

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.131 of 2015

JUDGMENT:-

This Second Appeal under Section 100 of the Code of Civil Procedure by the unsuccessful defendants 1 and 3 is directed against the decree and judgment dated 10.12.2014 of the learned II Additional District Judge, Visakhapatnam passed in A.S.No.259 of 2010, whereby the learned II Additional District Judge, while dismissing the said appeal, had confirmed the decree and judgment dated 07.07.2010 of the learned V Additional Junior Civil Judge, Visakhapatnam passed in O.S.No.2743 of 2005 filed by the plaintiff for mandatory injunction directing the defendants to remove the pan shops and the temporary shelters raised in the plaint 'B' schedule property shown as 'AB' and 'CD' in the plaint plan and to handover vacant possession of the property to the plaintiff and for a perpetual injunction restraining the defendants, their men and agents from altering the physical features of the plaint 'B' schedule property in any manner and from ever interfering with the plaintiff's peaceful possession and enjoyment of the plaint 'C' schedule property in any manner whatsoever.

2. I have heard the submissions of the learned counsel for the appellants/defendant 1 and 3 ('the defendants 1 and 3', for brevity) and the learned counsel for the first respondent/plaintiff ('the plaintiff', for brevity). The second defendant had died, as per the submission of the learned counsel for the defendants 1 and 3. The fourth defendant/the second respondent herein was stated to have vacated the property and delivered possession of the wooden bunk, pursuant to the proceedings in the Execution Petition No.34 of 2012 and in that regard, a memo has been filed on 10.07.2012 before the Court of execution stating that the fourth defendant had vacated the property.

3. The learned counsel for the defendants 1 and 3 would contend as follows: 'The Courts below have not properly appreciated the evidence. The Courts below did not take note of the material fact that the plaintiff was not

examined and that only PW1, who is the power of attorney holder of the plaintiff, was examined and that the alleged power of attorney in favour of PW1 is also not filed. Apart from examining the PW1, the plaintiff had also examined the supporting witnesses, PWs 2 and 3, but their evidence does not support the case of the plaintiff and that, therefore, there is no legal evidence adduced in proof of the pleaded case of the plaintiff. Considering the fact that the plaintiff was not examined and that he did not offer himself for cross-examination, the Court below ought to have drawn an inference that the case set up by the plaintiff is not correct. The defendants had filed and exhibited their documents in Exhibit 'B' series, particularly, exhibit B1 – the driving license of the first defendant, which was issued on 05.09.1994. The said documents would reveal that the defendants 1 and 3 were in possession of the property even prior to the date of trespass alleged by the plaintiff. Non-appreciation of the said material evidence on the side of the defendants 1 and 3 and not drawing an inference that the case set up by the plaintiff is not correct on account of the non-examination of the plaintiff at trial, would constitute substantial questions of law. Therefore, the decrees and judgments of the Courts below are liable to be set aside and the suit of the plaintiff is liable to be dismissed.' In support of the said contentions, the learned counsel for defendants 1 and 3 had placed reliance on the judgments of the Supreme Court in ***Janki Vashdeo Bhojwani and another Vs. IndusInd Bank Ltd., and others***^[1] and ***Man Kaur (dead) by LRs Vs. Hartar Singh Sangha***^[2].

4. On the other hand, the learned counsel for the plaintiff, while supporting the decrees and judgments of the Courts below, wherein concurrent findings of facts were recorded, had submitted that PW1 is none other than the wife of the plaintiff and that she is having personal knowledge of the facts and that she is a competent witness under Section 120 of the Indian Evidence Act, 1872 and that both the Courts below had accurately considered the facts and properly appreciated the evidence and that the questions of law sought to be raised in this appeal are not pure questions of law, much less substantial

questions of law, and that the appeal is devoid of merit and is liable to be dismissed without being admitted as no substantial questions of law arise for admission and disposal on merits.

5. Now it is to be examined as to whether or not any substantial questions of law are involved and whether the appeal deserves to be admitted for disposal on merits or is liable to be dismissed at the stage of admission.

6. Now, it is necessary to refer to the cases pleaded by both the parties.

6.1 The plaintiff's case and the contentions on their behalf as urged before this Court are as follows: 'The plaintiff had purchased plaint 'A' schedule property under the registered sale deed dated 11.07.2000. Exhibit A1s the copy of the said sale deed. The plaintiff had appointed a watchman to safeguard the said property which is in possession and enjoyment of the plaintiff. The 1st defendant had unauthorisedly constructed a wooden bunk (pan shop) in December 2004 on a municipal drain/drainage canal on the East of the plaintiff's property and had obstructed free access to the plaint schedule property. When a complaint was given to the municipal authorities in the third week of December 2004, he was instructed by an officer of the municipal authority, who made a visit to the spot, to remove the pan shop. Having come to know of the said complaint, on 20.12.2004, the first defendant along with his mother, wife and sister, i.e., the defendants 2 to 4 and with the help of his henchmen had highhandedly demolished a portion of the compound wall and had forcefully trespassed into plaint 'A' schedule property and had damaged certain property of the plaintiff and committed theft of some building material of the plaintiff worth Rs.30,000/- and had shifted the wooden bunk which was earlier on the drain into a small portion of the plaintiff's property on the Eastern side and had also occupied the rear side vacant site inspite of protests made by the wife of the watchman and had also erected a temporary shelter by the side of the said pan shop. And, the entire encroached property is shown as 'B' schedule property. On a report given to the police on 23.12.2004, a case in Cr.No.373 of 2004 was registered against the 1st defendant and on his arrest; he was remanded to judicial custody.

The plaintiff had also requested the TRANSCO not to provide electricity connection to the pan shop. When further damage was caused to the property and theft of building material lying at the property was committed, a further report was lodged on 17.07.2005 with the Station House Officer, IV Town Police Station. When the criminal cases were pending, another pan shop was erected just by the side of the existing pan shop. Therefore, the plaint was got amended seeking necessary further reliefs including the relief of recovery of possession after removal of the structures. In the facts and circumstances, the defendants have no manner of right whatsoever in the property purchased by the plaintiff under exhibit A1 sale deed dated 11.07.2000. The defendants had trespassed into the property for the first time in the year 2004 despite an objection raised by P. Saroja, the wife of the watchman. The defendants who are trespassers and encroachers and who made constructions originally on the municipal drain and later in part of the property of the plaintiff have no manner of right to remain in possession of the illegal constructions made by them without any manner of right.'

6.2 On the other hand, the defence of the defendants 1 and 3 is that the plaintiff is not the owner of the suit schedule property and that there is a civil case between the parties and that the suit schedule property belongs to them and that the defendants are the possessors and the owners of the schedule property, which is in their occupation, and that the plaintiff had alleged that he had purchased the property allegedly in the year 2004; and that there are disputes between the plaintiff and the family of the defendants 1 and 3; and, the property belongs to the defendants; and, that the plaintiff had entered into the suit schedule property by purchasing the same and that the defendants had trespassed and made encroachments are all created allegations; and, the suit is not maintainable; and, therefore, the suit is liable to be dismissed.

7. At trial, the wife of the plaintiff and two other supporting witnesses, including the wife of the watchman by name P.Saroja, were examined and exhibits A1 to A8 were marked. On the side of the defendants, the third defendant was examined as DW1 and another supporting witness was

examined as DW2 and exhibits B1 to B10 were marked. On merits, the trial court had decreed the suit of the plaintiff but, had not granted the relief of damages. And the court of first appeal had dismissed the appeal of the defendants 1, 3 and 4. The aggrieved defendants 1 and 3 had only preferred this appeal.

8. I have carefully gone through the material record and the decrees and the judgments of the Courts below. Exhibit A1 is the certified copy of the registered sale deed dated 11.07.2000 in favour of the plaintiff in respect of the suit schedule property. Exhibit A2 is the certified copy of the complaint dated 23.12.2004, given by the plaintiff against the defendants along with the FIR. Exhibit A3 is the copy of the remand report dated 21.02.2005. Exhibit A4 is the copy of notice to Transco. Exhibit A5 is another complaint given by the plaintiff to the IV Town Police Station on 17.07.2005. Exhibit A6 is the certified copy of the judgment dated 11.03.2005 in C.C.No.577 of 2005 on the file of the learned I Additional Chief Metropolitan Magistrate, Visakhapatnam. Exhibit A7 is another copy of the complaint dated 07.06.2008 given by PW1, the wife of the plaintiff. Exhibit A8 is the relevant acknowledgment. The wife of the plaintiff, in the well considered view of this Court, is a competent witness in view of provision of Section 120 of the Indian Evidence Act, 1872 and as she is having personal knowledge of the matters and had also in fact lodged complaints with the police. Hence, the decisions in **Janki Vashdeo** (supra) and **Man Kaur** (supra) relied upon in support of the contentions that PW1 is not a power of attorney holder of the plaintiff and that for non-appearance of the plaintiff as a witness and his failure to offer himself for cross-examination by the defendants, a presumption would arise that the case of the plaintiff is not correct are not helpful to the defendants, in the facts peculiar to the case. Therefore, the 1st contention that PW1 is not a competent witness and that for non-examination of the plaintiff, an adverse inference has to be drawn that the case set up by the plaintiff is false cannot be countenanced. She had deposed in-line with the pleaded case of the plaintiff and had maintained her stand in the cross-examination, as could be seen from the concurrent findings in the judgments of the Courts below. It is

undisputed that on a complaint of trespass given by the plaintiff, a calendar case was taken on file and that in that case, by the judgment under exhibit A6, the first defendant was convicted and the said judgment of the criminal Court has become final. Though a judgment of a criminal Court is not binding on a civil Court, but it can be considered as a circumstance in favour of the plaintiff to come to a safe conclusion that the first defendant is a trespasser. Though the defendants 1 and 3 had pleaded that they are the owners of the property, which is in their possession, they could not produce any document or title deed or any other document to show that they have right, title and interest in the plaint 'B' schedule property, which is in their occupation, and which was trespassed into by them according to the plaintiff. Coming to the documents in exhibit 'B' series, exhibit B1 is the driving licence of the 1st defendant issued by a competent authority on 05.09.1994. Exhibits B2 and B3 are the voter identity cards of the 1st defendant's adoptive father and mother said to have been issued in the year 1987. However, as these two documents contained material corrections, the same were kept out of consideration by the Courts below. Exhibit B4 is the Voter Identity Card of the 3rd defendant. Exhibit B5 is a miscellaneous receipt dated 19.05.2004 issued by Town Planning Supervisor. Exhibit B6 is a saving deposit account statement from March 2002 to October 2007. Exhibit B7 and B8 are electricity bills issued in October 2005 and on 05.10.2010. Exhibit B9 is a house hold card dated 30.07.2005 and exhibit B10 is a document dated 25.05.2002 relating to domestic gas connection. The main contention of the defendants 1 and 3 is that the courts below ignored exhibit B1—the driving licence of the first defendant which is of the year 1994 and that the said document would show that the defendants are in possession even by the date of the alleged trespass and that non-consideration of that material document vitiated the findings of the trial court. It was further contended on their behalf that the courts below ought to have drawn an inference that the case pleaded by the plaintiff is not true for non-examination of the plaintiff. This court has already noted that PW1 is no other than the wife of the plaintiff and that she is having personal knowledge of the matters and therefore, she

is a competent witness. Moreover, the plaintiff had got exhibited through PW1 exhibit A1, registered sale deed in respect of the plaint schedule property and on the other hand, the defendants having contended that they are the owners and that they have occupied the property way back in the year 1979, could not establish either their ownership or long possession since 1979. Though by filing exhibit B1, the driving licence of the 1st defendant, it was sought to be contended that it shows possession of the 1st defendant prior to the alleged trespass, the 1st defendant was not examined. Be that as it may, it is a document of the year 1994. DW1 was residing in Surreddypalem of K.Kotapadu Mandal prior to her marriage. DW2 had deposed that he is not aware of the plaintiff employing the husband of PW3 as watchman and PW3 as watchwoman and had also pleaded ignorance as to whether the defendants had trespassed into the property in December 2004. There is also no mention in the written statement of the 3rd defendant that the pan bunk was leased out to DW2, though DW2 had stated so at trial. No documents are produced to show that DW2 was in occupation of any of the bunks erected by the defendants since April 2003. In fact, an execution petition in E.P.No.34 of 2012 was already filed pursuant to the decree and the 4th defendant who is the 4th J.Dr. had filed a memo in the execution proceedings stating that she had handed over vacant possession of the wooden bunk to the plaintiff and she has no claim in that regard. There is no plea in the defence raised that the defendants were and are in continuous possession for more than 12 years to the knowledge of the real owner and that they had perfected title by adverse possession. Therefore, the possession of the defendants however long is not going to advance their defence any further. In a suit for recovery of possession, when once the title of the plaintiff stands established by virtue of exhibit A1, the registered sale deed, the plaintiff stands entitled for recovery of possession, unless the defendants establish a valid right to continue to remain in possession. In the case on hand, the defendants could not plead and prove any such right. Moreover, as rightly observed by the first appellate Court and as already noted by this court, there is no plea of adverse possession specifically taken

and established by the defendants. Therefore, the contentions of the defendants 1 and 3 that material evidence was not considered by the courts below and that non-examination of the plaintiff is fatal to the case of the plaintiff are both devoid of merit.

9. Therefore, none of the contentions which are now raised and are stated to be substantial questions of law, are not involved in this appeal, in the well considered view of this Court; and, there is no substance in the questions raised. Hence, this court finds that the appeal is devoid of merit and is liable to be dismissed at the admission stage. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. A second appeal under Section 100 of the Code is now confined to cases where a question of law is involved and when such question is a substantial one. The view of this court is reinforced by the ratio in the decision in **Gurudev Kaur v. Kaki** (AIR 2006 SC 1975). In the case on hand, as this court found, after careful examination of the pleadings, the evidence and the contentions, that no substantial question of law is involved, this second appeal is liable for dismissal at the stage of admission in view of the narrow compass of Section 100 of the Code of Civil Procedure.

10. Accordingly, the second appeal is dismissed at the stage of admission. However, the defendants 1 and 3 are granted two (02) months time from the date of the receipt of a copy of this judgment to vacate and handover to the plaintiff the vacant possession of the plaint 'B' schedule property after removing the structures thereon as directed in the decree impugned. On failure of the said defendants/appellants to do so, the plaintiff is at liberty to obtain vacant peaceful possession of the decree schedule property in accordance with the procedure established by law. No costs.

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

M. Seetharama Murti, J

24th June, 2015
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[\[1\]](#) (2005) 2 SCC 217
[\[2\]](#) (2010) 10 SCC 512