favour of the 2nd defendant. He further submits that the Courts below failed to appreciate the evidence adduced and erroneously dismissed the suit of the plaintiff.

11. Though several contentions are raised by the learned counsel for the appellant, but the only question that is required to be considered in this Appeal is whether Ex.A1 is sale deed and if so, whether it affects rights of preemption of plaintiff.

12. To prove the case of the plaintiff that Ex.A1 suit document as the sale deed and consideration passed on from defendants 2 and 3 in favour of 1st defendant, plaintiff himself examined as P.W.1 and also examined P.Ws.2 and 3, who are Branch Managers of Andhra Bank, Penugonda and Amalapuram respectively.

13. Plaintiff as P.W.1 deposed that the 1st respondent is the owner of the subject property; that he is cultivating the same from 1978-79 onwards and also that he has taken the said property on lease on a rental of 30 bags. He also deposed that when all of sudden, the 1st defendant intends to sell the schedule property to the 3rd defendant on or about 1st week of March, 1997, he filed ATC No.18 of 1997, wherein

orders of status quo was granted on 17.03.1997, which was extended from time to time on petition till 13.06.1997.

14. Learned counsel for the plaintiff would contend that the 1st defendant has received sale consideration of Rs.2,00,000/- from the 3rd defendant and executed suit document dated 21.03.1997 only to defeat the tenancy rights of the plaintiff. In order to prove the said contention, plaintiff examined P.Ws.2 and 3, who are branch managers of Andhra Bank, Penugonda and Amalapuram, respectively. The depositions of P.Ws.2 and 3 are extracted hereunder.

“PW.2: Guduru Padmanabham:

Chief examination:

I am working as Branch Manager, Andhra Bank, Penugonda, Mallipudi Narayanamurthy opened an account in our bank Abhaya Savings Bank Account 722. There is no record about the date but on 11-7-97 the account was transferred to Amalapuram. Our bank received the request for such transfer. Ex.X1 is the said document. Ex.X2 is the request letter from Andhra Bank, Amalapuram. Ex.X3 is Credit advice. By the date of Ex.X3, the balance was Rs.50,938/-. This is the available record.

Cross-examination by D2 and D3: reported nil

Cross-examination by D4 and D5: heard absent; recorded: Nil.

“P.W.3: N.Satyanarayana:

Chief Examination:

I am working as Branch Manager, Andhra Bank, Amalapuram. Mallipudi Narayanamurthy requested our bank for transfer of his account from Penugonda. We made a request with Penugonda branch for transfer and accordingly it was transferred. On 17-7-97 Account No.2065. The amount on credit was Rs.50,938/-. On 18-11-2000 the account was closed. By paying the amount to the nominee, we paid Rs.87,108/-. The name of the nominee not mentioned. Ex.X2 is the account copy.

Cross-examination for D2 and D3: reported Nil.

Cross-examination for D4 and D5 called absent reported Nil.”

Both P.Ws.2 and 3 categorically deposed that cash balance of Rs.50,938/- in the account of the 1st defendant by the date of its transfer and date of receipt at both branches

and the said account was closed on 18.11.2000, by which the amount at credit was Rs.87,108/-. Except stating so, there is no evidence forthcoming from the evidences of P.Ws.2 and 3 about receipt of Rs.2,00,000/- from the 2nd defendant or 3rd defendant by the 1st defendant. Moreover, P.Ws.2 and 3 were not cross-examined by the defendants. Except the self serving evidence of Plaintiff himself as P.W.1 there is no other evidence to support his contention. Therefore, the contention of the plaintiff that the amount of Rs.1,50,000/- was deducted in the bank account of the 1st defendant out of sale consideration for Ex.A1 is not established, as rightly observed by the trial Court and affirmed by the appellate Court.

15. Be that as it may, the contention of the learned counsel for the plaintiff that the 3rd respondent executed pronote in favour of 1st defendant for a sum of Rs.50,000/-, thus the 1st defendant received sale consideration, is also not proved, as said aspect is neither pleaded in the plaint nor any document is filed and marked, as such, the plaintiff not able to prove the aforesaid fact also. Thus, the plaintiff failed to establish depositing of an amount of Rs.50,000/- in to the bank account of 1st defendant so also execution of pronote for Rs.50,000/- in favour of 1st defendant by the 3rd defendant. When once no sale consideration is received by the 1st defendant from the 2nd defendant, the suit document

dated 21.03.1997 cannot be termed as sale deed. When the 3rd respondent, who is son of 2nd defendant examined himself as D.W.2, he deposed that the father of the plaintiff i.e., Venkatarayudu is the brother-in-law of the 1st defendant and the wife of the 1st defendant by name Satyavathi is the own sister of said Venkatarayudu. In his cross-examination by the defendants 4 and 5, he categorically denied to a suggestion that he has deposited an amount of Rs.1,50,000/- and denied execution of pronotes for an amount of Rs.20,000/- and also denied another pronote for an amount of Rs.50,000/- by his brother-in-law towards consideration under Ex.A1 settlement deed. He admitted during cross-examination that though the settlement deed Ex.A1 was executed, the suit property is still in the possession of the plaintiff, as a cultivating tenant. As such, it can safely be concluded that Ex.A1 is a settlement deed executed by 1st defendant in favour of 2nd defendant, out of love and affection as she is the daughter of his co-brother. Therefore, the contention of the learned counsel for the plaintiff that the 1st defendant received sale consideration of Rs.2,00,000/- by the 1st defendant from defendants 2 and 3 also not established, as rightly held by both the Courts below.

16. A perusal of the suit document dated 21.03.1997 goes to show that out of love and affection, since the 2nd defendant

is the daughter of co-brother of the 1st defendant and that she served 1st defendant during his lifetime, he executed the document in favour of 2nd defendant. In the entire deed, there is no whisper of payment and receipt of sale consideration by either of the parties. As already observed supra, the plaintiff failed to prove that the sale consideration is paid in favour of 1st defendant by 2nd defendant and 3rd defendant. When there is no sale, the question of affecting right of preemption of plaintiff does not arise. That apart, in the said deed, it is also categorically stated by the 1st defendant that the original document of sale deed dated 07.01.1972 were handed over to the 2nd defendant. Though, both the trial Court as well as appellate Court erred in considering the date of purchase of property by the 1st defendant as 07.01.1992 instead of 07.01.1972, but the fact remains that the 1st defendant purchased the property in the year 1972. The purchase of the property by the 1st defendant in the year 1972 will not have any bearing on the decision in the present case, since in the present appeal, the only issue to be considered whether Ex.A1 is a sale deed under the guise of settlement deed executed by the 1st defendant in favour of 2nd defendant and that it affects the rights of preemption by the plaintiff.

17. The 4th defendant examined as D.W.1, who deposed that the schedule property is the ancestral property and the

1st defendant has no exclusive right of disposition of the property and also that himself and 5th defendants are having coparcenary right over the schedule property. But, he admitted in his cross examination that the plaintiff is cultivating tenant of the 1st respondent and that he does not know the particulars of the properties purchased by the 1st defendant. He also admitted during cross-examination by the defendants 2 and 3 that he did not go to through the suit document or the Will executed by the 1st defendant and that also that he does not know the contents of the written statement filed by 1st defendant. Though D.W.1 deposed that the property of the 1st defendant is ancestral property, he failed to produce any documentary proof to that effect. Suit is filed only for setting aside the suit document, as such, no relief can be granted in favour of Defendants 4 and 5 in the suit.

18. The trial Court also observed that though ATCNo.18 of 1997 filed by the plaintiff was allowed by the Special Officer, but challenging the same, ATA No.35 of 2005 was preferred, which was allowed setting aside the orders in ATC No.18 of 1997. Even otherwise, no evidence is placed before the Courts below that there was status quo order as on the date of execution of suit document i.e., 21.03.1997.

19. As I have already observed supra, the suit document is a settlement deed but not sale deed executed by the 1st

defendant in favour of 2nd defendant and same is a family arrangement from the landlord in favour of his co-brother's daughter. Therefore, the suit document will not effect the plaintiff's possession over the suit schedule property as a tenant, if he is in possession as alleged, but being a tenant, he cannot claim the absolute rights over the suit property. Since the suit document is a settlement deed and not sale deed, exercising of right of preemption by the plaintiff does not arise at all.

Therefore, I do not find any compelling reasons warranting interference with the concurrent findings of the Courts below in dismissing the suit of the plaintiff. Consequently, there is no question of law much less the substantial question of law and accordingly, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this Appeal, shall stand closed.

A.RAJASHEKER REDDY, J

Date: 21.03.2018
KVS

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

SECOND APPEAL No. 860 of 2017



Date:21.03.2018

KVS