

THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI

SECOND APPEAL No.162 OF 2003

JUDGMENT:

This Second Appeal is filed by the plaintiff challenging the judgment and decree dated 21.10.2002 passed in A.S.No.461 of 2000 on the file of the learned IX Additional Chief Judge, City Civil Court, Hyderabad, confirming the judgment and decree dated 30.08.2000 passed in O.S.No.115 of 1989 on the file of the learned I Senior Civil Judge, City Civil Court at Hyderabad. Thus, the present Second Appeal is filed against the concurrent findings of trial Court as well as first Appellate Court.

2. For the sake of convenience, the parties hereinafter are referred to as they are arrayed before the trial Court.

3. The brief facts of the case, which necessitated the appellant/plaintiff to file the present appeal, are as follows:

a) The plaintiff filed O.S.No.115 of 1989 against defendant Nos.1 to 6 for specific performance of agreement of sale. The brief averments of the plaint are that the plaintiff entered into an agreement of sale with defendants in respect of suit schedule property on 16.05.1980 for consideration of Rs.9,000/- and paid Rs.3,000/- as advance. Though the plaintiff was ready and willing to perform his part of contract by paying remaining consideration, the defendants were dragging the matter, as such, the plaintiff got issued legal

notice on 21.09.1981 to which the defendants requested for time. On 13.08.1983 the defendants received Rs.500/- as further earnest money and as the property was offered for sale was for the benefit and welfare of the minor's interest. On 19.11.1986 due to mediation, defendants agreed to sell the property on enhanced sale consideration of Rs.40,000/- and received Rs.1,000/- by 10.02.1987. As the defendants failed to execute sale deed, the plaintiff got issued legal notice dated 10.02.1987 to executed the sale deed in pursuance of second agreement, dated 19.01.19865 but there was no response. The defendants in all received Rs.11,900/- as part consideration despite written undertaking to withdraw the eviction petition by playing fraud. Defendants got *ex parte* eviction orders and executed terms on 16.12.1987 and got issued legal notice dated 22.11.1987 but they replied it denying to execute sale deed blaming the defendant No.6. Hence, the suit.

b) In reply to the plaint averments, the defendant Nos.1 to 3 filed written statement, which was adopted by defendant No.4. The brief averments of the written statement filed by the defendant Nos.1 to 3 is that they denied execution of agreement of sale dated 16.05.1980 and so also second agreement dated 19.01.1986 and receipt of Rs.11,900/- as part of sale consideration. The alleged sale transaction was not meant for benefit and well being of the minors. The entire suit schedule property is absolute property of defendant Nos.1 to 5, who never entered into any contract or agreement with the plaintiff, much less under the alleged agreements. The agreements if any entered with defendant No.6 is not binding on defendant Nos.1 to 5, who are minors as on the date of

alleged agreement dated 16.05.1980. Defendant No.6 has no right or interest over the property and that he is not entitled to minors' property though he is their father. Defendant No.6 addicted to bad vices leading a wayward life. The alleged agreement dated 16.05.1980 was brought into existence in collusion with defendant No.6. The plaintiff was the tenant of the suit schedule property paying rent of Rs.200/- per month and committed default in payment of rents. Hence, defendant Nos.1 to 5 filed R.C.No.474/1987 and obtained eviction orders and got evicted the plaintiff through process of law and since then defendant Nos.1 to 5 holding the suit schedule property in their own right. Hence, the defendants prayed to dismiss the suit.

c) Based on the pleadings of both sides, the trial Court framed the following issues:

1) Whether the plaintiff is entitled for the specific performance of the suit agreement of sale and for delivery of possession?

2) To What relief?

d) During the court of trial, the GPA holder of plaintiff i.e., his son got examined himself as PW1 and Exs.A1 to A23 were marked. On behalf of defendants, the first defendant was examined as DW1 and got marked Ex.B1.

e) The trial Court after considering the rival contentions, dismissed the suit. Aggrieved by the judgment and decree, the plaintiff filed the appeal before the learned IX Additional Chief Judge, City Civil Court, Hyderabad vide

A.S.No.461 of 2000, which was also dismissed on 21.10.2002. Aggrieved by the concurrent finding given by the trial Court as well as first appellate Court, the plaintiff filed the present appeal to set aside the impugned judgments.

4. Heard both sides and perused the record including the grounds of appeal.

5. The defendant Nos.1 and 3 have raised the following two substantial questions of law in this appeal:

“A) Whether a natural guardian has no right to alienate the property of a mohammadan minor for the benefit of minor?

B) Whether the action of the natural guardian alienating the minor mohammadan minor is not binding on him?

C) Whether the natural guardian of mohammadan minor can alienate the property for the welfare of the minor?

6. As can be seen from the record, the defendant No.6 is the father of defendant Nos.1 to 5, who are minors. Thus, there is no dispute with regard to the relationship between the defendants. The plaintiff alleged to have come into contact with the defendants as he is the tenant of the defendants in the suit schedule property. There is also no dispute that defendant Nos.1 to 5 are the absolute owners of the suit schedule property by virtue of Gift Settlement Deed dated 31.10.1977 under Ex.B1 executed by grandfather of the defendant Nos.1 to 5. There is also no dispute that the plaintiff is residing in the suit schedule property in the capacity of tenant.

7. The contention of the plaintiff is that defendant Nos.1 to 5 being represented by their natural guardian/father i.e., defendant No.6 have entered

into an agreement of sale under Ex.A2 dated 16.05.1980 with the plaintiff to alienate the suit schedule property. On the other hand, the defendants contend that they have not executed any agreement, much less, the agreement of sale under Ex.A2 and even if any agreement was executed by defendant No.6 on their behalf is not binding on them. The plaintiff got examined his GPA i.e., his own son as PW1 and also one of the attestors of Ex.A2 as PW2. From the above assertion on behalf of defendants coupled with oral evidence of PWs 1 and 2, it can be held that Ex.A2 was alleged to have been executed by defendant No.6 on behalf of defendant Nos.1 to 5 in favour of plaintiff in respect of suit schedule property.

8. Now the crucial question that needs to be answered is whether defendant No.6, who is the father and natural guardian of defendant Nos.1 to 5, has right to alienate the suit schedule property in favour of the plaintiff, as the three substantial questions of law framed by the plaintiff in this second appeal are connected with the above aspect. In **Meethiyan Sidhiqu v. Muhammed Kunju Pareeth Kutty and others** the Honourable Supreme court observed as under:

“Father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the court. When a sale is to be made on behalf of the minor the necessary ingredients are that the sale must be for the benefit of the estate of minor and, therefore, the competent person entitled to alienate the minor's property would be, subject to the above condition, either the natural guardian or the property guardian appointed by the Court.”

9. In view of the principle laid down in the above said decision, it is clear that the father of a minor under Mohammedan Law can alienate the suit schedule property if the said alienation is for the benefit of the estate of minor. Thus, it is to be ascertained as to whether execution of Ex.A2 i.e., the attempt of defendant No.6 in alienating the suit schedule property in favour of plaintiff is for the benefit of estate of defendant Nos.1 to 5, who are minor children of defendant No.6. It is to be seen that the defendant No.6, who examined Ex.A2 did not come forward to contest this case and thus, he was set *ex parte*. The first defendant, who is not a minor by the date of execution of Ex.A2, was examined as DW1. The defendants in their written statement categorically stated that their father i.e., defendant No.6 was addicted to bad vices and leading a wayward life. As observed by the trial Court as well as first appellate Court, PW1 did not depose in his chief examination affidavit initially that the suit schedule property was intended to be alienated for the benefit of minors and it is only when PW1 was recalled, he deposed in the subsequent chief examination that the suit schedule property was intended to be alienated for the benefit of minors. But this evidence of PW1 is appearing to be invented and improved for the purpose of succeeding in the suit as an after thought. Moreover, the learned first appellate Court observed in the impugned judgment that a cursory reading of Ex.A2 does not disclose that the property is intended to be sold for the benefit of minors. The trial Court at paragraph No.19 of the judgment observed that in the notice copies which are marked as Exs.A4, A15 and A16, in the plaint or in the evidence of PW1, no particulars about

necessity or benefit of minor defendant Nos.2 to 5 are furnished. A suggestion was given to DW1 that property was agreed to be sold on the eve of marriage of their sister and the same was denied. However, even if the said suggestion was admitted by DW1, the purpose of alienating the property would not be for the benefit of estate of minor defendant Nos.2 to 5. It appears that the defendant No.1, who is addicted to bad vices, tried to alienate the suit schedule property belonging to his minor children and perhaps that might be the reason as to why he did not come forward to contest this suit.

10. From the above discussion, it is crystal clear that the plaintiff failed to establish that the defendant No.1 executed Ex.A2 agreement of sale in respect of suit schedule property for the benefit of his minor children. Since the plaintiff failed to establish that Ex.A2 agreement of sale in respect of suit schedule property was executed for the benefit of his minor children, Ex.A2 is not binding on defendant Nos.1 to 5 and thereby plaintiff cannot enforce Ex.A2.

11. The other lacunae in the case of the plaintiff is that though the plaintiff stated in the plaint that on 19.11.1986 due to mediation defendants agreed to sell the same property on enhanced sale consideration of Rs.40,000/- and received Rs.1,000/- on 10.02.1987, no documentary evidence is adduced to that extent. Even the trial court observed at paragraph No.21 of the judgment that the alleged second agreement dated 19.01.1986 under which sale consideration was enhanced to Rs.40,000/- is not produced before the Court.

Further, as on the date of execution of Ex.A2, DW1 was a major but his signature was not obtained on Ex.A2. Since the suit schedule property exclusively belongs to defendant Nos.1 to 5, the plaintiff ought to have obtained the signature of defendant No.1 on Ex.A2. It appears that time was not the essence of the contract and perhaps that is the reason why the plaintiff alleged to have been paying part of sale consideration till 15.12.1987 though the suit agreement of sale under Ex.A2 was executed on 16.05.1980. In situations where there is no time period specified for the performance of the contract and the promisor has to perform the contract without any request by the promisee, in such a case the promisor must perform the contract within a 'reasonable time'. Now the question is what is reasonable time? A 'reasonable time' is decided after taking into account all the circumstances of the case at hand. But whether that reasonable time should be shorter or longer also depends on the facts and circumstances of the case. In the case on hand, by the date of Ex.A2 the defendant Nos.2 to 5 were minors and by the date of last payment i.e., on 02.12.1995 all the defendants have become majors. Thus, there are changed facts and circumstances during the period of these 15 years. As per Ex.A19 the plaintiff alleged to have continued to pay consideration even during the pendency of the suit. It is to be seen that mere extension of time for deposit of balance sale consideration will not absolve the plaintiffs of obligation to prove readiness and willingness to perform their part in an agreement for sale. The grant of extension of time cannot *ipso facto* be construed as otherwise demonstrating readiness and willingness on part of the plaintiff. In view of the

above facts and circumstances, this Court is of the opinion that the plaintiff is not ready and willing to perform his part of contract.

12. It is to be observed that by the date of filing of the suit, already there is a pending case vide R.C.No.474 of 1987 filed by the defendant No.6 representing defendant Nos.1 to 5 for eviction of the plaintiff from the suit schedule property. It is the contention of the plaintiff that despite written undertaking to withdraw the eviction petition, by playing fraud the defendants got *exparte* eviction order and executed the same on 16.12.1987. It is not the case of the plaintiff that he is not aware of the eviction proceedings pending against him in respect of suit schedule property. There is no explanation on behalf of the plaintiff as to why he failed to contest the said eviction proceedings. The plaintiff failed to even produce the alleged written undertaking alleged to have been executed by the defendants to withdraw the eviction petition. The plaintiff relied upon Exs.A3, A5 to A14 and Ex.A19 to prove that defendants have received Rs.11,900/- towards advance sale consideration. It is pertinent to note that Ex.A19 receipt for Rs.1,000/- pertains to 02.12.1995. The eviction proceedings in R.C.No.474 of 1987 were executed on 16.12.1987 and five years thereafter the plaintiff alleged to have paid Rs.1,000/- to the defendants on 02.12.1995. A man of ordinary prudence would not expect that when eviction proceedings filed by the defendants are pending and subsequently decided against him, they would come forward to enforce an agreement of sale in respect of the same property.

13. The learned trial Court in the paragraph No.22 of the judgment observed that Exs.A6, A8, A9 to A14, A17 to A19 do show that defendant No.6 has signed in his personal capacity but not as guardian of the defendant Nos.2 to 5 and that EXs.A8 to A12 and A19 receipts to not disclose the purpose or towards what account the said payments were made. It is to be noted that the defendants have denied the signature of defendant No.6 on the receipts relied upon by the plaintiff and even then the plaintiff did not choose to prove that the signature on the said receipts bears the signature of defendant No.6. Even for the sake of arguments, if the signatures on the receipts belong to defendant No.6, there is no ample evidence to establish that the said consideration alleged to have been received by defendant No.6 from the plaintiff, was spent for the welfare, maintenance and benefit of defendant Nos.2 to 5, who are minors. It was further observed that Exs.A13 and A14 discloses that the payments were made towards old account and arrears of rent respectively. Thus, there is considerable ambiguity, as to whether the alleged receipts produced by the plaintiff, especially Ex.A19, in support of his contention that he paid consideration to the defendants, are pertaining to the rent under tenancy or towards part of sale consideration in pursuance of Ex.A2.

14. Thus, viewed from any angle, the plaintiff failed to establish that he is entitled for the relief of specific performance. Admittedly, this Second Appeal is filed against the concurrent findings of trial Court as well as first Appellate Court. In ***Narayanan Rajendran and another v. Lekshmy Sarojini and others*** the Honourable Supreme Court observed as under:

“24. Similarly, before amendment in 1976, this Court also had an occasion to examine the scope of Section 100 C.P.C. In *Deity Pattabhiramaswamy v. S. Hanymayya and Others*, the High Court of Madras set aside the findings of the District Judge, Guntur, while deciding the second appeal. This Court observed that notwithstanding the clear and authoritative pronouncement of the Privy Council on the limits and the scope of the High Court’s jurisdiction under Section 100, Civil Procedure Code, “some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the Judgment of the High Court which had no jurisdiction to interfere in second appeal with the findings of fact arrived at by the first appellate Court based upon an appreciation of the relevant evidence.

30. In *Bholaram v. Amirchand* a three-Judge Bench of this court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.

31. In *Kshitish Chandra Purkait v. Santosh Kumar Purkait*, a three judge Bench of this Court held: (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.

32. This court had occasion to determine the same issue in *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor*. The court stated that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of the such duly framed substantial questions of law.”

15. It is also well settled principle by a catena of decisions of the Honourable Apex Court that in the Second Appeal filed under Section 100 of the Code of Civil Procedure this Court cannot interfere with the concurrent findings arrived at by the learned trial Court as well as learned first Appellate Court, which are based on proper appreciation of the oral and documentary evidence on record.

Further, in **Gurdev Kaur v. Kaki**, the Apex Court held that the High Court sitting in Second Appeal cannot examine the evidence once again as a third trial Court and the power under Section 100 of the Code of Civil Procedure is very limited and it can be exercised only where a substantial question of law is raised and fell for consideration.

16. In **Suresh Lataruji Ramteke v. SAU. Sumanbai Pandurang Petkar and others** the Honourable Apex Court observed that jurisdiction under second appeal not to be exercised merely because an alternate view is possible. It was observed in **Hamida v. Mohd. Khalil** that while exercising jurisdiction under Section 100 CPC, cannot reverse the findings of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court another view was possible. This position was reiterated by **Avtar Singh and Others v. Bimla Devi and others**. However, there are certain exceptions to the rule as pointed out by the Apex Court in **Nazir Mohamed v. J. Kamala** as under:

“33.4. The general rule is, that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well recognised exceptions are where: (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

17. In a second appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in **V. Ramachandra Ayyar v. Ramalingam**

Chettiar [V. Ramachandra Ayyar v. Ramalingam Chettiar.

18. Having considered the entire material available on record, rival contentions and also the findings recorded by the learned trial Court as well as the learned first Appellate Court, this Court finds no ground or reason warranting interference with the said concurrent findings recorded by both the Courts in an appeal filed under Section of the Code of Civil Procedure. Moreover, the grounds raised by appellant are factual in nature. Hence, this Second Appeal deserves to be dismissed as devoid of merits.

19. In the result, this second appeal is dismissed. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

Date: 21.06.2024

Note: LR copy to be marked
B/o. AS

JUSTICE M.G. PRIYADARSINI