

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

S.A.No.699 of 2016

JUDGMENT:

This Second Appeal is preferred challenging the judgment and decree dt.25.04.2016 in Appeal Suit No.232 of 2009 on the file of I Additional District Judge, West Godavari, Eluru confirming the judgment and decree dt.08.09.2009 in Original Suit No.130 of 2004 on the file of Principal Junior Civil Judge, Eluru.

2. The appellants herein are defendants in the above suit.
3. The said suit was filed by one Smt. Kama Mariyamma (hereinafter referred to as, '**the 1st plaintiff**') for recovery of possession of the plaint schedule property which is an extent of Ac.0.43/4 cents equivalent to 229 Square Yards in R.S.No.422/1 of Vatluru Village, Pedapadu Mandal, Eluru, West Godavari within boundaries specified in the schedule to this suit.

THE PLAINTIFFS'/RESPONDENTS' CASE

4. The suit was filed by 1st plaintiff claiming ownership of the plaint schedule property under a registered sale deed Ex.A1 dt.07.09.1988 executed in her favour by one Gudipudi Tirupati alias Lawrence and others. She contended that the father of vendor of 1st plaintiff was one Gudipudi Moses and he was originally allotted the subject property as a house-site by the Revenue department vide proceedings No.41/1930 of DLOS' RDIS, W.G.District dt.29.12.1930; on his death, the 1st plaintiff's vendors succeeded to it and were in possession and enjoyment thereof; and

thereafter, the 1st plaintiff purchased the property from her vendors. She contended that she got surveyed the property by Government Surveyor and got fixed survey stones around the boundaries of the plaint schedule property and that she later obtained construction permission on 24.11.1988 from the Gram Panchayat, Vatluru. She contended that when she was making preparations for construction of the building, the appellants/defendants, who reside on the north of the plaint schedule property, started causing interference with the construction operations and she filed O.S.No.856 of 1989 against the appellants for permanent injunction. She contended that the said suit was dismissed on 27.07.1985 observing that she was not in possession in the plaint schedule property as on the date of the suit though it was declared therein that she had valid title to the property; that she filed A.S.No.135 of 1995 against the said judgment before the Principal District Judge, Eluru, but the appeal was dismissed on 14.07.2003; thereafter, she filed Second Appeal before this Court; and in the meantime, in August, 2003, the appellants forcibly and high-handedly occupied the plaint schedule property with the assistance of rowdy elements. She contended that the appellants have no right or title over the plaint schedule property, that they have no right to be in occupation of the same and in view of the fate of the earlier litigation, she thought it fit to file the present suit for recovery of possession rather than pursuing the Second Appeal before the High Court.

5. Pending suit, she died and the respondents herein were impleaded as her legal heirs.

THE DEFENDANTS'/APPELLANTS' CASE

6. The appellant nos.2 and 3 filed a written statement which was adopted by 1st appellant. They denied the contents of the plaint, and contended that the deceased-1st plaintiff with the help of police tried to evict them from the plaint schedule property by force and she was not in possession of the property at any time as held in O.S.No.336 of 1989. They contended that the plaint schedule property is designated as *poramboke* land in the Revenue Records of the Vatluru Village Panchayat, that their vendor by name V. Arogyam was in possession thereof since time immemorial, and he sold it to appellant nos.1 and 2 for Rs.90/-. They contended that the question of title and possession were decided in the earlier round of litigation, and these findings would operate as *res judicata*. They wanted the written statement filed by them in O.S.336/1989 be read as part and parcel of their written statement here. In the written statement filed in that suit, the appellants had also pleaded alternatively that they acquired title to the plaint schedule property by adverse possession.

7. Basing on the rival contentions, the following three issues were framed by the Trial Court :

“Issue No.1 : Whether the plaintiff is entitled to possession of the schedule property from the defendants as prayed for ?

Issue No.2 : Whether the suit is barred by limitation ?

Issue No.3 : To what relief ?”

8. The respondents examined PWs.1 to 5 and marked Exs.A.1 to A.27. The appellants examined DWs.1 to 3 and marked Exs.B.1 to B.20. CW.1 was examined as Court witness.

9. The Court *suo motu* framed another issue:

“whether the suit is hit by Section 11 of Civil Procedure Code?”

10. On the above issue, the Court held that the earlier suit was only for perpetual injunction, that there was no occasion in the earlier round of litigation to decide the title of deceased-1st plaintiff, and any finding of title given therein is only an incidental one and the findings in the earlier litigation therefore do not operate as *res judicata*.

11. On the question of title, the Trial Court held that though the deceased-1st plaintiff did not file proceedings of the year 1930 under which the predecessors-in-title of 1st plaintiff got the subject land from the Government, the registered sale deed (Ex.A.1) executed in favour of 1st plaintiff contains a recital about the assignment in the year 1930 to Gudipudi Moses; PW.2, the Mandal Revenue Officer, Pedapadu stated that though proceedings No.41/1930 were not available in his office, eleven persons were given pattas under the said proceedings, and their names are mentioned in Ex.A.19 report of the Village Revenue Officer, Vatluru; even DW.2, an independent witness examined by appellants, who resides near the plaint schedule property, deposed that the plaint schedule property is one among the eleven plots assigned in the year 1930; in Ex.B.8 Adangal for the Fasli 1393, the names of all the beneficiaries including Gudipudi Moses were mentioned; and the evidence of PW.4 (one of the vendors of the plaint schedule property to the deceased-1st plaintiff) and PW.5 (the attestor of Ex.A.1) also corroborates the deceased-1st plaintiff's case about the existence of the 1930 proceedings and grant of house pattas by the Government to eleven persons including Gudipudi Moses. It held that though the appellants pleaded that defendant nos.1 and 2 purchased the

property from V. Arogyamma in the year 1970, DW.2=2ND defendant stated that he alone purchased it ; having pleaded that they obtained title to the property through a sale, the appellants cannot plead acquisition of title by adverse possession; that the land is admittedly *poramboke* land, and the appellants nowhere pleaded that they acquired title against the Government, and they have failed to establish their possession adequately in continuity or in publicity to the knowledge of the true owners. It held that that the suit is not barred by limitation inasmuch as the respondents had been agitating since 1989 when O.S.No.336 of 1989 was filed. It therefore concluded that the respondents are entitled to recovery of possession of the plaint schedule property and therefore decreed the suit for possession with costs and dismissed the claim for *mesne* profits.

12. The appellants then filed A.S.No.232 of 2009 before the I Additional District Judge, West Godavari, at Eluru.

13. The said appeal was also dismissed confirming the findings of the Trial Court. The lower Appellate Court again considered the evidence on record and held that the plea of *res judicata* is not available to appellants since the earlier suit was only for perpetual injunction, by relying on the decision of a Division Bench of this Court in **R.V.S. Vara Prasad and others v. Dr. V. Ramdas**¹. It held that the plaint schedule property was allotted to Gudipudi Moses as a house-site in 1930 by the Revenue Department in proceedings No.41/1930 dt.29.12.1930, and on his death, his children sold it to the deceased-1st plaintiff and her title is established by Exs.A.1 and A.19. It relied on the evidence of PW.2, the Mandal Revenue

¹ 2003 (3) ALT 716 (D.B.)

Officer, who stated that as per sanction given by the Village Revenue Officer, Vatluru, under proceedings No.41/1930, eleven persons were given pattas in the Gramakantam land, and that in Ex.A.19-Report given by the Village Revenue Officer, Vatluru, the name of Gudipudi Moses was mentioned as one the of the eleven persons who had been given a patta. It held that the appellants did not produce any evidence in the form of a registered sale deed to prove their title. It held that CW1 stated on basis of records that subject property is Gramakantam land and in such land, the Government cannot claim any title or right. It took note of the fact that in the written statement filed by the appellants in O.S.No.336 of 1989, which was marked as Ex.A.26, a plea was taken by the appellants that they acquired title to the property by adverse possession, and held that having pleaded that they purchased the property from V. Arogyamma in the year 1970, the appellants are estopped from raising the plea of adverse possession. It further held that there is no need for the respondents to seek declaration of title in respect of the schedule property since the appellants failed to adduce any evidence of their title.

14. Challenging the same, the present Second Appeal is filed.

15. Heard Sri M.V. Durga Prasad, learned Senior Counsel appearing for Sri M.R.K. Chakravarthy, counsel for appellants.

16. The counsel for appellants firstly contended that the findings in the earlier round of litigation operated as *res judicata*.

17. It is to be noticed that O.S.No.336 of 1989 was filed by the deceased-1st plaintiff against appellant nos.1 to 3 for a perpetual injunction alleging

that she was in possession of the property. By judgment dt.27.7.1995, the trial court held that the deceased-1st plaintiff was not in possession of the plaint schedule property, and it is only necessary to go into *prima facie* title of the deceased-1st plaintiff. In fact, it observed that on the issue of title, the evidence is oath against oath and neither party was able to produce clear and cogent evidence to establish the title. In the appeal in A.S.No.135 of 1995 filed by the deceased-1st plaintiff also, the said Appellate Court categorically held that it is not going into the issue of absolute title and would only look into incidental title as it was a suit for injunction. It opined that the deceased 1st plaintiff should have sought relief of declaration of title also, since title was denied by the appellants, who were defendants in that suit.

18. Thus there was no clear finding on question of title in the earlier litigation and both the trial and appellate court in that litigation had held that question of title is an incidental issue and they decided the matter only on the basis of possession of the parties. So there is no bar for the 1st plaintiff to file a fresh suit seeking recovery of possession basing on her title.

19. Merely because the suit O.S.No.336 of 1989 filed by deceased 1st plaintiff was dismissed on ground that she did not have possession, she is not barred from filing the subsequent suit for recovery of possession of the same property. In fact she could have as well sought for amendment of relief in the earlier suit and sought relief of recovery of possession therein. (See **Sampath Kumar v. Ayyakannu**²).

20. A Division Bench of this Court in **R.V.S.Vara Prasad** (1 supra) held;

² AIR 2002 SC 3369

“14. According to Section [11](#), in order to attract the principle of *res judicata* the matter in the subsequent suit shall be directly and substantially in issue which was directly and substantially in issue in the former suit between the same parties litigating under the same title and finally decided by such Court. The earlier suit was for an injunction simpliciter. The present suit is for declaration of title and recovery of possession of the property. Therefore, it cannot be said that the matter in the present suit is directly and substantially in issue in O.S. No. 58 of 1976. The Supreme Court while considering the provisions of Section [11](#) C.P.C. in **Gram Panchayat of Village Naulakha v. Ujagar Singh and Ors**³, held:

“The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into or decided. The said decision cannot, therefore, be binding on the question of title.”

15. In the above decision, the Supreme Court referred to a decision in **Sajjadanashin Sayed v. Musa Dadabhai Ummer**⁴, held:

“Where, on a detailed consideration of law in India and elsewhere held, that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a later suit or proceeding where title is directly in question, unless it is established that it was “necessary” in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title.”

16. The principle laid down by the Supreme Court in the above decision makes the position clear that a decision of a Civil Court in the earlier suit for injunction cannot operate as *res judicata* in a later suit between the same parties for declaration of title and recovery of possession. In Ex.A.44 - certified copy of the judgment of the appellate Court in A.S. No. 72 of 1979 relating to the earlier suit, the appellate Court held as follows:

Suit being one for injunction simpliciter, investigation of title is relevant only to the extent it probalilise the claim of possession of the plaintiff and nothing more. It is open to the affected to file a suit for declaration of title and for recovery of possession.

³ AIR 2000 SC 3272

⁴ 2000 (3) SCC 350

17. This finding of the appellate Court in the earlier suit is also an indication that the issue relating to title of the parties was left open. In the light of the above discussion, we have no hesitation to hold that the present suit is not barred by res judicata.”

21. In the light of the above decision, there is no merit in the contention of counsel for appellants that the suit for recovery of possession is barred by principle of *res judicata*..

22. It is also contended by Sri M.V. Durga Prasad that the respondents should have sought relief of declaration of title and ought not to have filed a mere suit for recovery of possession.

23. In **Anathula Sudhakar v. P. Buchi Reddy**⁵, the Supreme Court has held that where title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and that prayer for declaration will be necessary only if denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. It observed that if the plaintiff has a clear title supported by documents, and a trespasser, without any claim to title or an interloper without any apparent title, merely denies the plaintiff's 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.

24. In the present case both the trial and appellate courts have concurrently held that the deceased 1st plaintiff had title to the property. The appellants having pleaded acquisition of title by sale through V.Arogyam did not file any document to substantiate their plea. Though the appellants pleaded that defendant nos.1 and 2 purchased the property from V. Arogyam

⁵ 2008 (4) SCC 594

in 1970, DW.2 i.e., the 2nd defendant stated that he alone purchased it. Thus their evidence is not consistent.

25. Moreover by pleading acquisition of title against deceased 1st plaintiff by adverse possession in the earlier litigation, the appellants impliedly admitted her title.

26. In **P. Periasami v. P. Periathambi**⁶, the Supreme Court declared:

“..Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.”

27. So it was not incumbent on the part of deceased-1st plaintiff to seek relief of declaration of title since, in my opinion, the plea of appellants did not essentially create a cloud on the title to the property.

28. Having pleaded title, it was not open to appellants to take the inconsistent plea of adverse possession. In **Arundhati Mishra (Smt) v. Sri Ram Charitra Pandey**⁷, the Supreme Court held :

“the pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.”

29. No other plea was raised by counsel for appellants.

30. Both the Courts below, on appreciation of evidence, have held that respondents have proved title to the property and that the appellants have failed to establish their title to the property. In view of these concurrent findings of fact on the issue of title, I do not find any substantial question of law in this Second Appeal warranting interference with the concurrent

⁶ (1995) 6 SCC 523

⁷ (1994) 2 SCC 29

findings on facts and law by the courts below. Therefore the Second Appeal is dismissed. No order as to costs.

31. Miscellaneous applications, pending if any, in this Second Appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 14-10-2016

Ndr/*

