

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.348 of 2000

JUDGMENT:

The second appeal is filed by one A. Veerabhadra Rao, sole defendant in O.S.No.1579 of 1989 on the file of I Additional District Munsif, Visakhapatnam. It was the suit filed by the 3 plaintiffs, who are the second appeal respondents for the relief of declaration that the defendant is the encroacher of plaintiff's plan red marked site of the plaintiffs by construction of staircase and digging well therein which are to be removed and the plaintiffs be given vacant possession so also for relief of declaration and possession after removal of the constructions. The sole defendant contested the suit and ultimately it was ended in dismissal by the judgment and decree dated 14.08.1996 and the unsuccessful plaintiffs maintained AS.No.36 of 1997 on the file of I Additional District Judge, Visakhapatnam, where the learned I Additional District Judge allowed the appeal of the plaintiffs by decreeing the suit as prayed for setting aside the trial Court's dismissal judgment and decree and in directing the defendant to deliver possession of the property to the plaintiffs after removing the staircase constructed therein and after closing the well dug therein by granting four months time. The plaintiff's schedule property is mentioned as an extent of 20 square yards bounded by East-house of K.Appalakonda 20 feet, West-15 feet road of 5 feet, North-Gadda 60 feet and South-defendant's house 60 feet.

2. It is aggrieved thereby the present second appeal filed with contentions in grounds of appeal by mentioning as involved substantial questions of law that the lower appellate Court reversal

decree and judgment of the trial Court's dismissal of the plaintiffs suit claim, by decreeing the same for declaration for vacant possession by removal of constructions is contrary to law, weight of evidence, probabilities of the case and with no basis to say Ex.B2-sale agreement is not genuine and suspicious or collusion brought into existence with Appala Raju vendor of Exs.A1 and B2 despite the trial Court was perfectly right also in relying on Ex.A2 and dismissal of the plaintiffs suit and the learned District Judge committed irregularity in rejecting the evidence of DWs.1 to 3 even nothing elicited from their cross examination by plaintiffs much less in relation to Ex.B2 even and the conclusions of the lower appellate Court are in ignorance of relevant and based on irrelevant considerations including on genuineness of Ex.B2 for the reason even plaintiffs failed to take steps to call for the register of the stamp vendor who sold stamp paper on which Ex.B2 was scribed and plaintiffs did not filed rejoinder denying the execution of Ex.B2 and plaintiffs did not produced any evidence that the land sold to him by Appala Raju under Ex.A1 was by delivery of possession of 83 square yards. The lower appellate Court failed to see that the plaintiffs claimed ownership and recovery of possession only for 23 square yards in which staircase and well of the defendant in existence and even defendant denied plaintiffs right and ownership therein since said extent was sold to him by Appala Raju under Ex.B2 which is prior to Ex.A1 obtained from Appala Raju by plaintiffs and defendant even proved Ex.B2 and plaintiffs could not disprove said evidence through DWs.1 to 3. The lower appellate Court did not consider significance of the agreement for sale does not confer right under Ex.B2 on defendant

and as to Appala Raju could have sold 83 square yards under Ex.A1 after execution of Ex.B2 sale agreement for 23 square yards and in view of the property of right created under Section 48 of Transfer of Property Act to the defendant what Appala Raju could sell is for remaining and not 83 square yards under Ex.A1 that was completely over looked by the lower appellate Court despite defendant proved the protection under doctrine of part performance pursuant to Ex.B2 of their continuing in possession pursuant to the agreement and there is nothing to suspect Ex.B2 or entitlement under Section 53-A of Transfer of Property Act therefrom and with no ground to reverse the trial Court's dismissal judgment and to decree the plaintiffs suit for the lower appellate court and at best to say if at all under Ex.A1 extent of the land the plaintiffs was put in possession by Appala Raju was for 60 square yards after excluding 23 square yards sold under Ex.B2 possessory sale agreement by Appala Raju to defendant and thereby sought for allowing the second appeal by its admission by setting aside the lower appellate court's reversal decree and judgment and to confirm the trial Court's dismissal decree and judgment.

3. Though the second appeal was admitted on 03.07.2000 by mentioning appeal ground Nos.7, 8 & 10 involve substantial questions of law without formulation of the substantial questions of law contemplated by Section 100 CPC, this Court on 27.03.2018 from the involvement of substantial questions of law and after hearing formulated the following:

1) Whether the defendant is a bonafide purchaser for value of the plaint schedule property of 23 square yards under Ex.B2 from one Appala Raju and the plaintiff has no title over the

property as part of 83 square yards including that in survey No.124 purchased from said Appala Raju under Ex.A1?

2) Whether the lower appellate Court reversal judgment setting aside the dismissal of the plaintiff suit claim by the trial Court and allowing the appeal for recover of possession is unsustainable and outcome of non-consideration of the material facts and without formulating the required points for determination for giving findings with reasons thereunder contemplated by Order 41 Rule 31 CPC?

3) To what result?

4. Heard both sides and in the course of hearing, the learned counsel for the appellant/defendant of the second appeal having reiterated the points from the grounds urged and also pointed out that the lower appellate Court did not apply even Order 41 Rule 31 CPC by formulating points for consideration to answer by assigning reasons on the scope of appeal lis and thereby the appeal judgment is liable to be set aside. The learned counsel for the plaintiffs/respondents supported the reversal decree and judgment of the lower appellate Court.

5. The case of the plaintiffs is that they purchased 83 square yards of vacant site in survey No.124 covered by Ex.A1 sale deed dated 14.06.1982 from Appala Raju to the south of the said site the defendant is having site and thereafter house of the plaintiffs are there and on the west of those houses there is 15 feet road. Defendant constructed his house in the western portion of his house site and left vacant site in eastern site. The defendant constructed staircase on the North West corner and dug well on North East corner by making believe the plaintiffs of constructed

house with staircase and dug well within his site. When owners of the house in the row took measures of their sites, it came to light of the staircase constructed and well dug by the defendant is by encroachment of plaintiffs site, which is in the plaint schedule property and when questioned by plaintiffs, defendant chosen to give evasive answers saying the encroachment is negligible and small. The notice of the plaintiffs to the defendant dated 15.10.1989 to remove the staircase and the well not meted compliance but for false reply by defendant dated 01.11.1989.

6. The written statement of the defendant is that the vendor of the plaintiffs was having site of 83 square yards to the North of the defendant site and the question of purchase of 83 square yards of the plaintiffs does not arise for said vendors not having 83 square yards of site in that survey No.124 from Y.Appala Raju, Gajuwaka Gram Panchayat formed road in the alleged site purchased by the plaintiffs and constructed cement concrete drainage to the North of the defendant's property which is running from East to West, thereby the plaint plan measurements are incorrect. The defendant has total site of 212 square yards and not 189 square yards shown in the plaint plan and the allegation of defendant constructed staircase and dug the well in the recent past to the date of the suit is not correct for those have been in existence for more than 3 years back and plaintiffs are well aware of said construction of staircase and well dug and having kept quiet, they cannot maintain the suit claiming encroachment and the suit is not bonafide, but to harass the defendant if possible and to grab the site of the defendant if possible for the reason vendor of the plaintiffs sold 23 square yards of vacant site to the defendant

under agreement of sale dated 18.09.1980 and since then the defendant has been in possession and enjoyment having dug the well and constructed the staircase and suit is liable to be dismissed.

7. The issues framed by the trial Court were whether the plaintiffs are entitled to the relief of declaration and to the consequential relief of vacant possession prayed for and to what result.

8. Besides the 1st plaintiff-PV Raju as PW.1 one K.Lakshmipathi Rao was examined as PW.2 and placed reliance upon Exs.A1 to A3 i.e., sale deed dated 14.06.1992, office copy of legal notice and reply respectively of October/November 1989 and for the defendant himself examined as DW.1 cause examined DWs.2 & 3 and placed reliance on Exs.B1 to B6 viz., Ex.B1-sale deed of 1979, Ex.B2-sale agreement of 1980, Ex.B3-sale deed which is source of title which is vendor of Ex.B2 and Ex.A1 by name Appala Raju, Ex.B4-site plan, Exs.B5 & B6 house tax receipts of January 1987 and March 1989. The trial Court from said evidence and after hearing in dismissal of the suit observed that the defendant purchased 189 square yards site under original of Ex.B1 sale deed dated 08.12.1977 in S.No.124 and patta No.15 not in dispute and towards south side there is house of 3rd plaintiff and thereafter house of 2nd plaintiff and 1st plaintiff respectively as also deposed by the defendant as DW.1 and as described in the plaint plan besides the undisputed fact of to the west there is 15 feet road. Y.Appala Raju was owner of 83 square yards in S.No.124 which he purchased under Ex.B3 sale deed dated 14.02.1978 from its owner also not in dispute. Plaintiffs claim

purchase of said 83 square yards under Ex.A1 sale deed of 1982 June from Appala Raju whereas the defendant claims purchased of part of it under Ex.B2 possessory sale agreement from said Appala Raju on 18.09.1980. The existence of staircase and the well of the defendant is there not in dispute and there is also no dispute about plaintiff schedule northern boundary is gadda.

9. The contention of plaintiffs is defendant having 189 square yards under Ex.B1 sale deed is in possession of 212 square yards by encroachment of remaining 23 square yards and by construction of stair case and well therein, which is the plaintiff schedule property and shown in the plaintiff plan as an encroachment.

10. The contention of the defendant is besides Ex.B1 purchase of 189 square yards, he also purchased under Ex.B2 possessory sale agreement of 23 square yards from Appala Raju in 1980 and since then while in possession dug the well and constructed the staircase.

11. PW.1 in his evidence deposed and it is also suggested to DW.1 from cross examination of said sale agreement Ex.B2 is recently created one of 1989-90 after filing of the suit and with antedate and in collusion with said Appala Raju though Appala Raju by then has no property for whatever is 83 square yards site sold to the plaintiffs covered by Ex.A1 registered sale deed dated 14.06.1982 and defendant is encroacher and the encroachments are to be removed and vacant possession to be delivered same is also the suggestion in the cross examination of DWs.1 to 3 by plaintiffs. The trial Court observed in relation to said contention of Ex.B2 sale agreement as created one with antedate. The stamp

vendor is of Amruthapuram and neither of Visakhapatnam and nor of Gajuwaka and if at all purchased under Ex.B2 there is no meaning in not obtaining sale deed at that time, as earlier for 189 square yards obtained in 1977, Ex.B1 and thereby at least after the so called sale agreement dated 13.09.1980. The trial Court observed that even stamp vendors available at Gajuwaka and Visakhapatnam, purchase of stamp their stamp vendor of Amruthapuram no way fatal much less give any suspicion in the transaction therefrom. Even the Ex.B2 agreement stamp shown purchased in the name of defendant by the vendor Appala Raju who purchased that no way leads to suspicion. Even to say that Ex.B2 is created after filing of the suit with antedate, there is no such version in the evidence of PW.1 or his plaint much less to belie Ex.B2 with reference to evidence of DWs.1 to 3 and of whom DWs.2 & 3 are the attestors to Ex.B2 who deposed of Appala Raju scribed the Ex.B2 agreement and signed as executant and they attested and same not in dispute much less even by any worth suggestion but DWs.2 & 3 the mere fact of DWs.1 & 3 belongs to same caste no way belie their evidence particularly of DW.3. The plaintiffs did not even cause summon the stamp vendor register of the stamps sold for Ex.B2 sale agreement with antedate in 1980 if at all to dispute genuineness or to say the agreement antedated even the stamp vendor appears died register would be available with register office and in the absence of which, there is nothing to presume contrary to the appellant contends of the purchase of stamp for Ex.B2 and evidence of Dws.1 to 3 showing the stamp was purchased on 13.09.1980 of the sale agreement dated 18.09.1980 and serial No.1748. Ex.B3-reply notice dated

04.11.1989 cause issued by the defendant to the plaintiffs for Ex.A2 legal notice dated 15.10.1989 there is no mention of existence of Ex.B2-sale agreement but for stated by defendant of he is the owner and in possession of 212 square yards and the staircase and well are within his site. There is no evidence of possibility of collusion between Appala Raju vendor of plaintiffs under Ex.A1 sale deed of 14.06.1982 with defendant for creating Ex.B2 possessory sale agreement dated 18.09.1980 with antedate or securing of or making use of stamp with old one or antedate, much less in considering of relationship between the plaintiffs and Appala Raju or other probability to said contention of plaintiffs. PW.2 what deposed of one day 1st plaintiff complained to him about encroachment and when he questioned defendant, defendant agreed for cause measuring of properties and PW.2 and other relatives when cause measured found the encroachment of 2x60 feet site of the plaintiffs by defendant and admitted and agreed for purchase for Rs.15,000/- and they waited for three months however he did not come forward. In fact said version of PW.2 is neither borne by legal notice or plaint averments or their evidence to PW.1. Ex.B5 building fee receipt was dated 27.01.1987 and building tax receipt-Ex.B6 was 21.03.1989, so it shows the building was constructed during 1987-88. What the notice and plaint speaks of staircase constructed and well dug subsequent to house constructed by defendant whereas the case of the defendant is that the staircase constructed well dug along with the house and at the same time. He deposed of legal notice Ex.A2 was given 4 years after staircase was constructed so also the written statement contest. The plaintiffs cannot rely on the weakness of the

defendant for winning or losing his case of own strength and in view of the above plaintiffs failed to prove the case and not entitled to the relief of declaration and vacant possession by removal of the construction. The lower appellate Court reversal judgment of the trial Court observed that Ex.A1 sale deed dated 14.06.1982 under which appellants purchased site and if co-related with Ex.B1 property of the defendant dated 18.02.1977 to the North of the defendant's site and plaintiffs site is situated and plaintiffs alleged that defendant encroached up to 3 feet width of site and constructed staircase and dug well. The burden is on the defendant to prove the said 23 square yards site covered by the plaint schedule was that of the defendant. The defendant established his purchase under Ex.B2 sale agreement is genuine as if one perused the source of title of Appala Raju vendor of Ex.A1 and Ex.B2 dated 14.02.1978 it is only for 83 square yards to the North of the defendant's site and thereby Appala Raju cannot sell to anybody more than 83 square yards and plaintiffs contention of under Ex.A1 sale deed dated 14.06.1982 he sold entire 83 square yards to plaintiffs and as per Ex.B2 possessory sale agreement of defendant dated 18.09.1980 earlier to Ex.A1 if really Appala Raju sold 23 square yards to the defendant under possessory sale agreement prior to execution of Ex.A1 sale deed for 83 square yards it must be only for 60 square yards and 83 square yards itself is a small extent to construct house and no person would divide into portions of 23+60 square yards and sale respectively as a circumstance to disbelieve Ex.B2 and to believe of Ex.A1. It is also pointed out that in Ex.A3 reply dated 04.11.1989 there is mention of existence of Ex.B2 agreement dated 18.09.1980 if at all

in existence, which omission is material to judge the genuineness of Ex.B2. It is also observed the possessory sale agreement Ex.B2 cannot create rights in favour of the defendant for subsequently Appala Raju sold under Ex.A1 sale deed the 83 square yards to plaintiffs and the defendant did not obtained any sale deed from Appala Raju or his legal heirs to enforce that was called possessory sale agreement Ex.B2 dated 18.09.1980. It is said reversal judgment impugned in this second appeal.

12. Here the lower appellate Court did not consider one important aspect of the original source of title for the 83 square yards of Appala Raju is Ex.B3 admittedly dated 14.02.1978 and what was sold under possessory sale agreement dated 18.09.1980 was 23 out of 83 square yards and the original document was handed over to the defendant pursuant to Ex.B2 sale agreement which was exhibited as Ex.B3. The defendant is not disputing plaintiffs purchase from Appala Raju under Ex.A1 sale deed dated 14.06.1982 which is subsequent to Ex.B2 possessory sale agreement dated 18.09.1980 and what the defendant contest is what all remained after possessory sale agreement for 23 square yards under Ex.B2 out of Ex.B3 for Appala Raju to sell to the plaintiffs under Ex.A1 is only 60 square yards out of 83 square yards. If at all the entire property sold under Ex.A1 dated 14.06.1982 the voucher sale deed covered by Ex.B3 of source of title of Appala Raju could have been obtained by the plaintiffs with Ex.A1 that is crucial one for what all under Ex.B3 if at all sold under Ex.A1 the document could have been taken by plaintiffs, there is no explanation for it. Apart from the Ex.B2 possessory sale agreement dated 18.09.1980 the stamp shown purchased in

the name of defendant by Appala Raju the vendor on 13.09.1980 from Amruthapuram stamp vendor. There is nothing improbable much less as one of the circumstances to disbelieve the transaction even stamp vendors available at Gajuwaka that too when plaintiffs did not take any steps to call for the stamp vendors original register if the stamp was not purchased. Even to believe any collusion for creating Ex.B2 subsequent to Ex.A1 with antedate when no property for what was sold under Ex.A1 what contend for Appala Raju under Ex.B3, where the question of Appala Raju possessing the original sale deed Ex.B3 without taking the same as voucher sale deed by plaintiffs that is also shows no ingenuity in Ex.B2. Thus what all under Ex.B2 possessory sale agreement entered by Appala Raju for 23 square yards out of 83 square yards covered by Ex.B2 source of title what could be sold subsequently under Ex.A1 is 60 square yards and even mentioned as 83 square yards, beyond 60 square yards remained Appala Raju cannot confer title that too when the earlier possessory sale agreement was from under Ex.B2 and the possessory sale agreement not canceled and under the possessory sale agreement even protection under Section 53-A of Transfer of Property Act of doctrine of part performance as shield available when ready and willing to perform what is remained under the contract for sale even the enforceability for specific performance barred by limitation under Article 54 of the Limitation Act no such bar to the protection under Section 53-A of Transfer of Property Act and the lower appellate Court did not consider the same in its observation at Para 8 of the appeal judgment contrary to it though the law in this regard is well settled including from the expression

of the Apex Court in **Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi (D) by LRs**¹ as law of limitation applicable only against enforcing remedy and not to bar the plea of protection under Section 53-A of Transfer of Property Act defense. The Apex Court in **State of Andhra Pradesh Vs. Mohd. Ashrafuddin**² observed in an agricultural land reforms proceedings referring to Section 2(14) of the Act 1973 on the scope of Section 53-A of Transfer of Property Act of the transferee came into possession pursuant to the sale agreement even no valid sale deed as document of title obtained from the ownership revived with the respondent transferor the possession pursuant to the agreement cannot be treated as invalid or illegal for the transferee entitled to remain in possession as a shield of the protection under Section 53-A of Transfer of Property Act. Once such is the case, the remedy open to the plaintiffs is to cancel the possessory sale agreement if at all covered by Ex.B2 liable for cancellation by stepping into the shoes of Appala Raju their vendor under Ex.A1.

13. Having regard to the above and in the result, the reversal judgment of the lower appellate Court is set aside to the above extent and it is made clear that unless the possessory sale agreement covered by Ex.B2 which could not be proved as false or collusive or created, cancelled the protection of the agreement holder, the defendant is available as shield even remedy for specific performance barred by Article 54 of Limitation Act and unless the plaintiffs by stepping into the shoes of their vendor under Ex.A1 Appala Raju take steps to cancel the Ex.B2-sale agreement they cannot dispossess the defendant and recover possession, much

¹ 2002 (3) SCC 676

² AIR 1982 SC 913

less vacant by removal of staircase and well by kept open any such remedy.

14. Accordingly and in the result, the appeal is allowed in part.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 05.06.2018
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