

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.623 of 2011

JUDGMENT:

This appeal is filed under Section 100 of CPC, by the first defendant, assailing the judgment and decree dated 27.10.2010 passed in A.S. No.146 of 2004 on the file of the Court of VI Additional District Judge (Fast Track Court) at Vikarabad, wherein and whereby the judgment and decree dated 20.2.2001 passed in O.S.No.27 of 1995 on the file of the Court of Junior Civil Judge, Vikarabad, decreeing the suit for partition in part, was confirmed.

2. The parties will hereinafter be referred to as they were arrayed before the trial Court, to avoid confusion.

3. The facts leading to filing of the present appeal are, in nutshell, as follows: Plaintiff is the daughter and the first defendant is the son of late Mahaboob Sab. Second defendant is the junior paternal uncle of the plaintiff and first defendant. Late Mahaboob Sab was the absolute owner of suit 'A' and 'B' schedule properties. After the death of Mahaboob Sab, the plaintiff and first defendant became successors of suit 'A' and 'B' schedule properties. In spite of repeated demands made by the plaintiff, first defendant did not come forward to partition the suit schedule properties. Having no other alternative, plaintiff filed the suit for partition of the suit schedule properties and allot 1/3rd share in her favour. Second defendant remained *ex parte*. First defendant filed written statement denying all the averments made in the plaint *inter alia* contending that he purchased item No.5 of suit 'A' schedule property i.e., an extent of Acs.3.02 guntas situated in

survey No.63/1 of Govindapur Village, Mominpet Mandal, Ranga Reddy District, from one Syed Ismail. He constructed house bearing No.3-106, which was shown as suit 'B' schedule property. Item Nos.1 to 4 of suit 'A' schedule properties are Matraka properties of late Mahaboob Sab. The plaintiff filed the suit with ulterior motive to harass first defendant. Hence, the suit may be dismissed *in limine*. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for 1/3rd share in the suit land and house by passing a preliminary decree?
2. Whether D1 is the absolute owner of suit house and land in survey No.63/1, an extent of Acs.3.02 guntas, situated at Govindapur?
3. Whether the suit lands and house are in joint possession of the plaintiff and defendants?

To substantiate the case, plaintiff herself examined as P.W.1 and got marked Exs.A.1 and A.2. P.Ws.2 and 3 were examined to prove the nature of the suit schedule properties. To demolish the case of the plaintiff, first defendant examined himself as D.W.1 and got marked Exs.B.1 to B.4. D.Ws.2 and 3 were examined to prove that first defendant is the owner of suit schedule properties. Basing on oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is entitled for 1/3rd share in item No.5 of suit 'A' schedule property and suit 'B' schedule house. Feeling aggrieved by the judgment and decree of the trial Court, first defendant preferred the appeal. The plaintiff did not challenge the judgment and decree rejecting the claim of plaintiff in respect of item Nos.1 to 4 of suit 'A' schedule property; therefore, the judgment and decree of the trial Court, to that extent, has become final. The first appellate Court, after re-appraising the oral and documentary evidence available on record,

without being influenced by the findings of the trial Court, arrived at a conclusion that the plaintiff is entitled for 1/3rd share of suit 'A' schedule property and suit 'B' schedule house. The unsuccessful first defendant preferred the second appeal.

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

1. Whether the findings recorded by the Courts below are perverse?
2. Whether the Courts below misconstrued Exs.B.1 and B.3?

5. Both the questions are interlinked with each other; hence, this Court is inclined to answer both the questions simultaneously in order to avoid recapitulation of facts and evidence.

6. It is an admitted fact that the plaintiff and first defendant are children of late Mahaboob Sab. Second defendant is the brother of Mahaboob Sab and paternal uncle of the plaintiff and first defendant. It is the case of the plaintiff that her father was the absolute owner of the suit schedule properties; therefore, she is entitled for 1/3rd share in the properties. It is the contention of first defendant that item No.5 of suit 'A' schedule property was purchased by him from one Syed Ismail. It is the further contention of first defendant that item Nos.1 to 4 of suit 'A' schedule properties are Matruka properties of Mahaboob Sab; therefore, the plaintiff is not entitled for any share in those items.

7. P.W.1 and D.W.1 being the parties to the *lis*, the possibility of deposing falsehood in order to suit their respective claims, cannot be ruled out completely. P.Ws.2 and 3 supported the

version of P.W.1 whereas D.Ws.2 and 3 supported the case of D.W.1.

8. The crucial question that falls for consideration is whether first defendant himself purchased item No.5 of suit 'A' schedule property. No doubt, first defendant has taken a specific plea, in the written statement, that he purchased item No.5 from Syed Ismail. Mere assertion in the written statement itself is not sufficient to substantiate the stand taken by a party to the proceedings. If really first defendant purchased item No.5 from Syed Ismail, what prevented him to examine his vendor or the neighbouring owners of item No.5 of suit 'A' schedule property. Except the self-served testimony of D.W.1, there is no other convincing evidence to establish that he purchased item No.5 from Syed Ismail.

9. The name of the first defendant is shown in 'possessory' column of Exs.B.1 to B.4-Record of rights books and pattadar passbooks. There is no entry in these two documents that first defendant has purchased the property covered under item No.5 from Syed Ismail. However, it is needless to say that mere entries in the revenue records do not confer title in favour of the person named therein. The Courts below have considered all these legal aspects and rightly discarded Exs.B.1 to B.4. On the other hand, these documents support the version of plaintiff that item No.5 of suit 'A' schedule property was purchased by their father. In the cross-examination, D.W.1 in unequivocal terms deposed that that he did not allot any share to the plaintiff in item No.5 of suit 'A' schedule property. Being the daughter of Mahaboob Sab and

sister of first defendant, plaintiff is entitled for 1/3rd share in item No.5, as per Mulsim law.

10. If the findings recorded by the Courts below are based on no evidence or based on evidence, which is not legally admissible, those findings can be termed as perverse. The trial Court as well as first appellate Court independently arrived at a conclusion that first defendant failed to prove that he purchased item No.5 of suit 'A' schedule property. The Courts below have assigned reasons much less cogent and convincing reasons to its finding. I am fully endorsing the finding recorded by the Courts below on that aspect.

11. It is the case of first defendant that he constructed the house i.e., suit 'B' schedule property. As per the testimony of P.W.1, she also contributed for construction of the house. Except the self-served testimony of D.W.1, there is no other convincing evidence to establish that he constructed suit 'B' schedule house with his own earnings. In the absence of positive evidence, it is not possible to arrive at a conclusion that first defendant alone constructed suit 'B' schedule house. In the cross-examination, D.W.1 admitted that the vacant site on which suit 'B' schedule house was constructed belonged to their father. The trial Court as well as first appellate Court, basing on the material available on record, arrived at a conclusion that first defendant failed to establish that he constructed suit 'B' schedule house with his own earnings. I am fully endorsing the finding recorded by the Courts below on that aspect.

12. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, 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. ...

13. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the questions raised by the learned counsel for the appellant will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law in this appeal.

14. Hence, the second appeal is dismissed at the stage of admission. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 24.10.2018
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¹ (2010) 13 SCC 216