
(2004) 03 AP CK 0087

In the Andhra Pradesh High Court

Case No : Second Appeal No. 89 of 1998

I. Vasamsetty Surya Rao and Others

APPELLANT

Vs

Vasamsetty Durgayya and Others

RESPONDENT

Date of Decision : 11-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2004) 4 ALT 546

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : V.L. Gopala Krishna Murthy, for the Appellant; Anjani Devi, for the Respondent

Final Decision : Allowed

Judgement

V. Eswaraiah, J.—The appellants herein are the defendants and respondents are the plaintiffs who filed the suit O.S. No. 826 of 1988 on the file of the Principal Junior Civil Judge, Kakinada. The parties are hereinafter referred to as they are arrayed in the suit.

2. The plaintiffs filed the suit for declaration of title and for consequential permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the plaint schedule property and also for mandatory injunction, directing the defendants to remove the unauthorised and illegal construction made on the south-west corner of the plaint schedule land and also to grant a decree for delivery of the vacant possession of the plaint schedule land, which was in occupation of the defendants, after ejecting the defendants from the suit land.

3. The said suit was decreed by the Judgment and decree dated 28-6-1996, against which, the defendants filed A.S. No. 90 of 1996 on the file of the IV Additional District Judge, Kakinada. The said appeal was dismissed by the Judgment dated 19-11-1997, confirming the Judgment and decree of the trial

Court. Aggrieved by the said Judgment, the defendants preferred the present Second Appeal.

4. This Court admitted the Second Appeal as the following substantial questions of law arise for consideration.

(a) Whether the Judgment of the Appellate Court is vitiated by its failure to refer to the relevant piece of evidence i.e., a portion of the Commissioner's Report, which states that the measurements taken by the Surveyor is not supported by any documentary evidence to fix the points.

(b) Whether the decree for possession can be granted without identifying the property which is claimed by the plaintiffs.

(c) Whether a decree can be passed in respect of a survey number which is stated by the Commissioner to be not the one he measured.

5. The case of the plaintiffs is that the suit schedule property was originally purchased by the grand father of the plaintiffs by name Vasamsetti Subbaiah and his brother Kannaiah and all the heirs of Kannaiah died. Vasamsetti Subbaiah was having two sons, first son was not having any heirs and the second son Nookaiah was having three sons and a daughter and two sons and daughter of Nookaiah died and only one son i.e., the first plaintiff Durgaiah is alive and the first plaintiff has got four sons i.e., plaintiffs 2 to 5 and thus, the entire property devolved on the plaintiffs who are the descendents of Vasamsetti Subbaiah. The father of the first plaintiff had permitted Vasamsetti Veeramma and Vasamsetti Sathaiah to stay in two Kottu gadulu in or about 1965 as licencees. The descendents of Sathaiah demolished one Kottugadi to construct a house and the said descendents of Sathaiah further encroached towards eastern and southern side into the suit schedule property and constructed a house encroaching into the suit land measuring 35" x 27" and the defendants had no right to do so.

6. It is the further case of the plaintiffs that the suit schedule property was purchased by the plaintiffs' ancestors in the year 1918 under Ex.A1 registered sale deed and there are two Kottugadulu admeasuring 14" x 12" each on the western side, where the paddy was used to be stored. The first defendant and father of the defendants 2 to 4 namely Vasamsetti Lavaraju are brothers, who are the sons of Vasamsetti Sathaiah. The defendants 2 to 4 are residing in one Kottu gadi about 8 months prior to the institution of the suit. Thereafter, the defendants 1 to 4 demolished the Kottugadi in which they are living in order to construct a house in the place of Kottugadi without any manner of right whatsoever and they encroached further upon the western side towards eastern side and southern side into the plaint schedule property. Subsequently, the defendants constructed a house encroaching into the plaint schedule land admeasuring 35" x 27" towards south-west corner of the plaint schedule land. The site to an extent of 105 Sq.yards is now in possession of the defendants, which is marked in red colour and shown as ABCD area in the plaint plan. The defendants 1 to 4 have no right whatsoever to encroach into the plaint schedule

land.

7. It is the specific case of the plaintiffs that the defendants are allowed to stay in the said Kottugadulu as licencees only and they have no right or title over the said Kottugadulu, but the defendants are denying the title devolved on the plaintiffs through their forefathers by registered sale deed dated 6-11-1918 under Ex.A1. It is stated that the cause of action arose for filing the suit in or about 1965 when the first plaintiff allowed Vasamsetti Lavaraju-father of defendants 2 to 4 and the first defendant to reside in the said Kottugadulu as licencees and when the defendants 2 to 4 demolished the Kottugadi and constructed a house, encroaching into the plaint schedule land about 8 months prior to filing of the suit and when the defendants are trying to further encroach into the land of the plaintiffs about one week prior to the institution of the suit.

8. It is the case of the defendants that admittedly, the survey number of the plaint schedule property purchased by the plaintiffs is in Sy.No. 49, which was sub-divided subsequently as Sy.Nos.49/1, 49/2 and 49/3 and the corresponding new Survey numbers for 49/1 is 100, for 49/2 is 101 and for 49/3 is 102. The properties of the plaintiffs and the defendants are situated in old Sy.No. 58 and in Gramakantam and the corresponding new Survey number is 122 in respect of the total extent of Ac.3-25 cents. Thus, the said land of Ac.3-25 cents is situated in old Sy.No. 58, corresponding to new Sy.No. 122.

9. The disputed plaint schedule property is far away from the property of the defendants. On the application filed by the plaintiffs in I.A.No. 1247 of 1988, the Court appointed a Commissioner, who executed the warrant with the help of Mandal Surveyor and according to the said report, the suit schedule property is not within Sy.No. 49. Thus, the suit is totally mis-conceived and Ex.A1 does not refer to the property in dispute. It is stated that the defendants are nothing to do with the two Kottugadulu situated on the western side of the plaint schedule property. The allegation of the plaintiffs that the father of the first plaintiff permitted Vasamsetti Veeramma and Vasamsetti Sathaiah to stay in the said Kottugadulu as licencees in or about 1965 is absolutely in correct and false. The father of the first defendant Vasamsetti Sathaiah died 40 years prior to the filing of the suit and he was not alive by the year 1965 and therefore, the question of his being licencee in the year 1965 does not arise.

10. The defendants have not encroached any portion of the suit schedule property. The property in occupation of the defendants was originally belonged to the father of the first defendant namely Sathaiah. Late Sathaiah was having two sons i.e., the first defendant and Lavaraju who is the father of defendants 2 to 4. The first defendant executed a registered sale deed Ex.B1 dated 1-10-1970 in respect of his half share in favour of Lavaraju-father of the defendants 2 to 4. Subsequently, after the death of Lavaraju, the defendants 2 to 4 become absolute owners and possessors of the said property.

11. To prove the case of the plaintiffs, the second plaintiff was examined as Pw.1

and Ex.A1 registration extract of sale deed dated 6-11-1918 and Ex.A2 bunch of tax receipts were marked on behalf of the plaintiffs. Defendants 1 and 2 were examined as Dws.1 and 2 respectively and Ex.B1 registered sale deed dated 1-10-1970 was marked on behalf of the defendants. At the instance of the plaintiffs, an Advocate-Commissioner was appointed and the said Advocate Commissioner with the help of a Mandal Surveyor filed a report along with the sketch plan. Pw.1 deposed that he is looking after the affairs of the first plaintiff and also plaintiffs 3 to 5, who are his brothers. Originally, the suit schedule property was purchased by his grandfathers by name Subbaiah and Kannaiah under Ex.A1 sale deed dated 6-11-1918. The total extent purchased under Ex.A1 is 40 cents. The original of Ex.A1 sale deed was destroyed in the fire accident. Originally, the suit schedule property was zeroyati wet land and the Government has converted the said land into Gramakantam. His grand father Subbaiah constructed a house in it. To the west of the suit schedule property, there are two store rooms and the plinth area of which is 14" x 12" and the same were permitted to be occupied by Veeramma and Sathaiah as licencees in the year 1965. Sathaiah got two sons Surya Rao-first defendant and Lavaraju-father of defendants 2 to 4. In February, 1988, defendants 2 to 4 attempted to demolish the store room to construct a house, then he objected for the same and also filed a suit O.S.No. 13 of 1988. When the Court has not granted Ad-interim injunction as the Caveat Petition was pending, he filed the present suit and obtained injunction against the defendants 2 to 4. By the date of filing of the suit, the defendants 2 to 4 constructed their house by claiming that they are having right and title over the suit schedule property. The defendants constructed a house in the plinth area of 35" x 27".

12. It is stated that he is also paying the taxes to the suit schedule property under Ex.A2 tax receipts. He denied the suggestion that Sathaiah died 40 years back. He has admitted that at his instance, the Advocate Commissioner was appointed. It is the case of the plaintiffs that originally, the suit schedule land was in old Sy.No. 49/3, but subsequently, it was changed to Sy.No. 58 and thereafter, it was changed to Sy.No. 122. Ex.A1 sale deed relates to Sy.No. 49/3 and the disputed property is in Sy.No. 122 at present.

13. The first defendant who was examined as Dw.1 deposed that his father Sathaiah died 40 years back. The suit schedule property is a Zeroyati land and not Gramakantam. Sathaiah was not alive in the year 1965 and he died long back and they made constructions in their own land and they never encroached into the property of the plaintiffs in an extent of 35" x 27". The second defendant is examined as Dw.2. He also similarly stated that Lavaraju is father of defendants 2 to 4 and he denied the suggestion that his grand father Sathaiah occupied the suit land as a licencee in the year 1965 with the consent of the plaintiffs. He further deposed that Sathaiah died long back i.e., prior to 1965.

14. The Advocate Commissioner in his report stated that the suit schedule property is an extent of 40 cents and according to the plaintiffs, the new survey

number of the suit schedule property is 122 and old survey number is 58. But, according to the Mandal Surveyor, the suit schedule property is not in Sy.No. 49/3. The land covered by Sy.No. 122 is Ac.3-25 cents. The boundaries shown by the plaintiffs are as per the present enjoyment on the ground. As per the Surveyor, the house of the defendants is situated as shown in the plaint schedule land of 40 cents as per the measurements shown in item No. 1. The house of the defendants is situated in door No. 1-49 abutting to the house of the plaintiffs. He has stated that there is no documentary evidence to fix the points. There is no demarcation on the land to delineate the property for item No. 1.

15. Thus, it is the case of the defendants that the plaintiffs land in old Sy.No. 49, was sub divided as 49/1, 49/2 and 49/3 and corresponding new Survey numbers are 100, 101 and 102 respectively. It is the case of the defendants that their property is situated in old Sy.No. 58 and the corresponding Survey number is 122. It is further case of the defendants that the property of the plaintiffs is also situated in old Sy.No. 58 and the corresponding Sy.No. 122, but the plaint schedule property is situated in Sy.No. 49, which was sub divided into Sy.Nos.49/1, 49/2 and 49/3, corresponding new Sy.Nos.100, 101 and 102, which is far away from Sy.No. 122.

16. The trial Court in appreciation of the aforesaid evidence, held that Ex.A1 relates to Sy.No. 49/3 and as per the contention of the plaintiffs, the new survey number of the plaint schedule property is 122 and the same was also admitted by the defendants in their written statement and the Commissioner also stated in his report that the plaint schedule property is within Sy.No. 122, as such, the plaintiffs established their title over the suit schedule property and they further established that the defendants have encroached into the plaint schedule land, in which, they have no manner of right to encroach into the plaint schedule land and accordingly, held that the plaintiffs are entitled to the declaration of title and for consequential relief of mandatory injunction as prayed for.

17. The Lower Appellate Court also held that Ex.A1 sale deed is admeasuring 40 cents covered by Sy.No. 49/3, but whereas, the defendants acquired the land by Ex.B1 sale deed dated 1-10-1970 and the defendants mentioned that the old Sy.No. 58 is changed to new Sy.No. 122. As per the report of the Commissioner placed before the Court, the plaintiffs discharged their initial burden about the existence of the property and the alleged encroachment and therefore, the burden shifts on to the defendants to discharge the same showing that the old Sy.No. 49/3 changed to new Sy.No. 102 and it is different and far away from the plaint schedule property. The defendants have not discharged their burden, but simply stated that Sy.No. 49/3, corresponding new Sy.No. 102 is one furlong away from the house situated in old Sy.No. 58, corresponding new Sy.No. 122 and it is no where mentioned by the plaintiffs that they got land in Sy.No. 49/3 is the new Sy.No. 102. It is the case of the plaintiffs that the property is their ancestral property and it is a Gramakantam. Therefore, the theory propounded by the plaintiffs appears to be probable. No doubt, the plaintiffs have not filed

any document to show that the father of first defendant died 40 years back, but Dw.2 admitted that he made constructions inspite of the injunction granted by the Court and the defendants have established the death of Sathaiah about 40 years back. The lower appellate Court without formulating any points to be considered and the only point that was considered as to whether the Judgment of the trial Court is liable to be set aside and if so on what ground and without appreciating the oral and documentary evidence, simply upheld the Judgment of the trial Court and dismissed the appeal suit.

18. The learned counsel appearing for the plaintiffs submits that both the Courts below concurrently recorded a finding of fact that the plaintiffs proved their case and therefore, the said finding of fact cannot be interfered in a Second Appeal and there are no questions of law involved in the Second Appeal. In support of her contention, she relied on the Judgments of the Apex Court and this Court. In the case of Hamida and Others Vs. Md. Kahlil, the Supreme Court held that:

"Upsetting the finding of fact recorded by the first appellate Court taking a different view merely on re-appreciation of evidence in the absence of valid and acceptable reasons to say that the findings recorded by the first appellate Court could not be sustained either they being perverse or unreasonable or could not be supported by any evidence. The High Court neither framed a substantial question of law nor any such question is indicated in the said Judgment as required u/s 100 of the Code of Civil Procedure. The approach of the High Court in our view is clearly and manifestly erroneous and unsustainable in law".

19. In the case of Veerayee Ammal Vs. Seeni Ammal, the Supreme Court held that:

"Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by determining the question as substantial question of law".

20. This Court in the case of Purushotham Patel and Another Vs. Ravula Lakshminarayana and Others, held that:

"When a finding relating to the identity of the property taking into consideration the boundaries had been recorded by both the Courts below on appreciation of both oral and documentary evidence available on record, the same cannot be disturbed in a Second Appeal unless such a finding is based on no evidence or the finding is in any way perverse or based on only surmises and conjectures".

21. On the other hand, the learned counsel appearing for the appellants-defendants relied on the Judgment of the Supreme Court in the case of Bondar Singh and Others Vs. Nihal Singh and Others, , wherein the Supreme Court held that:

"If the findings of the subordinate courts on facts are contrary to the evidence on record and are perverse, such findings can be set aside by the High Court in appeal u/s 100 CPC. A High Court cannot shut its eyes to perverse findings of the

courts below".

22. In the said case, the High Court held that the findings of fact arrived at by the lower courts are perverse and the said Judgment of the High Court was upheld by the Supreme Court. The learned counsel appearing for the appellants/defendants further submitted that the plaintiffs cannot succeed on the weakness of the defendants case and the plaintiffs must establish their own case on the strength of their own title deeds and the plaintiffs are not entitled for the relief of declaration of title and injunction as sought for.

23. The substantial questions of law that arises for consideration are:

(1) whether the findings of the Courts below in holding that the plaintiffs have established their right, title to the plaint schedule property and the defendants encroached upon the portion of the suit schedule property is perverse and based on the evidence available on record.

(2) Whether the plaintiffs proved that the plaint schedule property is the property said to have been purchased by their ancestors under Ex.A1 sale deed.

(3) Whether a decree of possession can be granted without identifying the property which is claimed by the plaintiffs; and

(4) Whether a decree can be passed in respect of the survey number when it is stated by the Commissioner to be not the one he measured.

24. It is the specific case of the plaintiffs that their ancestors have purchased the land measuring 40 cents covered by Ex.A1 sale deed and the survey number of Ex.A1 sale deed is 49/3. In the plaint plan, absolutely, there is no pleading as to what is the changed survey number of Ex.A1 sale deed, but Ex.A1 shows that it is in Sy.No. 49/3. There is no pleading in the plaint that the land in Ex.A1 sale deed is situated in Sy.No. 49/3 and the same is changed as Sy.No. 58, corresponding to new Sy.No. 122.

25. It is the specific case of the defendants that Sy.No. 49/3 corresponds to new Sy.No. 102. The properties of the plaintiffs and defendants are situated in old Sy.No. 58 in Gramakantam and the corresponding new survey number is 122. The total extent of Sy.No. 122 is Ac.3-25 cents.

26. The question that arises for consideration as to whether the plaintiffs have pleaded and proved that Sy.No. 49/3 is changed into old Sy.No. 58, which is the corresponding new Sy.No. 122. Absolutely, there is no documentary evidence to show that old Sy.No. 49/3 was a Zeroyati land and it was converted into old Sy.No. 58 as Gramakantam. Except the oral evidence, there is no documentary evidence adduced by the plaintiffs. On the other hand, it is the specific case of the defendants that the present properties of the plaintiffs and defendants are in old Sy.No. 58, the corresponding new Survey number is 122 and the lands covered by Sy.No. 49/3 are far away to the lands in question in Sy.No. 122. The Advocate Commissioner also specifically stated that the suit schedule property is

not in Sy.No. 49/3. But, contrary to the report of the Advocate Commissioner and in the absence of any documentary evidence, both the Court below found that the plaintiffs have proved their case and that the plaint schedule property of which the old Sy.No. 49/3 is changed into Sy.No. 58 and thereafter, the same has been converted into new Sy.No. 122. Thus, I am of the opinion that both the Courts below recorded the said fact there being without any evidence on record to show that Sy.No. 49/3 is converted into old Sy.No. 58 and again as new Sy.No. 122. The finding of the Courts below is perverse and there being without any evidence whatsoever.

27. Yet another question arises that the Courts below have failed to consider whether the ancestors of the plaintiffs have permitted the father of the first defendant and grandfather of defendants 2 to 4 Sathaiah as licencees. For that contention, no evidence has been adduced by the plaintiffs to show that Sathaiah was permitted to be occupied as a licensee in the suit schedule property. It is the case of the defendants that Sathaiah died 40 years prior to filing of the suit and even prior to the birth of the second defendant. Therefore, the said pleading of the plaintiffs that the property was permitted to be occupied as a licensee by the father of the first defendant and grand father of defendants 2 to 4 is also not proved. Thus, the finding of the Courts below is perverse and contrary to the evidence available on record and the appreciation of evidence only leads to one conclusion that the plaintiffs have failed to prove that the plaint schedule property is the property covered by Ex.A1 sale deed and also further failed to prove that the defendants have illegally occupied the plaint schedule property covered by Ex.A1.

28. The learned counsel appearing for the plaintiffs submits that the boundaries on fact is tallied and therefore, it cannot be said that the plaintiffs failed to establish their case and she further submitted that the boundaries prevail over the survey number. The only document on which the plaintiffs relied on is Ex.A1. Ex.A1 sale deed pertains to a different land from that of the land in occupation of the defendants and even according to the Commissioner's report, the plaint schedule properties are as per the present occupation of the parties. It is the case of the defendants that in fact, the plaintiffs property in which they are residing and the defendants property is in old Sy.No. 58, and its corresponding new survey number is 122, but whereas, the property claimed by the plaintiffs under Ex.A1 is in Sy.No. 49/3 and its corresponding new survey number is 102 and it is different, distinct and far away from the old Sy.No. 58. Therefore, there is no substance in the said contention of the learned counsel for the plaintiffs.

29. The finding recorded by the Courts below is perverse and based only on surmises and conjectures. Absolutely, no documentary evidence has been filed by the plaintiffs to prove their case that Ex.A1 schedule property is that of the plaint schedule property. There is no evidence on record to show that the tax receipts filed by the plaintiffs relate to Ex.A1 schedule property. The plaintiffs have not shown how the old Sy.No. 49/3 has been changed into Sy.No. 58. On

the other hand, the defendants specifically given old survey numbers and the relevant new survey numbers. There is no justification on the part of the Courts below to believe the version of the plaintiffs that old Sy.No. 49/3 is changed to corresponding old Sy.No. 58 and its corresponding new Survey number is 122. Thus, I am of the opinion that the finding of the Courts below is perverse and contrary to the evidence. Accordingly, I set aside the said findings of both the Courts below and answer all the aforesaid questions of law as framed above in favour of the defendants and against the plaintiffs.

30. The Second Appeal is accordingly allowed and the Judgments and decree of the Courts below are set aside and the suit is dismissed. No order as to costs.