

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.299 of 2016

JUDGMENT:

The unsuccessful defendant No.1 in O.S.No.2252 of 2010 on the file of VI Junior Civil Judge's Court, City Civil Court, Hyderabad and Appellant in A.S.No.191 of 2013 on the file of III Additional Chief Judge, City Civil Court, Hyderabad, has preferred this Second Appeal under Section 100 of Code of Civil Procedure ('CPC' for brevity), whereby the trial Court granted a decree for removal of construction made by defendant No.1 in the suit schedule property i.e., on eastern side of plaintiff's house bearing No. 23-6-918/31 and 32 and western side of schedule property i.e., H.No.23-6-872 with open space and sump i.e., 15' lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad, which was confirmed by the Appellate Court in its Decree and Judgment dt.02.12.2015.

2. For convenience of reference, the parties to the appeal will herein be referred as ranked in O.S.No.2252 of 2010 by VI Junior Civil Judge, City Civil Courts, Hyderabad, through out the judgment.

3. The Plaintiff filed the suit for grant of mandatory injunction directing defendant No.1 for removal of illegal construction made by him, in default, direct defendant Nos. 2 and 3 to demolish the illegal constructions made by D.1, alleging that the plaintiff is the owner and possessor of suit schedule premises, which is 15' lane on the eastern side of the property and defendant No.1 being a neighbouring owner of the premises bearing No. 23-6-872 raised illegal constructions, like sump and projected sun shades into the lane causing obstruction for ingress and egress to the public in

general.

4. Despite demands made by the Plaintiff, defendant Nos. 2 and 3 being the municipal authorities, failed to take any steps for removal of illegal constructions raised by defendant No.1 encroaching into the open space and sump i.e., 15' lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad, and hence the suit for the aforesaid reliefs.

5. Defendant No.1 filed Written Statement denying the material allegations while admitting ownership of the house bearing Door No.23-6-872, *inter alia* contending that he is the owner of the house built on 170.6 sq.yards purchased by him under registered Sale Deed dt. 28.02.2006 and the lane being used by the plaintiff and public in general is the exclusive property of defendant No.1 having got the same to his share in the division among co-sharers and therefore, the plaintiff has no right to claim any relief in the suit.

6. Defendant Nos. 2 and 3 filed separate Written Statements contending that suit schedule property i.e., lane of 15' width is a public lane and not the exclusive property of anybody while admitting that defendant No.1 constructed three floor building without permission of the municipal authorities and further 4 feet balcony is projected into the 15 feet lane margin in addition to construction of Dhobi Pail and the defendant Nos. 2 and 3 issued Notice under Section 461 of Greater Hyderabad Municipal Corporation Act, 1955 ('the 1955 Act' for brevity) to defendant No.1 and prayed for dismissal of the suit.

7. Basing on the above pleadings, the trial Court framed the following issues for trial :

i) Whether the plaintiff is entitled for relief of mandatory injunction by directing defendant Nos. 2 and 3 to demolish the illegal construction made by Defendant No.1 on eastern side of plaintiff's property house No.23-6-918/31 and 32 and western side of schedule property (H.No.23-6-872) with open space and sump i.e., 15' lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad?

ii) Whether the suit is bad for non-issuance of notice under Section 685 of GHMC Act?

iii) To what relief ?

8. During trial, on behalf of plaintiff, PWs. 1 and 2 and Cw.1 were examined and Exs. A.1 to A.16 and C.1 to C.35 were marked. On behalf of defendants, DWs. 1 to 4 were examined and Exs. B.1 and B.2 were marked.

9. Upon hearing argument of both the counsel, the trial Court decreed the suit granting relief as follows:

“ In the result, the suit is decreed without costs in favour of plaintiff and against Defendant No.1 by granting mandatory injunction by directing the defendant No.1 to remove the illegal construction within one year from the date of judgment, failing which, the defendant Nos. 2 and 3 are directed to demolish the illegal construction made by the defendant No.1 on eastern side of plaintiff's property house No.23-6-918/31 and 32 and western side of schedule property i.e., H.No.23-6-872) with open space and sump i.e., 15' lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad”.

10. Aggrieved by the said Decree and Judgment of the trial Court, defendant No. 1 being unsuccessful before the trial Court preferred an appeal A.S.No.191 of 2013 on the file of III Additional Chief Judge, City Civil Court, Hyderabad, raising several contentions. But, the Appellate Court confirmed the decree and judgment of the trial Court recording concurrent findings, vide decree and judgment dt.02.12.2015 and thus, the Appellate Court confirmed the direction issued by the trial Court regarding removal of entire illegal construction made by defendant No.1.

11. Aggrieved by the decree and judgment of the Appellate Court, defendant No.1 preferred this Second Appeal under Section 100 of CPC, formulating three substantial questions of law. First substantial question of law i.e., (a) is with regard to consideration of Commissioner's Report in toto and question No.(c) is relating to granting of relief beyond the relief claimed by the plaintiff. But, question No.(b) is based on factual aspect. Therefore, 'a and c' alone are substantial questions of law and they are as follows:

i) Whether the trial Court is justified in taking the Commissioner Report in entirety and passing decree in the suit when the plaintiff failed to prove the same?

ii) When the plaintiff failed to prove the exact extent of the defendants property, is the trial court justifiable granting mandatory injunction of the suit schedule property when the suit schedule property part and parcel of the defendants property?

12. This Court ordered notice before admission and Sri M.M. Goud appeared on behalf of plaintiff/ respondent No.1 herein before this Court.

13. During hearing Sri Rajagopallavan Tayi, learned counsel for Appellant while reiterating the contentions urged before the Courts below mainly contended that acceptance of Commissioner's Report in toto is an error on the face of the record and consideration of the same for grant of relief is a serious error committed by the trial Court and the Appellate Court and similarly, the relief granted by the trial Court, which was confirmed by the Appellate Court, is beyond the relief claimed in the plaint by the plaintiff, which is impermissible in law, and the Courts cannot grant the relief, which is beyond the relief claimed by the plaintiff in the suit.

14. No argument is advanced for the plaintiff/respondent No.1

before this Court either in support of the findings recorded by the trial Court, which was confirmed by the appellate Court or pointing out any infirmity or illegality in the findings of the trial Court.

15. In Re QUESTION No.(a):

One of the major contentions raised before this Court is that considering the entire Commissioner's Report by the trial Court and the Appellate Court passed decree accepting the encroachment and projecting the balcony into the lane to an extent of 4 feet and Dhobi Pail is not in accordance with law. A commissioner was appointed on the application of the plaintiff before trial Court and he submitted his report, after due inspection in the presence of both plaintiff and defendant No.1. As per his report, defendant No.1 raised construction i.e., Balcony projecting into lane to an extent of 4 feet width and so also Dhobi Pail. But, the contention of defendant No.1 is that Dhobi Pail was in existence since long time. Therefore, defendant No.1 cannot be directed to remove Dhobi Pail.

16. As seen from the record, defendant No.1 had neither filed objections on the Commissioner's Report nor elicited anything in the cross examination of Cw.1 questioning the fact findings noted by Commissioner as existing on ground on the date of inspection and disputing the truth in the report of the Commissioner in the cross examination. Therefore, in the absence of any objection and when the Commissioner's Report was marked as Ex.C.1 along with Plan as Ex.C.2, in the evidence of Cw.1, the Court is bound to take note of the Commissioner's Report, unless the counsel for defendant No.1 elicited anything disputing the facts recorded in the Commissioner's Report and plan. It appears from the record, that the counsel for defendant No.1 failed to elicit anything to discredit

the testimony of Cw.1 coupled with Exs. C.1 and C.2 i.e., Commissioner's Report and plan respectively. In the absence of any material, the trial Court is bound to accept the report of the Commissioner and pronounce appropriate judgment. Nothing precluded the trial Court to pronounce its judgment basing on the Commissioner's Report, even otherwise, under Order 26 Rule 10, the Report of the Commissioner would form part of the record.

17. Order 26 Rule 10 of CPC is as hereunder:

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) Report and depositions to be evidence in suit- Commissioner may be examined in person:- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

18. It is no doubt true that when substantial objections are raised to the report of the Commissioner, it would be advisable and desirable to examine the Commissioner for the purpose of having a clear picture. But on that ground alone, it cannot be said that the report of the Commissioner cannot be looked into by the Court unless the same is exhibited or the Commissioner is examined. Such a narrow proposition cannot be laid down and this would depend upon the facts and circumstances of a particular

given case. In **Chintalapatla Arvind Babu v. K. Balakistamma**^[1], it was held that the report of the Commissioner appointed under Order 26 Rule 9 C.P.C., is evidence and it is generally more credible evidence. In **V. Appayamma v. L. Sahu**^[2], it was held that the report of the Commissioner is a part of record and can be considered as evidence irrespective of the fact whether the Commissioner was examined as a witness or not. In **Kalandi Swain v. Braja Kishore**^[3], it was held that a report is automatically admitted in evidence under Order 26 Rule 9 C.P.C., and forms part of the record. In **Sathya Engineering Contractors v. Nachammai**^[4], 1992(2) MLJ 221, it was held that unless it appears to the Court that the examination of the Commissioner is necessary, his report can be exhibited and acted upon. In **Chandrapal v. Roop Rama**^[5], it was held that the report of the Commissioner may be read in evidence but it is not conclusive or binding on the Court and the report to be assessed in the light of other evidence and material on record like any other piece of evidence. Reliance also was placed on **Marcoli Achuthan v. Kunhipathumma**^[6], and **State of Uttar Pradesh v. Smt. Ram Sri and Anr**^[7].

19. Before the trial Court, Commissioner was examined and marked his report, during cross examination, nothing was elicited to discredit his testimony or at least challenged the facts recorded in the report existing on ground. The dispute is projection of construction, both parties adduced evidence in support of their plea, but, an independent Commissioner Report can certainly be based to pass appropriate decree, attaching credibility, in the absence of any material to disbelieve his report.

20. When the Commissioner was examined as witness before the trial Court, the report of the Commissioner would form part of the record and based on such report, the Court can pronounce appropriate judgment and the basing on the Commissioner's Report, the Court recorded the findings that the suit schedule property is the public lane, all the more Commissioner was examined and cross examined. Therefore, the findings recorded based on Commissioner's Report by the trial Court and the appellate Court is not an error on the face of the record and the findings of the Courts below does not warrant interference of this Court while exercising power under Section 100 of CPC. Accordingly, question No.(a) is answered in favour of the plaintiff and against Defendant No.1

21. **In Re QUESTION NO.(C):**

The main contention of defendant No.1 is that the trial Court granted relief beyond the relief claimed in the plaint, and on the sole ground, the decree and judgment of the trial Court are liable to be set aside. The counsel for appellant fairly conceded that the relief be confined to the relief prayed in the plaint while deciding this second appeal.

22. It can be seen from first para of the judgment in O.S.No.2252 of 2010 , the plaintiff sought mandatory injunction by directing defendant Nos. 2 and 3 to demolish the illegal construction made by defendant No.1 on the eastern side of plaintiff's house No.23-6-918/31 and 32 and western side of schedule property i.e., H.No.23-6-872 with open space and sump i.e., 15' lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad. But, whereas the trial Court issued a direction in the operative portion as follows:

“In the result, the suit is decreed without costs in favour of plaintiff and against Defendant No.1 by granting mandatory injunction by directing the defendant No.1 to remove the illegal construction within one year from the date of judgment, failing which, the defendant Nos. 2 and 3 are directed to demolish the illegal construction made by the defendant No.1 on eastern side of plaintiff’s property house No.23-6-918/31 and 32 and western side of schedule property i.e., H.No.23-6-872) with open space and sump i.e., 15’ lane situated at Devdi Rai Rayan, Shalibanda, Hyderabad”.

23. From the beginning, the contention of the plaintiff is that he is the owner of suit schedule property i.e., 15’ width space; whereas the contention of defendant No.1 is that the space was left as a set back while constructing the house and it exclusively belongs to him. Defendant Nos. 2 and 3 contended that it is a public lane meant for use of the public at large. The Courts below believed the contention of defendant Nos. 2 and 3 and held that it is a public lane meant for use of public at large and neither the plaintiff nor defendant No.1 are the owners of the suit schedule property, based on evidence available on record. Therefore, the fact finding recorded by the Courts below regarding the nature of suit schedule property i.e., public lane cannot be interfered by this Court in the second appeal because the jurisdiction of which is limited to a substantial question of law.

24. Section 2 (46) of the Hyderabad Municipal Corporation Act, 1955, defines ‘Public Street’ as follows:

“ Public Street’ means any street over which the public have a right of way, whether a thoroughfare or not and includes--

(a) a Broadway over or a foot way attached to any public bridge or cause way, and

(b) The drain attached to any such street, public bridge or causeway and the land, whether covered or not by any pavement, verandah, or other structure, which lies on either side of the roadway upto the boundaries of the adjacent property, whether that property, is private property or property belonging to Government”.

25. The suit schedule property is a public lane, as per the contention of defendant Nos. 2 and 3, and the Courts below held that it is a public lane since public have a right of way as per definition referred above. The plaintiff did not prefer any appeal challenging the finding recorded by the trial Court, which was confirmed by the Appellate court, regarding the nature of the property in dispute i.e., the public lane. But, though defendant No.1 filed first appeal against such finding, it was turned down assigning reasons by the Appellate Court and recorded a concurrent finding by it regarding the nature of the property. When the suit schedule property is a public lane, the adjacent owners are not entitled to encroach into the lane and raise any construction, like construction of sun shades balcony or Dhobi Pail, as per building rules under Greater Hyderabad Municipal Corporation Act, 1955. When the 4 feet width of balcony is projected into such lane, certainly it would cause obstruction to the public i.e., to use the passage for ingress and egress. When the property is a public lane and it is encroached by raising Balcony projecting into lane to an extent of 4 feet, certainly, it is liable to be removed by granting mandatory injunction.

26. So far as the other construction i.e., construction of Dhobi Pail is concerned, it is the contention of defendant No.1 that it is in

existence since time immemorial and it is not a new construction. But, this contention was not substantiated by adducing any evidence, that would not give rise to creation of any right in the movable property i.e., public lane. Therefore, the Courts below rightly concluded that the constructions made by D.1 in the public lane i.e., suit schedule property, are liable to be removed, issued a direction to defendant No.1 to remove the construction, in case D.1 failed to remove the construction in the public lane, defendant Nos. 2 and 3 are given liberty to remove the illegal constructions.

27. The main contention of defendant No.1 before this Court is that let the removal be limited to the obstruction caused in the lane and not to the entire building. As seen from the relief granted by the trial Court, confirmed by the Appellate Court, the plaintiff sought for removal of entire construction illegally raised though he is claiming right in the public lane i.e., suit schedule property. Defendant Nos. 2 and 3 admitted that they issued Notice under Section 461 of the 1955 Act to show cause why illegal constructions should not be removed, raised by the defendant No.1 and till today, no action was taken because of pendency of the appeal before this Court. However, taking into consideration, the facts and circumstances of the case, the mandatory injunction is limited to removal of constructions raised by D.1 in the suit schedule property. However, liberty is given to defendant Nos. 2 and 3 to enforce Notice issued under Section 461 of the 1955 Act and liberty is given to defendant No.1 to make an application for regularization of unauthorized construction except to the extent of encroachments into the lane i.e., suit schedule property, subject to permissibility under law.

27. Accordingly, the Decree and Judgment of the trial Court is

modified directing the defendant No.1 to remove the encroachments in the suit schedule property i.e., lane of 15 feet, within two months from today, in the event of failure of defendant No.1 to remove the encroachments into the lane, defendant Nos. 2 and 3 are directed to remove those illegal encroachments into the public lane and if defendant Nos. 1 to 3 failed to remove the construction, the plaintiff is at liberty to file an execution petition to get the encroachments removed in the suit schedule property.

28. With the above modification, this Second Appeal is partly allowed, but without costs in the circumstances of the case.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 22-08-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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[\[1\]](#) 1992 (1) ALT 319

[\[2\]](#) AIR 1973 AP 168

[\[3\]](#) AIR 1980 Ori 98

[\[4\]](#) (1992) 2 MLJ 221

[\[5\]](#) 1979 All.LJ 55

[\[6\]](#) AIR 1968 Ker 28

[\[7\]](#) 1996 SCALE (2)627