THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.580 of 2013

JUDGMENT:

This appeal is filed by the plaintiffs, under Section 100 of CPC, assailing the judgment and decree dated 15.3.2013 passed in A.S. No.28 of 2012 on the file of the Additional District Court, Narsapur, wherein and whereby the judgment and decree dated 10.3.2011 passed in O.S.No.246 of 2006 on the file of the Court of Senior Civil Judge, Narsapur, dismissing the suit filed by the plaintiffs for declaration and consequential perpetual injunction restraining the defendant from alienating the suit schedule property, 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, briefly, as follows: The marriage of the first plaintiff was performed with the defendant on 11.5.1968. Out of lawful wedlock, they were blessed with a son i.e., second defendant, and three daughters. In the year 1987, first plaintiff purchased the vacant site from one Kavuru Subbamma and got registered the same in the name of the defendant. The first plaintiff, with his own money, constructed a Building with upstairs and a tiled house in the vacant site situated in R.S.No.118/1, Sagamcheruvu village, Palakol Mandal, West Godavari District (hereinafter referred to as, the suit schedule property). The first plaintiff has been paying house tax to the Gram Panchayat, Sagancheruvu. Due to the disputes between the first plaintiff and defendant with regard to the marriage of the second plaintiff, the defendant deserted the first plaintiff. Hence,

the suit. The defendant filed written statement admitting inter se relationship, *inter alia*, contending that she purchased vacant site in the year 1987 with the money given by her mother. She constructed the houses in the vacant site by obtaining loan from Palakol Co-operative Building Society Limited, Palakol (for short, the Society). The plaintiffs have no right whatsoever over the suit schedule property. Basing on the complaint lodged by the defendant, the Station House Officer, Palakol Police Station registered a case in Crime No.90 of 2006 against the first plaintiff for the offence under Section 498-A of IPC. The plaintiff filed the suit without cause of action. Hence, the suit is liable to be dismissed. Basing on the above pleadings, the trial Court framed the following issues for trial:

> 1. Whether the plaintiffs are entitled to the declaration that they are the owners of the schedule property?
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> 2. Whether the plaintiff has got any possession over the schedule property?
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> 3. Whether the plaintiff is entitled to the injunction as prayed for?
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> 4. To what relief?

Before the trial Court, on behalf of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A.1 to A.44 were marked. On behalf the defendant, D.Ws.1 to 3 were examined and Exs.B.1 to B.6 were marked. C.W.1 was examined as Court witness through whom Exs.X.1 to X.11 were marked.

4. Basing on oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs failed to prove their title over the suit schedule property; consequently dismissed the suit. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiffs preferred the

appeal. The first appellate Court, after re-appraising the oral and documentary evidence available on record, dismissed the appeal. The unsuccessful plaintiffs preferred the second appeal.

5. Heard the learned counsel for the appellants and learned counsel for the respondent.

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

> 1. Whether the Courts below misconstrued Section 33 of the Indian Evidence Act?
>
> 2. Whether the findings recorded by the Courts below are perverse?

7. 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.

8. The following admitted facts can be culled out from the pleadings of both the parties. The marriage of the first plaintiff was performed with the defendant in the year 1968. Out of lawful wedlock, they were blessed with a son i.e., the second plaintiff and three daughters. Suffice it to say, in a suit for declaration, the plaintiff may succeed or fail basing on the strength or weakness of his case. In a suit for declaration, the plaintiff has to establish his case by preponderance of probabilities. Let me consider the facts of the case on hand, in the light of the above legal principles.

9. It is the case of the plaintiffs that first plaintiff purchased the vacant site, with his own money, from Kavuru Subbamma, in the name of the defendant. It is the case of the defendant that she purchased the suit schedule property with the money given by her mother. P.W.1 and D.W.1 being parties to the proceedings, the

possibility of distortion of the facts in order to suit their respective claims cannot be ruled out completely. As per the oral testimony of P.Ws.1 to 3, first plaintiff purchased the vacant site under Ex.A.1 sale deed dated 15.6.2007. Ex.B.1 is copy of the registered sale deed. As per the testimony of D.W.2, his mother sold the vacant site to the defendant under Ex.A.1 registered sale deed. P.W.2 is none other than the son of first plaintiff and the defendant. As per the testimony of P.W.2, his mother purchased the vacant site. In order to appreciate the rival contentions, this Court is placing reliance on Ex.A.1 sale deed. As per the recitals of Ex.A.1 sale deed, the defendant paid sale consideration to her vendor. Unless and until the contrary is proved, the Court can place reliance on a registered sale deed. If really, the first plaintiff has paid the sale consideration, what prevented him from mentioning in Ex.A.1 sale deed that he paid the sale consideration to the vendor on behalf of his wife? In the absence of such a recital in Ex.A.1 sale deed, much weight cannot be attached to the oral testimony of P.Ws.1 to 3.

10. Having regard to the facts and circumstances of the case, this Court is of considered view that the stand taken by the plaintiffs that the first plaintiff purchased the vacant site in the name of his wife is not sustainable.

11. It is the case of the first plaintiff that he constructed the house with his money in the name of the defendant. A perusal of Ex.B.4–Resolution passed by Sagamcheruvu Gram Panchayat, dated 06.12.2006 reveals that the Gram Panchayat permitted the defendant to construct house in the vacant site. Ex.B.5 is the duplicate passbook. As per the testimony of P.W.1 and D.W.1, the

defendant constructed house by borrowing money from the Society. A perusal of Ex.B.2–Encumbrance Certificate clearly reveals that the defendant mortgaged the suit schedule property to the Society. It is the case of the defendant that she discharged the loan amount due to the Society. To substantiate their stand, the plaintiffs mainly placed reliance on Ex.A.12 to A.41–bills and counter-foils, which stand in the name of the defendant. The documents filed by the plaintiffs support the version of the defendant.

12. C.W.1 is the Sarpanch of Sagamcheruvu Gram Panchayat. As per his testimony, the Gram Panchayat mutated the name of the defendant in the Panchayat records in respect of the suit schedule property. C.W.1 is an independent witness, whose testimony cannot be discarded on flimsy grounds. The oral testimony of C.W.1 clearly supports the version put-forth by the defendant. As rightly pointed out by the learned counsel for the plaintiffs, Exs.X.1 to X.11 house tax demand notices stood in the name of the first plaintiff. It is needless to say that the Court cannot grant the relief of declaration, basing on the demand notices issued by the Gram Panchayat.

13. Learned counsel for the appellants strenuously submitted that the Courts below have not considered Ex.B.6, in the light of Section 33 of the Indian Evidence Act. Ex.B.6 is the certified copy of the deposition of the defendant, as P.W.1, in M.C.No.23 of 2006. In order to press into service Section 33 of the Indian Evidence Act that the evidence deposed by a witness, in an earlier proceedings, can be taken into consideration only when such witness is dead or his whereabouts are not known. The proviso to Section 33 of the

Indian Evidence Act clearly demonstrates that the deposition of a witness is relevant if the question in issue in the first and the second proceedings is substantially the same. M.C.No.23 of 2006 is filed by the defendant under Section 125 of Cr.P.C., claiming maintenance from the first plaintiff, whereas O.S.No.246 of 2006 is filed by the plaintiffs against the defendant seeking declaration of title and consequential perpetual injunction in respect of the suit schedule property. The issue involved in both the proceedings is not one and the same. The nature of the proceedings in the M.C., and the present suit are quite different. It is needless to say that any observation made in the judgment of a criminal court is not binding on civil Court. The Courts below have considered the scope of Sections 33 and 58 of the Indian Evidence Act, in right perspective, and discarded Ex.B.6. The material available on record falls short to establish that the first plaintiff is the owner of the suit schedule property. Without establishing title over the suit schedule property, plaintiffs are not entitled to seek the relief of declaration. The Court cannot grant the relief of declaration, basing on the demand notices or tax receipts issued by Gram Panchayat.

14. The trial Court as well as first appellate Court, basing on the material available on record, arrived at a conclusion that the plaintiffs failed to establish that they are the owners of suit schedule property. I am fully endorsing the finding recorded by the Courts below on that aspect. The first appellate Court is the fact finding final Court.

15. The other predominant contention of the learned counsel for the appellants-plaintiffs that the findings recorded by the Courts

below are perverse; therefore, it is a fit case to allow the second appeal. If the findings recorded by the Courts below are based on no evidence or based on the evidence, which is not legally admissible, such findings can be termed as perverse and are liable to be set aside. The findings recorded by the Courts below are supported by documentary evidence produced by both the parties. The Courts below have assigned reasons much less cogent and valid reasons to its findings. Viewed from any angle, I am unable to accede to the contention of learned counsel for the appellants that the findings recorded by the Courts below are perverse and are liable to be set aside.

16. 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. ... ...

17. 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 appellants 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.

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[1] (2010) 13 SCC 216

18. 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: 14.11.2018
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HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
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