

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.457 OF 2015

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment and decree dated 19.01.2015 passed in A.S. No.94 of 2010 on the file of the IV Additional District Judge, Nellore (for short, 'first appellate court'), wherein the first appellate court confirmed the judgment and decree dated 31.05.2010 passed in O.S. No.363 of 2005 on the file of the Principal Senior Civil Judge, Nellore (for short, 'the trial court'). The appellant herein filed O.S. No.363 of 2005 for grant of permanent injunction restraining the respondents-defendants and their men from disturbing the peaceful possession and enjoyment of the appellant-plaintiff over the suit schedule property.

2. Heard the learned counsel for the appellant-plaintiff and the learned counsel for the respondents-defendants, apart from perusing the material available on record.

3. For the sake of convenience, the parties hereinafter are referred to as they were arrayed before the trial Court.

4. Learned counsel for the appellant-plaintiff would contend that both the Courts below erroneously dismissed the suit and appeal on mere conjectures, presumptions and assumptions discarding the cardinal principles of law without evaluating the evidence on record in correct perspective; the dismissal of earlier suit filed by the plaintiff in O.S. No.291 of 1993 on the file of the III Additional Junior Civil Judge, Nellore, for grant of permanent injunction, do not operate as *res judicata*; the plaintiff is in possession and enjoyment of the suit schedule property; the defendants are nothing to do with the suit schedule property; both the Courts below erred in dismissing the suit; the findings of both

the Courts below are perverse; and ultimately, prayed to allow the appeal by decreeing the suit as prayed for. It is further contended that the following substantial questions of law would emerge for determination in this second appeal:

- (i) Whether the courts below failed to see that the suit properties having been in possession of the appellant/plaintiff although which raises a presumption until dispossess by the Government continuous to remain in lawful possession and thereby committed grievous error in dismissing the suit of the plaintiff.
- (ii) The courts below have misread the earlier suit proceedings covered by Exs.B1 to B4 and erroneously observed that the possession of the defendants has been affirmed earlier?
- (iii) Whether the courts below went wrong in observing the principles of *res judicata* applicable to the case on hand without proper appreciation of the facts and circumstances of the present case?
- (iv) Whether the Courts below are correct in dismissing the suit as well as appeal?

5. Learned counsel for the defendants-respondents herein would contend that there is concurrent finding with regard to the defendants' rights in the suit schedule property; the judgment and decree passed in O.S. No.291 of 1993 on the file of the III Additional Junior Civil Judge, Nellore, operates as *res judicata*; both the Courts below rightly gave findings basing on the evidence on record; the scope of Section 100 C.P.C. is limited; the findings of both the Courts below are not perverse; there are no circumstances to set aside the findings of both the Courts below; and ultimately, prayed to dismiss the second appeal.

6. To adjudicate the *lis* and to answer the substantial questions of law, it is necessary to refer to the relevant pleadings of the parties.

(a) The plaintiff filed the original suit for grant of permanent injunction restraining the defendants and their men from disturbing the peaceful possession

and enjoyment of the plaintiff over the suit schedule property. It is averred by the plaintiff that he has been in possession and enjoyment of the suit schedule property and he got lease patta for a period of three years for Fasili 1407 to 1403 and he is cultivating the said land. When the defendants, who are nothing to do with the suit schedule property, are trying to interfere with the possession of the plaintiff over the suit schedule land, the plaintiff filed O.S. No.291 of 1993 on the file of the III Additional Junior Civil Judge, Nellore, and obtained interim injunction. Though the lease period is over, the plaintiff is cultivating the suit schedule land and the government also recognized his possession by recording his cultivation in Adangal. Later, O.S. No.291 of 1993 filed by the plaintiff was dismissed erroneously and the plaintiff preferred A.S. No.94 of 1993 on the file of the IV Additional District Judge, Nellore, and the said appeal was also dismissed. Then the plaintiff preferred S.A.No.706 of 2005 before this Court and the said second appeal was also dismissed at the stage of admission observing that the plaintiff is at liberty to take proceedings that are available to him under law. The plaintiff, during pendency of the above litigation, is in continuous possession and enjoyment of the suit schedule property and there is no objection from the side of the government for cultivation of the suit schedule land by the plaintiff. The defendants subsequent to disposal of the above suit, when the plaintiff tried to remove the unwanted growth of shrubs, the defendants again tried to object the plaintiff.

(b) The defendants 1 to 4 filed written statement. Subsequently, the 4th defendant died and the defendants 5 to 7 were impleaded as legal representatives of the 4th defendant. The defendants 5 to 7 filed memo adopting the written statement of defendants 1 to 4. The defendants denied all the averments made in the plaint and contended that the dismissal of the original suit, appeal suit and the second appeal filed by the plaintiff operates as *res judicata*. The plaintiff filed the present suit in respect of the same property

mentioned in the earlier suit filed by the plaintiff, which was dismissed. The plaintiff is nothing to do with the suit schedule land and he intends to grab the land and created some documents.

(c) Basing on the pleadings, the trial Court framed the following issues:

- 1) Whether the suit is barred by res-judicata?
- 2) Whether the plaintiff is entitled for permanent injunction as prayed for?
- 3) To what relief?

(d) Basing the evidence of P.Ws.1 to 5 and the documents Exs.A.1 to A.7 marked on behalf of the plaintiff and the evidence of D.Ws.1 and 2 and the documents Exs.B.1 to B.4 marked on behalf of the defendants, the trial Court dismissed the suit, vide judgement and decree dated 31.05.2010. Aggrieved by the dismissal of the original suit, the plaintiff preferred A.S. No.94 of 2010 and the first appellate court, after appreciating the evidence on record, vide decree and judgment dated 19.01.2015, dismissed the appeal by confirming the judgment and decree passed by the trial Court. Questioning the said judgment and decree passed by the first appellate court, the plaintiff filed this second appeal.

7. In view of the contentions of both sides, the only point that arises for determination is, whether the concurrent findings of both the Courts below are liable to be set aside?

8. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having

substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse findings are some of the questions, which involve substantial questions of law.

9. The record reveals that the trial Court having analysed the entire evidence adduced by both sides, held that the plaintiff is not in possession of the suit schedule land and ultimately, dismissed the suit as the suit is barred by principle of *res judicata*. The first appellate court after appreciating the entire evidence on record, held that the plaintiff is not in possession and enjoyment of the suit schedule land during the year 1993 and in the present suit again, he claims his possession running from the year 1993 as claimed in the earlier suit and ultimately, dismissed the appeal confirming the decree and judgment passed by the trial Court. The earlier suit filed by the plaintiff in O.S. No.291 of 1993 on the file of the III Additional Junior Civil Judge, Nellore, for permanent injunction, was dismissed on 08.12.1998 on merits and the same was confirmed in A.S. No.94 of 1993 on the file of the IV Additional District Judge, Nellore, vide judgment and decree dated 30.04.2005. Thereafter, the Second Appeal No.706 of 2008 filed by the plaintiff challenging the said dismissal of the suit, was also dismissed by this Court. Both the Courts below, while dealing with the subject matter of this second appeal, have elaborately dealt with regard to the principles of *res judicata* and held that the parties, subject matter and the relief claimed in the earlier suit and the present suit filed by the plaintiff are one and the same and the earlier suit and appeals were dismissed on merits. Exs.B.1 and B.2-certified

copies of judgment and decree in O.S. No.291 of 1993 on the file of the III Additional Junior Civil Judge, Nellore, dated 08.12.1998 and Exs.B.3 and B.4- certified copies of judgment and decree passed in A.S. No.94 of 1998 on the file of the IV Additional District Judge, Nellore, dated 30.04.2005, clearly shows that the parties, relief sought for and the subject matter of the earlier suit and the present suit are one and the same and the earlier suit was dismissed on merits. These documents further show that there is no fresh cause of action. Further, the questions as to whether the plaintiff is in possession and enjoyment over the suit schedule land and whether the plaintiff is entitled to permanent injunction are all factual aspects and they were elaborately dealt with by both the Courts below. The findings of both the Courts below are not perverse and they are in accordance with law. There is no infirmity in the findings of both the Courts below.

10. It is appropriate to state that under Section 100 of the C.P.C., the jurisdiction of the High Court to interfere with the judgment of the Courts below is confined to substantial question of law. The findings with regard to the factual aspects by the first appellate court are final. Those findings of facts are not amenable to the jurisdiction of this Court by way of Second Appeal. In the circumstances of the case, this Court cannot re-appreciate the evidence and arrive at a different conclusion. Neither inadmissible evidence has been considered nor admissible evidence not acted upon. The findings of the Courts below are not perverse. So, no re-appreciation of entire evidence is warranted in this Second Appeal and further, no question of law much less substantial question of law arise for determination in this Second Appeal. Therefore, the Second Appeal is devoid of merit and it is liable to be dismissed.

11. In the result, the Second Appeal is dismissed, at the stage of admission, confirming the judgment and decree dated 19.01.2015 passed in A.S. No.94 of 2010 on the file of the IV Additional District Judge, Nellore. Miscellaneous Petitions pending, if any, shall stand closed. There shall be no order as to costs.

Date: 19.09.2018
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Dr. SHAMEEM AKTHER, J

