

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

-

SECOND APPEAL No.851 OF 2015

JUDGMENT:

The second defendant in O.S. No.3947 of 2006 on the file of III Additional Junior Civil Judge, Rangareddy District, who was the second respondent in A.S.No.90 of 2009 on the file of XIII Additional District and Sessions Judge, Rangareddy District, has preferred this appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code') challenging the Decree and Judgment dated 27.07.2015 wherein the first appellate court reversed the Decree and Judgment, dated 19.03.2009, passed by the trial court in O.S. No.3947 of 2006.

02. For convenience of reference, the rank given to the parties before the trial court will be adopted through out the Judgment.

03. The plaintiff filed suit for permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of the plaintiff over the suit schedule property alleging that V.Ratna Bai was granted patta certificate dated 26.02.1979 for an extent of Ac.10.00 in Sy.No.60 of Karmanghat Village, obtained necessary lay out from the Grampanchayat of Karmanghat, divided the land into plots on 26.08.1979. She executed a general power of attorney in favour of her sons, viz., V.Bheem Reddy, V.Sudershan Reddy and P.Ranga Reddy vide registered document No.788/1988 dated 21.11.1988. One A.Prameela Rani has purchased plot No.46 in Sy.No.60 situated at Karmanghat Village under a registered sale deed dated 15.03.1990. The plaintiff also purchased plot No.46 i.e. suit schedule property from the said A.Prameela Rani under registered sale deed dated 21.11.1997. Subsequently, he constructed a compound wall and small room, and he is in possession and enjoyment of the property without any interference. While the matter

stood thus, on 08.10.2006 when the plaintiff cleaning the plot for further development, the defendants and their men came to the schedule property, threatened the plaintiff with dire consequences, and tried to grab the land. Hence, the suit.

04. The defendants filed written statement alleging that the second defendant has purchased the schedule property from the first defendant under registered agreement of sale-cum-general power of attorney dated 15.11.2005 and constructed a room besides construction of compound wall around the plot. Thus, he has been in possession and enjoyment of the property, since the date of purchase. Earlier, V.Ratna Bai and their sons filed suit in O.S. No.34 of 1999 on the file of I Additional District Judge, Rangareddy, against the first defendant and 51 others for declaration and consequential injunction claiming right in the land to an extent of Ac.8.00 in Sy.No.60 situated at Karmanghat Village and the I Additional District Judge was pleased to dismiss the said suit. Therefore, the sale deed bearing No.2956 of 1990 is void and prayed to dismiss the suit.

05. Basing on the above pleadings, the trial court framed as many as three issues. During trial, on behalf of the plaintiff, P.W.1 was examined and got marked Exs.A.1 to A.7. On behalf of the defendants D.W.1 was examined and got marked Exs.B.1 to B.4.

06. Upon hearing both the counsel, the trial court held issues 1 and 2 against the plaintiff and dismissed the suit.

07. Aggrieved by the Decree and Judgment of the trial court, the plaintiff, being unsuccessful, preferred appeal in A.S. No.90 of 2009 and the first appellate court by its Decree and Judgment dated 27.07.2015 reversing the finding of the trial court, granted permanent injunction in favour of the plaintiff.

8. During hearing before the first appellate court, an interim application was filed under Rule 27 of Order XLI of the Code to receive the documents-Exs.A.8 and A.9, and the said documents-

Exs.A.8 and A.9 were received without recording evidence of any witness, and on the strength of Exs.A.8 and A.9, which are pertaining to period subsequent to the filing of the suit, the finding was recorded. Therefore, the present appeal is filed challenging the Decree and Judgment passed by the first appellate court dated 27.07.2015.

09. At the stage of admission, heard Sri K.Venugopal Reddy, learned counsel for the appellant and Sri Ch.Ramesh Babu, learned counsel for the respondents.

10. The learned counsel for the second defendant mainly contended that Exs.A.8 and A.9 were received allowing the petition in I.A. No.35 of 2012, but marked without recording evidence of any witness. Therefore, marking of documents- Exs.A.8 and A.9 is contrary to Rule 28 of Order XLI of the Code, since the documents were marked without examining any witness, and therefore, passing a Decree based on Exs.A.8 and A.9 is an illegality on the face of the record and prayed to set aside the Decree and Judgment passed by the first appellate court.

11. Whereas Sri Ch.Ramesh Babu, learned counsel for the respondents, fairly conceded that the documents were marked without recording evidence of any witness and prayed to pass appropriate order.

12. As seen from the Judgment of the first appellate court, it is evident that the documents-Exs.A.8 and A.9 were marked while allowing I.A. No.35 of 2012 along with appeal. Rule 27 of Order XLI of the Code, permits the Court to receive additional evidence at the stage of appeal, if the case falls within the ambit of Rule 27 of Order XLI of the Code, more of recording evidence as prescribed under Rule 28 of Order XLI of the Code. According to it, wherever additional evidence is allowed to be produced, the appellate court may either take such evidence, or direct the court from whose

decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court.

13. Instead of following the procedure prescribed under Rule 28 of Order XLI of the Code, the appellate court directly marked Exs.A.8 and A.9 without recording evidence. It is a general principle that a document can be marked by examining any witness, but marking of documents by consent is not prescribed anywhere. Therefore, the procedure adopted by the first appellate court in marking Exs.A.8 and A.9, is contrary to Rule 28 of Order XLI of the Code. Hence, on this ground alone, the Decree and Judgment dated 27.07.2015 are liable to be set aside.

14. However, by exercising the power under Rule 23-A of Order XLI of the Code, the matter has to be remanded, directing the first appellate court to record evidence and mark the documents- Exs.A.8 and A.9, which were received as additional evidence, by resorting to the procedure prescribed under Rule 28 of Order XLI of the Code, setting aside the Decree and Judgment passed by the appellate court on the sole ground.

15. In the result, the appeal is allowed, setting aside the Decree and Judgment dated 27.07.2015 passed by the XIII Additional District Judge, Rangareddy District, and remanded the matter to the first appellate court restoring the appeal to its original number in appeal register with a direction to follow the procedure prescribed under Rule 28 of Order XLI of the Code and dispose off the appeal as expeditiously as possible, but not later than 6 months from the date of receipt of a copy of this Judgment. Both the parties are directed to appear before the appellate court on 09.09.2016.

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

M. SATYANARAYANA MURTHY, J

Date: 05.08.2016

BV