

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 1067 OF 2000

JUDGMENT:

1. The Second Appeal is filed against the judgment and decree dated 07.09.2000 in Appeal Suit No.130 of 1995 on the file of the Senior Civil Judge, Amalapuram whereby the appeal preferred against the judgment and decree dated 06.11.1995 in O.S. No.247 of 1990 on the file of the Principal District Munsif, Amalapuram dismissing the suit filed for declaration of title and perpetual injunction, was partly allowed.

2. The appellant herein is the defendant no.1, and the respondent no.1 herein is plaintiff and the respondent no.2 herein is defendant no.2, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. Vide order dated 07.12.2000, the Second Appeal was admitted on the substantial questions of law mentioned in the ground nos.2, 4 and 5, which read thus:

“a) The learned Senior Civil Judge erred in decreeing the suit for the land which is not claimed by the plaintiff ?

b) The learned Senior Civil Judge cannot pass a decree for the land which is kept for easements by the vendor?

c) The learned Senior Civil Judge ought to have considered the well considered principle that if there is some discriminency about the actual extent of land, the boundaries will prevail ?”

4. To adjudicate the *lis*, it is necessary to refer the pleadings of the parties.

(a) Plaintiff filed the suit (a) for declaration of title over ABCD plot of plaint plan and grant of permanent injunction restraining 1st defendant from interfering with plaintiff's possession and enjoyment of the same or in the alternative for declaration of title over ABCD plot of plaint plan and deliver possession thereof after ejecting 1st defendant therefrom; (b) for declaration of title over MNOP plot of plaint plan and delivery of possession thereof after ejecting 2nd defendant therefrom; and (c) for *mesne profits*, - stating that she purchased an extent of Ac.2.65 cents in R.S. No.642/2 out of Ac.4.95 cents, under two sale deeds dated 20.09.1982 and 22.9.1982; that she took possession of the said land from her vendor K.Surya Satyavathi after measuring it; that as she had been residing with her husband at a far off place, she entrusted management of the property to defendant no.1 (her mother); that without any manner of right, defendant no.1 encroached and began to pluck fruits of coconut trees situated in Ac.0.06 cents of land shown as ABCD in plaint plan; that there are two thatched sheds in the said land which belong to plaintiff; that defendant no.1 plucked yield for one year; that though the plaintiff requested defendant no.1 not to interfere with her enjoyment and got issued notice dated 1.8.1990, the latter continued to pluck coconuts from ABCD plots. It is the further case of plaintiff that defendant no.2

owns land in R.S. Nos.642/1 and 642/4; that taking advantage of absence of plaintiff, he, in collusion with defendant no.1, encroached upon a triangular bit in R.S. No.682/2 admeasuring Ac.0.12 cents shown as MNOP in plaint plan and started enjoying the same for the last 10 years. Hence, the suit.

(b) Defendant No.1 filed written statement denying plaintiff averments, and contended that plaint plan is incorrect; that vendor of plaintiff did not deliver ABCD site of plaint plan to plaintiff; that defendant no.1 purchased Ac.1.00 in R.S. No.642/3 from K.Surya Satyavathi under a registered sale deed dated 26.4.1983 and was put in possession up to BC line of plaint plan and thus BC line is demarcating line between her land and plaintiff's land; that the said property was delivered to her along with coconut trees situated near BC line; that the same was known to plaintiff; that ever since her purchase, she had been enjoying the property and taking usufruct of the trees and raised two cattle sheds in ABCD portion; that the sheds do not belong to plaintiff; that plaintiff never enjoyed the usufruct of coconut trees and that defendant no.1 never managed the property of plaintiff, and hence, the suit is liable to be dismissed.

(c) Defendant No.2 filed written statement denying plaintiff averments, and contended that plaint plan is incorrect; that he is owner of Ac.0.42 cents of land in R.S. No.642/1 along

with some other land in that vicinity; that he purchased the same from one Dangeti Martayya under sale deed dated 25.09.1976 and was put in possession; that his wife purchased Ac.0.58 cents in R.S. No.642/4 on the same day and they had been in peaceful possession and enjoyment of the respective extents of land; that land of his wife is situated on east of dry land and to its east, the land in possession of defendant no.1 is situated; that on the west of plaintiff's land also, his land is situated; that he never encroached any portion of land of plaintiff; that eastern bund of his land is in high level wherein he is having palmyrah and coconut trees and the plaintiff has no source with them; that since 1976 onwards, he had been enjoying the same and as such he perfected his title to the entire land including the high level land on the west of his wet land, by adverse possession and prescription, and hence, the suit is liable to be dismissed.

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

- 1) Whether the plaintiff is entitled for declaration of title to ABCD and MNOP plots of plaint plan and for possession of the same ?
- 2) Whether the plaintiff is entitled for past and future profits ?
- 3) To what relief ?

Additional issues:

- 1) Whether 2nd defendant perfected his title by way of adverse possession over MNOP plot ?
- 2) To what relief ?

6. During trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A13 were got marked, and on behalf of defendants, D.Ws.1 to 7 were examined and Exs.B1 to B6 were got marked. Exs.C1 and C2 were got marked through P.W.2.

7. The trial Court, upon appreciation of the evidence on record, dismissed the suit. Challenging the judgment and decree of the trial Court, the plaintiff preferred Appeal Suit No. 130 of 1995 on the file of the Senior Civil Judge, Amalapuram. Vide the impugned judgment and decree, the first appellate court partly allowed the appeal decreeing the suit insofar as the relief declaration of title of the plaintiff over the land shown as PQR in Ex.C2 plan and directing the defendant no.1 to deliver the land shown as PQR in Ex.C2 to plaintiff, by giving liberty to the plaintiff to get *mesne profits* ascertained in respect of said portion of land by taking separate proceedings as per law. Insofar as the relief of declaration of title over the land shown as MNO in Ex.C2 and *mesne profits* in respect of said portion, the first appellate court dismissed the suit. Challenging the same, the present Second Appeal has been preferred by the defendant no.1.

8. Though the Second Appeal is posted today under the caption 'for orders', there is no representation on behalf of the appellant. On earlier two occasions also, there was no

representation for the appellant. Learned counsel for respondent no.1 is present. Heard the learned counsel for respondent no.1 and perused the record. This Second Appeal is of the year 2000. It underwent several adjournments. Hence, it can be disposed of basing on the evidence available on record.

9. Learned counsel for respondent no.1 would contend that only factual aspects are agitated in the Second Appeal; that the first appellate court, while dealing with the subject matter of the case, rightly decreed the suit filed for declaration of title and possession in respect of land shown as PQR in Ex.C2-plan annexed to Advocate Commissioner's report viz. part of land covered by survey no.642/2 of Amalapuram village & mandal; that the none of the findings of the first appellate court is shown to be perverse; that there is no illegality or substantial question of law arises for determination in the subject Second Appeal, and ultimately, prayed to admit the Second Appeal.

10. 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.

11. The factual matrix as narrated above is not in dispute. There is no dispute that the respondent/plaintiff purchased Ac.2.65 cents of land out of Ac.4.95 cents in R.S. No.642/2 under Exs.A1 to A.3 from its original owner K.Surya Satyavathi. There is also no dispute with regard to one Vasamsetti Sattiraju and others purchasing the remaining extent of land in R.S. No.642/2 to an extent of Ac.1.64 cents adjacent to western side of suit survey number. Out of the said extent, defendant no.1 purchased Ac.1.00 cents under Ex.B2 in 1983, and on 22.9.1982, plaintiff purchased Ac.0.61 cents under Ex.A3, from original owner Surya

Satyavathi, and the remaining Ac.0.03 cents remained with the original vendor. It is the case of plaintiff that as she was residing with her husband at different places, management of the lands purchased by her was entrusted to defendant no.1, who is her mother, and when she returned and got her land measured, she found an extent of Ac.0.06 cents of land marked in the plaint plan as ABCD was short. It is her contention that the said portion was encroached by the defendant no.1 and so after issuance of the notice, she filed the present suit.

12. In the case on hand, the finding of the first appellate court with regard to land shown as MNO in Ex.C2-plan annexed to Ex.C1-commissioner's report, has become final. The dispute is with regard to PQR portion of Ex.C2. The commissioner's report and plan (Exs.C1 and C2) were accepted and there are no grounds to disbelieve the same. While dealing with the subject matter of the appeal, the first appellate court placed reliance on commissioner's report filed demarcating the suit schedule property bearing survey nos. 642/2 and 642/3 of Amalapuram village & mandal. The first appellate court, having considered the commissioner's report and plan (Exs.C1 and C2), the evidence adduced by both the sides and the documents marked in the suit, was pleased to hold that defendant no.1 failed to prove that she enjoyed portion of land in R.S. No.642/2 shown as PQR in

Ex.C2-plan with absolute rights but not with permission of plaintiff, and so taking advantage of absence of plaintiff, defendant no.1 encroached the said PQR portion in Ex.C2. Having analysed the entire evidence on record, the first appellate court decided the factual aspects with regard to situation of the disputed portion of the land. It is also held that the defendant no.2 did not perfect any title over the subject land by way of adverse possession. There is also evidence with regard to encroachment made by defendant no.1 in respect of land shown as PQR portion in Ex.C2. Having dealt with elaborately all the aspects, the first appellate court was pleased to partly decree the suit insofar as the land shown as PQR portion in Ex.C2. The findings of the first appellate Court are not shown to be perverse or not based on record.

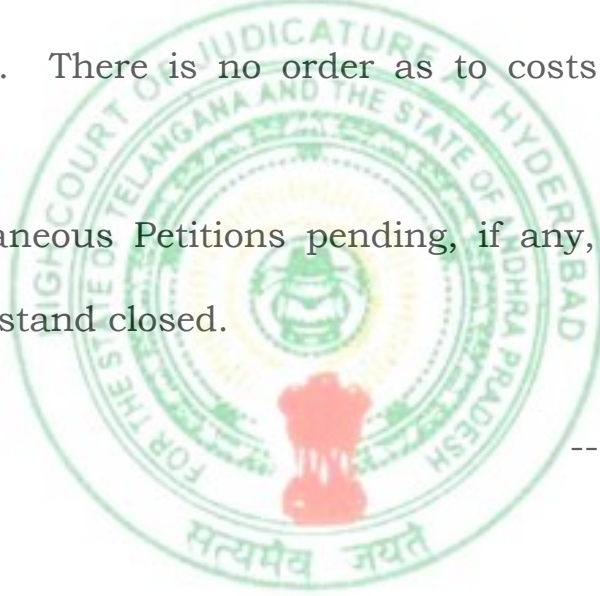
13. As regards the appreciation of the evidence on record is concerned, the first appellate court dealt with all the aspects in right perspective, and neither any inadmissible evidence is admitted, nor any admissible evidence was not acted upon, by the first appellate court. While partly decreeing the suit, the first appellate court gave elaborate reasons. The findings of the first appellate court 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 question of law is only

on factual aspects. 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 in the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

14. In the result, the Second Appeal is dismissed, confirming the judgment and decree dated 07.09.2000 in Appeal Suit No.130 of 1995 on the file of the Senior Civil Judge, Amalapuram. There is no order as to costs of the Second Appeal.

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

07.08.2018
DRK



(Dr.SA, J.)

THE HON'BLE DR JUSTICE SHAMEEM AKTHER



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