

HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.420 OF 2007

Dated 9-3-2015

Between:

Mantada Wheelar Swamy Das.

..Appellant.

And:

Soppa Guruvulu.

..Respondent.

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HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.420 OF 2007

JUDGMENT:

This appeal is against judgment dated 31-1-2007 in A.S.No.4 of 2006 on the file of Senior Civil Judge, Gajuwaka, Visakhapatnam whereunder judgment dated 28-11-2005 in O.S.No.143 of 2004 on the file of Junior Civil Judge, Gajuwaka is reversed.

Appellant herein is the plaintiff and respondent herein is defendant and they are hereinafter referred to as "plaintiff and defendant" as arrayed in the suit.

Plaintiff filed the suit seeking declaration that he is absolute owner of suit schedule property and for consequential relief of recovery of possession with damages. According to plaintiff, he purchased vacant site in an extent of 300 square yards and a thatched house therein bearing D.No.3-30 covered by S.Nos.23/5 and 23/6 in the year 1974 from "Boddu" family through a registered sale deed dated 5-4-1974. Subsequently, in the year 1978, he destroyed thatched house and constructed a two portioned slabbed house by obtaining necessary permission from Executive Officer, Grampanchayat, Akkireddypalem village, Visakhapatnam District. At the time of construction of the slabbed house, he left 11 feet width vacant space

from North to South. Subsequently, the property was transferred in the name of his wife and thereafter, plaintiff raised a wall from East to West by leaving suit site which is shown as "ABCD" and constructed a shed by using asbestos sheets. At that time, defendant raised a dispute and demanded to leave three feet width from East to West and on the intervention of village elders, the matter was compromised and thereafter, plaintiff constructed a wall by leaving the suit schedule property. In the year 1995, plaintiff removed 'ABCD' schedule property and raised height of southern wall and constructed first floor and since then, he and his wife have been residing peacefully without any interruption. While so, in the year 2001- 2002, the defendant while constructing his house tried to encroach into 'ABCD' marked portion and the same was resisted by the plaintiff and his wife but the defendant did not stop his acts and raised gova tree and papaya tree in the 'ABCD' portion and thereby, prevented sun light and air to the bed room of plaintiff. Hence, he is constrained to file the suit for declaration and consequential recovery of possession of 'ABCD' portion.

Defendant resisted claim of plaintiff contending that the defendant is absolute owner of the property covered by S.No.23 of 2005 in an extent of 194 square yards, which is purchased from one B.Nookalu and since the date of purchase, he has been in possession of property without any interruption. He contended that after purchase, he raised thatched house and subsequently made pucca construction in his property. It is contended that plaintiff constructed RCC building without leaving any space on southern side and now claiming right in the property belonging to defendant and the suit is based on imaginary grounds. It is further contended that the suit is not maintainable.

On these pleadings, trial court framed appropriate issues and conducted trial during which, two witnesses are examined and eight documents are marked on behalf of plaintiff and three witnesses are examined and three documents are marked on behalf of defendant.

On a consideration of oral and documentary evidence, trial court accepted the claim of plaintiff and decreed the suit. Aggrieved by the said judgment and decree, defendant preferred appeal and the appellate court on a reappraisal of evidence held that plaintiff failed to prove that he has right over the 'ABCD' plaintiff schedule property and consequently, allowed the appeal by setting aside the decree and judgment of the trial court. Aggrieved by the same, present appeal is preferred.

This court treated the following grounds as substantial question of law.

*a) Whether in the facts and upon the circumstances of the case under Section 27 of Limitation Act applies?*

*b) Whether the plea of limitation pleaded by the respondent/defendant herein without producing any piece of evidence which is crucial to the respondent/defendant case, the present Judgment and decree passed by the lower appellate court in favour of the respondent/defendant herein, is the judgment not vitiated by perversity in recording a finding contrary to the plaintiff/appellant case.*

Heard both sides.

Advocate for plaintiff submitted that plaintiff purchased the suit property in the year 1974 and in possession and enjoyment without any interruption till 2000-2001 and defendant at the time of construction of his house encroached into this part and therefore, plaintiff is constrained to file the suit for declaration of title and recovery of possession. He further submitted that trial court on a proper appreciation of oral and documentary evidence held that plaintiff is owner of plaint schedule property and consequently, decreed the suit but the appellate court without any valid grounds reversed findings on surmises and presumptions which are not based on sound principles.

It is submitted that appellate court failed to observe the real dispute between the parties and further stated that there is a wrong appreciation of facts which resulted in injustice to the plaintiff. He further submitted that the findings of the appellate court have to be treated as perverse findings as they are contrary to the material on record and that the Second Appeal is to be allowed.

On the other hand, advocate for defendant submitted that having claimed relief of declaration, it is the burden on plaintiff to prove that he has a legal right over the plaint schedule property but the plaintiff has miserably failed in discharging his burden. He further submitted that there is no material to show that this 'ABCD' portion is part of property purchased by plaintiff in the year 1974 and without establishing that 'ABCD' is part and parcel of property covered by Ex.A.1 sale deed, plaintiff is not entitled for reliefs claimed and the appellate court rightly allowed the appeal and that there are no grounds to interfere with the findings of the appellate court.

He submitted that trial judge, without properly appreciating the evidence mechanically decreed the suit in favour of the plaintiff and appellate court rightly reversed the findings of the trial court and that

there is no substantial question of law to be decided by this court and that the appeal is liable to be dismissed.

` Now the point that would arise for my consideration in this appeal is whether there is any substantial question of law involved in this appeal to be decided by this court.

POINT:

According to the submissions, it is the specific case of plaintiff that he left 'ABCD' portion while constructing his house on southern side and that the defendant encroached into the said site. So, the burden is on the plaintiff to prove that he constructed house by leaving site on southern side. For this, he relied on his evidence and the documents Exs.A.1, A.3 and A.8. Plaintiff purchased this property from Boddu family in the year 1974 under Ex.A.1 document. According to him, he has transferred the said property in the name of his wife in the year 1980 and that his wife again retransferred the property in the name of plaintiff by way of gift deed in the year 2003. No specific reason is given as to why the very same property is changed in between husband and wife through three registered documents. Whatever may be the reason, plaintiff can only have right in the property that was purchased from Boddu family in the year 1974 under Ex.A.1. Having contended that "ABCD" portion is part of the property, purchased under Ex.A.1, it is for the plaintiff to show that the plaintiff schedule property i.e., "ABCD" portion forms part of Ex.A.1. Plaintiff except relying on his self serving testimony, has not placed any other evidence to show that 'ABCD' portion is part and parcel of the property purchased under Ex.A.1.

To support his testimony, he only examined his wife as P.W.2 and no other person is examined.

Normally, when there is a dispute with regard to area covered by particular document, it is expected from a party claiming right under that document to get the property surveyed through qualified surveyor to find out whether particular piece of land forms part and parcel of property covered by particular document. Plaintiffs can get rights only to the extent that was referred in the sale deed and he can recover possession only if there is a reduction of extent.

Learned appellate judge observed when there is dispute with regard to the extent of the land, burden is on the plaintiff but the plaintiff has failed to place any satisfactory evidence to support his pleadings. Learned appellate judge held that except interested testimony of husband and wife, no other person is examined to support the claim of the plaintiff. Learned trial judge without noticing this fact simply accepted the interested testimony of P.Ws.1 and 2 but discarded the

evidence of D.Ws.1 and 3 on the ground of interestedness. If interestedness is to be taken into consideration that has to be applied to both parties equally, but the trial judge accepted the interested testimony of plaintiffs and discarded the evidence of defendants on that ground. Plaintiff having come to court, it is his burden to show that plaint schedule property is part and parcel of the property purchased under Ex.A.1 and then only the burden shifts on to the defendant to show how he has got right over the plaint schedule property. Here the plaintiff has not at all placed any evidence leave alone cogent and sufficient evidence to show that plaint schedule property is part and parcel of the property purchased under Ex.A.1. Learned appellate judge has elaborately discussed the entire evidence of both parties and rightly appreciated the same and therefore, the contention of the plaintiff that findings of the appellate judge are perverse, cannot be accepted. On the other hand, the findings of the appellate judge are based on sound principles and that there are no grounds to interfere with the same.

On a scrutiny of entire material, I am of the view that there is no substantial question of law involved in this case to be decided by this court and the grounds urged by the appellant in this Second Appeal are not at all tenable, and no limitation aspect is involved.

For these reasons, this Second Appeal is dismissed as devoid of merits and both parties shall bear their own costs.

As a sequel to the disposal of this appeal, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

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JUSTICE S.RAVI KUMAR

Dated 9-3-2015.

Dvs.

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