

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.224 of 2000

JUDGMENT:

This second appeal is filed by the unsuccessful plaintiff, under Section 100 of CPC, assailing the decree and judgment dated 26.10.1999 in A.S.No.42 of 1992 on the file of the Court of Additional District Judge, Madanapalle, wherein and whereby the decree and judgment dated 21.4.1992 in O.S.No.184 of 1984 on the file of the Court of First Additional District Munsif, Madanapalle, dismissing the suit filed for 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.

3. The averments made in the plaint are as follows: Originally the suit schedule property belongs to his grandfather viz., Md. Sarvar Sahib, who executed a Will bequeathing certain property in favour of the plaintiff, plaintiff's father and plaintiff's brother. As per the Will, the plaintiff is entitled to 1/3rd share including the suit schedule property. The plaintiff filed O.S.No.85 of 1983 on the file of the Court of the Subordinate Judge, Madanapalle, against his father and brother, for partition of the properties of late Md.Sarvar Sahib. Item Nos.26 and 27 in O.S.No.85 of 1983 are the suit schedule property in this suit. On 10.8.1984, the defendants high-handedly entered into the suit schedule property and erected stone pillars and thatched hut. Hence, the suit.

4. The defendants filed written statement denying all the averments made in the plaint *inter alia* contending that late

Md.Sarvar Sahib executed gift deed endowing the suit schedule property in favour of Muslim Community for construction of a mosque. The Will alleged to have been executed by late Md.Sarvar Sahib in favour of plaintiff, his father and brother, is not a valid one. Muslim community people constructed a mosque in the suit schedule property nearly fifty (50) years ago. The defendants perfected by their right over the suit schedule property by way of adverse possession. The suit is not maintainable for non-impleading of necessary and proper parties.

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

- 1) Whether the plaintiff has right and title to the property wherein the maszid is in existence?
- 2) Whether the defendants and other members of Muslim Community residing in cross-roads, railway station area, Kothapet and Madanapalle Spilling Mill area have perfected their right and title to the site wherein the maszid is constructed, by adverse possession and ouster also?
- 3) Whether the plaintiff is estopped from claiming title in the suit property wherein the Miaszid is constructed in the plaint schedule survey numbers by reason of its donation by his grandfather and which fact is admitted by the plaintiff's father in his deposition in O.S.No.139 of 1957?
- 4) Whether the frame of the suit is correct?
- 5) Whether the suit is bad for non-joinder of necessary parties?
- 6) To what relief?

6. Before the trial court, on behalf of the plaintiff, P.W.1 was examined and Exs.A.1 to A.3 were marked. On behalf of the defendants, D.Ws.1 to 5 were examined and Exs.B1 to B5 were marked.

7. Having thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court

arrived at a conclusion that the plaintiff was not in possession of the suit schedule property as on the date of filing of the suit; consequently dismissed the suit. Feeling aggrieved by the decree and judgment of the trial court, the unsuccessful plaintiff preferred A.S.No.42 of 1992 on the file of the Court of Additional District Judge, Madanapalle. The first appellate Court, after reappreciating the oral, documentary evidence and other material available on record, concurred with the finding of the trial Court that the plaintiff was not in possession of the suit schedule property as on the date of filing of the suit; consequently dismissed the appeal. Hence, this second appeal is preferred by the unsuccessful plaintiff.

8. Heard the learned counsel for the appellant-plaintiff and learned counsel for the respondents-defendants. The questions of law urged by the learned counsel for the appellant are as follows:

1. *Whether the Courts below have justified in dismissing the suit for non-production of the Will by the plaintiff?*
and
2. *Whether the findings recorded by the Courts below are perverse?*

9. Both the points 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.

10. It is an admitted fact that the suit schedule property originally belongs to Md.Sarvar Sahib, who is the grandfather of the plaintiff. It is the case of the plaintiff that his grandfather bequeathed the suit schedule property, in his favour, under a Will. The defendants are claiming that Md.Sarvar Sahib gifted the suit

schedule property in favour of Muslim Community people. In a suit for perpetual injunction, the plaintiff has to establish that he has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. If the plaintiff *prima facie* establishes his possession over the suit schedule property, the onus of proof shifts on the defendants to establish that they are in possession of the suit schedule property, at the relevant point of time. Except the self-served testimony of P.W.1, there is no other convincing evidence to establish that his grandfather executed a Will in favour of his father, brother and himself. The Will purported to have been executed by Md.Sarvar Sahib has not seen the light of the day till date. In the absence of the Will, it may not be possible for the Civil Court to arrive at a conclusion that the plaintiff got the suit schedule property by virtue of the Will. The Courts below gave a specific finding that in the absence of production of the Will, the version put forth by the plaintiff is not believable. The findings recorded by the Courts below, on this aspect, are based on logical conclusion and sound reasoning.

11. As seen from the testimony of D.Ws.1 to 5, Muslim Community people have constructed a mosque in the suit schedule property long back and using the same for conducting prayers (namaz), as per Muslim rites and customs. It is not the case of the plaintiff that the mosque does not exist in the suit schedule property as on the date of filing of the suit. The plaintiff has taken a specific plea in the plaint that the defendants high-handedly entered into the suit schedule property on 10.8.1984 and erected a

thatched hut on the stone pillars. The testimony of P.W.1 also reveals that the defendants entered into the suit schedule property and made construction. Even as per the pleadings in the plaint and the oral testimony of P.W.1, the plaintiff was not in possession of the suit schedule property as on the date of filing of the suit. Ex.B2 is the deposition in O.S.No.139 of 1957, wherein the father of the plaintiff, in unequivocal terms, deposed that late Md.Sarvar Sahib gifted the suit schedule property in favour of Muslim Community for the purpose of constructing a mosque. Ex.B1 is the certified copy of the decree in O.S.No.139 of 1957. These two documents substantiate the stand of the defendants. For one reason or the other, the plaintiff did not choose to implead Muthawalli or the Committee of the Mosque. Both the Courts concurrently held that non-impleading of the Mosque committee itself is a sufficient ground to dismiss the suit. The findings recorded by the Courts below are supported by oral and documentary evidence available on record. To put it in a different way, the findings recorded by the Courts below are based on evidence much less legally admissible evidence. The findings recorded by the Courts below are based on sound reasoning. In such circumstances, I am unable to accept the contention of learned counsel for the appellant that the findings recorded by the Courts below are perverse as such they are liable to be set aside. As observed earlier, non-filing of the Will substantiates the stand taken by the defendants. There is no question of law much less substantial question of law that arises in this second appeal.

12. Hence, the second appeal is dismissed. Miscellaneous petitions if any pending in this second appeal shall stand closed.

T.SUNIL CHOWDARY, J

November 30, 2017.
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