

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

SECOND APPEAL No.1506 of 2017

JUDGMENT :

This Second Appeal is filed challenging the judgment and decree dt.05-07-2017 in A.S.No.49 of 2005 of the Principal District Judge, Chittoor reversing the judgment and decree dt.22-02-2005 in O.S.No.274 of 1998 of the III Additional Junior Civil Judge, Chittoor.

2. Appellants herein are Defendant Nos.2 and 3 in the suit. They are wife and son of defendant no.1 in the suit.

3. The 1st respondent/plaintiff filed the suit on 04-04-1998 for declaration of his title to the plaint-A scheduled properties and for consequential injunction restraining the appellants and other respondents from interfering with his peaceful possession and enjoyment of the said property.

4. The plaintiff's case is that he, his father, brothers, sisters and mother divided all their properties under a registered partition deed Ex.A-1 dt.19-09-1963; that there was a reunion thereafter; and after the death of their mother in 1986-87, himself, Defendant no.1/2nd respondent and one Ramaiah again divided the properties under another partition deed Ex.A-2 dt.16-02-1975. He contended that plaint-A schedule property in the present suit was part and parcel of plaint-B schedule property which the plaintiff was allotted under

Ex.A-2 partition deed and that he is the absolute owner thereof. He contended that when defendant no.1 and late Ramaiah attempted to interfere with his peaceful possession and enjoyment of the property of plaintiff-A schedule during December, 1981, he filed O.S.No.967 of 1981 before the Additional District Munsif, Chittoor for permanent injunction; that the suit was dismissed on the ground that he did not seek declaration of title therein; and he filed A.S.No.42 of 1991 before the District Judge, Chittoor, who also dismissed the appeal on 14-05-1997 on the same ground; and therefore he filed the present suit.

5. 2nd respondent/Defendant no.1 filed a written statement admitting Ex.A-1 partition deed but denying there was reunion subsequently as alleged by the plaintiff. He contended that Ex.A-2 partition deed dt.16-02-1975 was obtained by the plaintiff by playing fraud and misrepresentation, that it was invalid and it was never acted upon; and the plaintiff taking advantage of the illiteracy of Defendant no.1 and late Ramaiah, obtained their signatures thereon. It is alleged that the Karanam of Gollapalli village colluded with the plaintiff and got the said Ex.A-1 executed and it does not bind them. He contended that in OS No.967/1981 and AS.no.42/1991 it was held that Ex.A2 was not a genuine document and plaintiff had no possession and enjoyment of the plaintiff A schedule properties and so the present suit is barred by *res judicata*.

6. Defendant Nos.10 to 12 also filed common written statement stating that the partition deeds Ex.A1 and A2 did take place, and put

the plaintiff to strict proof of the title and exclusive possession of the A schedule properties. They contended that they were in possession of C schedule properties and they were not concerned with the allegations in the plaint that they obstructed the plaintiff's enjoyment of the lands.

7. The 10th defendant filed additional written statement on attaining majority, which was adopted by defendant Nos.1, 12 and 8 stating that there was a reunion among the 1st respondent, 2nd respondent and Ramaiah and that Ex.A-2 partition deed was genuine. They stated that they had no objection if the suit is decreed.

8. The trial Court framed the following issues and additional issues:

- "1. Whether the plaintiff is entitled for declaration of 'A' schedule property?*
- 2. Whether the plaintiff is in possession and enjoyment of schedule mentioned property?*
- 3. Whether the plaintiff is entitled for permanent injunction as prayed for?*
- 4. To what relief?*

Additional Issues:

- 1. Whether the suit is barred by limitation?*
- 2. Whether the principles of resjudicata is applicable to this suit?"*

9. Before the trial Court, the plaintiff examined P.Ws.1 to 4 and marked Exs.A-1 to A-18. The defendants examined D.Ws.1 to 3 and marked Exs.B-1 to B-3.

10. By judgment and decree dt.22-02-2005, the trial Court dismissed the suit. After considering the evidence on record, the trial Court held that the plaintiff has proved his title over the plaint-A schedule property; that there was a reunion between 3 brothers, which is evidenced by the sale deed Ex.A-9 executed by them together in 1968; that the defendant no.1 was aware of Ex.A-2 in 1981 itself, but took no steps to seek its cancellation and so Ex.A-2 is also binding on him. However, the trial Court held that in O.S.No.967 of 1981 as well as A.S.No.42 of 1991 arising of the said suit, there was a finding that the 1st respondent was not in possession of the plaint-A schedule property on the date of filing of the suit in 1981, that the said finding binds the plaintiff and he cannot again seek the relief of permanent injunction without seeking relief of possession. It however held that the plaintiff is not entitled to relief of declaration of title also since he failed to establish his possession over the suit schedule property, and the Court cannot grant relief of declaration of title when the 1st respondent was not in possession of plaint-A schedule property.

11. Assailing the same, the appellant filed A.S.No.49 of 2005 before the Principal District Judge, Chittoor.

12. The lower appellate Court by judgment and decree dt.5.7.2017 allowed the appeal. It concurred with the trial Court held that 1st respondent had right, title over the plaint-A schedule properties and that Ex.A-2 dt.16-02-1975 was a genuine document and binds the 2nd respondent and Ramaiah. After analysing the evidence on record,

the lower appellate Court held that the plaintiff proved his possession over the plaint-A schedule properties. It disbelieved the evidence of D.Ws.1 to 3. It further held on consideration of the judgment in O.S.No.967 of 1981 and A.S.No.42 of 1991 that relief of injunction was refused to plaintiff in the said suit on the ground that he did not establish title to the property and that it was not held in that suit that he is not entitled to relief of injunction because he was not in possession of the property. It observed that even in A.S.No.42 of 1991 the Court did not record any finding whether the plaintiff had proved his possession or not, and dismissed the said appeal by holding that it is immaterial whether he is in actual possession or not in view of his failure to prove his undisputed title and so he was not entitled to relief of injunction. It therefore held that plaintiff was not prevented from establishing his possession in the present suit and that principle of *res judicata* does not apply. It also held that even if there was any adverse finding on plaintiff's title in O.S.No.967 of 1981, since the said suit was only for injunction, the plaintiff was not prevented from establishing his right and title in the present suit filed for declaration of title and for permanent injunction. It held that the trial Court committed a mistake in holding that the finding in the earlier suit about possession operates as *res judicata*.

13. Assailing the same, this Second Appeal is filed.

14. Learned counsel for appellants contended that the lower appellate Court did not properly appreciate the legal principle

involved or evidence on record. He also contended that the issue of limitation was not properly appreciated by the lower appellate Court.

15. Under Section 100 C.P.C., the disputed questions of fact cannot be gone into in a Second Appeal and consequently appreciation of evidence cannot be gone into in the absence of a plea that finding is perverse or based on no evidence.

16. As regards the plea of limitation raised by appellants, though such a plea appears to have been raised in the trial Court, and an issue also was framed on the said point, the said point does not appear to have been argued at all by the appellants or by any of the parties in the lower appellate Court. When the appellants have not argued the point of limitation in the lower appellate Court, they are deemed to have waived the said point and cannot be permitted to raise the said point in this Court.

17. The trial Court took the view that the applicable article of limitation is Article 58 of the Limitation Act, 1963, which prescribed 3 years period of limitation for seeking relief of declaration and held that A.S.No.42 of 1991 having been dismissed on 31-03-1998 the present suit filed on 03-04-1998 is within limitation. The appellants have not shown how this finding is erroneous.

18. In this view of the matter, I see no merit in the Second Appeal and it is accordingly dismissed at the stage of admission. No costs.

19. As a sequel, miscellaneous petitions pending if any in this Second Appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date : 19-01-2018

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