

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.731 OF 2000

JUDGMENT:

This Second Appeal is filed, by the unsuccessful plaintiffs, under Section 100 of C.P.C., assailing the judgment and decree dated 05.06.2000 passed in A.S.No.146 of 1998 and cross-objections on the file of the Additional District Court, Ongole, wherein and whereby the judgment and decree dated 07.09.1998 passed in O.S.No.97 of 1993 on the file of the Court of I Additional Junior Civil Judge, Ongole, partly decreeing the suit, was set aside and dismissed the cross-objections.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal, in nutshell, are as follows:

The plaintiffs filed O.S.No.97 of 1993 for declaration that Veddera community people of Chimakurthy Village perfected their title over the suit schedule property (which is shown as 'A2 and A3' in the plaint plan) by way of adverse possession, for recovery of possession of it after removing 'Q R' marked newly constructed wall and XX3 wall (which is shown in the Commissioner's plan) and for perpetual injunction restraining the defendants not to interfere with the suit schedule property. 'MNOP' vacant site is situated in Survey No.147 is a Gramakantam poramboke of Chimakurthy Village. About 60 years back it was occupied by the elders of Vaddera community and thereafter they constructed a

pacca building. There is only one entry to the building that is towards north and it is shown as 'E' in the plaint plan. The defendants without any right whatsoever occupied the suit schedule property. The first defendant filed O.S.No.511 of 1992 against the plaintiffs for perpetual injunction. Hence, the suit.

4. The first defendant filed a written statement denying all the averments made in the plaint *inter alia* contending that she purchased 'A2 and A3' marked site plus a house from defendant Nos.2 and 3 for Rs.20,000/- under a registered sale deed dated 24.09.1992. This defendant has been in possession and enjoyment of 'A2 and A3' marked site. The present suit is filed as a counter blast to O.S.No.511 of 1992 filed by the first defendant.

5. Defendant Nos.2 and 3 did not file written statement. Defendant No.5 filed a written statement and the same was adopted by defendant No.4. The case of defendant No.5 is that Survey No.147 of Chimakurthy Village is a Gramakantam poramboke and Vaddera community people of that village constructed a function hall in the 'A' marked site. They also left 'A2 and A3' site for their use. Defendant No.1 constructed a disputed wall and therefore, passage from the northern bazaar into 'A2 and A3' site is blocked. However, there is a small gap between the community hall building and the wall constructed by the first defendant at the southern side of the disputed land and it enables access to western road across the side canal. The Government granted patta in favour of one Chaluvadi Venkataswamy, son of Venkata Subbaiah on 29.04.1965 to an extent of 476 square feet in Survey No.147/3A, which is adjacent to patta land. Defendant

No.3 without any right sold the property to the first defendant. The plaintiffs submitted a petition for cancellation of the patta issued in favour of the father of third defendant. Hence, the suit may be dismissed.

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

1. Whether the plaintiff is entitled for declaration, possession and injunction as prayed for?
2. To what relief?

7. Before the trial Court, on behalf of the plaintiffs, PWs.1 to 3 were examined and no documents were marked. On behalf of the defendants, DWs.1 to 3 were examined and Exs.B.1 to B.12 were marked.

8. After full-fledged trial, the trial Court decreed the suit in part directing the first defendant to remove the constructions in 'A2 and A3' site including 'Q R' marked wall of the plaint plan and granted perpetual injunction directing the first defendant not to interfere with the passage. The trial Court dismissed the suit so far as the relief of declaration is concerned. The trial Court also dismissed the suit against defendant Nos.2 to 5.

9. Feeling aggrieved by the judgment and decree of the trial Court, the first defendant preferred A.S.No.146 of 1998 on the file of the Additional District Court, Ongole. Feeling aggrieved by the part of judgment and decree of the trial Court, the plaintiffs preferred cross-appeal in A.S.No.146 of 1998. The first appellate Court allowed A.S.No.146 of 1998 and dismissed the cross-appeal.

Hence, the unsuccessful plaintiffs preferred the present second appeal.

10. Heard the learned counsel for the appellants-plaintiffs and perused the material available on record.

11. The question of law urged by the learned counsel for the appellants is as follows:

“Whether the findings recorded by the first appellate Court are perverse and liable to be set aside?”

12. The following admitted facts can be culled from the pleadings of both parties:

The suit schedule property is situated in Survey No.147 of Chimakurthy Village, which is part of Gramakantam. Vaddera community people occupied the Gramakantam and constructed a function hall. The then Tahsildar issued a patta in favour of one Chaluvadi Venkataswamy to an extent of 476 square feet in Survey No.147/3A of Chimakurthy Village on 29.04.1965, which is adjacent to the Vaddera community function hall. The said Venkataswamy is father of the third defendant. Defendant Nos.2 and 3 sold the property in favour of the first defendant under a registered sale deed Ex.B.5 dated 24.09.1992. Ex.B.6 is the patta issued in the name of Venkataswamy. Ex.B.10 is the notice issued to Ch.Venkataswamy, father of the third defendant.

13. The first defendant filed O.S.No.511 of 1992 against the plaintiffs seeking perpetual injunction in respect of the suit schedule property. The trial Court decreed the suit in favour of first defendant and against the plaintiffs. For one reason or other, the plaintiffs did not choose to file an appeal challenging the

judgment and decree in O.S.No.511 of 1992. The judgment and decree passed in O.S.No.511 of 1992 became final and binding on the plaintiffs; therefore, the plaintiffs are not entitled to challenge the same in this second appeal.

14. The crucial question that falls for consideration is whether the plaintiffs are entitled for the relief of declaration on the ground that the first defendant purchased the assigned land under Ex.B.5-sale deed.

15. It is needless to say that the Government alone is the competent to cancel the patta and resume the land from the original patta holder. Admittedly defendant Nos.4 and 5 have not taken any steps to tack back the land allotted to late Venkataswamy. Unless and until Ex.B.5-registered sale deed dated 24.09.1992 is set aside by a competent Civil Court, the sale deed is legally enforceable. The plaintiffs did not seek the relief to declare Ex.B.5-sale deed dated 24.09.1992 as null and void. The plaintiffs without seeking such a relief are not entitled to challenge the validity of Ex.B.5 at the stage of second appeal. The trial Court has not framed an issue, whether the plaintiffs are entitled for the relief of mandatory injunction. The trial Court, without pleading and issue, directed the first defendant to remove the constructions in the suit schedule property. The finding recorded by the trial Court is not sustainable legally. The first appellate Court considered this aspect and allowed the appeal. The plaintiffs are not entitled to the relief of declaration basing on the laches or lacunae, if any, on the part of the defendants. The plaintiffs did not file even a single scrap of paper to prove that they are the

owners of the suit schedule property. The plaintiffs have taken a specific plea in the plaint that they perfected title to the suit schedule property by way of adverse possession. The plaintiffs have not taken a little bit care at the time of framing of the issues. The trial Court has not framed issues with regard to adverse possession. Mere pleading in the plaint would not amount to proof of the same. In the absence of framing of a specific issue, the Court cannot grant the relief of declaration that the plaintiffs perfected their title to the suit schedule property by way of adverse possession. During pendency of the appeal also, the plaintiffs have not taken any steps in this regard. The plaintiffs miserably failed to prove that they are the owners of the suit schedule property. Both the Courts below concurrently held that the plaintiffs failed to prove that they are the owners of the suit schedule property. The plaintiffs are not entitled for the relief of mandatory injunction without establishing their title over the suit schedule property. So far as the right of passage is concerned, as per the averments made in the written statement of defendant Nos.4 and 5, there is an other way to reach the Vaddera community function hall. In the cross-examination, PW.1 in unequivocal terms deposed that there is a road on the west of A, A1, A2 and A3 to reach the Vaddera community hall. There is no pleading in the plaint that the plaintiffs got easementary right over the alleged passage. The findings recorded by the first appellate Court are based on evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the first appellate Court are perverse.

16. 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."

17. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, this Court is of the considered view that there is no question of law much less substantial question of law involved in this appeal. Hence, the appeal is liable to be dismissed.

18. In the result, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 19.11.2018
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¹ (2010) 13 SCC 216