

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.711 OF 2014

JUDGMENT:

This Second Appeal is filed by the unsuccessful plaintiff assailing the decree and judgment dated 30.06.2014 in A.S. No.16 of 2014 on the file of the Court of the II Additional District Judge, Karimnagar at Jagtial, wherein and whereby the decree and judgment dated 27.09.2013 in O.S.No.105 of 2009 on the file of the Court of the Principal Junior Civil Judge at Jagtial, dismissing the suit filed by the plaintiff 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, in brief, are as follows:

The plaintiff's father by name Gangadhara Swamy, who is the third defendant in the suit, inherited the agricultural land an extent of Ac.1.24 guntas in Survey No.534 of Sriramulapalli Village from his father Gangadhara Mallaiah @ V.Mallaiah. The plaintiff is the only son of the third defendant. The plaintiff and third defendant are the members of the joint family governed by Hindu Law. The plaintiff got the suit schedule property under the oral family settlement. The third defendant put the plaintiff in possession of the suit schedule property. The plaintiff shifted his family to Karimnagar. Due to non-availability of carpentry work, again the plaintiff came back to the village. The plaintiff came to know that the third defendant sold an extent of Ac.1.08 guntas in

favour of the first defendant under a simple sale deed without any right whatsoever. The first defendant name was entered in the revenue records. The first defendant has been cultivating the suit schedule property by raising dry crops. Hence, the plaintiff filed suit for declaration and consequential perpetual injunction. The plaintiff also sought the relief for rectification of the revenue records. The third defendant remained *ex parte*. Defendant Nos.1 and 2 filed common written statement denying all the averments made in the plaint *inter alia* contending that the third defendant, who is the absolute owner of the plaint schedule property, executed simple sale deed in favour of the first defendant. The suit schedule property is the self acquired property of the third defendant. The third defendant had purchased the suit land in Survey No.534 of an extent of Ac.0.32 ½ guntas from Vadla Chandraiah and Ac.0.26 guntas from Vadla Kondaiah. The defendants have been in possession and enjoyment of the suit schedule property. As on the date of filing of the suit, the plaintiff was not in possession and enjoyment of the property. Therefore, the plaintiff ought to have filed a suit for recovery of possession instead of filing the suit for perpetual injunction.

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

1. Whether the plaintiff is entitled for declaration of title as prayed?
2. Whether the plaintiff is entitled for relief of perpetual injunction as prayed?
3. Whether the unregistered simple sale deed dated 13.04.2004 is null and void and not binding the plaintiff?
4. Whether the plaintiff is entitled for rectification of entries in revenue records as prayed?
5. To what relief?

5. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.8 were marked. On behalf of the defendants, DWs.1 to 5 was examined and Exs.B.1 and B.2 were marked.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff was not in possession of the property as on the date of filing of the suit and dismissed the suit. Feeling aggrieved by the decree and judgment dated 27.09.2013, the plaintiff filed A.S.No.16 of 2014 on the file of the Court of the II Additional District Judge, Karimnagar at Jagtiyal. The first appellate Court, after reappraising the oral and documentary evidence available on record, arrived at a conclusion that the plaintiff was not entitled for the relief of declaration and dismissed the suit. Hence, the second appeal.

7. The question of law urged by the learned counsel for the appellant is as follows:

Whether the finding of the Courts below with regard to the nature of the document Ex.A.2 as Pahani for the year 1977-78 is result of improper appreciation about the document which is in fact, certified copy of the tenancy record for the year 1977-78 containing the name of Mallaiah, who is the grandfather of the appellant, as shareholder, along with his three other brothers?

8. In order to appreciate the rival contentions, this Court is placing reliance on the judgment of the Hon'ble apex Court in **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, wherein while considering the scope of Section 100 of CPC, it was held at paragraph No.16 as follows:

¹ (2010) 13 SCC 216

16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. 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. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari v. Purshottam Tiwari*, (2001) 3 SCC 179; *Sarjas Rai v. Bakshi Inderjit Singh*, (2005) 1 SCC 598; *Manicka Poosali v. Anjalai Ammal*, (2005) 10 SCC 38; *Sugani v. Rameshwar Das*, (2006) 11 SCC 587; *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545; *P. Chandrasekharan v. S. Kanakarajan*, (2007) 5 SCC 669; *Kashmir Singh v. Harnam Singh*, (2008) 12 SCC 796; *V. Ramaswamy v. Ramachandran*, (2009) 14 SCC 216 and *Bhag Singh v. Jaskirat Singh*, (2010) 2 SCC 250.)

9. Let me consider the facts of the case on hand, in the light of the above legal principles.

10. It is the case of the plaintiff that the suit schedule property originally belongs to his grandfather by name Mallaiah. His father, who is the third defendant, inherited the property. During family partition between him and the third defendant, the suit schedule property fell to his share. It is the further case of the plaintiff that the third defendant executed a simple registered sale deed in favour of the first defendant on 13.04.2004 without any right whatsoever.

11. The contention of defendant Nos.1 and 2 is that the suit schedule property is the self acquired property of the third defendant. To substantiate the arguments, the learned counsel for the appellant has drawn the attention of this Court to Ex.A.2-certified copy of tenancy record. In Ex.A.2, the grandfather name is shown as owner of an extent of Ac.4.08 guntas in Survey No.534 and Ac.4.32 guntas in Survey No.533/A of Namilikonda Village of Kodimiyala Mandal along with the others. Both the Courts below treated this document as Pahani. This document is useful to the plaintiff to the extent to show that originally the property in Survey No.534 and 533/A belongs to grandfather of the plaintiff. Even as per the contention of the plaintiff, the suit schedule property fell to his share in the partition. Except the self-served statement of the plaintiff, there is no other convincing evidence to establish that he got the property in the family partition. The plaintiff having taken a plea that the suit schedule property fell to his share, estopped to take the plea that the suit schedule property is an ancestral property. Both these are mutually self-destructive. The plaintiff is not entitled to take pleas, which are mutually self-destructive. Both the Courts below concurrently held that the plaintiff failed to prove that the suit schedule property fell to his share in the family partition. Regardless the nature of the document, Ex.A2 is no way helpful to the plaintiff to establish that the suit schedule property fell to his share in the family partition. The material available on record clearly reveals that the plaintiff was not in possession of the property. Even as per the testimony of PWs.2 and 3, the defendants are in possession of the property. The plaintiff filed the suit for declaration and consequential injunction. The trial Court

also made an observation that the suit is not maintainable. At this stage, this Court is placing reliance on the decision of the Hon'ble Apex Court in **C.Mohammad Yunus v. Syed Unnissa**², wherein it was held as follows:

“A suit for declaration with a consequential relief for injunction, is not a suit for declaration simpliciter; it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case.”

12. As per the principle enunciated in the case cited supra, the consequential relief to be sought by the plaintiff in a suit for declaration depends upon the facts and circumstances of each case.

13. In the instant case, the plaintiff filed the suit for declaration and the consequential relief of perpetual injunction. In order to appreciate the same, it is not out of place to extract hereunder the relevant portion of the plaint, which reads as follows:

“Taking advantage of the aforesaid entry in the said pahani by virtue of invalid agreement of sale the defendant Nos.1 and 2 are in illegal and unauthorised possession and unlawfully without having any right, have been cultivating by raising green gram crop in the suit schedule property.”

14. A perusal of the above clearly reveals that by the time of filing of the suit, the plaintiff was not in possession of the property. The plea taken by defendant Nos.1 and 2 in written statement is as follows:

“The defendants submit that they are in possession of the suit land by purchasing for valid consideration and the instant suit is not tenable as the plaintiff himself admitted in para 4 of the plaint that “Taking advantage of aforesaid entry in the said pahani by virtue of invalid agreement of sale. The defendant Nos.1 and 2 are in illegal and unauthorised possession right have been cultivating by raising green gram crop in suit schedule property. The defendants submit that as per the admission of the plaintiff

² AIR 1961 SC 808

himself that the defendants 1 and 2 are in possession of the suit schedule land. Hence the plaintiff ought to have filed a suit for recovery of possession instead of filing of this suit for perpetual injunction if he is having any right or claim over the suit land.”

15. A perusal of the above paragraph clearly reveals that the defendant Nos.2 and 3 have taken a plea that they were in possession of the suit schedule property much prior to filing of the suit. The plaintiff himself admitted that he was not in possession of the property as on the date of filing of the suit. In such circumstances, the plaintiff ought to have filed a suit for declaration and consequential relief of recovery of possession and not perpetual injunction.

16. In order to appreciate the contention of the appellant, this Court is placing reliance on the decision in **Union of India v. Ibrahim Uddin and another**³, wherein the Hon’ble Apex Court held at paragraph Nos.55 to 57 as follows:

“Section 34 of the Specific Relief Act, 1963

55. The section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

56. In *Ram Saran v. Ganga Devi*, (1973) 2 SCC 60, this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of the Specific Relief Act, 1963 (hereinafter called ‘the Specific Relief Act’) and, thus, not maintainable. In *Vinay Krishna v. Keshav Chandra*, (1993 Supp. (3) SCC 129, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also *Gian Kaur v. Raghubir Singh* (2011) 4 SCC 567).

³ (2012) 8 SCC 148

57. In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.”

17. In **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandran**⁴, wherein the Hon’ble Apex Court held at Paragraph No.35 as follows:

“35. The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. The plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 CPC could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit.”

18. As per the principle enunciated in the cases cited supra, mere suit for declaration without seeking relief of recovery of possession is not maintainable, if the plaintiff was not in possession of the suit schedule property as on the date of filing of the suit. The principle enunciated in the cases cited supra is squarely applicable to the facts of the case on hand. There is no question of law much less substantial question of law in this appeal.

19. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 03.11.2017
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⁴ (2017) 3 SCC 702