

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

S.A.No.43 of 2015

JUDGMENT :

This Second Appeal is filed challenging the judgment and decree dt.01.09.2014 in AS.No.136/2005 of the IV Additional District Judge, Kadapa.

2. The appellants herein are plaintiffs in the above suit.
3. They filed the suit for : (a) declaration of their title to the plaint schedule site marked as 'FAOPQE' in the plaint plans; (b) grant of a permanent injunction restraining defendant and his men from interfering with the peaceful possession and enjoyment of plaint schedule property of plaintiffs by making any unlawful construction on that site or on the air-space above that site or demolishing the western side compound wall of plaintiffs marked as 'OP' in the plaint plan; (c) for grant of a mandatory injunction directing defendant to remove sunshade marked as 'EFGH' and parapet wall marked as 'IJKL' constructed thereon over the ground floor of his house and to close the vent in the parapet wall, marked as V1, V2, V3, V4 and V5 in the plaint plan; (d) if he fails to do so, to have it removed through process of Court; (e) grant a mandatory injunction directing defendant to remove the staircase marked as 'MN' constructed on the western side of plaintiff's house encroaching upon the suit site marked as 'FAOPQE' in the plaint plan and if he fails to do so, to have it removed through process of Court; (f) grant a mandatory injunction directing the defendant to remove the southern side compound wall marked as 'PQ' in the plan on the east of his house encroaching into the suit site on the western side of the

plaintiffs house and if he fails to do so, to have it removed through process of Court; (g) grant a mandatory injunction directing defendant to remove the 3 door ways marked as D1, D2 and D3 in the plaint plan and 3 windows marked as W1, W2 and W3 in the plaint plan, opened in the eastern side wall of defendant's house, and if he fails to do so, to have it removed through process of Court; (h) grant a mandatory injunction directing defendant to remove the projected water tap marked as 'T' in the plaint plan situate in the suit site, and if he fails to do so, to have it removed through process of Court; (i) and for costs of the suit.

4. The appellants/plaintiffs allege that 2nd appellant is the wife of 1st appellant and the house marked as 'ABCD' in the plaint plan is the ancestral property belonging to 1st respondent and his brothers and two others; two of them relinquished their shares in the house property under a registered Relinquishment Deed Ex.A.1 dt.01.02.1995 and the other two have sold their shares to 1st plaintiff and his wife under Ex.A.2 dt.14.12.1977; that the respondent/defendant is the owner of house marked as 'EFRS' in the plaint plan which lies to the west of plaintiffs' house; that their ancestors had left 3 feet wide space marked as 'FAED' in the plaint plan all along the western wall of plaintiffs' house for free passage of air and light and also for affecting repairs to their house on the western side; all along the western wall of the said house, there are eaves over the roofing to a width of about 1 ½ feet East-West from North to South and the said western wall is the exclusive wall of plaintiffs since the times of their ancestors; that they and their ancestors have been using the space of 3 feet width for affecting repairs, etc., and receive air and light to

their house and they have title to the said space; that there was a registered agreement Ex.A.3 dt.05.07.1918 between the grandfather of 1st plaintiff and one Sridhara Narayanaiah, who was the owner of house to the West of plaintiffs' house, whereunder the latter admitted the unauthorized constructions made by him and undertook to affect repairs to his own roofing in the event of removal of eaves of plaintiffs' house at a future date; there were windows existing in plaintiffs' property adjacent to the property of defendant since 1927 and that the passage allowed air and light through the windows; defendant had purchased the house adjacent to house of plaintiffs on the western side in 1999 when the plaintiffs were absent and constructed a staircase marked as 'MN' in the plaint plan and also on the southern side compound wall marked as 'PQ' in the plaint plan encroaching into the suit site on the eastern side of plaintiffs' house, i.e., adjacent to the western side compound wall of plaintiffs and touching the western side compound wall of plaintiffs thereby preventing the plaintiffs from entering into the open space all along the eaves for making any repairs to their western wall. It is also alleged that defendant had extended the sunshade of his house, marked as 'EFGH' in the plaint plan all along the eastern side of defendant's house marked as 'EFRS' touching the sunshade of plaintiffs' house on the western side, constructed a parapet wall marked as 'IJKL' in the plaint plan over the above sunshade and opened vents marked as V1, V2, V3, V4 and V.5 in the plaint plan in the parapet wall for letting out rain water; the rain water which is being let out from the said vents of defendant's house is falling on plaintiffs' eastern wall damaging the eaves and the western side wall and that the defendant had

encroached into plaintiffs' 3 feet wide space marked as 'FAOPQE' all along the western wall; the defendant not only constructed the sunshade and the roof but also constructed parapet wall over the sunshade to a height of 3 feet and opened vents for letting out rain water which is falling on the roofing of his house, and this has deprived plaintiffs of a free passage of air and light; the said parapet wall is entirely blocking the windows of plaintiffs' house in the 1st floor; and plaintiffs therefore claimed that they have title to plaint schedule site marked as 'FAOPQE' in the plaint plan by virtue of Exs.A.1 and A.2 and they perfected their title thereto also by adverse possession since they were in possession for a period of eighty years.

5. The respondent/defendant filed a written statement opposing the suit claim. He contended that his site is to the West of plaintiffs' house; Srichara Narayanaiah, is the paternal grandfather of one Ekambara Sastry, was the owner of two houses to the west of plaintiffs' house; Narayanaiah laid roofing in 1918 with full rights; and that there was no need to ask any permission from the grandfather of plaintiff. He denied Ex.A.3 agreement dt.05.07.1918, and contended that defendant never encroached into plaintiffs' side; the documents relied on by plaintiffs do not show the existence of 3 feet wide space showing the western boundary; and the relief sought for cannot be granted.

6. The court below framed the following issues :

"1. Whether the plaintiffs are entitled for declaration of right and title over the plaint schedule property ?

2. Whether the plaintiffs are entitled for permanent injunction against the defendant in respect of the plaint schedule properties ?

3. Whether the plaintiffs are entitled for grant of mandatory injunction

directing the defendant to remove sun-shades marked as EFGH constructed the parapet wall marked as IJKL constructed there on over the ground floor of his house and to close the vents V1, V2, V3, V4 and V5 in the plaint plan ?

4. Whether the plaintiff is entitled for mandatory injunction directing the defendant to remove the stair case marked as MN constructed on the western side of the plaintiffs house in the suit site marked as FAOQUE in the plaint plan ?

5. Whether the plaintiff is entitled for mandatory injunction directing the defendant to remove the southern side compound wall marked as OP in the plaint plan on the east of his house ?

6. Whether the plaintiff is entitled for grant of mandatory injunction directing the defendant to remove the 3 door ways marked as D1, D2 and D3 in the plaint plan and 3 windows marked as W1, W2 and W3 in the plaint plan on the eastern side of the wall of the defendant ?

7. Whether the plaintiff is entitled for grant of mandatory injunction directing the defendant to remove the projected water tap marked as T in plaint plan is the suit site ?

8. To what relief ?”

7. The plaintiffs examined PW.1 and marked Exs.A.1 to A.18. The defendant examined DWs.1 and 2 and marked Exs.B.1 and also Exs.C1 and C2.
8. By judgment dt.25.10.2005, the trial court dismissed the suit.
9. Questioning the same, the appellants/plaintiffs filed AS.No.136 of 2005 before the IV Additional District Judge, Kadapa. By judgment dt.01.09.2014, the said appeal was also dismissed.
10. Challenging the same, this appeal is filed.
11. The counsel for appellants contended that the judgments and decrees of both courts, declining to grant relief to appellants, are contrary to law and unsustainable; that appellants/plaintiffs have proved their entitlement to the 3 feet wide passage beyond their western wall by marking Exs.A.1 to A.3; and defendant having

purchased the property in 1999 only, cannot make any claim to the passage in question.

12. Exs.A.1 to A.3 relied on by plaintiffs do not mention that the title to 3 feet wide passage in between both houses of plaintiffs and defendant is with PW.1. These documents, therefore, do not help plaintiffs. As far as Ex.A.2 is concerned, this is an agreement between ancestors of 1st plaintiff and one Ekambara Sastry and it shows that the right to affect repairs to the house of plaintiffs was granted as a permissive right and it did not create any title in the plaintiffs to the 3 feet wide space. This permissive right to affect repairs cannot be elevated to an easment right in respect of disputed site of 3 feet wide space which is being exclusively claimed by 1st plaintiff.
13. Although plaintiffs had got appointed an Advocate-Commissioner, the said Advocate-Commissioner had merely noted the physical features and identified the plaint schedule property, but did not measure the properties of plaintiffs and defendant. Therefore, the said report is also not useful to determine the right of plaintiffs in respect of passage in question.
14. The plea of plaintiffs that their ancestors had left 3 feet wide space outside their compound wall to enable access for the purpose of repair works cannot be accepted, since no person would leave 3 feet wide space outside his compound wall even if it is for repair works. Admittedly, the plaintiff and his brothers had got issued Ex.A.4 legal notice on 14.03.1988 asking defendant to provide 3 feet wide space from the western wall from the western side in the sale deed to be obtained from Sridhara

Ekambara Sasthry to avoid further litigation. This indicates that there was, at that time, no 3 feet wide space in between their properties. Having claimed easementary rights over the passage, the burden rests on plaintiffs to prove it, but they have failed in proving the same as they have not adduced any evidence that their right to easement is still subsisting.

15. Having regard to all these facts, I am of the opinion that Courts below have correctly appreciated his evidence on record and declined to grant relief to appellants. In my opinion, there is no question of law, much less, any substantial question of law, arising for consideration in the Second Appeal. Therefore, this Second Appeal fails, and is accordingly dismissed. No order as to costs.

16. As a sequel, miscellaneous applications pending, if any in this Second Appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 15-04-2015

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