

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.214 of 2000

Date:02.12.2015

Between:

Syed Wahudunnisa and others.

... Appellants.

AND

Syed Muktarunnisa

...Respondent.

The Court made the following :

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.214 of 2000

JUDGMENT:

This appeal is preferred challenging judgment & decree dated 01-09-1998 in A.S.No.54/1995 on the file of I Additional District Judge, Kurnool whereunder judgment & decree dated 23-03-1995 in O.S.No.474/1989 on the file of II Additional District Munsif, Kurnool is confirmed.

2. Appellants herein are defendants in O.S.No.474/1989 and respondent herein is plaintiff. The said suit is filed for grant of permanent injunction restraining the defendants, their men from entering into and interfering with possession and enjoyment of plaint schedule property by plaintiff. Trial Court, on the basis of pleadings of both parties, framed issues and thereafter, conducted trial, during

which two witnesses are examined and four documents are marked on plaintiff side and three witnesses are examined and seven documents are marked on behalf of defendants. On a over all consideration of oral and documentary evidence, trial Court held that plaintiff is entitled for permanent injunction and accordingly, granted permanent injunction restraining defendants, their men and agents from interfering with the plaintiff's possession and enjoyment of the suit property. This judgment and decree is challenged before the District Court, Kurnool and I Additional District & Sessions Judge, Kurnool, on a reappraisal of the oral and documentary evidence, confirmed the decree and judgment of the trial Court and aggrieved by the same, present second appeal is preferred.

3. This Court admitted the Second Appeal on 09-06-2000 treating the following as substantial questions of law that arise for consideration in the second appeal:-

- "1). Suit for perpetual injunction was filed by the wife of land owner without obtaining the due permission from the Court of law, without making the correct person as one of the plaintiff in the suit, as envisaged under order 1 of CPC., whether this suit is maintainable in the eye of law?*
- 2) The plaintiff has filed the suit without obtaining a power of attorney from her husband who is the actual, absolute owner of the schedule property, whether the suit is maintainable?*
- 3) Order 1 of the CPC., is a mandatory provision, whether a Court is vested with the powers to overlook the mandatory provision of law and can entertain a suit?*
- 4) Whether the judgment and decree passed by the lower Court and confirmed by the first appellate Court confers any right, title powers upon the so called plaintiff and what will be its effect?*
- 5) Whether a judgment, which is a nullity, nonest in entity, is executable in the given circumstances by the plaintiff?*
- 6) As per Order 1 of CPC., the Court suo motu can add plaintiff in a suit when a suit is instituted by a wrong person. Court failed to appreciate even though this ground was canvassed before lower Court and first appellate Court and both the Courts failed to take appropriate steps to Additional plaintiff in the suit,*

presently the Limitation Act restrains the Courts from adding new plaintiff in the suit, whether the suit should be remanded back for a limited purposes for adjudicating the point of maintainability in the given circumstances?

- 7) *The lower appellate Court and the lower Court failed to frame an issue on the aspect of non-joinder of correct plaintiff?*
- 8) *The lower appellate Court miserably failed to discuss about the maintainability of the suit when the suit was filed by a wrong person.*
- 9) *The lower Court and lower appellate Court travelled beyond the pleadings and granted relief which was not prayed for. Are the Courts empowered to grant the relief which was not prayed for and how far the Courts are correct?*
- 10) *The lower Court and the first appellate Court granted injunction over the 50 cents of land which has not been mentioned in the plaint schedule by the plaintiff. Whether such injunction granted by the Courts has any power in it and how far the Courts are justified in granting the injunction over the property which was not mentioned in the plaint schedule?*
- 11) *The lower Court and the first appellate Court failed to frame an issue when the appellants herein in their written statement clearly stated that the 50 cents of land which was not sold to P.W.1 was forcibly taken by the plaintiff and her henchmen under the guise of exparte injunction order, if it is so, whether the plaintiff is entitled for perpetual injunction because she was not in physical possession over the 50 cents of land on the day of institution of the suit."*

4. Respondent, in spite of service of notice, neither he appeared in person nor through any Advocate.

5. Heard arguments of Advocate for appellants.

6. Advocate for appellants submitted that both the Courts have not properly dealt with the pleadings and have not determined the main objection that has been taken by the defendants. He submitted that defendants have got still Ac.0-50 cents of land towards north of the property sold to plaintiff's husband under Exs.A3 & A4-sale deeds, but in view of the wrong recital of northern boundary, they claimed

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Ac.0-50 cents also and this aspect was not properly appreciated by the Courts below. He further submitted that when a specific plea is taken that plaintiff has no *locus standi* and the mandatory provisions of Order 1 CPC are not followed, both the Courts have over looked this aspect and did not answer, therefore, the judgments are nullity and nonest.

7. All the grounds referred to above are only in respect of Order 1 CPC, therefore, it may be necessary to look into that provision. Order 1 CPC deals with parties to suits. Though defendants have not specifically referred to the Rule relevant to the case on hand from the contentions of the defendants.

The relevant rules may be Rules 9 & 10 of Order I CPC, which reads as follows:-

**“ORDER I
PARTIES TO SUITS**

Rule.1.xxxxxxxxxx;

Rule.2.xxxxxxxxxx;

Rule.3.xxxxxxxxxx;

Rule.4.xxxxxxxxxx;

Rule.5.xxxxxxxxxx;

Rule.6.xxxxxxxxxx;

Rule.7.xxxxxxxxxx;

Rule.8.xxxxxxxxxx;

Rule 9. Mis-joinder and non-joinder.- No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.

Rule 10. Suit in name of wrong plaintiff.- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bone fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) **Court may strike out or add parties.**—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just,

order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

*(4) **Where defendant added, plaint to be amended.**—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.*

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

8. As per the above provision, if a suit is instituted in the name of a wrong person, the Court has power to add the correct person as plaintiff. Here, the contention of the defendants is that plaintiff is not the owner of the suit schedule property and the sale deed stands in the name of her husband and without any General Power of Attorney from her husband, she cannot maintain a suit. As already referred above, the suit is filed for the relief of perpetual injunction to protect possession over the suit schedule property. In the plaint, it is specially stated that husband of plaintiff purchased the suit schedule property under two registered sale deeds dated 21-02-1996 & 24-02-1986 and that her husband is working in Saudi Arabia (Kuwait) and that plaintiff is in actual possession and enjoyment of the suit schedule property and protecting it. It is further alleged that taking advantage of the absence of husband of plaintiff, the third defendant at the instance of defendants 1 & 2 with the help of unruly elements, is trying to enter into the suit schedule property and trying to take forcible possession of the land on the northern side under a false claim. She stated for that reason, she approached the Court to protect the property. When plaintiff is no other than the wife of the

real owner of the property and when her husband is out of country and she is in possession and enjoyment of the suit schedule property, I fail to understand how the suit is said to be in the name of a wrong person. When a person has got cause of action, such person is entitled to knock the doors of civil Court to protect the property. Here, the plaintiff specifically pleaded that defendants, taking advantage of the absence of plaintiff's husband or trying to enter in to the suit schedule property and trying to take forcible possession, therefore, the plaintiff has got every right being wife of owner of the property to approach the Court to protect their property, therefore, the objection of the appellants, as to the *locus standi* of plaintiff and application of provisions of Order I CPC is not at all tenable.

9. From the pleadings and evidence, it is clear that the northern boundary shown in the sale deeds is Thungabadra River. According to defendants, in between Thungabadra River and land sold under Exs.A3 & A4, defendants have still got Ac.0-50 cents of land, but due to mistake, the northern boundary is shown as Thungabadra River instead of mentioning as land of vendors. Both the Courts, while dealing with this aspect, held that as per the settled law, that boundaries would prevail over the extent. Both the Courts are absolutely right in giving such a finding. If the boundary on a particular side is incorrectly mentioned, the remedy of the executant is to take steps for correction revocation of it, but cannot take law into their hands taking advantage of absence of plaintiff's husband. From the recitals of Exs.A3 & A4, it is clear that the purchasers were put in possession of the property of the land within the four boundaries. If the purchaser is in excess possession, the remedy of the vendor is to take legal steps for recovery of the excess land, but they cannot take forcible possession. Both trial

Court and appellate Court have elaborately discussed oral and documentary evidence and held that plaintiff is in possession of the plaint schedule property. Nothing wrong in non-application of provisions of Order 1 CPC by the trial Court and appellate Court and the objection of the defendants on this aspect is not at all tenable.

10. Advocate for appellants relied on the judgment of Division Bench of Allahabad High Court in **Municipal Board vs. Abdul Hameed and others**^[1], judgment of Kerala High Court in **Kurian Chacko vs. Varkey Ouseph**^[2], judgments of Hon'ble Supreme Court in **Shasidhar vs. Ashwini Uma Mathad**^[3], **B.V. Nagesh vs. H.V. Sreenivasa Murthy**^[4], **Madhukar vs. Sangram**^[5] and **Santhosh Hazari vs. Purushottam Tiwari**^[6] on the point of appellate Court's power.

11. The scope and powers of appellate Court as referred to in the above decisions is not in dispute, but those decisions have no application here for the reason that the substantial question of law urged by the appellants is not at all tenable.

12. Learned Advocate for appellants has relied on a decision of Hon'ble Supreme Court in **Santhosh Hazari vs. Purushottam Tiwari**⁶ for the proposition that appellate Court has jurisdiction to reverse the findings of the Courts below. In that case, the Hon'ble Supreme Court, while considering the test for determining whether a question of law raised in a case is substantial or not held as follows:-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by

the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

13. So from the above para, when a public importance is not settled by the Supreme Court or Privy Council, such matter can be taken as a case of substantial law, but if the question is settled by highest Court on the general principles, it cannot be treated as substantial question of law. Here, from the pleadings and evidence, the main controversy is whether boundaries would prevail or extent of the land. When the law is settled by the higher Courts, that boundaries shall prevail and that decision has no application. Here, the Courts below have applied that principle in granting decree in favour of plaintiff and therefore, there is no general public importance involved in this case to be treated as substantial question of law and as such the argument of the appellants' counsel cannot be accepted.

14. For these reasons, I am of the view that both trial Court and first appellate Court have not committed any error and there are no grounds to interfere, therefore, the second appeal fails and dismissed accordingly. No costs.

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

JUSTICE S. RAVI KUMAR

Date:02.12.2015

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[1] 1980 LawSuit (All) 560

[2] LAWS(KER)-1968-9-23

[3] LAWS(SC)-2015-1-26

[4] LAWS(SC)-2010-9-34

[5] LAWS(SC)-2001-4-129

[\[6\]](#) LAWS(SC)-2001-2-110