

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.526 of 2016

JUDGMENT:

The plaintiff in O.S.No.130 of 2001 on the file of Junior Civil Judge, Pathapatnam, Srikakulam, who succeeded before the trial Court, lost his claim before first Appellate Court in A.S.No.85 of 2012 on the file of Additional District Judge, Srikakulam, as the appeal filed by the defendants was allowed dismissing the suit in O.S.No.130 of 2001 on the file of Junior Civil Judge, Pathapatnam.

2. For convenience of reference, the parties to the appeal will hereinafter be referred, as ranked in O.S.No.130 of 2001 by Junior Civil Judge, Pathapatnam, Srikakulam, through out the judgment.

3. The Plaintiff filed the suit for declaration that he is the owner of the suit property shown as 'QMPC' and 'NRDO' and to grant a mandatory injunction to remove the fencing within the suit schedule property at 'QM' and 'NR' and to further direct to change the direction of the roof from east to west to North to South i.e., EF to GH, over the mud walled granary to prevent the rain water from falling into the remaining part of the plaintiff's property and for recovery of possession shown as 'QMPC' and 'NRDO' as a consequential relief.

4. The claim of the plaintiff is that his father purchased the schedule property and other property by registered Sale Deed bearing No. 1975/1964, dt. 27.06.1964 for a sum of Rs.200/- from Karnam Chinnavadu and others and out of the property purchased, item No.2 is the schedule property shown as Item Nos. 1 and 2 in the plaint schedule. First item of the schedule annexed

to the document is thatched residential house on the northern row of Mahasingi village and there is no dispute relating to Item No.1 of the document schedule. In the southern row, father of the plaintiff purchased Item No.2 under the same Sale Deed i.e., vacant place, measuring east to west 5 cubits and North to South 150 cubits and the same is described as 'ABCD' as item Nos. 1 and 2 in the plan annexed to the plaint.

5. The house i.e., Item No.1 in the Northern row and the vacant place in the southern row are intervened by a government road, called as 'Raja Margam' where Mahasingi Village is situated.

6. Defendant No.1 is the father of defendant No.2 and defendant No.3 and defendant No.4 are the brothers of defendant No.1. During life time of his father, defendant Nos. 1 to 4 approached and requested his father to provide two cubits width with length of 36 cubits length of site shown as 'ABCD' in the plaint plan, and his father permitted them to use the same. The Defendants occupied the western side vacant place, but as it become difficult to reach their houses. Then, all the defendants requested his father to give 'ABCD' site to them. Out of sympathy, his father permitted two cubits width up to length of 36 cubits of length to the defendants to construct their houses and mud walled granary within his site. About 10 years ago, the plaintiff's father died and the plaintiff became absolute owner of the property and has been in possession and enjoyment of the same. In the vacant site marked as 'QMPC' east to west and also marked as 'NRDO', the plaintiff used to keep his she-buffalos including calves, shown as 'ABCD' in the plaint plan and the defendants extended their

houses without any lawful entitlement and without rights erected a temporary fencing despite objections raised by the father of the plaintiff. Thereupon, the plaintiff requested them to remove the same, but they did not head to his words and later the matter was placed before village elders and on the advice of village elders, the defendants agreed to remove the same, but they did not do so and hence, the suit.

7. The defendants resisted the claim contending that the plaint schedule property does not belong to the plaintiff and it was not used by the plaintiff at any time and the alleged tethering of cattle in the schedule property by the plaintiff is not correct. Item No.1 of the schedule property was being maintained as way for the use of the villagers including the defendants and to protect their privacy and convenience to go to the drinking water well situated to north of the village. It is a short cut route for the people, who are residing abutting to Haddubangi-Palakonda road, the cattle shed of the father of the plaintiff situated to the south of the street road. So, father of the plaintiff encroached northern portion of the way abutting to the west of the cattle shed belonging to him and thereby caused obstruction to the villagers. The street road i.e., Rajamargam abutting to the north, the cattle shed of plaintiff's family is the only way for their cattle, but not the suit schedule property, as contended by the plaintiff. There is no such land in existence on ground and the father of the plaintiff was never in possession and enjoyment of the plaint schedule property and they are nothing to do with the schedule property. Therefore, the defendants are entitled to enjoy the suit schedule property and prayed for dismissal of the suit.

8. Basing on the rival contentions of both parties, the trial Court framed six issues for trial. During trial, PWs. 1 to 3 were examined and Exs. A.1 to A.5 were marked. On behalf of defendants, Dws. 1 to 3 were examined and no documents were marked.

9. Upon hearing the arguments of both the counsel and perusing the material available on record, the trial Court, believing the right and title of the plaintiff to the schedule property and alleged encroachment by the defendants, passed a decree in favour of plaintiff.

10. Aggrieved by the decree and judgment passed by the trial Court, the defendants preferred an appeal before Additional District Judge, Srikakulam in A.S.No.85 of 1992, whereby the Additional District Court, set aside the decree and judgment of the trial Court dismissing the suit in O.S.No.130 of 2001 as the plaintiff failed to establish his right and title to the schedule property.

11. Aggrieved by the dismissal of the suit by the first appellate Court while allowing the appeal filed by the defendants in O.S.No.130 of 2011, by decree and judgment dt.28.08.2014, the plaintiff preferred the present second appeal raising several contentions. Most of the contentions are with regard to appreciation of evidence, but not with regard to any legal errors committed in the judgment of the first appellate Court.

12. This Court ordered Notice before admission and on appearance of the respondents' counsel, heard Sri Aravala Rama Rao, learned counsel for appellant/plaintiff and Sri Suresh Kumar Pusarla, learned counsel respondents/defendants.

13. During hearing Sri Aravala Ramarao, learned counsel for appellant/appellant, drawn the attention of this Court to certain observations in the judgment of the trial Court, more particularly, in para No.11-A and B, so also, the Settlement Deed marked as Ex.A.5 settling the dispute between the plaintiff and defendants, and contended that the appellate court did not appreciate the evidence in proper perspective and it is a substantial question of law to be decided in the present second appeal and therefore, he contended that decree and judgment of first Appellate Court is perverse and prayed to set aside the same by allowing the suit in O.S.No.130 of 2001 on the file of Junior Civil Judge, Pathapatnam.

14. Whereas, Sri Suresh Kumar Pusarla, learned counsel appearing for the respondents/defendants contended that Settlement Deed marked as Ex.A.5 is sufficient that the plaintiff has no right or title to the property and in the absence of any plea in the pleadings, the settlement deed cannot be accepted. Therefore, Ex.A.5 has no direct bearing on the issue and on the basis of such admission, the Court cannot pass a decree in favour of plaintiff and prayed for dismissal of the appeal as the findings recorded by first Appellate Court after appreciation of evidence and on the basis of application of judicial mind, which are fact findings, and these facts would not give rise to any substantial question of law.

15. The only contention raised by the learned counsel for plaintiff/appellant is that the judgment of the first Appellate Court is perverse as it did not consider the material on record in proper perspective. The trial Court though decreed the suit, first

Appellate Court interfered with the decree and judgment of the trial Court since it is a final court of fact and it re-appreciated the facts with reference to the material on record considering the rival contentions of both sides and the material available on record, applying its judicial mind independently. When the trial Court committed any error in appreciation of evidence, certainly, first appellate Court is entitled to re-appraise and give an independent conclusion. When the trial Court recorded an independent finding after re-appraisal of entire evidence, that would not give rise to a substantial question of law to be decided in this appeal.

16. Yet, the contention of learned counsel for appellant/plaintiff is that Ex.A.5 is the Settlement Deed dt. 2.05.2003. The suit in O.S.No.130 of 2001 was filed on 11.12.2001. Therefore, the document marked as Ex.A.5 before the trial Court during pendency of the suit and by the said document, the claim of the parties is settled and the defendants agreed to abide by the terms of the settlement i.e., to vacate the property in their occupation. But, their contention was that it was obtained by using force and the same is unenforceable under law. No doubt, Ex.A.5 is the Settlement arrived by the plaintiff and the defendants. But, as per the terms of Ex.A.5—Settlement, the defendants have to deliver 6 feet width of site to the plaintiff. If really, the parties entered into a settlement during pendency of the suit, it is open for them to file an application under Order 23 Rule 3 of CPC seeking permission of the Court to enter into compromise and request the Court to pass a compromise decree, in terms of the settlement arrived by them, but they kept quiet for certain period and suddenly introduced the same before the trial Court, which is marked as Ex.A.5, without

any factual foundation in the pleadings. But, the question of laying factual foundation in the pleadings on the date of filing of Ex.A.5—Settlement Deed does not arise, since this alleged settlement had taken place during pendency of the suit. Despite the settlement, they went on trial in the suit before the trial Court and the plaintiff did not take any steps to get the plaint amended based on Ex.A.5 to proceed with the trial. Though Ex.A.5—Settlement is a subsequent event, when a subsequent event took place to avoid unnecessary complications, pleadings can be amended, subject to permissibility of law. For the reasons best known to the plaintiff, he did not amend the plaint suitably and in the absence of any pleadings with regard to Ex.A.5—Settlement Deed, it has no bearing on the issue and it cannot be looked into for any purpose.

17. The Ex.A.5—Settlement Deed itself is doubtful for the reason that the plaintiff claiming that he is the owner of the suit schedule property and when he is the owner of the property, he cannot accept to handover of 6.5' site at the mercy of the defendants and by the Settlement Deed marked as Ex.A.5, the plaintiff's positive case is proved to be false. Even otherwise, agreement to delivery 6.5' site under Ex.A.5 confers any right on defendants, it is nothing but transfer of right in immovable property, which requires registration. Even if the document is accepted as true, it has no enforceability because compromise was not recorded under Order 23 Rules 2 and 3 of CPC. Therefore, based on Ex.A.5 alone, it is difficult to accept the contention of the plaintiff that the plaintiff is the owner of the suit schedule property.

18. In any view of the matter, the question before this Court is appreciation of evidence by first appellate Court. When the plaintiff contended that judgment of the first Appellate Court is perverse, it is for him to demonstrate that what evidence was not considered by the appellate Court either oral or documentary and based on mere allegation that the judgment is perverse, the appeal cannot be admitted since the jurisdiction of this Court under Section 100 of CPC is limited to substantial question of law.

19. A similar question came up for consideration before this Court in “**Gorrella Durga Vara Prasada Rao v. Indukuri Ram Raju and others**¹”.

20. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact as held in “**Madhusudan Das v. Narayanibai**²”.

The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact as held in “**Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh**³” Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a

¹ 2002 (2) ALT 589 (D.B.)

² (1983) 1 SCC 35

³ AIR 1951 SC 120

further appeal that the first appellate court had discharged the duty expected of it”.

In view of the principle in the above said judgment, when the appellate Court appreciated the evidence both oral and documentary, that would not give rise to substantial question of law. Therefore, based on the alleged perversity in the judgment as contended by the appellant, the appeal cannot be admitted in the absence of any material to show that judgment of first Appellate Court is perverse.

21. Yet, the contention of learned counsel for appellant is that first Appellate Court did not record satisfactory reasons to believe the case of the defendant and in fact, the Appellate Court did not consider the evidence in proper perspective, more particularly, the contents of Ex.A.5—Settlement Deed.

22. The trial Court and Appellate Court have to assess the evidence and the parties are expected to prove their case independently. When the plaintiff approached the Court seeking declaration which is equitable remedy i.e., mandatory injunction, it is for him to prove that he has right and title to the property and the same is infringed or invaded by adducing cogent and convincing evidence and the first Appellate Court, based on the judgment of the Apex Court reported in ***Punjab Urban Planning and Developing Authority v. M/s Shiv Saraswati Iron and Steel re-Rolling Mills***⁴ concluded that the plaintiff must succeed or fail on his own case and not on the weakness of the defendants’s case to get a decree and insisted the plaintiff to prove

⁴ 1998(4) SCC 539.

his independent case, in view of Section 110 of Evidence Act and relying on a judgment of the Apex Court in ***State of Andhra Pradesh and Others v. M/s Star Bone Mill and Fertilizer Company***⁵, concluded that a person in possession of the property is presumed to be the owner of the said property and the burden of proof is on the person, who denies the title of the person in possession, to establish that he was not the owner and at the same time, the plaintiff has to succeed, based on his evidence produced by him. But here, the plaintiff miserably failed to establish his independent case and therefore, the first Appellate Court rightly came to a conclusion, on appreciation of both oral and documentary evidence, that the plaintiff miserably failed to establish his independent title to the property and removal of alleged encroachment by mandatory injunction, which is harshest. Therefore, I find no substantial question of law to admit the appeal upon hearing both the counsel. Hence, this Second Appeal is liable to be dismissed, being *de void* of merit.

23. In the result, this Second Appeal is dismissed at the stage of admission. No costs.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 26-10-2016.

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⁵ 2013(2) SCJ 914

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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