

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL Nos.749 and 987 OF 2012

and

SECOND APPEAL No.530 OF 2017

COMMON JUDGMENT:

S.A.No.749 of 2012 is filed, under Section 100 of C.P.C., by the unsuccessful plaintiff assailing the decree and judgment dated 15.04.2011 in A.S.No.97 of 2010 on the file of the Family Court-cum-VII Additional District Court, West Godavari, Eluru, wherein and whereby the decree and judgment dated 02.02.2010 in O.S.No.429 of 2005 on the file of the Court of I Additional Junior Civil Judge at Eluru, granting perpetual injunction in favour of the plaintiff, was set aside.

2. S.A.No.987 of 2012 is filed, under Section 100 of C.P.C., by the unsuccessful plaintiff assailing the decree and judgment dated 15.04.2011 in A.S.No.107 of 2010 on the file of the Family Court-cum-VII Additional District Court, West Godavari, Eluru, wherein and whereby the decree and judgment dated 02.02.2010 in O.S.No.429 of 2005 on the file of the Court of the I Additional Junior Civil Judge at Eluru, granting perpetual injunction in favour of the plaintiff, was set aside.

3. S.A.No.530 of 2017 is filed, under Section 100 of C.P.C., by the first defendant assailing the decree and judgment dated 15.04.2011 in A.S.No.97 of 2010 on the file of the Family Court-cum-VII Additional District Court, West Godavari, Eluru, wherein and whereby the decree and judgment dated 02.02.2010 in O.S.No.429 of 2005 on the file of the Court of the

I Additional Junior Civil Judge at Eluru, granting perpetual injunction in favour of the plaintiff, was set aside.

4. For the sake of convenience, the parties will hereinafter be referred to as they were arrayed before the trial Court.

5. The averments made in the plaint are briefly as follows: One Tammineedi Abburaju executed a registered settlement deed dated 07.05.2001 in favour of the plaintiff bequeathing the suit schedule property. Ever since, the plaintiff has been in possession and enjoyment of the suit schedule property. Defendant Nos.1 and 2 are making hectic attempts to dispossess the plaintiff from the suit schedule property.

6. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that this defendant filed O.S.No.28 of 1979 on the file of the Court of Principal Senior Civil Judge, Eluru, seeking partition of the suit schedule property which includes an extent of Ac.11.86 cents in R.S.No.245 of Sattala Village. The first defendant is the youngest son of Tammineedi Naganna. The said Tammineedi Naganna had five sons namely, Seshayya, Subbarao, Kanakam, Satyanarayana and this defendant. Seshayya's only son is Abburaju. The second son of Naganna i.e., Subbarao died, leaving behind him his sons Bullayya, Nageswara Rao and Sreenu. The third son of Naganna i.e., Kanakam was given in adoption to one N.Appalaswamy, thereby he ceased to be a member of the joint family. The fourth son Satyanarayana died prior to marriage. The plaintiff is the daughter-in-law of the first

defendant's brother by name Subbarao. By the year 1979, this defendant and late Seshayya alone remained as coparceners; therefore, Seshayya and this defendant had equal shares in all the co-parcenary properties. Seshayya sold some properties in favour of one Lakshmayya. Then, this defendant filed O.S.No.28 of 1979 for partition of joint family properties, which include the suit schedule properties herein. A preliminary decree was passed in O.S.No.28 of 1979 by ordering partition of item Nos.1, 2, 3 and 5 of plaint 'A' schedule property into two equal shares and allotting one such share to this defendant. Against the said decree and judgment, Seshayya preferred A.S.No.134 of 1985 and the same was dismissed. In the final decree proceedings, advocate commissioner was appointed, who in turn executed the warrant improperly and the Court accepted the same. Then, this defendant preferred A.S.No.116 of 2004 and the same is pending before the Court of II Additional District Judge, West Godavari, Eluru. Hence, the suit is liable to be dismissed.

7. The second defendant filed separate written statement *inter alia* contending that he purchased Ac.5.72 cents in R.S.No.245 and Ac.0.50 cents in R.S.No.242/7 situated at Sattala Village from the first defendant and his wife under an agreement of sale for a valuable consideration of Rs.8,250/- per acre. This defendant made part payments to the first defendant. The plaintiff did not approach the Court with clean hands; therefore, the suit is liable to be dismissed. If perpetual injunction is granted in favour of the plaintiff, it will virtually

defeat the rights of this defendant. Hence, the suit is liable to be dismissed.

8. Basing on the above pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff is entitled for permanent injunction?
- 2) To what relief?

9. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 4 were examined and Exs.A1 to A5 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B13 were marked. Basing on the oral, documentary evidence and other material available on record, the trial Court granted perpetual injunction in favour of the plaintiff. Feeling aggrieved by the decree and judgment dated 02.02.2010 in O.S.No.429 of 2005, the first defendant preferred A.S.No.107 of 2010. The second defendant preferred A.S.No.97 of 2010. During the pendency of A.S.No.107 of 2010, Ex.B14 was marked. The first appellate Court, after reappraising the oral and documentary evidence, arrived at a conclusion that the plaintiff is not entitled for perpetual injunction and allowed both the appeals by separate judgments. Hence, the plaintiff preferred two second appeals i.e., S.A.Nos.749 of 2012 and 987 of 2012. S.A.No.530 of 2007 was preferred by the first defendant.

10. Heard Sri P.Rajasekhar, learned counsel for the appellant-plaintiff in S.A.Nos.749 of 2012 and 987 of 2012 and Sri Y.V.Anil Kumar, learned counsel for the appellant-first

defendant in S.A.No.530 of 2017 and Sri K.Sitaram, learned counsel for the second respondent-second defendant in the appeals.

11. The question of law urged by the appellants' counsel is as follows:

Whether a coparcener is entitled for perpetual injunction in respect of joint family property?

12. The following admitted facts can be culled out from the pleadings:

The suit schedule property and some other property originally belong to one Tammineedi Naganna. The said Naganna had five sons namely Seshayya, Subbarao, Kanakam, Satyanarayana and first defendant-Venkata Rao. One Abburaju is the son of Seshayya. Bullayya is the son of Subba Rao. The plaintiff is the wife of Bullayya. Abburaju executed a gift and settlement deed in favour of the plaintiff on 17.05.2001(Ex.A1) in respect of Ac.1.25 cents in R.S.No.245/1 of Sattala village, Dwaraka Tirumala Mandal, West Godavari District. The first defendant filed O.S.No.28 of 1979 on the file of the Court of Principal Senior Civil Judge, Eluru seeking partition of the undivided joint family properties, which includes the suit schedule property in the present suit, i.e., part of item No.1 in O.S.28 of 1979. The trial Court decreed the suit by passing preliminarily decree. Feeling aggrieved by the judgment and decree in O.S.No.28 of 1979, Seshayya preferred an appeal in A.S.No.134 of 1985 on the file of the Court of I Additional

District Judge, Eluru, and the same was dismissed on 11.02.2000. The first defendant herein filed I.A. No.281 of 2002 for passing of final decree in O.S.No.28 of 1979, wherein the advocate commissioner made an observation that item No.1 of the suit schedule property was already partitioned. Feeling aggrieved by the final decree proceedings, the first defendant preferred A.S.No.116 of 2004. During pendency of A.S.No.116 of 2004, the present suit was filed.

13. It is the case of the second defendant that the first defendant executed an agreement of sale in his favour in respect of an extent of Ac.5.72 cents in R.S.No.245 of Sattala village. The plaintiff claiming the property basing on Ex.A1 settlement deed dated 17.05.2001. A perusal of the record also reveals that pattadar pass books and title deed pass books were issued in favour of the plaintiff, i.e., Exs.A2 and A3. Ex.A5 is the certificate issued by the Gram Panchayat Secretary in favour of the plaintiff. A perusal of the record reveals that an extent of Ac.11.86 cents in R.S.No.245 of Sattala village of Dwaraka Tirumala Mandal is item No.1 in O.S.No.28 of 1979 on the file of the Court of Principal Senior Civil Judge, Eluru. A perusal of Ex.B14 marked in A.S.No.107 of 2010 clearly reveals that the appellate Court set aside the observations made by the advocate commissioner in I.A.No.281 of 2002 in O.S.No.28 of 1979 that item No.1 was already partitioned. A perusal of the record reveals that the preliminary decree was passed in respect of item Nos.1, 2, 3 and 5 in O.S.No.28 of 1979. As observed

earlier, the suit schedule property originally belongs to one Tammineedi Naganna. It is also not in dispute that no partition was taken place among the sons of late Naganna. Suffice it to say that unless and until the joint family properties were partitioned by metes and bounds, each coparcener has equal right over the Hindu undivided joint family property. The first defendant and the plaintiff are joint family members. The trial Court as well as the first appellate Court has rightly not placed any reliance on Ex.A1 settlement deed as the same was executed during pendency of the partition suit. The trial Court granted injunction in favour of the plaintiff basing on Exs.A2 and A3 pattadar pass book and title deed book. After disposal of O.S.No.429 of 2005 and during pendency of A.S.No.97 of 2010, A.S.No.116 of 2004 was allowed by setting aside the observations made by the advocate commissioner that item No.1 of the suit schedule property i.e., land in R.S.No.245 was already partitioned. It is not in dispute that the plaintiff herein did not prefer any second appeal challenging the judgment and decree in A.S.No.116 of 2004. The judgment and decree in A.S.No.116 of 2004 is binding on the plaintiff and the first defendant as they are the members of the joint family. In view of the findings recorded in A.S.No.116 of 2004, the land in Sy.No.245 is the joint family property of plaintiff, first defendant and other co-parceners. In view of pendency of final decree proceedings, this Court is not inclined to express any opinion on Ex.A1 settlement deed.

14. It is a settled principle of law that no coparcener is entitled to seek perpetual injunction in respect of joint family property against the co-parcener. As observed earlier, the suit schedule property is the joint family property of plaintiff, first defendant and other co-parceners. The trial Court granted injunction under a misconception that the property in R.S.No.245 of Sattala village is not the joint family property. In view of the decree and judgment in A.S.No.116 of 2004, the findings recorded by the trial Court in O.S.No.429 of 2005 are not sustainable either on facts or in law. The first appellate Court considered Exs.B11 to B14 in right perspective and arrived at a conclusion that the suit schedule property is the joint family property of plaintiff, first defendant and other co-parceners. It is a settled principle of law that a person, who is aggrieved by the decree and judgment of the appellate Court, can prefer second appeal. As observed earlier, the first defendant preferred S.A.No.530 of 2007 even though no adverse finding was recorded against him.

15. Having regard to the facts and circumstances of the case, this Court is of the considered view that no coparcener is entitled to perpetual injunction against the coparcener in respect of the joint family property. If the findings recorded by the trial Court are allowed to stand, certainly it would amount to miscarriage of justice. The first appellate Court has assigned reasons much less cogent and valid reasons to its findings. The findings recorded by the first appellate Court are based on

evidence much less legally admissible evidence. Hence, this Court is fully endorsing with the findings recorded by the first appellate Court.

16. In fact, the first appellate Court while setting aside the decree and judgment of the trial Court, one way upheld the rights of the first defendant in respect of the joint family properties. This Court is unable to understand why the first defendant preferred S.A.No.530 of 2017, even though no adverse finding was recorded against him. This Court while exercising the jurisdiction under Section 100 CPC shall not lightly to interfere with the concurrent finding of fact recorded by the Courts below.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB¹**, while dealing with the scope of Section 100 of CPC, 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. ...

18. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that there is no question of law much less

¹ (2010) 13 SCC 216

substantial question of law involved in S.A.Nos.749 of 2012 and 987 of 2012 and accordingly all the appeals are liable to be dismissed.

19. In the result, S.A.Nos.749 of 2012 and 987 of 2012 and S.A.No.530 of 2017 are dismissed at the admission stage. As a sequel, miscellaneous petitions pending, if any in all the appeals, shall stand closed.

T. SUNIL CHOWDARY, J

Date: 02.01.2018

IVD/Rns

