

**HON'BLE SRI JUSTICE A. SHANKAR NARAYANA**

**SECOND APPEAL No.1041 of 1999**

**JUDGMENT :**

The plaintiff preferred the present Second Appeal. He was successful in the suit before the trial Court for the relief of perpetual injunction simplicitor, vide judgment and decree dated 29.12.1995 passed in O.S.No.184 of 1990 by the I Additional Subordinate Court, Warangal, (for brevity "the trial Court"), but unsuccessful in the Appeal Suit before the lower appellate Court, vide judgment and decree dated 06.10.1999 passed in A.S.No.63 of 1996 by the I Additional District Judge, Warangal (for brevity "the lower appellate Court"), as the said Appeal Suit preferred by the respondents – defendant Nos.2 to 4 was allowed.

2. The basic facts needed for disposal of the present Second Appeal are, that Vijayanagar Colony Railway Staff Cooperative Housing Society Limited, Kazipet (for brevity "the Housing Society") had purchased an extent of Acs.9.10 guntas situated at Kadipikonda via Kazipet Village, Warangal District, from one Sri Pingili Vijaya Paul Reddy under a registered Sale Deed bearing document No.3110/1980, dated 23.01.1980. The plaintiff, being a Member of the said Housing Society, was allotted Plot No.5, admeasuring 400 square yards in Sy.No.47, situated at Kadipikonda Village, Warangal

District, within specific boundaries shown in the plaint schedule. The deceased – 1<sup>st</sup> defendant, originally, was a Watchman of the said Pingili Vijaya Paul Reddy, whose residential quarter was situated on the northern side of the plaintiff's plot. The Housing Society, subsequent to the purchase of the said land, asked the deceased – 1<sup>st</sup> defendant to watch the Housing plots. According to the plaintiff, taking advantage of his absence, the deceased – 1<sup>st</sup> defendant tried to encroach over the suit plot, which was successfully resisted by him with the help of Office Bearers of the Housing Society. The plaintiff could not construct the house on the said plot immediately after the allotment, but, three years after retirement from his service, he got demarcated the boundaries, constructed a shed and sunk a well in the suit plot. When he went to the suit plot on 13.06.1990 to inspect with an intention to construct a compound wall, since the deceased – 1<sup>st</sup> defendant unjustly interfered, which he could successfully resist and apprehending that the deceased – 1<sup>st</sup> defendant would come in the way of construction of his house, he filed the said suit for the aforesaid relief.

3. The suit was resisted by the deceased – 1<sup>st</sup> defendant by filing a written statement, denying the plaintiff's Membership in the Housing Society, allotment of suit Plot No.5 to him, the very purchase of Acs.9.10 guntas by the Housing Society, obtaining layout sanction plan from the Gram Panchayat and allotment of plots to its Members. He, even denied the alleged

unjust interference and further denied the allegation that he was asked by the Housing Society to keep a watch over the land purchased by it.

4. On the other hand, he pleaded that he worked as a Watchman under Sri Pingili Vijaya Paul Reddy from 1953 to watch his Bungalow, in which the Government School is housed, and considering his services, the said Sri Pingili Vijaya Paul Reddy has sold Ac.0.14 guntas of land in Sy.No.47 on a nominal consideration under an Agreement of Sale dated 04.09.1993 and since then he had been in continuous possession, having constructed a house, which was given Municipal Door No.25-6-11/1, in the said Ac.0.14 guntas and also sunk a well and used to keep his goats in the vacant place and permitted his grown up family members to reconstruct for further required accommodation, but the plaintiff dismantled the structures under the guise of temporary injunction order.

5. The deceased – 1<sup>st</sup> defendant also pleaded that Sy.No.47 consists of Acs.12.34 guntas and the plaintiff and the Housing Society Members tried to illegally occupy the open land abutting his house, basing on an incorrect survey numbers and the plaintiff thus, played fraud and was never in possession of the suit land and his (deceased – 1<sup>st</sup> defendant) family members raised structures. Stating that the plaintiff created a false layout plan with the collusion of Gram

Panchayat employees prior to its merger in Warangal City Municipality, sought to dismiss the suit.

6. During the pendency of suit, when the death of the 1<sup>st</sup> defendant occurred, defendant Nos.2 to 4 were brought on record as the legal representatives of the deceased – 1<sup>st</sup> defendant. Defendant No.3 filed written statement adopted by defendant Nos.2 and 4 by filing a Memo. Defendant Nos.2 to 4 took the stand that Ac.0.14 guntas of land was purchased by the joint family with the funds of the joint family under an Agreement of Sale dated 04.09.1973 and raised structures, having sunk a well, partitioned in four equal shares and the suit land is part and parcel of house bearing No.25-6-11/1 fallen to the share of defendant No.4, who raised structures and sunk a well. According to them, the plaintiff is neither the owner nor in possession, but attempted to grab the suit land. He stated that since the deceased – 1<sup>st</sup> defendant was aged, deaf, lame and a disabled person, deceased – 1<sup>st</sup> defendant did not disclose about the facts properly and it is false to allege that the plaintiff colluded with the deceased – 1<sup>st</sup> defendant and caused loss to them and, therefore, prayed for dismissal of the suit.

7. Originally, a comprehensive issue was settled for trial on 13.10.1990, but, subsequent to the filing of written statement by defendant Nos.2 to 4, three additional issues were settled for trial.

8. During trial, on behalf of the plaintiff, he himself was examined as P.W.1 and examined 2 more witnesses as P.Ws.2 and 3, and got marked Exs.A.1 to A.7, whereas on behalf of the defendants, DWs.1 to 5 were examined and got marked Exs.B.1 to B.49. Besides the documentary evidence, the report of the Advocate Commissioner along with rough sketch map were marked as Exs.C.1 and C.2.

9. The trial Court, disbelieving the documentary evidence under Ex.B.45 – Partition Deed dated 07.06.1983, on the ground that it was inadmissible as it was unregistered, but was marked subject to objection at the time of its marking and also recording a finding that Ex.B.1 – Layout plan pertaining to the Housing Society shows the suit Plot No.5 with measurements 38 feet x 75 feet and located on the southern side of the defendants house and observing further that the documentary evidence filed by the plaintiff constitutes the registered Sale Deed and Ex.A.5 – Encumbrance Certificate dated 09.07.1980 relating to Sy.No.47, showing the Housing Society's name as purchaser, and supported by Exs.A.6 and A.7, which are Layout Plan sanctioned by Gram Panchayat, Kadipikonda, and Blue print of Layout thereof, respectively, held that the plaintiff is in possession of the suit property and, therefore, entitled to protect his possession by perpetual injunction and thus, decreed the suit, while rejecting Exs.C.1 and C.2, assigning

reasons therefor, by its judgment and decree dated 29.12.1995.

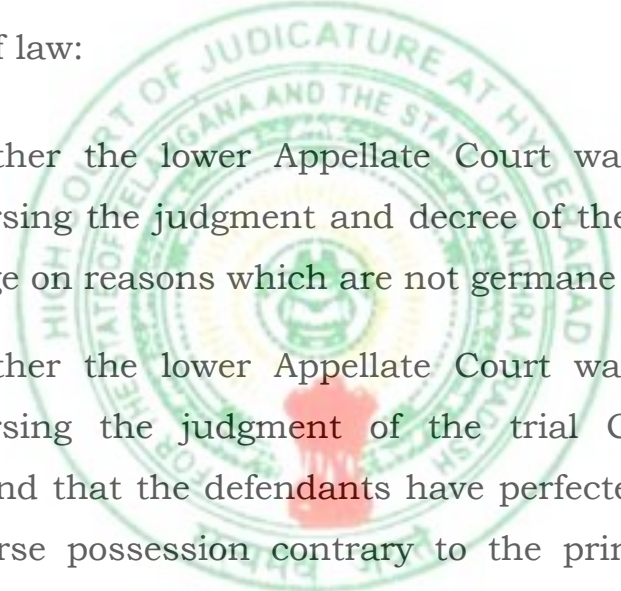
10. The said judgment and decree dated 29.12.1995 were assailed by the defendants as appellants in A.S.No.63 of 1996 before the I Additional District Judge, Warangal. The lower appellate Court, basing on the grounds of appeal, formulated the following two points for determination:

- (1) Whether the suit for simplicitor injunction is maintainable with seeking the relief of declaration of title.
- (2) Whether the plaintiff is in possession and enjoyment of the suit plot as on the date of filing of the suit.

11. On re-appraisal of evidence and pointing out the shifting of Plot No.5, which was originally shown between Plot Nos.4 and 6, which stood **unexplained** by the plaintiff, the lower appellate Court arrived at a conclusion that until the entire property is surveyed and measured, it was not possible to say as to whether the extent of Acs.9.10 guntas includes Plot No.5 or excludes it, however, observing that the documentary evidence filed by the defendants would indicate that the defendants were in possession and enjoyment of the house as well as the appurtenant site and though, a cloud is cast on the title of the plaintiff, still, inaction of the plaintiff in seeking title over the disputed property would all account to reject the request for injunction made by the plaintiff, set aside the judgment and decree dated 29.12.1995 passed by

the trial Court, while allowing the appeal suit on 06.10.1999. The consequence is the present Second Appeal, preferred by the plaintiff, under Section 100 of C.P.C.

12. In the grounds of appeal, besides agitating that the lower appellate Court erred in holding that the defendants perfected their title by adverse possession and misread the Advocate Commissioner's Report, which clearly show that the appellant – plaintiff is in possession of the suit plot, the appellant – plaintiff formulated the following substantial questions of law:

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- (a) Whether the lower Appellate Court was justified in reversing the judgment and decree of the learned trial Judge on reasons which are not germane to the issue?
  - (b) Whether the lower Appellate Court was justified in reversing the judgment of the trial Court on the ground that the defendants have perfected the title by adverse possession contrary to the principles of the said doctrine?
  - (c) Whether the Court below was justified in ignoring a registered instrument which is a conclusive proof under the Indian Evidence Act and in non-suiting the appellant?
  - (d) Whether the lower Appellate Court was justified in holding that the simple suit for injunction without declaration is not maintainable?
  - (e) Whether the lower Appellate Court was justified, with respect, in coming to a perverse conclusion?

13. Heard Sri P. Venugopal, learned counsel for the appellant – plaintiff. No representation for the respondents – defendants. In spite of affording number of chances to tender arguments, the respondents – defendants have not availed of the same.

14. Learned counsel for the appellants – plaintiffs would submit that the findings recorded by the lower appellate Court are mutually inconsistent and there was no justification, at all, in setting aside the judgment and decree rendered by the trial Court. It is also his submission that the re-appraisal of evidence on record was not done in proper perspective.

15. Adverting to the substantial questions of law raised, in fact, the re-appraisal of evidence on record requires consideration, for the reason that the judgment rendered by the lower appellate Court appears to be without any clarity, which would be discussed a little later.

16. It is clear that the law is settled that without seeking declaratory relief, a party can maintain suit for perpetual injunction simplicitor, as held by this Court in **N.R. Srinivas Vs. Madduri Mallareddy and others**<sup>1</sup>, **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs. and others**<sup>2</sup> (para-13).

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<sup>1</sup> 2005 (1) ALD 268

<sup>2</sup> AIR 2008 SC 2033

17. Turning to the findings recorded by the lower appellate Court as regards possession, the lower appellate Court, at one stage, observes thus:

“..... In other words that the plot and house with their measurements which were in actual possession of the plaintiff as claimed by him are less than the measurement which was referred in Ex.A.1. ....”

18. The said finding was recorded in the context of examining the report of the Advocate Commissioner and the Plan, which were marked as Exs.C.1 and C.2, respectively. Again, at a later portion of the judgment, it was observed thus:

“..... The documents, such as tax receipts, water tax receipts, enumeration forms and their ration cards indicate that the defendants have been in possession and enjoyment of the property. ....”

19. The lower appellate Court again, having recorded that Ex.B.2 agreement of sale is not disputed by the plaintiff, observes thus:

“..... It is not established by the plaintiff that the site which is under the occupation of the defendant is inclusive of the property that was sold by Vijayapal Reddy in favour of the society. ....”

Thereafter, the lower appellate Court passes an observation that it is for the plaintiff to establish his title over the property purchased by him from the Society, when there a doubt in respect of the right of the Society over the property purchased by the plaintiff under Ex.A.1 and thereby holds both the points in favour of the appellants – defendants and against the respondent – plaintiff. Hence, consequently, the judgment and decree passed by the trial Court were set aside.

20. A thorough examination of the observations made by the lower appellate Court and the findings recorded thereon would show that, in fact, they are based on surmises, but not based on probabilities derived from proved facts. The very finding recorded by the lower appellate Court that the defendant perfected his title by adverse possession by virtue of his possession till 1990, during which year, the suit was filed, is, in fact, a glaring error. When the defendants claim title through an Agreement of Sale, of-course, from Mr. Vijaya Paul Reddy, the original owner, in regard to which, there is no dispute between the parties, that too, under Ex.B-2 - Agreement of Sale dated 04.09.1973, which was unregistered, only to the extent of part performance by the defendants, by virtue of the provisions of Section 53-A of the Transfer of Property Act, 1882, can seek protection, but not in regard to perfection of their title by adverse possession and, thus, the very finding recorded, holding that the defendants perfected their title by adverse possession, is totally in derogation of the

intendment in enacting Section 53-A. This finding alone is sufficient to hold that the lower appellate Court did not appreciate evidence on record in proper perspective, but also went wrong in tendering a definite finding against what is contemplated by the mandate of Section 53-A of the Transfer of Property Act. The other observations made in the judgment by the lower appellate Court relate to small discrepancies in the boundaries, as spoken to by P.Ws.1 and 2, in the sense, inconsistency in the evidence of P.Ws.1 and 2 as regards boundaries shown in Exs.A.1 and A.2, but, that cannot be the way in which the appreciation of evidence is to be resorted to.

21. It is unnecessary, in my view, to refer to each assumption and surmise made in the judgment by the lower appellate Court. What all can be said is that the lower appellate Court went wrong in reversing the judgment and decree of the trial Court, as the trial Court has appreciated the evidence on record in accordance with the evidenciary rule and tendered its findings on both original issues and additional issues. The trial Court has recorded a relevant finding that Ex.B.2 was not proved for the reasons that the persons connected with it, such as Scribe or Attestors, were not examined, at the time of its alleged execution. A clear finding is recorded by the trial Court that Ex.A.6 is an approved Layout Plan and Ex.A.7 is the Layout sanction Blue Print Plan, approved by the Gram Panchayat, Kadipikonda, and the Plan annexed to Ex.A.1 - Sale Deed would completely

tally with the Layout Plan under Exs.A.6 and A.7 as regards the measurements of suit Plot No.5.

22. This apart, a definite observation is made by the trial Court that Ex.B.2 - Plan is also tallying with the plans filed by the plaintiff, and thereby, recorded a finding that the stand of the defendants, that the documents filed by the plaintiff were forged and fabricated, is absolutely incorrect and held that Ex.B.45 is a created document and Ex.B.2 Agreement of Sale was not proved.

23. This apart, the trial Court also referred to Ex.C.2 - Plan prepared by the Commissioner and assigned reasons as to why there was less extent available according to Ex.C.2 - Plan, when compared with the measurements shown under Ex.A.2 - Sale Deed. When the trial Court has tendered findings on proper appreciation of evidence on record, assigning convincing reasons therefore, in over-turning each of the findings, the lower appellate Court, certainly, bound to assign cogent reasons in arriving at that the findings recorded by the trial Court are perverse and cannot remain on record, which the lower appellate Court did not do and, on the other hand, certain insignificant inconsistencies were taken into consideration magnifying them, and held both the points against the plaintiff and in favour of the defendants - appellants.

24. Thus, on a thorough scrutiny, invariably, it has to be held that the questions of law formulated are substantial to hold that the judgment and decree under challenge in the present Second Appeal are liable to be set aside and accordingly set aside.

25. The Second Appeal is, therefore, allowed, setting aside the judgment and decree dated 06.10.1999, passed in A.S.No.63 of 1996 by the lower appellate Court, restoring the judgment and decree dated 29.12.1995, passed in O.S.No.184 of 1990 by the trial Court. No order as to costs.

26. As a sequel, miscellaneous petitions pending, if any, shall stand closed.



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JUSTICE A. SHANKAR NARAYANA

30.09.2016.  
Msr

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Msr