

THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.342 of 2000

JUDGMENT:

On 18.7.2001 while admitting the Second Appeal, this Court referred to substantial questions of law raised in Ground No.4 of Grounds of Appeal, but the substantial questions of law were not mentioned specifically.

2. Therefore, the present substantial questions of law are formulated:

“(1) Whether the suit for declaration without seeking the relief of recovery of possession and cancellation of sale deed executed by the Court in favour of the 2nd defendant pursuant to the decree for specific performance dated 2.7.1985 in O.S. No.3845 of 1984 is maintainable?

(2) Whether the suit for partition earlier filed by the 1st defendant against the plaintiffs herein excluding the plaint schedule property does amount to constructive *res judicata* against the plaintiffs as they have been claiming the suit schedule property as part of joint family property?”

3. Heard Sri L. Prabhakar Reddy, learned counsel for the appellant and Sri C.V. Bhaskar Reddy, learned counsel for the respondents.

4. At the outset, it is to be mentioned that substantial questions of law formulated in Ground No.4 of Grounds of Appeal,

which deal with earlier litigations where partition suit was decreed and Ex.A-11, Memorandum of Partition, which relates to that suit has been questioned, certainly, cannot be looked into since if the party has got any grievance he has to pursue the remedy in regard to the decree and judgment that were passed in the earlier suit. Like-wise, the suit for perpetual injunction in O.S. No.490 of 1986 is not concerned with the present facts for the reason that the decree and judgment in O.S. No.1286 of 1986 was questioned in a regular First Appeal, and, then in the present appeal aggrieved over the concurrent findings recorded decreeing the suit.

5. When this matter came up for hearing, this Court, referring to Ground-4, admitted the Second Appeal. Today, having heard the learned counsel for the appellant, the aforesaid substantial questions of law have been formulated. The learned trial Court in O.S. No.1286 of 1986, by the judgment and decree dated 30.10.1985 answered the issues, which were settled for trial, as follows:

- “(1) Whether the plaintiffs are entitled to declaration as sought for?
- (2) Whether the plaintiffs are entitled to perpetual injunction as prayed for?
- (3) Whether the suit is valued properly and sufficient court fee is paid?
- (4) Whether D-2 is entitled to compensatory costs of Rs.5,000/- from the plaintiffs?
- (5) To what relief?”

6. The point, which is of vital significance that involved in the present Second Appeal is, whether the suit property is joint family property or whether it is the absolute property of the 1st defendant?

7. The suit property was purchased by one Late S. Kista Reddy, who is the father of plaintiffs 1 to 4 and defendant No.1, and husband of plaintiff No.5, and, therefore, it constitutes joint family property and relies on Ex.A11-Memorandum of Partition, dated 20.08.1979, which is filed in a partition suit, and whereas the stand of the defendants 1 and 2 is that defendant No.2 supplied the funds and sale was obtained in the name of defendant No.1 is absolutely incorrect, and the decree and judgment obtained on 2.7.1985 in O.S. No.3845 of 1984 on the file of V-Assistant Judge, City Civil Court, Hyderabad, was by playing fraud on the plaintiffs as well as on the Court.

8. To substantiate the case of the plaintiffs, before the trial Court, P.Ws.1 to 4 were examined and Exs.A-1 to A-51 documents were marked and on behalf of the defendants D.Ws.1 to 3 were examined and Exs.X-1 to X-7 and Exs.B-1 to B-8 were marked. The suit schedule property is 750 sq. yards in Sy.Nos.140 & 141 situated at Langer House, Hyderabad, bounded by:

“North : Land of Mohammed Azam

South : Other land belonging to Mohd. Azam

East : Main Road

West : Land of Mohd. Azam”

9. The finding recorded by the trial Judge on Issue No.1 shows that after referring to the evidence of P.Ws.1 to 4, in paragraph-14, he refers to the stand taken by the plaintiffs and in paragraph-15 relies on Ex.A11 contents, which is the Memorandum of Partition, that was signed by defendant No.1, who did not deny his presence at the time of preparation of Ex.A11, which includes the suit schedule property.

10. The trial Court was of the opinion that in case suit property was exclusive property of defendant No.1 and sale consideration was supplied by defendant No.2, nothing prevented defendant No.1 in questioning Ex.A11 when it is being drafted and would have got excluded the suit schedule property, which was not done. This apart, the trial Court, basing on the admissions made by D.W.1 in his evidence to the effect that the suit property was purchased by his father when he was 28-year-old and the joint family consists of himself and plaintiffs and it is located at Langer house, Attapur, Hyderguda, Sangam, etc., and thus, taking into consideration the specific admission made by D.W.1, disbelieved the case of the defendants and arriving at the conclusion that fraud was played in obtaining decree in O.S. No.3845 of 1984 tendered the findings favouring the plaintiffs and also in view of the decisional law relied on by the plaintiffs, and formed an opinion, arrived at basing on the evidence on record and held that the plaintiffs are entitled to a decree as prayed for, and, accordingly, decreed the suit.

11. When the said decree and judgment was questioned by both the defendants separately in A.S. No.339 of 1995 and A.S. No.132 of 1996, the learned appellate Judge by his common judgment dated 26.11.1999 on his independent appraisal of evidence both, oral and documentary, let in by both the parties, evaluated Ex.A11 in paragraph-12 and arrived at the same finding that was tendered by the trial Court and even observing that there was no need to repeat that defendant No.1 admitted his signature on Ex.A11 and that he was present at the time of preparation of Ex.A11, and he being a party to the said document, he is estopped from turning around and to contend that the suit property did not form part of the joint family properties. This has been the finding recorded by the lower appellate Court besides referring to certain admissions in the cross examination which were adverted to in paragraph-13, which were unnecessary to refer to again since patent defect or illegality is not to be found in the concurrent findings recorded by the Courts below.

12. Thus, viewed from any angle, there is absolutely no merit in the present Second Appeal and in fact questions of law that were formulated basing on the grounds agitated in paragraph-4, the other grounds touching other questions of law some are based on factual aspects and others are in relation to the judgments already decided by civil Courts do not constitute substantial questions of law at all, and, therefore, the present Second Appeal is dismissed for want of merit. The parties shall bear their own respective costs.

As a sequel there to miscellaneous petitions, if any, pending in the present Second Appeal shall stand closed.

A. SHANKAR NARAYANA, J

February 5, 2018.

gbs

