

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1040 OF 2013

JUDGMENT:

This Second Appeal is filed, by the plaintiff, under Section 100 of C.P.C., assailing the judgment and decree dated 24.11.2009 passed in A.S.No.7 of 2007 on the file of the Court of I Additional District Judge, Ongole, wherein and whereby the judgment and decree dated 21.11.2006 passed in O.S.No.546 of 2003 on the file of the Court of the Principal Junior Civil Judge, Ongole, dismissing the suit filed by the plaintiff for perpetual injunction, 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:

It is the case of the plaintiff that he purchased an extent of Ac.1.32 cents in Survey No.237 of Ongole Rural Panchayat under a registered sale deed dated 21.02.1979. The vendor of the plaintiff purchased the suit schedule property from one Kunchala Ramaiah under a registered sale deed dated 15.03.1972. Survey No.237 is sub-divided into Survey No.237/1 and 237/2. The plaintiff converted the vacant land into plots and sold the same to different persons on different dates. The plaintiff retained an extent of Ac.4½ cents, which is the subject matter of the suit. The Ongole Municipality issued a tender notification on 14.02.2003 for formation of the road in the suit schedule property without any

right whatsoever. The plaintiff has been in possession and enjoyment of the suit schedule property. Hence, the suit.

4. The defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the plaintiff unauthorisedly sold the plots to different persons without approved layout. The plaintiff and his family members left the suit schedule property for the purpose of formation of road. The plaintiff ought to have left 10% of the total land towards formation of the road. The suit schedule property was merged in Ongole Municipality in the year 1994. The plaintiff was not in possession of the suit schedule property as on the date of filing of the suit. Hence, the suit is liable to be dismissed.

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

1. Whether plaintiff is entitled for permanent injunction as prayed?
2. To what relief?

6. To substantiate the case, before the trial Court, the plaintiff examined himself as PW.1 and got marked Exs.A.1 to A.4. PW.2 was examined to prove that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit. To demolish the case of the plaintiff, the defendant officials were examined as DWs.1 and 2 and got marked Exs.B.1 to B.4. The advocate commissioner was examined as CW.1 and got marked Exs.C.1 and C.2.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the

plaintiff failed to prove his possession over the suit schedule property; therefore, he is not entitled for the equitable relief of permanent injunction and consequently, dismissed the suit.

8. Feeling aggrieved by the judgment and decree of the trial Court dated 21.11.2006 passed in O.S.No.546 of 2003, the plaintiff preferred A.S.No.7 of 2007 on the file of the Court of I Additional District Judge, Ongole. The learned I Additional District Judge, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff is not entitled for the relief of perpetual injunction and consequently, dismissed the appeal, while confirming the judgment and decree of the trial Court.

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

10. The questions of law urged 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 plaintiff, being the owner of the suit schedule property, is entitled for perpetual injunction?

11. Question Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address 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 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. It is not in dispute that the vendor of the plaintiff purchased an extent of Ac.1.32 cents from one Ramaiah under a registered sale deed dated 15.03.1972-Ex.A.2. The plaintiff purchased the same under a registered sale deed dated 21.02.1979-Ex.A.1. As seen from the testimony of PWs.1, 2 and DWs.1 and 2, the plaintiff converted the land covered under Ex.A.1 into plots and sold the same to different persons. As per the case of the plaintiff, he retained an extent of Ac.4½ cents, which is the suit schedule

¹ (2010) 13 SCC 216

property. As per the testimony of DWs.1 and 2, the plaintiff unauthorisedly sold the plots without obtaining necessary approval from the Ongole Municipality. For the reasons best known, the plaintiff has not produced the sale deed executed by him to different persons in order to establish that he retained an extent of Ac.4½ cents, which is the subject matter of the suit. As per the testimony of DWs.1 and 2, the suit schedule property was merged in Ongole Municipality in the year 1994. No doubt, the Municipality has not produced the record to that effect. Even as per the case of the plaintiff, the defendant-Municipality issued a tender notification, dated 14.02.2003-Ex.A.4 for formation of 18 feet road on the west of the bypass road. The proposed road width is 18 feet and length is 100 feet. Issuance of tender notification presupposes that the Municipality is in possession of the suit schedule property. The plaintiff filed the suit on 30.06.2003. It appears that the plaintiff filed the suit after issuance of tender notification by the Municipality for formation of the road. PW.2 was examined to substantiate the stand of the plaintiff. As per the testimony of PW.2, the neighbouring owners are using the suit schedule property as a common passage. There is no whisper in the testimony of PW.2 that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit. As per the testimony of advocate commissioner-CW.1, by the time of his inspection, there is a mud road in the suit schedule property. If the testimony of CW.1 is taken into consideration, there is no vacant site as pleaded by the plaintiff. The testimony of CW.1 negates the contention of the plaintiff.

15. The predominant contention of the learned counsel for the appellant is that the plaintiff, being the owner of the suit schedule property, is entitled for the relief of injunction. As observed earlier, the plaintiff has not proved the total extent of land sold by him is less than Ac.1.32 cents. For the reasons best known, the plaintiff did not produce the registered sale deed executed by him. This creates a suspicion in the mind of the Court with regard to title of the plaintiff. When a cloud is cast on the title of the plaintiff, the plaintiff has to file a suit for declaration and consequential perpetual injunction. In a mere suit for perpetual injunction, the Court has to consider whether the plaintiff was in possession of the suit schedule property as on the date of filing of the suit or not. The plaintiff failed to prove that as on the date of filing of the suit, he was in possession of the suit schedule property. Whether the defendant has acquired the land without following the procedure or not falls outside the purview of the present suit. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff failed to prove his possession over the suit schedule property as on the date of filing of the suit. The first appellate Court is the fact finding final Court. If the findings recorded by the Courts below are based on no evidence or based on evidence, which is not legally admissible, then those findings can be termed as perverse. In the present case, the findings recorded by the Courts below are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the

Courts below are perverse. I am fully endorsing with the findings recorded by the Courts below.

16. 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 involved in this appeal. Hence, the appeal is liable to be dismissed.

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

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

Date: 06.11.2018
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T.SUNIL CHOWDARY, J

