

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

S.A.No.1003 of 2016

JUDGMENT:

This Second Appeal is preferred challenging the judgment and decree dt.31-10-2016 in A.S.No.11 of 2013 of the Senior Civil Judge, Tadepalligudem, confirming the judgment and decree dt.31-10-2012 in O.S.No.225 of 2005 of the II Additional Junior Civil Judge, Tadepalligudem.

2. The appellants herein were defendants in the said suit.

3. The respondents filed the suit for declaration of title to the plaint schedule property admeasuring Ac.0.98 cts in R.S.No.40/5 of Avapadu village, Nallajerla Mandal, West Godavari District and for recovery of possession of the same with future profits or damages against the appellants.

4. The respondents contended in the suit that they are both daughters of one Nunna Lakshmana Swamy, that plaint schedule property is his ancestral property and the revenue records show the name of their grandfather Nunna Subbayya. They contended that a registered settlement deed Ex.A-1 was executed by their father bequeathing the property to them; that in 1986, their father had given the land on oral lease on crop share system to the 2nd appellant; that the 2nd appellant was having his own land on the eastern side of the plaint schedule property; and he changed the bunds of the plaint schedule property and tried to grab it. They contended that on a

complaint made by their father to the revenue authorities, the land was measured on 03-10-2002 and possession of the plaint schedule property was handed over to their father by the Village Secretary after enquiry and pattadar passbook (Ex.A-2) and title deed (Ex.A-3) were also issued in favour of their father on 20-11-2002. They alleged that on 22-01-2004, when their father was ill and their mother was attending agricultural works, the 2nd appellant let in their cattle and she buffaloes into the suit schedule property and destroyed the crop. They contended that since they were women, the appellants threatened them and occupied the plaint schedule property in February 2005 without any right or title therein. Therefore, they filed the above suit.

5. The 1st appellant filed Written Statement which was adopted by 2nd appellant.

6. In the Written Statement, it was contended that the 2nd appellant purchased the plaint schedule property under a sale deed, Ex.B-5 dt.31-12-1964 for valuable consideration of Rs.97/- from Nunna Subbayya, the grandfather of the respondents and that possession was also delivered to him. It is alleged that since the value of the property was less than Rs.100/-, the document was not registered, but it is valid in law. It is alleged that the 2nd appellant gifted the property under Ex.B-1 dt.06-04-1990 to his son, 1st appellant, and since then, he was in peaceful and uninterrupted possession of the property. They alleged that in 2004, the father of

the respondents fabricated documents and tried to occupy the land by using force and therefore, the suit deserves to be dismissed.

7. The trial Court framed the following issues:-

i) Whether the plaintiffs are entitled for declaration as prayed for?

ii) Whether the plaintiffs are entitled to the possession as prayed for?

iii) To what relief?

8. The respondents/plaintiffs examined P.Ws.1 and 2 and marked Exs.A-1 to A-10. The appellants examined D.Ws.1 to 3 and marked Exs.B-1 to B-5.

9. By judgment and decree dt.31-12-2012, the trial Court decreed the suit.

The 1st respondent's evidence was in tune with the allegations in the plaint and P.W.2, a third party, stated that the plaint schedule property was the ancestral property of the respondents, that the respondents were in possession of the plaint schedule property and in 2005, the appellants entered into the suit schedule land unlawfully without having any right or title therein. He stated that he was cultivating the land of one K.Veerayya on lease which was adjacent to the plaint schedule property.

The trial Court considered the evidence of D.Ws. and held that the defendants had admitted the ownership of Subbayya, grandfather of the respondents in respect of the plaint schedule property. Though the 1st appellant had pleaded that there was a purchase from Nunna

Subbayya by the 2nd appellant on 31-12-1964 and there was subsequent registered sale deed on 06-04-1990 in his favour, in his evidence, he set up a new case that he had a brother, and that his father partitioned the properties between himself and his brother and in the said partition, the plaint schedule property devolved on him. The trial Court took note of the fact D.W.1 deposed that the partition deed was available with his counsel but the same has not been filed and the 1st appellant's brother was not examined in the suit as a witness to show that the plaint schedule property devolved on the 1st appellant through the partition.

It took note of the evidence of the attesor of Ex.B-5 that the age of the 1st appellant/D.W.1 was 67 years when in fact according to the 1st appellant, he was only 45 years of age and concluded that D.W.2 was not aware about the 1st appellant at all and so he could not have been aware of Nunna Subbayya also.

It also concluded that Ex.B-5 had been prepared by observing Ex.B-1; that the appellants failed to prove Ex.B-5; and unless it is proved, the 1st appellant will not get any rights under Ex.B-3.

It therefore concluded that the appellants admitted the title of the grandfather of the respondents but failed to show that the 2nd appellant purchased the schedule property and so they did not get any rights over the property. It therefore decreed the suit with costs by declaring the respondents as absolute owners of the plaint schedule property and

directing the appellants to handover the property to them within three months.

10. Assailing the same, the appellants filed A.S.No.11 of 2013 before the Senior Civil Judge, Tadepalligudem.

11. The said appeal was dismissed on 31-10-2016.

12. The lower appellate court also held that once the appellants had admitted the title of the family of the respondents initially, the burden shifts to the appellants to establish their right and title over the plaint schedule property.

The lower appellate Court held that Ex.B-5 was laminated on front and back, that it was separated as two papers and after it was separated as two papers, the second paper had a plaster wherein the paper was torn which was covered with plaster. It noted that Ex.B-5 was laminated but had two papers but the same was laminated as single paper so that the inner side of the second page has lost. It concluded that first page had one plaster and it had shown that the appellants intentionally laminated the two papers as one paper.

It confirmed the finding of the trial court that Ex.B-5 was prepared by observing Ex.B-1 and it was a manipulated document. It held that once Ex.B-5 was vitiated, there cannot be any purchase by the 2nd appellant from the grandfather of the respondents.

13. Assailing the same, this Second Appeal is filed.

14. Sri M.P.Chandra Mouli, learned counsel for the appellants, contended that the suit of the respondents is barred by limitation. According to him, since the appellants were in possession, the respondents should have established that they had possession within 12 years from the date of filing of the suit.

15. This contention is untenable. Under the Limitation Act, 1963, when a plaintiff filed a suit for recovery of possession, he is not required to prove his possession within 12 years from the date of filing of the suit. It is for the defendant to establish that he was in possession continuously, openly and adversely to the plaintiff for more than 12 years.

16. In **Md. Mohammad Ali v. Jagadish Kalita**¹, the Supreme Court held:

“By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.”

17. This legal position is not disputed by the learned counsel for the appellants.

¹, (2004) 1 SCC 271, at page 277

18. Also there is no plea of adverse possession raised by the appellants. The essence of the plea of adverse possession is the admission of title of the plaintiffs.

19. In the present case, the appellants/defendants have set up a plea that under Ex.B-5 dt.31-12-1964, their father had purchased the plaint schedule property from the grandfather of the respondents/plaintiffs by name Nunna Subbayya. Having pleaded acquisition of right in the property through a document, the appellants could not have raised the plea of adverse possession since both these pleas are inconsistent with each other. (**See Arundhati Mishra (Smt) v. Sri Ram Charitra Pandey**²) Therefore, it cannot be said that the suit filed by the respondents is barred by limitation.

20. Learned counsel for the appellants also contended that the Courts below considered the evidence let in by the appellants and ought to have focused on the evidence adduced by the respondents and had failed to do so.

21. This contention is without merit. Once the appellants had admitted that originally the property belongs to the respondents' grandfather Nunna Subbayya, the burden is on the appellants to establish how they acquired title to the plaint schedule property. It is not necessary for the respondents to prove their title once their grandfather's initial title was admitted by the appellants.

² (1994) 2 SCC 29

22. The evidence on record reveals that contrary to the pleading of the appellants that the 2nd appellant executed settlement deed Ex.B-1 dt.06-04-1990 in favour of the 1st appellant, the 1st appellant deposed that the land was obtained by him in a partition with his brother. He failed to examine his brother or mark the partition deed. The attesting witness of Ex.B-5 stated that the 1st appellant was aged 67 years at the time of execution of Ex.B-5 whereas at the time of giving evidence in the suit, the 1st appellant was aged 45 years. This showed that the witness D.W.2 did not know the 1st appellant or the 2nd appellant or the respondents' grandfather and his evidence was introduced only to prove Ex.B-5, which both Courts found to have been created after Ex.B-1 came into existence.

23. I am therefore of the opinion that the Courts below had correctly appreciated the evidence on record and disbelieved the plea of the appellants that they were the owners of the property and decreed the suit in favour of the respondents. There is no error of law much less any substantial question of law arising for consideration in the Second Appeal.

24. Accordingly, the Second Appeal is dismissed. No costs.

25. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 22-03-2017
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