

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.1161 of 1999

JUDGMENT:

This Second Appeal is preferred by the appellant/plaintiff aggrieved by the Judgment and Decree dated 06.09.1999 in A.S.No.110 of 1996 passed by the learned Additional District Judge, Vizianagaram whereby and whereunder the learned Judge dismissed the appeal filed by the plaintiff confirming the Judgment and Decree dated 30.08.1996 in O.S.No.535 of 1988 passed by the Principal District Munsif, Vizianagaram, filed for injunction.

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

3) The factual matrix of the case is thus:

a) Plaintiff's case is that his father—Konathala Hanumantha Rao and his brother—Konathala Appa Rao were in possession and enjoyment of vacant site situated in T.S.No.54 and 143 of Santhapeta South Ward, Vizianagaram Municipality since times immemorial which was previously in Vizianagaram Zamindari Estate; there was a big pit in the schedule land which was covered by plaintiff's ancestors by incurring huge expense; during survey and settlement the schedule land was wrongly demarcated and surveyed as municipal site; despite the same, plaintiff's ancestors were in possession and enjoyment of the same continuously acquiring title by adverse possession long back;

while so, plaintiff's father applied to the defendant—municipality for assignment in the year 1961 which in its resolution No.155 dated 22.05.1961 recommended to the Government for assignment of the same in favour of plaintiff's father at the rate of Rs.1/- per square yard; while so, in the year 1980, the Special officer of the defendant-municipality tried to assign the said land in favour of third parties; then the father and brother of plaintiff filed Writ Petition No.2202 of 1980 against defendant and 3 others and the same was disposed of on 05.08.1986 directing the defendant-municipality to take a decision after giving an opportunity to plaintiff's father, after complying with the rules of principles of natural justice; thereafter, the defendant-municipality has not taken any steps for finalization of assignment; the father of the plaintiff also paid vacant land tax for the years 1984-88; there was a cattle shed in the plaintiff schedule property; the defendant-municipality instead of levying taxes, issued proceedings in RC.7336/88 dt.05.10.1988 asking the plaintiff to remove the Fancy and Kirana General stores as he was an unauthorized occupant. Hence, the suit.

b) Defendant—Municipality filed its written statement contending that suit schedule site belongs to the Municipality; the resolution of the Municipal Council to assign the site was only in the nature of recommendation and it was to be approved by the District Collector and necessary sanction has to be given by the Government, but the necessary sanction was kept in abeyance and therefore plaintiff does

not get any right until same was confirmed in his favour; as no confirmation was made conferring absolute title on the father of the plaintiff, plaintiff has no *locus standi* to maintain the suit; the Commissioner had issued notices to the plaintiff's family on 04.10.1988 and found that he has not received any objections for the decision of Municipal Council that T.S.No.54 and 143 of Santhapeta Ward was required for constructing vegetable market as per the approved development plan and for expansion of road in view of growing traffic; the Municipality has taken a decision not to assign the suit site; the municipal staff found some unauthorized constructions were made by the plaintiff by erecting bunk and running a fancy shop which was made without any permission and therefore the said encroachment was asked to be removed; the plaintiff mischievously filed the suit and obtained *ex parte* injunction against the defendant—Municipality; he thus prayed to dismiss the suit.

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

- 1) *Whether the plaintiff is entitled for permanent injunction as prayed for?*
- 2) *Whether the suit is bad for misjoinder and non-joinder of parties?*
- 3) *Whether the valuation of the suit and the court fee paid thereon is correct?*
- 4) *To what relief?*

d) During trial, PWs.1 to 4 were examined and Exs.A1 to A11 were marked on behalf of plaintiff. DW1 was examined and Exs.B1 and B2 were marked on behalf of defendant.

e) After hearing both sides and basing on the oral and documentary evidence, the trial Court observed that plaintiff cannot seek relief of permanent injunction without bringing on record the necessary party to the suit and accordingly dismissed the suit.

f) Aggrieved, the plaintiff filed A.S.No.110 of 1996 before the Additional District Judge, Vizianagaram and the said appeal was dismissed by upholding the judgment and decree of the trial Court in O.S.No.535 of 1988.

Hence, the instant Second Appeal by plaintiff.

4) The following substantial questions of law were framed by this Court out of the grounds of appeal filed by the appellant.

- 1) *Whether the courts below are correct in dismissing the suit on the ground of title in a suit for injunction?*
- 2) *Whether the courts below are correct in dismissing the suit for injunction when the appellant has proved his legal possession on the date of filing of the suit having found that the appellant is in possession?*
- 3) *Whether the lower court's finding is based on misconception, perverse and not supported by evidence?*

4) *Whether the courts below are correct in dismissing the suit for injunction contrary to the orders of the Hon'ble High Court passed in W.P.No.2202 of 1980?*

5) Heard arguments of Sri Venkateswara Rao Gudapati, learned counsel for appellant and Sri Venkateswarlu Nimmagadda, learned counsel for respondent.

6) **Substantial Question Nos.1 to 4:** On a conspectus of facts, evidence and judgments of the Courts below, I find no much force so far as substantial questions 1, 2 and 3 are concerned. However, in my considered view, substantial question No.4 requires a careful consideration. Admittedly, the family members of plaintiff filed W.P.No.2202 of 1980 against defendant and others wherein this Court passed order dated 05.08.1986 thus:

“Sri M.S.K.Sastri, learned counsel for petitioners after narrating the salient facts of the case has submitted that the assignment of the land in favour of the second petitioner by virtue of the resolution dated 25.05.1961 cannot be negatived without notice to the petitioner and without affording him an opportunity to explain his case. The Municipality does not seem to have taken any positive action in his matter even after the lapse of so many years. It is obvious that even though the resolution of the Municipality dated 25.05.1961 passed in favour of the petitioners has not become final, in the sense that the necessary permission of the Collector and other authorities have not been obtained, still it indicates very clearly the fact, that one time the Municipal Council has resolved to assign the land in favour of the petitioner. However, on a subsequent occasion in view of the continued encroachment over an extent of 810 sq. feet by respondent No.3 another report referred to above has been sent

to the Collector for assignment of the land to the extent of encroachment made by him. The upshot of the whole controversy is that the Municipal Council, Vizianagaram, respondent No.1 will have to take a decision after giving full opportunity to both the parties namely the petitioners herein and the third respondent about the proposed assignment of land to either of them. It may eventually take a decision after complying with the rules of principles of natural justice and giving the parties an opportunity to explain their case before it. For this it would be necessary to maintain the status quo as on the date of this judgment i.e. 05.08.1986 on the land in question till a decision is taken by the Municipality in accordance with the law, with regard to the said land. With these observations the writ petition is disposed of. No costs.”

However, it appears, in compliance of the said order the defendant-Municipality have not taken any decision though DW1—the Town Planning Supervisor of defendant—Municipality in his evidence claimed that the Municipality had cancelled the earlier resolution dated 25.05.1961 covered by Ex.A1. Except his oral testimony, copy of the alleged resolution cancelling Ex.A1 does not find place in the record before the trial Court. It must be noted that this Court in W.P.No.2202 of 1980 has given a clear direction to the defendant-Municipality to take a decision after complying the rules of principles of natural justice and giving the parties an opportunity to explain their case before it. In the absence of a written resolution, the oral assertion of DW1 will not have any probative value. Therefore, it must only be held that defendant—Municipality has not passed any order on merits in due compliance of the writ direction. Unfortunately,

the Courts below without considering this aspect, held that since the plaintiff is a trespasser in the municipal property, he does not deserve perpetual injunction against the true owner. There is no demur with the principle that trespasser is not entitled to injunction against a true owner. However, the peculiar circumstances in this case are that plaintiff has occupied municipal site since sometime prior to Ex.A1 and the Municipal Council has recommended for assignment of the plaintiff schedule site to him under Ex.A1. In the meanwhile, the 3rd and 4th respondents in the writ petition also applied for assignment of portion of the suit property and their case was also seems to have been recommended by the Municipal Council. In those circumstances, the High Court passed an order directing the defendant—Municipality to take a decision after complying the rules of principles of natural justice and giving the parties an opportunity to explain their case before it. It was emphasized that since such a decision would take some time, it would be necessary to maintain the *status quo* as on the date of writ order. Therefore, in my view, the Courts below committed a grave error in not giving due weight to Ex.A2—writ order. They should have directed the defendant—Municipality to pass an order in due compliance of Ex.A2. Hence, the judgment of the lower appellate Court upholding the judgment of the Trial Court is not legally sustainable. Therefore, this Court in order to do complete justice in the matter passes the following order:

(a) The judgment in A.S.No.110 of 1996 is set aside and defendant—Municipality is directed to take a decision in compliance of the order passed in W.P.No.2202 of 1980 within six (6) weeks from the date of receipt of copy of this order after giving opportunity to all the parties concerned as observed in the aforesaid order and pass an order on merits.

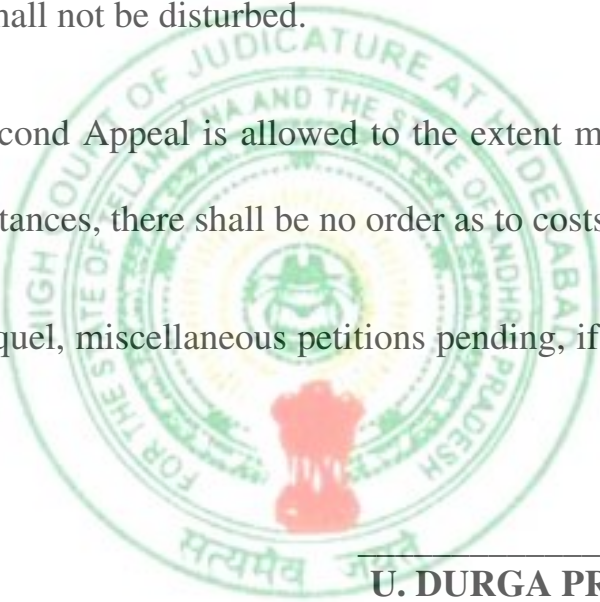
(b) Till such an order is passed the possession of the plaintiff shall not be disturbed.

7) This Second Appeal is allowed to the extent mentioned above.

In the circumstances, there shall be no order as to costs.

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

Date: 19.01.2018
Murthy

The seal of the High Court of Judicature at Hyderabad, State of Andhra Pradesh, is a circular emblem. It features a central sun-like symbol with rays, surrounded by a green border containing the text 'HIGH COURT OF JUDICATURE AT HYDERABAD' and 'FOR THE STATE OF ANDHRA PRADESH'. Below the seal, the text 'सत्यमेव जयते' is written in Devanagari script. To the right of the seal, the name 'U. DURGA PRASAD RAO, J' is printed in bold, black, uppercase letters.

U. DURGA PRASAD RAO, J