

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

SECOND APPEAL NO.139 of 2015

JUDGMENT:

The sole defendant in the suit is the appellant herein. He lost in both Courts and hence, instituted this second appeal.

Heard Sri Siva Bhami Reddy, the learned counsel for the appellant.

The respondent herein filed the suit seeking for mandatory injunction to restrain the defendant from interfering with the plaintiff's possession over the plaint schedule property and for restoring the eaves removed by the defendant to their original position along the level of their houses.

The plaintiff was an agricultural coolie residing in Biccavole Village, East Godavari District. The defendant/appellant was also residing in the same village. The grand mother of the plaintiff, it is asserted, was granted gift of certain land by the Village Munsif along with 22 others. The maternal grandmother of the plaintiff and others raised thatched huts in the land and started living therein for a long time. In an unfortunate fire accident, the plaintiff's thatched house was completely gutted. A philanthropist in the village got constructed 2 Mangalore tiled houses for the 23 persons. One house comprises of 13 portions on the western side and the other 10 portions on the eastern side with a common passage. 10 years prior to the filing of the suit, the maternal grandmother of the plaintiff died and ever since then, the plaintiff was residing and was staying in exclusive possession of the said portion of the house, which is lying on the northern end of the 13 portions of the house. Thereafter, the plaintiff and his wife purchased a small extent of vacant land lying further to the north of their house. They purchased the said land from Singarapu Madhava and his wife under a registered sale deed dated 09.06.1997. The defendant in the suit was residing in the house lying on the western side of the plaintiff's house. The defendant/appellant filed a civil suit O.S.No.688 of 2002 making factually inaccurate allegations that the plaintiff was interfering with the vacant site belonging to the defendant and he was also interfering with the defendant's constructions that were going on there. The Court granted an *ex parte* injunction order. Under the protection of the said injunction order, the defendant removed the tiled eaves of the house portion of the plaintiff on the western side of

the plaintiff's house to an extent of 12 feet in length and 3 feet in width on 17.11.2002. Unfortunately for the plaintiff, he and his wife were not at home when this encroachment took place. When they returned to the village and when the plaintiff questioned the defendant, he has shown the copy of the *ex parte* injunction order and then proceeded to make new constructions and laid portico to such newly constructed house by encroaching into the plaintiff's site. As it turned out, the Court below tried O.S.No.688 of 2002 also parallelly, while trying O.S.No.632 of 2003 instituted by this respondent. Upon considering the material evidence, the trial Court dismissed O.S.No.688 of 2002 and decreed O.S.No.632 of 2003 instituted by the respondent herein on 02.07.2010. A finding of fact was recorded that the defendant/appellant removed the tiles of the plaintiff's tiled house to some extent so that, he can undertake construction of his house. It was also held that, it is the defendant/appellant who has interfered with the plaintiff's possession (O.S.No.632 of 2003) over the plaint schedule property and he has also encroached upon certain portion of the vacant site. Therefore, the suit is decreed.

Thereafter, the appellant/defendant preferred A.S.No.25 of 2013 before the III Additional District Judge, East Godavari at Kakinada. The Appellate Court has dealt with the issue raised by the defendant/appellant that the plaintiff did not have valid title over the suit schedule property. In Para 15 of the judgment rendered by the appellate Court, it was clearly noted that the defendant/appellant herein, who examined himself as DW.1, in his cross-examination admitted that the plaintiff was in possession of disputed portion of the house after the death of one old lady. In that view of the matter, the Appellate Court found that the defendant having admitted the possession of the plaintiff over the suit schedule property and having noticed that the maternal grandmother of the plaintiff was in possession of the suit schedule property much earlier thereto, had no difficulty whatsoever to dismiss the appeal preferred by the appellant herein. All the more so, the appellant herein has not preferred any appeal against the judgment rendered in O.S.No.688 of 2002 which was renumbered as O.S.No.629 of 2003. Hence the judgment and decree dismissing that suit of the present Appellant has become final. Thus, it is clear that pursuant to a *n ex parte* injunction order granted by the Court in O.S.No.688 of 2002 (renumbered as O.S.No.629 of 2003), the appellant herein has taken full advantage and encroached upon the site of the respondent/plaintiff and also interfered with the possession of the plaintiff over a portion of his house and removed the tiled eaves therefrom.

The learned counsel for the appellant would urge that, without seeking for a declaration of the title over the suit schedule property, the plaintiff cannot institute a simple suit for permanent injunction. He relies on the judgment rendered by the Supreme Court in **Gurunath Manohar Pavaskar Vs. Nagesh Siddappa Navalgund**.

That is a case, where there is a serious dispute with regard to title of the property, while the plaintiff alleged that the defendant in the suit has encroached upon a portion of the suit property by erecting a structure measuring 369 1/9 square yards, while the defendant has claimed right title and ownership over a larger extent of land including the plaint schedule property there. In view of the parallel claims made by both the plaintiff and the defendant in that suit in respect of the very same piece of land, the Supreme Court noted that it would not be proper to grant a mandatory injunction without deciding the question of title and/or leaving the same open. In the instant case, there is no parallel claim with regard to title of the suit schedule property. Hence, the principle behind the judgment rendered in **Gurunath Manohar's case** (Supra 1) is not attracted.

Learned counsel for the appellant then pressed the judgment rendered by a Division Bench of this Court in **Syed Fahim Arif and another Vs. Rahmatunnisa Begum and another**. That is a case where, the plaintiff/appellant instituted civil suit for declaration as lawful owner of a particular premises situated at Banjara Hills locality, Hyderabad. The opposite parties there have also asserted title. The trial Court recorded a finding that both sides have failed to prove their title to the property. But since, the plaintiff/appellant has failed to discharge the burden of proof lying on him and taking note of the fact that the respondent/defendant has established possession over the property in question, in that context, while dismissing the appeal of the plaintiff, the Division Bench of this Court has observed that in the absence of proof of title to the house property in dispute, no mandatory injunction could have been brought for or granted.

In juxtaposition, the facts in the present second appeal are that the defendant/appellant herein has never challenged the title of the respondent/plaintiff. The only question of debate was that the plaintiff was in possession of the house property, which is the suit schedule property, and the finding in that regard went against him and more importantly in favour of the respondent/plaintiff.

Since both Courts have concurrently found that the defendant/appellant herein has taken full advantage of the *ex parte* interim injunction order secured by him in O.S.No.688 of 2002 instituted by him and under the guise of the said injunction order, he interfered with the right of the respondent/plaintiff and also removed certain tiled eaves, both Courts concurrently held against the appellant herein. Such finding of fact, in the absence of any material on record cannot be declared as perverse finding.

I, do not find any substantial question of law arising for consideration in this Appeal for me to admit this second appeal. Both Courts have concurrently recorded the finding based upon the material evidence.

Hence, the Second Appeal is dismissed at the admission stage. No order as to costs.

The miscellaneous petitions, if any pending in this appeal, shall stand closed.

JUSTICE NOOTY RAMAMOHANA RAO

06.04.2015

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