

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.197 of 2017

JUDGMENT:

This appeal is filed by the defendant under Section 100 of Civil Procedure Code challenging the judgment and decree dated 20.12.2016 in A.S.No.20 of 2014 on the file of the Court of the Principal Senior Civil Judge, Kothagudem, wherein and whereby the decree and judgment dated 28.11.2014 in O.S.No.290 of 2009 on the file of the Court of Principal Junior Civil Judge, Kothagudem, decreeing the suit filed by the plaintiff for perpetual injunction, was confirmed.

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

3. The facts leading to filing of the second appeal are briefly as follows:

The plaintiff is the absolute owner and possessor of dry land to an extent of Ac.3.23 guntas situated in Sy.No.1061 of Sujathanagar Revenue village. The plaintiff got the said land in the family partition among himself and his brothers namely Venkateshwarlu, Chander Rao, Ranga Rao, Nageswara Rao and Madhava Rao during the year 1990. Thereafter, the plaintiff's name was recorded in the revenue records as occupant and pattadar in respect of the land fell to his share i.e. suit schedule property. The revenue authorities granted pattadar pass books

and title deed in favour of the plaintiff in respect of the suit schedule property. The plaintiff raised cotton crop in the year 2008 in the suit schedule land. The plaintiff has been enjoying the suit schedule property as absolute owner without any interruption from anybody since the date of partition in the year 1990. The defendants, who are not concerned with the suit schedule property and without any right whatsoever are interfering with the suit schedule property. Hence, the plaintiff filed the suit for perpetual injunction.

4. Defendants 1 to 3 filed written statement denying all the averments made in the plaint *inter alia* contending that the plaintiff is not the absolute owner of the suit schedule property. The plaintiff created pattadar passbooks and title deeds in his favour in respect of the suit schedule property. Originally, the suit schedule property and some other property belong to D.Prakasam, D.Gopaiah and D.Krishnarjuna Rao, who are the sons of late Dupakuntla Muthaiah and Vajramma. D.Prakasam had seven sons, viz., Venkateswarlu, Mohan Rao, Purnachandra Rao, Ranga Rao, Nageswara Rao, Madhava Rao (the plaintiff) and Bhader Rao. D.Gopaiah had three sons, viz., Vajreswara Rao, Rama Laxmana Rao and Chakradhara Rao, who are defendants 1 to 3. Before the Land Reforms Tribunal, Kothagudem, late Gopaiah, the father of the defendants submitted the declaration of family, wherein the suit land in Sy.No.1061 was shown as joint family property. The plaintiff failed to produce the market value certificate. The name of the

plaintiff and their grand father were shown in pahanis up to 1994-95 and false entries were created by the plaintiff in the year 1995-96 pahani. It is a joint family property of plaintiff and his brothers on one hand and the defendants on the other. The plaintiff suppressed the material facts. Hence, the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed as many as nine issues and one additional issue.

6. Before the trial Court, on behalf of the plaintiff, the plaintiff examined himself as P.W.1 and got marked Exs.A1 to A12. P.Ws.2 and 3 were also examined to prove that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit. To non-suit the plaintiff, the second defendant examined himself as D.W.1 and got marked Exs.B.1 to B.10. D.W.2 was examined to prove the case of the defendants.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit and consequently decreed the suit. Feeling aggrieved by the judgment and decree of the trial Court dated 28.11.2014 in O.S.No.290 of 2009, the defendants preferred A.S.No.20 of 2014 on the file of the Court of Principal Senior Civil Judge, Kothagudem. The first appellate Court after reappraising the oral, documentary evidence and other material

available on record afresh, arrived at a conclusion that the plaintiff was in possession of the property as on the date of filing of the suit, therefore, he is entitled for the relief of perpetual injunction and dismissed the appeal. Hence, the present second appeal by the defendants.

8. Heard Sri Rajasekhar Tallapally, learned counsel for the appellants-defendants and Sri P.Venkat Reddy, learned counsel for the respondent-plaintiff.

9. The substantial questions of law urged by the learned counsel for the appellants are as follows:

1. Whether the courts below are justified in granting the relief of perpetual injunction even though the defendants are coparceners of the plaintiffs?
2. Whether the findings recorded by the Courts below are perverse?

10. The following admitted facts can be culled out from the pleadings and evidence.

11. Dupakuntla Prakasam and Gopaiah are own brothers and sons of late Muttaiah. The plaintiff is one of the sons of Prakasam and the defendants are the sons of late Gopaiah. It is the case of the plaintiff that he got an extent of 3.23 guntas in Survey No.1061 of Sujatha Nagar Revenue village, Kothagudem in the family partition in the year 1990. Ever since the date of partition, he has been in possession and enjoyment of the same. It is the case of the defendants that they have partitioned the entire joint family property except the land in Sy.Nos.1061 and

1112 of Sujatha Nagar Revenue village. The suit is not filed in respect of the land covered in Sy.No.1112 of Sujatha Nagar Revenue village.

12. The entire controversy revolves around an extent of Ac.3.23 guntas in Sy.No.1061 of Sujatha Nagar Revenue village, Kothagudem. Whether it is the joint family property of the plaintiff and defendants as contended by the defendants or the plaintiff got the same in the family partition in the year 1990 between himself and his brothers is the subject matter of adjudication.

13. In a suit for perpetual injunction, the Court has to consider whether the plaintiff has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. Once the plaintiff *prima facie* establishes his possession over the suit schedule property, then it is for the defendants to establish that the plaintiff was not in possession of the suit schedule property at the relevant point of time. The trial Court as well as the first appellate Court granted perpetual injunction in favour of the plaintiff mainly basing on the documentary evidence, i.e. Exs.A1 to A12. It is needless to say that the burden of proof lies on the person, who asserts that part of the joint family properties were partitioned and some of the properties are being enjoyed as joint family property. If the plea of the defendants is taken into consideration the land in Sy.No.1061 and Sy.No.1112 of Sujatha Nagar Revenue Village were not partitioned. Except the assertion in the written

statement, nothing was placed to substantiate the same. The defendants mainly relied on Ex.B6 report of the Verifying Officer of the Land Reforms Tribunal to substantiate their case. As per Ex.B6 the total extent of land in Sy.No.1061 is Ac.7.00 gts. Out of Ac.7.00, the plaintiff's father and the defendants' father are entitled for equal share. In the cross-examination, D.W.1 in unequivocal terms deposed that his father sold certain extent of land in Sy.Nos.364, 365, 1061, 1318 to third parties. If that is so, how the father of the plaintiff sold land in Sy.No.1061 of Sujatha Nagar Revenue village is not properly explained by the defendants. This Court is very much conscious that the plaintiff has to prove his stand by adducing evidence much less cogent and convincing evidence. As observed earlier, merely because the defendants failed to prove their stand, that itself is not a valid ground to grant the relief of perpetual injunction in favour of the plaintiff.

14. The oral testimony of P.Ws.2 and 3 clearly reveals that the plaintiff and his brothers have partitioned the properties in the year 1990. As rightly pointed out by the learned counsel for the appellants, no partition deed is filed by the plaintiff. In the absence of partition deed, the Court can consider that aspect by taking into consideration the other attending circumstances of the case. A perusal of Exs.A1 and A2 reveals that the revenue authorities have issued a pattadar pass book and title deed in favour of the plaintiff in respect of suit schedule property. In Exs.A3, A4 and A5 pahanies, the name of the plaintiff is shown in the column of 'possessor' for the years 2005-06, 2006-07,

2007-08, 2008-09 and 2009-10. A perusal of Ex.A5 reveals that the plaintiff herein filed O.S.No.386 of 2007 in respect of the suit schedule property seeking perpetual injunction against one Bandi Sailu and the same was allowed. Ex.A6 is the certified copy of the decree in O.S.No.386 of 2007. A perusal of Exs.A7 and A8 reveals that the plaintiff herein mortgaged the suit schedule property to Primary Agricultural Market Society, Kothagudem. A perusal of Ex.A8 reveals that loan availment certificate was issued in favour of plaintiff in respect of the suit schedule property. A perusal of Ex.A10 reveals that the plaintiff executed a sale deed on 19.05.2004 in respect of some other property stating that he got the same in the family partition. Ex.A11 is the agreement of sale executed by the plaintiff in favour of one Amrutha Rao. Ex.A12 is the arbitration award. A perusal of Exs.A.10 to A.12 *prima facie* reveals that the plaintiff and his brothers have partitioned the properties. In such circumstances, the possibility of allotment of the suit schedule property to the share of the plaintiff cannot be ruled out completely.

15. The pahanies filed by the defendants pertain to the year 1996-97, i.e. Exs.B1 to B5. The defendants have not filed the pahanies for the year 2008-09 to negate the contention of the plaintiff. It is needless to say that unless and until the contrary is proved, the Court can place reliance on the title deed books and pattadar pass books. The defendants have not produced any document to establish that Ex.A1 pattadar pass book and Ex.A2 title deed granted in favour of the plaintiff in respect of

suit schedule property were cancelled even subsequent to filing of the suit. Exs.A1 to A12 clearly establishes that the plaintiff has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. In Exs.B1 to B10, it is not mentioned that the defendants are in possession of the suit schedule property at the relevant point of time. The trial Court considered the oral and documentary evidence in right perspective and granted the relief of perpetual injunction in favour of the plaintiff. The first appellate Court reappraised the oral and documentary evidence available on record without being influenced by the findings recorded by the trial Court and came to the conclusion that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit; therefore, he is entitled for the relief of perpetual injunction. Whether the plaintiff was in possession of the suit schedule property or not is purely a question of fact. Both the courts concurrently held that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit. The first appellate Court is the fact finding final Court. As observed earlier, the material placed before the Court falls short to establish that the suit schedule property is the joint family property, thereby the plaintiff and defendants are entitled for equal shares as sons of late Prakasam and Gopaiah respectively.

16. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the

appellants that the findings recorded by the courts below are perverse. This Court while exercising the jurisdiction under Section 100 CPC shall not lightly to interfere with the concurrent finding of fact recorded by the Courts below.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB¹**, while dealing with the scope of Section 100 of CPC, 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 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.

18. 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 there is no question of law much less substantial question of law involved in this appeal and the appeal is liable to be dismissed.

19. In the result, the Second Appeal is dismissed at the admission stage with costs through out. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

22nd December, 2017

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¹ (2010) 13 SCC 216