

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 1243 OF 2017

JUDGMENT:

1. The Second Appeal is filed against the judgment and decree dated 31.10.2016 in Appeal Suit No.116 of 2012 on the file of the V Additional District Judge, East Godavari at Rajamahendravaram, whereby the appeal preferred against the judgment and decree dated 19.10.2012 in O.S. No.611 of 2006 on the file of the I Additional Junior Civil Judge, Rajamahendravaram dismissing the suit, was allowed.

2. The appellant herein is defendant, and the respondent herein is plaintiff, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. Plaintiff filed the suit stating that he purchased 'ABCD' portion of plaint plan from the defendant and his brother under Ex.A1-registered sale deed dated 14.03.1990 and thereafter constructed a house in it, by leaving ABB1A1 portion of the plaint plan for the purpose of vasthu. The defendant and his brother are on northern side and the defendant sold the southern site property to one Veerraju, who constructed a house therein. The defendant owned and possessed the site on the northern side of AB portion plaint plan. The plaintiff is keeping his articles in ABB1A1 portion of plaint plan and using it for other purposes. The

defendant, in order to construct a house in his site, requested the plaintiff to convey the said portion to him by merging it into his site. The plaintiff refused therefor. Still, the defendant tried to trespass into the plaintiff's schedule land. Hence, the plaintiff filed the suit originally for permanent injunction and later amended the prayer seeking declaration of title and possession of plaintiff's schedule property.

4. The defendant filed written statement denying plaintiff's averments, and contended that ABB1A1 portion of plaintiff's plan was not covered under Ex.A1-sale deed, and that immediately after he delivered the possession of the property covered under Ex.A1, the plaintiff constructed a house and a compound wall on its northern side. There is no outlet of waste water into the plaintiff's schedule land and there is no site beyond northern side compound wall. Defendant and his family members have an extent of Ac.1.20 cents in survey no.461 and it was divided among them in a partition. Hence, he prayed to dismiss the suit.

5. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether the plaintiff is in possession and enjoyment of the schedule property ?
- 2) Whether the plaintiff is entitled for permanent injunction as prayed for ?
- 3) To what relief ?

The following additional issues were also settled.

- 1) Whether the plaintiff is entitled for declaration, as prayed for ?
- 2) Whether the plaintiff is entitled for eviction of the defendant after removing unautahorized constructions made by the defendant ?

6. During trial, on behalf of the plaintiff, P.W.1 was examined and Exs.A1 to A5 were got marked, and on behalf of defendant, D.Ws.1 and 2 were examined and no documents were marked on his behalf. Advocate commissioner was examined as C.W.1 and Exs.C1 and C2 were got marked through him.

7. The trial Court, upon appreciation of the evidence on record, dismissed the suit with costs. Challenging the judgment and decree of the trial Court, the plaintiff preferred Appeal Suit No.116 of 2012 on the file of the V Additional District Judge, East Godavari district at Rajamahendravaram. Vide the impugned judgment and decree, the first appellate court allowed the appeal with costs through out declaring the plaintiff as absolute owner of the plaint schedule property and recovery of possession. Challenging the same, the present Second Appeal has been preferred by the defendant.

8. Heard the learned counsel for the appellant. Though notice is served on the respondent, there is no representation for him. Perused the record.

9. Learned counsel for the appellant would contend that the findings of the first appellate court are contrary to law, weight of evidence and probabilities of the case; that the first appellate court ought not to have reversed the findings of the trial court, which are based on proper appreciation of the evidence on record; that the first appellate court erred in placing reliance on the report of the advocate commissioner Ex.C1 in arriving at the conclusions; that the findings of the first appellate court are perverse, and ultimately, prayed to admit the Second Appeal.

10. The Second Appeal is sought to be admitted on the following substantial questions of law.

“a) Whether the learned court below has acted perversely in relying on a mala fide, erroneous and suspicious report dated -nil- submitted by the advocate commissioner, to pass the impugned judgment while ignoring the entire evidence available on record ?

b) Whether the learned court below acted perversely by virtually ignoring all the categorical observations, findings and evidence recorded by the learned trial court in its judgment dated 19.10.2012 by way of not at all dealing with such observations, findings or evidence in any manner whatsoever, while solely relying on the mala fide, erroneous and suspicious report of the advocate commissioner dated -nil- in passing the impugned judgment ?

c) Whether the learned court below acted perversely by giving credence to the report of the advocate commissioner, even though, evidently, the advocate commissioner has recorded that the length of

the northern side and southern side boundaries of the plaint schedule property are allegedly 78 feet when allegedly the eastern and western boundaries are admittedly unequal ?

d) Whether the learned court below has acted perversely in passing the impugned judgment by believing the case of the respondent/plaintiff, based on his mere transitory claim based on the alleged science of vastu though the same is recognized under law and not properly pleaded and proved also ?

e) Whether the learned court below has acted perversely in absolutely ignoring the finding of fact recorded by the learned trial court that the respondent/ plaintiff has pleaded falsely before the court that, the 'appellant/defendant insisted him to reconvey plaint schedule property in his favour to include the same in his site and proceed with the construction of his house' ?

f) Whether the impugned judgment of the court below is vitiated by non-consideration of material evidence available on record and consideration of irrelevant information and by perverse reasoning ?”

11. In view of the submissions made by both the parties, the point that arises for consideration is whether any substantial question does arise for admission of the Second Appeal ?

12. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question

of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse finding- are some of the questions, which involve substantial questions of law.

13. Originally, the plaintiff instituted the suit for perpetual injunction. Later, the plaint was amended seeking the prayer of declaration of title and recovery of possession stating that the schedule land was illegally occupied by the defendant. The suit schedule property consists of 47.67 square yards of land in bearing Door No.4-28/1 situated in survey no.461 of Gadarada panchayat of East Godavari district, depicted as ABB1A1 in the plaint plan. There is no dispute that the plaintiff purchased the land shown as ABCD in the plaint plan under Ex.A1 from the defendant for a valuable consideration. Case of the plaintiff is that he left some portion of land for the

purpose of vasthu and constructed his house, and the left over land is the land in dispute i.e. suit schedule property, and that the same was illegally occupied by the defendant. Contention of the defendant is that the suit schedule land does not form part of the land sold to the plaintiff under Ex.A1.

14. During pendency of the suit, an advocate commissioner (C.W.1) was appointed and he submitted a report Ex.C1. To answer the *lis*, the first appellate court placed reliance on the evidence of C.W.1-advocate commissioner and his report Ex.C1, and held that the suit schedule land is in illegal occupation of the defendant and that it is covered by the land sold under Ex.A1. When the suit land and the land in occupation of the defendant were together measured by C.W.1-advocate commissioner in the presence of the parties, the suit land was found to be part of the land covered under Ex.A1-sale deed. On evidence, the appellate court held that the plaintiff left the land on northern side of the plot for the purpose of vasthu and the same was illegally encroached by the defendant. Under Ex.A1-sale deed, there are measurements of the land purchased by the plaintiff from the defendant. When the land in occupation of the plaintiff and the suit land were measured by the advocate commissioner, the area covered under Ex.A1 had been tallied. Whether the plaintiff left the land on northern side of the plot for the

purpose of vaasthu and constructed the house, is a fatal aspect. Placing reliance on the documentary and oral evidence, particularly on Ex.C1-report of the advocate commissioner, it was held that the suit land was part and parcel of the land purchased by the plaintiff under Ex.A1-sale deed. There are no grounds to discredit the evidence of C.W.1-advocate commissioner and his report marked as Ex.C1.

15. The proposed substantial questions of law on which the Second Appeal is sought to be admitted, relate to the advocate commissioner's report and other factual aspects. As regards the appreciation of the evidence on record is concerned, the first appellate court dealt with all the aspects in right perspective, and neither any inadmissible evidence is admitted, nor any admissible evidence was not acted upon, by the first appellate court. While reversing the judgment and decree of the trial Court, the first appellate court gave elaborate reasons. The findings of the first appellate court are based on the evidence. None of the findings is shown to be perverse. The findings are based on record and there is no infirmity. There are no grounds to take a different view. The proposed substantial questions of law in the grounds of appeal are only on factual aspects. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellant/defendant to

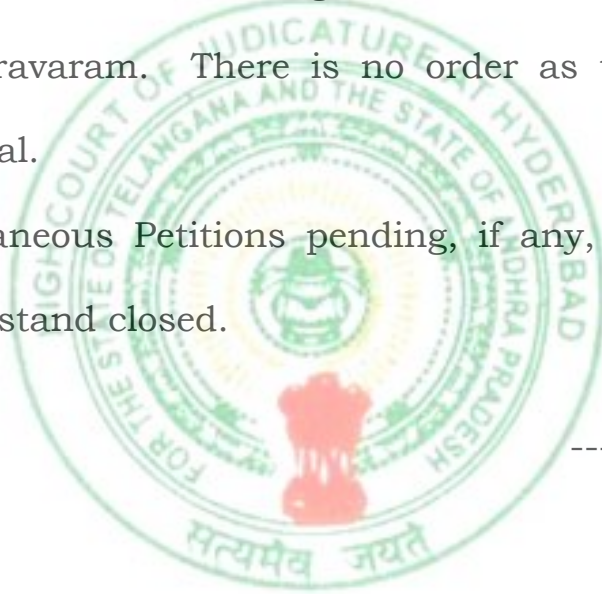
deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination so as to admit the Second Appeal. Therefore, there are no grounds to admit the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

16. In the result, the Second Appeal is dismissed at the stage of admission, confirming the judgment and decree dated 31.10.2016 in Appeal Suit No.116 of 2012 on the file of the V Additional District Judge, East Godavari at Rajamahendravaram. There is no order as to costs of the Second Appeal.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

07.09.2018
DRK

(Dr.SA, J.)



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