

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 674 OF 2015

JUDGMENT:

1. The Second Appeal is filed against the judgment and decree dated 17.06.2015 in Appeal Suit No.20 of 2010 on the file of the XXVII Additional Chief Judge, City Civil Court, Secunderabad, whereby the appeal preferred against the judgment and decree dated 16.12.2009 in Original Suit No.163 of 1996 on the file of the XIII Additional Senior Civil Judge (Fast Track Court), City Civil Court, Secunderabad was partly allowed.

2. The appellant herein is defendant, and the respondents herein are plaintiffs, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. Plaintiffs filed the suit stating that 1st plaintiff and his family members were in joint possession and enjoyment of land in survey no.59 (new), corresponding to old survey no.55, of Trimulgherry village, Secunderabad, which was being used for agricultural purposes. It was left uncultivated as it was fit for house sites. By 1978, one housing society by name Lal Bahadur Nagar Co-operative Housing Society, established a housing colony in survey no.60, which was almost adjacent to northern boundary of land in survey no.59 with a lane intervening, and prepared layout. At the request of 1st

plaintiff to demarcate land in survey no.59 with reference to tippon and village map and fix boundaries and as per the directions of the Deputy Director of Survey and Land Records, the Deputy Inspector of Survey and Land Records carried out a survey of survey no.59 on 30.06.1982 and prepared a panchanama, which revealed that on northern and southern boundaries of survey no.59, there were encroachments by purchasers of plots of the aforesaid housing society and others. The plaintiffs found that the defendant, claiming to have purchased open plot no.28 admeasuring 197 square yards from the housing society, encroached into the property of plaintiffs in survey no.59. In June, 1992, when survey no.59 was surveyed at the instance of plaintiffs, the encroachment of the defendant was found. Hence, the suit for declaration of title, recovery of possession and past and future *mesne* profits.

4. The defendant filed written statement stating that she purchased plot no.28 in Lalbahadur colony, Tirumalagiri village, Secunderabad under registered sale deed dated 15.7.1978 and ever since she had been in continuous, exclusive and uninterrupted possession of the same and perfected her title by way of adverse possession to the knowledge of the plaintiffs. The defendant did not encroach any land in survey no.59 belonging to the plaintiffs. The suit is barred by time. Hence, it is prayed to dismiss the suit.

5. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether the defendant valid purchased a plot no.28 under a registered sale deed dated 15.07.1978 ?
- 2) Whether the defendant perfected her title to the schedule property by adverse possession ?
- 3) Whether the plaintiffs are entitled to declaration of title as prayed for ?
- 4) Whether the plaintiffs are entitled to delivery of possession of the schedule property from the defendant?
- 5) Whether the plaintiffs are entitled to the damages for use and occupation of the schedule property ? if so, at what rate ?
- 6) To what relief ?

6. During trial, on behalf of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A1 to A14 were got marked, and on behalf of defendant, D.W.1 was examined and Exs.B1 to B11 were marked on her behalf.

7. The trial Court, upon appreciation of the evidence on record, decreed the suit with costs declaring title of the plaintiffs over the suit schedule land and that they are entitled to recover possession thereof from the defendant. The trial Court also directed the defendant to pay past *mesne* profits @ Rs.100/- per month from 01.07.1993 to the date of filing of the suit and future *mesne* profits @ Rs.100/- per month from the date of suit till the date of delivery of possession.

Challenging the judgment and decree of the trial Court, the defendant preferred Appeal Suit No.20 of 2010 on the file of the XXVII Additional Chief Judge, City Civil Court, Secunderabad. Vide the impugned judgment and decree, the first appellate court allowed the appeal in part disallowing the *mesne* profits granted by the trial court and confirming the others reliefs granted by it. Challenging the same, the present Second Appeal has been preferred by the defendant.

8. Heard both sides. Perused the record.

9. Learned counsel for the appellant would contend that the findings of the courts below are contrary to law and facts; that the first appellate court did not appreciate the written submissions made on behalf of the appellant/defendant; that the suit schedule property is part and parcel of plot no.28 admeasuring 197 square yards situated in survey no.60 of Lal Bahadur Colony, Tirumalghiri, which was purchased by the defendant from Lal Bahadur Co-operative Housing Society, under Ex.B2-registered sale deed dated 15.7.1978; that the plaintiffs have no right, title or interest whatsoever in the land in survey no.60; that they are not the owners of the subject land; that there is no evidence to hold that the appellant/defendant encroached into a part of land in survey no.59; that there is Ex.B11-sanctioned plan and Ex.B2-registered sale deed to show ownership and possession of the appellant/defendant over the suit schedule property; that the appellant/

defendant constructed a house and living therein by paying property taxes; that there are documents to substantiate the case of the appellant/defendant; that there is no cause of action to file the suit and the suit is barred by limitation; that the factual aspects and evidence had not been appreciated by both the courts below. It is further contended that the plea of adverse possession was wrongly taken by the then counsel of the defendant in the written statement, without knowledge of the defendant; that both the courts below wrongly came to the conclusion that the subject land is in survey no.59; that the findings of the both the courts below are perverse, and ultimately, prayed to allow the Second Appeal.

10. On the other hand, learned counsel for the respondents/ plaintiffs would contend that the suit schedule property falls in survey no.59; that the total extent of survey no.59 of Tirumalghery village is Ac.3.32 guntas; that the subject land is surrounded on 3 sides by the land in survey no.59 and on northern side, it is surrounded by survey no.60 and beyond cart track. It is further contended that as per Ex.B1, land in survey no.60 is Ac.2.23 guntas whereas in Ex.B11-lay out, land in survey no.60 is shown as 15,936 square yards, which is much more than land in survey no.60; that the vendor of the appellant/defendant has no right to sell the land in survey no.59; that under the guise of Ex.B2-sale deed, suit land was encroached by the appellant/defendant, which fact was

established by the plaintiffs by leading convincing and cogent evidence and same was well considered by the both the courts below. He further contended that the proposed substantial questions of law raised are all on factual aspects; that both the courts below dealt with all the factual aspects and gave concurrent findings, and prayed to dismiss the Second Appeal.

11. 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

finding- are some of the questions, which involve substantial questions of law.

12. The Second Appeal was admitted on the following substantial questions of law.

a) Whether the appellate court is justified in upholding the trial Court's judgment when there is no cause of action to file the suit against the appellant/defendant is prevalent and also proved by the respondents/plaintiffs which goes to the root of the case ?

b) Whether the revised survey conducted by a lower staff in the Survey Department during the trial of the suit can take precedence over the survey conducted by a senior staff of the same department i.e. the Deputy Inspector of Survey, based on which the panchanama was conducted on 30.06.1992 and the encroachments were alleged to have been noticed thereon ?

c) Whether the encroachment could be ascertained without measuring the entire extent of lands in two adjoining survey numbers having an intervening lane in between the two survey numbers ?

d) Whether the knowledge about the encroachments mentioned in the plaint by the plaintiff is to be reckoned for calculating the period of limitation for filing the suit or the date intentionally and deliberately mentioned in the plaint by the plaintiffs ?

e) Whether the suit is maintainable with misjoinder of parties and also with non-joinder of parties?

13. It is the case of the plaintiffs that the plot no.28 in Lalbahadur colony said to be situated in survey no.60 of Tirumalagiri village, Secunderabad purchased by the

defendant under Ex.B2-registered sale deed dated 15.7.1978, falls in survey no.59, which is owned by the plaintiffs, and after coming to know the encroachment in the survey, the suit was filed by them. Based on the evidence on record, both the courts below held that the subject land is part and parcel of land in survey no.59. As per Ex.A13-copy of conch map of Trimulgherry village, land in survey nos. 59 and 60 are separated by cart track in between. The land in survey no.60 is on northern side of the land in survey no.59. As per Ex.B11-copy of layout, land in survey no.60 was made into house plots and total area of the plots and roads is shown as 15,936 square yards. Ex.A11-certified copies of pahani for the year 1987-88, total extent of land in survey no.60 is Ac.2.23 guntas, which is equivalent to 12,463 square yards. It goes to show that in Ex.B11-lay out, an excess of 3,473 square yards of land is shown in survey no.60. There is also survey report and other documents and as per those records, the land in survey no.59 is Ac.3.32 guntas and it devolved on the respondents/plaintiffs. There is also evidence that on 30.06.1992, the Deputy Inspector of Survey conducted survey of the said land and prepared a panchanama by fixing boundaries of the land in survey no.59. Case of the respondents/plaintiffs is that basing on the said inspection, they came to know the encroachment made in survey no.59, particularly by the purchasers of land from the Lal Bahadur Nagar Co-operative Housing Society i.e. vendor of the

appellant/defendant, who made house plots in survey no.60. It is their further case that the appellant/defendant who purchased plot in survey no.60 from the said housing society, had encroached the suit schedule property situated in survey no.59. The same has been established by the plaintiffs by leading cogent oral and documentary evidence.

14. Both the courts below, having discussed the oral and documentary evidence, came to conclusion that the appellant/defendant encroached into land in survey no.59, belonging to the respondents/plaintiffs. There is also evidence of P.W.2, Advocate Commissioner, and his report to show that the suit is a part and parcel of the land covered by survey no.59. There are also so many other documents to establish that the suit land is part and parcel of land covered by survey no.59. There is clear findings of both the courts below that the Lal Bahadur Nagar Co-operative Housing Society prepared layout plan under original of Ex.B11 showing the extent as 15,936 square yards of land whereas total extent of land in survey no.60 is only 12,463 square yards. The respondents/plaintiffs are claiming the land in survey no.59 by way of succession. Revenue records filed by them establish the same. There is nothing wrong on the part of both the courts below in relying on the entries made in revenue records and in holding that the respondents/

plaintiffs are owners and possessors of the land covered by survey no.59.

15. The substantial questions of law raised by the appellant/defendant relate to the factual aspects. As regards the appreciation of the evidence on record is concerned, both the courts below dealt with all the aspects in right perspective, and neither any inadmissible evidence is admitted, nor any admissible evidence was not acted upon, by the courts below. The findings of the courts below are based on the evidence. None of the findings is shown to be perverse. The findings are based on record and there is no infirmity. There are no grounds to take a different view. The substantial questions of law in the grounds of appeal are only on factual aspects which were elaborately dealt by the courts below and answered. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellant/defendant to deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination so as to admit the Second Appeal. Therefore, there are no grounds to admit the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

16. In the result, the Second Appeal is dismissed at the stage of admission. There is no order as to costs of the Second Appeal.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

07.09.2018
DRK

(Dr.SA, J.)



THE HON'BLE DR JUSTICE SHAMEEM AKTHER



SECOND APPEAL No. 674 OF 2015

07.09.2018

DRK