

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 18 OF 2014

JUDGMENT:

1. The Second Appeal is filed by the appellant-defendant no.3 against the judgment and decree dated 21.10.2013 in Appeal Suit No.8 of 2011 on the file of the II Additional District Judge (Fast Track Court), Mahaboobnagar, whereby the judgment and decree dated 25.11.2010 in Original Suit No.221 of 1991 on the file of the Junior Civil Judge, Mahaboobnagar passing a preliminary decree for division of plaint schedule properties item nos.1 and 2 into five equal shares and allotting 1/4th share to the respondent no.1/plaintiff along with possession, were confirmed.

2. The appellant herein is defendant no.3, the respondent no.1 herein is the plaintiff, and the respondents 2 to 4 herein are defendants 1, 2 and 4 respectively, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. On 05.02.2014, the Second Appeal was admitted in view of the substantial questions of law involved in the memorandum of grounds of appeal.

4. To adjudicate the *lis*, it is necessary to refer to admitted and disputed facts.

(a) The plaintiff and defendants 2 to 4 are sons of defendant no.1. Plaintiff, being a government servant, looked after the affairs of the family and brought up defendants 2 to 4, gave them education and performed their marriages. Plaintiff purchased a plot in the name of defendant no.1 out of his earnings and constructed house in some portion thereof and living in the said house along with the defendants (item no.1 of suit schedule). Plaintiff and defendants also acquired another house. Some differences arose between plaintiff and defendants with regard to share in the schedule properties. Defendant no.1 was not willing for partition of the properties during her life time. She executed a settlement deed on 09.09.1991 giving four shares in the schedule properties as settlement for her four sons i.e. defendants 2, 3, 4 and the plaintiff and kept Rs.21,000/- in her name in the Bank. They purchased item no.1 of the suit schedule out of the sale proceeds of ancestral house at Shamshabad (shown as item no.3 of suit schedule). Whenever plaintiff demanded for partition and separate possession, the defendants postponed the partition of all the properties on one pretext or the other. Defendant no.1 gave notice on 21.10.1991 with false allegations for which plaintiff got issued reply notice on 03.12.1991. Hence, the suit for partition of suit schedule properties and allotment of 1/5th share therein to plaintiff.

(b) Defendant no.1 filed written statement denying plaintiff averments and contending that she purchased plot in 1961 from one P.Chennamma and Dayyala Kondaiah. By that time, the plaintiff was a minor and student. Two rooms were constructed in the said plot in 1966 by her. Subsequently, some more area was purchased by her. As such, the suit house bearing No.1-7-63/B at Monappagutta (item no.2 of suit schedule) is her self-acquired property. It is her exclusive property. Defendant no.1 is not the owner of item no.2 of suit schedule viz.House bearing No.6-1-7 at Hanmanpura, but the said house was gifted to defendant no.3 by one Moulamma, w/o. Ramachander under registered gift deed bearing document no.157/87, dated 16.01.1987 and the same is subject matter of O.S. No.86 of 1987 on the file of the Sub Court, Mahaboobnagar. She did not execute any document or took Rs.21,000/- towards her share. She spent Rs.65,000/- from item no.1 of schedule property and became indebted. The document dated 09.09.1991 was by force and coercion under fraud by plaintiff, defendants 2 to 4. She got issued notice on 21.10.1991 with regard to fraud played by plaintiff who gave reply notice. Plaintiff and defendants 2 to 4 are not entitled to claim share in the schedule properties. Hence, it is prayed to dismiss the suit.

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

- 1) Whether the plaintiff is entitled to his 1/5th share in the suit schedule property ?
- 2) To what relief ?

6. During trial, on behalf of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A3 were got marked, and on behalf of defendants, D.Ws.1 to 10 were examined and Exs.B1 to B15 were got marked.

7. Defendant no.1 died during pendency of the suit. The trial Court, upon appreciation of the evidence on record, decreed the suit passing a preliminary decree for division of item nos.1 and 2 of the suit schedule properties into five equal shares and allotting 1/4th share to the plaintiff. Challenging the judgment and decree of the trial Court, the defendant no.3 preferred A.S. No.8 of 2011 on the file of the II Additional District Judge (Fast Track Court), Mahaboobnagar. 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 no.3.

8. Heard the learned counsel for the appellant, the learned counsel for the respondents and perused the record.

9. Learned counsel for the appellant would contend that both the courts below erroneously decreed the suit filed for partition and separate possession, allotting 1/5th share each

to the parties to the litigation in respect of item nos.1 and 2 of the schedule property. It is further contended that the appellant/defendant no.3 is in exclusive possession and enjoyment of the schedule property; that originally the property belonged to his mother, who is defendant no.1 and died during pendency of the suit; that she executed Exs.B14 and B15 bequeathing the suit schedule property in his favour and therefore he is in exclusive possession and enjoyment of the same; that when the plaintiff is not in joint possession and enjoyment of the suit schedule property, he is not entitled to pay fixed court fee of Rs.200/-; that the appellant/D.3 is the exclusive owner and possessor of the suit schedule property. It is further contended that Ex.A1-settlement deed requires registration and therefore it cannot be looked into for any purpose; that both the courts below have not appreciated the evidence on record in proper perspective and arrived at perverse findings, and ultimately, prayed to allow the Second Appeal.

10. On the other hand, learned counsel for the respondent no.1/plaintiff could contend that item nos.1 and 2 of the suit schedule property were purchased by the parties to the litigation by selling ancestral property; that the respondent no.1/plaintiff also contributed amounts for purchase of those properties in the name of defendant no.1; that defendant no.1 conceded the same under Ex.A1; that the so-called will deeds

marked as Exs.B14 and B15 are fabricated for the purpose of the case; that defendant no.1 (mother) did not mention execution of those deeds at any point of time; that there is no mention of the same in the proceedings in the suit; that the suit schedule property is in joint ownership and possession of the parties to the litigation; that the original suit was filed 1/5th share in the suit schedule properties as the respondent no.1/plaintiff has got 3 brothers and their mother was alive as on the date of filing of the suit; that since his mother died, they are entitled for 1/4th share each in the suit schedule property; that all factual aspects are involved in the matter and there are no grounds to disturb the concurrent findings arrived at, by both the courts below on factual aspects; that there is no substantial question of law to be adjudicated in the Second Appeal, and ultimately dismiss the Second Appeal.

11. In view of the submissions made by both the parties, the point that arises for consideration is whether any substantial question does arise for adjudication in the Second Appeal ?

12. 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 finding- are some of the questions, which involve substantial questions of law.

13. The trial Court decreed the suit filed for partition and separate possession allotting 1/4th share to the parties herein in respect of item nos. 1 and 2 of the suit schedule properties, and the same was affirmed by the first appellate court. Both the courts discussed validity and genuineness of Ex.A1-settlement deed made between the parties to the litigation. The said document is substantiated by the evidence adduced on behalf of respondent/plaintiff. Both the courts below held that the said document is genuine. Both the courts below observed that Ex.B14-will deed was executed on 11.6.1992 and Ex.B15-will deed was executed on 17.11.2004,

by defendant no.1 late Smt.Tara Bai, mother of other parties to the litigation, who died on 17.02.2005, but the said late Tara Bai did not mention either in her written statement or notice or any document with regard to execution of Exs.B14 and B15. The said fact is not found even in her evidence. Both the courts below held that Exs.B14 and B15 are fabricated and they do not confer any title in favour of the appellant/defendant no.3 in respect of any items of the schedule properties. Further, on appreciation of evidence, both the courts below held that item nos. 1 and 2 of the schedule property are the properties purchased by the parties to the litigation by selling their ancestral property. The finding of both the courts below with regard to nature of the acquisition of item nos. 1 and 2 of the schedule property and also the binding nature of Ex.A1, B14 and B15, is not shown to be perverse. The same is based on proper appreciation on evidence on record. Only factual aspects are involved in this case. They have been answered by both the courts below. The findings recorded by both the courts below with regard to joint possession of the parties to the litigation cannot be disturbed.

14. 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 on the

factual aspects. 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 appellant/plaintiff to deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination. Therefore, there are no merits in the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

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

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

25.07.2018
DRK



(Dr.SA, J.)

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