

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1043 of 2013

JUDGMENT:

This appeal is filed by the plaintiff, under section 100 CPC, assailing the judgment and decree dated 29.08.2012 passed in A.S.No.18 of 2009 on the file of III Additional District Court (Fast Track), Bhimavaram, wherein whereby the decree and judgment dated 19-01-2009 passed in O.S.No.414 of 2005 on the file of Principal Junior Civil Judge Court, Bhimavaram, decreeing the suit filed by the plaintiff seeking perpetual injunction, was confirmed.

2. Heard the learned counsel for the appellant and perused the record.

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 second appeal in brief are as follows: The suit schedule property, an extent of Ac.0.04³/₄ cents of vacant site out of Ac.0.63 cents in R.S.No.146-3 of Jakkaram village, Kalla Mandal, West Godavari District, belongs to mother of the plaintiff and defendant. The defendant is the own brother of the plaintiff. The mother of the plaintiff and defendant executed a registered settlement deed on 10.09.2004 in favour of the plaintiff bequeathing the suit schedule property, ever since she has been in possession and enjoyment of the same. The defendant is having a tiled house on the south of the plaint schedule property. The defendant is interfering with the suit schedule property with an

ulterior motive to grab the same. Having no other alternative, the plaintiff filed the suit for perpetual injunction.

4. The defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the father of the defendant got the house property under a partition deed. The father of the defendant purchased the suit schedule property in the name of his mother. The mother of the plaintiff and defendant executed an agreement of sale in favour of the defendant on 27.09.2003 agreeing to sell the suit schedule property for an amount of Rs.70,000/- and received an amount of Rs.60,000/- towards advance money. The defendant has been using suit schedule property for ingress and egress. The plaintiff without any right whatsoever filed the present suit. Hence, the suit is liable to be dismissed.

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

1. Whether the plaintiff was in lawful possession of plaintiff schedule property, by the date of suit?
2. Whether the plaintiff is entitled for permanent injunction, as prayed for? and
3. To what relief?

6. Before the trial Court, to substantiate the case, the plaintiff examined herself as P.W.1 besides examining P.Ws.2 and 3 and got marked Exs.A1 to A4. To demolish the case of the plaintiff, the defendant examined himself as D.W.1 but no documents were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff has been in possession and enjoyment of the suit schedule property by virtue of settlement deed Ex.A1 and consequently, decreed the suit granting perpetual injunction in favour of the plaintiff. Feeling aggrieved by the judgment and decree of the trial Court, the defendant preferred A.S.No.18 of 2009 on the file of the III Additional District Court (Fast Track), Bhimavaram. The learned III Additional District Judge after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiff has been in possession and enjoyment of the suit schedule property, therefore, she is entitled for perpetual injunction and consequently dismissed the appeal. Hence, the present second appeal.

8. Now, the substantial questions of law that arise for consideration are:

1. "Whether the Courts below misconstrued Ex.A1 settlement deed dated 10.09.2004?
2. Whether the findings recorded by the Courts below are perverse?"

Point Nos.1 and 2:

9. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

10. Before advertng to the findings of the Courts below, this Court is placing reliance on the judgment in **Municipal**

Committee, Hoshiarpur v. Punjab SEB¹, wherein, while dealing with the scope of Section 100 of 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 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. ...

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

12. One Smt. Anasuyamma is the mother of the plaintiff and the defendant. The plaintiff is claiming suit schedule property basing on the settlement deed dated 10.09.2004 Ex.A1. A perusal of the record reveals that the mother of the plaintiff purchased the suit schedule property under a registered sale deed dated 18.05.1982, Ex.A3. As per the recitals of Ex.A4 partition deed, the father of the plaintiff and defendant got the tiled house situated on the south of the plaint schedule property. The testimony of P.W.1 and D.W.1 clearly reveals that the defendant has been in possession and enjoyment of the tiled house. The defendant has taken a specific plea that his father purchased the property in the name of his mother. Except the self-served testimony of D.W.1, there is no other convincing evidence to establish that his father purchased the suit schedule property in the name of his mother under Ex.A3.

¹ (2010) 13 SCC 216

The defendant did not choose to examine either the scribe or attestors of Ex.A3. The defendant also did not choose to examine the neighbouring owners in order to establish the stand taken by him. Unless and until the contrary is proved, the Court can place reliance on the registered document Ex.A3. Having regard to the facts and circumstances of the case, I am unable to accede to the contention of the learned counsel for the appellant that the father of the defendant purchased the suit schedule property in the name of his mother. In the written statement, the defendant did not specifically deny the execution of settlement deed Ex.A1 in favour of the plaintiff. It is a settled principle of law that the party who placed reliance on settlement deed has to examine one of the attestors of the document. If the opposite party admits the execution of the settlement deed, there is no need to examine one of the attestors of the settlement deed. In the cross-examination the defendant in unequivocal terms admitted that his mother executed settlement deed Ex.A1 in favour of the plaintiff. In view of admission made by the defendant the Court can place reliance on Ex.A1.

13. The defendant has taken a specific plea in his written statement that his mother executed an agreement of sale in his favour on 27.09.2003 agreeing to sell the suit schedule property for an amount of Rs.70,000/- and received Rs.60,000/- as advance amount. If really the mother of the defendant executed a settlement deed on 27.09.2003, what prevented him to produce the same either before the trial Court or the appellate Court. The alleged agreement of sale dated 27.09.2003 has not seen the light

of the day till date. The stand taken by the defendant that he got the property under an agreement of sale is not sustainable on facts.

14. The other contention of the defendant is that he has been using the suit schedule property for ingress and egress to reach his house. In the cross-examination of D.W.1 in unequivocal terms deposed that he is having alternative way to reach the main road from his house. The defendant failed to prove the stand taken by him. It is needless to say the Court shall not grant a relief in favour of the plaintiff basing on the latches or lacunas, if any, on the part of the defendant. The court can grant the relief if the plaintiff establishes his/her case. In the instant case, the plaintiff clearly established that she got the suit schedule property under Ex.A1 settlement deed. Ex.A2 clearly reveals that the plaintiff has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. The trial Court after considering the oral and documentary evidence available on record arrived at a conclusion that the plaintiff has been in possession and enjoyment of the suit schedule property and granted perpetual injunction in her favour. The first appellate court, without being influenced by the findings recorded by the court below, arrived at a conclusion that the plaintiff has been in possession and enjoyment of the suit schedule property, therefore, she is entitled for perpetual injunction in respect of the suit schedule property. The findings recorded by the Courts below are based on oral and documentary evidence. The Courts below have assigned reasons much less cogent and valid reasons to its findings. The first

appellate Court is the fact finding final Court. The Courts below have considered Ex.A1 settlement deed in the light of the provisions of Indian Evidence Act. 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. The substantial questions of law framed by the appellant will not fall within the ambit of Section 100 CPC. Having regard to the facts and circumstances of the case and also in view of the principle enunciated in the case 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.

15. In the result, the second appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

29.10.2018

Rns

T.SUNIL CHOWDARY, J