

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.1119 OF 1999

JUDGMENT:

The unsuccessful plaintiffs throughout are the appellants in the instant Second Appeal. Aggrieved by the judgment and decree dated 03.09.1999 in A.S. No.86 of 1997 on the file of III Additional District Judge, Warangal, whereby and whereunder, the dismissal of the suit in O.S. No.635 of 1992 by the judgment and decree dated 31.10.1997 on the file of the II Additional District Munsif, Warangal, was confirmed, preferred the instant Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC').

2. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the trial court in the original suit.

3. The plaintiffs, claiming that they are the absolute owners of the house site admeasuring 600 square yards comprised of plot Nos.31 and 32 constituting part of Sy.No.174 situated in Enumala village, Warangal District, having acquired title under registered sale deed dated 08.04.1981, sought relief of perpetual injunction simplicitor against the defendants apprehending the proposed construction of compound wall covering the poles, which also includes the suit plots.

4. The suit was resisted by defendant No.1, whereas defendant No.2 remained *ex parte*. Substantially, the case of defendant No.1 has been that for establishing a market yard, site was selected admeasuring Acs.112-06 cents in Sy.Nos.174, 175, 176, 136, 126, 127, 179, 135, 128, 278, 138 and 144 and the said requisition was submitted to the District Collector, Warangal, for acquisition of the said lands under the Land Acquisition Act, 1894 and the possession was also taken and handed over to defendant No.1 for the said purpose, while denying the stand of the plaintiffs that the acquired land was at a distance but not included in the land acquired. Hence, sought to dismiss the suit.

5. Learned trial court framed four issues and granting leave to file re-joinder, framed an additional issue also thus:

"Issues:

1. Whether the plaintiffs are entitled for permanent injunction as prayed for?
2. Whether the suit is barred by limitation?
3. Whether the suit is bad for non-joinder of necessary parties?
4. To what relief?

Additional issue:

Whether the first defendant acquired suit schedule property as alleged in the written

statement?"

6. To substantiate their respective cases, P.Ws.1 and 2 were examined and Exs.A.1 to A.6 were marked on behalf of the plaintiffs; whereas, on behalf of defendant No.1, its Assistant Secretary was examined as D.W.1 and Exs.B.1 to B.5 were marked.

7. Learned trial court, on appraisal of evidence on record, observing that the onus rests on the plaintiffs to prove that the suit schedule property was not included in Acs.5-08 gts comprised in Sy.No.174 and cannot seek to shift the burden to the defendants and also observing that the possession of the suit schedule property was taken under a panchanama dated 23.02.1991, recorded finding that the plaintiffs have no *prima facie* case to approach the Court seeking the relief of perpetual injunction and, thereby, held issue No.1 and additional issue against the plaintiffs. Though, the trial court found favour with the plaintiffs in regard to limitation of the suit on issue No.2, still, on issue No.3, recorded finding against the plaintiffs stating that the suit is bad for non-joinder of Government as a necessary party and, thus, dismissed the suit by awarding costs.

8. Being aggrieved with the judgment and decree passed by the trial court, appellants-plaintiff preferred A.S. No.86 of 1997 before the lower appellate court.

9. The lower appellate court having formulated the necessary points, confirmed the judgment and decree passed by the trial court, observing that the learned trial court was justified in accepting Exs.B.1 to B.4 and they do reflect that the possession was taken way back in the year 1991 itself, whereas, the plaintiffs presented the plaint on 19.11.1997, which circumstance rules out that the plaintiffs were not in possession of the suit property on the date of institution of the suit and, thus, dismissed the appeal holding that there are no merits.

10. It is the aforesaid judgment and decree, which are under challenge in the instant second appeal contending in the grounds that the learned trial court ought not to have admitted Exs.B.1 to B.5 and both the courts below went wrong in accepting and acting upon Ex.B.1-award copy which was not an authenticated copy and, thereby, sought to allow the second appeal by formulating the following substantial questions of law:

"(a) Whether the Respondent can be allowed to lead or adduce evidence quite contrary to contents of its written statement (pleadings)? and whether the action courts below is justified in permitting the respondent to propound a new and different case giving up the case as setout in the pleadings?

(b) Whether the Courts below can make out a case or accept the case of the Defendant (respondent) which was not setup in the

Written Statement and also not suggested to the plaintiff when he was cross examined?

(c) Whether the Trial Court is justified in receiving Ex.B.1 and recalling D.W.1 at adduce evidence contrary to the pleadings and evidence already let in till 20-8-93 more specifically without amending the written statement?

(d) Whether the findings of both the courts below regarding exhibit B1 is perverse in view of the fact that the said finding is contrary to the pleadings and also to the case setup by the respondent in the cross examination of P.W.1?

(e) Whether the documents exhibits B1 to B5 are admissible in evidence without examining the concerned officer?

(f) Whether the findings of both the courts below dismissing the suit of Appellant and rejecting the relief of permanent injunction is correct/justified in the circumstances when the DW1 himself admitted that the possession of suit property was not obtained from the Appellant plaintiff?

(g) Whether findings of both the courts below in dismissing the suit in the absence of any evidence on behalf of the Respondent regarding dispossession of the Appellant from the suit schedule property is legal and correct?

(h) Whether the Action of the Trial Court is justified in marking, accepting and relying upon as exhibits B1 to B4 which are admittedly zerox copy of the alleged original documents de-horing the mandatory provision U/S 65 of

the Evidence Act inspite of the objections raised on behalf of the Appellant."

11. At the stage of admission, this Court has formulated the substantial questions of law for consideration thus:

"(c) Whether the Trial Court is justified in receiving Ex.B1 and recalling DW.1 to adduce evidence contrary to the pleadings and evidence already let in till 20.8.93 more specifically without amending the written statement?

(d) Whether the findings of both the courts below regarding Ex.B1 is perverse in view of the fact that the said finding is contrary to the pleadings and also to the case setup by the respondent in the cross-examination of P.W.1?

(e) Whether the documents Exs.B1 to B5 are admissible in evidence without examining the concerned officer?"

12. In view of the concurrent findings recorded by the courts below based on appraisal of evidence and re-appraisal of evidence respectively, the appellants-plaintiffs cannot succeed in the instant second appeal.

13. The only short question that requires consideration is, whether the findings recorded by both the courts below are tainted with illegality leading to perversity?

14. In fact, the suit itself was misconceived in the absence of acquisition authority being a party. The State ought to have been made as a party when the entire exercise was done by the State and it is mandatory in accordance with the provisions of the Land Acquisition Act, 1894. In case of grievance, the remedy open to the plaintiffs was not by institution of the suit seeking perpetual injunction simpliciter to stall and stating the acquisition proceedings, but otherwise. On this short ground itself, the instant second appeal is liable to be dismissed as to what the learned trial court did by rightly recording a finding thereon.

15. Even turning to the questions of law aforementioned, Ex.B.1 is copy of award and marked by recalling D.W.1. In fact, when acquisition proceedings were initiated and comprehensive pleadings have been put forth by defendant No.1 in its written statement tendering Ex.B.1, admitting the same in evidence by the learned trial court cannot be faulted. As rightly observed by the lower appellate court, Exs.B.1 to B.4, more particularly, Ex.B.1, being copy of the public document, and so also Ex.B.5, which is certified copy of the judgment in O.S. No.195 of 1991 on the file of the Principal District Munsif, Warangal, it cannot be said that they are inadmissible as sought to be construed by the plaintiffs. The consistent case of defendant No.1 has been that a

total extent of Acs.112-06 cents was acquired from various survey numbers including Sy.No.174, in which the suit schedule property is situated. The very fact that the compensation was awarded by the Land Acquisition Officer apportioning the amounts to which the plaintiffs were entitled for acquisition of the suit schedule property itself is sufficient enough to condemn the case of the plaintiffs and, therefore, there is absolutely no merit in the instant second appeal.

16. Accordingly, the instant Second Appeal is dismissed confirming the judgment and decree dated 03.09.1999 passed by the lower appellate court in A.S. No.86 of 1997, by which, the decree and judgment dated 31.10.1997 passed by the trial court in O.S. No.635 of 1992 was confirmed. There shall be no order as to costs.

17. As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, stand closed.

A. SHANKAR NARAYANA, J

10-06-2016

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