

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.933 of 2000

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JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity), by the unsuccessful appellants/plaintiffs is directed against the decree and judgment dated 25.09.2000 of the learned II Additional District Judge, Visakhapatnam, passed in A.S.No.230 of 1996. The learned Additional District Judge while dismissing the aforementioned first appeal had directed the plaintiffs 1 and 2 to remove the huts raised by them in the suit schedule land covered by S.No.82/4 in an extent of Acs.1.50 cents within 30 days from the date of judgment and further directed that on failure to do so, the defendants 3, 5 and 7 are entitled to get the huts removed through the Court of law.

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

3. At the time of admission of this second appeal, this Court has taken note of grounds 6(a) to 6(c) of the memorandum of grounds of second appeal as the substantial questions of law involved in this second appeal and the said substantial questions of law read as under:-

1. **Whether the lower appellate Court is right in granting a decree for demolition of huts in S.No.82/4 when the defendants filed a counter claim in the trial Court paying court fee claiming that they are the absolute owners of S.No.82/4 and the trial court dismissed such a counter claim holding that defendants 6 to 8 did not produce any evidence to prove their title to the same?**
2. **Whether the courts below are right in dismissing the suit for**

permanent injunction when the identity of the land is established by the boundaries and the wrong S.No. was only a misdescription.

3. **Whether the courts below erred in dismissing the suit relying on Ex.B3 when it is not established that the subject matter of Ex.B.3 and the present suit is same and identical?**

(Reproduced verbatim)

4. To adjudicate the *lis* and answer the substantial questions of law, it is necessary to first refer to the facts that lead to filing of this appeal and also the pleadings of the parties.

5. The averments in the pliant, in brief, are as follows:

The plaint schedule property and the property situated to its North originally belonged to Sirasapalli Kannayya and his family. The said S.Kannayya had sold the properties situated to the North of it covered by old survey No.64/A of the erstwhile Tokada village by means of a registered sale deed dated 17.05.1949 for a consideration of Rs.100/- to S.Adayya S/o Late Atchanna, S.Appalaraju S/o Appanna who is also the grandson of Atchanna and the plaintiffs 1 and 2 herein. The said land was purchased by four people. The said land was subsequently divided between the said four purchasers. Adayya and Appalaraju took 1/4th share each and they had sold away the same to one Lanka Venkateswarlu. As far as the present plaintiffs are concerned, they had got the Southern portion. They have been in possession and enjoyment ever since the partition. The defendants 1 and 2 and one late Atchibabu are the sons of Late Venkayya, the brother of Late S.Adayya. The defendant no.3 is the wife and the defendants 4 and 5 are the sons of Late Atchibabu, the elder brother of Demudu. Thus, the defendants 1 and 2 are brothers, the defendants 4 and 5 are their elder brothers's sons and the 5th defendant is the widow of their elder brother. The defendants have nothing to do with the plaint schedule property. The plaintiffs are in possession and enjoyment of the plaint schedule property. During the last ten years, the area abutting the plaint schedule

property on its East, which was a government poramboke was occupied by many outsiders and a colony in the name and style of 'Lal Bahadur Colony' was developed and that during the last few years, it became impossible to carry on any cultivation in the plaint schedule land as the land is abutting residential colony and the crops could not be watched and saved. The plaintiffs wanted to shift their residence from the main village to China Gantyada, to the plaint schedule land. The plaintiffs had gathered necessary material for the construction of a thatched house in the South Eastern corner of the plaint schedule land. At that time, the defendants had demanded the plaintiffs to permit them also to make a construction therein. The plaintiffs did not agree for the same. Thereupon, the defendants who are young and who have no respect for the law and order, along with their friends and hirelings, had obstructed the plaintiff in the construction of their hut. They have also proclaimed that they will not permit the plaintiff until they are also permitted to raise a house therein. They have no respect whatsoever for truth and law. The plaintiffs have also raised a loan on the security of the plaint schedule land and other lands for purchase of cattle even as long back as Fasli 1360 and they have also discharged the said loan. The cist receipts and the discharge receipts are also filed into the Court. Since the defendants are obstructing the enjoyment of the plaintiffs, the plaintiffs 1 and 2 are constrained to file a suit against the defendants 1 to 5 for a perpetual injunction restraining the said defendants and their men from interfering with the peaceful possession and enjoyment of the suit land of Acs.2.00 cents of land in Survey No.63/A (old S.No.82 part) of Gazuwaka Revenue Mandal, Visakhapatnam District, more fully described in the schedule annexed to the plaint.

6. During the pendency of the suit, the 4th defendant had died; and, the defendants 6 to 8 were brought on record, they being the Legal Representatives of the deceased 4th defendant.

7. The averments in the written statement of the second defendant, in brief, are as follows:

The plaint schedule is incorrect. The plaint showing the proposed localization of the land in survey No.82/4 of China Gantyada village is no way correlating with the plaint schedule. Survey No.64/A, which is corresponding to present survey No.82 of

Gajuwaka Mandal, consists of Acs.11.20 cents and it is again having number of sub divisions. The plaint schedule is imaginary by showing the old survey number 64/A and the present survey no.82 part. The second defendant is having land in China Gantyada village covered by survey no.82/4 and covered by patta no.340 in an extent of Acs.1.55 cents. When the first plaintiff, the first defendant and his supporters have tried to dispossess him from the said land, he had filed a suit for permanent injunction in O.S.No.184 of 84 on the file of the learned I Additional Subordinate Judge, Visakhapatnam. The said suit was decreed in favour of the plaintiff and others. Thus, this defendant is the owner of the said land in an extent of Acs.1.55 cents covered by survey no.82/4 and patta no.340 of China Gantyada village. This defendant has nothing to do with the claim of the other defendants.

7.1 The averments in the written statement of the third defendant, in brief, are as under:

The plaint schedule is incorrect. The suit is filed to harass the defendants and occupy the schedule land by dubious methods. The plaintiffs have no title or interest or possession and have no enjoyment over the suit schedule property. The documents filed along with the plaint do not relate to the schedule property. They are irrelevant and not connected to the plaint schedule property. A suit for perpetual injunction without seeking the relief of declaration of title is not maintainable.

7.2 The averments in the written statement and the counter claim of the 6th defendant, in brief, are as follows:

The material allegations in the plaint are false and untenable. The plaint schedule property covered by survey no.64/A of the erstwhile Tokada village is comprised in R.S.No.82/3 and 82/4. On the date of filing of the suit, the suit schedule land is a vacant land and the plaintiffs are not in possession and enjoyment of the property covered by survey no.82/4. The land covered by survey no.82/4 is adjacent to the plaintiffs' land covered by old survey no.64/A and new survey no.82/3; and the plaintiffs have trespassed into the land covered by survey no.82/4 and had obtained interim injunction against the defendants and had constructed four thatched houses and tiled houses during the pendency of the suit. A Commissioner was also appointed by the Court for localization of the plaint schedule property. The

documents filed by the plaintiffs are fabricated documents and they are intended to grab the plaint schedule property. The plaintiffs have trespassed into the land covered by survey no.82/4 of Tokada village during the pendency of the suit. Hence, the counter claim is made to direct the plaintiffs to remove the structures in survey no.82/4 or in the alternative permit the 6th defendant to do the same.

7.3 To the counter claim of the sixth defendant, the plaintiffs had filed a reply statement stating as follows:

The plaintiffs are not trespassers into the counter claim schedule property. They did not enter the property after obtaining interim injunction, and, they did not make any constructions under the guise of the injunction orders. The sixth defendant has no right, title and interest over the schedule property covered by survey no.82/4 at any point of time. He is not entitled for a decree as prayed for in the counter claim and the counter claim made by the sixth defendant is liable to be dismissed.

7.4 Taking into consideration the above pleadings, the trial Court had framed the following issues and additional issues for trial:-

1. **Whether the plaintiffs have got title and possession in the suit schedule property?**
2. **Whether the suit is maintainable without prayer for declaration of title?**
3. **To what relief**

Additional issues dated 04.08.1995:-

1. **Whether D.6 to D.8 are absolute owners of the land in S.No.82/4. If so, whether D.6 to D.8 are entitled for possession of the same from the plaintiff?**
2. **Whether the plaint schedule is correct?**

(Reproduced verbatim)

7.5 At trial, on behalf of the plaintiffs, PWs 1 to 8 were examined and exhibits A1 to A6 were marked. On behalf of the defendants DWs1 to 4 were examined and exhibits B1 to B3 were marked. Exhibits X1, X2, C1 and C2 were also exhibited.

7.6 On merits, the trial Court had dismissed the suit of the plaintiffs and also the counter claim of the 6th defendant. The 6th defendant or any of the other contesting defendants did not prefer any first appeal against the dismissal of the counter claim. However, the plaintiff, who was aggrieved of the decree and judgment of the trial Court insofar as the dismissal of the suit had preferred a first appeal. The Court below while dismissing the first appeal of the plaintiff had granted the following relief to the defendants 3, 5 and 7 though any of the defendants had not preferred any first appeal or cross appeal or cross-objections against the dismissal of the counter claim.

“In the result, the appeal is dismissed with costs directing the plaintiffs 1 and 2 to remove the huts raised by them in the suit land covered by S.No.82/4 in an extent of Acs.1.50 cents, within 30 days from the date of judgment failing which the defendants 3, 5 and 7 are entitled to get the huts removed through the Court of law.”

(Reproduced verbatim)

Feeling aggrieved of the same, the plaintiffs had filed this second appeal.

8. The learned counsel the plaintiffs would contend as follows:

The sixth defendant had filed counter claim alleging that the plaintiffs had trespassed into the part of the survey no.82/4 and made constructions and that the said constructions were made during the pendency of the suit and after obtaining interim injunction orders and had prayed for in the counter claim to direct the plaintiffs to remove the constructions or in the alternative, permit the sixth defendant

to remove the constructions on the failure of the plaintiffs to do the same. Though admittedly the property was not in possession of the sixth defendant and when his case is that the plaintiffs had trespassed into the plaint schedule property and made constructions, he had only sought a direction to remove the constructions in the nature of mandatory injunction but did not seek recovery of possession. The trial Court had recorded categorical findings and in the concluding portion of its judgment it had categorically observed that “*defendants had failed to prove that they have got exclusive title to the land covered by survey no.82/4*” . While recording other sequential findings, the trial Court held against defendants 6 to 8 and in favour of the plaintiffs insofar as the counter claim is concerned. Thus, the relief sought in the counter claim is not granted by the trial Court to the sixth defendant and the other defendants. No appeal was preferred by the 6th defendant or any other defendants assailing the judgment and decree of the trial Court dismissing the counter claim. However, in the first appeal filed by the plaintiffs assailing the decree of the trial Court insofar as it related to dismissal of their suit for perpetual injunction, the first appellate Court, had erroneously granted a direction to the plaintiffs to remove the constructions and had decreed the counter claim of the sixth defendant. The Court below had grossly erred in doing so. The said decree and judgment of the Court below are contrary to law and are liable to be set aside. The Courts below concurrently held that the identity of the plaint schedule property could not be established by the plaintiffs. The said findings are erroneous since they were arrived at without proper consideration and appreciation of material evidence. The plaintiffs had sufficiently established the identity of the property. The findings of the Courts below without properly appreciating the documents in exhibit ‘A’ series and the findings recorded by the Courts below that the plaintiffs are not in possession of the plaint schedule property and that the boundaries are not tallying and that the identity of the plaint schedule land is not established are all erroneous and are liable to be set aside. The trial Court had categorically held that the plaintiffs 1 and 2 may be in possession and enjoyment of the suit land covered by survey no.82/4 in an extent of Acs.1.27 cents, but the trial Court had held that the plaintiffs have not placed any evidence that they are in possession and enjoyment of the entire suit schedule land covered by survey no.82/4. When the possession of the plaintiffs is admitted and established, the Courts below ought to have decreed the suit instead of dismissing the same. The Courts below ought to have decreed the suit at least to the extent of the findings that are recorded in favour of the plaintiffs.

9. *Per contra*, the learned senior counsel appearing for the defendants would contend as follows:

Insofar as the dismissal of the suit of the plaintiffs for perpetual injunction, both the Courts below have held that the plaintiffs are not in possession of the plaint schedule property and that the plaintiffs could not establish the identity of the plaint schedule property. In a suit for perpetual injunction, in the absence of identity of the plaint schedule property, no perpetual injunction can be granted. Therefore, the Courts below have rightly dismissed the suit of the plaintiffs. The Court below is having power to grant a direction to the plaintiffs to remove the constructions made taking advantage of the injunction order in view of the provision contained in Order XLI Rule 33 of the code. There are no substantial questions of law involved in the second appeal and there is no substance in the questions raised in the second appeal. The findings recorded are concurrent findings of fact and the same are well supported by cogent and valid reasons. Hence, the appeal is devoid of merit and is liable to be dismissed.

10. I have given earnest consideration to the facts and the submissions.

11. Dealing first with the direction granted by the Court below to the plaintiffs while dismissing their appeal, what is to be noted is that while dismissing the first appeal of the plaintiffs, the Court below had directed them to remove the constructions in survey no.82/4 in an extent of Acs.1.50 cents of land within thirty days from the date of the judgment; and in the judgment impugned it was further held that on failure to do so, the defendants 3, 5 and 7 are entitled to get the huts removed through the Court of law. Admittedly, the sixth defendant in his written statement made a counter claim by paying certain amount of Court fee. The relief claimed in the Counter claim is as follows:-

“The sixth defendant therefore prays the Hon’ble Court to direct the plaintiffs for the removal of the structures in S.No.82/4 and if they failed to do so, permit the defendants to get them removed and recover the costs from the plaintiffs.”

11.1 On merits, the trial Court, while dismissing the suit of the plaintiffs, had refused to grant this relief claimed in the counter claim. No first appeal was preferred by the sixth defendant or any of the other defendants including the defendants 3 to 5 and 7 assailing the decree and judgment of the trial Court insofar as the dismissal of the counter claim. The plaintiffs alone had preferred the appeal feeling aggrieved of the dismissal of their suit for perpetual injunction.

11.2 In this factual backdrop, it is necessary to refer Order XLI Rule 33 and Order XLI Rule 22 of the Code, which were relied upon by the learned senior counsel appearing for the respondents.

33. Power of court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees: Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been In his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one months from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow:

Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or In part, in favour of that respondent.

(2) Form of objection and provisions applicable thereto—Such cross objection shall be in the form of the memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Omitted

(4) Where, in any case in which any respondent has under this rule filed

a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit,

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

A plain reading of the above provisions would show that the respondents in an appeal can support the decree in their favour and contend that a particular finding also ought to have been in their favour. However, when a respondent in the first appeal seeks reversal of the decree while contending that a particular finding ought to have been in his favour, he cannot do so without preferring an independent appeal or a cross appeal. Adverse finding may be assailed by the respondent in an appeal even without filing the cross objections or cross appeal as long as such respondent is supporting that part of the decree of the trial Court which is the subject matter of the appeal. But, when once the respondent intends to seek the reversal of that part of the decree which is against him, it is necessary for the respondent to prefer an independent appeal or a cross appeal or cross objections against him. This view of the Court is reinforced by the decision of the Apex Court in **Banarsi and others Vs. Ram Phal**, wherein, it is observed as follows:-

“The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree.

11.3 Turning to the instant case facts, be it noted that the trial Court had dismissed the suit of the plaintiffs as well as the counter claim of the defendants. The defendants did not prefer any first appeal or cross objections. The first appellate Court, while dismissing first appeal preferred by the plaintiffs before it, had reversed

the decree of the trial Court and granted a decree in favour of the defendants and gave a direction to the plaintiffs to remove the huts raised by them even in the absence of any cross objection or cross appeal by the defendants. This interference by the first appellate Court has reduced the plaintiffs/appellants herein to a situation worse than in what they would have been if they had not appealed.

11.4 Any respondent, though he may not have filed an appeal from any part of the decree may support the decree to the extent to which it is already in his favour by laying a challenge to a finding recorded in the impugned judgment against him. A party who has fully succeeded in the suit need not prefer an appeal; he need not also take any cross objection though the finding may be against him; as a party in whose favour the decree stands in its entirety, he is not obliged to prefer any cross objection. However, if such a respondent proposes to attack any part of the decree, he must take cross-objections.

11.5 In view of the settled legal position, this Court holds that the Court below was in error in granting a decree in favour of the defendants 3, 5 and 7 directing the plaintiffs to remove the huts raised by them in the suit schedule property covered by survey no.82/4 in an extent of Acs.1.50 cents of land, even though the said defendants or any other defendant for that matter had not preferred an independent appeal insofar as the dismissal of the counter claim. The defendants did not also file cross objections in the appeal preferred by the plaintiffs. Accordingly, substantial question 6(a) is answered holding that the Court below had committed a grave error in granting a decree against the plaintiffs in favour of the defendants. As a sequel, it must be held that the said portion of the decree granted against the plaintiffs by the Court below deserves to be set aside being unsustainable under facts and in law.

12. Turning to the dismissal of the suit for perpetual injunction of the plaintiffs, what is to be noted is that the Courts below have recorded concurrent findings of fact and held that the identity of the property is not established. Having gone through the evidence and examined the evidence in juxtaposition with the pleadings, this Court finds that the trial Court had adverted to the oral and documentary evidence and also the Commissioner's report before recording well-reasoned finding that the plaintiffs

could not establish the identity of the property. In a suit for injunction, if identity of property is not established, it is not just and fair to grant a perpetual injunction. There is neither non-consideration of material evidence nor mis-appreciation of material evidence or perversity in appreciation of evidence by the trial Court. Therefore, the Courts below were justified in holding that the plaintiffs could not establish the identity of the suit schedule property. As a result, this Court finds that there is no substance in this substantial question of law raised by the plaintiffs.

13. Having regard to the reasoned findings, this Court is satisfied that the judgment of the Court below is liable to be set aside only insofar it relates to the direction to the plaintiffs to remove the structures in the suit land covered by S.No.82/4 in an extent of Acs.1.50 cents.

14. In the result, the second appeal is allowed in part and the judgment and the decree of the Court below directing the plaintiffs 1 and 2 to remove the huts raised by them in the suit land covered by S. No.82/4 in an extent of Acs.1.50 cents, coupled with the observation that failing which the defendants 3, 5 and 7 are entitled to get the huts removed through Court of law, are hereby set aside. The second appeal on the other aspects is dismissed confirming the decree and judgment of the Court below.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in the appeal, shall stand closed.

M.Seetharama Murti, J

14th October, 2015

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