

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.61 OF 2013

JUDGMENT:

This Second Appeal is filed by the unsuccessful plaintiff assailing the decree and judgment dated 01.10.2012 in A.S.No.326 of 2009 on the file of the Court of the IV Additional District Judge, East Godavari, Kakinada, wherein and whereby the decree and judgment dated 13.11.2009 in O.S.No.390 of 2007 on the file of the Court of the I Additional Senior Civil Judge, Kakinada, dismissing the suit filed by the plaintiff for declaration, recovery of possession, mandatory injunction and perpetual injunction, was confirmed.

2. For the sake of convenience, the parties will hereinafter be referred to as they were arrayed before the trial Court, to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: The plaintiff purchased an extent of Ac.0.20 cents of land from Palika Akkarao under a registered sale deed vide Document No.3130/93, dated 07.06.1993. The plaintiff purchased an extent of Ac.0.02 cents of land from the legal heirs of late Palika Akkarao and another i.e., defendant Nos.10 to 12 under a registered sale deed vide Document No.5084/97, dated 19.06.1997. The case of the plaintiff is that in the two sale deeds, the sub-division number of the plaint schedule property was wrongly mentioned as '8' (194/8) instead of '1' (194/1). The said mistake occurred since sub-division No.1 was wrongly copied from the prior title deed dated 29.12.1955, wherein the vendor of late Palika Akkarao originally purchased the schedule property. In the original title

deed in favour of the plaintiff's vendor the sub-division number was correctly mentioned as '1' (194/1). When the plaintiff came to know about the said mistake, he obtained two separate rectification deeds dated 07.11.2002 from defendant Nos.10 to 12. Prior to the execution of sale deed dated 07.06.1993 in favour of the plaintiff, Palika Akkarao executed a letter dated 07.06.1993 mentioning the measurements of item-1 of the schedule property promising to deliver the said property to the plaintiff as per the measurements. Accordingly, Palika Akkarao delivered the possession of plaint 'A' schedule property to the plaintiff at the time of registration of sale deed dated 07.6.1993. When the defendant Nos.1 to 11 tried to interfere with the possession of the suit schedule property, the plaintiff filed O.S.S.R.No.6214 of 2007 on 11.06.2007 on the file of the Court of the Principal Junior Civil Judge, Kakinada. The said plaint was returned with some objections. Meanwhile, on 22.06.2007 defendant Nos.1 to 11 with common intention to grab the properties of the plaintiff, jointly removed the fencing on south and west of the suit schedule properties and trespassed into western side portion of plaint 'A' schedule property. During pendency of the above suit, defendant Nos.1 to 9 along with third parties sold away the plaint 'B' schedule property and other property to defendant Nos.12 to 20 under a registered sale deed dated 21.02.2009. Hence, the plaintiff is constrained to file a suit for declaration, recovery of possession, mandatory injunction directing the defendants to remove the constructions, and perpetual injunction.

4. The defendants filed written statements denying all the averments made in the plaint *inter alia* contending that full extent

of the land covered by Survey No.194/1 of Gaigolupadu, H/o. Ramanayyapeta, Kakinada, is Ac.0.68 cents, which originally belongs to one Palika Swamy. After the demise of said Swamy, an oral partition took place among his sons and in the said partition, an extent of Ac.0.22 cents situated on eastern side fell to the share of Palika Ratnam and the remaining Ac.0.46 cents on the western side was allotted to Palika Chitteyya and Palika Venkata Ratnam. Defendant Nos.1 to 9 represent the branch of Palika Chitteyya, whereas Palika Venkata Ratnam had four sons viz., Palika Akkarao, Palika Satyam, Palika Suribabu and Palika Chanti. Defendant Nos.12 to 20 purchased an extent of Ac.0.30 cents of land from the branch of Palika Chitteyya under a registered sale deed dated 21.02.2009 and ever since they have been in peaceful possession and enjoyment of the said property. The remaining extent of Ac.0.16 cents situated in survey No.194/1, on the south of the above said Ac.0.30 cents, was purchased by Pepakayala Chandra Sekhara Rao and others from the legal heirs of Palika Venkata Ratnam under a registered sale deed dated 20.02.2009. It is not true to say that the defendant Nos.1 to 9 sold away the plaint 'B' schedule property and other property in favour of third parties. After receipt of the notice in the suit, defendant Nos.12 to 20 came to know that the plaintiff has filed the suit with a *mala fide* intention to grab the suit schedule properties.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for declaration of title and for recovery of possession of plaint-B schedule property?

2. Whether the plaintiff is entitled for mandatory injunction for demolition of the wall between plaint-B and A schedule properties?
3. Whether the plaintiff is entitled for permanent injunction in respect of plaint-A schedule property?
4. To what relief?

Additional issue:

Whether the plaintiff is owner of the plaint-B schedule property and the trespass by the defendants into B-schedule property is true?

6. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.12 were marked. On behalf of the defendants, DWs.1 to 3 were examined and Ex.B.1 was marked. Exs.C.1 and C.2 were marked through the advocate commissioner.

7. After considering the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is not entitled for the relief of declaration, recovery of possession of plaint-B schedule property and perpetual injunction; consequently, dismissed the suit. Feeling aggrieved by the decree and judgment dated 13.11.2009 in O.S.No.390 of 2007, the unsuccessful plaintiff preferred A.S.No.326 of 2009 on the file of the Court of the IV Additional District Judge, East Godavari, Kakinada. The learned IV Additional District Judge, after reappraising the oral, documentary evidence and other material available on record afresh, arrived at a conclusion that the plaintiff is not entitled for the relief of declaration, recovery of possession, mandatory and perpetual injunction; consequently dismissed the appeal. Feeling aggrieved by the concurrent findings of fact recorded by the Courts below, the unsuccessful plaintiff preferred the present second appeal.

8. Heard the learned counsel for the appellant-plaintiff at length.

9. The questions of law urged in this second appeal are as follows:

1. Whether the Courts below justified in placing the burden of proof on the plaintiff? and
2. Whether the Courts below committed error in discarding Ex.A.6 letter?

10. Point Nos.1 and 2 are interlinked with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

11. The following admitted facts can be culled out from the pleadings of both parties: One Palika Swamy is the owner of an extent of Ac.0.68 cents of land in Survey No.194/1 of Gaigolupadu H/o. Ramanayyapet Panchayat, Kakindada Municipality. After the death of Palika Swamy, his sons Palika Chitteyya, Palika Venkata Ratnam and Palika Ratnam have partitioned Ac.0.68 cents of land. Palika Ratnam got Ac.0.22 cents, whereas Palika Chitteyya and Palika Venkata Ratnam got Ac.0.46 cents of land in the family partition. Palika Akkarao inherited an extent of Ac.0.22 cents of land after the death of Palika Ratnam.

12. It is the case of the plaintiff that he purchased an extent of Ac.0.20 cents from Palika Akkarao under a registered sale deed dated 07.06.1993 Ex.A.1. He also purchased an extent of Ac.0.02 cents of land from defendant Nos.10 to 12 under a registered sale deed dated 19.06.1997. It is the further case of the plaintiff that the defendants have encroached plaint-B schedule property admeasuring an extent of Ac.0.02 cents. The trial Court, after considering the material available on record, discarded Ex.A.6

letter purported to have been executed by Palika Akkarao in favour of the plaintiff on 07.06.1993. The entire controversy revolves around Ex.A.6. In a suit for declaration, the plaintiff has to establish his case by preponderance of probabilities. It is equally a settled principle of law that the plaintiff is not entitled for the relief of declaration basing on the weaknesses or lacunae, if any, on the part of the defendant. To put it in a different way, the plaintiff may succeed or lose, basing on the strength or weaknesses of his/her case. It is needless to say that the burden of proof and onus of proof is not one and the same. The burden of proof is a static, whereas onus of proof shifts from one party to other party depending upon the facts and circumstances of each case. In a suit for declaration, the burden of proof is always on the plaintiff regardless of evidence adduced by the defendant. In the present case, in order to succeed in the suit the plaintiff has to establish that he got an extent of Ac.0.22 cents with specified boundaries and measurements. A perusal of the record reveals that the specific measurements of the property on four sides i.e., East to West and South to North are not mentioned in Ex.A.1 and Ex.A.2 sale deeds. It is simply mentioned that the plaintiff purchased Ac.0.20 cents of land. It is not in dispute that the plaint schedule is also silent with regard to the extent of the land from east to west and south to north. The plaintiff introduced a new version in his evidence. The plaintiff has not pleaded in the plaint that the exact length from south to north. It is needless to say that the pleadings form bedrock of a civil suit. Any amount of oral or documentary evidence without the pleading is of no avail. Therefore, it is not

safe to place reliance on the oral testimony of PW.1 with regard to measurements of suit schedule properties.

13. The contention of the learned counsel for the appellant-plaintiff is that the Courts below committed error in discarding Ex.A.6 letter. In order to appreciate the contention of the learned counsel for the appellant, it is not out of place to extract paragraph No.4 of the plaint, which reads as follows:

“Prior to the execution of the sale deed dated 07.06.1993, Sri Akkarao executed a letter dated 07.06.1993 giving the measurements of Item-1 of the schedule property promising to deliver the said property as per measurements. Accordingly he delivered possession of the land to the plaintiff at the time of registration of the sale deed. The plaintiff also raised fencing with cement polls around plaint schedule property.”

14. If the stand of the plaintiff is taken into consideration, Palika Akkarao has issued Ex.A.6 letter dated 07.06.1993 in favour of the plaintiff. Ex.A.1 registered sale deed was also executed on 07.06.1993. In such circumstances, what prompted the plaintiff to obtain Ex.A6 letter dated 07.6.1993 from Akkarao is not properly explained. If the plaintiff and his vendor measured the land prior to execution of Ex.A.1, what prevented them to mention the measurements in the sale deed? Likewise, the measurements are not mentioned in Ex.A.2 sale deed dated 19.06.1997. If really Ex.A.6 letter was in the custody of the plaintiff, what prevented him to mention the same in Ex.A.2 sale deed dated 19.06.1997. In order to overcome the laches, the possibility of taking such plea by the plaintiff cannot be ruled out completely. At least, had the plaintiff mentioned the measurements in the plaint schedule, that might have enabled the Court to give specific finding as to whether the defendants have encroached the plaint 'B' schedule property or

not. A perusal of the record reveals that the advocate commissioner has not taken the measurements of the suit schedule property with the help of Field Measurement Book (FMB). The advocate commissioner made an observation in his report that the defendants might have encroached the land of the plaintiff. This Court is unable to understand how the advocate commissioner had come to such an opinion without measuring the suit schedule properties with the help of a qualified surveyor. The opinion given by the advocate commissioner is no way helpful to the plaintiff to seek the relief of declaration. Both the Courts below concurrently held that the plaintiff failed to establish the measurements of the plaint schedule property. On that ground only, both the Courts below declined to grant the relief of declaration. Absolutely there is no material available on record to establish that the defendants have encroached the plaint 'B' schedule property with specified measurements. In such circumstances, the Courts below have rightly dismissed the suit insofar as the relief of recovery of possession of plaint 'B' schedule property is concerned. It is needless to say that the first appellate Court is the fact finding final Court. The Courts below have not committed any error of law in disbelieving Ex.A.6 letter.

15. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. ... A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous

¹ (2010) 13 SCC 216

findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the questions of law urged by the learned counsel for the appellant will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law is involved in this appeal.

17. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 13.11.2017
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T. SUNIL CHOWDARY, J

