

THE HONOURABLE SRI JUSTICE RAJA ELANGO
SECOND APPEAL No.624 OF 2016

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, is directed against the judgment and decree, dated 25.4.2016, in A.S.No.29 of 2009 on the file of the I Additional District Judge, Rajahmundry whereunder and whereby, the learned District Judge dismissed the appeal filed by the plaintiffs against the judgment and decree, dated 28.11.2008, in O.S.No.1335 of 2002 on the file of the Principal Junior Civil Judge, Rajahmundry.

2. For better appreciation of facts, the parties will be hereinafter, referred to as they were arrayed before the trial Court.

3. The suit was filed by the plaintiffs against the defendant seeking the plaint mentioned reliefs of declaration of easementary right, consequential prohibitory permanent injunction, mandatory injunction for removal of some constructions and for recovery of possession of some extent of site apart from awarding suit costs with the following averments:

The plaintiffs are the absolute owners of the plaint schedule residential house bearing D.No.16/82 (old D.No.9/20) situated in Sadanalavari Street, Dowleswaram whose particulars are described in the schedule. The defendant is the owner of the terraced house abutting the eastern and southern side of the plaintiffs' house. The plaintiff's house is shown as ABCD while defendant's house is shown as EFGH in the plaint plan.

The paternal grandfather of plaintiffs 2 and 3 Rowthula Seetaramayya purchased the schedule house and site from Rachakonda Sattiraju and others under the registered sale deed, dated 12.2.1959, and since then, he had been in absolute possession

and enjoyment thereof in his own right. After his death, his son Suryanarayana Murthy became the owner who is the husband of the 1st plaintiff and father of plaintiffs 2 and 3. Recently, Suryanarayana Murthy also died. The plaintiffs, being legal heirs, succeeded to the schedule property along with other properties and they have been in absolute possession and enjoyment of the same in their own right by paying taxes and by leasing out to the tenants. Plaintiffs are residing in another place at Dowleswaram away from the plaint schedule house. There are two windows in existence W1 and W2 in the plaint plan in the eastern house wall of BC of the plaintiffs' house. Those windows are in existence since more than 60 years even prior to his purchase and the plaintiffs and their predecessor in title continuously, uninterruptedly and peacefully were enjoying the light and air through the said windows. Abutting those windows to the east, there is a vacate site of the defendant. The said two windows are opening into the defendant's site. Thus, the plaintiffs perfected their easementary right through the said windows by prescription. It is also an easement of necessity and without which the plaintiffs could not live in the said house. Because of the obstruction by the defendant, the inhabitants have to switch on their lights in the day time also. Taking advantage of the plaintiffs' absence, who are residing elsewhere, the defendant high-handedly, illegally and unauthorisedly closed permanently those windows by constructing walls thereof and caused obstruction to their easementary right of light and air. They also erected a shed resting its roof on the eastern house wall of the plaintiffs' building by driving of rafters and beams of the shed IJKL into the said wall resulting in huge cracks in the said wall due to heavy weightage. The defendant constructed two bathrooms and a store room in the said shed using the eastern building wall of the schedule house as one of their walls. Hence, eastern house wall developed cracks and it is damaged completely and it may collapse at any moment. The defendant is not allowing the plaintiffs to effect repairs. He is liable to pay

compensation after removing the obstruction. The plaintiffs are, therefore, entitled for declaration of their easementary right to light and air through windows W1 and W2 and consequential permanent injunction restraining the defendant from interfering with peaceful possession and enjoyment as well as for a mandatory injunction to remove the obstruction.

The defendant, taking advantage of the absence of the plaintiffs, high-handedly, illegally and unauthorisedly constructed steps abutting the southern house wall of the plaintiffs AB leading to his terrace by inserting iron rods into the AB wall causing immense damage to it. The wall is not only developed cracks but it is also damaged due to heavy weightage resting on it. The defendant is liable to remove and demolish the said steps. The plaintiffs demanded him to remove but he refused. The plaintiffs are entitled for mandatory injunction to remove those steps and to restore AB wall and also for compensation. While constructing the above steps and by erecting the shed, the defendant has clandestinely, high handedly and unauthorisedly trespassed into the plaintiffs' site to an extent of 1' x 27'.6 feet on the eastern side and 2' x 24'.6 feet into southern side totalling 8.5 sq.yards in extent. The eastern eaves and southern eaves of the plaintiffs' house are protruding into the defendant's site to an extent of 2' as the plaintiffs have got site on both sides to that extent. The plaintiffs demanded the defendant to deliver the encroached portion, but the defendant did not comply. In fact, the plaintiffs' father raised a dispute before elders and the defendant did not hear the elders' advice and after his death, the plaintiffs raised a dispute before the elders and they also summoned the Mandal Surveyor in the middle of April, 2001 to measure the houses and to note the encroachments. He conducted survey and measured the house of plaintiffs as per their sale deed. The defendant did not produce his title deeds and refused without justifiable cause. Hence, the plaintiffs got issued a legal notice, dated 10.10.2001, to the defendant. He received and gave a belated reply,

dated 15.10.2001, with all false allegations. Hence, the mediation failed. Hence, the suit.

4. The defendant got filed a written statement before the lower Court denying the case of the plaintiff and the case of the defendant, in brief, as per the averments in the written statement is that the plaintiffs are the owners of the plaint plan ABCD portion and the plaintiffs have got the property as heirs of late Rowthula Seetharamayya are not admitted. The plaintiffs are put to strict proof of their relation with late R.Seetharamayya. It is true that the defendant is the owner of the southern side and eastern side property shown in the plaint plan. The defendant's father purchased the eastern side property from Bahursha family in or about 1957. Subsequently, one B.T.Ranga Rao filed O.S.No.1300 of 1982 against the defendant and his family members seeking declaration of his right and for recovery of the possession of the property. It was dismissed accepting title of the defendants. B.T.Ranga Rao filed A.S.No.160 of 1986 on the file of the II Additional District Judge, Rajahmundry and it was also dismissed accepting the title of the defendants to the property. Item No.2 of the plaint schedule property of nearly about 160 sq.yards is described as eastern side portion. The findings of the Courts in O.S.No.1300 of 1982 and A.S.No.160 of 1986 being declaratory in nature operate *res judicata*. The defendant has been in uninterrupted possession and enjoyment in between boundaries. As such, the plaintiffs' claim that there is an encroachment to an extent of 27.1 feet in length and 1 foot in width are all absolutely false. The judgment and decree in O.S.No.1300 of 1982 was passed on 22.9.1986 accepting the defendant's title over entire extent of item No.2 which is eastern side portion of plaint plan. That adverse order should have been challenged within a reasonable time but the plaintiffs kept quiet for about 17 years. They cannot have any right, title or interest in the property beyond compound wall on eastern side. As such, the plaintiffs are not entitled to 27.6 sq.feet on eastern

side of the plan. The plaintiffs' allegations are vague as to how the plaintiffs enjoyed the property beyond compound wall as eastern side and how they got title and to what extent, they have got title. Even the plaintiffs' title deed in the name of R.Seetharamayya, dated 12.2.1959, clearly described eastern side boundary of item No.1 as follows:

“East : 27.6 feet Bahdursha Ranganayakulagari site.”

Thus, the plaintiffs never enjoyed the property beyond the wall. They are estopped for contending that they have any property beyond compound wall. The defendant made constructions of the sheds in the alleged portion of the plan more than 20 years ago. The plaintiffs or their predecessors never objected for such constructions. As such, the plaintiffs have no locus standi to claim any easementary right to light and air seeking removal of the shed on the eastern side. The plaint allegations are vague and it does not contain any particulars about the accustomed extent of light and air. In the absence of such material, they are not entitled to any relief. The suit is liable to be dismissed on the ground of insufficient pleading and on the ground of waiver of the right, if any. The defendant got northern side property under gift deed, dated 2.7.1980, from Venum Ramanamma, W/o.Kotipalli. Thereafter, he constructed house therein as per approved plan, dated 10.8.1983, and he has been in possession and enjoyment of the entire eastern and southern side portions of the plaint plan. The claim on the southern side to an extent of 2 feet x 24.6 feet is false and the suit is liable to be dismissed.

5. Basing on the above pleadings, the following issues were settled for trial before the trial Court:

- “1. Whether the plaintiffs are entitled for the declaration of easementary right of light and air to the windows W1 and W2?
2. Whether the plaintiffs are entitled for the mandatory injunction to remove the obstruction as prayed in the suit?

3. Whether the plaintiffs are entitled for the mandatory injunction to demolish the steps abutting the southern house wall of the plaintiffs building ABCD?
4. Whether the plaintiffs are entitled for the delivery of the vacant possession of the site 8.5 sq.yards as prayed?
5. Whether the plaintiffs are entitled for the permanent injunction as prayed for?
6. To what relief?"

6. During trial, on behalf of the plaintiffs, P.W.1 was examined and Exs.A-1 to A-3 were got marked. On behalf of the defendant, D.Ws.1 and 2 were examined and Exs.B-1 to B-7 were got marked.

7. The trial Court, after considering the evidence on record, came to the conclusion that the plaintiffs failed to prove their right of easement to light and air through W1 and W2 windows though there was existence of such windows on BC eastern side wall and that as the plaintiffs failed to prove the same, there is no question of answering issue No.2 and that the plaintiffs failed to prove their entitlement for mandatory injunction to demolish the steps abutting the southern side AB wall of plaintiffs' house and for delivery of vacant possession of 8.5 sq.yards and further, failed to prove their entitlement for permanent injunction and as such, dismissed the suit of the plaintiffs. Aggrieved by the said judgment, the unsuccessful plaintiffs filed A.S.No.29 of 2009 on the file of the I Additional District Judge, Rajahmundry and the same was dismissed with costs confirming the judgment and decree, dated 28.11.2008, in O.S.No.1335 of 2002 on the file of the Principal Junior Civil Judge, Rajahmundry. Challenging the same, the plaintiffs preferred this Second Appeal.

8. On proper appreciation of the entire evidence on record, the trial Court dismissed the suit and the same was rightly confirmed by the

first appellate Court. In view of the concurrent findings of both the Courts below and as the plaintiffs are unable to substantiate that there any legal issues to be decided by this Court, the Second Appeal is liable to be dismissed.

9. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs.

10. Miscellaneous petitions pending, if any, in this Second Appeal shall stand closed.

JUSTICE RAJA ELANGO

24.8.2016
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THE HONOURABLE SRI JUSTICE RAJA ELANGO

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