

HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.1051 OF 2010

Dated 19-3-2015

Between:

Immedisetti Lakshmi Kumari.

..Appellant.

And:

Batchu Kondayya Guptha and another.

..Respondents.

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HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.1051 OF 2010

JUDGMENT:

This appeal is preferred against judgment dated 25-8-2010 in A.S.No.20 of 2009 on the file of Principal Senior Civil Judge, Kakinda whereunder judgment dated 19-12-2006 in O.S.No.884 of 2000 on the file of First Additional Junior Civil Judge, Kakinada is confirmed.

Appellants herein are defendants and respondents herein are plaintiffs in the above referred suit O.S.No.884 of 2000. Parties are herein after referred to as plaintiffs and defendants as arrayed in the suit for better understanding and convenience.

Plaintiffs filed O.S.No.884 of 2000 mandatory injunction directing defendants to restore lane shown as 'HIPG' to its original condition without any roof to allow passage of water from the rooms adjoining 'HI' wall portion into the drain which is in the lane, to grant mandatory injunction directing the defendants to remove the roof laid on the lane to receive light and air to the plaintiffs building, to grant mandatory injunction directing defendants to receive sun shades to the door and windows to the ground floor and to grant mandatory injunction directing defendants to remove the wall constructed in front of the door way in 'HI' wall, and other reliefs. Trial court on a consideration

of oral evidence of P.W.1, documents Exs.A.1 to A.10, C.1 and C.2 and oral evidence of D.Ws.1 to 4, documents Exs.B.1 to B.3 decreed the suit in favour of the plaintiffs granting all the reliefs claimed by the plaintiffs and granted one month time. Aggrieved by the decree of the trial court, defendants preferred appeal to the first appellate court i.e., Principal Senior Civil Judge, Kakinada and the appellate court on a reappraisal of entire evidence confirmed the decree passed by the trial court and dismissed the appeal. Now aggrieved by the concurrent findings of both the courts, present Second Appeal is preferred.

The grounds shown as substantial questions of law are as follows:

1. Whether the judgment of the lower Appellate Court is perverse and based on surmises and conjectures without proper appreciation of evidence on record in so far as the findings against the appellant are concerned;
2. Whether the findings of the lower appellate court are vitiated for non consideration of the evidence adduced on behalf of the appellant;
3. Whether the judgment of the lower appellate court is vitiated by failure to consider the entire material on record and misreading the same;
4. Whether the lower appellate court acted in error in disposing the impugned A.S.No.20 of 2009 without disposing the I.A.No.284 of 2010 in A.S.No.20 of 2009 whereby the rights of the appellant to prosecute his remedies are taken away;
5. Whether the lower appellate court erred in curtailing the rights of the appellant to prove his case on facts by not disposing the I.A.No.284 of 2010 in A.S.No.20 of 2009 being the final court for questions of facts;
6. Whether the courts below erred in not seeing that the burden to plead and prove easementary right absolutely rests on the respondents and that they failed to discharge the same as decided in *(A.I.R.1998 ORISSA 117) SANKAR KUMAR VS. MOHANIAL SHARMA*;
7. Whether the courts below erred in not seeing that the title deeds of the respondents do not speak of any such easementary rights claimed and hence, failed to draw adverse inference as decided by this Hon'ble Court in *SABBU YELLA ANJANEYULU VS. UPPARI LAKSHMANA (2006 (4) ALT 219)*.
8. Whether the lower appellate court went in error in not considering

the arguments and reliance of case law as stated in their written arguments by the appellants herein whereby acted in detriment to the appellants.

Heard arguments.

Advocate for appellants submitted that there is no actionable claim by plaintiffs as per Section 33 of Easements Act and both the courts wrongly granted reliefs. It is further contended that trial court gave a wrong finding that the property 'HIPQ' belongs to plaintiffs which is contrary to the evidence and pleadings. He further submitted that appellate court has not at all appreciated the evidence and it simply re-produced the findings of the trial court without any reappraisal of evidence and accepted findings of the trial court. He further submitted that -findings of the trial court that plaintiffs are owners of 'HIPQ' portion and the findings of the appellate court confirming the same have to be treated as perverse findings. He further submitted that the appellate court has not at all discussed any of the points urged on behalf of appellants-defendants and that the plaintiffs failed to plead any specific injury and in spite of that, both courts granted the reliefs and therefore, the findings of both courts are liable to be set aside.

Now the point that would arise for my consideration in this appeal is whether there are any substantial questions of law to be determined by this court in the Second Appeal?.

POINT:

Both parties have not disputed the plaint plan. The main controversy is about "HIPQ" portion of plaint plan. Here plaintiffs are husband and wife and defendants are also wife and husband.

According to plaintiffs, defendants converted their tiled roof building about two years prior to this suit and at that time also, they have not closed the lane except raising the height of the lane but thereafter, on the dispute raised by one Punnayya, defendants restored the lane into its original condition and the plaintiffs' father purchased property and they got repaired to the drain but the defendants about 15 days prior to the injunction the suit, raised level of the lane, on account of which, the discharged water from the rooms in the ground floor adjoining 'HI' wall is not moving due to raise of the level, defendants also closed the drain which is in the property of the plaintiffs to the East of 'HI' wall and defendants constructed steps encroaching both in the road margin into site belonging to the plaintiffs and thereafter laid a roof on the lane by closing the lane which obstructed air and light on account of which plaintiffs building is not receiving light and air. It is also contended that defendants constructed a wall in front of the door way in the ground floor prohibiting plaintiff from using the

doorway. Defendants constructed roof of the first floor by encroaching the frontage of the plaintiffs by making areal trespass at the roof level of first floor and they also fixed electrical and telephone pipes to the plaintiffs' wall for the construction of steps on both sides of the lane and they have removed sunshade in the ground floor and two sunshades from the first floor and when plaintiffs questioned these acts, defendants promised to remove the steps and other encroachment and to restore lane to its original condition but protracting the same on one pretext or the other, and that made the plaintiffs to approach the court.

On the other hand, defendants denied all these allegations contending that there is no hindrance for the flow of water and that the windows in the ground floor are opening into the lane into the Eastern house wall and the plaintiffs have closed them and are not using them. Thus, there is no prevention of light and air as complained by plaintiffs.

The main contention raised by defendants is that there is no actionable claim for plaintiffs because defendants did not lay any roof on the lane preventing passage of air and light and the same is not on account of the acts of the defendants but due to closure of windows by the plaintiffs/tenants, therefore, there is no actionable claim. This contention of defendant cannot be accepted for the reason simply because plaintiffs/tenants closed the windows and using them as racks and almyrahs for storing stocks as the premises is used as kirana shop, the defendants cannot completely close the lane by laying a roof and making some constructions when there is existing right for the plaintiffs. An Advocate Commissioner is appointed and he filed his report after inspecting the disputed property. Advocate Commissioner noticed that there is closed stair case on the Northern side of the lane and the steps are resting on other side to the wall. The Commissioner's Report also discloses that the stair case was closed on the Northern side and steps are resting on either side of the wall.

As per the Commissioner's report, the disputed constructions are made in the lane. D.W.1 admitted in his evidence that the disputed lane was open to sky and the constructions were made by the defendants after their purchase. It clearly indicates that the usage of lane as it was from times immemorial was changed and some constructions were made. Further, Commissioner noticed that the flooring in the lane appears to be newly cemented and lane is from South to North. He also noticed that portion under four windows have been recently cement plastered and run upto the closed area. The Commissioner also noticed traces of removal of some portion above the windows and removed portion is plastered with cement which is

of recent origin. The plaintiffs specifically contended that the sunshades were removed, which contention is supported by the observations of the Advocate Commissioner.

Learned trial judge elaborately discussed each and every observation made by the Advocate Commissioner during his inspection and evaluated the same with reference to the evidence on record. On seeing the Commissioner's Report and the oral evidence of both parties, the contention that there is no actionable claim for the plaintiffs invoking the provisions of the Easement Act cannot be sustained.

One of the objections of the appellants-defendants is that trial court wrongly held that 'HIPQ' is the property of plaintiffs and that finding is contrary to the material on record.

Here, both parties filed their title deeds through which they have purchased their respective properties. Learned appellate judge by referring to the boundaries referred to in their sale deeds under Exs.B.1 and B.2, considered the evidence of D.Ws.1 and 3 and held that plaintiffs have right in 'HIPQ' and it does not belong to defendants. The trial court gave this finding because defendants claimed rights over this part and for that reason, trial court referred to the boundaries mentioned in the documents of defendants which clearly indicated that lane is not part and parcel of the property purchased by defendants. In the sale deed of plaintiff Ex.A.9, Eastern boundary is shown as house of Pattabhiramayya i.e., second defendant and by considering these two recitals, trial court held that defendants have no right in the lane.

I do not find any wrong appreciation of facts by the trial court, particularly, when recitals in the documents are contrary to the pleadings of the defendants and the evidence thereon. As already observed above, simply because tenants have closed the windows and door and not using the lane, it will not take away the rights of the owners i.e., plaintiffs as tenant is using the premises and a shop and for that reason, may not be using the windows and doorway that was into the lane portion and for that, defendants cannot completely close the lane portion which amounts to inference with the existing rights of the plaintiffs. Both trial court and appellate court have elaborately discussed each and every aspect raised on behalf of both parties and there is no wrong appreciation.

Learned counsel for the appellants-defendants cited two rulings to support plea of actionable claim. They are *SUKHADEV v. RUKMINAMMA* (), *PUSHPA (DIED) PER LRs. v. DR.*

*L.C.FARNANDEZ (DIED) PER LRs. AND OTHERS ()* for the proposition that mere obstruction to the passage of light and air by itself is not actionable claim unless it results substantial damage.

These decisions have no application in view of the fact that the defendants have made constructions in the lane in which they have no right.

Learned counsel for the appellants-defendants also cited ruling of *SMT. KAMALAMMA AND ANOTHER vs. SRIRANGAM SUBBARAO AND ANOTHER ()* for the proposition that plaintiffs have no right to question the deviation of construction from the approved plan and it is for the Municipality to take appropriate action.

This decision is also not relevant for the case on hand because it is only an observation made by the trial court that the defendants failed to produce approved plan for the constructions made to support its finding that the constructions are made without right.

Advocate for appellants-defendants also cited the rulings in *ANATHULA SUDHAKAR v. P.BUCHI REDDY (DEAD) BY L.Rs. and Ors. ()* and *UNION OF INDIA v. IBRAHIM UDDIN AND ANOTHER ()*, but they are no way relevant for the dispute on hand.

On a scrutiny of the entire material on record, I am of the view that both trial court and appellate court have rightly appreciated both facts and law and came to a correct conclusion and that there is no perversity in any of the findings of both the courts. The grounds that are urged as substantial question of law are only factual aspects which are correctly decided by the courts below and there is no question of law involved, much less substantial question of law. Further, as already pointed out legal point raised that plaintiffs have no actionable claim is not at all tenable.

For these reasons, this Second Appeal is dismissed as devoid of merits. No costs. Defendants are granted three months time for complying with the directions given in the decree.

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

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JUSTICE S.RAVI KUMAR

Dated 19-3-2015.

Dvs.

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