

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.720 of 2016

JUDGMENT:

This appeal is filed under Section 100 of Civil Procedure Code assailing the decree and judgment dated 05.01.2016 in A.S.No.22 of 2012 on the file of the Court of III Additional District Judge, (FTC II) Khammam, wherein and whereby the decree and judgment dated 19.07.2010 in O.S.No.310 of 2003 on the file of the Court of Senior Civil Judge, Khammam, dismissing the suit filed by the plaintiffs for declaration and recovery of possession, 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 grand father of the plaintiffs 2 to 4 by name Mangapathi Rao got the suit schedule property in Survey No.235 through final decree proceedings in I.A.No.199 of 1969 in O.S.No.24 of 1963 on the file of the Senior Civil Judge Court, Khammam on 28.12.1974. In the said final decree proceedings, as per the map, items 'A' to 'E' were allotted to the said Mangapathi Rao. After the death of said Mangapathi Rao, the father of the plaintiffs 2 to 4 succeeded the suit schedule property and enjoyed the same during his lifetime. The first plaintiff is the mother of plaintiffs 2 to 4. The husband of the

first plaintiff and father of plaintiffs 2 to 4 by name Venkata Rama Rao, who died intestate, on 28.04.2003, got the suit schedule property. After the death of Venkata Rama Rao, the plaintiffs succeeded the plaint schedule property. The defendants without having any right whatsoever occupied the suit schedule property and erected three temporary sheds on 26.10.2003. The defendants 4 and 5 forcibly occupied the plaint schedule property with the support of 100 persons and constructed basement in the plaint schedule property. The defendants have no right whatsoever in the suit schedule property. Hence, the plaintiffs constrained to file a suit for declaration and recovery of possession.

4. Defendants 1 and 2 filed written statement denying all the averments made in the plaint *inter alia* contending that they have occupied the suit schedule property, which belongs to the Government, about 35 years back. The defendants constructed sheds in the suit schedule property. Neither the plaintiffs nor their predecessor have any right whatsoever over the plaint schedule property. On considering the long standing possession of the defendants, the Government recognised their possession and issued possession certificate. The defendants perfected their right over the suit schedule property. The defendants are not parties to the final decree proceedings. The suit is barred by limitation. Hence, the suit is liable to be dismissed. Defendants 3 to 5 filed a memo adopting the written statement of defendants 1 and 2.

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

1. Whether the plaintiffs are entitled for declaration as prayed for?
2. Whether the plaintiffs are entitled for delivery of vacant possession of plaint schedule property?
3. Whether the plaintiffs are entitled for damages as prayed for?
4. To what relief?

6. During the course of trial, on behalf of the plaintiffs, P.Ws.1 to 4 were examined and Exs.A1 to A6 were marked. On behalf of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to B12 were marked.

7. After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs failed to prove the identity of the suit schedule property, therefore, they are not entitled for the relief of declaration and consequential recovery of possession and dismissed the suit. Feeling aggrieved by the judgment and decree of the trial Court dated 19.07.2010 in O.S.No.310 of 2003, the plaintiffs preferred A.S.No.22 of 2010 on the file of the Court of III Additional District Judge(FTC II), Khammam. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiffs failed to prove the identity of the suit schedule property, therefore, they are not entitled for the relief of declaration and recovery of possession and dismissed the appeal. The unsuccessful plaintiffs preferred the present second appeal.

8. Heard the learned counsel for the appellants-plaintiffs and perused the material available on record.

9. The question of law that arises for consideration in this appeal is as follows:

“Whether the findings recorded by the Courts below are perverse and liable to be set aside?”

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

One Mangapathi Rao got the land in Survey No.235 of Khanapur Haveli of Khammam in pursuance of the orders dated 28.12.1974 in I.A.No.199 of 1969 in O.S.No.24 of 1963 on the file of the Court of Senior Civil Judge, Khammam. One Venkata Rama Rao is the son of Mangapathi Rao and husband of the first plaintiff and father of plaintiffs 2 to 4. Venkata Rama Rao being the sole legal heir of Mangapathi Rao, succeeded the suit schedule property. The said Venkata Rama Rao died on 28.04.2003 leaving behind him the plaintiffs as his legal heirs. It is the case of the plaintiffs that they succeeded the suit schedule property after the death of Venkata Rama Rao. It is also an admitted fact that as on the date of filing of the suit, the plaintiffs were not in possession of the suit schedule property.

11. It is the case of the plaintiffs that the defendants forcibly occupied the suit schedule property without any right whatsoever. It is the case of the defendants that they occupied the Government land about 35 years back and the Government allotted possession certificate in their favour. It is a settled

principle of law that in a suit for declaration, the plaintiff may succeed or fail, basing on the strength or weaknesses of his own case. It is needless to say that the plaintiff is not entitled for the relief of declaration basing on the weaknesses of the defendant's case. Let me consider the facts of the case on hand in the light of the above legal principle in order to determine whether the findings recorded by the Courts below are perverse.

12. The pleading in a civil suit forms bedrock. Any amount of oral evidence without pleadings is of no avail. In a suit for declaration, a duty is cast upon the plaintiff to place all the facts much less material facts so as to enable the Court to grant the relief of declaration. This Court carefully perused the plaint. The plaint is conspicuously silent with regard to the extent of land got by late Mangapathi Rao in pursuance of the final decree proceedings in I.A.No.199 of 1969 in O.S.No.24 of 1963. During the course of trial, the plaintiffs' witnesses have categorically admitted that the Government acquired the land fell to the share of Mangapathi Rao. In the cross-examination, P.W.1, in unequivocal terms, deposed that he does not know the extent of land got by Mangapathi Rao under Ex.A1 in Survey No.235. He further admitted that the Government issued possession certificate in favour of the defendants. The trial Court made an observation that in Ex.A1 the extent of land allotted to the share of Mangapathi Rao is not clearly mentioned. Even assuming but not conceding that late Mangapathi Rao got the land in Survey No.235, the plaintiffs

failed to establish the exact extent of land acquired by the Government. The plaintiffs also failed to establish the extent of land owned by them in Survey No.235. The plaintiffs simply filed a suit for declaration as if they are owners of the suit schedule property. P.W.4 is Government official. There is no clarity in the testimony of P.W.4 with regard to the extent of the land acquired by the Government and the extent of the land owned by the plaintiffs. In the absence of all these aspects, it is not possible for the Court to grant the relief of declaration in favour of the plaintiffs. Both Courts concurrently held that the plaintiffs failed to prove the identity of the suit schedule property.

13. In the absence of identity of the suit schedule property, it may not be possible for the Court to grant the main relief of declaration and consequential relief of recovery of possession. As observed earlier, the plaintiff may succeed or fail basing on the strength or weaknesses of his case. In a suit for declaration, the plaintiff has to establish his case by preponderance of probabilities. The plaintiffs miserably failed to prove the extent of land owned by them in Survey No.235 of Khanapur Haveli as on the date of filing of the suit. In such circumstances, granting of relief of declaration in favour of the plaintiffs does not arise.

14. If the findings recorded by the Courts below are not based on evidence or based on evidence which is not legally admissible, then such findings can be termed as perverse and liable to be set aside. The trial Court arrived at a conclusion

that the plaintiffs failed to prove their title over the suit schedule property basing on the material available on record. The appellate Court also endorsed the findings recorded by the trial Court on this aspect. 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.

15. 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. ...

16. 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

¹ (2010) 13 SCC 216

substantial question of law involved in this appeal and the appeal is liable to be dismissed.

17. 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

20th December, 2017

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