

HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD

Second Appeal No. 1713 OF 2011

Between:

G.S.N.Prasad

... Appellant

G.Madhusudhan Reddy and others

... Respondents

DATE OF JUDGMENT PRONOUNCED: 14.08.2024

Submitted for approval.

THE HON'BLE SRI JUSTICE K.SURENDER

- 1 Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
- 2 Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
- 3 Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

K.SURENDER, J

* THE HON'BLE SRI JUSTICE K. SURENDER

+ Second Appeal No. 1713 OF 2011

% Dated 14.08.2024

G.S.N.Prasad

... Appellant

\$ G.Madhusudhan Reddy and others

... Respondents

! Counsel for the Appellant: Sri K.V.Bhanu Prasad, learned Senior
Counsel representing
Sri Kothapalli Sai Sri Harsha

^ **Counsel for the Respondents:** Sri P.Venugopal, learned Senior Counsel
representing Y.Ashok Raj, learned counsel

>HEAD NOTE:

? Cases referred

- 1.(2007(3) ALT 6);
2. (2018 SCC OnLine Bom 12002);
- 3.(2015(2) CivilLJ 324)
- 4.(2019(9) SCC 358)
- 5.(1981) 2 SCC 414)
- 6.(1997) 5 SCC 438)
- 7.(2004) 5 SCC 762)
- 8.(2005) 10 SCC 553)
9. (2020) 19 SCC 57
10. (AIR 2023 SC 379)
11. (2003) 8 SCC 752 Supreme Court

THE HON'BLE SRI JUSTICE K.SURENDER**SECOND APPEAL No.1713 of 2011****JUDGMENT:**

1. The plaintiff being unsuccessful in both the Courts below, has filed the present Second Appeal.

2. Appellant is the plaintiff in the trial Court and respondents are defendants. For the sake of convenience, the parties hereinafter will be referred to as arrayed in the trial Court. Suit was filed by plaintiff vide OS No.1715 of 2003 and thereafter AS No.259 of 2009, questioning the judgment and decree passed in O.S.No.1715 of 2003.

3. The plaintiff filed Suit for grant of perpetual injunction restraining the defendants from interfering with the peaceful possession of the plaintiff over the suit schedule property. Plaintiff's schedule property is part of Plot no. 7.

4. Briefly, the case of the plaintiff is that he purchased 1,479 square yards in old Survey No. 129/71 (new no. 144) of Shaikpet village, Road No. 2, Banjara Hills from Kamal under a registered sale deed dated 5.9.1968 (Ex.A1). Subsequently, the municipal

corporation acquired 257 square yards for road widening, leaving the plaintiff with the remaining 1,222 square yards.

5. The defendants claimed no knowledge of the location of the land as claimed by plaintiff. They asserted that the plaintiff mistakenly claimed the suit property as part of the land purchased by defendants under the sale deed dated 5.9.1968. Defendants contended that the suit property was not part of the land in the plaintiff's sale deed but was instead part of Acs.3.15 guntas in Plot No. 7. Plot No. 7 had been assigned by the Government to their ancestor, Narayan Bhavanani, after acquiring their Plot No. 18 (Acs.3.36 guntas) in Jubilee Hills for the development of a nala. Plot No. 18 was subsequently cancelled and replaced with Plot No. 7, which was given to defendant No. 3's husband.

6. It is the claim of plaintiff that he had mortgaged his property under Ex.A1 to secure a loan of Rs 25 lakhs from Syndicate Bank but failed to repay it. Consequently, the Bank /creditor filed case OA No.1279 of 1999 before Debt Recovery Tribunal for recovery. The Tribunal passed final orders and issued execution warrant for the sale of the mortgaged property.

7. Defendants 3 to 5 filed Claim Petition No. 31 of 2004, in the OA claiming the property, with the bank and the plaintiff as respondents in the claim petition. The Tribunal, recognizing the importance of the property's location, appointed a Deputy Director of Survey and Land Reforms to locate the land and submit a report (Ex.B2). The surveyor attempted to locate the property in the presence of an Advocate-Commissioner, the parties, and their counsels. The report concluded that the property shown by the plaintiff did not match the land purchased under the sale deed (Exhibit A1). The Surveyor and Commissioner provided three reasons for their findings, which led to the conclusion that the plaintiff's land could not be identified. The surveyor's report was accepted while allowing the defendants' claim petition. The Tribunal concluded that the property shown by the plaintiff was not the one purchased under the sale deed (Ex.A1). Thus, the plaintiff failed to identify his own land.

8. Litigation between the parties (defendants and Kamal- the vendor) predates the plaintiff's purchase from Kamal. Defendants 3 to 5 had a history of litigation with Kamal, in suit (OS No. 118

of 1968) where Narayana Bhavanani claimed the suit property, resulting in a decree in his favour.

9. The defendants in OS No. 1715 of 2003 relied on a Supreme Court judgement in Civil Appeal No. 5024/91 (Ex.B19), which stated that a triangular portion measuring 16 guntas, jutting into Survey No. 144, should be in the possession of and treated as the property of the defendants herein- i.e., Kamal. The judgement further clarified that the plaintiff/respondent had no claim to this portion, and the land in Plot No. 7 in survey no. 151/4 shall belong to defendants 3 to 5(Ac.2.39 guntas).

10. According to defendants plot no. 7 in survey no. 151/4 and Survey no. 144 are adjacent to each other. Hence, defendants contend that besides the triangular piece of land- plaintiff cannot lay any claim over land in survey no. 151/4 pertaining to plot no. 7. Further, plaintiff has nothing to do with plot no. 7 in survey no. 151/4 – since his site is covered by survey no. 144, old survey no. 129/71 and that Kamal wrongly showed location of his plot.

11. The defendants argued that the plaintiff did not provide any record showing that the title to Survey No. 144 or Plot No. 7 was ever declared in his favour by the Supreme Court or any other court.

12. Basing on the above pleadings, the Trial Court considered the following issue:

“Whether Plaintiff is entitled for perpetual injunction?”

13. The defendants claimed that Kamal, the vendor, who was the owner of the old Survey No. 129/71 (new Survey No. 144), sold the site to the plaintiff by providing incorrect boundary numbers and location. They relied on the Supreme Court judgment (marked as Exhibit B19) in Civil Appeal No. 5024/91. Based on the judgment, the defendants in OS No. 1715 argued that the plaintiff failed to submit any record showing that his title to Survey No. 144 or Plot No. 7 was ever recognized in his favour by the Supreme Court or any other court. Consequently, the plaintiff did not provide any evidence to prove his title to Survey No. 144 or that Plot No. 7 was ever declared in his favour.

14. Trial Court's Consideration and Findings:

The trial court, considered the evidence placed on record by both parties. According to trial Court, the main evidence indicated that the plot claimed by the plaintiff could not be identified on the ground on the basis of the boundaries provided by the plaintiff under Exhibits B1 and B2. The Court concluded that it was clear that the plaintiff had no information about the location of his site and that it could be safely inferred that the plaintiff was never in possession or enjoyment of the plaintiff schedule property.

15. Furthermore, the Court held that the plaintiff failed to prove the identity of the plaintiff schedule property and had approached the Court while suppressing material facts, including the suit proceedings initiated by Defendant No. 3's husband, which went up to the Supreme Court and culminated in the judgment under Exhibit B4. The plaintiff also suppressed the results of the OA Proceedings before the tribunal and failed to identify the plot on the ground with reference to the boundaries provided by him under the Exhibit B2 plan. Consequently, the Trial Court determined that the plaintiff was not entitled to the equitable relief of perpetual injunction and dismissed the suit.

16. Aggrieved by the said judgment, AS No.259 of 2009 was preferred before the XI Additional Chief Judge (FTC), City Civil Court, Hyderabad. The learned District Judge observed that it was not the defendants' position that the plaintiff did not own any site at all. Rather, the defendants argued that the disputed property was not the one purchased under the sale deed, Exhibit A1. Thus, the primary dispute concerned the location of the property, and the burden of proof was on the plaintiff, which he failed to discharge.

17. The First Appellate Court found that since the plaintiff failed to prove the location of the suit property and his right over it, he was not entitled to a permanent injunction. The plaintiff contended that Defendants 1 and 2 were representatives of Defendants 3 to 5, and that the main parties, Defendants 3 to 5, were not examined. Only Defendant No. 2, who was the general power of attorney holder, was examined as DW1. The plaintiff argued that the evidence of a GPA holder could not be considered as that of a party, citing a Supreme Court judgment. The court responded by stating that if the burden of proof was on Defendants 3 to 5, then DW1's evidence could be considered. However, since the burden was not on the defendants to prove

the location of the property or the plaintiff's right, the non-examination of Defendants 3 to 5 did not affect the plaintiff's claim and did not support the plaintiff's case. Consequently, the first appellate court dismissed the appeal.

18. Sri K.V.Bhanu Prasad, learned Senior Counsel appearing for Kothapalli Sai Sri Harsha, learned counsel appearing for the plaintiff/appellant submits that the defendants while admitting the vendor of the plaintiff is the owner of the property and he has every right to sell the property, however claimed that the map location was wrongly shown. Both the Courts below, failed to see the difference whether there is any difference in the schedule to the sale deed and map annexed to Ex.A2, i.e., copy of plan annexed to Ex.A1 sale deed. The said aspect goes to the root of the case and both the Courts below without considering the documents went on to arrive at their own conclusions. Further, the entire basis for believing the version of the defendants is the Commissioner's report which was filed in the suit. Such report of the Advocate Commissioner which was filed in OA No.1279 of 1999 by the Bank against the plaintiff, cannot be relied on unless the Commissioner was examined in the Court. Merely marking Commissioner's report would not suffice. Learned counsel relied

on the following judgments: i) **Haridasyam Srinivasa Murthy v. M.Nanardhan Reddy** (2007(3) ALT 6); ii) **Vijay A.Mahatre and others v. Yashwant B.Mhatre and others** (2018 SCC OnLine Bom 12002); iii) **Seethalekshmi v. Lekshmi** (2015(2) CivilLJ 324) in support of his argument that Commissioner's report cannot be looked into unless the Commissioner was examined.

19. Learned Senior counsel further argued that the Hon'ble Supreme Court in Civil Appeal No.5024/1999 in between vendor of the plaintiff and the defendants, respondents herein) dated 08.12.1991 held that there was no controversy about the triangular portion. The said triangular portion shall be in possession and shall be treated as property of defendants and appellant and plaintiff would have no claim thereto. Similarly, the defendants have no claim in respect of rest of plot to an extent of Acs.2.39 guntas said to be comprised in Sy.No.151/4 which has been decreed in plaintiff's favour by the High Court.

20. Learned Senior Counsel also submitted that the GPA holder's evidence cannot be permitted in view of judgment of Hon'ble Supreme Court in the case of **Mohinder Kaur v. Sant Paul Singh** (2019(9) SCC 358), since the defendants in the Trial

Court did not enter into the witness box to substantiate their claim. However, GPA holder was only examined, whose evidence cannot be considered. Learned Senior Counsel submits that following substantial questions of law arise for consideration.

i) Whether the appellate Court is right in confirming the judgment and decree of trial court ignoring/not considering Ex.B4-B8 which do not support the case of respondents.

ii) Whether the courts below are right in accepting the evidence of GPA holder when the real owners did not speak about their own case?

iii) Whether the courts below are justified in denying the relief to the appellants when the respondents failed to make out prima facie case of assigning the land at least in plot No.7, Jubilee Hills?

iv) Whether the Courts below are right in accepting the surveyors report ignoring the other evidence on record and thereby misread the evidence?

21. After the case was heard at length and reserved for Judgment, petition was filed to reopen the case for further hearing and also for consideration of the additional substantial question of law according to the appellant, which is as follows:

“(v) Whether the Courts below are right in dismissing the suit on the ground appellant/plaintiff failed to prove the location of his plot (Suit Schedule) in Sy.No.144 basing on the report of the Advocate Commissioner, when the Hon’ble Supreme Court decided both survey No.144 and 151/4 are adjacent to each other in Civil Appeal No.5024/ 1991 (Ex.B19).”

22. On the other hand, Sri P.Venu Gopal, learned counsel appearing for Sri Y.Ashok Raj, learned counsel appearing the respondents/defendants would submit that the plaintiff purchased the suit schedule property vide Ex.A1 sale deed and having mortgaged the documents with the Syndicate Bank raised loan of Rs.25.00 lakhs. Since the plaintiff was unable to pay back the amount, the Bank filed OA No.1279 of 1999. In the said OA, order was passed and recovery certificate was also issued. In the said OA, the defendants filed claim petition vide C.P.No.31 of 2004 in R.P.No.506 of 2003 in O.A.No.1279 of 1999 and claimed ownership of the suit schedule property. The Tribunal appointed Advocate Commissioner and also the Collector, Hyderabad was asked to depute the Deputy Director, Land and Survey records to assist in identifying the suit schedule property. Having considered the Commissioner's report, the Tribunal found that the schedule property as claimed by the plaintiff was not tallying with Ex.A1 sale deed schedule property. Since the plaintiff could not identify the schedule property in OA, which was in Sy.No.129 of 1971 (old No.144), but plaintiff was showing the schedule property in JHM Plot No.7, TS No.12/3. The said plot belongs to the defendants. For the said reason, the OA was dismissed and

claim petition of the defendants was allowed in favour of the defendants.

23. Learned Senior Counsel further submitted that in fact, there was a separate proceeding which was prosecuted by the defendants vide OS No.118 of 1968. The said suit was filed against Ayub Kamal for perpetual injunction and the same was decreed. Ayub Kamal preferred CCCA No.94 of 1972 before the High Court of Andhra Pradesh, which modified the decree for 0.16 guntas. The said dispute went to the Hon'ble Supreme Court. The Hon'ble Supreme Court held that there was no controversy about the triangular portion admeasuring 0.16 guntas, which is jutting into Sy.No.129/71(old sy.No.144). The said triangular portion shall be in possession of and shall be treated as property of the defendant and the plaintiff shall have no claim. Similarly, the defendants will have no claim with respect to JHM plot No.7, TS No.12/3 to an extent of Acs.2.39 gts. However, the Hon'ble Supreme Court held that the triangular portion in respect 16 guntas shall be treated as property of Ayub Kamaal and the said Ayub Kamaal cannot claim land in Sy.No.151/4 pertaining to JHM Plot No.7, TS No.12/3, facing on road No.2, Banjara Hills.

24. Learned Senior Counsel further submitted that during trial, the plaintiff stated that he had no knowledge about the Sy.No.129/71. He further submitted that the Syndicate Bank filed O.A.No.1279 of 1999 for recovery of loan and he failed to identify the plot. Plaintiff also failed to provide any document to show that he was in enjoyment of the plaint schedule property or paying any taxes in respect of the subject property. On his own admission, it is clear that the plaintiff did not have any information regarding location of his site and this property has nothing to do with the property of the defendants, which is JHM Plot No.7, TS No.12/3. In view of the documents filed under Ex.B3-sale deed, Ex.B4-mutation was affected after exchange of JHM plot No.18 for JHM plot No.7, TS No.12/3 admeasuring Acs.3.15 gts. Permission for construction of house in JHM plot NO.7 under Ex.B6, supplementary sethwar issued in favour of the defendants under Ex.B7, vide Ex.B8, the District Collector, Hyderabad had confirmed the ownership of JHM Plot No.7, TS No.12/3 admeasuring Acs.3.15 gts in favour of Narayan Bhavanani, Ex.B9 is the mutation extract issued by MCH in favour of defendants and Ex.B10 is the mutation order of Tahsildar, Golconda dated 07.07.1976. In view of the documents

i.e., mutation proceedings, permission for construction, supplementary sethwar and other related documents marked under Exs.B3 to B53 defendants clearly proved that they are the owners and possessors of the land in question and since the plaintiff has failed to identify the plaint schedule property, the suit was dismissed. There are no grounds to interfere with the concurrent findings of the Courts below.

25. The Hon'ble Supreme Court in the case of **Bholaram v. Amirchand** (1981) 2 SCC 414), held that the findings of fact by the Courts below were wrong or grossly inexcusable that in itself would not entitle the High Court to interfere in the Second Appeal in the absence of clear error of law. In **Kshitish Chandra Purkait v. Santosh Kumar Purkait** (1997) 5 SCC 438), the Hon'ble Supreme Court held that (a) the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point.

26. In **Thiagarajan v. Sri Venugopalaswamy B.Koil** (2004) 5 SCC 762), the Hon'ble Supreme Court held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible. In **Madhavan Nair v. Bhaskar Pillai** (2005) 10 SCC 553), the Hon'ble Supreme Court held that the High Court will not be justified in interfering with the concurrent findings of fact even if the 1st appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the said finding.

27. The Hon'ble Supreme Court in **Nazir Mohammed v. J.Kamala** (2020) 19 SCC 57, held that the proper test for determining whether a question of law raised in the case is substantial would be to ascertain whether it is of general public importance or whether it directly and substantially affects the rights of the parties.

28. Conspectus of the judgments of the Hon'ble Supreme Court is that the High Court should be satisfied that the case involves a substantial question of law and not a mere question of law. The question of law should have material bearing on the decision of

the case. Unless the Courts below have decided the matter ignoring any legal principle or acting contrary to such legal principles would be substantial question. The High Court shall not interfere with the findings of facts arrived at the Court below unless the Courts below have ignored material evidence or drawn wrong inferences from proved facts by misapplication of law.

29. The Hon'ble Supreme Court in the case of **Smt.Smriti Debbarma (D) through Lr. V. Sri Prabha Ranjan Debbarma** (AIR 2023 SC 379) held as follows:

“31. The burden of proof to establish a title in the present case lies upon the plaintiff as this burden lies on the party who asserts the existence of a particular state of things on the basis of which she claims relief. This is mandated in terms of Section 101 of the Evidence Act, which states that burden on proving the fact rests with party who substantially asserts in the affirmative and not on the party which is denying it. This rule may not be universal and has exceptions, but in the factual background of the present case, the general principle is applicable.

The plaintiff could have succeeded in respect of the Schedule ‘A’ property if she had discharged the burden to prove the title to the Schedule ‘A’ property which squarely falls on her. This would be the true effect of Sections 101 and 102 of the Evidence Act. Therefore, it follows that the plaintiff should have satisfied and discharged the burden under the provisions of the Evidence Act, failing which the suit would be liable to be dismissed.”

30. The procedure prescribed under CPC and the Judgment of Hon'ble Supreme Court in the aforesaid decision, it is clear that a party which sets up a claim has to prove his case and the burden is always cast upon the party i.e., the plaintiff herein. The burden

never shifts onto the defendant unless the plaintiff proves his case.

31. The 1st question raised by the learned counsel is factual in nature. The 2nd and 4th questions can be answered together. The GPA holder has entered into witness box and examined himself as D.W.1. It is not the case that GPA did not have any personal knowledge regarding transactions in question. Having entered into the witness box, the relevant documents were brought on record including surveyor's report. At the time of bringing crucial documents, which is the surveyor's report on record, no objection was raised. The Hon'ble Supreme Court in the case of **R.V.E.Venkatachala Gounder v. Arulmigu Viswesaraswami v. V.P.Temple** (2003) 8 SCC 752 Supreme Court) held that failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting proper proof of document, the document itself which is sought to be proved being admissible in evidence. The Commissioner's report was filed in the case for recovery by the Bank in O.A.No.1279 of 1999. The Tribunal found that the suit schedule land was not the land of plaintiff under Ex.A1. According to the learned counsel for the appellant, having accepted the verdict of the Tribunal, no further appeal was filed

and the plaintiff entered into one time settlement with the Bank. The very same Commissioner's report which was filed in the suit for recovery by the Bank was filed in the present suit and was not objected when it was brought on record. The plaintiff cannot at appellate stage raise ground of admissibility or not to rely on the contents of the Commissioner's report unless the Commissioner was examined. When the Commissioner's report was admitted in Trial Court without objection and such document being admissible in evidence, the contention of the appellant regarding inadmissibility of the Commissioner's report is rejected.

32. Insofar as 3rd and 5th questions are concerned, the Hon'ble Supreme Court in Civil Appeal No.5024 of 1991 by order dated 18.12.1991 gave finding that 16 guntas of land belongs to Ayub Kamaal. However, the plaintiff failed to prove that the extent of land that the Hon'ble Supreme Court found as belongs to Ayub Kamaal is the very same land that was sold to the plaintiff. It cannot be assumed that 16 guntas of land which was in possession and property of Ayub Kamaal is the very same property under Ex.A1. Accordingly, the questions that are raised by the learned counsel for the appellant are answered.

33. I do not find any substantial questions that arise for consideration to be framed by this Court.

34. Accordingly, Second Appeal is dismissed.

Date: 14.08.2024
kvs

K.SURENDER, J