

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.948 OF 2013

JUDGMENT:

The unsuccessful plaintiffs throughout, in O.S. No.284 of 1993 on the file of the Court of I Additional Junior Civil Judge, Kakinada, and in A.S. No.115 of 1998 on the file of the Court of VII Additional District Judge, Kakinada, preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') challenging the dismissal of the suit by the trial court and affirmed by the first appellate court.

02. For convenience of reference, the ranks given to the parties in original suit No.284 1993 will be adopted throughout.

03. The plaintiffs filed a suit in O.S. No.284 of 1993 for mandatory injunction directing the defendants to remove the encroachment i.e. Slab and Northern wall to an extent of three inches of the defendants, which is projected over the staircase and Southern wall of the plaintiffs and for damages of Rs.9,200/- alleging that the plaintiffs own a terraced house D.No.24-8-151/14 situated at Venkateswara Colony. The plaintiffs are the owners of Southern side compound wall of their house and they have absolute right over the same.

04. The defendants purchased the Southern side site of the plaintiffs house recently and raised a construction, during construction the defendants encroached three inches of site projecting into the plaintiffs Southern side compound wall, and on account of such projection, the walls of toilets, stair case developed cracks, thereby sustained loss to an extent of Rs.9,200/-.

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05. Despite demands made by the plaintiffs, the defendants did not remove the projected slab which is to an extent of three inches, thereupon the plaintiffs got issued a legal notice on 28.01.1993 calling upon the defendants to remove the projection of three inches slab into the site of the plaintiffs, for which the defendants got issued a contentious reply dated 30.01.1993, raising false contentions, mainly contending that the compound wall does not belong to the plaintiffs. The plaintiffs again issued rejoinder dated 12.02.1993 calling upon to remove encroachment while reiterating the facts in the earlier notice. The plaintiffs also issued another notice dated 05.04.1993 to the Commissioner, Kakinada Municipality, complaining that the encroachment of Southern side site of the plaintiffs by the defendant projecting three inches of the slab and requested the Commissioner, Kakinada Municipality, to take necessary action, for removal of construction raised in deviation of the approved plan. The Commissioner, Kakinada Municipality in turn sent a Reply dated 10.05.1993 informing that the defendants raised unauthorized construction, thereby the provisional notice dated 12.03.1993 was issued and also issued final notice dated 20.03.1993 confirming the provisional notice to the defendants and he was prosecuted in STC No.363 of 1993, found guilty and sentenced to pay fine of Rs.200/- by the Special Judicial II Class Magistrate Court, Kakinada.

06. The plaintiffs again issued a notice dated 07.05.1993 bringing the facts to the knowledge of the defendants and demanded Rs.9,300/- towards compensation for the damage

caused to the property, but he did not comply the demand. Hence, he filed the suit for mandatory injunction.

07. The defendants filed written statement denying the material allegations alleging that the plaintiffs are the owners of the wall on the Southern side and that there is no encroachment much less three inches encroachment by projecting the slab of the building and that no damage was caused to the plaintiffs property.

08. It is specifically contended that he purchased the property including the compound wall on the Southern side of the plaintiffs from his vendor under registered sale deed and later constructed a house without any encroachment into the property of the plaintiffs and thereby the plaintiffs are not entitled to claim mandatory injunction for removal of construction i.e. alleged three inches projection of slab on the Southern side of the plaintiffs house and the defendants are not liable to pay any damages claimed by the plaintiffs and prayed for dismissal.

09. Based on the above pleadings, the trial court framed the following three issues.

1. Whether the plaintiffs are entitled for mandatory injunction as prayed for?
2. Whether the plaintiffs are entitled to damages as claimed?
3. To what relief?

10. During trial, on behalf of the plaintiffs, first plaintiff himself was examined as P.W.1 and other witnesses were examined as P.Ws.2 to 4 and Exs.A.1 to A.12 were marked. On

behalf of the defendants, second defendant himself was examined as D.W.1, Exs.B.1 and B.2 were marked.

11. Upon hearing argument of both the counsel, the trial court believed the second Commissioner's report, wherein the Commissioner found that there was no encroachment as contended by the plaintiffs and declined to grant relief in favour of the plaintiffs.

12. Aggrieved by the Decree and Judgment, the plaintiffs, who are unsuccessful before the trial court preferred A.S. No.115 of 1998 on the file of the Court of VII Additional District Judge, Kakinada, which ended in dismissal by Decree and Judgment, dated 20.06.2003. Thus the first appellate court recorded concurrent finding, dismissing the appeal.

13. The plaintiff being unsuccessful throughout preferred the second appeal raising several contentions. The main contention urged before this Court is that the trial court and the first appellate court would not have accepted the second Commissioner's report, to disbelieve the case of the plaintiffs without setting aside the first Commissioner's Report without eschewing from record. The trial court also failed to consider the evidence of P.Ws.1 to 4 regarding encroachment and without assigning any reason the first commissioner's report was not accepted. Therefore, the trial court and the first appellate court committed an error.

14. The learned counsel for the appellants has formulated three substantial questions of law.

15. The first question is perversity in the judgment, second question is illegality of the finding by the trial court and the first appellate court since the decree and Judgment are based on the second Commissioner's report, ignoring the first Commissioner's report, and the third question is not a substantial question of law and it is purely a question of fact. Therefore, questions (a) and (b) at paragraph 5 in the second appeal are required to be decided by this Court.

a) Whether the findings of the courts below are not perverse as the oral evidence of P.Ws.1 to 3 is totally ignored and not considered by the first appellate court being a fact pending court and also the trial court on material aspects?

b) Whether the courts below have not committed grave illegality in ignoring the report of the first Advocate-Commissioner which was not even objected by the respondents herein as they have no even filed the objections to the said well considered report?

IN RE. QUESTION No.a:

16.The first and foremost contention of the counsel for the appellants is that the judgment of the trial court and the first appellate court is perverse. The question of perversity would arise only when the trial court and the first appellate court decided the case without considering the evidence adduced by the plaintiffs or considering the extraneous evidence while deciding the issue.

17. In the present facts of the case, the trial court and the first appellate court recorded their findings based on the second

Commissioner's report, not based on the evidence of P.Ws.1 to 4. The evidence of Commissioner is part and parcel of the record and deciding the issue based on the Commissioner's report and evidence is not an error apparent on the face of the record and that does not amount to perversity deciding the case based on extraneous material. Therefore, the contention that the Judgment of the trial court and the first appellate court is perverse is without any substance, if the Commissioner's reports are marked. In the present facts of the case while placing reliance on the second Commissioner's report, both the trial court and the first appellate did not mark the Commissioner's report and plan prepared by him by examining the Commissioner as a witness before the Court, though it is a part of record. Unless the Commissioner was examined as witness and his report is marked as Exhibit before the trial court, recording finding based on the second Commissioner's report is erroneous.

18. Apart from that the trial court did not assign any reason for rejecting the first Commissioner's report, whether the Commissioner noted the alleged encroachment of three inches by projecting slab of the building. In the absence of marking of those reports before the trial court, consideration of those reports, and recording finding totally based on the second Commissioner's Report is an error apparent on record, recording such finding based on second Commissioner's report, totally ignoring the first Commissioner's report is bad under law.

19. In those circumstances, the only course open to this Court while exercising power under Rule 23-A of Order XLI of CPC while directing the trial court to afford an opportunity to mark the Commissioner Reports as Exhibits and examine the Commissioner as a witness before the Court, affording an opportunity to the adversary to elicit the truth in the Report of the Commissioner with reference to their objections, if any, filed.

20. Hence, I find that the finding recorded by the trial court without examining both the Commissioners and their Reports is erroneous and the same is liable to be set aside.

21. Accordingly, the point is answered.

IN RE. QUESTION No.b:

22. Since the Commissioner was not examined and his Report was not marked, though it is part of the record, the same cannot be taken into consideration, arriving to its conclusion when two reports are contrary to one another. Hence, finding of the trial court is liable to be set aside holding this point in favour of the plaintiffs and against the defendants.

23. In the result, the Decree and Judgment of the trial court in O.S. No.284 of 1993 and affirmed by the appellate court in A.S. No.115 of 1998 are hereby set aside, while remanding the matter to the trial court for limited purpose of marking Commissioner's report recording evidence of commissioners, affording opportunity to the parties to cross-examine the witness, and to decide the matter afresh, as expeditiously as possible, but not later than six months from the date of this Judgment.

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24. The trial court is directed to restore the suit to its original number in the suit register and both the plaintiffs and defendants are directed to appear before the trial court on 16.09.2016 and it is made clear that no fresh notice need be issued to the parties for their appearance before the trial court.

25. Accordingly, the second appeal is allowed. No costs.

26. Miscellaneous petitions, if any, pending in this second appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 23.08.2016
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