

THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.1049 OF 1999

JUDGMENT:

The two plaintiffs filed suit O.S.No.16 of 1985 against 6 defendants on the file of the learned Principal District Munsif, Kadiri, for declaration of their title to the suit schedule property and for permanent injunction restraining the defendants, their men and all persons claiming through them from interfering with the suit schedule property.

2. The factual matrix is that:

The suit schedule property is an open space and formed part of the house owned and possessed by S. Alli Saheb and his sons and they were in possession and enjoyment since long time in their own right by perfecting their title by adverse possession and said property is extended upto Kadiri-Madanapalle road. S.Alli Saheb and his sons executed number of registered sale deeds in favour of the plaintiffs i.e. on 30.01.47, 01.5.52 and 15.6.64. The 1st plaintiff is the father of the plaintiffs 2 and 3. Though the plaintiffs divided, they kept the suit property joint being an open space in front of their houses. The plaintiffs have been enjoying the property upto eastern boundary i.e. Kadiri-Madanapalli Road. The house purchased was an old one and plaintiffs remodeled the house and additional constructions were made in the front portion upto roof level and the same is also in the knowledge of the defendants (for short, being referred to as D1 to D6).

The open space has always been used by the plaintiffs and their predecessors-in-interest for tethering cattle and keeping agricultural implements. D.1 has got a house adjoining the ratha leading to Harijanawada on its southern side and is demarcated by a compound wall. D.1 and D.2 are brothers. D.3 and D.4 are the cousins of the

defendants 1 and 2. The defendants, who never interfered and objected with the constructions made by the plaintiffs, about a month ago, without any manner of right, obstructed the plaintiffs from constructing and putting up a roof. They being the opposite political party persons, in spite of intervention of elders did not heed in creating unnecessary troubles to the plaintiffs. The plaintiffs left 16ft. from the road and made constructions. During the pendency of the suit, 1st plaintiff died. On 26.06.1989, plaintiffs 2 and 3 filed memo stating that there are no more legal representatives to implead for they are on record. As various attempts made by them to persuade the defendants did not give fruitful result, the plaintiffs filed the suit.

3. Opposing the suit claim and the plaint averments supra, D.1 filed written statement. D.2 to D.4 filed a memo adopting the written statement of D.1. The brief averments of the written statement contest are as follows:-

(a) The suit is not maintainable either in law or on facts. The suit property was never in possession and enjoyment of either the plaintiffs or their vendors. Neither plaintiffs nor their vendors had any open space. The boundaries mentioned in the plaint schedule are imaginary and they are not binding on the defendants. The suit property forms part of Sy.No.871 which is patta land of the defendants and others. A portion of that open space abutting the road on its western side is being let out to several persons. The house of D.1 is in a portion of Sy.No.871 and he constructed a compound wall to his house on the northern side to have privacy. The plaintiffs never used the suit site as part and parcel of their house.

(b) When the D.2 to D.4 were residing at Reddivaripali, the plaintiffs encroached upon Sy.No.871 and made constructions stealthily on its western side, about 6 months back and on return, they objected

for the unauthorized encroachment and a panchayat was also held in which the plaintiffs and defendants agreed to take measurements of the old house and new constructions with reference to survey numbers with the assistance of a surveyor and the plaintiffs agreed to remove the unauthorized encroachment made in Sy.No.871 but resiled and tried to make further constructions. Anticipating the same, the D.1 filed caveat petition and sent notice to the plaintiffs but same was returned with some objection. Taking undue advantage of the return of the caveat, the plaintiffs filed the suit with false claim and obtained *ex parte* interim injunction by misrepresenting the facts. Plaintiffs intentionally suppressed the survey number in which the suit property is situated.

4. Basing on the pleadings, the trial Court framed the following issues:-

1. Whether the plaintiffs are entitled to the declaration and injunction as prayed for?
2. To what relief?

5. During the trial, (a) on behalf of the plaintiffs, 2nd plaintiff was examined as P.W.1, 3rd plaintiff as P.W.2 and got marked Exs.A.1 to 19 viz; sale deed executed by Khajamohiddin in favour of 1st plaintiff dt.30.01.1947, sale deed executed by Alli Saheb and his sons in favour of 1st plaintiff, dt. 01.05.1952; sale deed executed by Abudl Rahiman Saheb in favour of 2nd plaintiff dt.15.06.1964, Sale deed executed by Alli Saheb and his sons in favour of 2nd plaintiff, dt. 15.06.1964, receipt passed by Gram panchayat Tanakal for receiving Rs.40/- towards building fee, dt.20.09.1984, two approved plans relating to house bearing D.No.28/ 25 of Tanakal, two proceedings of the Gram Panchayat of Tanakal, dt. 25.10.1982 and 17.09.1984, receipt passed by the Gram Panchayat for Rs.20/- towards Building fee, proceedings of the Executive Officer, Tanakal Panchayat, dt.21.03.1981, Caveat petition filed by

1st defendant, registration extract of sale deed executed by Bommireddy Masthan Reddy and others in favour of Pinnu Narayana Murthy, certified copy of Land Ceiling Declaration given by D.2, photographs and its negatives.

(b) On behalf of the defendants, D.1 was examined as D.W.1 and cause marked Exs.B.1 to B.10 viz; certified copy of 10-1 account, certified copy of Adangal for the faslies 1389 to 1392, true copy of field measurement book relating to Sy.No.871 and land revenue receipts. The Advocate Commissioner as D.W.2 appointed in I.A.Nos.65 and 268 of 1985, the suit was also cause examined and exhibited Exs.C.1 to C.12 viz; warrants of commission respectively with notices given to parties or their counsel and their work memos, rough plans prepared relating to suit locality, besides plan given by Taluk Surveyor and the reports of the Commissioner.

6.(a) Basing the above evidence, the trial Court held that the execution of the Exs.A.1 to A.4 by Alli Saheb and his sons in favour of the plaintiffs is not in dispute, but the dispute is only with regard to the measurements. Non- examination of the vendors of Exs.A.1 to A.4 is not fatal. S.No.871 which is triangular in shape as per Ex.B.3 (Field Measurement Book) that abuts the Kadiri-Madanapalli road on the east of the house and open space of the plaintiffs on the west and the same did not show how the plaintiffs carved out the suit property from Exs.A.1 to A.4. Gram panchayat, Tanakal also approved the plans relating to house bearing D.No.28/ 25 on 17.09.1984 and 28/ 24 on 21.02.1981. There from it was held that it is suffice to say that Exs.A.5 to A.11 neither confer title nor possession to the plaintiffs, over the property covered by S.No.871.

(b) It was further held that the D.W.1 deposed that their house and rastha leading to Harijanawada are situated in Sy.No.871 and relied

on Exs.B.1 and B.2 and the extent is 0.08cents as seen from Ex.B.1 in column No.17 of Ex.B.2 existence of house in an extent of Ac.0.05cents, rasta leading to Harijanawada and vacant site are mentioned. D.W.1 deposed that their house was constructed in 1969 or 1970 for which there is no dispute. The report of the D.W.2-Advocate Commissioner shows that the plaintiffs encroached into Sy.No.871 and the Court by personal inspection found that the plaintiff encroached into Sy.No.871 by $1/8^{\text{th}}$ cent and open space in front of the houses of the plaintiffs in Sy.No.871 measures $3/8^{\text{th}}$ cent, the length of the old house was 67ft. 3 inches and it was extended by 25ft. and again by 9 ft. with brick and mud. Therefore it is clear that the plaintiffs want to extend towards east of their old house by 34 ft., but the same was not revealed as seen from Exs.A.6 and A.7 approved plans. The personal inspection made by the Court and the Commissioner report reveal that the plaintiffs encroached into Sy.No.871. As seen from Ex.C.6 the house of the defendants is situated to the south of Harijanawada. The plaintiffs' house and the house of defendants are separated by the lane leading to Harijanawada which runs east-west. Prior to filing the suit, D.1 filed caveat petition against the plaintiffs on 31.12.1984 and the same is marked as Ex.A.13, in which it is mentioned as plaintiffs are venturing to encroach into their vacant site but not mentioned survey number.

(c) Therefore, it is clear that the plaintiffs encroached into Sy.No.871 and it is not the case of the plaintiffs that they are having right in Sy.No.871. Exs.B.1,B.2 and Commissioner's report revealed that Sy.No.871 belongs to the defendants. Exs.B.1 and B.2 further revealed that plaintiffs vendors even have no right in Sy.No.871. Thus, mere mentioning of boundaries in the sale deeds of plaintiffs from their vendors neither confer right nor possession over the extent in the

absence of title. The boundaries mentioned in Exs.A.1 to A.4 are not binding on the defendants, as they are not parties to it.

(d) Both the parties pleaded mediations but neither of them examined the mediators and the same is not reduced to writing. As per the Exs.A.3 and A.4, it revealed that the doorway is towards east. As seen from Exs.C.10 and C.11, Sy.No.871 abuts on the western side of Madanapalle-Kadiri Road. There is no demarcation between Sy.No.871 and the open site situated to its west. On seeing the Exs.A.1, 3 and A.4, it can be said that the inmates of the houses were reaching Kadiri-Madanapali road through east. The vendors of the plaintiffs have no right in Sy.No.871 as seen from Exs.B.1 and B.2. On the other hand, the personal inspection made by the Court revealed that the plaintiffs encroached 28ft. 5 inches on eastern side and 26ft. 7 inches on western side, 10ft.6inches on Southern side into Sy.No.871. The suit property measures 29ft. east-west and north-south. Therefore, it is clear that the plaintiffs are making constructions in Sy.No.871 and their vendors cannot convey any title to the plaintiffs in Sy.No.871. Defendants contended that they have no objection if the plaintiffs make constructions to the west of Sy.No.871.

(e) The contention of the plaintiffs that the defendants have no right in Sy.No.871 as the same is not shown in Ex.A.15 land ceiling declaration is devoid of merits as Ex.B.2 clearly showing the house and rasta leading to Harijanawada are situated in Sy.No.871. The contention of the plaintiffs that the open space was being used by them and their predecessors-in-interest by enclosing it by fencing, tethering cattle and are keeping agricultural implements in the suit property and they perfected their title to the suit schedule property by adverse possession concerned, mere user of the property cannot be taken as a definite assertion of hostile and proprietary right; for there must be

some definite assertion in the enjoyment before it can be called adverse to the real owners. There must be some overt act of unequivocal character which may put the owner on guard and it is not mere possession that determines the right but it is the character of possession that controls. P.W.1 stated that they are tethering cattle in the suit property and customers pass through the suit property to reach their shops. Neither the Commissioner's report nor the personal inspection of the trial Court revealed that the plaintiffs are running shops. Mere tethering cattle and no objection for it does not amount to an act of adverse possession.

(f) Further, it was held that the doorways of the houses covered by Exs.A1,A.3 and A.4 reveal having doorways on the east. Therefore it can be inferred that the vendors of Exs.A.1, A.3 and A.4 were reaching Kadiri-Madanapalle road from east of their houses without any hindrance and likewise the plaintiffs are also using Sy.No.871 situated in front of their houses to reach said road.

(g) Thereby, the defendants shall not cause any obstruction to the plaintiffs to reach said road from east. With the above finding by recognizing practically an easementary right of passage to the plaintiffs over the defendants property in S.No.871 to that extent in use of passage, the trial Court dismissed the suit of the plaintiffs declining to declare title and grant permanent injunction over the suit schedule property.

7. Impugning the judgment dated 15.07.1992 of the trial Court in O.S.No.16 of 85, the defendants preferred appeal A.S.No.31 of 92 on the file of the learned Senior Civil Judge, Kadiri. The lower appellate Court from the material on record and after hearing, however, held that, the house of defendant covers an extent of 5½ cents enclosed by compound wall. In between his house and suit site and the plaintiffs'

house, the lane leading to Harijanawada is situated. The measurements of the lane, till the western boundary of the defendants' house are not taken by the Commissioner. If the measurements of the lane come to an area of 2½ cents, the defendants claim to the suit site will be self-contradictory. It is the evidence of D.W.1 that his house, lane to Harijanawada and the suit site are covered by Sy.No.871. Nothing prevented the defendants to get the lane measured during the visit of the Commissioner. The Commissioner's report is without the assistance of the Mandal Surveyor and official records. The Commissioner while fixing has only proceed on the existing survey stones. In his report, he clearly mentioned, that the authenticative documents were not available to him. The defendants ought to have provided the same to the Commissioner during his inspection. In the absence of such record, and the assistance of the surveyor localizing the survey No.871, the report of the Commissioner to the effect, that the plaintiff's encroached into Sy.No.871 is illogical and unsubstantiated. It is further in evidence that D.2 was a member of Gram Panchayat of the suit village prior to the filing of the suit. This evidence is relevant since the plaintiff obtained permission for construction during that period. In the plan and under Ex.A.6 the eastern boundary is shown as a road. This is a relevant piece of document. D.W.1 admitted that the width of the lane leading to Harijanawada is about 22 ft. The rough calculation of the area of the lane situated in between the suit site, the plaintiff's house and the defendant's house to the western point might exceed 03 cents. Thereby the defendant failed to establish that the suit site is situated in Sy.No.871. The plaintiff on the other hand with reference to documentary evidence, established his title till the highway which includes the suit site. In view of the above the lower appellate Court held that the plaintiffs are entitled to the reliefs of declaration of title

as well as injunction over the suit site by setting aside the judgment of the trial Court.

8. Impugning the reversal finding of the lower appellate Court, the defendants preferred the present Second Appeal. On 22.06.2000 the appeal is admitted to decide the substantial questions of appeal in grounds 2 to 5 of the appeal that are as follows:-

1. Whether the recitals in a document between party to the suit and a stranger are admissible under the Evidence Act and are binding to a stranger?
2. Whether the recitals in a document of thirty years or above are conclusive proof with regard to the boundaries mentioned in the document?
3. Whether the boundaries mentioned in a registered document of 30 years old would bind a party who is a stranger to the transaction?
4. Whether the lower appellate Court acted legally in decreeing the suit for declaration of title even though no evidence has been let in to substantiate their plea?

9. In deciding the above substantial questions of law in admitting the Second Appeal by this Court earlier, heard both sides at length and perused the entire material on record.

10. Undisputedly, the land in S.No.871 belongs to the defendants. The evidence of DW.1 (D1) with reference to Exs.B1 to B10, particularly, Ex.B1 - certified copy of 10 - I account and certified copies of adangals for faslies 1389 to 1392 clearly establish that the land in S.No.871 absolutely belongs to the defendants. The evidence with reference to two reports with two plans and also the Surveyor's plan are also indicating that the land absolutely belongs to the defendants. Among Exs.A1 to A19 and in particular, the four sale deeds, Exs.A1 to A4, though they are 30 years old respectively i.e., from 1947 to 1964, nothing reflects that S.No.871 is covered therein. Though, so far as the

identify is concerned, what the plaint schedule requires is capable of identification and the same is different from establishing that too in a suit either for declaration of title or for possession or injunction based on title with claim as owner of the boundaries described property with reference to the survey number, the burden is on the plaintiffs at least to show by preponderance of probability so as to establish. It is only there from it shifts the burden on the defendants to rebut. The lower appellate Court thus went wrong in saying that the defendants could not establish, though it is for the plaintiffs to establish their case by preponderance of probability to shift the burden on the defendants. In case where the plaintiffs case is admitted by the defendants or they set up any independent defence of disentitlement to the plaintiffs, then only the Court can say that the burden is on the defendants, though, otherwise, even admissions do not confer right and title, but for on showing the proof of entitlement. It is not the case of the plaintiffs that they are in occupation of the property of the defendants in S.No.871 and enjoying by setting up hostile title against the right and interest of the defendants. In the absence of proof of right and entitlement, mere wrong description of boundaries shall not entitle the plaintiffs to claim the property covered by the boundaries, either as owners or as if in adverse possession that too when the documents are not entered as property of defendants or their predecessors in interest, who were shown as parties to the sale transactions. In the absence of which, merely because these documents are 30 years old, they do not confer presumption, that too when the Court depends upon the facts and circumstances to draw wherever necessary the presumption, the defendants or their predecessors are not the parties and mere filing of documents is enough is squarely incorrect approach of the lower Court. Even in the absence of which, mere enjoyment by tethering cattle or

like and mere allowing, by plaintiffs of the defendants on the plaintiffs vacant land, that does not enable the plaintiffs that too with no specific plea and no positive evidence specifically to claim adverse possession. With regard to the claim of adverse possession, it must be proved that the possession is peaceful, open and continuous and there must be specific plea to the claim with proof for such possession and the person claiming adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owners and, thus, it is for him to plead and establish all necessary facts without which he cannot succeed.

11. In Cheedella Padmavathi (died) per LRs. And others v. Cheedella Lakshminarasimha Rao (died) per LRs. and others¹, this Court considered the scope of law in this regard and categorically held as above by referring to a catena of expressions, including with regard to adverse possession mainly relying upon the expression of the Apex Court in Karnataka Board of Wakfs v. Government of India².

12. Even regarding the presumption of 30 years old document that no doubt in the expression of Cheedella Padmavathi (1 supra) at paragraph No.15(a)(viii) at page No.691, referring to several expressions of the Apex Court, held that the presumption is in respect of genuineness of a document as regards the signature, execution and attestation, but not as regards the correctness of the contents of the document, that have to be established by any other evidence.

13. In the present case, there is no any document inter-parties, but documents of a third party which will not bind on a third party to the document without proof of the correctness of the recitals including for drawing said presumption. In Cheedella Padmavathi (1 supra), how far the document not inter-parties is binding was also considered and it

¹ 2015 (5) ALT 634

² (157) *2004) 10 SCC 639 = 2004 (5) ALT 1.1. (DN SC)

is held more particularly as to recitals in the boundaries of documents of third parties, at paragraph No.15(a)(v) that recitals in a documents of neighbouring land, referring of one of its boundaries as the suit land and as belonging to a particular person, for the person to rely on it, same is not even admissible under Section 32 (2) of the Indian Evidence Act and the same is not even admissible under Section 32 (3) of the Indian Evidence Act, as it is a statement and not a document containing the statement made against the proprietary interest of the person making it and the recitals in a document at best operates as estoppel, if it is inter-parties. Though the recitals are relevant even in documents of third parties in reference to a boundary as suit land, the proof and evidentiary value of the recitals are different from case to case as all are depending upon the facts and circumstances of each case, from zero to hundred percent evidentiary value.

14. Once such is the case, even if the documents got some relevancy for even the recitals of boundaries of neighbours referred are relevant, coming to the facts therefrom, the 30 years old document presumption no way can apply to the facts of the case on hand, when the plaintiffs are not claiming any extent of land in S.No.871 by their own or by their predecessors by mentioning the boundaries beyond their property including the land in S.No.871, in the absence of establishing their right or title with a specific positive plea and with evidence cogently even to claim adverse possession. Thus, plaintiffs cannot succeed in the suit for declaration and injunction. When once that is the right conclusion having scanned the evidence by the trial Court being fresh in mind of the facts, for the lower appellate Court law does not permit interference merely because another view is possible. Thus, the lower Court was not right to reverse said findings of trial Court as per the settled law. Thus, the lower appellate Court's reversing the trial

Court's judgment and decreeing the plaintiffs suit for declaration and injunction is *per se* unsustainable. It thus requires restoration of trial Court's judgment but for by finding to the entitlement of right of passage by the plaintiffs through S.No.871, from the existing passage in their use as a prescriptive right of easement.

15. Accordingly, while answering the above substantial questions of law in favour of the appellants/ defendants and against the plaintiffs/ respondents, the Second Appeal is allowed to above extent, while setting aside the lower appellate Court's reversal decree and judgment and by restoring trial Court's dismissal judgment, but for to the extent of holding the plaintiffs got easementary right of passage formed and in use from its existence in the defendants' S.No.871 by restraining the defendants interference only to the easementary right of passage of plaintiffs and nothing beyond. No order as to costs.

Miscellaneous petitions, if any, filed in this Second Appeal shall stand closed.

Dr. JUSTICE B. SIVA SANKARA RAO,

Date: 21.02.2017

Vvr/ KH