

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 897 OF 2004

JUDGMENT:

1. The Second Appeal is filed by the appellant/defendant against the judgment and decree dated 25.03.2004 in Appeal Suit No.116 of 2002 on the file of the IX Additional District Judge, Guntur, whereby the judgment and decree dated 20.03.2002 in Original Suit No.76 of 1997 on the file of the Senior Civil Judge, Gurajala, were confirmed.

2. The appellant herein is defendant, the respondents herein are the plaintiffs, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. The Second Appeal was admitted on the following substantial questions of law.

- a) Whether both the courts below failed to consider the questions of law properly with regard to the execution, proof and revocation and revival of wills as provide under the Indian Succession Act ?
- b) Whether Ex.A3 will deed dated 07.08.1990 was in force without revocation of the will deed dated 07.08.1990 without following procedure laid down in Section 73 of the Indian Succession Act ?
- c) Whether Rule 63 of the A.P. Rules under Registration Act override the provisions of Sections 63 and 64 of the Indian Succession Act ?
- d) Whether the court is entitled to substitute its own discretion in place of solid evidence of D.W.8, the

attestor of Ex.B1, who proved Ex.B1 as provided under Section 68 of the Indian Evidence Act ?

e) Whether the suit for declaration and possession is maintainable without seeking declaration of invalidity of Ex.B1 ?

f) Whether the court can grant permanent injunction without granting possession of suit house?"

4. Plaintiffs filed the suit for declaration of title and ownership of plaintiffs 2 and 3 and right and possession of first plaintiff during his life time, in respect of suit schedule property, and for consequential permanent injunction against the defendants.

5. The averments, in brief, in the plaint are as follows.

Plaint schedule property originally belonged to one Yeluri Pitchamma, who is mother first plaintiff. The plaintiffs 2 and 3 are sons of daughter of first plaintiff Bhagya Lakshmi. Mother of first plaintiff Pitchamma executed last will on 07.08.1990 during her life time in a sound and disposing state of mind, bequeathing the schedule property to first plaintiff giving life estate in favour of first plaintiff and the remainder vested to plaintiffs 2 and 3. During her life time, she executed an agreement on 29.12.1994 in favour of plaintiffs 2 and 3 permitting them to construct first floor over the existing building with a condition that they should take over the property after life time of her and the 1st plaintiff. At the time of execution of said will, the building situated in

the schedule property had ground floor only. Later, paternal grand father of plaintiffs 2 and 3 constructed first floor over the said building. The said Pitchamma died on 06.04.1997 and the will came into operation. Even prior to her death, first plaintiff was residing with her in the suit schedule property, and he continued his possession even after death of said Pitchamma, by letting out ground floor. Defendant is eldest son of first plaintiff. In order to knock away the property, he got served a caveat on first plaintiff that late Pitchamma executed will on 04.03.1996 bequeathing the schedule property to him. She never executed any will on 04.03.1996. Hence, the suit.

6. Defendant filed written statement denying the averments in the plaint and contending that his paternal grand mother Pitchamma executed a registered will in a sound and disposing state of mind on 04.03.1996 bequeathing her properties in favour of the defendant and revoking her earlier will dated 07.08.1990. As she was residing with the defendant, she executed the will out of love and affection. Defendant is in possession of suit schedule property. By the date of execution of will dated 07.08.1990, there was a dhaba house existing and no new constructions were made by plaintiffs at any point of time. Defendant is residing in first floor and leased out the ground floor under registered lease deed. The agreement dated 29.12.1994 does not give any

rights in favour of plaintiffs 2 and 3. Hence, the suit is not maintainable.

7. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether paternal grand mother of defendant revoked will dated 07.08.1990 by executing will dated 04.03.1996 ?
- 2) Whether the plaintiff is entitled to declaration as prayed for ?
- 3) Whether the plaintiff is in possession and enjoyment of the suit schedule property ?
- 4) Whether the plaintiff is entitled for injunction as prayed for ?
- 5) To what relief ?

8. During trial, on behalf of the plaintiffs, P.Ws.1 to 12 were examined and Exs.A1 to A61 were got marked, and on behalf of defendant, D.W.1 was examined and Ex.B1 original sale deed dated 14.12.1957 was got marked, besides Exs.X1 to X4 and C1, and on behalf of defendant, D.Ws.1 to 8 were examined and Exs.B1 and B2 were got marked.

9. The trial Court, upon appreciation of the evidence on record, decreed the suit. Challenging the judgment and decree of the trial Court, the defendant preferred Appeal Suit No.116 of 2002 on the file of the first appellate court. Vide the impugned judgment and decree, the first appellate court dismissed the appeal confirming the judgment and decree of

the trial Court. Challenging the same, the present Second Appeal has been preferred by the defendant.

10. Heard both sides and perused the record.

11. Learned counsel for the appellant would contend that the defendant derived title and possession over the schedule property on the death of original owner Pitchamma by virtue of Ex.B1-registered will deed dated 04.03.1996; that Ex.A3-earlier will deed executed by Pitchamma on 07.08.1990 was revoked by the testator under Ex.B1 will; that under Ex.A3, it is mentioned that first plaintiff has to enjoy the property during his life time and after his demise, the property would devolve upon plaintiffs 2 and 3, and therefore the suit for declaration of title and perpetual injunction is not maintainable at this stage; that there is no infirmity in Ex.B1 executed by said Pitchamma in favour of the defendant; that there is other record to establish the title of defendant over the schedule property; that without considering these aspects, the trial court decreed the suit which was erroneously confirmed by the first appellate court; that the findings of both the courts below are perverse, and ultimately prayed to allow the Second Appeal on the substantial questions of law stated above and dismiss the suit of the plaintiffs.

12. On the other hand, learned counsel for respondents would contend that under Ex.A3-will executed by the original

owner Pitchamma, first plaintiff has life interest and thereafter the property would devolve upon plaintiffs 2 and 3; that after her death, the schedule property devolved on the plaintiffs and they are entitled for the relief of declaration of title and permanent injunction; that both the courts below elaborately dealt with Ex.B1-registered will and held that it is a bogus one; both the courts below appreciated the oral and documentary evidence in right perspective and decreed the suit granting the reliefs sought, and there is no infirmity; that all the findings of courts below are on factual aspects; that the grounds raised in the Second Appeal are only on factual aspects and they cannot be dealt with under Section 100 CPC; that there is no substantial question of law to deal with in this Second Appeal, and ultimately, prayed to dismiss the Second Appeal.

13. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially

affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse finding- are some of the questions, which involve substantial questions of law.

14. The suit is filed by the plaintiffs for declaration of title and permanent injunction in respect of suit schedule property claiming title and possession thereof by virtue of Ex.A3-registered will deed. Defendant is eldest son of first plaintiff. Plaintiffs 2 and 3 are sons of daughter of first plaintiff Bhagya Lakshmi. The evidence of P.W.3, who is attester of Ex.A3-will, proves execution of the same. D.W.1 admitted execution of Ex.A3-will, but his contention is that it was later revoked. By leading cogent and convincing evidence, plaintiffs proved the genuineness of Ex.A3 will deed and their possession over the schedule property. In view of Ex.A3, plaintiffs are entitled to ownership and possession over the schedule property.

15. As regards the contention of the defendant, which is based on Ex.B1-will deed dated 04.03.1996, burden lies heavily on the defendant to prove execution of Ex.B1 by

adducing cogent and acceptable evidence. On facts, in view of the inconsistency in the evidence of material witnesses D.W.2 and D.W.8 on material aspects, both the courts disbelieved its execution. The courts below categorically recorded a finding that Ex.B1 has not been executed in accordance with the Rules laid down under the Registration Act. Both the courts below elaborately dealt with the said document and held, by assigning reasons, that the document is bogus one.

16. Title, ownership and possession of said Pitchamma is not in dispute. When she dies, she loses title over the property, and her successors under Ex.A3 would get title to the property. There is also record to establish possession of the plaintiffs over the suit schedule property after demise of said Pitchamma. Therefore, the suit filed for declaration of title and perpetual injunction, is maintainable by the plaintiffs against the defendant. No irregularity is found on this aspect when the plaintiffs proved their possession over the subject property.

17. The substantial questions of law raised with regard to proof of a will under the provisions of the Indian Succession Act and Rule 63 of the A.P. Rules under the Registration Act and Sections 63 and 64 of the Indian Succession Act. Both the courts below considered the oral and documentary evidence on record, and the possession of the parties over the suit schedule property. While dealing with the subject matter

of the suit, both the courts elaborately dealt with genuineness of Ex.A3 and the relevant provisions of the Registration Act and the Rules made thereunder with regard to proof of a will. Both the courts also considered the circumstances of the revocation of the earlier will while executing another one, and also decided the possession of the plaintiffs over the suit schedule property. The substantial questions of law raised are mixed questions of fact and law. Both the courts below answered the issues without omitting any legal evidence and appreciated the evidence in correct perspective. The concurrent findings on the said aspects are not amenable to jurisdiction of this Court in a Second Appeal under Section 100 CPC.

18. As regards the appreciation of the evidence on record is concerned, both the courts below dealt with all the aspects in right perspective, and neither any inadmissible evidence is admitted, nor any admissible evidence was not acted upon. The courts below gave elaborate reasons for decreeing the suit. The findings of the courts below are based on the evidence. There are no grounds to take a different view. The scope of Second Appeal under Section 100 C.P.C. is only to the extent of substantial question of law. The proposed substantial questions of law are only on questions of fact and law. Under these circumstances, no substantial question of law, as contended by the appellants, under Section 100 of the

Code of Civil Procedure, 1908 arises for consideration in the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

19. In the result, the Second Appeal is dismissed. No costs.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

26.09.2018
DRK

(Dr.SA, J.)



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