

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.974 of 1997

JUDGMENT:

The unsuccessful defendant filed this Second Appeal aggrieved by the Judgment and Decree dated 30.09.1996 in A.S.No.17 of 1990 passed by the learned Subordinate Judge, Kothagudem, confirming the Judgment and Decree dated 25.08.1990 in O.S.No.135 of 1983 passed by the Principal District Munsif, Kothagudem.

2) The parties in this appeal are referred as they were arrayed before the Trial Court.

3) The facts in nutshell are thus:

a) The case of the plaintiff—Company is that plaintiff schedule property in Sy.No.141 of Kothagudem and Sy.No.137 of Chunchupalli village of Kothagudem taluk in an extent of 18.50 meters x 3.50 meters is a part and parcel of its leasehold and they are in possession and enjoyment of the said land along with other properties; while so, on 24.03.1983, the defendant without any permission encroached upon the plaintiff schedule property and started digging foundations therein to construct a structure; having come to know of the same, plaintiff through its Area Officer sent Ex.A1—letter dated 02.04.1983 to the defendant; on receipt of the same, the defendant sent Ex.A2—reply dated 12.04.1983 contending that he purchased the plaintiff schedule property from the A.P. Industrial Infrastructure Corporation Limited under an agreement, and part of plaintiff Company's land might have been included in the land purchased

by him and therefore, the plaintiff—Company can correspond with the Corporation.

Hence, the suit.

b) Defendant filed written statement contending that he is only a partner of Sri Srinivasa Rice Mill and not the proprietor as alleged by the plaintiff, Anmolu China Bhadracharya is the proprietor of the said rice mill, as such he is the proper and necessary party and hence suit is bad for non-joinder of necessary parties; he purchased the suit land an extent of 1019 square yards from A.P. Industrial Infrastructure Corporation Limited covered by Ex.B2—agreement dated 15.12.1982 in Sy.No.137/1 of Chunchupalli revenue village and not in Sy.No.141 as alleged by the plaintiff and therefore, it has no title over the said land. He thus prayed to dismiss the suit.

c) Basing on the above pleadings, the trial Court framed the following issues.

- i) *Whether the suit land is part of Sy.No.141 of Kothagudem?*
- ii) *Whether the defendant is liable for eviction?*
- iii) *To what relief?*

The following additional issues were framed:

- (i) *Whether the suit land is partly of Sy.No.141 of Kothagudem and partly of Sy.No.137/1 of Chunchupalli?*
- (ii) *Whether the plaintiff is in possession of the suit schedule property on the date of filing of the suit?*
- (iii) *Whether the suit property forms part of leased area of plaintiff Company and defendant occupied on 24.03.1983 and liable for eviction?*

- (iv) *Whether the suit is bad for non-joinder of Sri Srinivasa Rice Mill—proprietor A.China Veera Bhadraiah is necessary party to the suit?*
- (v) *Whether the A.P. Industrial Infrastructure Corporation have got right to alienate the suit land to the defendant?*
- (vi) *To what relief?*

d) During trial, PWs.1 and 2 were examined and Exs.A1 to A11 were marked on behalf of plaintiff. DWs.1 and 2 were examined and Exs.B1 and B2 were marked on behalf of defendants. Exs.C1 to C7 were marked through Commissioner. Ex.X1 was marked through DW2.

e) After hearing both sides and basing on the oral and documentary evidence, the trial Court decreed the suit observing that suit land is part of Sy.No.141 as well as Sy.No.137/1 and defendant has not produced any evidence to show what extent of land out of the land handed over by the plaintiff—Company, was allotted to the Industrial Infrastructure Corporation by the Government. The trial Court also observed that in view of report and sketches prepared by the Commissioner, the defendant is not having any right and title over the land situated in Sy.No.141 and he also has no right and title other than the extent of land sold to him by the Industrial Corporation. The trial Court further observed that A.China Bhadraiah is not a necessary party to the suit and defendant has not questioned the right of the plaintiff as a lessee over the suit land and accordingly decreed the suit.

f) Aggrieved, the defendant preferred A.S.No.17 of 1990 wherein the lower appellate Court dismissed the appeal holding that defendant occupied the land belonging to the plaintiff—Company and it is entitled to

recover the possession by confirming the judgment and decree of the trial Court.

Hence, the instant Second Appeal by plaintiff.

g) During the pendency of appeal, sole appellant died and his L.R was brought on record vide Court order dated 27.06.2007 in CMP No.1132 of 2007.

4) While admitting the Second Appeal this Court on 30.12.1997, framed the following substantial questions of law:

(1) *Whether the judgments and decrees of the lower courts are vitiated on the ground the relief granted is contrary to the observations and findings in the judgments.*

(2) *Whether the Courts below erred in passing an unexecutable decree inasmuch as, the Courts having found the lands of parties were not identified or localized by the surveyor, passed the decree without localization.*

5) Heard arguments of Sri R.R.Kalyan, learned counsel for appellant and Sri J.Prabhakar, learned counsel for respondent.

6) **Substantial Questions 1 and 2:** Since both the substantial questions are more or less interconnected, they are decided together. The contention of learned counsel for appellant is that both the Courts below have decreed the suit against the canons of established principles of law by bypassing the evidence on record, inasmuch as, they failed to appreciate that the plaintiff failed to prove that the suit property which he claims as part of his leasehold, and which he imputes to have been

encroached upon by the defendant is, indeed, a part of his leasehold property on ground. PW2, the surveyor has categorically admitted that he cannot show where the suit property of 60 sq. mts. is located and in which survey number it is existed. He further admitted he cannot show whether the suit property of 60 sq. mts. is part of Sy.No.141 of Kothagudem or Sy.No.137/2 of Chunchupalli. From his evidence, learned counsel vehemently argued, it is clear that PW2 could not in clear terms state that the suit property is part of leasehold property. What all he surveyed and stated is the extent of land in respective occupation of plaintiff and defendant. By such finding of Commissioner, plaintiff cannot be said to have established the crucial fact that the suit land is a part of his leasehold land. Unless the plaintiff establishes this fact, he does not deserve decree.

a) He further argued, it is true that the defendant has not filed objections to the Commissioner's report. However, he is not precluded from commenting on the veracity of Commissioner's report. In this regard, he placed reliance in *Harihar Misra vs. Narhari Setti Sitaramiah*¹. Learned counsel thus reiterated that the Commissioner only stated about the extent of the land in the respective possession of the parties, but he could not localize the suit property to clinch whether the same is part of plaintiff's leasehold or not. The burden is heavy on the plaintiff to establish this fact and since he failed to do so, the Courts below ought to have dismissed the suit but they have erroneously decreed the suit. Since their judgments suffer the vice of perversity of appreciation of

¹ AIR 1966 Orissa 121

fact and law, the said perversity can be formulated as substantial question of law and in the Second Appeal, this Court can rectify the said mistake by allowing the appeal.

7) In oppugnation, while supporting the judgment of the lower appellate Court, learned counsel for respondent Sri J.Prabhakar would argue that the Government have leased out vast extent of land in Sy.No.141 of Kothagudem and in Sy.No.137 of Chunchupalli village to plaintiff Company of which the Company after some time surrendered some extent of land in Sy.No.137 by retaining the remaining extent and the suit land in an extent of 18.50 x 3.50 meters (60 sq. mts.) is part of their leasehold land which was illegally encroached upon by the defendant. It is the categorical stand of the defendant that he purchased 1019 sq. yds. of site in Sy.No.137/1 Chunchupalli village and therefore, he has nothing to do with the land in Sy.No.141. However, PW2 who surveyed the land, has categorically mentioned in his report about the extent of land in occupation of both the parties. As per his report, curiously the defendant has been in possession of an extent of 500 sq. mts./595 sq. yds. in Sy.No.141 besides an extent of 935 sq.mts./1112 sq. yds. in Sy.No.137. Since admittedly defendant purchased an extent of 1019 sq.yds only in Sy.No.137 from APIIC and he has not purchased any extent of land in Sy.No.141 from the said Corporation, it is obvious that he is in illegal occupation of 500 sq.mts./595 sq.yds. of land in Sy.No.141. Even in his written statement itself, he has categorically admitted he has been in occupation of Government land to the west of the land purchased by him. Thus, the land in Sy.No.141 which is in illegal occupation of the

defendant can be said to comprise the suit land also i.e. the suit land of 18.50 meters x 3.50 meters is a part of land in illegal occupation of the defendant. It is true that the Commissioner has not exactly located the suit land from out of the extent of the land in illegal occupation of the defendant in Sy.No.141. However, from the evidence of PW2 and admission of defendant in his written statement, the broad probability which the lower appellate Court arrived was that the defendant was in illegal occupation of the Government land including the suit land. Learned counsel argued that since the Government have long back leased out the land in Sy.Nos.141 and 137 in the vicinity of the suit land, the illegal occupation made by the defendant is certainly in respect of leasehold land of the plaintiff. The defendant has not chosen to file any objection against Ex.C3—Commissioner's report at the relevant point of time and therefore, he cannot now take any exception against the report of PW2. The Courts below considering the evidence on record, have given a concurrent finding of fact that the defendant has encroached upon the land of the plaintiff including the suit land and since it is a concurrent finding of fact and as there is no perversity in appreciation of facts and law, this Court may not interfere with the same in the Second Appeal since no substantial question of law is involved therein. He thus prayed to dismiss the appeal.

8) I have given anxious consideration to the above respective arguments and found formidable force in the submission of learned counsel for respondent. Plaintiff's case precisely is that the Government have leased out land to Singareni Collieries Company Limited for

excavation and other purposes situated in Sy.No.141 of Kothagudem and in Sy.No.137 of Chunchupalli which are adjacent to each other. The suit land in an extent 18.50 meters x 3.50 meters (60 sq.mts.) is part of said land. The defendant has encroached upon plaintiff schedule property on 24.03.1983 and started digging foundation and hence, after exchange of notices, plaintiff filed the suit for declaration and possession. Whereas the defendant while denying the allegations took plea that he never encroached upon the suit land and he is a partner of Srinivasa Rice Mill and he purchased 1019 sq. yds. on 15.12.1982 from Andhra Pradesh Industrial Infrastructure Corporation Limited in Sy.No.137/1 of Chunchupalli revenue village. His further case is that on the western side of allotted plot, the defendant is in occupation of Government land which is the suit land. The land which was allotted and purchased by him was part of Sy.No.137/1 of Chunchupalli revenue village and the land western side to the allotted land measuring 18.50 meters x 3.50 meters is also part of Sy.No.137 of Chunchupalli revenue village and therefore, the allegation of the plaintiff that suit land falls in Sy.No.141 of Kothagudem revenue map is false.

a) In a suit of this nature, no doubt, the burden rests on the plaintiff to establish that the suit land in an extent of 18.50 meters x 3.50 meters forms part of its leasehold land to claim the decree. In this regard, the evidence of PW2 assumes importance. He is the surveyor. He surveyed suit land and submitted his report in Ex.C3. In his report he mentioned the defendant is in physical possession of 500 sq.mts./595 sq.yds in Sy.No.141 (shown as Sy.No.141/2 in the sketch) and an extent of 935

sq.mts/1112 sq.yds in Sy.No.137 (shown as Sy.No.137/2 in the sketch). Similarly, the plaintiff—Singareni Collieries Company Limited is in physical possession of 5162 sq.mts/6678 sq.yds in Sy.No.137 (shown as Sy.No.137/3 in the sketch). In the cross-examination he admitted that he cannot show where the suit schedule property of 60 sq. mts. is located and whether the suit property is in Sy.No.141/2 of Kothagudem or in Sy.No.137/2 of Chunchupalli.

b) From his above evidence, the crucial aspect that falls for consideration is whether the suit property is properly identified to be part of leasehold land of the plaintiff. The admitted facts are that the Government have leased out to the plaintiff Company vast extent of land in Sy.No.141 of Kothagudem and also in Sy.No.137 of Chunchupalli and under Ex.A9, the plaintiff surrendered an extent of Ac.148.21 gts. of land in Chunchupalli which is obviously in Sy.No.137. The plaintiff retained the land in Sy.No.141 of Kothagudem and also some extent in Sy.No.137 of Chunchupalli.

c) Coming to defendant's case, he purchased 1019 sq.yds. in Sy.No.137 from APIIC and he has not purchased any land in Sy.No.141. He admitted in his written statement that to the west of the land purchased by him, he occupied the land of the Government which is the suit land. His admission is proved on ground by PW2 in Ex.C3 wherein he clearly mentioned the defendant is in occupation of 935 sq.mts/1112 sq.yds. in Sy.No.137. It should be noted the defendant purchased only 1019 sq.yds in Sy.No.137 but he is in physical possession of 1112 sq.yds. in the said survey number. That means he is in excessive possession of 93 sq.yds

(1112 - 1019) in Sy.No.137. Further, he is in illegal possession of 500 sq.mts/595 sq.yds. in Sy.No.141 without having purchased the same and without any right. Therefore, the admission of defendant coupled with the evidence of PW2 would clearly show that the defendant is in illegal possession of specific extents of land as stated supra. The lands in that vicinity covered by Sy.Nos.141 and 137 were admittedly leased out by the Government to the plaintiff. Moreover, it is nobody's case that third parties held land in Sy.No.141 or 137 in the vicinity of the suit land. All these facts would probablise that the land in illegal occupation of the defendant covered by Sy.Nos.141 and 137 belongs to plaintiff and none other. It also probablises that the suit land in an extent of (60 sq.mts.) 18.50 meters. X 3.50 meters is also a part of leasehold land of the plaintiff. Therefore, even though PW2 could not exactly localize the suit property to be in Sy.No.141 or in Sy.No.137, still the other surrounding facts and evidence particularly the admission of defendant, would probablise that the suit land is a part of plaintiff's leasehold land. On this premise, the lower appellate Court has confirmed the decree passed by the trial Court in favour of the plaintiff. I find no perversity in appreciation of facts and evidence by the Courts below to arrive at a different conclusion. The cited decision will not improve defendant's case.

9) In view of the concurrent finding of facts given by the Courts below and as the said finding is in correct lines, I find no question of law, muchless substantial question of law, involved in this case.

10) Accordingly, this Second Appeal is dismissed by confirming the judgment passed by the lower appellate Court in A.S.No.17 of 1990.
No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 14.02.2018
Murthy

