

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.875 OF 2014

JUDGMENT:

This second appeal under Section 100 of C.P.C is filed against the decree and judgment passed on 07.10.2014 in A.S.No.10 of 2012 on the file of the Additional Senior Civil Judge, Gajuwaka, Visakhapatnam District, reversing the decree and judgment in O.S.No.216 of 2008 dated 13.03.2012 passed by the Junior Civil Judge, Gajuwaka, Visakhapatnam District.

The appellant herein who is the 1st respondent before the Appellate Court and plaintiff before the Trial Court filed O.S.No.216 of 2008 for grant of permanent injunction restraining the defendants and their henchmen from ever interfering with the plaintiff's peaceful possession and enjoyment of the plaint schedule property and for costs of the suit.

For the sake of convenience, the ranks given to the parties before the Trial Court in O.S.No.216 of 2008 will be adopted throughout the judgment.

It is the case of the plaintiff that she is the owner of the suit schedule property having acquired the same by occupation and constructed a house therein in the year 1976, after obtaining approved plan from the Gram Panchayat of Gajuwaka, duly paying taxes to the Gram Panchayat. Further, after the death of the

plaintiff's husband, the defendants 1 & 2 who are the children of the plaintiff, made an attempt on 18.07.2008 to dispossess her from the suit schedule property. Hence, she filed suit for permanent injunction.

The 2nd defendant filed written statement admitting the relationship between them, while contending that the property belongs to his father and that his father paid taxes to the Panchayat. It is also stated that his father executed a registered Will in sound state of mind in his favour bequeathing the plaint schedule property on 19.11.2001, bequeathing the Eastern side portion of the ground floor and the 1st floor to the 1st defendant and the Western side portion of the ground floor and the 1st floor to the 2nd defendant. It is further stated by the 2nd defendant that he had been in possession and enjoyment of the suit schedule property and the plaintiff filed the suit at instigation of the 1st defendant with a view to grab his share in the property.

The 1st defendant remained *exparte*.

Based on the above pleadings, the following issues were framed by the Trial Court.

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. Whether the plaintiff is in possession and enjoyment of the schedule property?
3. Whether there is no cause of action to file the suit?

4. To what relief?

On behalf of the plaintiff PWs. 1 & 2 were examined and Exs.A-1 to A-4 were marked and on behalf of the defendants, DWs.1 to 4 were examined and Exs.B-1 to B-18 were marked.

Upon hearing argument of both the counsel, the Trial Court decreed the suit holding that the plaintiff is in possession and enjoyment of the property and granted permanent injunction restraining the defendants from interfering with the possession and enjoyment of the plaintiff over the suit schedule property.

Aggrieved by the decree and judgment of the Trial Court, the 2nd defendant, who is claiming to be a legatee under the Will executed by his father, filed A.S.No.10 of 2012, which was allowed by the Additional Senior Civil Judge, Gajuwaka, Visakahapatnam District by decree and judgment dated 07.10.2014, by modifying the decree and judgment of the Trial Court.

The present second appeal is filed challenging the decree and judgment passed by the Appellate Court on various grounds.

The main contention raised in the grounds of appeal and during arguments before this Court is that the documents which are marked as Exs.A-1 to A-4 clinchingly establish that, as on the date of filing the suit, the plaintiff is alone in possession and enjoyment of the property by duly paying property taxes to the concerned authorities, but the Appellate Court did not consider

those documents in proper perspective and committed an error by allowing the appeal and reversed the decree and judgment in O.S.No.216 of 2008 dated 13.03.2012 and prayed to set-aside the same and to pass a decree in favour of the plaintiff.

At the stage of admission, heard Sri C. Raghu, learned counsel for the appellant at length.

The suit is filed for injunction simplicitor for determining whether the Court is required to record a finding regarding lawful possession of the plaintiff as on the date of filing the suit and their infringement or invasion of the legal right of the plaintiff. According to the appellant/1st respondent/plaintiff, she occupied the property and later constructed a house after obtaining approved plan vide Ex.A-1 dated 16.05.1976. Allegedly, it bears thumb impression of the plaintiff. However, to substantiate the contention that she is in possession and enjoyment of the suit schedule property, she relied on Ex.A-2 undated original tax receipts, Ex.A-3 four positive photographs along with corresponding negatives and Ex.A-4 original receipt issued by the photo studio. These documents, at best, establish that appellant/1st respondent/plaintiff obtained permission and approval of the plan for construction of the house from the Gram Panchayat, Gajuwaka in the year 1976. But, the tax receipt does not disclose for which year she paid the tax. Therefore, Ex.A-2 is not useful and Exs.3 & 4 are also of no assistance to prove that she is in possession and

enjoyment of the suit schedule property, in the absence of any date on the photographs and issue of receipts.

Learned counsel for the appellant Sri C. Raghu, while contending that the 2nd defendant is not in possession and enjoyment of the property, drawn attention of this Court to paragraph 6 of the written statement, which is as follows:

“The allegations of the plaintiff the defendants are none other than her children and they are residing with their families in the above addresses are true and correct.”

Similarly, learned counsel has also drawn attention of this Court to paragraph 17 of the written statement filed by the 2nd respondent, which reads as follows:

“The 2nd defendant humbly submit that in the month of April, 2008, he shifted his family from the said house to his another house i.e. door No.26-42-8, Chaitanyanagar, old Gajuwaka, Visakhapatnam then the plaintiff and 1st defendant trying to occupy one of the portions of the 2nd defendant house and the 2nd defendant immediately rushed to the Gajuwaka police and given complaint and the police scrutinized the documents and found facts and the police warned the 1st defendant and the plaintiff for creating nuisance.....”

At best, these admissions would go to show that, in the month of April, 2008, the 2nd defendant shifted his family from the said house to another house bearing D.No.26-42-8, Chaitanya Nagar, Old Gajuwaka, Visakhapatnam. Thus, he is not in actual possession as on the date of filing the suit and he is residing at the address given in the plaint. That does not mean that the plaintiff is not in possession and enjoyment of the property, in view of the statement that the 1st defendant and the plaintiff made an attempt to interfere with enjoyment of the house portion of the 2nd defendant and he gave a complaint to the police. The admission is not unequivocal or unconditional and at best, it is an admission regarding shifting of his residence, but not actual possession of the property. However, in a suit filed by the plaintiff, the possession of the defendants is irrelevant and it is for her to establish that she is in actual possession and enjoyment of the property as on the date of filing the suit and that the defendants made any attempt infringe or invade the legal right of the plaintiff. Here, the plaintiff produced only four photographs, as discussed in the earlier paragraphs and none of them does go to establish actual possession and enjoyment of the property by plaintiff as on the date of filing the suit in 2008 and the voluminous documentary evidence produced by the 2nd defendant would show that that appellant herein was in possession of the property by paying land tax. But, this Court need not record any finding as to the

possession of the defendants, based on the documents produced by it. In the absence of any proof, it is difficult to accept her contention that she is in actual possession and enjoyment of the property. The Trial Court, though decreed the suit, did not consider the basic requirement for grant of perpetual injunction under Section 38 of Specific Relief Act, i.e., attempt to interfere or infringe or invade the legal right of the plaintiff, but simply recorded a finding that she is in possession and granted permanent injunction. But, the Appellate Court upon appreciation of the entire evidence, came to a conclusion that the plaintiff miserably failed to establish her lawful possession as on the date of filing the suit, so also alleged attempt to infringe or invade legal right of the plaintiff by the 2nd defendant and dismissed the suit by allowing the appeal.

The findings of the Appellate Court does not call for interference of this Court, since, I find no substantial question of law in the second appeal, as the jurisdiction of this Court is limited to a substantial question of law. The findings, if any recorded by the Trial Court or Appellate Court regarding the Will are beyond the scope of Trial in the suit and those findings are set-aside. However, the parties may claim their rights independently, in any other proceedings.

In the result, the second appeal is dismissed at the stage of admission.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:01.09.2016

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