

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.529 OF 2013

JUDGMENT:

This Second Appeal is filed by the defendant, under Section 100 of C.P.C., assailing the judgment and decree dated 10.12.2012 passed in A.S.No.233 of 2010 on the file of the Court of III Additional District Judge, Kakinada, wherein and whereby the judgment and decree dated 01.10.2010 passed in O.S.No.656 of 2009 on the file of the Court of I Additional Senior Civil Judge, Kakinada, decreeing the suit filed by the plaintiff for recovery of the suit amount with interest, 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 nutshell, are as follows:

The plaintiff-temple is the owner of an extent of Ac.17.67 cents of wet and dry land in Survey Nos.107 and 108 of Samalkot Village. On 10.06.2006 the Executive Officer of the plaintiff-temple conducted an auction of leasehold rights in respect of the suit schedule property. The defendant became a highest bidder and lease was granted in favour of the defendant for the years 2006-07 to 2008-09. The defendant agreed to pay maktha for the first crop on or before 31st January and 30th April of every year. The defendant paid an amount of Rs.10,000/- towards security deposit. The defendant also paid an amount of Rs.22,000/- on 16.06.2006. Thereupon, the Deputy Commissioner of

Endowments, Kakinada, approved the leasehold rights of defendant vide Proceedings in D.Dis.No.A4/10417/2006, dated 17.06.2006. The defendant failed to pay the balance maktha of 16 kata bags and 50 kgs. of paddy for the second crop for the year 2007-08 and the entire maktha for two crops for the year 2008-09. On 18.06.2009 the plaintiff got issued a notice directing the defendant to pay the maktha. The defendant did not choose to issue reply. Having no other alternative, the plaintiff filed the suit.

4. The defendant filed written statement admitting that he is the tenant of the plaintiff-temple in respect of the suit schedule property *inter alia* contending that out of Ac.17.67 cents, he cultivated an extent of Ac.7.35 cents. There is no water facility to the suit schedule property; therefore, he could not raise the crop in an extent of Ac.10.32 cents. The then Executive Officer by name K.Venkata Rao permitted the defendant to raise sugarcane crop in the land. The defendant filed Writ Petition No.11593 of 2009 on the file of Hon'ble High Court challenging the action taken by the Executive Officer and the same was dismissed. Hence, the suit is liable to be dismissed.

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

1. Whether an extent of Ac.7.35 cents out of the leasehold property of Ac.17.67 cents is a rain-fed land?
2. Whether no 2nd crop is raised in the lease hold property?
3. Whether the plaintiff is entitled for recovery of the suit amount from the defendant?
4. To what relief?

6. To substantiate the case, before the trial Court, on behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A.1 to A.8 were marked. To demolish the case of the plaintiff, the defendant examined himself as DW.1 and got marked Exs.B.1 to B.5, and Exs.X.1 and X.2. To prove the factum of cultivating an extent of Ac.7.35 cents only out of Ac.17.67 cents by the defendant, DWs.2 and 3 were examined.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the defendant failed to prove that he cultivated an extent of Ac.7.35 cents out of Ac.17.67 cents of land and consequently, decreed the suit.

8. Feeling aggrieved by the judgment and decree of the trial Court dated 01.10.2010 passed in O.S.No.656 of 2009, the defendant preferred A.S.No.233 of 2010 on the file of the Court of III Additional District Judge, Kakinada. The learned III Additional District Judge, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the defendant failed to prove that he cultivated an extent of Ac.7.35 cents out of Ac.17.67 cents of land and consequently, dismissed the appeal, while confirming the judgment and decree of the trial Court. Hence, the defendant preferred the present second appeal.

9. Heard the learned counsel for the appellant-defendant and perused the material available on record.

10. The questions of law framed by the learned counsel for the appellant are as follows:

1. Whether the findings recorded by the Courts below are perverse? and
2. Whether the Courts below committed any error while discarding Ex.B.5 certificate?

11. Question Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to answer both the questions simultaneously in order to avoid recapitulation of facts and evidence.

12. In order to appreciate the contention of the learned counsel for the appellant, 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:

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

¹ (2010) 13 SCC 216

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.)

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

14. The plaintiff-Sri Venu Gopal Swamy Temple is the owner of an extent of Ac.17.67 cents of wet and dry land in Survey Nos.107 and 108 of Samalkot Village. In the auction conducted by the plaintiff, the defendant became the highest bidder and the leasehold rights were granted in favour of the defendant vide proceedings in D.Dis.No.A.4/10417/2006, dated 17.06.2006. As seen from the testimony of PWs.1, 2 and DW.1, the temple handed over an extent of Ac.17.67 cents of land in favour of the defendant for cultivation for the agricultural years 2006-07 and 2008-09. There is no dispute with regard to the jural relationship of landlord and tenant between the plaintiff and defendant. As seen from the testimony of PWs.1 and 2, the defendant cultivated the land by raising paddy and sugarcane crops and failed to pay the maktha. As seen from the testimony of DW.1, he cultivated an extent of Ac.7.35 cents out of Ac.17.67 cents; therefore, he is not liable to pay maktha for the entire extent of the land. As per the testimony of DW.3, the defendant did not raise sugarcane crop. The testimony of DW.1 clearly reveals that he raised the sugarcane crop and sold the same to the Navabharat Ventures, Samalkot. The testimony of DW.3 is not corroborating with the testimony of DW.1; therefore, much weight cannot be attached to the testimony of DW.3. As per the testimony of DW.2 also, the defendant raised sugarcane crop in the suit schedule property.

15. The crucial question that falls for consideration is whether the defendant cultivated an extent of Ac.7.35 cents out of Ac.17.67 cents of land.

16. Basing on the oral and documentary evidence available on record, the Courts below came to a conclusion that the defendant failed to establish that he cultivated an extent of Ac.7.35 cents out of Ac.17.67 cents of land.

17. Learned counsel for the appellant strenuously submitted that the Courts below failed to consider Ex.B.5 certificate, dated 23.05.2009, issued by the Village Revenue Officer.

18. It is needless to say that a person, who is placing reliance on a document, has to examine one of the parties to the document. For the reasons best known, the defendant did not choose to examine the Village Revenue Officer, who issued Ex.B.5. The trial Court as well as the first appellate Court considered this aspect and discarded Ex.B.5. The possibility of creating this type of document in order to avoid payment of maktha to the landlord, more particularly, to the temple authority cannot be ruled out completely. If really the defendant did not cultivate the entire extent of the land during the particular season, what prevented him to file a tenancy petition seeking remission? For the reasons best known, the defendant did not choose to file a petition seeking for remission of maktha. This itself negates the contention raised by the defendant. Whether the defendant cultivated Ac.7.35 cents or Ac.17.67 cents is purely a question of fact. The first appellate Court is the final Court so far as the finding of fact is concerned. If

the findings recorded by the Courts below are not based on evidence or based on evidence, which is not legally admissible, then those findings can be termed as perverse. If the findings recorded by the Courts below are perverse, certainly this Court can set aside the same while exercising the jurisdiction under Section 100 of C.P.C. In the instant case, the defendant miserably failed to prove that he cultivated an extent of Ac.7.35 cents only. The point urged by the learned counsel for the appellant is purely a question of fact and not law. The Courts below have assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the Courts below.

19. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, this Court is of the considered view that there is no question of law much less substantial question of law to allow the appeal, while exercising the jurisdiction under Section 100 of C.P.C. Hence, the appeal is liable to be dismissed.

20. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs.

21. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 30.10.2018
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