

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Second Appeal No.662 of 1995

JUDGMENT:

The Second Appeal was admitted on 15.12.1995 holding that the substantial questions of law raised are involved to decide as to whether the encroacher can seek remedy in civil suit to continue in possession over the suit property without right or title to possession and whether grant of injunction in favour of the encroacher is sustainable?

2.The Second Appeal sole appellant (The Co-operative Sub Registrar), Agricultural Development Bank, Bodhan(for short 'the Bank'), is the 2nd defendant among the two defendants in the suit O.S.No.30 of 1986 including the Commissioner Municipal Council, Bodhan District maintained by the Second Appeal 1st respondent including against the Second Appeal 2nd respondent. It was a suit for bare injunction filed in respect of the plaint schedule property consisting of a hut bearing No. 1-4-921 with appurtenant site of 20 x 16 situated at the Bank as per the description of the plaint schedule. Undisputedly, the appellant herein/ 2nd defendant is the owner having the Bank premises in D.No. 1-4-926.

3. In the suit for bare injunction the averments of the plaintiff to the suit claim are that the defendants are trying to dispossess the plaintiff from said property from which he will suffer irreparable loss and hardship which cannot be compensated by damages and thereby to grant permanent injunction restraining them from interfering in any manner. The defendants filed respective written statements individually while denying the plaint averments and any entitlement of the injunction and any right much less ownership over the said premises

saying it is the 1st defendant-Municipality that owned and possessed the property and under the guise of injunction, the plaintiff cannot try to encroach much less in putting any hayrick or hut and thereby not entitled to the relief of injunction.

4. It is the contention of the 1st defendant that the plaintiff encroached the property and 1st defendant-Municipality already issued notice to the plaintiff for removal of the temporary hut raised and instead of removing the hut, having misrepresented the facts and come to the Court with unclean hands, he filed the suit and obtained the interim injunction order behind the back of the defendants. The contest of the 2nd defendant(appellant) is that he is the owner and possessor of the site D.No.1-4-926 (suit schedule property) having purchased from the 1st defendant under registered sale deed dated 19.09.1978(Ex.B.1) and the Bank is intending to construct compound wall to the same and the plaintiff under the guise of injunction is trying to encroach into the property of the Bank by sporadic acts of trespass and creating all sorts of nuisance in the area. The contention of the 2nd defendant (appellant) further is that the plaintiff has no cause of action and no locus to maintain the suit and also undervalued of the property worth Rs.30,000/- by maintaining on notional value the suit for bare injunction without declaration which claim is not at all maintainable for he has no title.

5. The trial Court from said contest, after examining P.Ws. 1 and 2 and D.W.1 with reference to Exs.A.1 to A.3 viz; notice issued by the 1st defendant-Municipality, Office copy of application given to the 1st defendant-Municipality and true copy of letter and Exs.B.1 to B.4 viz; are certified copy of sale deed dated 19.09.1979, Photostat copy of original letter, Photostat copy of letter addressed to Central office

acknowledging registered sale and copy of tax payment receipt of 1991; held that the plaintiff could not establish any entitlement to the property to maintain a suit for injunction, in claiming as if owned, without disclosing how he owned, that too when evidence on record is disclosing that the property belongs to the 1st defendant-Municipality and even Ex.A.2 office copy of the application of the plaintiff addressed to the 1st defendant-Municipality in seeking to allot said site allegedly occupied by him. If really he was the owner, there is no question of his seeking allotment from original owner and he admitted even in the cross-examination that he filed several applications seeking allotment of the site to him by the Municipality-cum-owner that was not considered and thereby he is not entitled to any right over the property. However, he is in possession of the land including from the evidence of PW.2 Nagamma that he erected a thatched shed and received eviction notice from the 1st defendant-Municipality and part of it nearby to the plaint schedule was sold to the 2nd defendant-the Bank by the 1st defendant-Municipality under Ex.B.1 and D.W.1 Officer of the Bank also deposed said facts, in particular by relying on the sale deed showing the area sold under Ex.B.1 is 80 x 40=335sq.yards which property delivered to the bank by the 1st defendant-Municipality and the Municipality also collected from the bank the property tax for the year 1999 by allotted H.No.1-4-926. From the evidence on record the plaintiff failed to prove neither as owner nor in settled possession of the suit property. The trial Court therefrom dismissed the suit claim holding that the plaintiff is not entitled to the relief of injunction.

6. It is against said dismissal judgment and decree of the trial Court dated 05.11.1993, the unsuccessful plaintiff when maintained 1st appeal, the lower appellate Court by the judgment dated 16.08.1995

observed that the evidence of P.W.1 shows that even he tried to pay the property tax to the 1st defendant-Municipality, same was refused, however the real owner-Municipality cannot take law into its hands but for to dispossess even a trespasser by following a due process of law and thereby entitled to maintain the suit for injunction to that extent and lower Court did not properly advert this aspect in answering the issue No.1 against the plaintiff. The lower appellate Court therefrom decreed the suit restraining the defendants 1 and 2 from interfering with the suit schedule land in possession of the plaintiff unless and until the plaintiff is evicted by the 1st defendant-Municipality through due process of law.

7. It is impugning the same, 2nd defendant-Bank maintained the Second Appeal.

8. Heard both sides and perused the material on record.

9. As referred supra, the appeal which involved the substantial question of law is that for seeking a permanent injunction which is a discretionary relief, the plaintiff has to approach the Court with clean hands on the principle that the person who seeks equity must come with equity and clean hands and he did not plead much less prove what is his right to seek the permanent injunction as without entitlement, the question of maintaining for relief of injunction does not arise. This aspect though considered by the trial court in answering the issue No.1 against the plaintiff, the lower appellate Court went wrong in answering in favour of the plaintiff by reversal of the finding. The evidence on record clearly shows the property belongs to the 1st defendant-Municipality and the plaintiff-P.W.1 also admitted the factum as discussed by the Courts below in seeking to allot to him the suit land which he encroached belongs to the 1st defendant. When such is the

case, the question of maintaining a suit against the 1st defendant-Municipality, original owner, does not arise. The 2nd defendant is not claiming any independent right over the property. The plaint is bereft of particulars as to what is the attempt of the 2nd defendant-Bank to interfere when the alleged possession and it is an unnecessary impleadment of the 2nd Defendant practically but for to say the 2nd defendant Bank is the abutting owner to the encroached portion of the plaint schedule by the plaintiff, having purchased by the 2nd Defendant from the 1st Defendant under Ex.B.1 wayback in the year 1979 with D.No.1-4-926 of 335sq.yards. Thereby the lower appellate Court went wrong in granting the relief of injunction against the true owner-1st defendant-Municipality and also against the 2nd defendant-Bank without any foundation.

10. No doubt, the observation of the lower appellate Court to the extent of even true owner cannot dispossess by taking law to its hands holds good, but it does not entitle the plaintiff to get permanent prohibitory injunction against the true owner.

11. No doubt, it is one of the submissions by the appellant-2nd Defendant vis-à-vis the 1st Defendant-Municipality that it is a public site vested in the Municipality owned by the Government and practically a community property for the public good and no person can encroach and even any public can individually to protect the communal property can maintain suit not even as representative suit under Order I Rule 8 CPC by placed reliance to that effect on the expression of the Apex Court in Kalyan Singh, London Trained Cutter, Johri Bazar Vs. Chhoti,¹. Similar is the view expressed in relation to Trust property by another two judge

¹ AIR 1990 SC 396

Bench of the Apex Court in R. Venugopala Naidu vs Venkatarayulu Naidu Charities².

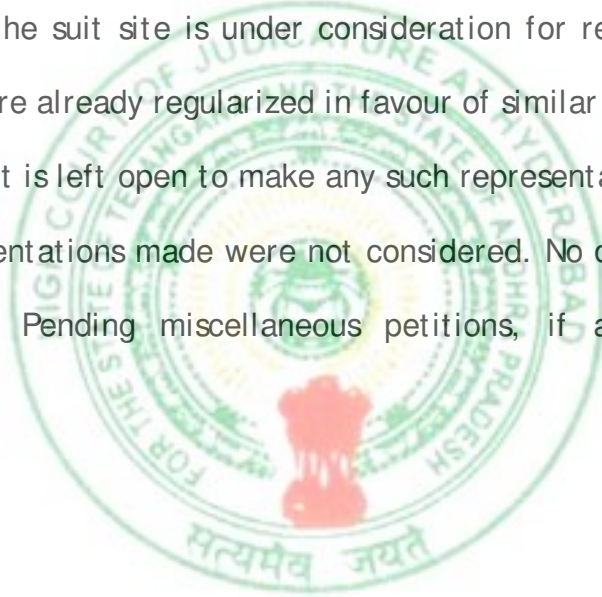
12. It is pre-mature for this Court to give any finding from the expressions that the law when speaks of entitlement, if at all, remedy is left open to maintain by any of the defendants including by the 2nd defendant, a suit for possession showing the 1st Defendant also as party to seek eviction of the plaintiff herein and to hand over possession to the 1st defendant. Otherwise even the 2nd Defendant Bank if shows any entitlement of the right of access or easementary right from purchase of the part of the land nearby of the Municipality to enforce the right against the suit land also independently.

13. With these observations of any such remedy is while left open to the 2nd defendant Bank, it is necessary to mention that the conduct of 1st Defendant-Municipality is highly depreciable despite having issued notice in provoking the plaintiff to maintain the suit for injunction, not resorted to take any steps under law to vacate the plaintiff who encroached the property. The Government Pleader representing 1st defendant-Municipality is thus directed by virtue of this judgment to draw attention of the 1st Defendant-Municipality to the observations supra to take immediate steps for removal of the encroachment. A copy is marked to the Secretary, Municipal Administration to see that necessary steps are to be taken.

14. In the result, the Second Appeal is allowed in part by setting aside the Judgment and decree of the lower appellate Court in A.S.No.26 of 1993 dated 16.08.1995 granting injunction in favour of the plaintiff encroacher for he is not entitled to the injunction against the

² AIR 1990 SC 444

1st Defendant-true owner of the property so also for no case is made out of any threatened interference but for to observe that the 2nd Defendant Bank either on the grounds of any public nuisance or easementary right or on the ground of protecting the Government property can maintain a suit to evict the plaintiff likewise, the 1st Defendant-Municipality true owner can take legal recourse for removal of the encroachment and but for that they cannot take law into their hands to dispossess the plaintiff other than through due process of law. The learned counsel for the plaintiff-1st respondent to the Second Appeal (1st plaintiff since died and represented by legal representatives-Respondents 3 to 5 in the appeal), submits that the suit site is under consideration for regularization, for nearby plots are already regularized in favour of similar encroachers. For that remedy, it is left open to make any such representation afresh from earlier representations made were not considered. No order as to costs. Consequently, Pending miscellaneous petitions, if any, shall stand closed.



Dr. B. SIVA SANKARA RAO, J

Date: 15.11.2016
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