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E. MAHBOOB SAHĒB

v.

N. SUBBARAYAN CHOWDHARY & ORS.

December 18, 1981

B

[V. BALAKRISHNA ERADI AND R.B. MISRA, JJ.]

Second Appeal—When no question of law whatever was agitated before the High Court, the High Court cannot interfere, in second appeal, with the finding of fact entered by the District Judge in first appeal—Civil Procedure Code, section 100, scope of.

C

In the insolvency proceedings half the property of one Allabaksh was sold by the Official Receiver to Moola Narayanaswamy in 1939 and the other half to Narasimhulu in 1945. Subsequently Narasimhulu transferred his interest in the property in favour of the daughter of Moola Narayanaswamy for a consideration of Rs. 4,000 under Exh. A-1 dated May 10, 1948.

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One Nagappa obtained a simple money decree against Moola Narayanaswamy in O.S. 26/1952 on the file of Sub-Judge Anantapur and in execution thereof, he attached and brought to sale in court auction two houses including the house purchased by the daughter of Moola Narayanaswamy. In the said court auction, Nagappa purchased the two houses for a sum of Rs. 2050 and in enforcement of the sale certificate, he obtained delivery of possession of the two houses. Since the application No. E.A. 90/58 filed by the daughter of Narayanaswamy in the Executing Court under Order XXI, Rule 100 C.P.C. asserting her independent right was dismissed, she filed a suit to set aside the said summary order and for recovery of possession of the property which is described in her plaint 'C' Schedule as falling to her share arising out of a partition effected in 1952.

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During the pendency of the suit, Nagappa sold the northern half of the property in favour of Mahboob Saheb, the appellant herein, on March 21, 1961 and later, the southern half of the property to N. Subbarayan Chowdhary, respondent No. 1 herein, on June 19, 1961.

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Nagappa contested the suit on the ground that Narasimhulu was all along acting as a benamidar for Narayanaswamy, when he purchased the half share in court auction in 1944-45 and again transferred the said share in favour of Narayanaswamy's daughter benami for Narayanaswamy and as such the sale by the court in his favour was valid.

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The Trial Court disbelieved the plea of benami taken by Nagappa, found that the plaintiff was the owner of a half share in her own right, and that there was no partition by metes and bounds of the entire property brought to sale, by court auction. The Trial Court, therefore, set aside the summary order passed in E.A. 90/58 in E.P. 7/56 in O.S. 26/52 of the Sub-Judge, Anantapur and a preliminary decree for partition of the 'B' Scheduled property by metes and bounds into the equal shares and for allotment and delivery of one such share to the plaintiff.

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Nagappa's appeal before the District Court (A.S. 173/66) was dismissed and the objections of the plaintiff were allowed, and accepting the plea of partition the District Court granted a decree for recovery of possession of the plaint 'C' Schedule.

In further second appeals, the High Court dismissed Nagappa's appeal on the plea of benami but reversed the findings of the District Court as to the question of partition pleaded by the plaintiff. Allowing the appeal of the 8th defendant (Respondent No. 1 herein) the High Court held that it was a case where a partition of the property should be effected between the plaintiff on the one hand and the appellant and respondent No. 1 herein on the other. Hence the appeal by special leave by 7th defendant Mahboob Saheb.

Allowing the appeal and leaving the question relating to the rights *inter se* as between appellant and respondent No. 1 open, the Court

HELD : 1. It was not open to the High Court to reappreciate the evidence and substitute its own conclusions in place of those entered by the lower court, while exercising the jurisdiction conferred by section 100 C.P.C. The finding entered by the Additional District Judge that a partition had taken place between the plaintiff and the other legal heirs of Narayanaswamy in 1952, and as a result thereof the southern portion of the 'B' Schedule property (plaint 'C' Schedule property) had been allotted to the plaintiff's share was based on a detailed consideration of the legal evidence available on the record. The relevant portions of the evidence having a bearing on the plea of partition make it clear that the finding entered by the Additional District Judge cannot be said to be unreasonable or perverse. No question of law whatever was agitated before the High Court. In the circumstances, there was no justification for the High Court to interfere with the finding of fact entered by the Additional District Judge. [244F; E, G-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 854 of 1971.

Appeal by Special leave from the judgment and order dated the 6th November, 1970 of the Andhra Pradesh High Court in S.A. Nos. 719 and 826 of 1967.

T. S. Krishnamoorti Iyer, Mrs. J. Ramachandran and K. Ram Kumar for the Appellant.

P. Govindan Nair, and G. Narasimhulu for Respondent No. 1.

A. V. Rangam for Respondents 2(c) & (e).

B. Parthasarathi for Respondent No. 3.

The Judgment of the Court was delivered by

A BALAKRISHNA ERADI, J. This appeal by special leave is directed against a judgment of the High Court of Andhra Pradesh in two connected Second Appeals—Second Appeal Nos. 719 and 826 of 1967. Those Second Appeals arose out of a suit filed by the appellant herein for setting aside the summary order passed in E.A. No. 90 of 1958 in E.P. 7 of 1956 in O.S. No. 26 of 1952 on the file of the Sub-Court, Anantapur, and for recovery of possession of plaintiff 'C' Schedule property or, in the alternative, for partition and recovery of one-half of the property described in the plaintiff 'B' Schedule. The plaintiff 'C' Schedule plot is a southern portion of the property described in the 'B' Schedule.

C The plaintiff 'B' Schedule property consisting of 1 acre and 90 cents of land together with two houses situated therein belonged to one Allabaksh. He was adjudged an insolvent and the Official Receiver sold a half right in the said property to one Moola Narayanaswamy under Exh. A-3 dated December 6, 1939. The remaining half interest in the property belonging to Allabaksh was also subsequently brought to sale by the Official Receiver and one J. Narasimhulu became the purchaser. Exh. A-27 dated January 5, 1945 is the sale certificate issued in his favour. The resultant position was that the 'B' Schedule property came to be owned in undivided half shares by Moola Narayanaswamy and J. Narasimhulu. Subsequently, Narasimhulu transferred his interest in the property in favour of the plaintiff for a consideration of Rs. 4,000 under Exh. A-1 dated May 10, 1948. The plaintiff is the daughter of Moola Narayanaswamy.

F One Nagappa (first defendant) obtained a simple money decree against Moola Narayanaswamy in O.S. 26/52 on the file of the Subordinate Judge's Court, Anantapur, and in execution thereof, he attached and brought to sale in court auction the two houses described in the plaintiff 'B' Schedule property. In the said court auction, the first defendant purchased the plaintiff 'B' Schedule property for Rs. 2,050 and in enforcement of the sale certificate, he obtained delivery of possession of the two houses. Since the judgment-debtor, Narayanaswamy, was entitled to only a half interest in the property, the plaintiff filed E.A. No. 90/58 in the Executing Court under Order 21, Rule 100 C.P.C., asserting her independent rights to the southern half of the property and praying for redelivery of the said portion in her favour. That petition was dismissed by the Sub-Court, Anantapur, by order dated March 11, 1960, and hence, the plaintiff brought the suit out of which this appeal has

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arisen for setting aside the said summary order and for recovery of possession of the southern portion of the property which is described in the plaint 'C' Schedule.

During the pendency of the suit, the first defendant sold the northern half of the property in favour of the 7th defendant as per Exh. B-14 dated March 21, 1961. Later, the first defendant transferred the southern half of the property to the 8th defendant under the sale deed (Exh. B-15) dated June 19, 1961.

Reference has been made to the fact that the two sales effected by the Official Receiver in favour of Narayanaswamy and Narasimhulu were in respect of un-specified half shares in the plaint 'B' Schedule property. The basis on which the plaintiff rested her claim for recovery of possession of the southern half of the property was that a partition had been effected between herself and the heirs of Narayanaswamy in 1952 and the 'C' Schedule property had been allotted to her share at the said partition. Defendants 2 to 6, who are the legal heirs of deceased Narayanaswamy, did not contest the suit. However, the first defendant, who was the main contesting defendant in the trial court, denied that any such partition had taken place. He put forward the case that in effecting the purchase of the balance undivided half interest in the property, when it was brought to sale by the Official Receiver on November 28, 1944, Narasimhulu was acting as a benamidar for Moola Narayanaswamy and that the ownership in respect of the said half interest also became vested in Narayanaswamy himself. It was further contended that the transfer by Narasimhulu in favour of the plaintiff was also a benami transaction for the benefit of Narayanaswamy and hence, the entire property had been validly purchased by him at the court sale held in execution of the money decree obtained by him against Narayanaswamy in O.S. 26 of 1952 of the Subordinate Court, Anantapur.

The two main issues that arose for determination by the trial court (court of the Munsif Magistrate, Tadpatri) were (a) whether the transactions of purchase of the half share in the plaint 'B' Schedule property by Narasimhulu at the court auction sale and the subsequent transfer of the same by Narasimhulu to the plaintiff were benami for the benefit of Narayanaswamy and (b) whether there was a subsequent partition of the property at which the plaintiff was allotted the southern half (plaint 'C' Schedule property). On a consideration of the evidence adduced in the case, the trial court found that there was no foundation whatever for the plea of

A benami put forward by the first defendant, that the plaintiff was the owner of a half share in the plaint 'B' Schedule property and that her interest could in no way be effected by the court sale held in execution of the money decree obtained by the first defendant against Narayanaswamy. The learned Munsif further held that the plaintiff had not succeeded in establishing her case that there had been a partition of the property by metes and bounds, at which the southern half of the property, namely, the plaint 'C' Schedule plot had been allotted to her share. In view of the aforesaid findings, the trial court set aside the summary order passed in E.A. 90/58 in E.P. 7/56 in O.S. 26/52 of the Subordinate Court, Anantapur, and passed a preliminary decree for partition of the plaint 'B' Schedule property by metes and bounds into two equal shares and for allotment and delivery of one such share to the plaintiff.

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The first defendant carried the matter in appeal before the District Court, Anantapur (A.S. 173/66) reiterating his contention that the purchase of the half interest in the plaint 'B' Schedule property by Narasimhulu and the subsequent sale by him to the plaintiff were benami transactions. The plaintiff filed a memorandum of cross objections questioning the correctness of the finding entered against by the Munsif that the plea of partition put forward by her had not been proved and praying that in place of decree for partition granted to her by the Munsif, she may be allowed to recover possession of the plaint 'C' Schedule property after upholding her prayer regarding the partition.

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After a detailed consideration of the oral and documentary evidence adduced in the case, the learned Additional District Judge, who heard the appeal, upheld the finding of the trial court that the first defendant had totally failed to establish the case put forward by him that the auction purchase effected by Narasimhulu and the subsequent transfer of the property by Narasimhulu to the plaintiff were both benami transactions intended for the benefit of Moola Narayanaswamy. It was further held by the learned Additional District Judge that subsequent to the purchase of the half interest in the 'B' Schedule property by the plaintiff, there had been a partition between her and the other heirs of Narayanaswamy in 1952, as pleaded by the plaintiff, and the plaint 'C' Schedule property had been allotted to the plaintiff's share at that partition. In the light of the aforesaid findings, the appeal filed by the first defendant was dismissed by the learned Additional District Judge, the cross-objections filed by the plaintiff were allowed and in modi-

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fication of the decree of the trial court, the plaintiff was granted a decree for recovery of possession of the plaint 'C' Schedule property.

Against the aforesaid judgment of the Additional District Judge, Anantapur, the first defendant and the 8th defendant filed two separate Second Appeals before the High Court of Andhra Pradesh. The two questions raised in those appeals were (a) whether the purchase of the property by the plaintiff was benami for Narayanaswamy and (b) whether a partition of the plaint 'B' Schedule property had taken place as between the plaintiff and the heirs of Narayanaswamy, at which the plaintiff got the southern half thereof.

A learned Single Judge of the High Court disposed of the two Second Appeals by a common judgment, wherein he has discussed at great length the oral and documentary evidence and entered findings of his own on the two questions aforementioned. The learned Judge found that there was no force in the contention put forward by the first defendant that the half interest in plaint 'B' Schedule property was purchased at the court auction sale by Narasimhulu benami for Narayanaswamy. He also rejected the further plea put forward by the first defendant that the subsequent transfer of the property by Narasimhulu to the plaintiff was also a benami transaction. In consequence, the Second Appeal filed by the first defendant was dismissed.

On the second question aforesaid, the learned Judge differed from the finding of the Additional District Judge and held that the plaintiff had failed to establish that a partition of the property had been effected as between herself and the legal heirs of Narayanaswamy at which the 'C' Schedule property had been allotted to her share. The learned Judge then proceeded to hold that the fact that the first defendant sold to the 7th defendant a specified portion in the north did not necessarily create any right in the 7th defendant to the particular property and hence this was a case where a partition of the property should be effected between the plaintiff on the one hand and the defendants 7th and 8th on the other. In view of the said findings, the Second Appeal filed by the 8th defendant was allowed by the learned Judge and the suit was remanded to the trial court for effecting a partition of the plaint 'B' Schedule property between the plaintiff, the 7th defendant and the 8th defendant. It is against the said decision of the High Court that the 7th defendant has filed this appeal after obtaining special leave from this Court.

A Two main contentions were advanced by the learned counsel on behalf of the appellant. Firstly, it was urged that the High Court has acted illegally and in clear violation of the limitations imposed by Section 100 C.P.C. in interfering with the finding entered by the Additional District Judge on the question as to whether or not there had been a partition between certain parties which is a pure question of fact. The second contention advanced on behalf of the appellant is that the High Court has committed a grievous error in omitting to notice that the 7th defendant had not been even impleaded as a party in the Second Appeal (S.A. 826/67) filed by the 8th defendant, and that while showing the plaintiff as the sole respondent in that Second Appeal a categorical statement had been made in the memorandum of the Second Appeal that "the other parties in the courts below are not necessary parties to this appeal". It was, therefore, contended by the appellant that the High Court has acted wholly illegally in recording a finding adverse to the 7th defendant and directing a partition of the entire 'B' Schedule property in spite of the fact that the northern plot had been sold to the 7th defendant by deceased Narayanaswamy.

B After hearing counsel appearing on both sides, we have unhesitatingly come to the conclusion that both the aforesaid contentions advanced on behalf of the appellant have to be upheld. The finding entered by the Additional District Judge that a partition had taken place between the plaintiff and the other legal heirs of Narayanaswamy in 1952, and as a result thereof the southern portion of the 'B' Schedule property (plaint 'C' Schedule property) had been allotted to the plaintiff's share was based on a detailed consideration of the legal evidence available on the record. It was not open to the High Court to reappreciate the said evidence and substitute its own conclusions in place of those entered by the lower courts while exercising the jurisdiction conferred by Section 100 C.P.C. The learned counsel appearing on both sides have taken us through the relevant portions of the evidence having a bearing on the plea of partition, and we are satisfied that the finding entered by the Additional District Judge cannot be said to be unreasonable or perverse. No question of law whatever was agitated before the High Court. In the circumstances, there was no justification at all for the High Court to interfere with the finding of fact entered by the Additional District Judge that there had been a partition between the plaintiff and the legal heirs of Narayanaswamy in 1952 at which the plaint 'C' Schedule property had been allotted to the share of the plaintiff.

In this view, it is unnecessary for us to go into the merits of the second contention advanced on behalf of the appellant.

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In the light of the foregoing discussion, we allow this appeal, set aside the decision of the High Court and restore the judgment and decree of the Additional District Judge, permitting the plaintiff to recover possession of the plaint 'C' Schedule property. We make it clear that we are expressing no opinion on the question relating to the rights *inter se* as between the defendants 7th and 8th in respect of the remaining portion of plaint 'B' Schedule property, and the said matter is left to open. The parties will bear the respective costs in this appeal.

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S.R.

Appeal allowed.

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