

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.7 of 2017

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, is filed by the appellants/defendants, challenging the decree and judgment, dated 21.07.2016, passed in A.S.No.122 of 2011 on the file of XIII Additional District and Sessions Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, whereby, the decree and judgment, dated 29.12.2010, passed in O.S.No.2960 of 2006, on the file of the II Additional Senior Civil Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, was confirmed.

2. Heard Sri Muhammad Veqar Hussain, learned counsel for appellants/defendants and perused the record.

3. The appellants herein are the defendants and the respondents herein are the plaintiffs before the trial Court. The parties are hereinafter referred to, as per their array before the trial Court.

4. The respondents/plaintiffs filed the suit for declaration of title in respect of plaint "A" and "B" schedule properties and for grant of perpetual injunction restraining the appellants/defendants, their agents, servants and any person or persons claiming through them from interfering with their peaceful possession and enjoyment of plaint "A" and "B" schedule properties, before the trial Court, contending as follows:

"The 1st plaintiff and his brother Beeraiah (father of the plaintiffs 2 and 3) jointly purchased lands in an extent of Acs.3.22 guntas in Survey No.104, Acs.5.03 guntas in Survey No.105,

Acs.5.07 guntas of land in Survey No.106 and Ac.1.28 guntas in Survey No.107, totally admeasuring Acs.15.19 guntas situated at Japal Village of the then Ibrahimpatnam Taluq, in the year 1965, under a registered document bearing No.1668/1965, dated 26.11.1965 from Smt.Shahzadi Begum, W/o. late Syed Ahmed, for a valuable sale consideration. Since then, the 1st plaintiff and his brother Beeraiah (father of plaintiffs 2 and 3) were in exclusive possession and enjoyment of the said property. Consequent to the death of Beeraiah, brother of the 1st plaintiff, the said land was divided into two parts and accordingly, the 1st plaintiff became the absolute owner and possessor of plaint "A" schedule property and the plaintiffs 2 and 3 (sons of Beeraiah) became the absolute owners and possessors of plaint "B" schedule property. Their names were also mutated in the revenue records. In the year 1970, one Syed Ahmed Ali and four others filed a suit in O.S.No.21/1970 on the file of District Munisiff at Ibrahimpatnam, R.R.District, against the 1st plaintiff and his brother Beeraiah (father of the plaintiffs 2 and 3) and also the vendor of the plaintiffs Smt.Shahzadi Begum for declaration of title and recovery of possession in respect of 3/4th share in plaint "A" and "B" schedule properties and for mesne profits and also for perpetual injunction. After contest, the said suit was decreed. The defendants therein (respondents/plaintiffs) preferred an appeal in A.S.No.113 of 1973 on the file of Additional Chief Judge-cum-Special Judge for SPE and ACB Cases, Hyderabad, which was also dismissed. Thereafter, the legal heirs of the plaintiff in the said suit filed I.A.No.231 of 1988 under Order XXVI Rule 13 of C.P.C., for appointment of Advocate Commissioner for partition of lands in Survey Nos.104, 105, 106 and 107 of Japal Village of the then Ibrahimpatnam Taluq and for passing

of final decree. On that, the learned District Munisiff at Ibrahimpatnam, R.R.District, appointed a Surveyor for survey the said lands. Thereafter, the plaintiffs and the defendants in O.S.No.21/1970 have amicably settled the matter. Pursuant to the said settlement, the first plaintiff and his brother Beeraiah (father of plaintiffs 2 and 3) have relinquished their total rights in respect of the land admeasuring Acs.1.28 guntas in Survey No.107 in favour of the plaintiffs therein (appellants/defendants), who sold the above extent of land to third parties. In the said settlement, the plaintiffs in O.S.No.21/1970 (appellants/defendants), by taking the land in Survey No.107 and also by receiving substantial amount from the first plaintiff and his brother (father of the plaintiffs 2 and 3), have relinquished their total rights accrued under the decree in O.S.No.21/1970, in favour of the first plaintiff and his brother (father of the plaintiffs 2 and 3). As per the said settlement, the plaintiffs in O.S.No.21/1970 have also sold land admeasuring Acs.3.00 guntas in Survey No.106 to the first plaintiff and his brother Beeraiah. Since then, the plaintiffs herein have been in continuous possession and enjoyment of the suit lands. Thereafter, the lands in Survey Nos.104, 105 and 106 were orally partitioned between the first plaintiff and his brother (father of plaintiffs 2 and 3) and as per the said oral partition, suit "A" schedule property was fallen to the share of the first plaintiff and the suit "B" schedule property was fallen to the share of father of the plaintiffs 2 and 3 and after his demise, devolved upon the plaintiffs 2 and 3. The names of the respondents/plaintiffs were also mutated in the revenue records. The appellants/defendants, without any right, title and interest over the plaint "A" and "B" schedule properties, are trying to interfere with their possession and

enjoyment. The appellants/defendants also tried to remove the boundary stones and trying to cut down the tress in the suit lands. In view of the same, the respondents/plaintiffs are constrained to file the suit for declaration and perpetual injunction.”

5. The first defendant resisted the suit by filing written statement and the defendants 2 and 3 filed a memo, adopting the written statement filed by the first defendant. He contended as follows:-

“All the allegations in the plaint are false. Smt. Shahazadi Begum (vendor of the respondents/plaintiffs) was not the owner and possessor of plaint “A” and “B” schedule lands and she has no right to sell the same in favour of the respondents/plaintiffs. One Syed Ali Ahmed, father of the first defendant, and four others have filed a suit in O.S.No.21/1970 on the file of District Munisiff at Ibrahimpatnam, R.R.District, for declaration of title and recovery of possession of 3/4th share in the suit lands, against the first plaintiff and his brother Beeraiah (father of plaintiffs 2 and 3). After contest, the said suit was decreed. Though the defendants in the said suit (respondents/plaintiffs) filed an appeal challenging the said decree, the said appeal was dismissed. Thereafter, I.A.No.231 of 1988 was filed by the legal heirs of the plaintiffs in the said suit for appointment of an Advocate Commissioner and another petition for passing of Final Decree. On that, the learned District Munisiff at Ibrahimpatnam, R.R.District, appointed the M.C.Inspector, Manchal, as Advocate Commissioner to divide the suit lands into four shares. The Advocate Commissioner divided the suit lands into four shares and submitted report to the Court. Out of four shares, three shares have been allotted to the legal heirs of the plaintiffs in O.S.No.21/1970 and one

share was allotted to Smt.Shahzadi Begum and final decree was passed accordingly. Subsequently, a memo was filed by duly enclosing a non-judicial stamp paper worth Rs.100/- on 12.09.1996 for engrossing the Final Decree on the said stamp paper and the same is pending. There was no amicable settlement between the plaintiffs and the defendants in O.S.No.21/1970 after filing I.A.No.231 of 1988, as alleged by the respondents/plaintiffs. The lands sold by Syed Ali Ahmed and his legal heirs, including the first defendant herein, in Survey Nos.106 and 107, are their exclusive properties and those properties have nothing to do with the suit lands. The documents filed by the respondents/plaintiffs do not substantiate their exclusive right and possession over the plaint "A" and "B" schedule properties. With a view to side track the main issue and the decree passed in O.S.No.21/1970 by the learned District Munisiff at Ibrahimpatnam, R.R.District, and to stall the execution proceedings in the said suit, the respondents/plaintiffs have filed the present suit with false allegations. There is no cause of action to file the suit. The plaintiffs are not the absolute owners and possessors of plaint "A" and "B" schedule lands and they are not entitled for declaration of title and consequential permanent injunction as prayed for. The suit is not properly valued for the purpose of Court fee. The suit is liable to be dismissed."

6. Based on the above pleadings, the trial Court settled the following issues for trial:

1. Whether the plaintiffs are having right and title in respect of the plaint schedule properties?
2. Whether the plaintiffs are entitled for the relief of declaration and permanent injunction as prayed for?
3. To what relief?

7. On behalf of the plaintiffs, the first and second plaintiffs were examined as P.W.1 and P.W.2 apart from examining P.W.3 to P.W.5 and got marked Exs.A.1 to A.35 – Certified copies of Pahanis from the year 1964-65 to 2002-03, Ex.A.36-Original Memo in file No.CC/726/2006, dated 03.11.2006, Ex.A.37 to Ex.A.43 – original land revenue receipts, Ex.44-Original sale deed, dated 26.11.1965, Ex.A.45-Original ROR proceedings in File No.B/5231/2004, Ex.A.46 and Ex.A.47 Original Pattadar Pass books, Ex.A.48-Original Market Valuation Certificate, Ex.A.49-Attested true copy of Pahanis for the year 2007-2008, Ex.A.50-certified copy of Judgment in O.S.No.28/1966, Ex.A.51-certified copy of plaint in O.S.No.70/1979, Ex.A.52-certified copy of Decree in O.S.No.70/1979, Ex.A.53-certified copy of plaint in O.S.No.82/1979 and Ex.A.54-certified copy of decree in O.S.No.82/1979. On behalf of the defendants, one Syed Hussuhzzaman was examined as D.W.1 and got marked Ex.B.1-office copy of plaint in O.S.No.21/1970 and Ex.B.2-Order copy in I.A.No.231/1988.

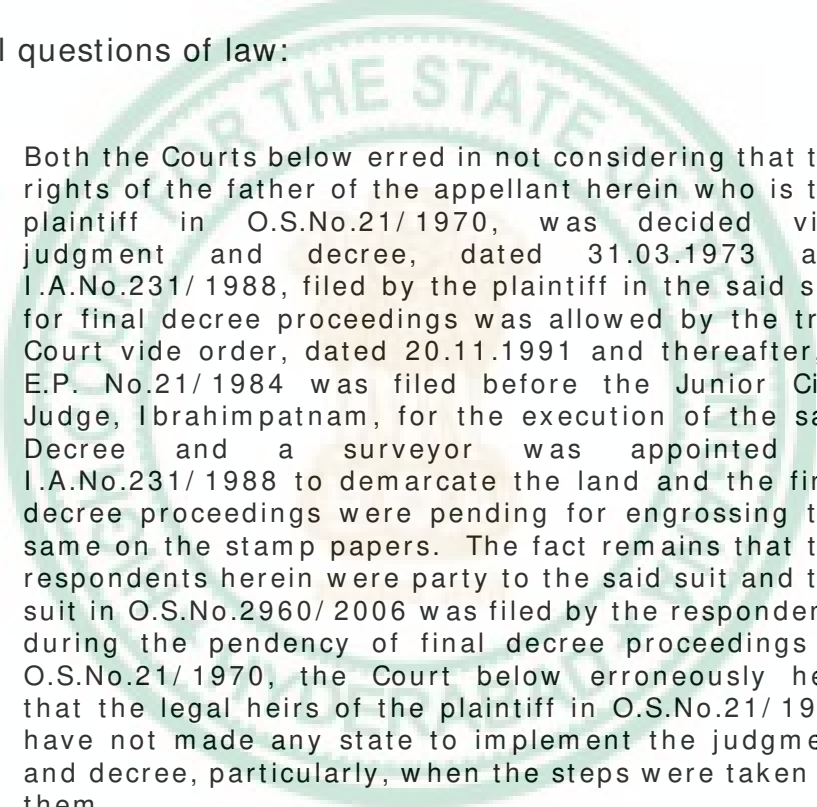
8. On merits, the trial Court decreed the suit holding that the plaintiffs are the absolute owners and possessors of the plaint “A” and “B” schedule properties and also granted perpetual injunction restraining the defendants, their agents, servants and any person or persons claiming through them from interfering with their peaceful possession and enjoyment of the plaint “A” and “B” schedule properties.

9. Aggrieved by the said decision of the trial Court, the appellants/defendant filed A.S.No.122 of 2011 before the lower

appellate Court. The lower appellate Court, after re-appreciating the entire evidence on record, dismissed the appeal by confirming the judgment and decree of the trial Court. Aggrieved by the same, the appellants/defendants preferred this Second Appeal.

10. On 02.02.2017, this Court ordered notice before admission but did not grant any interim stay. Since then, the matter underwent four adjournments, but however, the appeal is not admitted.

11. The Second Appeal is sought to be admitted on the following substantial questions of law:

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- (i) Both the Courts below erred in not considering that the rights of the father of the appellant herein who is the plaintiff in O.S.No.21/1970, was decided vide judgment and decree, dated 31.03.1973 and I.A.No.231/1988, filed by the plaintiff in the said suit for final decree proceedings was allowed by the trial Court vide order, dated 20.11.1991 and thereafter, a E.P. No.21/1984 was filed before the Junior Civil Judge, Ibrahimpatnam, for the execution of the said Decree and a surveyor was appointed in I.A.No.231/1988 to demarcate the land and the final decree proceedings were pending for engrossing the same on the stamp papers. The fact remains that the respondents herein were party to the said suit and the suit in O.S.No.2960/2006 was filed by the respondents during the pendency of final decree proceedings in O.S.No.21/1970, the Court below erroneously held that the legal heirs of the plaintiff in O.S.No.21/1970 have not made any state to implement the judgment and decree, particularly, when the steps were taken by them.
 - (ii) That, as when the rights of the father of the appellant herein and the respondents were already adjudicated by the Junior Civil Judge, at Ibrahimpatnam in O.S.No.21/1970, the suit filed by the respondents in O.S.No.2960/2006 for re-adjudication of the rights of the parties is not maintainable particularly when the judgment and decree, dated 31.03.1973, in O.S.No.21/1970 and confirmed in A.S.No.113/1973, is very much existing and the judgment and decree in A.S.No.122/2011, dated 21.07.2016 passed by the First appellate Court is liable to be set aside.

12. There cannot be any dispute that, under the amended Section 100 of 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 or 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 learned counsel for the appellants/defendants would contend that the findings of the lower appellate Court are perverse and contrary to law and facts. P.W.1 and P.W.2 (respondents/plaintiffs 1 and 2) have admitted the fact of filing of suit by the appellants/defendants in O.S.No.21/1970 on the file of District Munisiff at Ibrahimpatnam, R.R.District, for declaration of title and possession of their 3/4th share in the suit lands. The said suit was decreed. Challenging the same, the respondents/plaintiffs preferred an appeal in A.S.No.113 of 1973 on the file of Additional Chief Judge-cum-Special Judge for SPE and ACB Cases, Hyderabad, which was dismissed. Thereafter, the appellants/defendants initiated final

decree proceedings by filing I.A.No.231 of 1988. The learned District Munisiff at Ibrahimpatnam, R.R.District, appointed the M.C.Inspector, Manchal, as Advocate Commissioner, who divided the suit lands into four equal shares and submitted his report. Thereafter, final decree was passed. Engrossment of the final decree passed in O.S.No.21/1970 on the stamp paper is still pending. Since engrossment of final decree passed in O.S.No.21/1970 on stamp paper is still pending, the said final decree is not enforceable and the judgment and decree passed by both the Courts below are nullity. Though D.W.1 stated in the written statement and in his evidence that a memo was filed on 12.09.1996 by the plaintiffs in O.S.No.21/1970 duly enclosing the non-judicial stamp worth Rs.100/- for engrossing the final decree and the same is pending and the said fact was admitted by P.W.2 in his cross-examination, the Court below erred in holding that no Memo was filed for engrossing the final decree proceedings on stamp paper and no documents were filed to show that after passing of the order in I.A.No.231/1988 on 20.11.1991, Advocate Commissioner went to the suit lands and demarcated the same into four equal parts. The lower appellate Court failed to see that the appellants/defendants have got a share in the suit schedule property, pursuant to the judgment and decree, dated 31.03.1973, passed in O.S.No.21/1970 on the file of the District Munisiff at Ibrahimpatnam, R.R.District, and they filed I.A.No.231 of 1988 for appointment of Advocate Commissioner to divide the suit schedule property, in terms of the preliminary decree passed in O.S.No.21/1970. When the respondents/plaintiffs failed to prove the alleged compromise in between them and the appellants/defendants, the trial Court ought not to have decreed the

suit and lower appellate Court ought not to have confirmed the same. Both the Courts below erroneously held that the respondents/plaintiffs are entitled for the relief of declaration of title and permanent injunction. The judgment and decree under challenge is based on assumptions and presumptions and as such, it is liable to be set aside. The lower appellate Court was swayed away by the findings of the trial Court and erroneously dismissed the appeal suit without independently appreciating the evidence on record and ultimately prayed to allow the appeal by setting aside the order under challenge.

14. It is the case of the respondents/plaintiffs that the 1st plaintiff and his brother Beeraiah (father of the plaintiffs 2 and 3) have purchased a total extent of land admeasuring Acs.15.19 guntas in Survey Nos.104, 105, 106 and 107 situated at the then Ibrahimpatnam Taluq, under Ex.A.44, registered sale deed, dated 26.11.1965, from one Smt.Shahzadi Begum. They were also issued title deeds and Pattadar Pass Books in respect of the land held by them in terms of the oral partition said to have taken place between them. After the death of Beeraiah (father of plaintiffs 2 and 3), the land was mutated in the name of plaintiffs 2 and 3 under Ex.A.45-Original ROR Proceedings in File No.B/5231/04. To substantiate their continuous possession over plaint "A" and "B" schedule properties, the respondents/plaintiffs have filed Pahanies from the year 1964-65 onwards till the year 2002-03, under Ex.A.1 to A.35. Ex.A.1 is the certified copy of pahani for the year 1964-65, which reveals that the 1st plaintiff and his brother Late Beeraiah purchased the suit lands from Smt.Shahzadi Begum, W/o. Mr.Ali Ahmed, under a registered

title deed bearing No.1668/1965, dated 26.11.1965. From the year 1970-71 onwards, the names of the 1st plaintiff and his brother Late Beeraiah (father of plaintiffs 2 and 3) were are shown in pattedar and possessor columns, along with Mr.Syed Ali Ahmed, who is the shareholder of the remaining extent of land, along with the vendor of the plaintiffs, Smt.Shahzadi Begum. The names of the first plaintiff and his brother Late Beeraiah are continuously shown in the pahanies till the death of said Beeraiah and thereafter, the names of plaintiffs 2 and 3 (sons of Beeraiah) are substituted. The appellants/defendants, though admitted the purchase of the suit lands by the first plaintiff and his brother Beeraiah from Smt.Shahzadi Begum, contended that Smt.Shahzadi Begum has no right to sell the suit lands. It is pertinent to state that D.W.1, in his cross-examination, admitted the possession of the plaintiffs over the suit lands to the extent stated by them from the date of purchase under Ex.A.44-original sale deed dated 26.11.1965.

15. It is not in dispute that the appellants/defendants have filed O.S.No.21/1970 on the file of the District Munisiff at Ibrahimpatnam, R.R.District, against the respondents/plaintiffs and Smt.Shahzadi Begum claiming 3/4th share in the suit lands and for mesne profits and the said suit was decreed in their favour. The appeal filed by the respondents/plaintiffs in A.S.No.113 of 1973 on the file of Additional Chief Judge-cum-Special Judge for SPE and ACB Cases, Hyderabad, challenging the judgment and decree in O.S.No.21/1970, was dismissed. Thereafter, the appellants/defendants initiated final decree proceedings by filing I.A.No.231 of 1988, and the M.C. Inspector, Manchal, was appointed as Advocate Commissioner, who

divided the suit lands into four equal shares and submitted his report. The respondents/plaintiffs contended that there was an amicable settlement between the parties to the *lis* in O.S.No.21/1970 and pursuant to the said settlement, the respondents/plaintiffs have relinquished their rights in respect of land admeasuring Acs.1.28 guntas in Survey No.107 in favour of the appellants/defendants, who sold the said land to third parties by receiving substantial amounts. The evidence of P.W.1 and P.W.2 and the certified copies of pahanies from the year 1964-65 to 2002-03 marked as Ex.A.1 to A.35 clearly establishes that Smt.Shahzadi Begum, paternal aunt of the appellants/defendants, sold the suit lands in the year 1965 to the respondent/plaintiff No.1 and father of respondents/plaintiffs 2 and 3. As per the admission made by DW.1 in the cross-examination, there was a oral partition in between his father and paternal aunt Smt.Shahzadi Begum and his father gave half share to Shahzadi Begum in that oral partition on his own accord. Except filing O.S.No.21/1970 on the file of District Munisiff at Ibrahimpatnam, R.R.District, the appellants/defendants did not challenge the mutation of the names of the first plaintiff and his brother Beeraiah and after the death of Beeraiah, the names of his sons (plaintiffs 2 and 3), in the revenue records. D.W.1 also admitted in his evidence about the sale of suit land by Smt.Shahzadi Begum in favour of Plaintiff No.1 and his brother Beeraiah. The appellants/defendants except contending that Smt.Shahzadi Begum has no right to sell the suit lands in favour of the respondents/plaintiffs, could not substantiate as to why she has no such right to sell the property, when she got the same in an oral partition among father of plaintiffs and herself. There is no reason for the plaintiffs herein to abandon the preliminary

decree passed in O.S.No.21 of 1970 on 31.03.1973. Under these circumstances, the defence set up by the defendants that there was amicable settlement between the parties to the lis would prevail. So, no final proceedings had taken ultimately. There is ample evidence that having amicably settled the lis, the defendants sold away Ac.1-28 gts in Sy.No.107 to third parties. This alienation clearly substantiates the settlement of dispute as urged by the plaintiffs. The documents marked on behalf of the plaintiffs i.e., Ex.A.1 to A.54 would clearly establishes the purchase made by plaintiff No.1 and his brother Beeraiah and their names were continuously recorded in the revenue records as owners and possessors. Further, even after the death of Beeraiah, the names of Plaintiffs 2 and 3 were substituted in the revenue records in the place of their father Beeraiah. There is a long continuous possession of the plaintiffs over the suit schedule land from the date of purchase under Ex.A.44 from 26.11.1965. There is ample evidence placed on record by the plaintiffs to substantiate their title and possession over the suit land.

16. The questions sought to be raised in this appeal as substantial questions of law are pure questions of fact, which cannot be dealt with in this appeal filed under Section 100 of C.P.C. Where the lower appellate court, being the last Court of facts, is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error, either of law or of procedure, requiring interference in a Second Appeal. The findings of the lower appellate Court are not perverse. There is nothing to take a different view. The lower appellate Court has neither overlooked the admissible evidence nor acted upon inadmissible evidence. After careful examination of the

pleadings, evidence and the contentions, this Court finds that no question of law, much less substantial question of law, is involved in this Second Appeal. The appeal is devoid of merit and is liable to be dismissed.

17. In the result, the Second Appeal is dismissed *in limine*. No costs.

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

18th April, 2019
Bvv/Grk

Dr. SHAMEEM AKTHER, J



