

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.109 of 2013

JUDGMENT:

This appeal is filed by the defendant challenging the decree and judgment dated 26.09.2012 in A.S.No.597 of 2007 on the file of the Court of IX Additional Chief Judge, Fast Track Court, City Civil Court, at Hyderabad, wherein whereby the decree and judgment dated 22.10.2007 in O.S.No.5311 of 2005 on the file of the Court of IX Junior Civil Judge, City Civil Court, Hyderabad, decreeing the suit for perpetual injunction, was confirmed.

2. For the sake of convenience, the parties hereinafter will be referred to as they were arrayed in the suit.

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

The plaintiffs are the owners of an extent of 704 square yards bearing Municipal No.10-3-761/7/1/A and 10-3-761/7/1/B, situated at Vijaynagar colony (hereinafter referred to as the suit schedule property), which was originally owned and possessed by Smt. Zohara Begum, who executed a Will in favour of her daughter Smt. Kulsum Begum on 14.11.1957. After the death of Smt. Zohara Begum, Smt. Kulsum Begum became absolute owner of the suit schedule property. Smt. Kulsum Begum died intestate on 4-1-1992 leaving behind her son viz., Mr. Riyasat Ali Khan, who succeeded the suit schedule property. Mr. Riyasat Ali Khan executed an agreement of sale-

cum-General Power of Attorney on 04.5.2001 in respect of part of the suit schedule property admeasuring 354 square yards, bearing Municipal No.10-3-761/7/1/A, Vijaynagar Colony, Hyderabad, in favour of first plaintiff herein. The said Riyasat Ali Khan executed registered agreement of sale-cum-General Power of Attorney on 05.5.2001 in respect of the other half of the suit schedule property admeasuring 350 square yards in favour of the 2nd plaintiff. The plaintiffs have been in possession and enjoyment of the suit schedule property. The defendants without any right whatsoever made attempts to dispossess the plaintiffs. Hence, the plaintiffs filed O.S.No.5311 of 2005 seeking perpetual injunction.

4. The defendant filed written statement denying all the averments in the plaint *inter alia* contending that the defendant's father purchased the suit schedule property from two persons namely P.Ramaswamy and R.Jagadishwar under two different unregistered sale deeds. The father of the defendant filed R.C.No.65 of 2001 against Riyasat Ali Khan and the same is pending. On 23-8-2005 at about 2.00 p.m., plaintiffs along with 50 to 60 persons came to suit schedule property and tried to dispossess the defendant under the guise of interim injunction orders. The plaintiffs have altered the nature of property and raised tin shed and took water connection and electricity connection also. The plaintiffs were never in possession of the suit schedule property and the suit is liable to be dismissed.

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

1. Whether plaintiffs are in possession of the suit schedule property as on the date of filing of the suit?
2. Whether the plaintiffs are entitled for relief of perpetual injunction as prayed?
3. To what relief?

6. Before the trial Court, on behalf of the plaintiffs, P.W.1 was examined and Exs.A1 to A47 were marked. On behalf of the defendant, D.W.1 was examined and Exs.B1 to B6 were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that the plaintiffs have been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit and granted perpetual injunction. Feeling aggrieved by the decree and judgment of the trial Court dated 22.10.2007, the defendant preferred A.S.No.597 of 2007 on the file of the Court of IX Additional Chief Judge, Fast Track Court, City Civil Court, at Hyderabad. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiffs have been in possession of the property much less as on the date of filing of the suit and consequently, dismissed the appeal. Hence, the defendant preferred the present second appeal.

8. Heard the learned counsel for the appellant-defendant and the learned counsel for the respondents-plaintiffs.

9. Basing on the submissions made by both the counsel and the grounds of appeal, the question of law that arises for consideration in this appeal is:

“Whether the Courts below are justified in granting perpetual injunction in favour of the plaintiffs even though they were not in possession of the property much less as on the date of filing of the suit?”

10. As seen from the testimony of P.W.1, the first plaintiff has purchased the part of the suit schedule property under a registered agreement of sale cum General Power of Attorney dated 04.05.2001 from Riyasat Ali Khan. His testimony further reveals that the second plaintiff purchased the other part of the suit schedule property under a registered agreement of sale cum General Power of Attorney dated 05.05.2001 from the above said Riyasat Ali Khan. It is not in dispute that the property was not delivered to the plaintiffs under Exs.A1 and A2. A perusal of Exs.A3 and A4 certified copies of codicil agreements cum acknowledgments reveal that the possession was delivered to the plaintiffs in the year 2001.

11. It is the case of the defendant that his father purchased the suit schedule property from two persons under unregistered sale deeds in the year 1968. Except the self-served testimony of D.W.1, there is no other convincing evidence to prove that his father purchased the suit schedule property way back in the

year 1968 under an unregistered sale deed. The suit was filed in the year 2005 and the trial Court granted interim injunction in favour of the plaintiffs. It is the further case of the defendant that the plaintiffs dispossessed him from the suit schedule property under the guise of interim injunction. As per the pleadings in the written statement, the defendant was dispossessed from the suit schedule property on 23.08.2005. As per the testimony of D.W.1(defendant), he was dispossessed from the suit schedule property on 02.09.2005. The burden of proof lies on the defendant to establish when he was dispossessed from the suit schedule property i.e. either on 23.08.2005 or 02.09.2005. The defendant did not choose to examine the neighbours to establish the same. In the cross-examination, D.W.1 deposed that he was in possession of the suit schedule property from 1970 to 2001. In the cross-examination, D.W.1 in unequivocal terms deposed that there is no documentary evidence to establish that he was in possession of the property from 2001 onwards. In the cross-examination, D.W.1 further deposed that the plaintiffs were in possession of the property.

12. Learned counsel for the appellant submitted that the Court has to construe the above admission of the defendant in pursuance of suggestion; would not amount to admitting the possession of the plaintiffs over the suit schedule property as on the date of filing of the suit. The very purpose of cross-examination of the witness is to elicit the truth by way of putting

suggestions. Any admission made by a party to the proceedings in the cross-examination is binding on him. There is no doubt the Court cannot jump to a conclusion basing on a stray sentence in the cross-examination. It is the duty of the Court to consider the entire cross-examination of the witnesses in order to arrive at a just and reasonable conclusion. A perusal of the cross-examination of D.W.1 clearly establishes that he was not in possession of the property as on the date of filing of the suit. In a suit for perpetual injunction, the plaintiffs have to establish that they have been in possession of the suit schedule property much less as on the date of filing of the suit, then only they are entitled for the relief of perpetual injunction. It is needless to say that a plaintiff without proving his possession over the plaint schedule property is not entitled to the relief of perpetual injunction basing on a stray admission made by opposite party in the cross-examination.

13. Let me consider the evidence and other material on record to verify whether the Courts below have granted perpetual injunction in favour of the plaintiffs even though they failed to prove their possession over the suit schedule property as on the date of filing of the suit. Exs.A1, A2 A3 and A4 are registered documents. Interestingly the defendant is not disputing the execution of Ex.A1 and A2. Unless and until a contrary is proved, the court can place *prima facie* place reliance on the registered documents. Admittedly possession was not delivered to the plaintiffs under Exs.A1 and A2. Subsequently, the

vendors of the plaintiffs delivered the suit schedule property to the plaintiffs under Exs.A3 and A4 codicils. These two documents also substantiate the stand of the plaintiffs. A perusal of Ex.A5 house tax receipt reveals that the plaintiffs have paid the house tax for a period of twenty years prior to the date of filing of the suit. Ex.A5 is one piece of evidence, which supports the case of the plaintiffs. A perusal of Ex.A6 demand notice also reveals that the Municipal Corporation, Hyderabad issued a demand notice to the plaintiffs in respect of the suit schedule property. It is needless to say in a suit for perpetual injunction, the Court cannot decide the title of the parties. However, the Court can incidentally look into the title of the parties. Mere averment in the written statement would not amount to proof of the same.

14. As observed earlier, except the self-served testimony of D.W.1, there is no other evidence much less cogent and convincing evidence to establish that his father purchased the suit schedule property way back in the year 1968. On the other hand, the testimony of D.W.1 clinchingly establishes that he was in possession of the property from 1970 to 2001 only. The plaintiffs have produced the oral and documentary evidence to prove that they have been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. The Courts below not only considered the admissions made by D.W.1 in the cross-examination but also the documents produced by both parties in order to arrive at

a conclusion that the plaintiffs have been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. If the findings recorded by the Courts below are based on evidence which is not legally admissible, or basing on no evidence, then those findings can be termed as perverse. In the instant case, the findings recorded by the Courts below are supported by oral and documentary evidence. 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. In view of the oral and documentary evidence, I am unable to accede to the contention of the learned counsel for the appellant that the Courts below have granted perpetual injunction in favour of the plaintiffs even though they failed to establish their possession as on the date of filing of the suit.

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.

¹ (2010) 13 SCC 216

17. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases 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.

16. 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.

21st November, 2017.
Rns

T.SUNIL CHOWDARY, J

