

THE HON'BLE SRI JUSTICE SANJAY KUMAR

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**SECOND APPEAL NOS.776, 812 OF 2014 AND
CIVIL REVISION PETITION NO.4093 OF 2014**

DATED 4th JUNE, 2015

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Between:

Nedunoori Swamy

.... Appellant

and

Ganta Laxmi and others.

... Respondents

THE HON'BLE SRI JUSTICE SANJAY KUMAR

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**SECOND APPEAL NOS.776, 812 OF 2014 AND
CIVIL REVISION PETITION NO.4093 OF 2014**

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COMMON JUDGMENT

These two second appeals and civil revision petition are amenable to a

conjoined disposal. Hence, this common judgment.

O.S.No.692 of 2005 was filed by the appellant in these second appeals/petitioner in the civil revision petition, while O.S.No.1129 of 2005 was filed by the other side. The two suits were filed by the respective parties seeking a permanent injunction against the opposite party. However, the suit schedule properties in the two suits were different. In O.S.No.692 of 2005, the injunction sought was in respect of Ac.2-10 guntas of agricultural dry land in Sy.No.703 of Mucharla Village, Hasanparthy Mandal, Warangal District, while O.S.No.1129 of 2005 pertained to an extent of Ac. 3-35 guntas of agricultural land in Sy.No.704/1 of Mucharla Village, Hasanparthy Mandal, Warangal District. The boundaries of the suit schedule properties as set out in the plaints were also different. These two suits were filed before the learned II Additional Junior Civil Judge, Warangal. By common judgment dated 29.07.2013, the trial Court decreed O.S.No.692 of 2005 and dismissed O.S.No.1129 of 2005.

Aggrieved thereby, the respondents before this Court filed appeals in A.S.No.78 of 2013 (arising out of O.S.No.692 of 2005) and A.S.No.79 of 2013 (arising out of O.S.No.1129 of 2005) before the learned Principal District Judge, Warangal. They also filed I.A.No.1469 of 2014 in A.S.No.78 of 2013 under Order 41 Rule 27 CPC seeking to adduce additional documentary evidence. By a separate order dated 12.09.2014 passed in I.A.No.1469 of 2014 in A.S.No.78 of 2013, the lower appellate Court allowed the petition and received the document in evidence. Thereafter, by common judgment dated 22.09.2014, the lower appellate Court allowed both the appeals, dismissing O.S.No.692 of 2005 and decreeing O.S.No.1129 of 2005. Aggrieved thereby, the respondent in both the appeals before the lower appellate Court is before this Court in second appeal. He also filed CRP No.4093 of 2014 against the order passed by the lower appellate Court in I.A.No.1469 of 2014 in A.S.No.78 of 2013.

Having heard Sri D.Madhava Rao, learned counsel for the appellant in the second appeals/petitioner in the civil revision petition, and Sri B.Ranganatha Rao, learned counsel for the respondents in all the three cases, this Court is of the opinion that the matters can be disposed of at the stage of admission itself.

Parties shall be referred to as arrayed in the second appeals.

The appellant filed O.S.No.692 of 2005 for a permanent injunction claiming that his father had purchased the suit property in his name from one Smt.Sujatha Bai, the pattadar and possessor, under a simple sale deed dated 15.03.1970. He further claimed that since the date of purchase, the suit property was in their possession and enjoyment. He stated that he could not get his name entered in the revenue records immediately and that it was only in November, 2003, he applied for mutation. Thereupon, the revenue authorities regularized the simple sale deed under the provisions of the Andhra Pradesh Rights in Land and Pattadar Pass Books Act, 1971 (for brevity, 'the Act of 1971') and issued him a pass book and title deed in respect of the suit property. He further stated that his name was entered in the adangal/pahani for the year 2003-2004 duly showing his title and possession over the suit property. According to him, the suit property was situated in Sy.No.703 of Mucharla Village. It was his case that the deceased first defendant in the suit, under whom the respondents in the second appeals claim as legal representatives, owned land in Sy.Nos.704/1 and 704/2 adjacent to the suit property and that with an evil intention to occupy the suit property, he tried to interfere with his possession and that the appellant was therefore constrained to file the suit for a permanent injunction.

The deceased first defendant in the said suit filed a written statement denying the ownership and possession of the appellant over the suit property. He further stated that the suit property was situated in Sy.No.704 and not in Sy.No.703 of Mucharla Village as alleged. He claimed that the suit had been filed falsely so as to grab his land in Sy.No.704 by showing it as Sy.No.703. He alleged that the mutation had been carried out in the year 2003 with the connivance and collusion of the revenue authorities and that no stock could be laid by such revenue proceedings.

O.S.No.1129 of 2005 was filed thereafter by the deceased first defendant in O.S.No.692 of 2005 seeking an injunction against the appellant in respect of the suit property situated in Sy.No.704/1 of Mucharla Village. In the plaint filed therein, he claimed that the suit property, being in Sy.No.704/1, was part of the larger extent of land of Ac.5-15 guntas purchased from Smt.Sujatha Bai under simple sale deeds. He further claimed that his name had been mutated in the revenue records and that the appellant had no right in the said land.

This claim was contested by the appellant, reiterating the claim put forth by

him in O.S.No.692 of 2005.

On the above pleadings, the trial Court framed the following issues in O.S.No.692 of 2005:

1. Whether the plaintiff was in lawful possession of the suit schedule property as on the date of the suit?
2. Whether the defendant interfered with the possession of the plaintiff over the suit schedule property without any justification?

In O.S.No.1129 of 2005, the trial Court framed the following issues:

1. Whether the plaintiff is entitled to have permanent injunction as prayed for?
2. To what relief?

Evidence was recorded in O.S.No.692 of 2005. The appellant examined four witnesses and adduced Exs.A1 to A12 in evidence while the legal representatives of the deceased first defendant in O.S.No.692 of 2005, being the respondents herein, examined four witnesses and marked Exs.B1 to B15 in evidence.

The trial Court, as stated hereinabove, decreed O.S.No.692 of 2005 and dismissed O.S.No.1129 of 2005. In appeal, the lower appellate Court framed the following issues for determination:

1. Whether the disputed land is a part and parcel of Sy.No.703 or Sy.No.704 of Mucharla Village of Hasanparthy Mandal, Warangal District and if, either the respondent or the appellants established that they were in possession and enjoyment of the same, as on date of filing the suit in O.S.No.692 of 2005, with a lawful right and interest?
2. Whether the respondent was entitled for relief of perpetual injunction, against the appellants or the appellants were entitled for perpetual injunction, against the respondent, as prayed for?
3. To what relief?

Upon considering the material on record and the arguments advanced on behalf of the parties, the lower appellate Court reversed the common judgment and

decrees of the trial Court.

The aforestated facts manifest that the issue boiled down to the identity of the suit property in the two suits. On the one hand, the appellant claimed that he was interested in an extent of land situated in Sy.No.703 of Mucharla Village. *Per contra*, the claim of the respondents and their predecessor-in-title was that their interest lay in an extent of land situated in Sy.No.704/1 of Mucharla Village. The oral evidence of the appellant (P.W.1) and the first respondent (D.W.1), the widow of the first defendant in O.S.No.692 of 2005, was that they had nothing to do with the land in the survey number claimed by the other side. Therefore, the core issue that fell for consideration before the Courts below was whether each party had proved the identity and possession over the land claimed by them in their respective survey numbers.

Upon due consideration, the following substantial questions of law arise for adjudication in the two second appeals:

1. Whether the Courts below applied the law correctly while determining the entitlement of the contesting parties for the relief of permanent injunction?
2. Whether the lower appellate Court erred in making out a fresh case when the same was not even put forth or claimed by the party concerned?

The trial Court had appointed an Advocate-Commissioner in the suit proceedings to identify and locate the suit land in O.S.No.692 of 2005 with the help of a Surveyor to know whether it was in Sy.No.703 or Sy.No.704 of Mucharla Village. As per the report filed by the said Commissioner, the suit land in O.S.No.692 of 2005 was located in Sy.No.703 of Mucharla Village. The Surveyor fixed the boundaries of the land in Sy.No.703 with the help of the village map after verifying Sy.Nos.704, 702 and 718. It was on the basis of this report that the trial Court decreed O.S.No.692 of 2005 and dismissed O.S.No.1129 of 2005. Admittedly, the respondents had filed objections to this Commissioner's report. They also attacked the report on the ground that the Advocate-Commissioner had not been examined. The trial Court ruled that such objections would be decided in the suit. The lower appellate Court found that the said objections were, in fact, considered in para 15 of the trial Court's judgment.

No doubt, mere failure to examine the Advocate-Commissioner may not

invalidate his report but it is imperative that any objections thereto be dealt with meticulously by the Court. In the present case, the objections raised were that the Surveyor did not measure the land in Sy.No.704 using the same system as was adopted for Sy.No.703 and he located the land in Sy.No.704 with the help of boundary stones and by using chain system only. The further objection was that the report was incomplete and that the sketches did not disclose the measurements of the land in dispute. These issues were however not dealt with by the trial Court or the lower appellate Court. The trial Court blindly accepted the findings in the Commissioner's report and held in favour of the respondents while the lower appellate Court reversed the trial Court's judgment on the ground that the document of title, on the basis of which the appellant based his suit claim, was set aside by the revenue authorities and that he therefore failed to make out a case for an injunction.

In this regard, it may be noted that the appellant lay claim to the suit property in Sy.No.703 of Mucharla Village on the basis of a simple sale deed dated 15.03.1970 which was validated by the revenue authorities by way of Ex.A.3 certificate under the provisions of the Act of 1971. On that basis, he was also issued Ex.A1 pattadar pass book and Ex.A2 title deed. During the suit proceedings, it appears that Smt.Sujatha Bai, who was stated to be his vendor, filed an appeal seeking cancellation of the pattadar pass book and title deed granted to the appellant by the revenue authorities. During the hearing of the appeals before the lower appellate Court, the Revenue Divisional Officer, Warangal, by order dated 10.07.2014, set aside the pattadar pass book and title deed granted to the appellant and also Ex.A3 certificate validating the simple sale deed dated 15.03.1970. This order was sought to be placed on record as additional evidence in A.S.No.78 of 2013 by way of I.A.No.1469 of 2014 filed therein. The lower appellate Court permitted this evidence to be taken on record as Ex.B.16, by order dated 12.09.2014, and the present civil revision petition arises therefrom. The lower appellate Court took into account the fact that the appellant had preferred a revision before the Joint Collector, Warangal, aggrieved by the order dated 10.07.2014 passed by the Revenue Divisional Officer, Warangal, and that the said revision was pending. However, being of the opinion that invalidation of Exs.A1, A2 and A3 was fatal to the case of the appellant, the lower appellate Court held against him.

In so far as the issue of possession was concerned, the lower appellate Court

was of the opinion that the name of the appellant found mention for the first time in the revenue record of the year 2004-05 as per the order dated 10.07.2014 (Ex.B.16) of the Revenue Divisional Officer, Warangal. However, the lower appellate Court failed to consider Ex.A4 pahani pertaining to the year 2003-04, which also recorded the possession of the appellant. Further, invalidation of Exs.A1, A2 and A3 was yet to become final and in any event, the same had an impact only on the title claimed by the appellant. It was not determinative of the factum of his possession, if any, over the land claimed under those documents. This aspect necessarily had to be decided independently.

Trite to state, even an encroacher would be entitled to the protection of law against the rightful owner who seeks to dispossess him illegally. In the present case, the injunction sought was not against the alleged vendor, Smt.Sujatha Bai. On the other hand, the plaintiffs in the two suits claimed altogether different lands, one in Sy.No.703 and the other in Sy.No.704/1 of Mucharla Village. The core issue that had to be decided was whether the suit property in the two suits fell in the respective survey numbers claimed by the parties or whether there was any overlapping or contradiction in fact. Unfortunately, neither of the Courts below concentrated on the crux of the matter and baldly acted upon the Advocate-Commissioner's report in spite of relevant objections being raised at the appropriate time. The lower appellate Court, in fact, recorded that the Commissioner did use different systems for measuring and identifying the respective extents in Sy.Nos.703 and 704 of Mucharla Village. No steps were taken by either of the Courts below to ascertain the factual position through the officials of the Survey Department or by calling for survey maps.

Despite the finding of the Advocate-Commissioner that the suit property in O.S.No.692 of 2005 fell in Sy.No.703 of Mucharla Village, the lower appellate Court surprisingly modified the suit claim in O.S.No.1129 of 2005 by holding that though the suit property therein was said to be in Sy.No.704/1, it was actually situated in Sy.No.703 and decreed the said suit. As already stated herein above, the claim in that suit was that the suit property therein was in Sy.No.704/1 of the village. DW1, the widow of the deceased first defendant in O.S.No.692 of 2005/the original plaintiff in O.S.No.1129 of 2005, specifically stated in her deposition that they had no interest in the land in Sy.No.703 of the village. Surprisingly, the trial Court did not even deal with the suit claim in O.S.No.1129 of 2005 independently after considering the suit claim in O.S.No.692 of 2005.

To add to this, in spite of the specific stance of the parties themselves, the lower appellate Court held that the identity of the land in dispute was established as being part of Sy.No.703 of the village and that this land was purchased by the deceased first defendant in O.S.No.692 of 2005 from Smt.Sujatha Bai under the impression that it was a part of Sy.No.704/1 of the village! It was further held that his possession and enjoyment over the said land was established as on the date of the filing of the suit and therefore, he and his successors-in-title were entitled to an injunction protecting their possession. This was an altogether new case sprung upon the respondents, which was never their claim. When the respondents consistently asserted that they had no interest in the land in Sy.No.703, it was not for the lower appellate Court to bolster their suit by introducing a new case for them. Once the Commissioner's report was accepted and acted upon, the only issue that survived was whether the appellant substantiated his claim of possession over the said land and whether the suit property in O.S.No.1129 of 2005 was separate and distinct and whether the respondents had proved their possession in respect thereof, entitling them to a separate decree of injunction against the appellant. These aspects were altogether glossed over by both the Courts below.

The evidence of interested witnesses on both sides necessarily had to be eschewed from consideration as there was no clinching proof adduced through them as to the factum of possession claimed over the suit properties in the two suits. Though the respondents did not contest the manner in which their objections were dealt with, it is always open to the Court, under Order 26 Rule 9 CPC, to undertake such an exercise even *suo motu*. The report of the Advocate- Commissioner therefore had to be examined in further detail to determine whether the factum of identity and possession had been clearly established by the parties. As this exercise was not undertaken, this Court is of the opinion that the Courts below failed to apply the law as regards grant of a decree of injunction correctly. Further, foisting a new case upon a party, when it was not even put forth, is wholly unsustainable and the decretal of O.S.No.1129 of 2005 on the basis of such an exercise must necessarily be set aside.

The judgments and decrees of both the Courts below are accordingly set aside and the matter is remitted to the trial Court for adjudication afresh on the issue of identity and possession of the suit properties in the two suits. The trial Court shall undertake an enquiry as to whether the Advocate-Commissioner's report is reliable

and conclusive and determine these aspects afresh. It is only on the basis of a cogent finding as to which party is in possession of which land that an injunction could be granted in its favour.

In so far as the civil revision petition is concerned, it is the settled position of law that in an injunction suit, the Court is entitled to look into the issue of title incidentally. Therefore, any document which had bearing upon this issue is a relevant document and as the IA filed was to receive a quasi-judicial order attributable to a revenue authority, which did not need independent verification and corroboration, the lower appellate Court rightly allowed the same to be marked in evidence as Ex.B.16. This Court therefore finds no illegality in the order passed in I.A.No.1469 of 2014 in A.S.No.78 of 2013. The Civil Revision Petition is devoid of merit and is accordingly dismissed.

In the result, the second appeals are allowed and the civil revision petition is dismissed. There shall be no order as to costs.

SANJAY KUMAR, J.

4th JUNE, 2015.

PGS