

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 149 OF 2000

JUDGMENT:

1. The Second Appeal is directed against the judgment and decree dated 01.11.1999 in Appeal Suit No.24 of 1994 on the file of the Additional District, Hindupur, whereby the judgment and decree dated 29.04.1994 in Original Suit No.11 of 1989 on the file of the Subordinate Judge, Penukonda, dismissing the suit filed by the appellant/plaintiff for perpetual injunction restraining the defendant from interfering with plaintiff's possession and enjoyment of the plaint schedule lands, were confirmed.

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

3. While admitting the Second Appeal filed by the plaintiff, this Court framed the following substantial questions of law.

a) Having allowed the appellant to adduce additional evidence, whether the lower appellate court acted legally in not even adverting to the same at the time of disposal of the appeal ?

b) In a suit for permanent injunction, whether the courts below acted legally in dismissing the suit even though the documents filed on behalf of the appellant clearly show that he is in possession of the property as on the date of filing of the suit ?

c) When the documents are marked and taken in evidence and when there is no dispute with regard to the identity of the property, whether it is still obligatory on the part of the plaintiff to examine witnesses to prove the identity of the property ?

4. To adjudicate the *lis*, it is necessary to refer to admitted and disputed facts.

(a) The plaintiff filed the suit stating that defendant is his brother. Plaintiff, defendant and their father Chandrappa divided their properties by metes and bounds in April, 1979. Their family had Ac.13.01 ½ cents of land in survey No.497-3 of K.Locherla. Plaintiff got suit schedule property to his share, and the rest of the property fell to defendant and their father. After partition, plaintiff took possession of his share, constructed a hut in item no.4 of the suit schedule property, and was living in it. In item No.4, he also got dug a trial pit and a bore well, and obtained electricity service connection for the bore well. Plaintiff also has a hayrick yard. There is a well in the joint plot of plaintiff and the defendant on north of item no.2 of suit schedule property. The plaintiff has half share in the well. The defendant and his father sold 1/3rd share in the said well under registered sale deed dated 27.6.1979. Plaintiff has been in possession and enjoyment of the suit schedule property in his own right. The defendant, without any manner of right, is threatening to trespass into the schedule property. Hence, the suit.

(b) The defendant filed written statement denying plaintiff averments and contending that survey no.497-3 admeasuring an extent of Ac.27.22 cents was subdivided long back and the revenue records also show the sub-divided survey numbers, and as such, there is no such survey No.497-3 out of which Ac.13.01 ½ cents belonging to the joint family of the plaintiff and the defendant. Rough sketch filed by the plaintiff does not show correct features. Location of the well as stated by the plaintiff is also not correct. In fact, the well is in the land of one Gudipati Chinna Venkataiah, and except that well, there is no other well for the family. Rough sketch filed by the defendant shows correct features of the schedule land. Plaintiff is not entitled to item No.4 of the suit schedule property. The said extent of Ac.0.25 cents is covered by survey No.497-3K and it belongs to the defendant exclusively. Plaintiff is not entitled to any share therein or in kottam (hut) constructed by the defendant or the trial pit for the bore well and the hayrick yard. They belong to the defendant. Description of western boundary to item No.4 of the suit schedule property is not correct. The tamarind tree belongs to the defendant and third parties. Plaintiff alone separated from the family, and the defendant and his father continued to be members of joint family. After death of his father, defendant became entitled to share of his father also. Plaintiff got plot nos.2, 4 and 5, all admeasuring Ac.4.00, to his share, and the rest of the extents belong to the defendant.

Defendant never objected enjoyment of the plaintiff over the said plots. Plaintiff is not in possession of plaintiff schedule properties. 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 plaintiff schedule land fell to the share of the plaintiff in the partition with defendant and his father ?

2) whether the plaintiff was allotted plots 2, 4 and 5 of the rough sketch filed by the defendant, as claimed by the defendant ?

3) whether the plaintiff is in possession of the plaintiff schedule property ?

4) whether the plaintiff plan is correct ?

5) Whether the plaintiff is entitled to the permanent injunction as prayed for ?

6) to what relief ?

6. During trial, on behalf of the plaintiff, P.W.1 was examined and Exs.A1 to A18 were got marked, and on behalf of defendant, D.W.1 was examined and Ex.B1 was got marked.

7. The trial Court, upon appreciation of the evidence on record, dismissed the suit without costs. Challenging the judgment and decree of the trial Court, the plaintiff preferred A.S. No.24 of 1994 before the Additional District Judge, Hindupur. During pendency of the first appeal, as per order dated 26.10.1999 in I.A. No.74 of 1999, P.W.1 was recalled,

further examined-in-chief and cross and Exs.A19 to A21 were got marked. Vide the impugned judgment and decree, the first appellate court dismissed the appeal confirming the judgment and decree of the trial Court. Challenging the same, the present Second Appeal has been preferred by the plaintiff.

8. Heard the learned counsel for the appellant/plaintiff, the learned counsel for the respondent/defendant and perused the record.

9. Learned counsel for the appellant would contend that both the courts below erroneously pleased to dismiss the suit filed for perpetual injunction against the defendant, who is brother of the plaintiff; that there are documents to show possession of the plaintiff over the suit schedule property; that there is also clear identification of the suit schedule property; that the findings of the courts below are perverse, and hence, he prays to set aside the judgments of both the courts below and decree the suit.

10. On the other hand, learned counsel for the respondents contended that both the courts below recorded a clear finding with regard to entitlement for their share and the so-called partition between the parties to the litigation, and that no substantial question of law arises as contended by the plaintiff, and there are no grounds to disturb the concurrent

findings arrived at, by both the courts below on factual aspects, and ultimately, prayed to dismiss the Second Appeal.

11. In view of the submissions made by both the parties, the point that arises for consideration is whether any substantial question does arise for determination and what should be the result of the appeal.

12. 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.

13. In order to decree a suit for permanent injunction, the plaintiff has to establish that he was in possession and enjoyment of the suit properties by the date of the suit. A perpetual injunction is granted after a final determination of the rights of the parties. It is made at the determination of the suit for giving effect to, and protecting rights, of the party entitled thereto. There must be violation of an enforceable right and the violation must be of a substantial character. A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of plaintiff, whether expressly or by implication. The legal obligation may arise from infringement of plaintiff's right to, or enjoyment of, schedule property. In other words an injunction will be granted if it is the only means of enforcing a right.

14. The plaintiff filed the suit for perpetual injunction against the defendant who is his brother, in respect of the suit schedule property, situated at K.Locherla village of Anantapur district. It consists of 4 items. There is no dispute with regard to item nos. 1 to 3 of the suit schedule property. Defendant contended that the plaintiff was allotted plot no.2, 4 and 5 of the rough sketch map (Ex.B1) filed by him. The defendant specifically denied that item no.4 of the suit schedule property admeasuring Ac.0.25 cents in survey

No.497-3 belongs to plaintiff, and contended that the said item no.4 did not fall to the share of the plaintiff in the family partition and hence, plaintiff is not entitled to perpetual injunction in respect of item no.4 of the suit schedule property.

15. To substantiate the case of the plaintiff, he got examined himself as P.W.1 and got marked Exs.A1-rough sketch; Exs.A2 and A.3-receipts issued by Penukonda Co-operative Bank; Exs.A.4 to A.6-cist receipts; Ex.A7-registration copy of sale deed dated 27.6.1979; Ex.A3-enumeration card; Ex.A9-bunch of receipts for payment of electricity charges; Exs.A10 and A.14-electricity cards; Exs.A11 to A13, A.15-electricity demand bills; Ex.A16-copy of notice; Ex.A17-household supply card and Ex.A18-electricity pass book. Except the self-serving statement of plaintiff as P.W.1, there is no other evidence to substantiate his case. More over, the partition is an oral partition between the parties to the litigation. It is also the case of the defendant that the plaintiff has also got some other land in the suit survey number. The documents filed by him viz. land revenue payment receipts, electricity bills, etc. do not pertain to item no.4 of the suit schedule property. The trial Court recorded a finding to that effect. The plaintiff mainly placed reliance on Exs.A8 to A18. Ex.A8 is enumeration card dated 08.01.1986 wherein name of the plaintiff and his wife were shown. Ex.A9, A.11 to A.13 and

A.15 are bunch of bills and receipt which show that the plaintiff paid electricity charges in respect of service connection 248. Except Ex.A8, the other documents relate to subsequent to institution of the suit. The land in dispute is Ac.0.25 cents. It is an agricultural land. There is no single document filed to show the possession of the plaintiff over the said land. Further, no independent person was examined to prove possession of the plaintiff over item no.4 of the suit schedule property. The other documents viz. sale deeds, etc. do not relate to item no.4 of the schedule property.

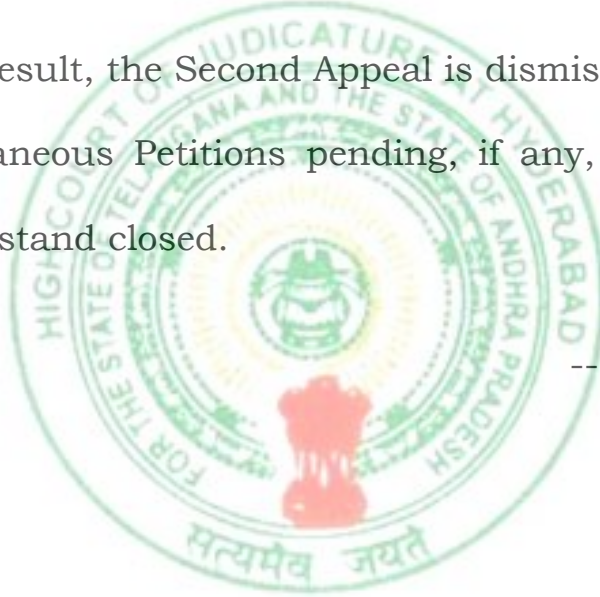
16. As per the evidence on record, father and two sons (plaintiff and defendant) partitioned Ac.13.01 ½ cents of land available at that point of time. An extent of Ac.1.00 was already given to the sister of the plaintiff and the defendant by name Mandala Naramma. Even if such is the case, the plaintiff getting Ac.6.25 cents of agricultural land to his share becomes doubtful. In a suit for permanent injunction, the plaintiff has to prove his possession as on the date of institution of the suit. There is no single document or oral evidence to substantiate the same. The documents filed by the plaintiff are not helpful to the plaintiff to substantiate his case. Only the factual aspects with regard to partition and exclusive possession of the plaintiff over item no.4 of the schedule property are disputed. The plaintiff did not prove the same. Both the Courts below analysed the entire evidence

on record and gave concurrent findings on the factual aspect of possession. 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. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellant/plaintiff to deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination. The Second Appeal is devoid of merit and is liable to be dismissed.

17. In the result, the Second Appeal is dismissed. No costs.

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

02.07.2018
DRK



(Dr.SA, J.)

THE HON'BLE DR JUSTICE SHAMEEM AKTHER



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