

HONOURABLE SRI JUSTICE S.RAVI KUMAR
+SECOND APPEAL No.124 OF 2009
&
CONTEMPT CASE No.1935 OF 2014

% Dated 5th June, 2015

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SECOND APPEAL No.124 OF 2009.

Between: _____

#Sardar Balwanth Singh.

_____.
..Appellant.

And:

\$ Sardar Bhagath Singh.

_____.
..Respondent.

! Counsel for the appellant
B.VIJAYSEN REDDY

: SRI

^ Counsel for respondent:
SATYANARAYANA

SRI RAMIDI

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CONTEMPT CASE No.1935 OF 2014.

Between:

#Sardar Bhagath Singh._____.

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..Petitioner.

And:

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..Respondent.

! Counsel for the petitioner
SATYANARAYANA

: SRI RAMIDI

^ Counsel for respondent
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< GIST:

>HEAD NOTE:

? Cases referred:

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HONOURABLE SRI JUSTICE S.RAVI KUMAR

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COMMON JUDGMENT:

This appeal is preferred against judgment dated
19-1-2009 in A.S.No.332 of 2007 on the
file of Chief Judge, City Civil Court, Hyderabad
whereunder judgment dated 29-1-2007 in
O.S.No.3459 of 2004 on the file of V Additional Junior
Civil Judge, City Civil Court, Hyderabad, is reversed.

Appellant herein is the defendant and
respondent herein is plaintiff in O.S.No.3459 of 2004.

Brief facts leading to this appeal are as follows:

Plaintiff filed above referred suit for declaration
that he is owner of site admeasuring Ac.9.5 square
yards situated at Ameerpet, Hyderabad, which is
shown as plaint schedule and for other consequential

reliefs.

According to plaintiff, his father acquired plaint schedule property and some other properties and died in the year 1973 leaving behind him, his wife and five sons including the plaintiff. Thereafter, separate gift deeds were executed and the plaintiff took major share while plaintiff and other brothers were given small shop. When the plaintiff lost some portion of property in road widening of MCH, his mother agreed to provide the suit schedule property to him as it was appurtenant to the premises bearing No.7-1-166,1661/1 and 153 belonging to plaintiff.

A memorandum of understanding dated 30-4-2002 was executed between plaintiff and his mother whereunder plaintiff is provided passage from his property bearing Door No.7-1-153 to western side of the road. Plaintiff has complied with the conditions mentioned in Memorandum and on that, mother executed registered gift deed on 5-5-2001 gifting schedule property and as such, plaintiff has become absolute owner.

Defendant resisted the claim of plaintiff on the ground that claim is barred by resjudicata as in the earlier suit filed by plaintiff in O.S.No.6 of 1994, a clear finding was given that the suit property was joint passage and that finding would bind both the parties and therefore, the claim is barred by resjudicata. It is also contended that the mother of plaintiff has no right to gift the common passage and there is no separate municipal number for this common passage and it is not the property of any single individual and therefore, the plaintiff is not entitled for the relief of declaration.

On these contentions, trial court framed appropriate issues and conducted trial, during which, one witness is examined on each side and 19 documents are marked on behalf of plaintiff and three

documents are marked on behalf of defendant and on an overall consideration of oral and documentary evidence, trial court dismissed the suit on the ground that the claim is barred by principle of resjudicata. Aggrieved by the dismissal of the suit, plaintiff preferred appeal and the Chief Judge, City Civil Court, Hyderabad, on a reappraisal of evidence decreed the suit holding that the finding in the suit O.S.No.6 of 1994 will not operate as resjudicata. Aggrieved by the judgment of the appellate court, defendant preferred the present appeal.

Following are the substantial questions of law that are urged in the grounds of appeal.

i) Whether the judgments in perpetual injunction regarding the same subject matter having attained finality do not at all operate as resjudicata in a subsequent suit for declaration of title.

ii) Whether the finding regarding common passage having attained finality can be ignored in a subsequent suit on the strength of a document allegedly creating absolute rights.

iii) Whether transferor having admitted the existence of a common passage, having allowed to use the common passage for several years by several transferee can create encumbrance over the common passage so as to cause inconvenience and hardship to one of the transferee.

iv) Whether the common passage can be alienated thereby creating absolute rights in favour of only one party to the detriment of another party in whose favour common enjoyment rights have been conveyed.

This court, treating the above grounds as substantial questions of law, admitted the appeal.

Heard both sides.

Advocate for appellant submitted that the dispute is with regard to 9.5 square yards between two brothers and the plaintiff herein earlier filed O.S.No.6 of 1994 for the relief of permanent injunction in respect of the same property and in that suit, a clear finding was given that this site was left as common passage for all the brothers and to overcome the findings in O.S.No.6 of 1994, plaintiff himself persuaded his mother and obtained a gift deed from her. He further submitted that no one has got exclusive right in the suit property including mother of plaintiff and defendant and plaintiff cannot get any right by virtue of gift deed as the mother herself has no right to make any gift or bequeath. He further submitted that it is a clear case of resjudicata but the appellate court by holding that the earlier suit is filed for an injunction where there is no necessity to give any finding in respect of title and the present suit being a suit for declaration, the earlier finding will not operate as resjudicata but that finding is perverse in nature. He further submitted that the material on record would clearly show that mother has no right over the suit schedule property and therefore, any conveyance without right cannot convey any right.

On the other hand, advocate for respondent supported judgment of the appellate court and submitted that in the earlier suit, defendant has made certain admissions and on that ground, incorrect findings of the trial court are corrected by the appellate court and that there are no grounds to interfere with the findings of the appellate court. He further submitted that the defendant herein violated interim order and for that reason, plaintiff filed contempt case and that the defendant is liable for punishment. He further submitted that the material filed in C.C. would clearly show that the shop was removed by the defendant

and the same would amount to violation of status quo orders.

Now the points that would arise for my consideration in this appeal and contempt case are:

- 1) Whether the claim of the plaintiff is barred by resjudicata? and
- 2) Whether the defendant has disobeyed the status quo order and liable for punishment?.

POINT 1:

According to plaintiff, he is the absolute owner of the plaint schedule property having got it from his mother through gift deed which was executed in pursuance of a memo of understanding.

On the other hand, it is the contention of the defendant that this is common passage and there was finding in the earlier proceeding about nature of very same suit property and therefore, that finding would operate as resjudicata.

There is no dispute with regard to relationship between the parties. There is also no dispute with regard to identity of the property. It is also not in dispute that the entire property originally belonged to Sardar Mohan Singh who is the father of plaintiff and defendant who died in 1973 leaving behind him the wife and five sons. It is also not in dispute that mother of plaintiff and defendant, executed different gift deeds in favour of her five sons. It is also not in dispute that plaintiff herein earlier filed O.S.No.6 of 1994 and thereafter, O.S.No.2691 of 2001. Even from the own admission of plaintiff, property covered by this suit and

the property in the earlier suits O.S.No.6 of 1994 and O.S.No.2691 of 2001 is one and the same.

As seen from the material papers, plaintiff in his earlier suit O.S.No.6 of 1994 claimed exclusive right of passage whereas defendant denied such right. Plaintiff who is examined as P.W.1 clearly admitted in his evidence that the present suit is third suit in respect of the same property. In O.S.No.6 of 1994, a clear finding was given that the suit property is a common passage and that finding has become final. No appeal is preferred against decree and judgment in O.S.No.6 of 1994. In the subsequent suit O.S.No.2691 of 2001 also, a finding was given in respect of this passage and the trial court extracted the relevant portion from the judgment of earlier suit and the same is marked as Ex.B.3.

Nowhere in the earlier proceedings, plaintiff contended that this property is exclusive property of their mother, on the contrary, specific case was that it is the exclusive property of the plaintiff. The contention of plaintiff in O.S.No.6 of 1994 contradicts to his pleading in the present suit. These aspects were considered by the trial court and disallowed the claim of plaintiff. As rightly pointed out by advocate for appellant-defendant, learned appellate judge making a distinction between an injunction suit and a declaratory suit, negated the objection of the defendant. But in the process, he lost sight of the fact that earlier two suits were in respect of the same property and a clear cut finding was given as to the nature of the suit property and those findings have become final. When a competent court gave a finding that a particular piece of land is a common passage, any change in respect of nature of that land cannot be accepted without cogent and convincing evidence. Here the only evidence produced by plaintiff is the gift

deed executed by his mother showing the suit property as property of her own.

As rightly pointed out by advocate for appellant-defendant, without showing mother's right in the suit schedule property, plaintiff cannot get any right in the suit schedule property by virtue of Ex.A.1 document.

When the executant has no right in the property, the beneficiary of document cannot get any better right. As seen from the material, I have to accept the contention of the advocate for appellant-defendant that appellate judge also lost sight of the fact, that the existence of common passage was confirmed by mother of both parties and also plaintiff under Ex.A.4 and A.15 documents.

When the plaintiff claimed relief of declaration, burden is heavy on him to prove his right over the suit property with cogent and convincing reasons. When there was an earlier finding in respect of the same property, that was given in the suits filed by plaintiff himself, his burden is more heavy. In order to get the relief of declaration, plaintiff must plead and prove as to how nature of property is converted from jointness to absolute right and then only, he can overcome earlier finding with respect to nature of property. But here, plaintiff neither pleaded nor proved as to when this common passage is changed into the absolute right to the mother of both parties and therefore, plaintiff cannot get the relief of declaration.

No doubt, earlier suit O.S.No.6 of 1994 was only for perpetual injunction but even for considering the relief of perpetual injunction, the court has to incidentally verify the title and in that process, held that suit property was common passage and not exclusive property of any of the parties and such finding would

bind both parties herein who are also parties to the earlier suit. As rightly pointed out by advocate for appellant-defendant, learned trial judge has rightly applied principle of resjudicata to the case on hand but the lower appellate court on surmises and presumptions reversed such finding which in my view is not a correct approach.

For these reasons, I am of the view that lower appellate court has erred in reversing finding of the trial court with reference to the application of principle of resjudicata, as such, the findings of the lower appellate court are to be set aside. The point is accordingly answered in favour of defendant.

POINT No.2:

According to plaintiff, appellant-defendant herein has disobeyed the orders by removing the stall and therefore, he is liable for punishment.

In view of my findings and observation in point No.1, with regard to nature of the property, the contention of plaintiff with regard to violation cannot be accepted. When the property is a common passage and even all the parties have equal rights, the order of status quo would only convey that the parties have to enjoy the rights existing as on the date of order and therefore, it cannot be treated as violation. For these reasons, I am of the view that there are no merits in the C.C. and the same is liable to be dismissed. Point is accordingly answered.

In the result, this Second Appeal is allowed and the judgment dated 19-1-2009 in A.S.No.332 of 2007 on the file of Chief Judge, City Civil Court, Hyderabad is set aside and the judgment dated 29-1-2007 in O.S.No.3459 of 2004 on the file of V Additional Junior

In view of my findings and observations,
Contempt Case is dismissed. No costs.

JUSTICE

Dated 5th June, 2015.

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Dvs