

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.733 OF 2017

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment dated 21.06.2017 passed in A.S. No.40 of 2014 on the file of the Judge, Family Court-cum-VIII Additional District Judge, Mahabubnagar (for short, 'first appellate court'), wherein the first appellate court, while dismissing the appeal, confirmed the judgment and decree dated 06.11.2014 passed in O.S. No.63 of 2014 on the file of the Senior Civil Judge, Shadnagar (for short, 'the trial court').

2. Heard the learned counsel for the appellants-defendants, the learned counsel for the respondents-plaintiffs, apart from perusing the material on record.

3. For sake of convenience, the parties hereinafter are referred to, as they are arrayed before the trial Court.

4. To adjudicate the *lis*, it is necessary to refer to the relevant pleadings of the parties.

(a) The original suit was filed by the plaintiffs for partition of the suit schedule land into five equal shares and for allotment of three such separate shares to them. They averred in the plaint that the 1st defendant is the father, and 3rd defendant is the mother, of plaintiffs 1 to 3 and the 2nd

defendant is their sister. The A-schedule land in an extent of Acs.5-38 guntas situated in survey no.363 at Chetanpally village, is their ancestral joint family property. The B-schedule house is also ancestral joint family property. The plaintiffs and the defendants are the members of Hindu undivided family and they are coparceners. The 1st defendant, being the kartha and head of the family, has been managing the family and the suit schedule land. The plaintiffs requested defendants for partition of the suit schedule land, but they postponed for the same, and on enquiry, the plaintiffs learnt that the 2nd defendant brought into existence of gift deed vide document No.470 of 2004 and the 1st defendant is not competent to gift the suit schedule land and the same is not binding on the plaintiffs. Hence, the suit.

(b) The defendants 1 and 2 filed written statement denying all the averments made in the plaint and contended that the plaintiffs are not in possession of the suit schedule land since last more than 20 years and they are ousters of the suit land. The 2nd defendant and her husband are in actual possession and enjoyment of the suit schedule land from the last more than 20 years without any interruption openly to the knowledge of the plaintiffs. The 1st defendant has no male issues and he has got four daughters. When the husband of the 2nd defendant was minor boy, the 1st defendant brought him from his parents as adopted son and educated him and changed the

name of his father as Narsimulu. After attaining the majority, all the caste elders advised the 1st defendant to perform the marriage of Nagabushanam with the 2nd defendant for which the plaintiffs also agreed. Accordingly, the 1st defendant performed the marriage of the 2nd defendant with the said Nagabhushanam, and as promised by the 1st defendant at the time of marriage of the 2nd defendant, he executed a registered gift deed in favour of the 2nd defendant, and the 2nd defendant and her husband are in possession of the suit schedule land from the last more than 20 years irrespective of fact that the registered gift deed was executed recently.

The defendants 2 and 3 filed additional written statement and contended that the suit schedule house is the self-acquired property of the 2nd defendant by virtue of gift deed dated 25.04.2007 executed by the 1st defendant and the plaintiffs cannot seek any partition and the 2nd defendant and her husband are in possession of the suit schedule house and her name is recorded as owner in grampanchayat records.

The 4th defendant, who was brought on record as the legal representative of the 1st defendant (died), filed written statement contending that the 1st defendant had no male issues and he kept the 2nd defendant in his house and performed her marriage with the son of his sister. The 1st defendant performed the marriage of the plaintiffs long back and incurred huge amount

and provided cash and kind to the plaintiffs. The 1st defendant executed a gift deed dated 28.01.2004 and delivered possession of the suit schedule land and since then the 2nd defendant has been in possession and enjoyment of the said property and subsequently, she sold Acs.2-00 guntas of land vide document No.1501/08 and that to avoid further complications, he obtained signature of defendant no.1 on the document.

(c) Basing on the pleadings, the trial Court framed the following issues:

1. Whether the suit sale deed property is the joint family property?
2. Whether the plaintiffs are entitled to partition as prayed for?
3. Whether the defendant No.1 has executed gift deed in favour of defendant No.2?
4. To what relief?

On 20.02.2010, the trial Court framed the following issues.

1. Whether the plaintiffs are entitled to partition and separate possession as prayed for ?
2. To what relief ?

(d) After considering the evidence of P.Ws.1 and 2 and the documents Exs.A.1 to A.10 marked on behalf of the plaintiffs and the evidence of D.Ws.1 to 3 and the documents Exs.B.1 to B.20 marked on behalf of the defendants, the trial Court was

pleased to pass a preliminary decree directing the defendants 2 to 4 to partition the A and B schedule properties into 25 equal shares and allot 18 such separate shares to the plaintiffs within two months, failing which the plaintiffs are at liberty to apply final decree. Aggrieved by the said judgment and decree, the defendants preferred A.S. No.40 of 2014 and the first appellate court, while dealing with the matter, vide the impugned judgment and decree dated 21.06.2017, was pleased to dismiss the appeal by confirming the judgment and decree passed by the trial Court. Challenging the said decree and judgment passed by the first appellate court, the defendants preferred the Second Appeal.

5. Learned counsel for the defendants-appellants herein would contend that the findings of both the Courts below are contrary to law and probabilities of the law; the father of the 1st defendant is the owner of the suit schedule lands and on his demise, the 1st defendant succeeded the suit schedule land so, the 1st defendant is the exclusive owner of the suit schedule lands acquired from his father, and that during his lifetime, he settled the suit schedule land through a registered gift deed in favour of defendant no.2, as such the suit schedule lands are no more joint family properties of the plaintiffs; the plaintiffs during the lifetime of their father, did not demand partition of the suit schedule lands; the defendants have taken plea of adverse

possession and the plaintiffs did not file any record to show that they were in possession of the suit schedule lands within 12 years at any time; both the Courts below erred in granting preliminary decree for partition of the suit schedule property; the findings of both the Courts below are perverse and not based on evidence and record; and ultimately, prayed to allow the second appeal by setting aside the findings of both the Courts below.

6. Learned counsel for the plaintiffs-respondents herein would contend that both the Courts below rightly granted preliminary decree for partition of the suit schedule property; there are no grounds to interfere with the findings of both the Courts below since they are well reasoned and based on evidence and record; no substantial questions of law do arise for determination in this second appeal; and ultimately, prayed to dismiss the second appeal.

7. The defendants-appellants contended that the following are the substantial questions of law arise for determination in this second appeal:

01) Whether self-acquired property be partitioned under Section 6 of the Hindu Succession (Amendment) Act?

02) Whether the court can decide the validity of gift deed without there being any objection and in the absence of the pleadings in the plaint?

8. 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 nor 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 findings are some of the questions, which involve substantial questions of law.

9. The specific case of the plaintiffs is that the suit schedule properties are ancestral joint family properties and they are open for partition in between the plaintiffs and defendants 1 to 3. There is ample evidence on record to establish that the plaint 'A' schedule property was devolved on defendant no.1 after

death of his father. It is vehemently contended that defendant no.2 got the suit schedule properties under Ex.B13-registered gift deed. Though the document is filed and it is pleaded that the suit schedule property was gifted to defendant no.2 by defendant no.1 under Ex.B13, there is no specific mention of acceptance of the gift by defendant no.2 and delivery of possession of the property in favour of defendant no.2 by defendant no.1, in the pleadings. D.W.1 (defendant no.2) did not state in her evidence with regard to acceptance of gift made by defendant no.1 in her favour and also delivery of possession. D.W.2, one of the attestors of Ex.B13, also did not state anything with regard to acceptance made by defendant no.2 in respect of the property covered under Ex.B13-gift deed. The gift relates to the property shown as 'A' schedule in the plaint. Case of the defendants is that defendant no.2 along with her husband is in possession of the plaint 'A' schedule property for the last 20 years. The burden is on the defendants to prove Ex.B13-gift deed in accordance with law. When offer, acceptance and delivery of possession has not been made out in respect of the property covered under Ex.B13 i.e. plaint 'A' schedule property, both the courts below declined to act upon Ex.A13-gift deed. The first substantial question of law raised viz. whether the property covered under Ex.B13 vests in defendant no.2, relates to factual and legal aspects which have been elaborately dealt

with and answered by both the courts below against the defendants and in favour of the plaintiffs.

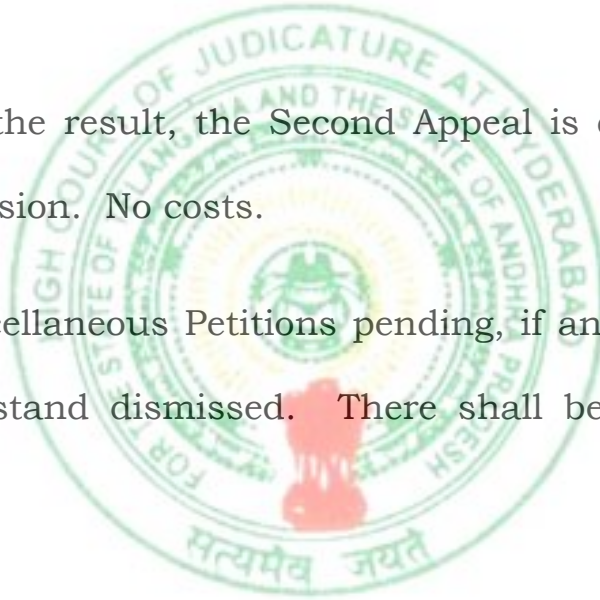
10. Father of plaintiffs and defendant no.2 died in the year 2009. Section 6 (1) of the Hindu Succession (Amendment) Act, 2005 is prospective in operation. Daughter attained the status of a coparcener from the date of commencement of the amended Act, 2005. As per the evidence on record, there was no partition of the suit schedule properties by metes and bounds, prior to coming into force of the amended act, 2005. Evidence of P.Ws.1 and 2 clearly establishes that the properties shown in plaint 'A' and 'B' schedule are ancestral properties of the parties. In the circumstances of the case, the first substantial question of law raised viz. whether self-acquired property be partitioned in terms of Section 6 of the Hindu Succession (Amendment) Act, is a mixed question of fact and law, which has been elaborately dealt with and answered by both the courts below. No inadmissible evidence has been acted upon or no admissible evidence has been omitted. No fairly arguable question which affects the decision of the first appellate court, is made out.

11. On a perusal of the judgments of both the courts below, it is clear that both the courts elaborately discussed the evidence on record. Both the Courts below analysed the entire evidence on record and gave concurrent findings. None of the

findings is shown to be perverse. The findings are based on record and there is no infirmity. There are no grounds to take a different view. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellants to deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination to admit the Second Appeal. Therefore, there are no merits in the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

12. In the result, the Second Appeal is dismissed at the stage of admission. No costs.

The Miscellaneous Petitions pending, if any, in the Second Appeal shall stand dismissed. There shall be no order as to costs.



Dr. SHAMEEM AKTHER, J

Date: 23 .10.2018
Siva/DRK

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

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23 .10.2018

Siva/DRK