

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No. 301 OF 1998

JUDGMENT:

The unsuccessful first defendant had preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908, assailing the decree and judgment, dated 20.01.1998 in A.S.No.11 of 1992 passed by the learned Additional District Judge, Khammam, whereby the learned Additional District Judge, while allowing the aforementioned appeal had set aside the decree and judgment, dated 30.11.1991 of the learned Principal District Munsif, Khammam, passed in O.S.No.204 of 1984 filed by the plaintiff filed against the defendants 1 to 3 for a perpetual injunction in respect of 97½ square yards of open house site more fully described in the schedule annexed to the plaint.

2. I have heard the submissions of the learned counsel for the appellant/first defendant (for brevity, "first defendant") and the learned counsel for the first respondent/plaintiff (for brevity, "plaintiff"). I have perused the material record. The defendants 2 and 3 are stated to be not necessary parties.

3. At the time of the admission of the second appeal, this court had taken note of the substantial questions of law formulated in grounds 4, 5 and 8 of the Memorandum of grounds of appeal, which are as follows:

"4. The learned Appellate Judge committed a grave error of law in questioning the admissibility of Ex.B6 on the ground that it is not duly stamped since a document cannot be challenged once it has been admitted in evidence under Section 36 of Indian Stamp Act, 1899.

5. The learned Appellate Judge committed a substantive question of law in discussing and rejecting Ex.B6 on the grounds of its insufficient stamp duty which is estopped under law as a document admitted in evidence and which becomes legal evidence and which has been not objected to cannot be objected at a later stage as an order admitting a document in evidence is not liable to be reviewed or refused.

8. The learned Appellate Judge failed to see that Article 54 of Part.II of Schedule of the Limitation Act, 1963 applies to only contracts where a specific date is fixed for the performance and not otherwise and therefore the learned appellate judge gave erroneous findings without pleadings and issues at trial and therefore the judgment and decree are illegal and liable to

be set aside.”

(Reproduced verbatim)

4. To adjudicate the lis and answer the said substantial questions of law, it is necessary to briefly refer to the pleadings of the parties in the first instance.

5. The case of the plaintiff is that she is the owner and possessor of the plaint schedule open site situate within Fort area of Khammam having purchased the same from Syed Ali (PW4) under exhibit A1 sale deed, dated 07.11.1967 for a consideration of Rs.99/-; and, that its English translation is exhibit A2; and, that she had thus acquired right, title and interest in the plaint schedule site by virtue of the said document and had also obtained possession of the same under the said document; and, that most of the properties in the Fort area are exempted from payment of house tax; and, that since the site is of a small extent no house tax was assessed and levied on the subject site; and, that since the date of the said purchase she has been in continuous possession of the said site; and, that since she is a resident of Santhinagar area of Khammam town, she used to raise vegetables in the suit site through her parents, who are residing inside the Fort; and, that she is thus enjoying the property; and, that when her husband went to the suit schedule site on 06.05.1984 to remove the wild growth with an intention to raise a basement thereon, the defendants 1 to 3 had objected and had tried to occupy the plaintiff's site by force; and, that therefore, she is constrained to file the suit for perpetual injunction.

6. The suit against the 3rd defendant was dismissed; the 2nd defendant had remained *ex parte*. The 1st defendant had alone resisted the suit. The defence of the first defendant is that plaintiff's father was the owner and possessor of 400 square yards of site; and, that he had purchased the said site from him for a consideration of Rs.1,500/- under a registered sale agreement, dated 28.09.1972 i.e., exhibit B6; and, that its true translation is exhibit B7; and, that by virtue of the said agreement, the possession of the property was delivered to him by the father of the plaintiff; and, that the plaint schedule property is a part of the said property purchased by him; and, that

his house is adjacent to the plaint schedule site; and, that from his property there is an entrance into the suit schedule site; and, that there are wild bushes in the plaint schedule site; and, that exhibit A1 agreement of the plaintiff is fabricated; and, that he is in possession of the property; and, that the plaintiff is not in possession; and, that, therefore, the suit is liable to be dismissed.

7. Having regard to the pleadings, the trial Court had framed the following issues:

- (i) Whether the plaintiff is entitled for the injunction as prayed for?
- (ii) To what relief?

(Reproduced verbatim)

8. At trial, the plaintiff, her mother, a supporting witness and her vendor, Abdul Ali, were examined as PWs1 to 4 and exhibits A1 to A15 were marked and on her side. The first defendant and a supporting witness were examined as DWs1 and 2 and exhibits B1 to B8 were marked. On merits, the trial court had dismissed the suit of the plaintiff. Further, the first appellate court had allowed the appeal of the plaintiff and decreed the suit having set aside the decree and judgment of the trial court. Therefore, the aggrieved first defendant had preferred this second appeal before this court.

9. The learned counsel for the appellant/first defendant would contend that the trial court had accurately considered the facts and had properly appreciated the evidence and had arrived at correct conclusions on all the issues and had rightly dismissed the suit of the plaintiff holding that she had failed to prove her possession; but, the court of first appeal by erroneously not considering exhibit B6 agreement executed by the father of the plaintiff in favour of the first defendant on the ground that it is inadmissible evidence, had failed to properly appreciate the evidence on record and also the facts, which are relevant; and, that the court below ought not to have considered the inadmissibility of exhibit B6 as such a question does not arise for consideration once the document has been exhibited much less without an objection; and, that the court below has erroneously held that the right to enforce specifically the exhibit B6 agreement is barred by law of limitation though no time is fixed for performance of the contract under the said

agreement; and, that the findings on exhibit B6 of the court below for non consideration of the same as a piece of evidence in support of the case of the first defendant are erroneous, contrary to law, and not sustainable; that the court below ought to have taken into consideration exhibit B6 and its contents; and, that the court below ought to have further seen that the plaintiff had failed to prove that she is raising vegetables in the plaint schedule through her parents and her consequential alleged possession over the suit schedule property; and, that the court below had erroneously went into the issue of incidental title to the property in a suit for perpetual injunction and had erroneously upset the well reasoned findings in the judgment of the trial court; and, that the first appellate court did not consider the material and relevant evidence in proper perspective; and, that, therefore, the judgment and decree, which are impugned, are liable to be set aside and the judgment and decree of the trial court are to be confirmed.

10. On the other hand, learned counsel for the plaintiff while supporting the decree and judgment of the court below had contended that the court below had given valid reasons for going into the issue of incidental title in a suit for perpetual injunction and had rightly appreciated both the oral and documentary evidence in juxtaposition with the facts of the case and that the court below had given valid reasons for not considering exhibit B6 and even otherwise, the first defendant had failed to prove that the plaintiff's father had right, title and interest in the said property to convey the same to him under exhibit B6; and, that the evidence on record, particularly the Commissioner's report, sufficiently established that the suit schedule property is full of bushes and wild growth as rightly observed by the court below; and, the court below had rightly held that the first defendant is not in possession of the property; and, that the court below had rightly decreed the suit of the plaintiff by following the settled principle of law that possession follows title, as the plaintiff had proved her title incidentally and as required under law; and, that the grounds, which are raised as substantial questions of law are questions of fact and at any rate, the said questions are mixed questions of fact and law and are neither pure questions of law nor substantial questions of law; and, that no substantial questions are involved in the second appeal; and,

that even assuming that exhibit B6 is to be considered, still the first defendant has no case; and, that, therefore, there is no merit in the second appeal; and, that the second appeal is liable to be dismissed.

11. I have carefully gone through the pleadings and the evidence.

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

Firstly, it is to be seen that as per the contentions of both the sides, plaint schedule site is a vacant site and there is wild growth in that. Therefore, neither of the parties could prove actual physical possession over the property, which is full of wild growth. Even as per the findings of the trial court, the Commissioner appointed went to the property and had found that there is a wild growth of 'Circari Thumma bushes' in the plaint schedule property. Therefore, when the property is a vacant site and when the plaintiff on one hand and the 2nd defendant on the other are claiming title to and possession over the property, in a case of this nature, the court of first appeal had rightly held that the question of title to the property has to be gone into incidentally and that the decision on the incidental title would determine the principle issue in regard to the plaintiff's entitlement or otherwise to the perpetual injunction as the law is well settled that possession follows title.

12. This view of the appellate court, which is correct in the well considered view of this court, finds support from the decision in **Anathula Sudhakar v.**

P. Buchireddy (dead) by LRs^[1]. In the cited decision, 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 the suit schedule site is a vacant site of a small extent with wild growth. The plaintiff and the 1st defendant are claiming to be in possession of the said site. Therefore, among the parties to the suit, one who is able to establish title incidentally thereto shall be considered to be in possession as against the other person, who is not able to establish incidental title. Therefore, even though the suit is for a mere perpetual injunction, it will be necessary to examine and determine incidentally the title as a prelude to *de jure* possession.

13. Now in this background, it is to be seen as to who amongst the two contesting parties is having incidental title to the suit schedule property. The plaintiff, as already noted, claims title by virtue of exhibit A1, which is a simple sale deed of the year 1967 executed by PW4 in her favour. It being a document in Urdu, its true translation is exhibited as exhibit A2. The plaintiff had examined her vendor-PW4; and, he had categorically deposed that he had executed the said sale deed in favour of the plaintiff for consideration of Rs.99/- and that his brother Syed Ali and another attestor had attested it and that a teacher had scribed it and that possession of the property was delivered to the plaintiff. When the very vendor of the plaintiff was examined and the sale deed being not a compulsorily attestable document, no further proof is required to *prima facie* come to the conclusion about the due execution of the sale deed by PW4 in favour of the plaintiff PW1. It is also in evidence that the scribe of exhibit A1 had died about 20 years back and that one of attestors of exhibit A1 had died about 15 to 20 years back and that the whereabouts of the other attestor could not be ascertained. The document being for a consideration of Rs.99/-, which is less than Rs.100/-, required no registration.

14. Coming to the contention of the defendant, that exhibit A1 is not a true document and it was created for the purpose of the suit, what is to be noted is that it was engrossed on a stamp paper of the year 1962, which bears the seal with the date 05.10.1962. Therefore, the document was created on a new stamp paper for the purpose of the suit cannot be countenanced, more particularly, when the vendor was examined and proved the genuineness of the transaction under the said document and also its execution by him. Apart from this document, the plaintiff had also filed exhibit A3, the sale deed dated 14.05.1955 in respect of the suit site in the name of her vendor Syed Ali executed by Mohd. Khaja. It being a document in Urdu, its true translation in English is exhibited as exhibit A5. Exhibit A4 is an agreement of sale dated 23.05.1957 for Western side, i.e the site to the West of the plaint schedule site executed in favour of the father of the plaintiff by his vendor and its English translation is exhibit A5. Exhibit A6 is the certified copy of registered sale deed dated 22.08.1957 and its true translation in English is exhibit A7. They relate to the site to the Western suit property executed by Khateejabee in favour of the father of the plaintiff. Exhibit A8, house tax demand receipt also establishes that the property bearing Door no.2-1-21 stands in the name of the plaintiff's father in the municipal records and that the same is situate to the Western plaint schedule site. Exhibit A10 is the permission dated 18.01.1956 for construction of a hut with Door No.2-1-20 i.e., in respect of the suit site issued by the Municipality. Exhibit A11 is the ownership certificate issued by the Municipality, where under it was certified that the plaintiff's vendor Syed Ali was the owner of the house bearing Door No.2-1-20/1 from 1965 to 1980. A careful reading of exhibit A1 (=A2) of the plaintiff, exhibit A3, the registered sale deed of her vendor-PW4 coupled with the documents viz., exhibits A4, A5, A6 and A7 pertaining to the Western side site, which was purchased by the plaintiff's father from Khateejabee sufficiently establish the title of the plaintiff's predecessor-in-interest from whom the plaintiff had purchased the plaint schedule property. As against this evidence, the only document relied upon by the first defendant/appellant is the sale agreement under exhibit B6. Exhibit B7 is its translation. There is no evidence brought on record to show that the vendor under the said agreement, i.e., the father of the plaintiff has got title to the property to convey

the same under said agreement to the first defendant. In fact, PW2, who is the mother of the plaintiff, had deposed that her husband never executed the sale agreement in favour of the first defendant and had never delivered the possession of the property to the first defendant. Moreover, exhibit B6 is not on a proper stamp, it being on a stamp paper worth Rs.3/-, while in fact the required stamp duty is Rs.5/-. Be that as it may, when the title, even incidentally, of the plaintiff's father was not established as required under law, it follows that the first defendant did not acquire any right, title and interest, much less valid title under the agreement under exhibit B6 as it is settled principle of law that no one can convey a better title than what he has. On such an examination of the evidence on record, this court is satisfied that by producing overwhelming documentary evidence the plaintiff had incidentally established her title and also her *de jure* possession that on the other hand, first defendant could not establish his incidental title. Applying the principle enunciated in the ratio of the decision of the Supreme Court aforementioned, among the parties to the suit, the plaintiff who is able to establish title incidentally to the suit shall be considered to be in possession as against the 1st defendant, who is not able to establish incidental title or a semblance of title. Applying the principle that possession follows title it must be held that the plaintiff is entitled to perpetual injunction as prayed for and as granted by virtue of the decree of the court below. Accordingly, this Court find no error in the judgment of the first appellate court in decreeing the suit of the plaintiff after reversing the decree and the judgment of the trial court.

15. Before parting with the case, it is necessary to mention that even accepting for a moment the contention of the appellant/1st defendant that exhibit B6 cannot be discarded on the ground that it was not engrossed on the required value of stamp paper and that it has also to be considered along with other evidence on record, it is trite to observe that the said document and other documents in exhibit 'B' series are of no avail to the 1st defendant as the 1st defendant could not establish the title of his vendor, i.e., the father of the plaintiff. When the vendor of the 1st defendant has no right, title and interest in the property the claim of the 1st defendant based on exhibit 'B' series documents is not sufficient to dislodge the case of the plaintiff which is

well established by virtue of the overwhelming evidence under exhibit 'A' series coupled with the evidence of PW4, the vendor of the plaintiff.

16. Viewed thus, this court finds that there is no substance in the substantial questions of law involved and that there is no merit in the second appeal and that the second appeal is devoid of merit and is liable to be dismissed.

17. Accordingly, the second appeal is dismissed. There shall be no order as to costs.

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

M.SEETHARAMA MURTI, J

June 18, 2015

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