

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.1024 OF 2012

JUDGMENT:

This second appeal under Section 100 of C.P.C is filed challenging the concurrent findings recorded by the Principal Senior Civil Judge at Warangal in O.S.No.199 of 2006 and confirmed by the II Additional District Judge at Warangal in A.S.No.97 of 2009, whereby, the suit filed by the plaintiff for recovery of possession of suit schedule property and mesne profits was dismissed.

2. For convenience of reference, the ranks before the Trial Court will be adopted throughout the judgment.

3. The plaintiff filed suit for the aforesaid reliefs alleging that Niamatullah was the original owner of the suit property, who died about 15 years ago and after his death, his wife Hameeda Bee was recorded as owner and she died later and the plaintiff alone being the legal heir succeeded the estate of the deceased Niamatullah and continued in possession and enjoyment of the property as owner of an extent of 517 sq.yards with a hut bearing No.16-10-150 (new) (16-10-2/6 (old)) situated at Shivanagar, Warangal, which is described in the schedule annexed to the plaint.

4. One Burra yadagiri S/o Ramulu and Burra Narsimhulu S/o Venkataiah filed suit O.S.No.486/1 of 1349 Fasli against the father

of the plaintiff before the District Munsif Court at Warangal for recovery of possession, the said suit was dismissed and the same became final.

5. It is contended that the area shown in the sketch was taken over for road widening i.e. 275 sq.yds. The defendant tried to encroach 517 sq.yds belonging to the plaintiff which is shown in red colour in the plan by constructing RCC building and a shed and boundary wall particularly on south and west, but the Warangal Municipality in the month of April, 2005 demolished the same, the defendant again constructed compound wall around the suit schedule property without any manner of right therein. Therefore, sought for recovery of possession of the property and for mesne profits, as the defendant is in unlawful possession of the property from the date of his encroachment and prayed for grant of the aforesaid reliefs.

6. The defendant resisted the claim of the plaintiff raising several contentions including denial of title of the plaintiff to the suit schedule property while contending that the defendant is the owner and possessor of open land in Sy.No.1505 new (old Sy.No.1987) of an extent of 270 sq.yds, situated at Fort Warangal having purchased the same from Burra Ramchandraiah S/o Ramulu through his G.P.A holder Singarapu Chakrapani under registered sale deed dated 25.11.2004 and the defendant filed O.S.No.1052 of 2005 on the file of II Additional Junior Civil Judge, Warangal seeking permanent injunction against Aameeda Bee D/o

Md. Afzal and Mohd Safia D/o Mohd Yakub and the said suit was decreed in the year 2005 and thereby he is the absolute owner of the property and prayed for dismissal of the suit.

7. Basing on the above pleadings, the Trial Court framed three issues, which are as follows: (extracted from the judgment)

- a) Whether the plaintiff is entitled to mesne profits from the date of occupation of the suit land from the defendant?
- b) Whether the plaintiff is entitled to mesne profits from the date of occupation till the date of delivery at the rate of Rs.1,000/- per month as prayed for?
- c) To what relief?

8. During hearing, the plaintiff examined himself as P.W-1 and got marked Exs.A-1 to A-8 and on behalf of the defendant, D-1 to D-3 were examined, but no documents were marked.

9. Upon hearing arguments of both the counsel, the Trial Court dismissed the suit holding that the plaintiff failed to establish his title to the property, since his claim is based on title.

10. Aggrieved by the decree passed by the Trial Court dismissing the suit dated 26.08.2008, the plaintiff being unsuccessful, preferred A.S.No.97 of 2009 under Order XLI Rule 1 of C.P.C on the file of the II Additional District Judge, Warangal, challenging the decree on various grounds. But, the Appellate Court, concurred with the recordings by the Trial Court and confirmed the decree passed by the Trial Court.

11. Now, the present second appeal is filed raising several contentions and at the stage of admission, Sri G. Kishore Kumar, learned counsel for the appellant would contend that the Trial Court did not consider oral and documentary evidence in proper perspective and committed an error in dismissing the suit filed for recovery of possession and even if the defendant did not produce any scrap of paper in support of his case, the Trial Court dismissed the suit disbelieving the claim of the plaintiff and at the end, he contended that the appellant is a poor rickshaw puller having no other property, prayed to allow the appeal setting aside the decree passed by the Trial Court, confirmed by Appellate Court and pass a decree in favour of the appellant.

12. The suit was filed for recovery of possession and mesne profits while admitting that the respondent/defendant is in possession and enjoyment of the property based on title. The basis for claim is the decree passed in O.S.No.486/1 of 1349 Fasli on the file of the District Munsif Court, Warangal filed by Burra Yadagiri and Burra Narsimhulu for recovery of possession. But, the suit was dismissed and the decree passed therein attained finality. Such decree would not confer any title on the plaintiff because his rights were not declared. But the suit filed by the plaintiffs Burra Yadagiri and Burra Narsimhulu was dismissed for their failure to establish their case specifically. But, that does not mean that the plaintiff became owner of the property.

13. It is also contended that till death of Niamatullah, he was in possession and enjoyment of the property during his lifetime and thereafter, his wife and later the appellant came into possession without any interruption from anybody. Merely because the possession is admitted, he is not entitled to claim right over the property because the suit is not based on possessory title but based derivative title. The question of extinguishment of title under Section 27 of Limitation Act would arise only when they asserted exclusive ownership over the property or hostile title, to the knowledge of the real owner and till then, their possession cannot be ripened into adverse possession and therefore, mere continuation in possession of the property either by Niamatullah or by the appellant/plaintiff thereafter would not confer any right to continue in possession of the property to claim right in the property. Therefore, unless the long continuous possession extinguished the right of real owner by negative prescription, the plaintiff is not entitled to claim any right and therefore, the decree or order in O.S.No.486/1 of 1349 Fasli is of no assistance to claim relief of recovery of possession based on title.

14. A specific contention is raised before this Court at the stage of admission with regard to non-consideration of evidence. That would never give rise to substantial question of law within the meaning of Section 100 of C.P.C by Trial Court and Appellate Court and even if it is contended that the decree and judgment are perverse, the appellant has to show *prima facie* as to how it is

perverse and what extraneous evidence is considered while passing decree by the Trial Court while dismissing the suit by the Trial Court or Appellate Court. But, *prima facie*, the learned counsel for the appellant failed to bring it to my notice that any such consideration of extraneous evidence or non-consideration of evidence on record.

15. The other contention urged before this Court is that the defendant did not produce any scrap of paper to substantiate his claim. Undoubtedly, the defendant except examining himself, no document is brought on record to substantiate his right in the property. But in a suit filed for recovery of possession, initial onus of proof is on the plaintiff to establish his title when his claim is based on title, in view of Section 101 of Evidence Act. If, the plaintiff is able to establish his title *prima facie*, then the onus of proof will shift to the defendant to establish his claim. But, here, the plaintiff miserably failed to establish his claim by producing satisfactory and cogent evidence. Therefore, the Trial Court and Appellate Court rightly concluded that the plaintiff failed to establish his title to the property when his claim for recovery of possession is based on title.

16. A perusal of the judgment of the Appellate Court, it is totally in conformity with Order XLI Rule 1 of C.P.C and the Appellate Court did not leave any stone unturned and discussed every contention with same seriousness which it deserves. Therefore, the

question of non-consideration of evidence is only an invention for the purpose of admission of the appeal.

17. On an overall consideration of the entire judgment of the Trial Court and the Appellate Court, I find no question of law, muchless, substantial question of law to admit this appeal, since the jurisdiction of this Court under Section 100 is limited to substantial question of law. The term 'substantial question of law' is not defined anywhere, but the Supreme Court in **Union of India vs. Ibrahim Uddin**¹ discussed the scope of substantial question of law.

18. In view of the principles laid down in the above judgment, the points urged before this Court would not give rise to substantial question of law to admit the appeal under Section 100 of C.P.C. Hence, the appeal is dismissed at the stage of admission having found no substantial question of law.

19. Consequently, miscellaneous applications pending if any shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:30.09.2016

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¹ 2012 (8) SCC 148