

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.715 of 2015

JUDGMENT:

This appeal is filed challenging the judgment and decree dated 13.07.2015 in A.S.No.143 of 2002 on the file of the Court of VIII Additional District Judge, Chittoor, Chittoor District, wherein and whereby the judgment and decree dated 17.09.2002 in O.S.No.86 of 2000 on the file of the Court of Junior Civil Judge, Pakala, Chittoor District, decreeing the suit filed by the plaintiff for removal of construction in 'B' schedule property, 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:

One Narayanaswamy Chowdary owned land in survey No.1147/2 of Pakala Village. The said Narayanaswamy Chowdary converted the said property into 44 house plots by allotting a specific number to each plot for its identification. The father of the plaintiff by name Athuluru Munaswamy Naidu purchased the plot bearing No.15 measuring east to west 60 feet and north to south 40 feet. From the date of purchase, the said Munaswamy Naidu has been in possession of the suit schedule property. The plaintiff is the daughter of Munaswamy Naidu.

After the death of Munaswamy Naidu, his wife Guravamma, son Devarajulu Naidu and the plaintiff succeeded the plaint 'A' schedule property. On 16.04.1988, the mother and brother of the plaintiff executed a settlement deed in favour of the plaintiff and put her in possession of the same. The defendant is the owner of plot No.16, which is adjacent to north of plaint 'A' schedule property. The defendant encroached plaint 'B' schedule property and constructed part of his house therein. Hence, the plaintiff constrained to file a suit for recovery of plaint 'B' schedule property after demolishing the construction therein.

4. The defendant filed his written statement denying all the averments made in the plaint *inter alia* contending that he did not encroach the plaint 'B' schedule property. He constructed the house with first floor taking absolute care and not encroaching even an inch of the plaintiff's plot. The defendant also has taken a special care in not letting even a drop of water from his house on to the plaintiff's plot. Adjoining the defendant's house, there is a vacant plot of 40 X 60 feet on the north and adjacent to it, there is a house. The defendant generously laid pipeline spending huge amount from his pocket. The defendant has not encroached plaint 'B' schedule property. The plaintiff filed the suit with an ulterior motive to blackmail the defendant. Hence, the suit is liable to be dismissed.

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

1. Whether the plaintiff be declared in respect of 'B' schedule property with right and title and to take delivery of possession from the defendant?
2. Whether the plaintiff is entitled for demolition of structures raised in plaint 'B' schedule by the defendant, and if necessary through process of law?
3. Whether the plaintiff is entitled for permanent injunction directing the defendant's not to allow the drain water into plaint 'A' schedule property?
4. Whether the plaintiff is blackmailing the defendant with ulterior motive?
5. To what relief?

6. To substantiate the case, the plaintiff examined herself as P.W.1 and got marked Exs.A1 to A6. P.W.2 who is a neighbour of plaintiff and P.W.3 the advocate Commissioner were examined on behalf of the plaintiff. To dislodge the case of the plaintiff, the defendant alone examined himself as D.W.1 and no documents were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the defendant has encroached plaint 'B' schedule property, which belongs to the plaintiff and decreed the suit. Feeling aggrieved by the judgment and decree dated 07.09.2002, the defendant preferred A.S.No.143 of 2002 on the file of the Court of VIII Additional District Judge, Chittoor. The first appellate Court after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff is the owner of plaint 'A' schedule property and the defendant encroached plaint 'B' schedule

property and thereby 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 respondent-plaintiff and perused the material available on record.

9. Learned counsel for the appellant urged the following substantial questions of law:

1. Whether the plaintiff had acknowledged the constructions made by the defendant thereby estopped to file the suit?

2. 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.

11. The plaintiff's father purchased an extent of 240 square yards from the original owner by name Narayanaswamy Chowdary under a registered sale deed dated 14.11.1979, Ex.A1. After the death of father of the plaintiff, the mother and brother of the plaintiff executed a gift deed dated 16.04.1988 in favour of the plaintiff in respect of the plaint schedule property under Ex.A3. The plaintiff got issued a notice Ex.A4 on 07.07.1999 directing the defendant to remove the constructions in the encroached portion. Ex.A5 is the postal acknowledgment. The defendant got issued reply notice under Ex.A6 dated 14.07.1999 denying the allegations made in the legal notice.

The defendant purchased plot No.16 and constructed house, which is on the north of plaint 'A' schedule property.

12. The entire controversy revolves around the following questions: (1) Whether the plaintiff is the owner of plaint 'A' schedule property? And (2) Whether the defendant had encroached the 'B' schedule property?

13. As seen from the material placed before the Court, the plaintiff's father purchased plot No.15 and the defendant purchased plot No.16 from the original owners, each plot consisting of 240 square yards i.e., 40 X 60 feet. Each plot is with similar measurements. The case of the plaintiff is that the defendant encroached plaint 'B' schedule property, which is part and parcel of plaint 'A' schedule property, and made constructions therein. The case of the defendant is that he constructed the house in 240 square yards only and he did not encroach even an inch of the property of the plaintiff. Both parties adduced evidence to suit their respective claims.

14. During pendency of the suit, the trial Court appointed advocate commissioner to measure the suit schedule property with reference to Ex.A1 sale deed. A perusal of the record reveals that the advocate commissioner visited the suit schedule property along with Village Administrative Officer and measured the suit schedule property with reference to Ex.A1 sale deed and Ex.A2 blue print issued by Competent Authority and submitted his report. As per the report of the advocate commissioner, plot

No.16 is almost parallel to plot No.29. But the report of the commissioner clearly reveals that the defendant constructed the house parallel to plot Nos.29 and 30. As per the report, the defendant encroached east to west 14 feet and north to south 9 feet, which is 'B' schedule property. As per the advocate commissioner's report, the defendant encroached plaintiff 'B' schedule property as contended by the plaintiff. Suffice it to say that the advocate commissioner's report becomes part and parcel of the record. The court can safely place reliance on the report of the advocate commissioner. The trial Court, basing on the oral and documentary evidence as well as Advocate Commissioner's report, arrived at a conclusion that the plaintiff is the owner of plaintiff 'A' schedule property and the defendant encroached plaintiff 'B' schedule property and decreed the suit. The first appellate Court after reappraisal of the oral and documentary evidence and other material on record, without being influenced by the findings recorded by the trial Court, came to the conclusion that the plaintiff is the owner of plaintiff 'A' schedule property and the defendant encroached plaintiff 'B' schedule property and dismissed the appeal.

15. Whether the defendant has encroached the plaintiff's property or not is purely a disputed question of fact. Both courts concurrently held that the defendant encroached plaintiff 'B' schedule property, which belongs to the plaintiff. At the time of arguments, learned counsel for the appellant-defendant has drawn the attention of this Court to the decision in **P.Madan**

Mohan Rao v. P.Surendranatha Rao and others¹. As per the principle enunciated in the case cited supra, in a suit for partition, if a particular property is not amenable for division, one of the coparcener can purchase the same by paying the value of that property. Each coparcener is entitled to equal share in the joint family property. In the instant case, the plaintiff and defendant are not co-sharers of the plaint schedule property. Therefore, the decision cited by the learned counsel for the appellant is not applicable to the facts of the case on hand.

16. Learned counsel for the appellant strenuously submitted that the defendant started construction in the year 1994 and completed the same in the year 1995, and this fact was very much known to the plaintiff; therefore, she is not entitled to file the suit. A perusal of the record reveals that the plaintiff has been staying in different places in view of employment of her husband. This Court carefully perused the written statement filed by the defendant. There is no mention in the written statement that the plaintiff is very much aware of the constructions made by the defendant during the year 1994-95 and she acknowledged the same. Mere assertion in the written statement that itself would not amount to proof of the same. Absolutely there is no material on record to establish that the plaintiff has acknowledged the constructions made by the defendant. No one is entitled to make constructions in the

¹ 2017 (3) ALD 563

property of others and set up a plea of acknowledgment without any basis or foundation.

17. Learned counsel for the appellant-defendant strenuously submitted that the plaintiff waived her right over the plaint 'B' schedule property as the defendant constructed house with her knowledge. Waiver must be either express or by necessary implication. Plea of waiver is purely a question of fact. A person, who pleads waiver has to lay foundation in the pleadings and produce corresponding evidence. This Court carefully scanned the written statement, nowhere it is mentioned that the plaintiff has waived her right over the plaint 'B' schedule property. The defendant without taking the plea of waiver in the written statement, for the first time, urged the same at the stage of second appeal. Learned counsel for the appellant submitted that even without pleading in the written statement, the appellant is entitled to take plea of waiver even at the stage of second appeal. If the argument of the learned counsel for the defendant is accepted, the very purpose of pleading and proof has no relevancy in the civil suit. The pleadings form bedrock of civil suit. Any amount of oral and documentary evidence is of no avail. Therefore, the same cannot be considered while deciding the second appeal. If the findings recorded by the courts below are based on no evidence or based on evidence, which is not legally admissible, then such findings cannot be termed as perverse. If the findings recorded by the Courts below are perverse, certainly this Court can set

aside the same by exercising the 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. Therefore, I am unable to accede to the contention of the learned counsel for the defendant that the findings recorded by the courts below are perverse. The plea of waiver without foundation in the written statement cannot be treated as a question of law.

18. In **Municipal Committee, Hoshiarpur v. Punjab SEB²**, 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 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 and there are no grounds in the second appeal.

² (2010) 13 SCC 216

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

13th December, 2017

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