

THE HON'BLE SRI JUSTICE SUBBA REDDY SATTI

SECOND APPEAL No.216 of 2020

JUDGMENT:

The above second appeal is filed by the defendant against the judgment and decree dated 27.02.2020 in A.S.No.41 of 2019 on the file of Senior Civil Judge, Razole, confirming the judgment and decree dated 31.08.2018 in O.S.No.71 of 2013 on the file of Junior Civil Judge, Razole.

2. For the sake of convenience and brevity, the parties herein are referred to as they are arrayed in the O.S.No.71 of 2013.

3. The plaintiffs, sisters, filed suit O.S.No.71 of 2013 to declare their title and for recovery of possession etc. In the plaint, it was contended *inter alia* that the plaint schedule property originally belonged to Chelliboina Somamma, mother of plaintiffs; that Somamma executed a registered gift settlement deed dated 10.09.2003 reserving life interest and vested remainder to the plaintiffs; that Somamma died on 28.12.2012 and hence the schedule property devolved upon the plaintiffs being vested remainder holders; that during the life time of Somamma, she allowed the defendant to cultivate plaint schedule property; that after death of Somamma, the plaintiffs demanded the defendant to deliver the plaint schedule property and at that point of time, defendant pleaded that he purchased the schedule property from Somamma; that defendant might have obtained the document by misrepresentation and taking advantage of innocence of

Somalamma and the said document does not bind the plaintiffs; that all the efforts made by the plaintiffs to take delivery went futile; that the plaintiffs got issued a legal notice dated 22.02.2013, however defendant refused to receive the same and hence, filed the suit.

4. Defendant filed written statement and contended *inter alia* that he is the bonafide purchaser of plaint schedule property under a registered sale deed dated 26.03.2011; that by virtue of sale deed, he came into possession of the property; that plaintiffs being cousins of defendant are aware of the sale deed; that plaintiffs obtained document dated 10.09.2003 by playing undue influence with a promise to maintain their mother till her last breath; that since the plaintiffs failed to keep up the promise, deceased Somalamma revoked the gift deed through a registered revocation deed dated 08.02.2011 and eventually prayed the Court to dismissed the suit.

5. During the trial, 1st plaintiff examined herself as P.W.1 and got examined P.Ws.2 and 3. Exs.A-1 to A-4 were marked. On behalf of defendant, defendant examined himself as D.W.1, got examined D.W.2 and Exs.B-1 & B-2 were marked.

6. Trial Court by judgment and decree dated 31.08.2018 decreed the suit with costs and declared the title of the plaintiffs and directed the defendant to deliver vacant possession of property within three months, failing which the plaintiffs are

also granted liberty to get the property delivered through process of Court.

7. Aggrieved by the said judgment and decree, appellant/defendant filed A.S.No.41 of 2019. First Appellate Court being final factfinding Court *vide* judgment dated 27.02.2020, dismissed the appeal confirming the judgment and decree of the trial Court. Aggrieved by the said judgment and decree, the present second appeal is filed.

8. Heard Sri Tata Singaiah Goud, learned counsel for appellant.

9. Learned counsel for the appellant would contend that the registered gift settlement deed dated 10.09.2003 was revoked by the executant by revocation deed dated 10.02.2011 and hence, the plaintiffs cannot maintain the suit for declaration. He would further contend that the registered gift settlement deed dated 10.09.2003 is a conditional gift and since the respondents/ plaintiffs failed to comply with the condition, the deceased Somamma revoked the gift by revocation deed dated 10.02.2011 and the same was registered *vide* document No.351 of 2011. He would also contend that the appellant/ defendant is a *bonafide* purchaser of the property and hence, the suit filed by the plaintiffs is liable to be dismissed. It is further contended that delivery of property is *sine qua non* for valid gift deed under Section 123 of the Transfer of Property Act, 1882 (for short "**TP**

Act”). Thus, it was prayed the Court to set allow the second appeal by setting aside the judgements of Courts below.

10. The following are substantial questions of law arise for consideration in the second appeal:

- 1) Whether delivery of property is *sine qua non* under Sec 123 of T.P. Act for a valid gift deed?**
- 2) Whether a registered gift deed can be revoked/ cancelled without the consent of donee? If so, such unilateral cancellation deed binds the donee?**
- 3) Whether Ex.A-1 Gift Deed is a conditional Gift Deed and non-consideration of Ex.A-1 vitiated the Judgements of the Courts below?**
- 4) Whether the defendant is a bonafide purchaser?**

11. Undisputed facts are that Smt.Somalamma executed a registered gift deed in favour of plaintiffs on 10.09.2003 reserving life interest to herself and vested remainder to the donee under Ex.A-1. The gift deed was revoked by way of Ex.B-2 registered revocation deed dated 08.02.2011. Later, defendant purchased the property under Ex.B-1 registered sale deed dated 26.03.2011.

12. Learned counsel for the appellant contended that delivery of property is *sine qua non* for valid gift deed under Sec 123 of TP Act. Since the property is not delivered, though the nomenclature document Ex.A-1 is described as gift deed, it is not a gift deed and hence unilateral cancellation of same is valid.

13. Section 122 of the Transfer of Property Act, 1882 reads thus:

122. "**Gift**" defined.—"**Gift**" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Section 123 of the Transfer of Property Act, 1882 reads thus:

123. Transfer how effected.— For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

14. The Hon'ble Apex Court in **Renikuntla Rajamma Vs. K.Sarwanamma**¹, held that "transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of the TP Act. It was further observed that the recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use

¹ (2014) 9 SCC 445

the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor.

15. In **Nakka Parthasarathy Vs. Nakka Krishnaveni and Ors²**, the composite High Court of Andhra Pradesh held that when once the gift is voluntarily made without there being any coercion or undue influence the acceptance of the gift by the donee would be complete even though the deed of gift is not delivered to the donee and the gift property continues to be in the donor's possession.

16. In view of ratio laid down in **Rajamma's** case and **Nakka Parthasarathy's** case, the contention of the learned counsel for the appellant that delivery of property is not *sine qua non* for a valid gift deed is without merit and falls to ground. Under Ex.A-1, life interest was retained by donor and vested remainder to the donees. Pleadings and evidence on record manifest that donor voluntarily executed the gift deed without undue influence or coercion and the same was accepted by plaintiffs.

17. According to learned counsel for the appellant, gift under Ex.A-1 is conditional one and since the respondents/ plaintiffs failed to comply with the said condition, it was revoked by the executant. A perusal of gift settlement deed dated 10.09.2003 does not indicate any such condition imposed by the donor. The recitals in the document are to the effect that respondents are the daughters of executants and out of love and affection,

² 2013 (5) ALD 711

since the executant promised earlier to deliver some property in their favour, she executed the document out of free will and volition. Thus, the contention of learned counsel for appellant that Ex.A-1 is a conditional gift is not true and correct and hence the same was rejected.

18. Ex.B-2, Revocation deed dated 08.02.2011 was executed nearly after 7½ years after execution of Ex.A-1 registered Gift settlement deed. A perusal of recitals in revocation/cancellation deed shows that it was cancelled unilaterally without notice to donees. Immediately after cancellation i.e. 1½ months after cancellation deed, sale deed was executed in favour of appellant/defendant. According to the appellant, appellant and respondents are cousins and the appellant is aware of the execution of registered gift settlement deed in favour of respondents. A careful perusal of the material on record shows that appellant/defendant is aware of execution of gift deed in favour of plaintiffs.

19. Cancellation of gift deed unilaterally by donor is contrary to the Rules under the Registration Act. Thus, cancellation does not affect the right of the respondents/plaintiffs.

20. In **Kolli Rajesh Chowdary Vs. State of Andhra Pradesh**³, while dealing with the aspect whether registration of deed of cancellation unilaterally is violative of principles of natural justice and also contrary to the Rule 26(i)(k)(i), Hon'ble Court held that deed of cancellation/deed of revocation is declared as

³ 2019(3)ALD229

null and void and it is of no effect. There cannot be a unilateral cancellation of registered document and that a cancellation deed cancelling a registered document can be registered only after the same is cancelled by a competent Civil Court, after notice to the parties concerned, and that in the absence of any declaration by a competent Court or notice to parties, the execution of deed of cancellation as well as its registration are wholly void and nonest.

21. In view of ratio laid down in the above decision, revocation deed executed by late Somalamma after 7½ years of execution of gift settlement deed is not valid in the eye of law. As a consequence, the appellant will not get better title under Ex.B-1 sale deed. The latin maxim *nemo dat quad non habit* squarely apply to the facts of the case, means No person can convey better title than what he has. Vendor of the appellant upon execution of Ex A-1 lost title to the property, except enjoyment during her lifetime. Cancellation of document is not valid and it being non-est, it will not inure to the benefit of appellant/defendant.

22. Whether the plaintiffs are entitled for declaration of title over the plaint schedule property?

23. To prove Ex.A-1 registered gift settlement deed, the 1st plaintiff examined herself as P.W.1 and got examined the attestors of Ex.A-1 as P.Ws.2 and 3. The attestors P.Ws.2 and 3 categorically deposed that they were present at the time of

execution of Ex.A-1 gift deed and after completion of execution of Ex.A-1, both of them signed on it. Since the execution of Ex.A-1 is duly proved, this Court is of the opinion that Ex.A-1 being gift/settlement deed reserving life interest with the mother and vested remainder to daughter, after the death of mother, the respondents/plaintiffs are being vested remind holder became owners of the property. Since the appellant/defendant disputed the title of the plaintiffs, they were constrained to file the suit for declaration and proved due execution of Ex.A-1. The evidence on record is unimpeachable and hence plaintiffs prove their title to the property and hence they are entitled for declaration. Thus, this Court holds that plaintiffs are owners of plaint schedule property.

24. It is also pertinent to mention here that appellant/defendant pleaded that respondents/plaintiffs obtained Ex.A-1 by playing undue influence with their mother with a promise to maintain her till her last breath. In fact, a perusal of Ex.A-1, no recital was incorporated in Ex.A-1 that the respondents/plaintiffs have to take care of their mother. In fact, the recitals are to the effect that out of love and affection, the document was executed. Apart from that Somamma also blessed with three sons and they are solvent persons. According to D.W.1, none of the sons of Somamma come forward to purchase the property after execution of deed of revocation. He further deposed that he did not enquire about the encumbrances over the property at the time of purchase. Any prudent purchaser normally enquires

before purchase of the property. He further deposed that he knew about execution of Ex.A-1 by his vendor in favour of the plaintiffs. However, he deposed that his vendor informed two months prior to bargain about the cancellation of gift deed executed in favour of plaintiffs. The deposition of appellant makes the thing more than discernable that the appellant is aware of execution of gift deed in favour respondents herein. Thus, in the opinion of this Court the appellant/defendant cannot be termed as *bonafide* purchaser.

25. It is the case of plaintiffs/respondents that Somamma continued to be in possession of property during her lifetime and after death of Somamma, the appellant/defendant came into possession of the property. The appellant/defendant contended that he came into possession of the property after execution of Ex.B-1 sale deed. Since the title of respondents/plaintiffs is declared, the appellant/defendant is not entitled to continue in possession of the property. Possession of appellant over the schedule property is not legal. Since this Court came to conclusion that respondent/plaintiffs are owners of the schedule property, they are entitled to recover the property from appellant/defendant.

26. Whether this Court can interfere with concurrent findings of the facts recorded by Courts below under Section 100 of CPC.

27. Dealing with the scope of Section 100 of CPC, the Hon'ble Apex Court in **Kulwant Kaur and Ors vs. Gurdial Singh Mann (Dead) By Lrs. and Ors.**⁴ held as follows:

“Section 100 of CPC introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to say that the Code of Civil Procedure Amendment Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact even if erroneous will generally not be disturbed but where it is found that the findings stands vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to dealt with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the Concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication what is required is a categorical finding on the part of the High Court as to perversity.”

28. The Hon'ble Apex Court in **Yadavarao Dajiba Shrawane Vs. Nanilal Harakchand Shah (Dead) and Ors.**⁵ held thus:

“From the discussions in the judgment it is clear that the High Court has based its findings on the documentary evidence placed on record and statements made by some witnesses which can be construed as admissions or conclusions. The position is well settled that when the judgment of the final Court of fact is based on mis-interpretation of documentary evidence or on consideration of inadmissible evidence or ignoring

⁴ (2001) 4 SCC 262

⁵ 2002 (6) SCC 404

material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades the records are voluminous. The High Court as it appears from the judgment has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevance.”

29. In **Leela Soni vs. Rajesh Goyal**⁶, the Hon’ble Apex Court held thus:

“21. It will be apt to refer to Section 103 of C.P.C. which enables the High Court to determine the issues of fact:

"103. Power of High Court to determine issue 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."

22. The section, noted above, authorizes the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations : (1) when that issue has not been determined both by the trial court as well as the Lower Appellate Court or by the Lower Appellate Court; or (2) when both the trial court as well as the Appellate Court or the Lower

⁶ 2001 (7) SCC 494

Appellate Court has wrongly determined any issue on a substantial question of law which can properly be the subject matter of second appeal under Section 100 of C.P.C.”

30. The Hon’ble Apex Court in **Ishwar Dass Jain (Dead) Thr. Lrs Vs. Sohan Lal (Dead) By Lrs**⁷, held thus:

“It is essential for the High Court to formulate a substantial question of law under section 100 CPC, after the 1976 amendment and it is not permissible to reverse the judgment of the first appellate Court without doing so.”

31. The Hon’ble Apex Court in **Hero Vinoth Vs. Seshammal**⁸, held thus:

“19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence.

It was furthermore held:

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision

⁷ 2000 (1) SCC 434

⁸ AIR 2009 SC 1481

of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involved in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (*See Santosh Hazari v. Purushottam Tiwari MANU/SC/0091/2001*).

24. The principles relating to Section 100 CPC, relevant for this case, may be summerized thus:-

(i) ...

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law."

32. In the light of the law laid down by the Hon'ble Apex Court on the scope of interference by the High Court in second appeal, this Court while exercising jurisdiction under Section 100 of CPC has to confine to the substantial question of law involved in the appeal. This Court cannot re-appreciate the evidence and

interfere with the concurrent findings of the Court below where the Courts below have exercised the discretion judicially. Further the existence of substantial question of law is the *sine qua non* for the exercise of jurisdiction. This Court cannot substantiate its own opinion unless the findings of the Court are manifestly perverse and contrary to the evidence on record.

33. The findings of the fact recorded by the Courts below are based on oral and documentary evidence on record. This Court may not substitute its opinion when Courts below recorded findings basing on evidence and documents. Thus, this Court is of view of that no questions of law muchless substantial questions of law involved in the above appeal. Hence, the appeal is liable to be dismissed, however, without costs.

34. Accordingly, the second appeal is dismissed at admission stage. No order as to costs.

As a sequel, all the pending miscellaneous applications shall stand closed.

SUBBA REDDY SATTI, J

13th April, 2022

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THE HON'BLE SRI JUSTICE SUBBA REDDY SATTI

SECOND APPEAL No.216 of 2020

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