

HON'BLE SMT JUSTICE ANIS
SECOND APPEAL No.878 OF 2010

J U D G M E N T:

This Second Appeal is directed against the judgment and decree dated 09.07.2010, passed in A.S.No.30 of 2002, by the Senior Civil Judge, Tadepalligudem, whereby and whereunder the learned Senior Civil Judge dismissed the appeal by confirming the judgment and decree dated 19.04.2002, passed in O.S.No.136 of 1997 by the Principal Junior Civil Judge, Tadepalligudem.

The parties hereinafter will be referred to as they are arrayed before the trial Court for the sake of convenience.

The brief facts of the case are that the plaintiff filed the suit for recovery of possession of the plaint schedule property after evicting the defendants and for grant of future *mesne* profits from the date of suit till the date of delivery of possession and for costs. The plaintiff contended that in a partition between himself and his brother under a registered partition deed dated 25.05.1996, the plaint schedule property which is specifically mentioned as A B C in the plaint plan fell to his share. The extent of the plaint schedule property is Ac.0-90cents and the said property is situated in R.S.No.183/3. Defendants 1 to 3 are brothers. Fourth defendant is the follower of defendants 1 to 3 and second defendant is looking after the affairs of the first defendant and cultivating the land. The land of the first defendant is on the eastern side and northern side of the plaint schedule property. According to the plaintiff, suit schedule property is a dry land and it is a cultivable land and yielding Rs.2,000/-. Several times, defendants 1 to 3 approached the plaintiff requesting him to sell the plaint schedule property for a low price and plaintiff

refused the same. Due to the said reason, the defendants bore grudge against the plaintiff and on 05.03.1997 when plaintiff tried to raise fencing around the schedule property, the defendants did not allow him to raise the same. By using force, defendants 1 to 3 trespassed into the schedule property. Plaintiff raised the dispute before the village elders, but the defendants refused to deliver the possession of the property to the plaintiff. Hence, plaintiff filed the present suit for recovery of possession of the said property. The plaintiff also stated that after filing of the suit, defendants 1 to 3 colluded with fourth defendant and created a sale deed dated 28.09.1998 executed in favour of defendants 5 & 6 and plaintiff came to know that sale consideration was not paid and it is only a nominal and collusive document. Therefore, plaintiff prayed the Court to grant recovery of possession of the plaintiff schedule property.

On 09.09.1997, second defendant remained *ex parte*. Defendants 1 & 3 filed their written statement and denied the plaintiff averments and also denied the partition deed dated 25.05.1996 executed between the plaintiff and his brothers. According to the defendants, the partition deed is a collusive document and it was brought into existence to have a frivolous claim against the defendants in respect of the schedule property and the recitals and survey numbers mentioned in the partition deed are not true and correct. Plaintiff never got the schedule property to his share and he was never in the possession of the property. The entire schedule property is of an extent of Ac.01.81cents situated in R.S.No.183 and it was in exclusive possession and enjoyment of Rudraboina Tatayya and it fell to his share. Defendants also denied that plaintiff wants to raise fencing on 05.03.1997 around the plaintiff schedule property and defendants forcibly occupied the

same. According to the defendants, the entire extent of Ac.01.81cents is a single block and the schedule property was never demarcated. Further, Rudraboina Tatayya, father of the plaintiff registered the settlement deed dated 17.04.1939 in favour of Tananki Ramanna by conveying undivided half share in the properties referred to in the said document. Rudraboina Tatayya and Tannanki Ramanna partitioned the properties and were jointly enjoying. Further, as per the arrangements made by defendants 1 to 3, the entire Ac.01.81cents fell to the share of Rudraboina Atchaiah (first defendant). Defendants 1 to 3 partitioned their properties twenty years back. Further, defendants 1 to 3 have executed the sale deeds, and consideration was received by them for their respective shares. Fourth defendant has nothing to do with the properties and finally prayed the Court to dismiss the suit.

The brief averments made in the written statement filed by defendants 5 & 6 are that the first defendant and his two sons sold away an extent of Ac.1.91cents situated in R.S.No.183/3, an extent of Ac.1.81cents and an extent of Ac.0-10cets situated in R.S.No.190/1 of Marellamudi village for a valuable consideration of Rs.86,000/-. Since the date of purchase, they are in possession and enjoyment of the property as absolute owners thereof and they are paying land revenue. Pattadhar pass books are also issued and they are bonafide purchasers for valuable consideration. On 28.09.1998, defendants 1 to 3 executed a sale deed in their favour. Defendants 1 to 3 also sold away an extent of Ac.2.00cents in favour of wife of sixth defendant under a registered sale deed dated 28.09.1998 for a valuable consideration of Rs.90,000/- and since then the wife of sixth defendant is in possession and enjoyment of the property. Before they purchased the said land, first defendant was in possession and enjoyment of

the same. The said property fell to the share of first defendant in the partition, which took place between first defendant and his brother about 15 years back and denied that they are colluded with defendants 1 to 3 and brought into existence the sale deed dated 28.09.1998 and finally prayed the Court to dismiss the suit.

Basing on the above pleadings, the trial Court framed two issues. To prove his case, the plaintiff got examined PWs.1 to 6 and got marked Exs.A1 to A10 on his behalf. In addition to it, Exs.X1 to X6 got marked through PW.6. On behalf of the defendants, DWs.1 to 3 were examined and Exs.B1 to 35 got marked.

After perusing the material on record and considering the oral and documentary evidence, the trial Court held that the evidence of PWs.1 to 5 clearly shows that the partition was made between the plaintiff and his brother and defendants 1 to 3 trespassed into the schedule property. It is also evident from Ex.B21 the defendants 1 to 3 sold away the schedule property to defendants 5 & 6. PW.1 is the absolute owner of the schedule property and the said property fell to the share of PW.1 under original of Ex.A1, as such the plaintiff is entitled to evict the defendants from the plaint schedule property. The trial Court further negated the relief of *mesne* profits as PW.1 failed to adduce any evidence with regard to future profits and he has not paid any Court fee on the said relief.

Aggrieved by the judgment of the trial Court, the defendants filed A.S.No.30 of 2002 on the file of the Senior Civil Judge, Tadepalligudem. The first appellate Court after considering the oral and documentary evidence dismissed the appeal filed by the defendants on the ground that the evidence produced by the

plaintiff clearly established that plaintiff is the owner of the suit schedule property. Further, as per the evidence of PW.6, Government paid an amount of Rs.1,711/- to PW.1 towards damages sustained to his crop in the cyclone. It is also observed the oral partition pleaded by the first defendant is not proved and considering the evidence, the first appellate Court held that plaintiff is the owner of the plaint schedule property and plaintiff is entitled to recover the possession of the plaint schedule property and defendants failed to prove that they got right and title in the schedule property. Hence, dismissed the appeal.

Aggrieved by the concurrent findings of both the trial Court as well as the first appellate Court, the defendants filed the present Second Appeal.

This Court on 24.09.2010, admitted the appeal on the following substantial questions of law:

- (a) Whether a deed of partition executed by the plaintiff and his brother under Ex.A1 dated 25.05.1996 can be a title deed in order to entitle the plaintiff to recover possession from the defendants?
- (b) Whether in a suit for recovery of possession the plaintiff has to prove his title and possession before the date of alleged dispossession in order to recover possession from the defendants?
- (c) Whether the simple suit for recovery of possession can be maintained without seeking the relief of declaration of title when the title of the plaintiff is disputed?

The learned counsel for the appellants/defendants argued that the concurrent findings given by both the Courts below are illegal, contrary to law and facts, weight of evidence and probabilities of case. The Courts below erred by holding that the

plaintiff has proved his title over the plaint schedule property. The suit for recovery of possession filed by the plaintiff is not maintainable without seeking the relief of declaration of title when the title of the plaintiff is disputed. Further, the plaintiff failed to prove Ex.A1 partition deed. The plaintiff also failed to prove that he was in possession of the suit schedule property before the date of alleged dispossession in order to recover the possession. Therefore, the appellants/defendants proved these aspects and prayed the Court to set aside the judgments and decrees passed by both the Courts below by allowing the second appeal.

On the other hand, the learned counsel for the respondent/plaintiff contended that there are no substantial questions of law involved in this case. Whatever grounds raised by the appellants are only with respect to the factual aspects and both the Courts below gave a concurrent finding on that aspect. The plaintiff is the owner of the suit schedule property. Plaintiff and his brother partitioned their property under Ex.A1 on 25.05.1996 and since then plaintiff is in possession of the property and title was not in dispute. Further, the claim of the appellants that suit for recovery of possession is not maintainable without the relief of declaration cannot be accepted and relied upon the case laws reported in ***P.H.Dayanand v. S.Venugopal Naidu and others***^[1], wherein it is held at paras 11 & 12 as follows:

11. Mr. Nageshwar Rao, however, drew our attention to a decision of this Court in Ramchandra Sakharam Mahajan v. Damodar Trimbak Tanksale (Dead) and Ors.[AIR 2007 SC 2577], wherein it was held:

13. The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions.

12. The said decision, thus, itself is an authority for the proposition that the court is entitled to take into consideration the defence of the defendants. The sole question which arose for consideration before the Court therein was as to which of the parties had a better title.

Garlapati Venkateswarlu (died) per L.Rs and others v. Divi

Appalacharyulu^[2], wherein it is held at para 35 as follows:

35. As regards the contention of the counsel for the appellant that it was incumbent upon the plaintiff to also seek the relief of declaration of title in addition to seeking the relief of recovery of possession is concerned, the decision of the apex court in *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs. and Ors.* [2008 (5) SCJ 359] is clear. In the said case, the Supreme Court declared:

.....

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiffs title raises a cloud on the title of the 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 plaintiffs 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.

and **Rajoji and another v. Patnam Hanmanth Reddy and**

others^[3], wherein it is held at para 8 as follows:

8. Coming to the second question, it needs to be observed that the relief of recovery of possession is an independent substantive right under Section 5 of the Specific Relief Act. It does not depend upon any other relief. No provision of the Specific Relief Act mandates that the relief under Section 5 cannot be claimed, except as a corollary or ancillary to a declaration under Section 34. On the other hand, it is the other way round. A relief of mere declaration cannot be claimed unless the other consequential reliefs are prayed for. Proviso to Section 34 of the Specific Relief Act makes this aspect very clear. In *Srenikbhai Kasturbhai v. Chandulal Kasturchand*, [AIR 1997 Patna 179], the Patna High Court held so (see Para 59).

It is also argued that the defendants never contended in their

written statement that the simple suit for recovery of possession cannot be maintained without the relief of declaration of title and finally prayed the Court to dismiss the second appeal.

Now the point that arose for consideration is whether the appellants had proved the substantial questions of law raised in the second appeal?

POINT: A perusal of the record shows that the plaintiff himself was examined as PW.1, got examined five witnesses and filed Exs.A1 to A10 documents. Ex.A1 is the registered extract of partition deed dated 25.05.1996 executed between the plaintiff and his brother. As per the evidence of PW.1, four or five years back prior to the filing of the suit he himself and his brothers partitioned the property under registered document Ex.A1 and suit schedule property admeasuring Ac.0-90cents fell to his share and he is in the possession of the said property. PWs.2 to 6 supported the evidence of PW.1. On the other hand, defendants filed Ex.B1, which shows that father of the first defendant settled half share in favour of father of plaintiff and it includes the suit schedule property and in the partition, which took place between the plaintiff and his brother under Ex.A1, plaintiff got the suit schedule property. Therefore a perusal of the evidence of PWs.1 to 6 and Exs.A1 and B1 itself clearly proved the title of the plaintiff over the suit schedule property. PWs.1 to 3 also stated that defendants 1 to 3 trespassed in the suit schedule property and occupied the suit schedule property by using force and thereafter, they sold the property to defendants 5 & 6 and delivered the possession to them. Thus, the plaintiff proved his title to the suit schedule property and there is no cloud of title on the suit schedule property. Therefore, the trial Court as well as the first appellate

Court rightly decreed the suit in favour of the first respondent/plaintiff and against the appellants/defendants.

The learned counsel for the appellants during the course of arguments rightly conceded that at no point of time appellants/defendants raised the plea that the suit filed by the plaintiff is not maintainable without seeking the relief of declaration of title. Admittedly, by producing the oral and documentary evidence, plaintiff proved the title over the suit schedule property and on the other hand, the defendants trespassed into the suit schedule property without having any right and title over the plaintiff schedule property. Admittedly, there is no cloud of title to the plaintiff schedule property. Therefore, it is not necessary for the plaintiff to seek declaration of title, as plaintiff proved Ex.A1 partition deed, and as per Ex.A1 suit schedule property fallen to his share. Therefore, when there is no cloud over the title of the plaintiff to the plaintiff schedule property, plaintiff need not seek relief of declaration of title. Therefore, suit filed by the plaintiff for recovery of possession is maintainable and appellant failed to prove the substantial questions of law raised in the second appeal warranting any interference by this Court in exercise of jurisdiction under Section 100 of the Code and the second appeal is liable to be dismissed.

Accordingly, the second appeal is dismissed. No order as to costs. Miscellaneous Petitions, if any, pending in this second appeal shall stand closed.

ANIS, J

Date: 21.04.2016
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[\[1\]](#) 2009 (1) ALD 76 (SC)

[\[2\]](#) 2014 (2) ALT 245

[\[3\]](#) 2005 (3) ALD 23