

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1064 OF 1998

JUDGMENT:

This Second Appeal is filed, by the unsuccessful plaintiff, under Section 100 of C.P.C., assailing the judgment and decree dated 16.07.1998 passed in A.S.No.4 of 1993 on the file of the Court of the Senior Civil Judge, Rayachoty, wherein and whereby the judgment and decree dated 24.12.1992 passed in O.S.No.212 of 1981 on the file of the Court of the Principal District Munsif, Rayachoty, dismissing the suit filed by the plaintiff for partition of the suit schedule property, was confirmed.

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

3. The facts leading to filing of the second appeal, in nutshell, are as follows:

The plaintiff and defendant Nos.1 to 5 are children of C.Peeran Sab through his first wife Kulsum Bi. Defendant Nos.6 to 10 are the purchasers from defendant Nos.1 to 5. The suit schedule property originally belongs to late C.Peeran Sab. Peeran Sab and his wife died 16 years and 10 years respectively prior to filing of the suit. The defendants are entitled to 14/88 share during the lifetime of Kulsum Bi. The defendants are entitled for 11/88 share after the death of Kulsum Bi. The suit schedule property never partitioned between defendant Nos.1 to 5 and the plaintiff. The defendants used to give two or three bags of groundnut towards her share each year. In the year 1965

Kulsum Bi and defendant Nos.1 to 4 sold an extent of Ac.0.75 cents of wet land. The plaintiff insisted her share in the sale consideration. Defendant Nos.1 to 4 and Kulsum Bi promised that they will give Rs.200/- extra to the plaintiff at the time of partition of the suit schedule property. Except the item sold in the year 1965, the plaintiff is entitled for share in the family properties. On 24.04.1970, defendant No.4 seems to have mortgaged certain portion of the schedule property in favour of defendant No.6. On 22.03.1972, defendant No.4 sold the same property to defendant No.6 under a registered sale deed. Defendant No.2 seems to have mortgaged certain portion of the suit schedule property in favour of defendant No.7. Later on 22.01.1976, defendant No.2 sold the same property to defendant No.7 under a registered sale deed. In the year 1978 the first defendant sold certain portion of the schedule property to defendant No.8. On 08.09.1980 defendant No.5 sold an extent of Ac.1.75 cents of item No.1 of suit schedule property in favour of defendant Nos.9 and 10. Defendant Nos.1 to 5 sold the property to defendant Nos.6 to 10 under different registered sale deeds. Having no other alternative, the plaintiff filed the suit for partition.

4. Defendant Nos.1 to 5 remained *ex parte*. Defendant Nos.11 to 14 also remained *ex parte*. Defendant Nos.6 to 10 filed written statement denying all the averments made in the plaint *inter alia* contending that defendant Nos.1 to 5 along with his mother have partitioned their properties with the knowledge and consent of the plaintiff. Defendant Nos.1 to 5 have occupied the Government land and constructed a house. The plaintiff was never in possession of the suit schedule property at any point of time. The

plaintiff filed the suit with an ulterior motive to harass the defendants. Hence, the suit is liable to be dismissed.

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

1. Whether the plaintiff is entitled for partition of 1/11th share in items 1 to 6 of the suit property?
2. Whether the plaintiff is entitled for a decree of Rs.200/- over defendants 1 to 5?
3. Whether the defendants 7 to 10 are bona fide purchasers for value and consideration and they are in possession of the properties with specific boundaries?
4. Whether the suit is barred by limitation?
5. Whether the defendants are entitled for equities?
6. Whether the property is under valued?
7. Whether the court fee paid is improper?
8. To what relief?

6. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.10 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.13 were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff has been ousted from the suit schedule property; therefore, she is not entitled for 1/11th share in the suit schedule property and consequently, dismissed the suit.

8. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiff preferred A.S.No.4 of 1993 on the file of the Court of the Senior Civil Judge, Rayachoty. The learned Senior Civil Judge, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff is not entitled for 1/11th share in the suit schedule

property and consequently, dismissed the appeal, while confirming the judgment and decree of the trial Court. Hence, the unsuccessful plaintiff preferred the present second appeal.

9. Heard Sri G.Sriharsha, Advocate, representing Sri M.N.Narasimha Reddy, the learned counsel for the appellant, Sri V.R.Avula, learned counsel for respondent Nos.7 and 8, and Sri S.Srinivas Reddy, the learned counsel for respondent Nos.11 and 12.

10. The substantial questions of law urged by the learned counsel for the appellant are as follows:

1. Whether the plaintiff was ousted from the suit schedule property? and
2. Whether the findings recorded by the Courts below are perverse and liable to set aside?

11. 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.

12. The following admitted facts can be culled out from the pleadings.

Defendant Nos.1 to 5 are the sons, plaintiff is the daughter and late Smt.Kulsum Bi is the wife of Peeran Sab. Peeran Sab got the landed property i.e., item Nos.1 to 5 of the suit schedule property under a registered partition deed dated 22.07.1937-Ex.A.6. Defendant Nos.1 to 5 sold the landed property to defendant Nos.6 to 10 under registered sale deeds-Exs.B.5, B.6, B.7, B.8, B.9 B.10, B.11 and B.12, dated 16.08.1965, 06.06.1973,

19.11.1982, 18.03.1987, 08.09.1980, 08.09.1980, 23.04.1988 and 23.12.1978 respectively. The fact remains that except the house property, defendant Nos.1 to 5 sold the landed property of late Peeran Sab under the above referred sale deeds from 1965 to 1978. A perusal of the record reveals that the second defendant and late Kulsum Bi mortgaged part of the suit schedule property under a mortgage deed Ex.B.2 dated 20.08.1992. Even as per the testimony of PWs.1 and 2, defendant No.2 alone discharged the mortgage debt. Before filing of the suit, in the year 1981, legal notices were exchanged between the parties. PW.1 in the cross-examination admitted that she maintained a cordial relationship with his mother during her lifetime. There is no whisper in the testimony of PW.1 that there are some disputes between herself and defendant Nos.1 to 5 prior to filing of the suit. For one reason or other, the plaintiff did not produce any evidence much less cogent and convincing evidence to prove that she claimed her right over the suit schedule property at any time prior to filing of the suit. It is not the case of the plaintiff that defendant Nos.1 to 5 sold the property without her knowledge. It is the case of the defendants that defendant Nos.1 to 5 have partitioned their properties much prior to 1965; ever since they have been in possession and enjoyment of their respective shares. As per the recitals of Exs.B.5 to B.12-registered sale deeds, defendant Nos.1 to 5 have partitioned the properties prior to 1965. The plaintiff has not produced any evidence to prove that her brothers have not partitioned the family properties. One Mr.Krishna Reddy, the purchaser of defendant Nos.1 to 5, has constructed a cinema theatre in the suit schedule premises long back. As seen from the

testimony of PW.1, her husband collected an amount of Rs.40,000/- from the said Krishna Reddy. PW.2 is none other than the husband of PW.1. In the cross-examination, PW.2 in unequivocal terms admitted that his wife received some land from Krishna Reddy. The testimony of PWs.1 and 2 clearly reveals that they have received some money from the purchasers of defendant Nos.1 to 5. This itself indicates that the plaintiff and her husband approached the purchasers and collected some amount from them.

13. Learned counsel for the appellant has drawn the attention of this Court to **P.Lakshmi Reddy v. L.Lakshmi Reddy**¹, wherein it was held that “it is well settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.” As observed earlier, the plaintiff was ousted from the suit schedule property much prior to filing of the suit. This decision is no way helpful to the appellant-plaintiff.

14. The testimony of DWs.1 to 3 reveals that defendant Nos.1 to 5 have occupied the Government land and constructed the house. Nothing is elicited in the cross-examination of DW.1 to DW.3 to disprove the above said fact. There is no mention about item No.6 in Ex.A.6-partition deed. If really the plaintiff and defendant Nos.1 to 5 got item No.6 of the suit schedule property in the family partition, the same might have reflected in Ex.A.6-registered partition deed. Non-mentioning of item No.6 in Ex.A.6 substantiate the stand of the defendants that defendant Nos.1 to 5 occupied the Government land and constructed the house. The

¹ AIR 1957 SC 314

plaintiff is not entitled to seek partition of item No.6, which is the self acquired property of defendant Nos.1 to 5. The plaintiff miserably failed to establish her right over the suit schedule property. The plaintiff without establishing her right over the suit schedule property is not entitled to seek partition. On the other hand, the material available on record clinchingly establishes that the plaintiff was ousted from the suit schedule property in the year 1965 itself. The finding recorded by the Courts below that the plaintiff was ousted from the suit schedule property is supported by evidence much less cogent and convincing evidence. The Courts below have assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the Courts below. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are perverse.

15. In **Municipal Committee, Hoshiarpur v. Punjab SEB²**, 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 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. ..."

² (2010) 13 SCC 216

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, this Court is of the considered view that there is no question of law much less substantial question of law involved in this appeal. Hence, the appeal is liable to be dismissed.

17. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

18. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 12.11.2018
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T.SUNIL CHOWDARY, J

