

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.257 of 2012

JUDGMENT:

This appeal is filed by the plaintiff, under Section 100 of CPC, assailing the judgment and decree dated 14.9.2010 passed in A.S. No.2 of 2009 on the file of the Court of III Additional Senior Civil Judge, Kakinada, wherein and whereby the judgment and decree dated 16.6.2005 passed in O.S.No.649 of 1998 on the file of the Court of Principal Junior Civil Judge, Kakinada, dismissing the suit filed by the plaintiff for declaration and consequential mandatory injunction, was upheld.

2. The parties will hereinafter be referred to as they were arrayed before the trial Court, to avoid confusion. During the pendency of the first appeal, first defendant died and fifth defendant, who is his wife, came on record as his legal representative.

3. The facts leading to filing of the present appeal are, in nutshell, as follows: The plaintiff and second defendant are sons of third defendant. The suit schedule property originally belongs to one G.Yekabu, who is the father of third defendant. The plaintiff, defendant Nos.2 and 3 got the suit schedule property situated within Samalkot Municipal area of East Godavari District, under a settlement deed dated 18.9.1961; ever since they have been in possession and enjoyment of the same. First defendant created a document dated 03.10.1997 in his favour to defeat the legal rights of plaintiff and defendant Nos.2 and 3. First defendant, without any right whatsoever, has encroached red-marked portion of the property, as shown in the plaint plan, when the plaintiff and

defendant Nos.2 and 3 were not in Samalkot. Plaintiff's sister filed O.S.No.359 of 1998 against first defendant seeking perpetual injunction. Inadvertently, the sister of the plaintiff mentioned in plaint that the red-marked portion of the property belongs to first defendant. The plaintiff is constrained to file the suit for declaration and consequential relief of recovery of possession of the suit schedule property. Hence, the suit.

4. First defendant filed written statement denying all the averments made in the plaint *inter alia* contending that third defendant alone is the owner of part of the suit schedule property and the plaintiff and second defendant have no right over the suit schedule property. The plaintiff is not entitled to file the suit for declaration and recovery of possession of the suit schedule property. The schedule filed by the plaint is not correct. The sister of the plaintiff filed O.S.No.359 of 1998 seeking perpetual injunction against this defendant by admitting that this defendant is owner of the suit schedule property herein. He filed O.S.No.1275 of 1997 on the file of the Court of I Additional Junior Civil Judge, Kakinada and obtained injunction order against the third defendant herein restraining her from interfere with the construction activities. Suppressing the said fact, the sister of the plaintiff has filed the suit and obtained injunction order against this defendant. The Advocate Commissioner appointed in O.S.No.359 of 1998. Hence, the suit is liable to be dismissed.

5. Defendant Nos.2 to 4 remained *ex parte*.

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

1. Whether the plaint plan and schedule are not correct?
2. Whether the plaintiff has got title to the schedule property?
3. Whether the plaintiff is entitled for mandatory injunction as prayed for?
4. To what relief?

Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.5 were marked. On behalf of first defendant, D.W.1 was examined and no document was marked.

7. Basing on oral, documentary evidence and other material available on record, the trial Court dismissed the suit on the ground that the plaintiff failed to prove his title over the suit schedule property. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiff preferred the appeal. The first appellate Court, after re-appraising the oral and documentary evidence available on record, without being influenced by the findings of the trial Court, arrived at a conclusion that the plaintiff failed to prove his title over the suit schedule property and consequently dismissed the appeal. The unsuccessful plaintiff preferred the second appeal.

8. Sri E.V.V.S. Ravi Kumar, learned counsel for the appellant submitted that the trial Court has not properly considered the documentary evidence available on record more particularly Ex.A.6 settlement deed. He further submitted that the findings recorded by the Courts below are based on the evidence; therefore, they are liable to be set aside. **Per contra**, Sri V.V.L.N. Sarma, learned counsel for the fifth respondent vehemently submitted that the findings recorded by the Courts below are in accordance with the provisions of the Indian Evidence Act. He further submitted that this Court shall not lightly interfere with the concurrent findings of

fact recorded by the Courts below, unless there is any error apparent on the face of the record.

9. The substantial questions of law urged by the learned counsel for the appellant are as follows:

1. Whether the Courts below misconstrued the recitals of Ex.A.6 settlement deed dated 18.9.1961?
2. Whether the findings recorded by the Courts below are perverse?

10. Both the questions are interlinked with each other; hence, this Court is inclined to answer both the questions simultaneously in order to avoid recapitulation of facts and evidence.

11. The plaintiff and second defendant are sons of third defendant. Third defendant is the daughter of one G.Yekabu. It is the case of the plaintiff that late Yekabu executed Ex.A.6 settlement deed dated 18.9.1961, by creating life interest in favour of third defendant, and vested remainder in favour of the plaintiff and second defendant. It is the case of first defendant that he is the owner of the suit schedule property. First defendant has taken a specific plea in the written statement that the plaintiff created Ex.A.6 settlement deed. For one reason or the other, plaintiff did not choose to examine one of the attestors of Ex.A.6 settlement deed. In such circumstances, it is not safe to place reliance on Ex.A.6. Merely because Ex.A.6 is 30 years old document, that itself will not dispense with its proof, in view of Section 68 of the Indian Evidence Act.

12. It is a settled principle of law that in a suit for declaration, the plaintiff has to establish his case by preponderance of probabilities. It is needless to say that the plaintiff is not entitled

for the relief of declaration basing on the latches and lacunae, if any, on the part of defendant. The sister of the plaintiff filed O.S.No.359 of 1998 against first defendant for perpetual injunction in respect of the suit schedule property. In the said suit, the sister of the plaintiff categorically admitted that first defendant herein is the owner of the suit schedule property. As rightly pointed out by the learned counsel for the appellant-plaintiff, any concession made by the sister of the plaintiff, in O.S.No.359 of 1998, is not binding on the plaintiff. Moreover, the plaintiff is not a party to O.S.No.359 of 1998. At the same time, the Court shall not lose sight of the factum of filing of O.S.No.359 of 1998 by the sister of the plaintiff against first defendant. If the sister of the plaintiff is not having any right whatsoever in respect of the suit schedule property, why she filed O.S.No.359 of 1998 against first defendant is not properly explained by the plaintiff.

13. The suit schedule property is an extent of 85.56 Sq.yards. During the pendency of the first appeal, an Advocate Commissioner was appointed to inspect the suit schedule property and submit report. The Advocate Commissioner was examined as C.W.1 and the report filed by him was marked as Ex.C.1. A perusal of the record reveals that the Advocate Commissioner has not measured the extent of the land covered under Ex.A.6. There is no mention in the Advocate Commissioner's report that the suit schedule property is the part and parcel of the property covered under Ex.A.6 settlement deed. The record further reveals that first defendant constructed a house in the red-marked portion as shown in the plaint plan. As per the testimony of P.Ws.1 to 3, first defendant constructed the house when plaintiff and defendant

Nos.2 and 3 were out of Samalkot. It is a matter of common knowledge that no one can construct a house within two or three days. It is not the case of plaintiff, that himself and defendant Nos.2 and 3 were not in Samalkot for a long time.

14. First defendant filed O.S.No.1275 of 1997 and obtained injunction order against third defendant. It is not the case of the plaintiff that there is no cordial relation between him and third defendant. In order to overcome the prevailing situation, the possibility of filing of the suit by the plaintiff cannot be ruled out completely. For the reasons best known, the plaintiff did not mention the factum of filing of O.S.No.1275 of 1997 by first defendant against third defendant.

15. It is the duty of the plaintiff to mention correct boundaries so as to enable the Court to pass a decree accurately. The plaintiff, while seeking the relief of declaration and consequential mandatory injunction, ought to have mentioned the correct boundaries of suit schedule property. The boundaries mentioned in the plaint plan are not tallying with the boundaries mentioned in Ex.A.6. The boundaries mentioned in the plaint schedule are not tallying with the boundaries on ground, as per the Advocate Commissioner's report. There is ambiguity with regard to the extent and boundaries of the suit schedule property. When there is ambiguity in the case set-up by the plaintiff, certainly he is not entitled for the relief of declaration and the consequential mandatory injunction.

16. The trial Court as well as first appellate Court, basing on the material available on record, arrived at a conclusion that the

plaintiff failed to establish that he is the owner of suit schedule property. I am fully endorsing the finding recorded by the Courts below on that aspect.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. 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.

18. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the questions raised by the learned counsel for the appellant will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law in this appeal.

19. Hence, the second appeal is dismissed at the stage of admission. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 08.11.2018
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¹ (2010) 13 SCC 216