

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.2951 of 1999

JUDGMENT:

This appeal is filed by the unsuccessful plaintiff against the judgment and decree dated 24.08.1999 passed in O.S.No.27 of 1990 by the Senior Civil Judge, Vizianagaram.

2. This is a first appeal and for the sake of convenience, the parties are referred to the plaintiff and the defendants only.

3. The brief averments of the plaintiff's case are as follows:

a) The suit is filed by the plaintiff for declaration that the plaintiff temple is the absolute owner of the lands in item No.1 of the plaint schedule; that they are ryotwari lands but not poramboke and to direct the defendants to deliver the vacant possession of the same with trees after evicting the 'D-Form' patta holders and Swamy Ayyappa Seva Sangam, removing the road and also to determine the mesne profits in respect of item No.1 of the plaint schedule property from 09.03.1984 till the delivery by a separate proceedings and for interest on mesne profits and to correct the revenue records and also to declare that the plaintiff temple is the absolute owner of the lands in item No.2 of the plaint schedule and also for granting permanent injunction restraining the defendants and their servants from ever interfering with the

possession and enjoyment of the plaintiff in respect of item No.2 of the plaint schedule and for costs of the suit.

b) The plaintiff temple claims to be the owner of the lands described in the schedule having been gifted and endowed the same by late Sri Jayapal Kumarika Ammaseheba varu, Varanasi by a registered trust deed dated 21.06.1938. Since then, the plaintiff temple has been in exclusive possession and enjoyment of the same without any obstruction from anybody. Ryot passbook was also issued by the then Tahsildar, Vizianagaram Mandal in favour of the plaintiff temple on 06.06.1980. The then Tahsildar also recognized the title of the plaintiff temple in his verification report in ceiling case No.101 of 1975 under Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings), 1973. The Assistant Executive Engineer (R & B), National Highways, Vizianagaram addressed a letter dated 24.02.1986 to the Deputy Executive Engineer (R & B), N.H. Gajapathinagarm with a copy marked to the plaintiff temple stating that the land in item No.1 of the plaint schedule may be acquired under the Land Acquisition Act for the purpose of road.

c) The then Tahsildar sent an order of intimation to the plaintiff temple omitting the schedule lands stating that objections are to be filed before 06.12.1983. But, it was served on the plaintiff temple on 23.12.1983 i.e., after the expiry of time fixed for filing objections. Even then, the plaintiff temple put forward objections immediately on

24.12.1983 including the schedule lands in the order of intimation. But, the 2nd defendant/RDO, Vizianagaram gave an endorsement in R.C.No.2395 of 1986, dated 20.10.1986 to the effect that the schedule lands are poramboke lands but not ryotwari lands. The Government also issued "D-Form Patta" in respect of item No.1 of schedule lands to the landless poor in or about 23.12.1983, whose names and particulars are not known to the plaintiff temple. The Government also assigned some land in item No.1 to Swamy Ayyappa Seva Sangam for construction of Swamy Ayyappa temple. Therefore, D.Form patta holders and Sri Swamy Ayyappa Seva Sangam are in unauthorized possession and enjoyment of item No.1 of the plaintiff schedule lands and therefore, they are liable to pay mesne profits or damages from 23.12.1983 to the plaintiff temple.

d) The plaintiff temple also filed Writ Petition No.15982 of 1986 before this Court on 03.11.1986 with regard to deletion of the plaintiff schedule lands in the order of intimation and the said W.P. was disposed of on 03.06.1989 directing the plaintiff to institute a suit in civil court concerned within three months from the date of receipt of order and also suspended the order of intimation passed by the RDO, Vizianagaram for a period of three months. Therefore, the plaintiff got filed the present suit after issuing Section 80 CPC notice on 13.09.1989 to the defendants and the defendants received the same.

4. The 1st defendant filed its written statement, which has been adopted by defendants 2 & 3 contending as follows:

a) They contended that as per Revenue records, item No.1 of the suit lands measuring about Ac.2.80 cents is classified as 'Road Poramboke'. The lands mentioned in item No.2 of the suit schedule measuring about Ac.14.30 cents is classified as 'Daloma Tank' Poramboke. The plaintiff temple was never in enjoyment and in occupation of the land covered by item No.1 of the plaint schedule, as there are no traces of cultivation at any time as it is classified as 'Road Poramboke' according to final check operation fair adangal to an extent of Ac.1.30 cents. The said item No.1 of the plaint schedule is occupied by forming National Highway road, but the plaintiff temple has not claimed item No.1 by making a claim for compensation. The plaintiff also has not taken any action against the persons who occupied the other part of the land in the year 1965. Therefore, the plaintiff has no right in item No.1 of the plaint schedule land.

b) They further contended that in the land ceiling proceedings dated 20.06.1977 passed by the Primary Tribunal, Visakhapatnam, it is mentioned that item No.1 of the suits schedule is road margin on the ground, whereas item No.2 of the suit schedule is a tank vested in the Government and as such they are excluded from the

computation of the holding of the tenant of the plaintiff. Against that order, no appeal is preferred by the plaintiff.

c) As the suit lands were held to be poramboke lands by the Primary Tribunal, vide proceedings dated 20.06.1977 and the said proceedings between the Government and the plaintiff became final, as no appeal is preferred by the plaintiff it operates as *res judicata* as the present suit is filed for the same lands between the same parties and therefore, the present suit is barred by *res judicata*. They further contended that this suit is barred by limitation, as it is filed after lapse of three months period granted by this Court in W.P.No.15982 of 1986 and therefore, the present suit is not maintainable under law.

5. Based on the above pleadings, the following issues were settled for trial:

- i) Whether the plaintiff is having title to the suit property?
- ii) Whether the plaintiff is in possession of item No.2 of schedule property?
- iii) Whether the plaintiff is entitled for possession of item No.1 of plaint schedule?
- iv) Whether the suit is barred by *res judicata* in view of the judgment in land ceiling cases?
- v) Whether the suit is barred by limitation?
- vi) Whether the court fee paid is not correct?
- vii) Whether the civil Court has no jurisdiction to entertain this suit?
- viii) Whether the plaintiff is entitled for mesne profits?
- ix) To what relief?

6. For the plaintiffs, PWs.1 & 2 were examined and Exs.A.1 to A.18 were marked. For the defendants, DW.1 was examined and Ex.B.1 was marked.

7. The lower Court after considering the documentary and other evidence came to a conclusion that the plaintiff is not entitled to any of the prayers and dismissed the suit. It is this judgment and decree dated 24.08.1999 by which the suit is dismissed that is challenged in the present appeal.

8. This Court has heard Sri Gudapati Venkateswara Rao, learned counsel for the appellant/plaintiff and the learned Government Pleader for Appeals appearing for the respondents/ defendants.

9. It is the contention of the learned counsel for the appellant/plaintiff that the lower court erred in its discretion and did not consider the documentary evidence that is introduced. The learned counsel also argued vehemently that the lower Court made a mistake in ignoring the evidence of PW.1 who is the General Power of Attorney holder and is also having personal knowledge. The learned counsel also submitted that the lower Court wrongly rejected the entire documentary evidence that is filed including Ex.A.1- trust deed, which is over 30 years old. In addition, he also submits that the lower Court misconstrued the provisions of Section 14 (1) of the Limitation Act and wrongly dismissed the suit. In effect, the learned counsel submits that the entire

judgment and decree of the lower Court is incorrect on all the issues.

10. In reply thereto, the learned Government Pleader for Appeals appearing for the respondents/defendants pointed out that the suit is filed for a declaration of title of item No.1 and for directing the defendants to deliver the vacant possession of the land after evicting the people in occupation of the same. Similarly, for item No.2 the suit is also filed for declaration of title and for the permanent injunction. The learned Government Pleader pointed out that from the reading of the plaint itself, it is clear that item No.1 of the suit schedule property is in the occupation of the third parties and that is why, the prayer is made for delivery of vacant possession after evicting the D-form patta holders and Swamy Ayyappa Seva Sangam holders. The learned Government Pleader also pointed out that as the suit for declaration of title, the plaintiff must plead and prove his title to the property and that he would succeed on the strength of his title.

11. As the counsel argued on each of the issues; this Court also will proceed to analyze the submissions made in line with the issues. Issue Nos.1 & 2 were dealt with together by the lower Court. It is the case of the appellant that the plaintiff is the absolute owner of plaint schedule properties which were given to them through a registered trust deed of the year 1938, the certified copy of which is marked as

Ex.A.1. The learned counsel submits that since 1938 the plaintiff has been in possession and enjoyment of the property and he relied upon the adangals and other documents which are marked on his behalf. He also pointed out that in 1986 they have paid cist to the Government. Therefore, it is the contention of the learned counsel for the appellant that the trust deed read with other documents makes it very clear that the plaintiff has title and possession to the property. The learned counsel for the appellant also pointed out that to prove the said documents, he has examined PW.1, GPA holder. He submits that the evidence of PW.1 was wrongly rejected by the lower Court which held that as a GPA holder, he cannot give evidence. The finding of the lower court is vehemently attacked by the learned counsel for the appellant.

12. This Court finds sufficient force in the contention of the learned counsel for the appellant in the matter of the GPA holder's evidence. The GPA holder did not merely depose as GPA holder nor did he confine himself to the actions/evidence relating to the period after the GPA was issued. The GPA holder deposed stating that he has personal knowledge of the facts and circumstances case. His evidence also shows that he was personally involved in the matter. He clearly deposed that he knows the plaint schedule properties and that he has been raising vegetable crops in the said land. He also deposed that he knows the facts of the present case

from 1976-77. Therefore, his knowledge of the properties of the case is not merely confined to what he knows as a GPA holder. He has personal knowledge of the facts. In view of the judgments of the Hon'ble Supreme Court of India reported in ***Janki Vashdeo Bhojwani v. Indusind Bank Ltd.***¹ and ***Shankar Finance and Investments v. State of Andhra Pradesh***², this Court holds that the finding of the lower Court that the PW.1 was not competent to depose the facts is not correct. This Court holds that PW.1 is competent to depose in this case because of his personal knowledge and not because he being GPA holder. As a GPA holder he cannot 'depose' in place of the principal; but if he has personal knowledge he can definitely depose as a witness.

13. The larger issue that falls for consideration is whether the plaintiff proved his title and interest to the property. The learned Government Pleader strongly objects to the consideration of Ex.A.1 certified copy. According to him, secondary evidence can only be given, if the primary evidence is missing or not available and the conditions specified under Sections 63 and 65 of the Indian Evidence Act, 1872 are satisfied. According to the learned Government Pleader for Appeals, unless and until the mandatory requirements of Section 65 were satisfied, secondary evidence cannot be given. In the cross-examination of PW.1, he simply stated that he does not know what happened to the original trust deed of

¹ (2005) 2 SCC 217

² (2008) 8 SCC 536

1938. He has not filed the original deed nor has he stated anything about the same. It is the submission of the learned Government Pleader for Appeals that Ex.A.1 is not validly proved. On the other hand, the learned counsel for the appellant argued that as the document is more than 30 years, no further proof is necessary. This contention is not really correct. Section 90 of the Indian Evidence Act states where a document is produced from proper custody and it is more than 30 years old, the Court may presume that the signature and handwriting of the person are correct and that it was duly attested/executed. The presumption does not extend to the contents of the document which have to be proved like any other fact. The case of ***Union of India v. Ibrahim Uddin***³ is relevant. Therefore, this Court holds that the mere fact that the document is more than 30 years old, does not lead to presumption that the contents are proved. The plaintiff was under obligation to duty to prove the contents of the document, which they did not. They did not satisfactorily explain the reasons for not filing the original also.

14. The learned Government Pleader for Appeals also pointed out that there is no reason given for non-examination of the Managing Trustee. It is the submission of the learned Government Pleader for Appeals that the Managing Trustee who is alive should have been examined or a valid and sound reason should have been given for non-examination of the

³ (2012) 8 SCC 148

Managing Trustee. He also submits that when the proof of contents of documents is an issue, persons connected with the document should have been examined. In this case, he submits that the Managing Trustee is not examined and the witness was examined mainly PW.1, who has no personal knowledge of the contents of the document.

15. This Court agrees with the submissions of the learned counsel for the respondents and holds that the contents of Ex.A.1 are not validly proved as required under law. The lower Court also came to the same conclusion about the non-examination of the Managing Trustee and the filing of the certified copy.

16. The lower Court rightly held that the extracts from the revenue records, are not proof of title. Therefore, Exs.A.3 to A.7 and the other correspondence are not useful to prove the title of the plaintiff to the suit schedule properties.

17. The learned Government Pleader for Appeals again asserts that the suit also was rejected for non-joinder of the necessary parties. He points out that the plaint itself makes it clear that the Government allotted the land as D-form pattas and that Ayyappa Seva Sangam is also in possession of the property. Therefore, he states that the prayer for a declaration and also delivery of possession cannot be granted without hearing the third parties or considering their case. He argued that it is settled law that a person in settled possession can only be evicted by due process of law after he

is heard. This Court also agrees with the submissions of the learned Government Pleader for Appeals on this issue. The lower Court also considered issue Nos.1 & 2 and held that the proper and necessary parties are not there. The persons who are in possession of the lands are not added as parties. In their absence, no order can be passed.

18. In addition, the learned Government Pleader for Appeals also pointed out that as per the evidence of the witnesses and the evidence of PW.1 also, it is clear that the plaintiffs were negligent and was sleeping over their rights. According to PW.1, his cross-examination itself, it is clear that the D-form pattadars are not made parties to the suit. It is also clear that the said D-form pattadars have constructed houses in the properties and residing there. The learned counsel pointed out that even after the part of the property was taken over by the National Highway authorities, the plaintiff did not take any steps against National Highway authorities. Similarly, he pointed out that the witness admits that items 1 & 2 of the plaint schedule property were deleted from the pattadar passbook and title deed book of the plaintiff, yet the plaintiff did not take any action against the deletion. He also pointed out that item No.2 is admittedly shown as dry land in the land ceiling declaration of the Managing Trustee and that therefore, their contention to the contrary in this Court is not correct. The learned counsel pointed out that this glaring inaction on the part of the

plaintiff more so when the land is occupied by the third parties etc., makes it clear that the plaintiff was aware that they have no title to the property and that they did not pursue the matter.

19. This Court finds force in the submission made by the learned Government Pleader for Appeals. The plaintiff did not take any action when a) 10 to 15 cents of land was taken over by the National Highway authorities, b) the so-called plaint schedule land was allotted to D-form patta holders constructed houses therein; c) the plaint schedule properties were deleted from the pattadar passbook and record of right book. Even if the plaintiff's negligence and inaction are overlooked, the learned counsel submits that the fundamental duty of proving their case is not made out. This Court on an examination of the entire evidence on this issue agrees with the submissions made by the learned Government Pleader for Appeals. It is evident that the Government was exercising title and ownership over item No.1 of the property which was taken over in part of the National Highway and in the remaining land, a colony was established. The plaintiff failed to prove their title and possession.

20. Issue No.3 is whether the plaintiff was entitled to possession of the item No.1 of the plaint schedule. Apart from the lack of proof of title, this Court holds that possession cannot be granted to the plaintiff for the reason that the land

in item No.1 is admittedly in the possession of the third parties and they are not added as parties to the suit. Hence, issue No.3 is held against the plaintiff/appellant.

21. Issue No.4 is whether the case is barred by *res judicata* in view of the judgment in the land ceiling case. For *res judicata* held to be applicable, the defendants shall have to file the pleadings and the judgment in the earlier proceedings to show that the matter before this Court is directly and substantially in issue in the judgment in the previous case. The lower Court held that so-called proceedings in the earlier case are not filed, *res judicata* does not apply. This Court agrees with the said findings.

22. Issue No.5 is whether the suit is barred by limitation. On this issue, substantial arguments were advanced by the parties. The lower Court rightly noticed that the cause of action arose for this suit in the year 1986 when the deletion of the lands was completed and a final protest was made. The plaintiff was aware by 1983 itself that the orders of the Tahsildar were incorrect. The protests by the letter dated 24.12.1983 (Ex.A.12) and 09.10.1986 (Ex.A.13) make it clear that the plaintiff was aware of what was happening. Assuming that the cause of action arose on 09.10.1986, the suit should have been filed within three years from 20.10.1986. The submission of the learned counsel is that the plaint in this case was presented on 19.12.1989 and is therefore, barred by time.

23. The alternative submission made by the learned Government Pleader for Appeals is that this Court ordered W.P.No.15982 of 1986 on 13.06.1989 and held that the plaintiff in the present case is given three months time to institute the suit. According to the learned Government Pleader for Appeals, the period of three months expired on 13.09.1989 itself. This Court specifically gave a period of three months time and kept the orders under suspension to enable the plaintiff to present the suit within three months. In this case, Ex.A.16, Section-80 CPC notice was issued on 12.09.1989 and the suit was filed on 19.12.1989. Therefore, the learned Government Pleader contends that the suit is barred by time.

24. In reply, it is stated that the cause of action for the suit arose in October, 1986 according to the learned counsel for the appellant. From October, 1986 till 13.06.1989 they were agitating their rights in this Court and therefore, according to the learned counsel for the respondents, the time spent in this Court should be excluded as per the provisions of Section 14 of the Limitation Act. He contends that if this period is excluded, his suit is in time.

25. This Court finds sufficient force in the submissions made by the learned Government Pleader. The period from 1986 till 1989 cannot be excluded. The lower Court missed the essential contents of Section 14 of the Limitation Act, which clearly says if the matter is prosecuted

in good faith in a Court, which does not have jurisdiction, the period should be excluded. This court in its order dated 13.06.1989 did not refer to Section 14 of the Limitation Act at all and did not exclude the period. This Court merely granted three months time to file the suit but the same was not adhered to. Therefore, this Court holds that the suit is barred by time.

26. As far as, the other issues are concerned, viz., court fee (issue No.6), jurisdiction of civil Court (issue No.7), mesne profits (issue No.8), nothing much argued by either of the learned counsel. Therefore, this Court is also not going into those issues.

27. This Court holds that the plaintiff did not prove their case as required under law. They did not also add the proper and necessary parties to this suit and therefore, the suit has to fail. This Court agrees with the finding of the lower Court that the plaintiff did not prove their case.

28. For all the above reasons, the appeal is dismissed. The judgment and decree dated 24.08.1999 passed in O.S.No.27 of 1990 by the Senior Civil Judge, Vizianagaram are hereby confirmed. However, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 22.02.2018
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