

THE HON'BLE SRI JUSTICE SANJAY KUMAR
SECOND APPEAL No.1374 OF 2017

J U D G M E N T

A.S.No.4 of 2009 was dismissed by the learned V Additional District and Sessions Judge, Ranga Reddy at L.B.Nagar, *vide* judgment dated 23.03.2017, confirming the judgment dated 01.12.2008 passed by the learned Principal Junior Civil Judge, Ranga Reddy District at L.B.Nagar, decreeing O.S.No.984 of 2004. Aggrieved by these concurrent judgments, the defendant in the suit is in second appeal.

Parties shall hereinafter be referred to as arrayed in the suit.

O.S.No.984 of 2004 was instituted by the plaintiff seeking a declaration that he was the absolute owner of the suit schedule property and for delivery of its vacant possession. He also sought a declaration that the sale deed bearing Document No.3127 of 1997 dated 24.07.1997 subsequently executed in favour of the defendant was not binding on him. The suit schedule property was Plot No.1, admeasuring 302 square yards, situated in Sy.No.140, Almasguda Village, Saroornagar Mandal, Ranga Reddy District. The boundaries of the suit plot as per the plaint schedule were:

'North : Almasaguda Village Boundary,
South : Plot Nos.2 and 3;
East : 25' wide Road;
West : Main Road.'

The case of the plaintiff was that he was the absolute owner of the suit plot having purchased it under the registered sale deed bearing Document No.391 of 2004 dated 09.01.2004 from one M.Subba Rao, who had purchased it, in turn, under the registered sale deed bearing Document No.6068 of 1981 dated 20.08.1981 from the original owners,

Samreddy Bal Reddy, Samreddy Dan Reddy, Samreddy Janga Reddy, Samreddy Yella Reddy and Samreddy Hanmanth Reddy, sons of Sambhi Reddy, represented by their General Power of Attorney (GPA) holder, Samreddy Bal Reddy, son of Sambhi Reddy. According to the plaintiff, an extent of Acs.14.00 guntas in Sy.No.140 belonged to Samreddy Sambhi Reddy and after his death, his sons developed a layout in Acs.8.29 guntas out of the total extent and sold the plots therein to various persons. His vendor, M.Subba Rao, was one such person. He further claimed that his vendor, M.Subba Rao, obtained permission for making construction in the suit plot in the year 1999 but could not proceed due to financial constraints. Thereafter, M.Subba Rao sold the suit plot to him. He further stated that in the year 2004, he was busy with assembly elections as his uncle was a candidate from Karwan Assembly Constituency and due to the same, he could not supervise his plot. In the second week of June, he visited the suit plot and found that the owner of the adjacent plot, viz, Plot No.3, on the southern side, had merged the suit plot to his house by constructing a compound wall and erecting a gate. The adjacent owner, being the husband of the defendant, claimed that he had purchased the suit plot in his wife's name from the GPA holder, Samreddy Bal Reddy. On verification of the records, the plaintiff came to know that on 24.07.1997, the said GPA holder executed a sale deed in favour of the defendant in relation to the suit plot. Asserting that the GPA holder had no right, title, possession or interest over the suit plot and that the subsequent sale deed executed by him was null, void and not binding upon him, the plaintiff filed the subject suit.

The defendant filed a written statement claiming that she had purchased the suit plot on 24.07.1997 under a registered sale deed. She

further stated that her husband purchased Plot No.3 in Sy.No.140 admeasuring 300 square yards in the year 1989 and as the suit plot was adjacent to it and was vacant, she approached the owners to purchase the same. She further claimed that her vendors were the rightful owners and her husband accordingly entered into a sale agreement with Samreddy Bal Reddy and others, represented by Samreddy Bal Reddy, their GPA holder, on 05.06.1997. Subsequently, a registered sale deed was executed in her favour under Document No.3127 of 1997 dated 24.07.1997 in relation to the suit plot. She asserted that she constructed a compound wall around the property and erected a gate apart from planting teak and other flower bearing plants in the suit plot. She asserted that the plaintiff and his vendor had no right, title or interest in the suit plot and prayed for dismissal of the suit.

Upon consideration of the pleadings, the following issues were framed for trial in the suit:

1. Whether the plaintiff is entitled to be declared as absolute owner of the suit schedule property?
2. Whether the plaintiff is entitled for eviction and recovery of possession from the defendant over the suit schedule property?
3. To what relief?

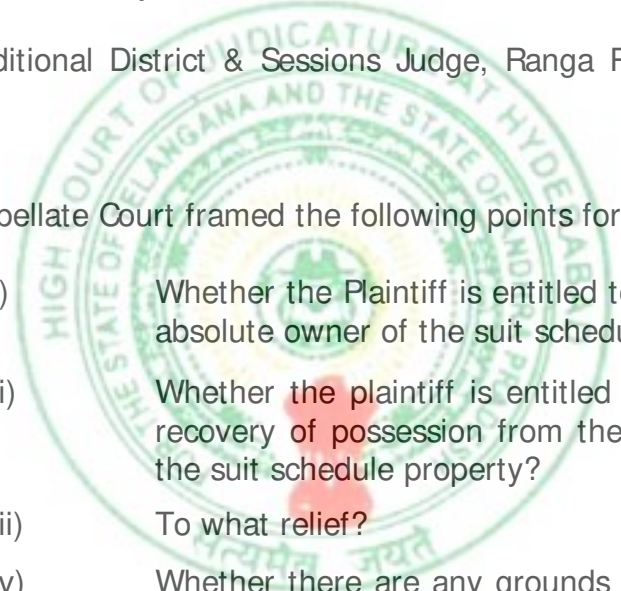
P.Ws.1 to 3 were examined by the plaintiff and Exs.A1 to A6 were adduced in evidence by him. On behalf of the defendant, D.Ws.1 and 2 were examined and Exs.B1 to B6 were marked.

Upon consideration of the evidence, oral and documentary, the trial Court opined that as Samreddy Bal Reddy was the common vendor for both parties, it had to be seen whether the sale in favour of M.Subba Rao or the sale in favour of the defendant would prevail. Significantly, one of the original owners, Samreddy Janga Reddy, was examined as P.W.3 during the trial. He admitted that in the year 1981, they had sold the suit

plot to M.Subba Rao. His testimony remained unshaken in cross-examination. The plaintiff also marked in evidence the permission obtained by his vendor, M.Subba Rao, from the Gram Panchayat in the year 1999 as Ex.A4. In these circumstances, the trial Court concluded that having executed the sale deed in favour of M.Subba Rao as long back as in the year 1981, Samreddy Bal Reddy, being the GPA holder of his brothers, could not have sold the very same plot once again to the defendant long thereafter. It is essentially on this basis that the trial Court decreed the suit.

Aggrieved thereby, the defendant filed A.S.No.4 of 2009 before the learned V Additional District & Sessions Judge, Ranga Reddy District at L.B.Nagar.

The Appellate Court framed the following points for determination:

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- i) Whether the Plaintiff is entitled to be declared as absolute owner of the suit schedule property?
 - ii) Whether the plaintiff is entitled for eviction and recovery of possession from the defendant over the suit schedule property?
 - iii) To what relief?
 - iv) Whether there are any grounds to interfere with the decree and judgment passed by the Lower Court?

Holding that no one could convey a better title than he himself has, the Appellate Court confirmed the finding of the trial Court that the plaintiff was entitled to declaration of his title as his title dated back earlier in point of time to that of the defendant under the same vendor. The Appellate Court affirmed that the vendors of the defendant had no right, title or interest over the suit plot by the year 1997 as they had already sold away the same to M.Subba Rao, the plaintiff's vendor, in 1981. Points (i) and (ii) were accordingly answered in favour of the plaintiff. As regards Point No.(iv), the Appellate Court recorded that no reasons were made

out to interfere with the judgment of the trial Court and accordingly confirmed the same. In consequence, the appeal was dismissed.

The following substantial questions of law are sought to be raised by the defendant in this second appeal:

- i) Whether the Courts below are right in not deciding the core issue whether the same plot was sold to the appellant or not?
- ii) Whether the Courts below are right in decreeing the suit in the absence of respondent/plaintiff establishing that he and his vendor were ever in possession of the land and the respondent particularly by the date of filing suit?
- iii) Whether the Courts below are right in decreeing the suit when the right of the vendor of respondent is extinguished under Sec.27 of the Limitation Act by reason of not taking appropriate steps under Sec.59 of the Limitation Act within the time?
- iv) Whether the Courts below are right in decreeing the suit when Ex.A1 and A2 is not tallying with Ex.B2 with regard to northern boundary, holding that same plot is purchased by the appellant?

Heard Sri K.V.Bhanu Prasad, learned counsel for the appellant-defendant, and Sri P.Chandrasekhar Reddy, learned counsel for the respondent-plaintiff.

Sri K.V.Bhanu Prasad, learned counsel, would contend that the boundaries of the plot purchased by his client and the plot purchased by the plaintiff do not tally. He would make this the foundation for his argument that the plots claimed by the two parties were not one and the same. In this regard, it may be noted that the boundaries of the plot purchased by the vendor of the plaintiff under the registered sale deed dated 20.08.1981 (Ex.A2) are the same as those mentioned in the sale deed executed by his vendor in his favour on 09.01.2004 (Ex.A1). These boundaries read as under:

‘North: Almasguda Village Boundary;
 South: Plot Nos.2 and 3;
 East : 25’ wide road;
 West : Main Road.’

When it comes to the sale deed under which the defendant claims title, being Ex.B2 dated 24.07.1997, the boundaries are noted as under:

‘North : Neighbour’s House

South : Plot No.3

East : 25’ wide road.

West : 30’ wide road.’

Sri K.V.Bhanu Prasad, learned counsel, would point out that the northern boundary of the plot claimed by the plaintiff is Almasguda Village Boundary, whereas the northern boundary of his client’s plot is a neighbour’s house. He does not dispute that the eastern and western boundaries of both the plots are essentially the same but would point out that the southern boundary of the plaintiff’s plot is shown as Plot Nos.2 and 3, whereas the southern boundary of his client’s plot is shown as Plot No.3 alone. On the strength of these differences, he would assert that the plots claimed by the parties are not the same. This argument forms the basis for the first and fourth substantial questions of law framed in this appeal. Learned counsel however concedes that this aspect of the matter was never raised, be it before the trial Court or the first Appellate Court. Despite the same, he would assert that as it goes to the root of the matter, he is entitled to raise it even at the second appellate stage. He would rely on Section 103 CPC in this regard.

At this stage, it would be relevant to note the provisions of Section 103 CPC:

‘103. Power of High Court to determine issues of fact:-- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100.'

It is only in the event the evidence on record is sufficient that the High Court in exercise of second appellate jurisdiction may determine an issue of fact which has not been determined by the lower Appellate Court or both by the Court of the first instance and the lower Appellate Court or which has been wrongly determined by such Court or Courts.

As the defendant never raised any dispute with regard to the boundaries and did not choose to put the same at issue, the question of the so-called discrepancies in the boundaries was never looked into. No evidence was adduced by either side on this aspect as it was never put in issue. It may also be noted that the so-called discrepancies are not incapable of explanation. As already stated *supra*, two of the boundaries, being the eastern and western ones, tally in the sale deeds of both parties. As regards the southern boundary, the plaintiff's plot is stated to be bounded by Plot Nos.2 and 3, whereas the defendant's plot is stated to be bounded only by Plot No.3. This could be mere failure to mention both numbers or there could be some reason to account for the same, such as purchase of both plots by a single owner leading to merging of the same into a single plot number. Similarly, in relation to the northern boundary, it may be noted that the plaintiff's plot is bounded by Almasguda Village Boundary, while the northern boundary of the defendant's plot is shown as a neighbour's house. Significantly, the plaintiff's plot boundaries date back to the year 1981 when his vendor purchased it, whereas the defendant's document of title is of the year 1997, i.e., 16 years later. In this interregnum, it is possible that the village boundary may have grown, whereby a house was constructed next to the subject plot. This would

account for the difference in the northern boundary. In any event, as stated earlier, when this aspect was never put in issue and no evidence was let in by either of the parties, there is no material before this Court whereby recourse can be taken to Section 103 CPC. All the more so, as such power is to be exercised only when the issue of fact has not been determined by the Courts below or has been wrongly determined. In the case on hand, when the defendant never even deemed it necessary to raise this issue, it cannot be said that the Courts below either failed to determine or wrongly determined an issue which was never raised.

Reliance placed by Sri K.V.Bhanu Prasad, learned counsel, on HERO VINOTH V/ s. SESHAMMAL¹, in relation to the legal effect of the terms or a term of a document being a question of law is of no avail as it is not a term or a term of the sale deed which is now sought to be interpreted but a factual aspect as to what were the boundaries of the plots sold under the two separate documents. The question raised is therefore essentially one of fact and not of law. Similarly, reliance on ACHINTYA KUMAR SAHA V/ s. NANEE PRINTERS² is misplaced as that was also a case pertaining to examination of the terms of an agreement, involving interpretation and construction.

The observation of this Court in MAHENDRA C. MEHTA V/ s. M/ S. KOUSALYA CO-OP. HOUSING SOCIETY LTD., HYDERABAD³ that when boundaries of a land covered by a deed are specific and clear, the wrong mention of the survey number or door number of the property covered by the deed is of no consequence, as boundaries prevail over the extent and survey number mentioned, is also of no avail to the defendant as that is not the issue obtaining in the case on hand.

¹ (2006) 5 SCC 545

² (2004) 12 SCC 368

³ 2001 (5) ALT 197

On the above analysis, the first and fourth questions sought to be raised in this appeal cannot be entertained as they are sought to be introduced for the first time before this Court without putting the same in issue and without any evidence having been adduced in relation thereto.

As regards the second and third questions of law, Sri K.V.Bhanu Prasad, learned counsel, would submit that the suit was barred by limitation but the Courts below failed to note the same. He would concede that this aspect of the matter was also not raised before either of the Courts below. He would also admit that an issue of limitation poses a mixed question of law and fact, but would place reliance on NIZAM SUGAR FACTORY LTD., SHAKKARNAGAR, BODHAN V/ s. SARFARAS BAIG⁴, wherein a learned Judge of this Court observed that Courts cannot close their eyes to the law of limitation and that even at the time of registration of the plaint, the Court must see if the suit is within limitation and reject the plaint if it is barred. Reference was also made by the learned Judge to Section 3 of the Limitation Act, 1963 (*for brevity*, 'the Act of 1963'), which empowers the Court to dismiss the proceeding on the ground of limitation though it was not pleaded in defence.

It may however be noted that these observations were made in the context of a suit seeking declaration of date of birth and consequently, date of superannuation. As declaratory suits are governed by Articles 56 to 58 of the Schedule to the Act of 1963, the learned Judge found that the period of limitation for obtaining a declaration relating to date of birth, as per Article 58, would be applicable and as the period of limitation prescribed was three years from the accrual of the right to sue, it was

⁴ 2003 (6) ALT 488

clearly barred by time. These observations cannot *ipso facto* be extended to cases where the limitation aspect is not so clearly made out.

In the case on hand, the questions of law now sought to be put forth seem to suggest that the plaintiff and his vendor were not in possession of the suit plot and thereby, their rights stood extinguished in relation thereto under Section 27 of the Act of 1963. It may be noted that the plaintiff claims that the suit plot was purchased by his vendor in 1981 and he secured construction permission in the year 1999 from the competent authority. It was only in the year 2004 that he sold it to the plaintiff. The defendant never claimed that the plaintiff's vendor remained out of the possession between 1981 and 1999. No issue was framed in this regard and no evidence was let in. Significantly, though one of the vendors, Samreddy Janga Reddy (P.W.3) was examined, the defendant did not deem it appropriate to even put it to him that the plaintiff's vendor was not in possession during all that time. It was not even suggested to the said witness that the plot sold to the defendant was different from the plot sold to the plaintiff. Without even putting suggestions in this regard to the common vendor of both the parties, the defendant cannot now come up with a new ground on facts and allege that Section 27 of the Act of 1963 stands attracted, as the plaintiff and his vendor were not in possession of the suit plot for 12 years after obtaining rights therein. This aspect is also grounded in facts which have not been averred or established before both the Courts below and no evidence whatsoever was adduced in relation thereto.

Sri K.V.Bhanu Prasad, learned counsel, would also contend that the sale deed in favour of the plaintiff's vendor was executed in the year 1981 but no mention was made therein of the layout under Ex.A3

though it dates back to July, 1978. This aspect of the matter was also not put to P.W.3. As to what were the circumstances which prevailed upon the vendors to not advert to the layout in the sale deed executed in favour of the plaintiff's vendor cannot be addressed by this Court at this stage when no evidence whatsoever was adduced in that regard and not even a question or suggestion was put to P.W.3, one of the vendors. In any event, failure to mention the layout in the sale deed is not sufficient to render it suspect to the point of discarding it altogether.

As pointed out by the Supreme Court in RAM SARUP GUPTA (DEAD) BY L.RS. V/ s. BISHUN NARAIN INTER COLLEGE⁵, no party can be permitted to travel beyond its pleadings and all necessary and material facts should be pleaded by the party in support of the case set up by it. The Supreme Court further observed that the object and purpose of the pleading is to enable the adversary party to know the case that it has to meet and in order to have a fair trial, it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise.

More recently, in DHARMARAJAN V/ s. VALLIAMMAL⁶, the Supreme Court observed that in the absence of pleadings, the High Court therein had gravely erred in finding out an entirely new case on the basis of unpleaded facts and non-existent rights. Earlier, in PATHAN MURTAZAKHAN DADAMKHAN V/ s. PATHAN PIRKHAN AMDUMIYAN (DEAD) BY L.Rs.⁷, the Supreme Court observed that a mixed question of law and fact, which needs investigation of facts and was neither raised in the pleadings nor argued before the Courts below, could not be raised in a second appeal for the first time. In Mst.SUGANI

⁵ AIR 1987 SC 1242

⁶ AIR 2008 SC 850

⁷ AIR 1993 SC 1750

V/ s. RAMESHWAR DAS⁸, the Supreme Court observed that it has to be kept in mind that the right of appeal under Section 100 CPC is neither a natural nor an inherent right attached to the litigation and it must be regulated in accordance with law. It was further observed that the conditions mentioned in Section 100 CPC must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. Howsoever erroneous, concurrent findings of facts, *per* the Supreme Court, cannot be disturbed by the High Court in exercise of power under Section 100 CPC and a substantial question of law has to be distinguished from a substantial question of fact.

In the light of the aforesaid settled legal principles, it is clear that this Court cannot permit the defendant to set up a new case in this second appeal or raise a new issue which is neither supported by the pleadings nor by the evidence on record.

On the above analysis, this Court finds that no question of law, much less a substantial one, falls for consideration in this appeal arising out of concurrent judgments. Questions of fact are now sought to be raised in the guise of questions of law for the first time, without supporting pleading or evidence, which cannot be permitted.

The Second Appeal therefore fails at the stage of admission and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR,J

13th JULY, 2018

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⁸ AIR 2006 SC 2172