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G. SURYAKUMARI & ANR.

v.

B. CHANDRAMOULI & ORS.

(Civil Appeal No. 8476 of 2009)

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DECEMBER 18, 2009

[B. SUDERSHAN REDDY AND DEEPAK VERMA, JJ.]

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Suit – For perpetual injunction restraining the defendants from interfering with peaceful possession of suit schedule property – Plaintiff as well as defendants claiming to be lawful purchasers of the suit property from two different co-operative Housing Societies – Trial Court decreed the suit – First appellate court dismissed the same – High Court, in second appeal decreed the suit holding that the plaintiff was in possession of the suit property; that the area claimed by the plaintiff did not fall within the area said to have been purchased by the defendants; and that the defendants could not pretend ignorance from the order against the co-operative society, from whom they had purchased the property – In appeal to this court, defendant taking plea that in view of O.9 r.9 CPC, after order of dismissal of the earlier suit filed by the society, plaintiff barred from filing fresh suit – Held: The ground on the basis of O.9 r.9 CPC since raised before Supreme Court for the first time, cannot be permitted to be raised – Finding of High Court decreeing the suit, upheld – Code of Civil Procedure, 1908 – O. 9 r. 9 – Practice and Procedure – New plea – Raising of.

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Yellapragada Gopalkrishnamurthi v. Pettu Poda Madireddi and Ors. AIR 1949 Madras 882; Gajpat Singh v. Sudhan (Died) by LRs. Hukum Chand AIR 1985 P&H 135, referred to

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Municipal Corporation of Greater Mumbai and Anr. v. Kamla Mills Ltd. (2003) 6 SCC 315; Panchugopal Barua and Ors. v. Umesh Chandra Goswami and Ors. (1997) 4 SCC 713; Nityananda Kar and Anr. v. State of Orissa and Ors. 1991 Supp (2) SCC 516; Ishwar Das Jain (Dead) Thr. LRs. v. Sohan Lal (Dead) by LRs. (2000) 1 SCC 434, relied on. A
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Case Law Reference:

AIR 1949 Madras 882	Referred to.	Para 19	
AIR 1985 P&H 135	Referred to.	Para 19	C
(2003) 6 SCC 315	Relied on	Para 21	
(1997) 4 SCC 713	Relied on	Para 21	
1991 Supp (2) SCC 516	Relied on	Para 21	D
(2000) 1 SCC 434	Relied on	Para 21	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8476 of 2009.

From the Judgment and Order dated 20.2.2006 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Second Appeal No. 541 of 2002. E

M.N. Rao, Promila for the Appellant Petitioners. F

H.S. Guru Raja Rao, G. Seshagiri Rao, Sridhar Potaraju and S. Thananjayan for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted. G

2. Defendants-appellants, feeling aggrieved by the judgment and decree pronounced by learned Single Judge of the High Court of Andhra Pradesh at Hyderabad, in H

A respondents' S.A. No. 541/2002 decided on 20.2.2006, are before us challenging the same on variety of grounds.

3. Respondents herein as plaintiffs had filed Original Suit No. 5731 of 1994, against the present appellants/ defendants,
 B for the relief of perpetual injunction restraining them from interfering in any manner into their peaceful possession and enjoyment over the Suit Schedule Property to an extent of 1,200 sq. yards forming part of House No. 6-3-584/31/B covered by Survey Nos. 94, 95 and 96 of Ward No. 3 out of 38,382 sq.
 C yards belonging to M/s. Gramodyog Cooperative Housing Society, situated at Khairtabad, Hyderabad.

4. According to the plaint averments, respondents/plaintiffs contended that schedule property is part of 50,000 sq. yards covered by Survey Nos. 94, 95 and 96. It originally belonged to Dr. Ahmed Mirza from whom Smt. K. Parvathi Devi and four others purchased the same under registered sale deed dated 17.3.1961. Thereafter, M/s. Gramodyog Cooperative Housing Society purchased an area admeasuring 38,382 sq. yards from them by a registered deed of sale executed on 20.9.1962.
 E Respondent Nos. 1 and 2 purchased 600 sq. yards each under registered sale deeds from the said society on 17.1.1994 and 19.1.1994 respectively. After the execution of sale deeds, they raised boundary walls and invested huge amounts of money for
 F its development. They also submitted plans for construction of houses, after paying necessary fee, for grant of such permission. Respondent Nos. 1 and 2, therefore, claimed to be title holders of the said lands and having possession over the same but appellants/defendants without any right
 G whatsoever tried to encroach about 382 sq. yards of the schedule property, claiming the same to have been purchased from a society, viz., M/s. Anand Jyothi Cooperative Housing Society. The respondents with great difficulty could resist illegal acts of encroachment by the appellants and lodged an FIR in

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this regard with the concerned Police Station but police did not take any appropriate action in the matter. On or about 8.12.1994 with the help and assistance of anti social elements, appellants once again, tried to encroach Suit Schedule Property of the respondents. They resisted the attempts of the appellants with the help of neighbours. Since there existed imminent danger of their land being encroached upon by the appellants, they were constrained to file suit for perpetual injunction against the appellants with a prayer to restrain them from encroaching upon their land in any manner whatsoever.

5. On summons being issued to them by the Civil Court, the appellants herein filed their Written Statement, denying the claim of the respondents/plaintiffs. According to them, schedule land is part of Survey No. 105/1 of Khairtabad village, which originally belonged to Hazmatunnisa Begum, who had gifted the same to Zohra Begum by gift deed dated 1.9.1966. Zohra Begum, after becoming owner had sold Ac. 4-36 cents to Ch. Achaiah by registered sale deed dated 8.9.1966 from whom M/s. Anand Jyothi Cooperative Housing Society had purchased 4,990 sq. yards under registered sale deed dated 8.5.1970 with specific boundaries. After purchase, the said society also got the layout plan approved from Municipal Corporation, Hyderabad. Internal roads were laid. The land was divided into plots with specific numbers and allotted to its members. Appellants have contended that the said society had executed registered sale deed dated 25.10.1993 in favour of first defendant i.e. Respondent No. 3 herein K.V.J.R. Krupanidhi, with respect to Plot No. 7 admeasuring 382 sq. yards. Thereafter, Respondent No. 3 herein obtained permission from the Special Officer-cum-Competent Authority, under Section 26 of the Urban Land Ceiling Act on 28.3.1994 to sell the said plot to defendant no.2-present Appellant No.1. The sale deed by Respondent No. 3 (original Defendant No. 1) was then executed in favour of Appellant No. 1 on 13.4.1994 who,

A thereafter, took possession of the plot.

5. In order to have the said site into regular and proper shape, appellant no.2 further purchased additional 21 sq. yards from C. Nageswar Rao out of his plot No. 6 and sold 21 sq. yards to Smt. A. Vijayalaxmi out of Plot No. 7 under registered sale deed dated 28.11.1994. He, thereafter, got his name mutated and started paying tax. Encumbrance Certificate for a period of 15 years was also obtained by him between 28.8.1980 to 24.8.1994. Domestic electrical connection was also obtained for the store/watchman room from APSEB and necessary permission from Municipal Corporation, Hyderabad to construct a house was also obtained.

6. Only when he started digging pits and constructing store/watchman room and compound wall, the respondents tried to dispossess Appellant No. 1 by using physical force. A police complaint was filed by her husband-appellant no.2. Thereafter, the present suit was filed by respondents against the appellants.

7. Other allottees of the plots of the aforesaid Housing Society had constructed their respective buildings/apartments in the plot so purchased by them. Thus, the averments made by respondents in their plaint were denied in toto.

8. After framing of issues, parties went to trial. After detailed consideration of both oral and documentary evidence, Trial Court vide judgment dated 01.12.1999 recorded a finding in favour of the respondents and decreed the suit granting temporary injunction, restraining appellants from interfering with peaceful possession and enjoyment of the plaintiffs over the Suit Schedule Property.

9. Aggrieved by the said judgment and decree passed by the Trial Court, the appellants-defendants herein were constrained to file an appeal before the lower appellate Court challenging the same on variety of grounds.

10. The lower appellate Court vide judgment and decree dated 14.3.2002 allowed the same and the respondents' suit was dismissed. A

11. Questioning the same and against quashment of judgment and decree of the Trial Court, respondents had preferred a second appeal under Section 100 of the Code of Civil Procedure (CPC). In the said second appeal the following two questions of law were formulated : B

"(i) Whether the lower appellate Court was right in reversing the entire judgment of the Trial Court though the interest of the defendants was only in respect of 382 sq. yards of land purported to be in Survey No. 105/1 of Khairtabad village, Hyderabad. C

(ii) Whether the lower appellate Court was right in reversing the findings of the trial Court and whether the same is not contrary to the evidence on record and amounts to a perverse finding." D

12. Learned Single Judge of the High Court came to the conclusion that the Suit Schedule Property is found to be in exclusive possession of respondents and the same is clearly identifiable. The appellants herein cannot pretend ignorance and say that they are not bound by the orders of the Court passed against M/s. Anand Jyothi Cooperative Housing Society because they have purchased this property from the said society by registered sale deed. Looking to the Commissioner's and Survey Report, it has been found that the area of 382 sq. yards claimed by respondents does not fall within the area said to have been purchased by appellants herein. A categorical finding has been recorded by the High Court that Commissioner's Report would show that there is a distance of more than ½ Km between the lands in Survey No. 96 and land in Survey No. 105. E
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A 13. In fact, it has been found that the land admeasuring 382
sq. yards, subject matter of the suit is not located within Survey
No. 94, 95, 96 of village Khairtabad, instead it is part of lands
belonging to Hazmatunnisa Begum of Khairtabad, which has
been purchased by the appellants. Thus, they could not have
B been restrained from entering their own lands.

14. Learned Single Judge of the High Court entirely agreed
with the finding recorded by the Trial Court with regard to
possession of the appellants on 382 sq. yards of land. It further
C agreed that possession being *sine qua non* for grant of
permanent injunction, the Trial Court had committed no error
in granting the same. After discussing the matter threadbare,
the High Court by the impugned judgment and order, set aside
the judgment and decree of the first appellate Court and
D restored that of Trial Court, whereby and whereunder the
respondents' suit was decreed. Hence, this Appeal.

15. It is pertinent to mention that a suit being O.S. No.1846
of 1982 was filed by Anand Jyothi Co-operative Housing
Society for perpetual injunction restraining Gramodyog Co-
operative Housing Society from interfering with 6090 sq.yards
E in survey no.105/1, which was dismissed for default on
12.7.1985.

16. Learned Senior counsel for appellants, Mr. M.N. Rao,
F tried to advance before us some questions of law with regard
to Order 9 Rule IX of the CPC, which were vehemently opposed
by learned counsel for respondents on the ground, that this
having not been taken earlier cannot be permitted to be taken
up for the first time at this stage.
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17. We have no doubt in our mind that at any point of time
earlier it was neither raised nor argued or hammered at the
stage of Trial Court, first appellate Court and High Court, thus
it cannot be permitted to be taken up for consideration for the
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first time. Thus, we refrain from taking cognizance of those grounds which are sought to be taken now for the first time. A

18. Learned senior counsel for the appellants has also strenuously submitted before us that as per O.9 R.IX, CPC, dismissal of earlier Suit filed before Junior Civil Judge, City Civil Court, Hyderabad against Gramodyog Cooperative Housing Society for injunction would create a bar against the present respondents/ plaintiffs to file fresh suit. B

19. To put forth contentions further in this regard, learned counsel for appellants have placed reliance on a judgment reported in AIR 1949 Madras 882 titled, *Yellapragada Gopalkrishnamurthi v. Pettu Poda Madireddi & Ors.* and full Bench opinion of Punjab and Haryana High Court reported in AIR 1985 P&H 135 titled *Gajpat Singh v. Sudhan (Died) Legal by L.Rs Hukam Chand.* C D

20. We are afraid and as mentioned hereinabove that it would neither be proper nor permissible to raise this ground for the first time in this appeal before this Court. Admittedly, this ground was never taken by the appellants either before the Trial Court or First Appellate Court or in Second appeal in the High Court and has been tried to be advanced for the first time, which in our opinion is impermissible. E

21. It is not necessary to deal this aspect of the matter as it stands concluded by various judgments of this Court, viz., (1) *Municipal Corporation of Greater Mumbai & Anr. v. Kamla Mills Ltd.*, (2003) 6 SCC 315 : AIR 2003 SC 2998; (2) *Panchugopal Barua & Ors. v. Umesh Chandra Goswami & Ors.* (1997) 4 SCC 713 : AIR 1997 SC 1041; (3) *Nityananda Kar & Anr. v. State of Orissa & Ors.* 1991 Supp (2) SCC 516; and (4) *Ishwar Das Jain (Dead) Through LRs v. Sohan Lal (Dead) by LRs* (2000) 1 SCC 434 : AIR 2000 SC 426. F G

22. Apart from the above, other grounds advanced before H

- A us have already been answered by an elaborate and detailed order passed by High Court in the respondents' second appeal. Despite arguing for quite some time learned counsel for appellants could not point out any illegality or perversity to us in the impugned judgment and decree. The Appeal being
- B devoid of merits and substance is hereby dismissed with costs throughout.

23. Counsels' fee Rs. 5,000/-.

K.K.T.

Appeal dismissed.

End of 2009