

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

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SECOND APPEAL No.207 of 2006

Date:01.05.2015

Between:

Mummidi Raghavendra Rao and others.

... Appellants.

AND

Mamidipalli Mohan Rao

...Respondents.

The Court made the following :

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

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SECOND APPEAL No.207 of 2006

JUDGMENT:

This appeal is preferred against judgment dated 17-10-2005 in A.S.No.185/2001 on the file of VII Additional District Judge, Kakinada, East Godavari District whereunder judgment dated 29-07-2000 in O.S.No.792/1994 on the file of II Additional Junior Civil Judge, Kakinada is reversed.

2. Appellants herein are defendants 1 to 4 & 6 and respondents herein are plaintiff & D5 in the above referred suit and they are herein after referred to as plaintiff and defendants as arrayed in the suit.

3. Brief facts leading to this appeal are as follows:-

Plaintiff filed the above suit contending that he is owner of house shown as 'HIJKLCB' in plaint plan, which consist of two items. According to plaintiff, there is a lane towards north of the suit property shown as 'ABCD', which is being used as path way for ingress and egress to the house of the plaintiff from Pichikavari lane since long time uninterruptedly and peacefully. According to plaintiff, the second defendant offered to sell vacant site shown as BLMBI in the plaint plan to the plaintiff at a higher rate for which, plaintiff agreed, but the second defendant insisted plaintiff to pay for ABCD lane portion also for which plaintiff did not agree, therefore, defendants started obstructing plaintiff from using this 'ABCD' joint lane and that made the plaintiff to approach the Court for relief of declaration of his right in joint path way. Defendants 1 to 4 & 6 contended that plaintiff has no right of access thorough ABCD and that it is exclusive property of defendants 1 to 4 & 6 and that the plaintiff has got ingress and egress towards west of his house to the Tilak Road and that the plaintiff is not entitled for the relief of declaration.

4. On these contentions, II Additional Junior Civil Judge, Kakinada conducted trial during which, two witnesses are examined and

Exs.A1 & A2 and Exs.C1 to C3 on behalf of plaintiff and three witnesses are examined and Exs.B1 to B3 are marked on behalf of defendants. On a over all consideration of oral and documentary evidence, trial Court dismissed the suit. Aggrieved by which, plaintiff preferred appeal and VII Additional District & Sessions Judge, Kakinada, on a reappraisal of evidence, decreed the suit holding that the plaintiff has got access through ABCD lane. Aggrieved by the same, defendants 1 to 4 & 6 filed the present appeal.

5. Appellants contended that the following are the substantial question of law for determination by this Court in the second appeal:-.

“Whether on the facts and in the circumstances of the case, the judgment of the lower appellate Court is vitiated in that it did not come to the close quarters to the reasoning assigned by the trial Court especially when the lower appellate Court is reversing the trial Court decree.?”

Whether the lower appellate Court is right in granting the equitable relief of declaration and injunction especially when the plaint plan is not correct as found by the trial Court and which finding was not disturbed by the lower appellate Court?

Whether the judgment of the lower appellate Court is vitiated in that it proceeded on surmises and conjectures divorced from the ground realities and fact situation.”

6. This Court admitted the second appeal treating the following as substantial question of law *“whether the lower appellate Court is right in granting the equitable relief of declaration and injunction especially when the plaint plan is not correct as found by the trial Court and which finding was not disturbed by the lower appellate Court.”*

7 Heard both sides.

8. Advocate for appellants submitted that both trial Court and appellate Court have held that plaintiff has not acquired right of access by prescription, but in spite of that, the appellate Court granted decree holding that plaintiff is entitled for the same by way of necessity.

He submitted that to grant access under the principle of necessity, there must be material to show that plaintiff has no other way, except the way pleaded, but from the evidence, it is clear that plaintiff has got other way through municipal drain, which is to the west of the plaintiff's house and site, therefore, the judgment of the appellate Court accepting the plea of necessity is not correct. He further submitted that in fact there is no plea in the plaint claiming necessity and it is only the appellate Court formulated and granted. He submitted that from the evidence, it is clear that at no point of time, there was jointness of this 'ABCD' portion and in fact, the plaint plan is not correct, when compared with the Commissioner's Report and Commissioner's Plan. He submitted that the trial Court without pleading discussed the easement of necessity and granted decree, which is a patent error and the same has to be set aside.

9. On the other hand, Advocate for plaintiff submitted that no substantial question of law is involved and even the point formulated by this Court is only on factual aspect. He further submitted that from the evidence, the municipal drain shown as alternative access to the plaintiff is closed with walls on both sides, therefore, there is no access through this municipal drain either to Pichikavari Street or to Tilak Lane and therefore, only way to plaintiff is through 'ABCD', which the appellate Court has rightly considered. He further submitted that from the Commissioner's Report, it is clear that this municipal drain is not completely closed and it is a open drain having opening at some places, which cannot be used as a way particularly

for vehicles.

He submitted that there is a bare necessity for the plaintiff to have ingress and egress and that was considered by the appellate Court from the evidence on record and that the appellate Court has not committed any error and that the substantial question of law pleaded by the appellants is not at all tenable. He submitted that findings on fact cannot be interfered in a second appeal and therefore, there are no grounds to interfere with the judgment of the lower appellate Court.

10. Now the point that would arise for my consideration in this second appeal is whether there is any substantial question of law to be considered by this Court?

11. **Point:-** According to appellants, plaintiff has no right of passage thorough 'ABCD'. On the contra, plaintiff contended, since times immemorial, plaintiff and his predecessors in title have been using 'ABCD' lane to reach Pichikavari lane. Admittedly, an Advocate Commissioner is appointed in this case and he is examined as P.W.2 on behalf of plaintiff and his report is marked as Ex.C2 and the plan prepared by him as Ex.C3. As seen from the report of the Advocate Commissioner, there are no constructions in the property of plaintiff and defendants 1 to 4 by the date of his visit and it was vacant site. Advocate Commissioner observed that in the site of plaintiff, there are some old walls with doors and door frames. According to appellants, the plaintiff has got way to his west, which is shown as municipal drain in the plaint plan. As seen from the material, Advocate Commissioner referred about this lane in his report and also shown it in his plan. According to Commissioner's Report, the lane shown as municipal drain is 71 feet in length 5 feet in width from Pichukavari Street, but the gate of 6th defendant in front of house of 6th defendant was up to the southern boundary wall, which is vacant site. The Commissioner only noticed the gate of D6 house towards this

municipal drain. Learned Commissioner noticed that this municipal drain (lane) is being used as public lavatory and he found unbearable foul smell at the time of his visit. The trial Court, considering the observations of the Advocate Commissioner with regard to gate of D6 house having opening towards this municipal drain, held that plaintiff has got alternative way through that municipal drain, therefore, refused the claim of plaintiff over 'ABCD', but the appellate Court, on complete analysis of Commissioner's Report with reference to other evidence of both parties on record, held that this municipal drain is not the original access, that the plaintiff and his predecessors had and they have been using this 'ABCD' lane to reach Pichikavari Lane and on that ground, granted decree in favour of plaintiff. As seen from the material, the property of defendants 1 to 4 & 6 originally belong to one common vendor. It is also clear from the evidence that unless plaintiff enter into small bit of area shown as B B1, C C1, he cannot pass through the lane shown as ABCD to reach Pichikavari Lane. From the report of Commissioner and also from the evidence of witnesses examined on behalf of both parties, it is clear that it is not possible to use the municipal drain, which was towards west of the plaintiff as passage either to reach Tilak Street or Pichikavari Lane. The learned Advocate Commissioner noticed inhabitants of the area are using this drain as Public Lavatory even during day time, which indicates that the same is being not used as ingress and egress. Though Advocate for appellants contended that there is no easement of necessity, but a close reading of evidence of P.W.1 would indicate that this 'ABCD' portion was used even by the plaintiff's predecessor in title and the objection started for use of this piece of land, only when plaintiff refused to pay charges for this piece of land also along with vacant site proposed to be purchased. Learned Appellate Judge has thoroughly scanned the evidence of both parties and the evidence of Advocate Commissioner and came to a right conclusion and the objection of the appellants with regard to findings of the appellate Court cannot be sustained. Both sides cited some rulings, which were already cited before the lower appellate Court, which were rightly considered, therefore, I am not again referring to them.

On a scrutiny of the entire material, the contention of the appellants that the appellate Court disturbed the findings of the trial Court contrary to the material on record cannot be accepted.

As rightly pointed out by Advocate for plaintiff, there is absolutely no substantial question of law involved in this appeal and the entire case is based on factual aspects.

12. For these reasons, I am of the view that the second appeal is devoid of merits and liable to be dismissed.

13. Accordingly, Second Appeal is dismissed as devoid of merits, but under the circumstances without costs.

14. As a sequel, miscellaneous petitions if any pending in this Second Appeal, shall stand dismissed.

JUSTICE S. RAVI KUMAR

Date:01.05.2015

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