

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.1387 of 2011

JUDGMENT:

The un-successful plaintiff in O.S.No.411 of 1998 and A.S.No.58 of 2002 preferred this Second Appeal under Section 100 of Code of Civil Procedure.

The suit was decreed by the trial Court and the appeal was allowed by the appellate Court, setting aside the decree and judgment passed by the trial Court.

The parties hereinafter will be referred as plaintiff and defendant for convenience.

The plaintiff filed suit for declaration that she has got right over 2nd item of the plaint schedule property shown as A.A1.B.B1 in the plan annexed to the plaint for recovery of possession of the same after removing the constructions made by the defendants 1 and 2 therein and for permanent injunction restraining the defendants from ever interfering with the plaintiff's possession of item No.2 of plaint schedule property after evicting the defendants there from and for declaration that the plaintiff has right of passage in item No.1 of the schedule property, which is described as I.J.K.L. in the plaint plan and for permanent injunction restraining the defendants and their men from ever causing obstruction for their passage rights.

The property shown as A.B.X.Y. originally belonging to 3rd defendant and it is the ancestral property of defendants 1 and 2. The 3rd defendant gifted the property shown as

A.B.C.D.E.F.G.H. in the plaint plan to the plaintiff by executing a registered gift deed, dated 21-04-1982 and she was put in possession of the same on the date of gift itself. Since then she is enjoying the aforesaid property. The 1st item of the plaint schedule property I.J.K.L. is a joint passage for enjoyment of item No.2 of the schedule property and it was shown in the gift as one of the boundaries on the southern side. While the plaintiff was undergoing treatment in Kakinada for one year prior to filing of suit taking advantage of her absence the defendants 1 and 2 while constructing the house in their A.B.X.Y. marked site occupied part of item No.2 of the plaint schedule property shown as A.A1.B.B1 in the plaint plan and constructed a house wall therein claiming right over the same under the guise of a fraudulent sale letter said to have been executed by the 3rd defendant. The 3rd defendant has no right to convey item No.2 of the schedule property since the 3rd defendant already conveyed the same to the plaintiff under a gift deed, dated 21-04-1982. It is further alleged that item No.1 of the schedule property shown as I.J.K.L. is a passage but the defendants 1 and 2 did not allow her to enjoy the right of passage. Therefore, filed the suit for aforesaid relief.

The 1st defendant filed written statement adopted by the 2nd defendant by filing a memo denying the material allegation of the plaint, *inter alia*, the defendants 1 and 2 are the owners of item Nos.1 and 2 of the schedule property and the boundaries of the gift deed, dated 21-04-1982 does not disclose existence of any such passage described as item No.1 I.J.K.L. in the plaint plan and even if there is any mention about the joint right in item No.1 that would not create right to the plaintiff. It is also contended that they

never occupied item No.2 of the schedule property and the defendants are the owners of the said property and therefore, the plaintiff is not entitled to claim any relief much less declaratory relief and injunction in respect of item Nos.1 and 2 of the schedule property, prayed for dismissal of the suit. Defendant No.3 reported no written statement.

Basing on the above pleadings the trial Court framed the following issues:

1. *Whether the plaintiff is entitled for declaration of her title over A.A1.B.B1 marked property as shown in the plaint plan and item.2 in the plaint schedule?*
2. *Whether the plaintiff is entitled for possession of item No.2 of schedule property shown as A.A1.B.B1 in the plaint plan after removing the constructions made therein by the defendants 1 and 2?*
3. *Whether the plaintiff is entitled for permanent injunction in respect of item.2. of the schedule property?*
4. *Whether the plaintiff is entitled for declaration of her passage rights through item.1 shown as I.J.K.L. in the plaint plan and for consequential permanent injunction for the aforesaid relief?*
5. *To what relief?*

During the course of trial on behalf of the plaintiff PWs.1 to 3 were examined and Exs.A1 to A5 were marked and on behalf of the defendants DW1 was examined and marked no documents.

Upon hearing arguments of both counsel the trial Court decreed the suit in favour of the plaintiff granting declaration and permanent injunction as prayed for in the plaint.

Aggrieved by the decree and judgment of the trial Court, the defendants 1 and 2 preferred appeal No.58 of 2002 on the file of Senior Civil Judge, Ramachandrapuram, whereby the appellate Court allowed the appeal setting aside the decree and judgment of the trial Court in O.S.No.411 of 1998, dated 13-09-2002. The plaintiff preferred the Second Appeal challenging the decree and judgment of the 1st appellate Court, dated 24-04-2008 in A.S.No.58 of 2002 on various grounds, mainly contending that there is a specific mention about existence of joint pathway in Ex.A1, dated 13-08-1973 executed by trustee of Sriramulu of Satyavada in favour of Tadala Seshachalam so also in Ex.A-2 original gift deed. The appellate Court ignored the recitals in Exs.A1 and A2 and dismissed the suit allowing the appeal setting aside the decree and judgment of the trial Court.

The substantial question of law formulated by plaintiff in the Second Appeal is only "Whether the judgment of the appellate Court is perverse? since, the appellate Court did not consider the material evidence on record".

Based on the substantial question of law formulated by this Court with the consent of Sri T.V.S. Prabhakara Rao, learned counsel for the appellant, heard the Second Appeal at the stage of admission since none appeared for the respondents though notices were served on them.

During the course of hearing, learned counsel for the appellant did not press for relief in respect of item No.2 while contending that the appellate Court ignored the boundaries in Ex.A1 sale deed, dated 13-08-1973 where there is specific

mention about existence of joint pathway of 6 feet in width and dismissed the suit without considering the recitals of the said document. He further contended that in Ex.A-2 there is a reference about existence of pathway but appellate Court did not consider the same in proper perspective and committed error, thereby the decree and judgment of the appellate Court is perverse since the appellate Court did not consider the evidence available on record.

POINT: Ex.A1 sale deed executed by trustee of Sriramulu of Satyavada in the schedule, there is a reference about existence of pathway of 6 feet in width on the eastern side of item No.1 and joint open site of 3 feet. The schedule of Ex.A2 is only item No.1, whereas the 3rd defendant gifted two items of the property conveyed two items of property of an extent of 66 Sq. yards and 18 Sq. yards.

The boundaries of item No.1 and 2 are as follows:

ITEM No.1

East: 6 yards land belonging to Mudragada Govinda Raju

West: 6 yards site of 3rd defendant (Tadala Seshachalam)

North: 11 yards site of Suravaram Satyanarayana and others

South: 11 yards site of Changanti Sooramma

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ITEM No.2

East: 3 yards pathway of Kondamoori Sheshaiah

West: 3 yards joint site.

North: 6 yards of item No.1

South: 6 yards of site of Suravarapu Pattabhiram

As per plaint plan for item No.2 there is a pathway on

northern side which is described as I.J.K.L. But the plaintiff claiming pathway on the eastern side of item No.2 i.e., 3 yards of lane of Kondamoori Sheshaiah. On the eastern side of item No.2 no lane belonging to Kondamoori Sheshaiah or joint lane was shown. The lane of Kondamoori Sheshaiah referred as on the eastern side of item No.2 is not joint lane described as I.J.K.L. in the plaint plan since it is on the northern side of item No.2 of the land shown as A.B.C.D.E.F.G.H. Therefore, the said lane of Kondamoori Sheshaiah is not shown as I.J.K.L. in plaint plan but the trial Court on wrong appreciation of facts i.e., boundaries of item Nos.1 and 2 of the schedule property concluded that a lane was in existence or a passage was in existence which is shown as I.J.K.L. but the appellate Court rightly concluded that no lane as claimed by plaintiff was in existence on appreciation of the evidence on record more particularly with reference to the boundaries mentioned in Ex.A2. Thus, I find no perversity in the findings recorded by the appellate Court and on the other hand, the appellate Court rightly concluded that no joint passage was shown in I.J.K.L. in existence and even if it is in existence the plaintiff is not entitled to claim right in the passage shown as I.J.K.L. since the property of plaintiff is not extended up to I & L and the property shown as G.H.I.L. is the property of others. As per the gift deed since the lane shown as I.J.K.L. is connecting G.H.A.L., which is the land of the 3rd defendant and in the absence of any right by grant the plaintiff is not entitled to claim a joint right of passage through I.J.K.L. even if it is in existence. It is not her case at any stage that she perfected her right of passage or otherwise, therefore, there is absolutely no material to reverse the finding

recorded by the 1st appellate Court. Hence. The Second Appeal is devoid of merits and deserves to be dismissed.

In the result, the Second Appeal is dismissed confirming the decree of the appellate Court dismissing the suit. There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

August 01, 2016

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