

HON'BLE SRI JUSTICE S.V.BHATT

SECOND APPEAL No.636 OF 2016

ORDER:

Heard Mr.A.Jayasankar Reddy for appellant and Ms.J.Vijayalakshmi for respondent.

Plaintiff in O.S. No.209 of 2003 in the Court of Principal Junior Civil Judge, Nandikotkur, is the appellant.

The plaintiff in this second appeal challenges the Decree and Judgment in A.S. No.13 of 2004 dated 17.01.2007. The suit was filed for declaration of right of way, mandatory injunction and also for permanent injunction against the defendant.

The case of the plaintiff is that he is the owner of house shown as 'ABCD' in the plaint plan and he acquired the house in partition between himself and his four brothers including the defendant. There is a gateway on the eastern side of the defendant's site which is being used as a rasta by plaintiff to reach his house. The plaintiff claims 4' rasta in the vacant site of the defendant as ingress and egress. The defendant taking advantage of wrong recital in the partition deed is trying to make constructions in the vacant site including 4' of rasta. Hence the suit.

The case of the defendant is that the plaintiff has no right as rasta on the 4' space and there is no agreement that defendant should leave 4' space for rasta to plaintiff, therefore, the suit is not maintainable. It is further case of defendant that the plaintiff has to open a doorway on the eastern side as an ingress and egress and cannot encroach in to defendant's property.

The trial Court on the above pleadings has framed the following issues for consideration:

- i. Whether the suit is bad for not seeking the relief of declaration of the right of the plaintiff over the way?
- ii. Whether the plaintiff is entitled to the relief of mandatory injunction against the defendant, as prayed for?
- iii. Whether the plaintiff is entitled to the relief of permanent injunction against the defendant, as prayed for?
- iv. Whether the court fee paid by the plaintiff is not correct?
- v. Whether the plaintiff is entitled for declaration of right of using ratha against the defendant, as prayed for?
- vi. If so, to what relief?

On behalf of the plaintiff, PWs 1 to 5 were examined and Exs.A.1 and A.2 were marked. On behalf of the defendant, DWs 1 and 2 were examined and Exs.B.1 and B.2 were marked.

The trial Court has recorded the following findings on issue Nos.2, 3 and 5.

“Now once again coming to the documentary evidence of Ex.A.1, it is clear that all the parties to the document were given right of passage according to their convenience. Likewise, the plaintiff is also given his right of way on the eastern side i.e. in between ‘BC’ points, but with an option to open it in the future. In the absence of specific recital in Ex.A.1 and Ex.B.1, the plaintiff cannot be permitted to use the vacant site of the defendant as a ratha.

Therefore, for the reasons stated above, the plaintiff has miserably failed to prove his case against the defendant and therefore he is not entitled to the reliefs of declaration of his right over the ratha mandatory injunction and permanent injunction against the defendant. Hence, these issues are settled against the plaintiff.”

Plaintiff filed A.S. No.13 of 2004 and the appellate Court has recorded the following findings of fact on the relief of declaration of right of way etc, pleaded by the plaintiff.

“Coming to the evidence of PW.4 he testified in his chief affidavit about the partition between the parties leaving four feet Rasta on extreme northern side of defendant. As seen from the cross examination he is interested towards plaintiff for the reasons given below. Firstly he denied suggestion they have proposed his eldest son to perform marriage with defendant's daughter Parvathi, his wife's sister also pressurized the defendant to give defendant's daughter to his son. Further admitted Parvathi's marriage was performed on 6-5-2004. They did not attend the marriage including his wife's sister. Not only this aspect there is enmity between his family and defendant with regard to fifteen tulas of gold belonging to his wife misappropriated by defendant's family. Therefore, the above part of cross examination is also clinchingly establish there were no good terms in between PW.4 and defendant in order to help the plaintiff he deposed against him.

PW.5 also stated about the partition between the parties to the proceedings with other brothers leaving four feet space on northern side of defendant's site and using Rasta through the defendant's site, he too expressed his ignorance of written document between parties.

Therefore the witnesses PWs 3 to 5 were not aware of the oral agreement between plaintiff and defendant about leaving four feet space to the plaintiff as Rasta on northern side of defendant's open space. Even though the chief testimonies of PWs 1 to 5 that there is an oral agreement between plaintiff and defendant to leave four feet space on northern side of defendant's open space as this Court found and assigned reasons for interestedness on part of PWs 2 to 5 who stated in support of plaintiff's case and without any recitals in Ex.A.1 or Ex.B.1 their evidence cannot be accepted. Therefore, the plea of the plaintiff the defendant accepted leaving four feet space on southern side of his house is untenable and unacceptable without being any substantial proof of

evidence. Therefore, the plaintiff has miserably failed to prove his claim. Having accepted the terms of the partition only with a view to harass the defendant who is no other than his brother had come to the Court without any justified grounds and all the witnesses who had enmity with the defendant had also stated before the Court in support of the contention of the plaintiff whose evidence can be discarded. Therefore, I am of the considered view and opinion from any angle the plea of the plaintiff cannot be sustained. Accordingly I answered this point against the plaintiff.”

With the assistance of counsel appearing for the parties, I have carefully examined the case of plaintiff, the oral and documentary evidence adduced by the parties and the findings recorded by the trial Court as well as the appellate Court. The findings of fact recorded are based on evidence and the reason for refusing relief is that plaintiff failed to prove his right of rasha admittedly in the share allotted to defendant. Further oral evidence of PWs 1 to 5 has been independently examined, whether arrangement is arrived between parties and the conclusion is that oral evidence is unreliable. The substantial questions framed for consideration in the second appeal do not come within the scope of Section 100 of the Civil Procedure Code. No exception to the findings of fact could be taken. The Second Appeal fails and is dismissed. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

S.V.BHATT,J

Date:21.10.2016
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