

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

SECOND APPEAL No.1015 of 2006

JUDGMENT:

This is an appeal by the plaintiff from the judgment and decree dt:31.07.2006 passed by the IX Additional District and Sessions Judge (FTC), Visakhapatnam in A.S.No.455 of 2004 whereby the learned Judge allowed the appeal and dismissed the plaintiff's suit—O.S.No.3393 of 2000 filed for permanent injunction.

2) The brief facts of the case are thus:

a) The case of the plaintiff is that he purchased the vacant site admeasuring 117 sq. yards in Sy.No.46/5, Bhanu Nagar, H.B.Colony, Visakhapatnam under a registered sale deed dated 01.06.1996 from one Budda Ramdas and ever since he is enjoying the suit schedule property without any interference. While so, his neighbour—Smt. R.Laxmi Rajyam purchased two roomed house with A.C. sheet roof in 1999. The plaintiff left the suit schedule site vacant without any construction. The plaintiff and said Laxmi Rajyam are having common path way on the western side of the suit schedule property for approaching 30 feet road on the western side and there is also an iron gate for their usage.

b) The further case of plaintiff is that on 04.12.2000 at about 6.30 P.M., the defendant and his men trespassed into the plaint schedule property and demolished the two roomed AC

sheet roof of Laxmi Rajyam and cleared the debris over night. When the plaintiff's watchman and neighbours questioned the defendant, he uttered that he would construct a pucca house in the plaint schedule property and issued a slip containing his name and address to the watchman and went away. Immediately the plaintiff and Laxmi Rajyam visited the plaint schedule property and found that the dismantled AC sheet shed and debris were cleared and that they gave police complaint. The defendant informed the police that he has right over the property, but he has not produced any document. Thus, the defendant is interfering with the plaintiff's possession and enjoyment of the suit schedule property.

Hence the suit for permanent injunction.

c) Defendant's case in his written statement was that plaintiff and Laxmi Rajyam never raised any iron gate for the alleged common path way and plaintiff's vendor filed two suits against the defendant in O.S.No.1360 of 1989 and O.S.No.1225 of 1992 relating to the disputed property in District Munsif Court, Visakhapatnam. O.S.No.1360 of 1989 was dismissed after full-fledged trial and O.S.No.1225 of 1992 was not pressed and the appeal filed by him was also dismissed for default.

d) The defendant's further case was that he filed O.S.No.1115 of 1992 before I Additional District Munsif, Visakhapatnam for mandatory injunction to remove the

asbestos shed and for permanent injunction against the plaintiff's vendor, who contested the suit and the said suit was decreed after full-fledged trial, directing the defendant therein to remove the sheds and other reliefs. Therefore, the defendant herein filed E.P.No.565 of 1998 for a direction to remove the said shed and the judgment debtor i.e. plaintiff's vendor—Budda Ramdas appeared but did not raise any objection by filing counter. In the E.P. it was directed to remove the sheds by the judgment debtor within 30 days from the date of order and it was also informed to him but he did not remove the structures within the time prescribed by the Court. The defendant personally went there and verified his property. The said sheds were abandoned and they were unattended and thus the defendant cleared his site on 04.12.2000 without obstruction by anybody. Therefore, the plaintiff who is a successor in the alleged title of Ramdas, was also restrained by permanent injunction not to interfere with the defendant's possession and enjoyment of the property. Thus, the plaintiff is estopped to file the present suit against the defendant. Further, the suit schedule is incomplete because the western boundary house appears to be of one D.V.Rao which earlier belongs to one Budda Ramdas.

e) Basing on the above pleadings, the trial Court framed the following issues for trial.

i) *Whether the plaintiff was in possession of plaintiff schedule property as on the date of suit?*

ii) Whether the decrees and judgments in O.S.No.1360 of 1989, O.S.No.1225 of 1992 and O.S.No.1115 of 1992 operate as *resjudicata*?

iii) Whether the plaintiff is entitled to injunction as prayed for?

iv) To what relief?

f) During trial, PWs.1 to 4 were examined and Exs.A1 to A5 were marked on behalf of plaintiff. DW1 was examined and Exs.B1 to B10 were marked on behalf of defendant.

g) On appreciation of the facts and evidence, the trial Court observed that decrees and judgments in O.S.Nos.1360 of 1989, 1225 of 1992 and 1115 of 1992 cannot operate as *res judicata* and held that oral and documentary evidence establish plaintiff's possession over the plaint schedule property. The trial Court further observed that plaintiff is entitled to permanent injunction and accordingly decreed the suit.

h) Aggrieved, defendant filed A.S.No.455 of 2001 before the IX Additional District and Sessions Judge (FTC), Visakhapatnam challenging the judgment of the trial Court.

i) On hearing both sides, the first appellate Court like the trial Court observed in Para 9 of its judgment that the decrees and judgments in O.S.Nos.1360 of 1989, 1225 of 1992 and 1115 of 1992 will not operate as *res judicata* to the suit on hand. However, sofaras plaintiff's entitlement to perpetual injunction decree is concerned, the first appellate Court

disbelieved the evidence of PWs.1 to 4 and observed that evidence on record clearly establish the plaintiff is not in possession of plaint schedule property as on the date of suit and held that the plaintiff is not entitled to permanent injunction. Hence, the second appeal at the instance of the aggrieved plaintiff.

3) The parties in this appeal are referred as they are arrayed before the trial Court.

4) On 29.09.2006, this Court admitted the appeal and framed the substantial question of law as “whether the lower appellate Court is justified in not considering the provisions in Section 65 of Civil Procedure Code (for short “C.P.C”)” and posted the matter for hearing.

5) Heard arguments of Sri S.Ramachandra Prasad, learned counsel for appellant and Sri E.V.V.S.Ravi Kumar, learned counsel for respondent.

6) Learned counsel for appellant/plaintiff vehemently argued that the plaintiff purchased the suit schedule property under Ex.A.1—registered sale deed from his vendor—B.Ramdas and has been in peaceful possession and enjoyment of the same and his vendor purchased the suit property in a Court auction which is clearly mentioned in Ex.A.1 and having recognized the title and possession of the plaintiff and also considering that the decrees in earlier suits—O.S.Nos.1360 of 1989, 1225 of 1992 and 1115 of 1992 do not operate as *res judicata*, the trial Court

decreed the suit in favour of the plaintiff. However, the first appellate Court without there being any proper reason, reversed the judgment on a surmise that the plaintiff was not in possession of the suit property. He argued that the first appellate Court has not given any cogent reason for its findings and therefore, the judgment is liable to be set aside. He thus prayed to allow the appeal and set aside the trial Court's judgment and decree the A.S.No.No.455 of 2004.

7) Per contra, learned counsel for respondent/defendant argued that plaintiff's own admission would show that he was not in possession of the suit property since the year 2000 and as such the suit for mere injunction without possession is not maintainable merely because the plaintiff's vendor purchased the suit property in a Court auction. Having found that the plaintiff was not in possession of the suit property by the date of suit, the first appellate Court rightly held that the plaintiff was not entitled to perpetual injunction decree and there is no illegality in the said decree. He thus prayed for dismissal of the appeal.

8) **POINT:** Predominantly the plaintiff's contention is that plaintiff's vendor purchased the suit property in a Court action which is not disputed by the defendant and as per Sec.65 of the C.P.C, his title became absolute from the time when he purchased the property and since the plaintiff purchased the suit property under Ex.A.1—sale deed from his vendor, his title also became absolute and further, the earlier three suits conducted between plaintiff's vendor and the defendant relate

to different property i.e, Sy.No.46/6 where as the suit property is in Sy.No.46/5 and as the decrees in those three suits do not operate as *res judicata*, the plaintiff is entitled to decree in the present suit. On the other hand, the contention of respondent/defendant is that irrespective of the fact that the plaintiff's vendor purchased the suit property in a Court auction, the plaintiff was admittedly not in possession of the suit property as on the date of suit and hence, he does not deserve perpetual injunction decree and the first appellate Court rightly dismissed the suit.

9) O.S.No.3393 of 2000 is admittedly a suit for perpetual injunction decree in respect of 117 sq.yds of site in Sy.No.46/5 filed by the plaintiff. Hence, the plaintiff must establish his peaceful possession and enjoyment of the suit property as on the date of filing of the suit to deserve perpetual injunction decree. Be that it may, Ex.A.1—sale deed would show that the plaintiff purchased the suit property from one B.Ramdas under registered sale deed dt:01.06.1996. In Ex.A.1 it is mentioned that the said Ramdas purchased the plaint schedule property and some other property in a Court auction held on 19.07.1991 by learned IV Additional District Munsif in O.S.No.930 of 1990 in E.P.No.232 of 1991. Basing on the fact that the plaintiff's vendor purchased the suit property in a Court auction, the plaintiff claims that his vendor's title became absolute and consequently his title also became absolute. In this regard Sec.65 of C.P.C reads thus:

“Section 65 - Purchaser's title: Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.”

Sec.65 is a deeming provision which says that where an immovable property sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in purchaser from the time when the property is sold and not from the time when the sale becomes absolute. So this provision says that the property vests in the purchaser from the date of sale but not from the date when the sale became absolute. There is no demur with this provision. However, in a suit for injunction what is germane for granting decree is whether the plaintiff was in effective possession and enjoyment of the suit property by the date of filing of the suit or not. In the instant case, a perusal of the record and the judgments of the two lower Courts would no doubt show that

- (i) The plaintiff purchased the suit property under Ex.A.1— sale deed.
- (ii) The decrees in the previous three suits i.e, O.S.Nos.1360 of 1989, 1225 of 1992 and 1115 of 1992 do not operate as *res judicata* as is concurrently held by both the Courts.

However, the above facts are not sufficient to enable the plaintiff to get injunction. He has to establish that he was in effective possession and enjoyment of the suit property by the

date of filing of the suit. However, unfortunately as rightly observed by the first appellate Court, the plaintiff was not in possession of the suit property. In the cross-examination, PW.1 admitted that he never stayed or enjoyed the suit site nor did he ever maintained the property. He further admitted that since the year 2000, the property was not in his possession. So his categorical admission was to the effect that he was not in possession of the suit property since 2000; the suit was also filed in the year 2000. That was why in Para (xi) of its judgment, the first appellate Court has held that the plaintiff was not in possession of the suit property and the plaintiff presented the plaint on 13.12.2000 i.e, 9 days after the alleged trespass and the evidence on record clearly establish the fact that plaintiff was not in possession of the suit schedule property as on the date of the suit and hence a simple suit for permanent injunction was not maintainable without seeking the relief of possession.

10) In the light of this admission, the first appellate Court did not believe the other oral and documentary evidence adduced by the plaintiff. I find the observation of the first appellate Court is impeccable because on his own admission, the plaintiff was not in possession of the suit property by the date of filing of the suit. Hence, mere suit for injunction is not maintainable on his behalf without seeking the relief of possession.

11) In the result, I find no merits in this Second Appeal and the same is accordingly dismissed. No costs.

As a sequel, miscellaneous applications pending, if any,
shall stand closed.

U. DURGA PRASAD RAO, J

Dt: 07.01.2016

Murthy/scs