

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.341 of 2001

JUDGMENT:

This appeal is filed by the defendants, under Section 100 CPC, assailing the judgment and decree dated 20.11.1997 passed in A.S.No.5 of 1986 on the file of Subordinate Judge Court, Addanki, wherein whereby the decree and judgment dated 15.01.1986 passed in O.S.No.357 of 1975 on the file of Principal District Munsif Court, Addanki, decreeing the suit filed by the plaintiffs for perpetual injunction, was confirmed.

2. Heard the learned counsel appearing for both the parties.
3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.
4. The facts leading to filing of the present appeal in nutshell are as follows: The first plaintiff is the wife, plaintiffs 2 to 5 are children of late Ummana Raghavulu. The first defendant is the brother and the second defendant is the brother's son of late Raghavulu. Late Raghavulu and his brothers have partitioned the suit schedule property 35 years prior to the filing of the suit. Late Raghavulu purchased an extent of Ac.5.77 cents, i.e. suit schedule property from one Alla Venkata Swamy under an agreement of sale in the year 1942; ever since, late Raghavulu and after his death the plaintiffs have been in possession and enjoyment of the suit schedule property. The defendants without any manner of right interfering with the suit schedule property. The first defendant issued a notice alleging that in the family partition late Raghavulu

got an extent of Ac.2.38½ cents, first defendant got an extent of Ac. 2.38½ cents and the second defendant's father got Ac.1.00. The defendants are threatening to interfere with the plaintiffs' peaceful possession and enjoyment of the suit schedule property. Hence, the suit.

5. The second defendant filed written statement and the first defendant filed a memo adopting the written statement of second defendant. It is the case of the defendants that the father of the first defendant, grand father of the second defendant and the father-in-law of the first plaintiff died 37 years back. The first defendant is not worldly wise man, therefore, the husband of the first plaintiff used to manage the joint family properties. The husband of the first plaintiff purchased the suit schedule property from one Alla Venkata Swamy with the joint family income. Ever since the husband of the first plaintiff and the defendants have been in possession and enjoyment of the same. The defendants and the husband of the first plaintiff have partitioned the suit schedule property 20 years back and the first defendant got an extent of Ac.2.38½ cents and the second defendant got Ac.1.00 cents. The second defendant sold his share in Adivi Chenu, which is also joint family property, to the first plaintiff's husband. The second defendant and the first defendant sold their share to Deekolu Narayana after partition. The first defendant has been in possession and enjoyment of an extent of Ac.2.38 ½ cents of land on the south of the suit schedule property. The first defendant let out an extent of Ac.1.00 to the first plaintiff's husband in the year 1972. After the death of first plaintiff's husband, the first defendant demanded the first plaintiff to redeliver the suit

schedule property. In the presence of village elders, the first plaintiff delivered possession of Ac.1.00 of land. On 30.01.1971, the second defendant sold his Ac.1.00 of land to Gutta Venkatasubbaiah, S/o.Sivaramaiah of Chinamagundam village and delivered possession of the same to him. Since then, the said Gutta Venkatasubbaiah has been in possession and enjoyment of Ac.1.00 of land. The plaintiffs are not in possession and enjoyment of the suit schedule property. The suit is not maintainable for non-impleading of Venkatasubbaiah.

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

1. Whether plaintiffs are in possession of the suit property on the date of suit?
2. Whether the suit is not maintainable as framed?
3. Whether the plaintiffs have no cause of action to file this suit?
4. Whether the suit is bad for non-joinder of Gutta Venkatasubbaiah and Malakondaiah as parties to the suit?
5. To what relief?

7. To substantiate the case, on behalf of the plaintiffs, P.Ws.1 to 6 were examined and Exs.A1 to A25 were marked. On behalf of the defendants, D.Ws.1 to 6 were examined and Exs.B1 to B6 were marked. Commissioner's report and plan were marked as Exs.C1 and C2.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs have been in possession and enjoyment of the suit schedule property and consequently decreed

the suit. Feeling aggrieved by the judgment and decree of the trial Court, the defendants preferred A.S.No.5 of 1986 on the file of Subordinate Court, Addanki. The learned Subordinate Judge after reappraising the oral, documentary evidence and other material available on record arrived at a conclusion that the plaintiffs have in possession and enjoyment of the suit schedule property and dismissed the appeal by confirming the findings of the trial Court. Feeling aggrieved by the judgment and decree of the first appellate Court, the defendants preferred the present second appeal.

9. The substantial questions of law formulated by the appellant's counsel are:

1. Whether the plaintiffs are entitled to file a suit for mere injunction without seeking the relief of declaration?
2. Whether the first appellate Court is justified while placing reliance on Ex.A25?

10. Basing on the material available on record, the following admitted facts can be culled out.

11. Raghavulu, Veeraiah and Peraiah are the sons of late Kotaiah. The second defendant is the son of Peraiah. The first plaintiff is the wife and plaintiffs 2 to 5 are children of late Raghavulu. The suit schedule property is an extent of Ac.5.77 cents situated in D.No.794 of East Kunduru village, erstwhile Addanki Taluq of Prakasam District.

12. It is the case of the plaintiffs that the husband of the first plaintiff purchased the suit schedule property from Alla Venkataswamy in the year 1942. Ex.A25 is the agreement of sale

executed by Alla Venkata Swamy in favour of the husband of the first plaintiff. As per the testimony of P.Ws.1 to 6 also, the husband of the first plaintiff purchased the suit schedule property. The defendants have taken a specific plea in the written statement that the husband of the first plaintiff purchased the suit schedule property with the joint family income. The factum of purchase of suit schedule property in the name of the husband of the first plaintiff is not disputed by the defendants. A perusal of Ex.A25 reveals that the husband of the first plaintiff purchased the property.

13. The next crucial question that falls for consideration is whether the husband of the first plaintiff purchased the suit schedule property with the joint family income. The second defendant, who examined himself as D.W.1 is the competent person to certain extent to say whether the husband of the first plaintiff purchased the suit schedule property with the joint family income. If the age of the second defendant is taken into consideration, he was not born in the year 1942. When compared to D.W.1, the first defendant is the competent person to speak about the family affairs. For the reasons best known, the first defendant did not choose to come into witness box to substantiate the stand taken by him. Interestingly, the first defendant alone filed written statement. There is no whisper in the testimony of D.Ws.2 to 6 with regard to the purchase of the suit schedule property by the husband of the first plaintiff with the joint family income. It is needless to say the burden of proof lies on the person, who lost the case, if no evidence is adduced on either side

in view of Section 101 of the Indian Evidence Act. The defendants having taken the specific plea that the suit schedule property stands in the name of the husband of the first plaintiff, they have to establish that the same was purchased with the joint family income. The defendants have not placed any material to establish that prior to 1942, the joint family is having landed property and out of the income of the joint family property, the suit schedule property was purchased by the husband of the first plaintiff in his name. The material available on record falls short to establish this aspect. Taking into consideration the facts and circumstances of the case, I am of the considered view that the defendants failed to prove that the suit schedule property was purchased by the husband of the first plaintiff with the income derived from the joint family property.

14. The predominant contention of the learned counsel for the appellant-defendant is that mere suit for injunction without seeking the relief of declaration is not maintainable. It is needless to say that if there is any cloud casts on the title of the plaintiffs, then he ought to have filed the suit for declaration and consequential perpetual injunction. The admitted facts need not be proved. The defendants themselves admitted that the suit schedule property stands in the name of the husband of the first plaintiff. The defendants having taken such a plea, are prevented to plead that mere suit for injunction without seeking the relief of declaration is not maintainable. This Court is placing reliance on

Ananthula Sudhakar v. P.Butchi Reddy¹, wherein the Hon'ble

apex Court held at paragraph No.21 as follows:

21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar*[*Annaimuthu Thevar v. Alagammal*, (2005) 6 SCC 202]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

¹ (2008) 4 SCC 594

15. As per the principle enunciated in the case cited supra, mere suit for bare injunction is maintainable if no cloud is casts on the title of the party. The facts of the case on hand are almost identical to the facts of the case cited supra.

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the plaintiffs are entitled to file suit for perpetual injunction without seeking the relief of declaration. Accordingly, point No.1 is answered in favour of the respondents and against the appellant.

Point No.2:

17. The other contention of the learned counsel for the appellant is that the findings recorded by the Courts below are perverse. Learned counsel for the respondents-plaintiffs submitted that the findings recorded by the Courts below are based on evidence much less legally admissible evidence, as such, it is not a fit case to interfere.

18. In order to appreciate the contentions raised by the learned counsel, this Court is placing reliance on the judgment in **Municipal Committee, Hoshiarpur v. Punjab SEB²**, wherein, while dealing with the scope of Section 100 CPC, 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

² (2010) 13 SCC 216

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. ...

19. Let me consider the facts of the case on hand in the light of the above legal principle.

20. The predominant contention of the learned counsel for the appellant is that the suit is not maintainable without impleading Gutta Venkata Subbaiah. The plaintiff is entitled to file the suit against the person, who infringes his right or interfering with the suit schedule property. It is not the case of the plaintiffs that Gutta Venkata Subbaiah is interfering with the suit schedule property. Admittedly, the second defendant was not in possession of the suit schedule property. Whether Gutta Venkata Subbaiah is in possession of the property or not is not the *lis* involved in the suit. A necessary party is one in whose absence the Court cannot adjudicate the matter effectively so as to put an end to the litigation. Whether defendants 1 and 2 are interfering with the suit schedule property or not can be adjudicated even in the absence of Gutta Venkata Subbaiah. Hence, this court is of a considered view that Gutta Venkata Subbaiah is not a necessary party to the suit.

21. The trial Court, after having a thoughtful consideration to the oral and documentary evidence available on record, arrived at a conclusion that the plaintiffs have been in possession and enjoyment of the suit schedule property. The first appellate Court also after reappraising the oral and documentary evidence

available on record, arrived at a conclusion that the plaintiffs have been in possession and enjoyment of the suit schedule property. As per the oral testimony of P.Ws.2 to 6, the plaintiffs have been in possession and enjoyment of the suit schedule property. The material available on record clinchingly establishes that the second defendant sold the property fell to his share i.e. Ac.1.00 in favour of one Gutta Venkata Subbaiah.

22. The plaintiffs mainly relied on Ex.A25 to prove their possession over the suit schedule property. I am fully agreeing with the submission made by the learned counsel for the appellant that a civil Court is not entitled to declare the title of the parties basing on Ex.A25-agreement of sale. The court can take into consideration the recitals of Ex.A25 in order to ascertain whether the vendor of the husband of the first plaintiff delivered the suit schedule property or not. As per the recitals of Ex.A25, Alla Venkata Swamy delivered the suit schedule property in favour of the plaintiffs. During the course of trial, the first defendant introduced a new version that the joint family properties were partitioned in the year 1955. As per the testimony of D.Ws.2 to 6, after family partition, the defendants 2 and 3 have been in possession of their respective shares. As per the recitals of Ex.A1 certified copy of 10(1) account and Ex.A2 certified copy of No.II adangals, the husband of the first plaintiff was in possession of the property during the year 1961-68. The recitals of Exs.A1 and A2 negate the contention of the defendants that they have partitioned the suit schedule property in the year 1955. As per the contention of the plaintiffs, the joint family properties were partitioned 35

years back. If 35 years is calculated from the date of filing of the suit, they might have partitioned the properties some where in the year 1940. If that is so, the husband of the first plaintiff purchased the property after partition only. The defendants have taken a plea in the written statement that the plaintiffs delivered Ac.1.00 of land to him. The second defendant did not choose to examine the person in whose presence Ac.1.00 of land was delivered by the first plaintiff in favour of the second defendant. To substantiate the stand, the defendants placed reliance on Ex.B4 will purported to have been executed by the first defendant in favour of the second defendant. The second defendant, who filed the written statement, has taken a specific plea that the first defendant is not worldly wise man. In such circumstances, second defendant ought to have examine anybody to explain this particular aspect. Ex.B4 was brought into existence after filing of the suit. The possibility of creating this type of documents in order to substantiate the stand of the second defendant cannot be ruled out. Hence, much weight cannot be attached to Ex.B4. The plaintiffs also filed receipts Exs.A8 to A12 from 1968 to 1975. These documents also support the version of the plaintiffs.

23. Having regard to the facts and circumstances of the case, this Court is of a considered view that the plaintiffs have clearly established that they have been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. Therefore, they are entitled for equitable relief of perpetual injunction. Whether the plaintiffs are in possession of the property as on the date of filing of the suit or not is purely a question of

fact. The first appellate Court is the fact finding final Court. As rightly contended by the learned counsel for the appellant, if the findings recorded by the courts below are not based on evidence, certainly this Court can set aside the same while exercising the jurisdiction under Section 100 CPC. The findings recorded by the Courts below are based on evidence much less legally admissible evidence; therefore, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are perverse. Accordingly, this point is answered.

24. In view of my foregoing discussion and also in view of the principle enunciated in the case second cited supra, I am 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.

25. Accordingly, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

02.11.2018
Rns

T.SUNIL CHOWDARY, J