

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.476 of 2016

JUDGMENT:

This appeal is filed under Section 100 CPC assailing the judgment and decree dated 18.01.2016 in A.S.No.12 of 2014 on the file of the Court of XVI Additional District and Sessions Judge cum XVI Additional Metropolitan Sessions Judge, Ranga Reddy District at Malkajgiri, wherein and whereby the judgment and decree dated 13.02.2013 in O.S.No.518 of 2008 on the file of the Court of Additional Junior Civil Judge-cum-XVIII Metropolitan Magistrate, Cyberabad, at Malkajgiri, granting perpetual injunction in favour of the plaintiffs, 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 present second appeal are briefly as follows:

The plaintiffs are permanent residents of Maruthinagar, Malkajgiri, Ranga Reddy District, having constructed houses over their respective plots and residing therein since more than 50 years. There is a graveyard in survey No.910/2 covering an area of 8 guntas, i.e., 968 sq. yards, which is the government land. The locality people are using the same as burial ground since 50 years. Due to rapid growth of the residential area in and around the suit schedule property, the government allotted a new place for graveyard. The first defendant illegally occupied an extent of 245 square yards out of 968 sq. yards in survey No.910/2, which is

shown as suit schedule 'A' property, due to escalation of prices of the land and constructed house therein. The Mandal Revenue Officer, Malkajgiri Mandal, R.R.District, issued a notice vide file bearing No.B/2781/1996, dated 22.08.1996 to the first defendant under Section 7 of A.P. Land Eviction Act, alleging that the first defendant occupied 245 sq. yards in survey No.910/2. Aggrieved by the said notice, the first defendant preferred an appeal before the Revenue Divisional Officer, Chevella Division, R.R.District and the same was dismissed. The plaintiffs along with locality people made several representations through Maruthinagar Welfare Association, requesting to convert the suit schedule 'A' and 'B' schedule property as Children Park, but the second defendant did not take any steps. In the circumstances, the plaintiffs have filed the suit under Section 91 CPC in the public interest.

4. The first defendant filed her written statement denying the averments made in the plaint *inter alia* contending that the plaintiffs have no *locus standi* to file the present suit as they have no interest in the suit schedule property. One Sri K.Lakshmikantha Rao, was the owner and possessor of an extent of 1.33 guntas in survey No.910/1 of Malkajgiri, which is popularly known as 'Ammavari Thota' and obtained a layout and converted the land into plots. The said Lakshmikantha Rao sold the property to many people. The husband of the first defendant A.Papaiah, purchased 385 sq.yards from R.Lakshmikantha Rao and constructed a residential house in it. As the original sale deed was lost, subsequently another sale deed was executed on 18.08.1993 in favour of D1 by Sri R.Lakshmikantha Rao. Towards eastern side of house No.3-157, the first defendant is having a house bearing

No.3-165/2 on plot No.24/2, which was also purchased by her long back. Towards southern side of house No.3-157, the first defendant is having land admeasuring 432 sq. yards, purchased from R.Lakshmikantha Rao by her. The first defendant also filed O.S.No.355/2006 against the Malkajgiri Municipality in respect of 385 sq. yards covering the house bearing No.3-157. The first defendant filed a writ petition W.P.No.15315 of 2004 against the Government and obtained interim order in W.P.M.P.No.19855 of 2004. Hence, the suit is liable to be dismissed.

5. The second defendant, Commissioner, Malkajgiri Municipality, filed written statement admitting that there is a graveyard in survey No.910/2 in an area of 8 guntas, i.e., 968 sq. yards, situated at Maruthinagar, Malkajgiri Mandal and it is a government land. The first defendant had illegally occupied part of the land claiming to be the owner in survey No.910/A. The Mandal Revenue Officer, Malkajgiri had initiated proceedings under Land Encroachment Act, against the first defendant under file No.B/2781/1996, dated 22.08.1996 and that the first defendant had approached the Joint Collector, Ranga Reddy District, against the orders of Mandal Revenue Officer, vide appeal No.A1/6757/1997 and the same was dismissed on 13.05.2004. Aggrieved by the said orders, the first defendant filed Writ Petition No.15315 of 2004 before this Court. The second defendant is the custodian of the suit schedule property, as it is a government land. The second defendant had not taken any action against the first defendant, as she has been filing suits one after another. Hence, the suit may be dismissed.

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

1. Whether the suit filed by the plaintiffs is barred by limitation?
2. Whether the plaintiffs are entitled for declaration, as prayed for?
3. Whether the plaintiffs are entitled for mandatory injunction, as prayed for?
4. Whether the plaintiffs are entitled for perpetual injunction, against the defendants, as prayed for?
5. To what relief?

7. Before the trial Court, on behalf of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A1 to A11 were marked. On behalf of the defendants, D.Ws.1 and 2 were examined and Exs.B1 to B33 were marked.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court dismissed the suit in respect of plaint 'A' schedule property and granted perpetual injunction in respect of plaint 'B' schedule property. Feeling aggrieved by the judgment and decree of the trial Court dated 13.02.2013, the first defendant preferred A.S.No.12 of 2014 on the file of the Court of XVI Additional District and Sessions Judge-cum-XVI Additional Metropolitan Sessions Judge, Ranga Reddy District, at Malkajgiri. The first appellate Court after considering the oral, documentary evidence and other material available on record afresh, comes to a conclusion that the plaintiffs are entitled for perpetual injunction in respect of plaint 'B' schedule property. For the reasons best known, the plaintiffs did not choose to file an appeal challenging the decree and judgment of the trial Court to the extent of rejecting the relief of declaration and mandatory injunction in respect of plaint 'A' schedule property. The judgment of the trial Court became final so far as plaint 'A' schedule property is concerned.

The unsuccessful first defendant preferred the present second appeal.

9. Heard the learned counsel for the appellant-defendant and perused the material available on record.

10. The following substantial questions of law are urged by the learned counsel for the appellant for consideration:

“1. Whether the suit under Section 91 CPC is maintainable without seeking leave of the Court?

2. Whether the findings recorded by the Courts below are perverse?”

11. The plaintiffs filed the suit in respect of survey No.910/2, Maruthi Nagar, Malkajgiri Municipality and Mandal. The predominant contention of the learned counsel for the appellant is that no cause of action accrued in favour of the plaintiffs to file the suit. He further submitted that the plaintiffs filed the suit without seeking the leave of the Court.

12. In order to appreciate the contention of the learned counsel for the appellant, it is appropriate to extract here under Section 91 of CPC.

"91. Public nuisances and other wrongful acts affecting the public:

(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,--

(a) by the Advocate General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this Section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. "

3. Sub-clause 2 of the Section 91 of the CPC clarifies that the right of the plaintiff to file a suit is not otherwise affected and such right can be exercised independently of the provisions of clause 1 of section 91 of the CPC.

13. A perusal of the above section clearly demonstrates that any citizen can approach the civil Court to prevent the public nuisance or wrongful acts by filing a suit. In order to file a suit under Section 91 CPC, the plaintiffs have to obtain the permission of the Advocate General or leave of the Court. There is no material on record to establish that the plaintiffs have obtained permission from the Advocate General. The trial Court in paragraph 32 of its judgment, made an observation that the plaintiffs filed a petition seeking leave of the Court and the same was granted. A perusal of the record reveals that the plaintiffs had strictly adhered to the procedure as contemplated under Section 91 CPC. It is the case of the plaintiffs that the first defendant made an attempt to encroach the plaint 'B' schedule property, which is a graveyard. It is needless to say that the villagers or the people of the locality can use the graveyard regardless of the caste and creed. The second defendant filed written statement categorically admitting that there is a graveyard in survey No.910/2, which is the suit schedule property. A perusal of the record further reveals that the Mandal Revenue Officer initiated proceedings against the first defendant when she made an attempt to encroach the government land in survey No.910/2. A perusal of the record further reveals that the first defendant filed Writ Petition No.15315 of 2004 on the file of this Court challenging the orders passed by the Revenue Divisional

Officer and the same was dismissed. The material placed before the Court clinchingly establishes that there is some tussle between the plaintiffs, government and the first defendant in respect of survey No.910/2. In such circumstances, the plaintiffs being the locality people are certainly entitled to file a suit taking aid of Section 91 CPC.

14. Having regard to the facts and circumstances of the case, I am of the considered view that the plaintiffs filed the suit by strictly adhering to the procedure contemplated under Section 91 CPC.

15. The next question that falls for consideration is, whether the findings recorded by the Courts below are perverse and liable to be set aside. It is the case of the plaintiffs that there is a graveyard in survey No.910/2 of Maruthinagar, Malkajgiri. The oral testimony of D.W.2 clearly reveals that there is a graveyard in survey No.910/2. The Malkajgiri Municipal Commissioner filed written statement admitting that there is a graveyard in survey No.910/2 of Maruthinagar. The oral testimony of P.Ws.1 and 2 and D.W.2 clearly reveals that there is a graveyard in survey No.910/2. The first defendant has taken a specific plea in the written statement that she purchased a vacant site in survey No.910/1 of Maruthinagar from one Lakshmikantha Rao. It is not the case of the plaintiffs that the first defendant is having any land in survey No.910/2. In the cross-examination, D.W.1 in unequivocal terms deposed that she is not having any land in survey No.910/2. The apprehension of the plaintiffs is that the first defendant is making attempts to encroach into the plaint 'B' schedule property. The

apprehension of the plaintiffs is supported by the proceedings initiated by Mandal Revenue Officer, Malkajgiri. The writ petition filed by the first defendant was also dismissed. The trial Court after considering the oral and documentary evidence available on record granted perpetual injunction in favour of the plaintiffs and against the defendants not to interfere with survey No.910/2. The first appellate Court after reconsidering the material available on record without being influenced by the findings recorded by the trial Court, comes to a conclusion that the first defendant has no right whatsoever to interfere with the government land situated in survey No.910/2.

16. The findings recorded by the Courts below are supported by oral and documentary evidence. The Courts below have assigned reasons much less cogent and valid reasons to its findings. If the findings recorded by the Courts below are not based on any evidence, then this Court can interfere with the same while exercising jurisdiction under Section 100 CPC. In the instant case, the findings recorded by the Courts below are based on evidence much less legally admissible evidence.

17. Whether a graveyard exists in survey No.910/2 or not is purely a disputed question of fact. Both Courts concurrently held that there is a graveyard in survey No.910/2 of Maruthinagar, Malkajgiri Mandal. This Court shall not lightly to interfere with the concurrent findings of fact unless there is legal issue involved. The first appellate Court is the fact finding final Court. Therefore, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the courts below are perverse.

18. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, 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.

19. 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 second appeal is liable to be dismissed.

20. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

21st December, 2017

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¹ (2010) 13 SCC 216