

HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL Nos.1036 OF 2002

&

190 OF 2003

Dated 17-4-2015

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SECOND APPEAL Nos.1036 OF 2002

Between:

Bodapati Subba Rao.

...Appellant.

And:

Bodapati Subbarao and others.

...Respondents.

SECOND APPEAL No. 190 OF 2003

Between:

Bodapati Subba Rao and others.

...Appellants.

And:

Bodapati Subbarao.

...Respondent.

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HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL Nos.1036 OF 2002

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COMMON JUDGMENT:

These two appeals are preferred challenging the common judgment in A.S.No.3 of 2002 and A.S.No.5 of 2002 dated 9-8-2002 on the file of Principal District Judge, Ongole, whereunder common judgment dated 22-12-2001 in O.S.No.1052 of 1999 and O.S.No.614 of 1999 on the file of Principal Junior Civil Judge, Ongole, is confirmed.

Appellant herein is plaintiff in O.S.No.614 of 1999 and defendant in the other suit whereas first respondent herein is plaintiff in O.S.No.1052 of 1999.

First respondent herein filed O.S.No.1052 of 1999 for the relief of declaration in respect of plaint schedule property and consequential permanent injunction whereas appellant herein filed O.S.No.614 of 1999 for the relief of permanent injunction in respect of passage shown in the plaint plan and the trial court on the request of parties clubbed both the suits and conducted joint trial and on the request of parties, evidence is recorded in O.S.No.1052 of 1999 and on a consideration of oral and documentary evidence of both the parties, trial court decreed O.S.No.1052 of 1999 and dismissed O.S.No.614 of 1999. Aggrieved by the dismissal of O.S.No.614 of 1999, the appellant herein preferred A.S.No.5 of 2002 and against the decree in O.S.No.1052 of 1999, he preferred A.S.No.3 of 2002 to the District Court and the Principal District Judge, Ongole, on a reappraisal of entire oral and documentary evidence dismissed both the appeals confirming the judgment of trial court in both the suits. Aggrieved by the dismissal of appeals, second appeal No.1036 of 2002 is preferred challenging judgment in A.S.No.3 of 2002 and second appeal No.190 of 2003 is preferred challenging the judgment in A.S.No.5 of 2002.

Heard both sides.

Advocate for appellant mainly contended that appellant claimed easementary right in respect of 'X, X1, X2 X3' shown in the plaint plan as easement of necessity though advocate commissioner noticed that there is no alternative way for the appellant as on the date of visit of the advocate Commissioner, both trial court and appellate court without considering the Commissioner's report refused relief of the appellant and decreed the suit filed by the first respondent and both the courts erred in not considering the advocate's Commissioner's report. He further submitted that suit property originally belonged to one Bodapati Venkata Swamy and it

was divided amongst his three sons namely Yallayya, Ankayya, Subbaraidu who got Ac.0.08 1/3 cents. He further submitted that the appellant herein purchased the property to the East of second son Ankayya from Yellayya. He submitted that first respondent herein is son of the said Ankayya who also purchased the share of other person i.e., Subbaraidu and as it was the joint family property, there was no specific necessity for the others to leave anything towards the passage. But as appellant purchased share of one of the sharers, it necessitated him to claim passage and 'X, X1, X,2, X3' is the only way for ingress and egress which is also noticed by the advocate Commissioner but both the courts have not accepted this and that the findings of the courts below are contrary to the material on record.

On the other hand, advocate for first respondent submitted that both trial court and appellate court have noticed that appellant has got way towards East of plot and in fact, opened a gate towards Eastern passage but the same was found closed by advocate commissioner also and when he has got ingress and egress from Eastern side, his contention that 'X, X1, X,2, X3' is the only ingress and egress cannot be accepted which both courts have rightly done. He further submitted that from the evidence, the portion shown as 'X, X1, X,2, X3' in the commissioner plan is different from portion shown as 'X, X1, X,2, X3' in the plaint plan and therefore, both the courts, on appreciation of evidence, found that appellant is not entitled for the relief and that there are no grounds to interfere with the concurrent findings. He further submitted that report of the advocate-commissioner, in fact, is helpful to the first respondent and for that reason, appellant has not taken any steps to get advocate commissioner examined as witness or get the report marked. Appellant cannot take his latches as advantage and question the well reasoned judgments of both courts. He further submitted that no question of law is involved in both the appeals and appeals are liable to be dismissed.

According to appellant, the following are the substantial questions of law involved in both the appeals.

*1. Whether the courts below were correct in law in ignoring the report of the commissioner which goes to the root of the matter, thus causing prejudice to the appellant?*

*2. Whether in the suit O.S.No.1052 of 1999 the plaintiff is entitled for declaration and injunction even though the plaintiff did not acquire title to the suit property at the time of filing of the suit?*

*3. Whether in the facts and in the circumstances of the case, the judgments of the Courts below are not perverse and liable to be set-aside?*

*4. Whether in the facts and circumstances of the case the*

*courts below were correct in holding that, the plaintiff did not acquire easementary rights over the 'X' series passage?*

This court formulated the above as substantial questions of law while admitting the appeal.

Now the point that would arise for my consideration in these appeals is whether there is any substantial question of law involved in these two appeals, particularly, the above referred which are formulated by this court.

POINT:

Admittedly, the entire property originally belongs to one Bodapati Venakta Swamy who owned Ac.0.25 cents of land in S.No.119 of 3 in patta No.50 of Muktinuthalapadu village. The said Venkata Swamy had three sons by name Yellaiah, Subbaraidu and Ankayya. After the death of Venkata Swamy, his three sons divided the said property and Yellayya got eastern share who sold his share to the father of the appellant in the year 1962 under a registered sale deed. According to appellant, the property purchased by appellant's father is shown as plot 'A' and the share of Subbaraidu which subsequently devolved on Venkateswarulu is shown as plot 'B' and share of first respondent herein as plot 'C' in the plaint plan filed along with O.S.No.614 of 1999. According to appellant, there is a passage with width of 10' to the North of plot 'B' and 'C' which is shown as 'X, X1, X,2 X3' in the plaint plan.

Now the dispute is in respect of this piece of land i.e., 'X, X1, X,2 X3'. According to appellants, he has a right of easement for ingress and egress by necessity and in fact, he was enjoying that right but as the first respondent obstructed, he was forced to file suit for permanent injunction.

The main ground urged in the second appeals is that both the courts have not considered the report of the advocate commissioner and ignored material documents and that attracts substantial question of law and as such, findings of courts below are liable to be set aside. Admittedly, an advocate commissioner is appointed in the suit filed by appellant and commissioner submitted his report along with plan. But this report is not marked as Exhibit and both sides have not taken any steps to get commissioner's report marked or to examine the advocate commissioner.

Now the contention of appellant is that advocate commissioner has noticed existence of 'X, X1, X,2, X3' and therefore, the claim of appellant over the passage is duly proved.

On the other hand, it is the contention of the first respondent that

commissioner's report is not favourable to the appellant and in fact, it supports the case of the first respondent herein. He further submitted that on the Eastern side of the appellant's plot, Commissioner noticed a gate which was closed with japan babul branches and iron net and that 'X, X1, X,2, X3' is not old in nature which supports the contention of the first respondent, that after obtaining injunction in O.S.No.614 of 1999, appellant laid this 'X, X1, X,2, X3' passage.

I have perused entire material including judgments of both the courts.

The plan prepared by appellant filed in O.S.No.614 of 1999 is marked as Ex.B.1, in which, his property is shown as plot 'A' and the property of the first respondent herein is shown as plots 'B and C'. To the North of plots 'B and C', a passage with a width of 10' is shown as 'X, X1, X,2, X3'. In O.S.No.1052 of 1999, first respondent herein claimed ownership rights over the passage and he claimed declaratory relief with consequential injunction.

On a scrutiny of oral and documentary evidence, both the courts held that this 'X, X1, X,2, X3' is the exclusive property of first respondent herein and there is no reference about this passage in any of the documents including the sale deed of appellant which is of the year 1962.

The main grievance of appellant is that the commissioner's report is not considered by both the courts and that the report would support his case. As referred above, Advocate Commissioner's report is not marked as Exhibit and advocate commissioner is not examined as a witness on either side, however, a copy of the report is placed before me which I have perused. As rightly pointed out by advocate for first respondent, this 'X, X1, X,2, X3' passage as per the observations of the advocate commissioner, is not old in nature. Advocate commissioner also noticed a gate on eastern side leading to the eastern passage and that the same is not in use and covered by branches of japan babul. So the contention of appellant that there is easement of necessity, cannot be accepted in view of the convincing evidence about the existence of eastern passage and a gate opened into that passage which was found closed. So the objection that courts below have ignored the report of commissioner that caused prejudice to the appellant, cannot be accepted.

The other grounds urged on behalf of appellant are only in respect of factual aspects and they are not with reference to any question of law. Both the trial court and appellate court have elaborately discussed the entire oral and documentary evidence and rightly accepted the version of first respondent herein and both the courts

have not committed any error in appreciating either facts or law.

For these reasons, I am of the view that there is no substantial question of law involved in these two appeals and that both the appeals are devoid of merits.

Accordingly, both the Second Appeals are dismissed with costs.

As a sequel to the disposal of these appeals, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

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JUSTICE S.RAVI KUMAR

Dated 17-4-2015

Dvs

HONOURABLE SRI JUSTICE S.RAVI KUMAR

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