

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Second Appeal No.744 of 1997

JUDGMENT:-

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This Second Appeal, under Section 100 of Code of Civil Procedure by the unsuccessful plaintiffs, is directed against the decree and judgment dated 25.03.1997 of the learned I Additional District Judge of Krishna at Machilipatnam passed in A.S.No.154 of 1989, whereby, the learned I Additional District Judge, while dismissing the said appeal had confirmed the decree and judgment dated 21.08.1989 of the learned Senior Civil Judge, Gudivada, passed in O.S.No.23 of 1982 filed by the plaintiffs/appellants for perpetual injunction to restrain the defendants from interfering with the plaintiffs' peaceful possession and enjoyment of the house site of an extent of 826 square yards in R.S.No.189 in old 13th ward – new 16th ward with Old Assessment No.618 and present assessment no.1712, in Gudivada Municipal limits of Krishna District, morefully described in the schedule annexed to the plaint.

2. I have heard the submissions of the learned counsel for the appellants/plaintiffs ('the plaintiffs', for brevity) and the learned counsel for the respondents/the contesting defendants ('the defendants', for brevity). I have perused the material record.

3. At the time of admission of this second appeal, the following substantial questions of law from the grounds of appeal were taken note of.

- a) *Whether the judgment of the lower appellate Court is vitiated for the reason that it mis-read the plaint allegations as well as the deposition of P.W.1?*
- b) *Whether the judgment of the lower appellate Court is vitiated for the reason that it failed to consider the clinching documentary evidence including the judgment in O.S.No.59 of 1980 (Ex.A.33) and the admissions of the first defendant and the report of the*

commissioner?

- c) *Whether the dismissal of I.A.No.198 of 1996 filed by the appellants under Order 47 Rule 27 C.P.C. is justified on the facts and in the circumstances of the case?*
- d) *Whether the judgment of the lower appellate Court is vitiated for the reasons that it is perverse?*

[reproduced verbatim]

4. The learned counsel for the plaintiffs' would contend that the Court of first appeal had erroneously relied upon the error in the plaint in regard to the word 'inducted' though actually the word is 'induct' and that the judgments of the Courts below are vitiated by perversity and that the learned Judges of both the Courts below have not appreciated the facts and the evidence in correct perspective and that the lower appellate Court had failed to consider the clinching documentary evidence, including the judgment in O.S.No.59 of 1980, which is exhibited as exhibit A33, and also the admissions of the first defendant in his evidence as well as the report of the Commissioner and that the lower appellate Court had erroneously dismissed the application to receive additional evidence and that both the Courts below have misread the plaint and mis-appreciated the evidence and that, therefore, the appeal deserves to be allowed and the suit of the plaintiffs' is to be decreed.

5. On the other hand, learned counsel for the defendants would contend that none of the questions raised are substantial questions and that no such questions are involved in this second appeal. He had supported the judgments of the courts below which have recorded concurrent findings on all the issues in favour of the defendants. It is *inter alia* contended that even if the plaint averments in regard to admissions that the third defendant was inducted into possession are to be ignored, there is other material evidence on record to show that the plaintiffs were not in possession and that the defendants only are in

possession and that the Courts below, having found that the plaintiffs were not in possession of the suit schedule property as on the date of the suit, had rightly dismissed the suit.

6. To adjudicate the *lis* and answer the substantial questions, it is necessary to refer to, briefly, the facts as well as the pleadings of both the sides.

6.1 The subject matter of the suit is 826 square yards, which is said to be a house site; and, it is only a pit.

6.2 The case of the plaintiffs is this:

The plaintiffs 1 to 3 are the sons of the fourth plaintiff. The suit site originally belonged to T. Bhagiradi Devi. One Kamineni Ramachandra Rao had purchased the suit site from the said Bhagiradi Devi under exhibit A1 – a registered sale deed dated 20.03.1949. He had continued in possession of the property of the property till his death. The said Ramachandra Rao had died after executing the Will dated 15.11.1978, bequeathing the suit property in favour of his son Kamineni Gangadhara Rao – the PW3. The said Will was registered as per procedure, after the death of the said Ramachandra Rao. PW3 in turn sold the same to the plaintiffs under exhibit A7-the registered sale deed dated 19.10.1981 and delivered possession of the same to the plaintiffs and since then plaintiffs were and are in possession of the suit site and were and are paying taxes to the Municipality. The first defendant owned site to the West of the suit site. The said site was sold by Bhagiradi Devi to Chintapalli Venkata Subba Rao under exhibit A2- a registered sale deed 26.03.1949. The 1st defendant had purchased the said Western property from the said Chintapalli Venkata Subba Rao under exhibit A3 – a registered sale deed dated 25.05.1962. The plaintiffs came to know that the defendants 1 and 2 on one hand and the 3rd

defendant on the other are negotiating for sale of 919 square yards of site with building including the suit site. The defendants tried to forcefully put the 3rd defendant in possession of the same taking advantage of the fact that the plaintiffs are living else where. Hence the plaintiffs are obliged to file the suit for perpetual injunction.

6.3 The defence, in brief, of the 1st defendant, who alone had contested the suit, is as follows:

The actual extent as recited in the sale deed dated 25.12.1962 and delivered possession of to the 1st defendant is 1120 square yards. This defendant had constructed a pacca building in that site and was and is in uninterrupted possession and enjoyment. The site of Ramachandra Rao is to the East of the said site and building. It is almost a pit and is useless. This defendant's husband negotiated for sale of the said site with Ramachandra Rao and he had executed an agreement of sale with possession in favour of this defendant on 25.12.1962 and the consideration was Rs.1200/- and the extent of site mentioned in the agreement was only 630 sq. yards. And, since the date of the agreement, the said site has been in possession of this defendant.

There is a site to the South of the site of the 1st defendant. She had purchased 230 square yards all along the Southern boundary from Y.Radhamanoharamma and A.Jhansi Laxmi Bai under a oral contract on 29.06.1962 for Rs.450/- and had subsequently obtained an agreement from them on 29.08.1964. Therefore, this defendant has got title in respect of entire 1121 sq. yards and has been in possession of 630 sq. yards also covered by the agreement obtained from Kamineni Ramachandra Rao and also site of 230 sq. yards covered by the agreement dated 29.08.1964. Ramachandra Rao was not in exclusive possession and enjoyment of the suit site. This defendant has been in possession of the same and has been paying municipal taxes. The entire extent was surveyed by the Municipal authorities and all the plots are

shown as a single plot and is being assessed to municipal tax. This defendant, even otherwise, had perfected title by adverse possession.

The allegations regarding the Will of Ramachandra Rao are untenable as the said Will is false; and, he was not having valid title. This defendant is not aware of the whereabouts of the 3rd defendant. The plaintiffs were never in possession of the suit schedule property either as on the date of the suit or prior to it. The suit is filed to grab the property.

6.4 Having regard to the above pleadings, the trial Court had framed the following issues:

- (i) **Whether the plaintiff is entitled to permanent injunction as prayed for against D1?**
- (ii) **To what relief?**
(Reproduced verbatim)

At trial, the guardian of the plaintiffs 1 to 3 and the supporting witnesses were examined as PWs 1 to 3 and exhibits A1 to A61 were marked on their side. The 1st defendant and his supporting witnesses were examined as DWs 1 to 4 and exhibits B1 to B27 were marked. On merits, the trial Court dismissed the suit with costs. The court of first appeal dismissed the appeal suit of the plaintiffs confirming the decree and judgment of the trial Court. Therefore, the plaintiffs are before this court.

6.5 I have already noted the submissions of the learned counsel for both the sides.

6.6 It is to be noted that the plaintiffs did not claim the relief of declaration of title and the suit is one for perpetual injunction. Therefore, the principal issue, which is germane for consideration is as to whether or not the plaintiffs are in possession of the suit property by the date of the suit and at all relevant times and whether they have a better right than the defendants and whether the possession, if any, of the plaintiffs

is lawful. The initial onus of proof as well as the legal burden are on the plaintiffs. Admittedly, the plaintiffs claimed that they had purchased the suit site under exhibit A7 dated 19.10.1981 and that it is a pit. There is no dispute that the suit site originally belonged to T.Bhagiradhi Devi and that one K.Ramachandra Rao purchased the said site from the said Bhagiradhi Devi under the registered sale deed dated 29.03.1949. The registration extract of the same is exhibit A1. According to the plaintiffs, the said Ramachandra Rao executed a Will dated 15.07.1978 bequeathing his properties to his son Gangadhara Rao (PW3) and that the said Will was registered, as per the procedure, after the death of the testator and that later, PW3 had sold the said property to the plaintiffs under exhibit A7 as already mentioned. Exhibit A6 is the extract of the said Will of Ramachandra Rao. Its copy is also marked as exhibit A46. It is also admitted that the 1st defendant owns a site and house property to the West of the suit site. According to the first defendant, she had purchased the said Western side property of an extent of 1121 square yards under exhibit A3-the registered sale deed dated 25.05.1962 from Chintapalli Venkata Subba Rao. Exhibit A2 is the extract of sale deed dated 26.03.1949 in favour of the said Chintapalli Venkata Subba Rao for that site and the same was executed by a power of attorney holder of Bhagiradhi Devi. Therefore, the 1st defendant contends that she had purchased the Western side site in an extent of 1129 sq. yards under exhibit A3 from the said Chintapalli Venkata Subba Rao and that she had also purchased 630 square yards of site from Kamineni Ramachandra Rao under exhibit B27 (=B1), agreement dated 25.12.1962. The 1st defendant had also contended that she had purchased 230 sq. yards of site out of the Mill site under exhibit B2 agreement dated 29.05.1964 from her daughter Y.Radhamanoharamma (Dw2) and her sister-in-law A.J.Lakshmi Bai and that the entire property covered by exhibit A3, B1 and B2 was surveyed and included in the assessment of the 1st

defendant. Per contra, the plaintiffs contend that as per the exhibit A2 sale deed in favour of the 1st defendant's vendor in respect of Western site, the extent was only 919 square yards and that mischievously the extent was got swelled up and mentioned as 1129 sq. yards in exhibit A3-the sale deed of the 1st defendant and that exhibit B27 (=B1) agreement and exhibit B2 agreement are forged. Both parties admitted that the property being a pit is not useful for any purpose as on the date of the commencement of the lis. The plaintiffs pleaded that they were staying away from the property. According to the 1st defendant, it is not useful for any purpose. Therefore, the plaintiffs are admittedly not having physical possession/khas possession, they being not in actual occupation of the suit site. In **Anathula Sudhakar v. P. Buchireddy**

(dead) by LRs^[1] the Hon'ble Supreme Court while considering the general principles as to when a mere suit for perpetual injunction will lie and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, had stated that the general principles in that regard are well settled and had referred briefly to the said general principles which are as follows: -

'Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in

possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

13. In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

14. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against

the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.'

Reverting to the case facts, it is pertinent to note that prior to filing of the present suit, the plaintiffs had filed O.S.No.59 of 1980 against the first defendant herein, her daughter (DW2) and another and had claimed certain reliefs. Exhibit A5 is the certified copy of the decree with plan and schedule in the said suit. Exhibit A33 is the copy of the judgment dated 23.09.1986 in the said suit. Exhibit A4 is the copy of the written statement filed on 21.01.1981 in the said suit. However, the plaintiffs had obtained exhibit A7, registered sale deed, in respect of the suit site on 19.10.1981. In the earlier written statement in the former suit, it was stated that the plaintiffs herein who are the plaintiffs in the said suit have no right of discharging the drainage and sullage water from rice Mill towards North and ultimately into the pit situated in the site of K.Ramachandra Rao, which has been purchased by the husband of the 1st defendant in this suit long back under a contract of sale and that the said pit site is in the possession of the husband of the 1st defendant. Thus, even before the plaintiffs herein had purchased the suit site, the 1st defendant herein had put up a claim in the former suit stating that the suit site, which is a pit, was purchased under an agreement of sale by the husband of the 1st defendant herein from Kamineni Ramachandra Rao and that it is in their possession. Thus, in the written statement filed in the former suit, the 2nd defendant therein, i.e., the 1st defendant herein

had contended specifically that the plaintiffs herein have no right to discharge the drainage and sullage waters from the rice Mill towards North and ultimately into the pit situated in the site of Ramachandra Rao and that the said site of Ramachandra Rao has been purchased by the second defendant's husband therein, i.e., the husband of the first defendant herein long back under a contract of sale and that it is in their possession. The plaintiffs had admittedly purchased the suit site after such a categorical assertion was made by the 1st defendant. The plaintiffs having purchased the suit property (pit) subsequent to such assertion by the 1st defendant, did not seek the declaration of title to the property and had brought the present suit for bare perpetual injunction. Therefore, in the well considered view of this court, the plaintiffs ought to have brought a suit for declaration of title. Be that as it may.

6.6 In this background, it is necessary to examine the documents, which are relevant to find out as to whether the plaintiffs' established their possession that too lawful possession over the suit schedule property as on the date of the suit. Exhibit A7 is the sale deed obtained by the plaintiffs' in respect of the suit site. As already noted, it is just six months prior to the filing of the suit. It is borne out by record that to the South of the first defendant's site and the suit site, there is a rice Mill. The said fact is not in dispute. The Southern boundary of the first defendant's site under exhibit A3 is of a measurement of 128 feet, whereas in the prior title deed under exhibit A1, the Southern boundary measurement is given as 105 feet. Exhibit A41 is the registration extract of the sale deed dated 11.06.1962 in favour of DW2 and her sister-in-law in respect of the Southern Mill site of an extent of 4123 square yards. In this document, the Northern boundary of the site was given as the first defendant's site to an extent of 168 feet. Though the plaintiffs are not parties to this exhibit A41 document, they had admittedly purchased subsequent thereto, the shares in the mill and also the site from the

same vendees under exhibit A42. Thus, exhibit A41 is an antecedent title deed of the plaintiffs in regard to the Mill site purchased by them. Exhibit A42 is the registration extract of the sale deed dated 16.01.1979. Admittedly, under the said document, the plaintiffs had purchased 3900 square yards of site and the rice Mill in it under the name and style of Sri Venkatakrishna Rice Floor and Ground Nut Oil Mill. In exhibit A42 also, the Northern boundary was mentioned as site and compound wall of the first defendant to an extent of 177 feet. The plaintiffs, who are directly parties to exhibit A42 document, cannot dispute the said recitals in the said document. The recitals of the said document would show that the first defendant owns property to the East of the property purchased under exhibit A3. Therefore, the Northern boundary mentioned in exhibit A42, which reads as the site and compound wall of the first defendant to an extent of 177 feet, clearly indicates that Ramachandra Rao did not own or at least possess the suit site by the date of exhibit A42. Even in exhibit A43 also, the Northern boundary was given as the property of the first defendant's wife and compound wall to an extent of 177 feet. Both the parties to the suit are parties to the said exhibit A43. Therefore, exhibits A42 and 43 clinch the issue that neither Ramachandra Rao nor was his son PW3 in possession of the suit site and that on the other hand, the first defendant has been in possession of the suit site at least from the year 1962, having claimed ownership of the same. Exhibit A46 is the registered lease deed in respect of the Mill. All the partners of the Mill executed the said document and in the said document, the Northern boundary is given as the first defendant's site to an extent of 168 feet. Similarly, exhibit B26 is the registered sale deed dated 26.03.1977 executed by the partners of the Mill including the fourth plaintiff herein, the first defendant and DW2, wherein, the Northern boundary of the Mill is shown as the first defendant's site and in that site, she has got a terraced house, thatched house and latrines. On an analytical examination of the evidence, this Court is satisfied that as rightly noted

by the Court below, all these documents unmistakably point out that the first defendant is the possessor of the site which is situated to the North of the Mill property. From the above documentary evidence, an inference can incidentally be drawn that the first defendant was and is in possession of the suit site having claimed that she had purchased the suit site from Kamineni Ramachandra Rao in the year 1962 itself. But, for the pleaded purchase by the first defendant, the recitals in the above documents from the year 1962 onwards would not have been made referring to the ownership and possession of the first defendant in respect of the entire site to the North of the Mill. Therefore, in view of the contents of the documents/exhibits discussed supra, it can incidentally and safely be concluded that the first defendant was in settled possession of the suit site which is to the North of the Mill site. DW1, even in his cross-examination, deposed that he knows about the suit site and its possession from the year 1965, but still, knowing about the suit site and its possession, he has obtained exhibits A42 and A43 in favour of the plaintiffs' in respect of the shares in the Mill by mentioning the Northern boundary as the property belonging to the first defendant entirely. Apart from that, the fact remains that the first defendant had put forward the claim to the entire suit property and not to the portion of the suit property covered by exhibit A3-sale deed; and, the first defendant is now found to be in possession of the same since the year 1962 and her such settled possession was being recognized from the year 1962 onwards. In view of the recitals of the Northern boundary in various documents, it can incidentally and safely be held that the first defendant had been in effective possession of the suit site, which is enclosed partly by a compound wall and partly by barbed wire fencing. In the presence of the voluminous evidence that was already brought on record and as no further evidence was found necessary for arriving at a just decision in the matter, the court below is justified in not exercising the discretion for receiving additional evidence on the side of the plaintiffs. Looking at the

facts and the evidence in an analytical manner, this court finds that the courts below are justified in recording findings against the plaintiffs and in dismissing the suit for perpetual injunction. There is no misreading of the plaint allegations. Further, there is neither mis-appreciation of oral and documentary evidence nor improper consideration and non-consideration of material evidence; and, there is no perversity in the findings of the courts below.

7. Viewed thus, this Court finds that there is no substance in any substantial questions of law and that in fact no substantial questions of law are involved in this appeal and as such, the second appeal is devoid of merit and is liable to be dismissed.

8. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this appeal shall also stand dismissed.

JUSTICE M.SEETHARAMA MURTI

05th June, 2015

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[\[1\]](#) (2008) 4 SCC 594