

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.652 OF 2015

JUDGMENT:

The appellants in A.S. No.155 of 2012 on the file of the Court of I Additional District Judge, Guntur, who are the defendants in O.S. No.159 of 2010 on the file of the Court of III Additional Junior Civil Judge, Guntur, preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') challenging the concurrent finding recorded by both the trial court and the first appellate court, whereby declared that the plaintiff is the owner of the property and granted permanent injunction in his favour, restraining the defendants and their men from interfering with peaceful possession and enjoyment of the schedule property subject to the result of the appeal in A.S. No.333 of 2007 on the file of the Court of V Additional District Judge, Guntur.

02. The ranks given to the parties in the suit will hereinafter be adopted throughout the Judgment, for convenience of reference.

03. The plaintiff filed a suit in O.S. No.159 of 2010 before the III Additional Junior Civil Judge, Guntur, for grant of permanent injunction alleging that he is absolute owner of the plaint schedule property, since he purchased the schedule property from Gajjala Salamma, W/o.Narapa Reddy, under registered sale deed bearing No.7557/1994. Ever since he has been in possession and enjoyment of the same, subsequently, a rectification deed dated 04.03.2005 was obtained, as a mistake was crept in the document in respect of Eastern boundary of the

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property and that the defendants are the owners of Eastern side of the plaint schedule property and they are nothing to do with the said property. The first defendant filed a suit in O.S. No.525 of 2005 on the file of the Court of Principle Junior Civil Judge, Guntur, against the plaintiff for declaration that she is entitled to claim right over the suit schedule property and also for mandatory injunction for removal of construction raised therein, which ended in dismissal, the same was affirmed in A.S. No.333 of 2007 by the V Additional District Judge, Guntur. Thus, the dismissal of the suit itself is sufficient to conclude that the defendants have no right or interest in the schedule property including the alleged lane (nadava). However, the defendants are trying to encroach upon the schedule property. Hence, he filed the suit for the aforesaid relief.

04. The defendants resisted the claim on the ground that there is a six feet width joint lane (nadava) between the property of the plaintiff and defendants, to reach the ring road towards Southern portion, which is being used for ingress and egress by both plot owners, but however, with an intention to grab six feet lane (nadava), the plaintiff obtained rectification deed without their knowledge and to cause wrongful loss and preventing them to enjoy their property, and in fact, the lane (nadava) is in existence since long time and that the defendants are entitled to claim a joint right in the lane (nadava). The defendants also admitted filing of suit in O.S. No.525 of 2005 before the Principal Junior Civil Judge, Guntur, and an appeal in A.S. No.333 of 2007 before the V Additional District Judge,

Guntur and its dismissal, while contending that the second appeal is pending before this Court and prayed for dismissal of the suit.

05. Based on the above pleadings, the trial court framed the following issues:

01. Whether the plaintiff is in possession and enjoyment of the plaint schedule property?

02. Whether the plaintiff is entitled for permanent injunction as prayed for?

03. To what relief?

06. During trial, Plaintiff was examined as P.W.1 and marked Exs.A.1 to A.6 and on behalf of defendants, D.Ws.1 to 4 were examined and Exs.B.1 and B.2.

07. Upon hearing both the counsel, the trial court decreed the suit. Aggrieved thereby, the defendants preferred an appeal in A.S. No.155 of 2012 before the I Additional District Judge, Guntur, which ended in dismissal by Decree and Judgment dated 10.06.2014.

08. Heard both the counsel at the stage of admission.

09. Thus, both the trial court and the first appellate court recorded concurrent finding. Hence, the defendants filed the present second appeal challenging the concurrent finding of both the trial court and the first appellate court while granting decree in favour of the plaintiff, raising several contentions.

10. The appellants/defendants formulated as many as five substantial questions of law, however, during hearing, learned counsel for the appellants/defendants contended that the appellants/defendants and the respondent/plaintiff are entitled

to claim joint right and though a suit in O.S. No.525 of 2005 was dismissed both by the trial court and the first appellate court, and confirmed by this Court in second appeal, still he is entitled to claim a right of way in view of Section 7 of the Indian Easements Act, 1882 and Section 184(2)(a) of A.P. Municipalities Act, 1965 and though the judgment in earlier suit in O.S. No.525 of 2005 operates as estoppel by record, that cannot be the basis for passing a Decree in favour of the plaintiff.

11. Therefore, basing on the arguments of the counsel for the appellants/ defendants, the following substantial question of law is framed:

Whether the appellants/defendants are entitled to claim restrictive easement right under Section 7 of the Indian Easements Act, 1882 and right under Section 184(2)(a) of A.P. Municipalities Act to enjoy the path way (nadava) for ingress and egress and mostly to reach the ring road? If so, the Decree and Judgment of the trial court and first appellate court be sustained?

IN RE. POINT:

12. Undisputedly, the respondent/ plaintiff has purchased 102 square yards of site under registered sale deed, which was marked under the Original of Ex.A.1 dated 17.09.1994. The said site was within the specified boundaries, but later, as the Eastern boundary was wrongly mentioned for the same extent of site in the document, obtained rectification deed under original of Ex.A.2 dated 04.03.2005. The extent is not changed, but

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boundary alone is changed on the Eastern side of plot purchased under Ex.A.1. On account of such execution, the alleged joint path way (nadava) claimed by the defendants/appellants in O.S. No.525 of 2005 was also included. Therefore, the respondent/plaintiff, taking advantage of original of Exs.A.1 and A.2, claimed exclusive right over property of an extent of 102 square yards, which is inclusive of the alleged path way. Whereas the defendants/appellants claimed joint right for ingress and egress to reach ring road.

13. The defendants/ appellants specific claim is that they are entitled to pass through the joint path way (nadava) of six feet width, to reach ring road. When they were obstructed to enjoy such right, filed a suit in O.S.No.525 of 2005 on the file of the Court of Principal Junior Civil Judge, Guntur, it was dismissed, and affirmed the Decree and Judgment by the first appellate court in A.S. No.333 of 2007 and this Court in second appeal, denying the relief holding that the plaintiffs therein is not entitled to claim passage, much less joint path way (nadava) through six feet width of alleged lane (nadava). Thus the rights of the defendants, who were the plaintiffs, in O.S. No.525 of 2005 were finally determined by this Court in second appeal and concluded that the plaintiffs in the said suit were not entitled to claim any joint right in the alleged passage, which is part and parcel of the suit schedule property purchased by the plaintiff herein under the original of Ex.A.1 and rectified by Ex.A.2.

14. The main endeavour of Sri Raja Reddy Koneti, learned counsel for the appellants, is that the appellants/ defendants

are entitled to claim right of restrictive easement under Section 7 of the Indian Easement Act, 1882 and drawn the attention of this Court to illustration (a) of the Act and according to it, every owner of land in a town to build on such land, subject to any municipal law for the time being in force. This is not in quarrel. In fact, it permits the owner to raise a construction in his own land subject to municipal law.

15. Curiously, no such plea was set up before the trial court and there is absolutely no pleading to claim such right. When a suit is filed based on easementary right, more particularly, the restrictive easement under Section 7 of the Easements Act, facts need be pleaded and on those facts pleaded, evidence be let in by the parties, it can be decided, whether the relief claimed by the party falls either under Section 7 or under Section 13 of the Indian Easement Act, 1882. Here the written statement is bereft of such pleading. In **MARIA MARGARIDA SEQUERIA FERNANDES AND OTHERS V. ERASMO JACK DE SEQUERIA(DEAD) THROUGH L.RS.**¹ the Apex Court held that pleadings are vital in a civil litigation and held as follows:

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.

63. Possession is important when there are no title documents and other relevant records before the

¹ AIR 2012 SC 1727

Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.

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67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents."

16. Even as seen from the settled legal position, to decide specific right of restrictive easement under Section 7 of the Act, it is for the defendants/appellants to raise such plea, so as to enable the adversary to refute such contention, by filing a

rejoinder, to frame a specific issue and permit the parties to adduce evidence. In the absence of any pleading, it is difficult to accept such contention. Even otherwise, the restrictive easement under illustration (a) to Section 7 of the Act is only permitting the owner of the land to build a house within the site subject to municipal laws. Therefore, there is no quarrel about the right to build a house within his land subject to municipal laws.

17. The other contention of Sri Raja Reddy Koneti, learned counsel for the appellants/ defendants, is that it is an obligation of the plaintiff to make a layout and to form a street or road when disposing of lands as building sites and according to sub-Section (2) of Section 184 of the Act, the owner of any land shall, before he utilizes, sells, leases, or otherwise disposes of such land or any portion thereof, as sites for construction of buildings-(a) make a layout and form a street or road giving access to sites and connecting them with an existing public or private street except in the cases where the sites abut on an existing public or private street.

18. As seen from clause (a) to sub-Section (2) of Section 184 of the Act, it obligates the owner to make layout and to form a street or road when disposing of lands as building sites to have access to the main road from the layout etc. Therefore, based on Section 184(2) of the Municipalities Act, right of the defendants cannot be obviated.

19. The major contention raised before this Court is that the earlier judgment is only estoppel by record as per Section

115 of the Indian Evidence Act and it would not operate as *res judicata*.

20. Estoppel is a rule of evidence and the general principle is enacted in Section 115. There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. It is of four kinds – (1) by record, i.e. a decision of a court under Sections 40 to 44 of the Indian Evidence Act, (2) by deed; (3) in pais, i.e. by conduct or representation,; (4) by conduct, where a person has, by his declaration, act or omission permitted another to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed to deny its truth.

21. Now the case of the defendants/ appellants falls within the first kind i.e. estoppel by record. Section 40 of the Evidence Act says the existence of any Judgment, Order or Decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Sections 40 to 43 of the Act provide which Judgment of Courts of Justice are relevant and to what extent. A Judgment not falling within the ambit of Sections 40 to 42 is irrelevant, unless it fulfills conditions of Sections 43. Section 40 enacts that the existence of any Judgment, Order or Decree which by law i.e. Section 11 of Civil Procedure Code dealing with *res judicata*, and, Section 300 of Criminal Procedure Code, which incorporate the doctrine of double jeopardy and bars a second trial for the same offence bars a

second suit or trial, is a relevant fact. In order to take a plea of *res judicata* in civil cases, former Judgment has to be filed in support of such plea. Therefore, such former Judgment, which must be inter parties, is made relevant and admissible under Section 40. For a previous Judgment to have effect or to be relevant under Section 40 of the Evidence Act, the parties must be the same or their representatives in interest.

22. Thus, the earlier Judgment which decides the rights of the parties in controversy between the same parties, which attained finality or conclusiveness, the subsequent proceedings are barred by principle of *res judicata* in view of the principle laid down in **PRITAM SINGH AND ANOTHER VS THE STATE OF PUNJAB²**

23. Section 11 of CPC created an interdict to try any suit or issue in which the matter directly or substantially in issue, has been directly and substantially in issue in former suit between the same parties or between the parties in whom they are, any of them claim litigating in the same decision in a court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by such court.

24. In the present facts of the case, the defendants/appellants filed a suit in O.S. No.525 of 2005 before the Principal Junior Civil Judge, Guntur, to declare that they are entitled to right of passage through six feet width lane (nadava) on the Eastern side of the suit schedule property,

² AIR 1956 SC 415

which is connecting the ring road. But the said suit was dismissed denying relief of declaration and mandatory injunction. Now in the present suit, the defendants/appellants set up the same plea that they are entitled to claim right of passage through six feet lane (nadava) on the Eastern side of plaint schedule property for ingress and egress and to reach ring road. The said issue was finally decided in the former suit in O.S. No.525 of 2005 and attained finality. Therefore, the issue raised by the defendants/ appellants herein i.e. right to enjoy the lane (nadava) of six feet width on the Eastern side of the plaint schedule property for ingress and egress need not be tried and decided by this Court, since the issue was decided in the former suit. Thus, the claim of the defendants/appellants is hit by Section 11 of CPC and it is equivalent to estoppel by record.

25. To substantiate their contention in the earlier suit, the defendants/ appellants herein produced Ex.A.5- certified copy of Decree and Judgment in O.S. No.525 of 2005 and Ex.A.6 certified copy of Decree in A.S. No.333 of 2007 and Sri Raja Reddy Koneti, learned counsel for the defendants/appellants fairly conceded that the second appeal was dismissed by this Court and marked as additional evidence in S.A. No.1056 of 2011 dated 10.12.2013, it was referred as additional evidence however, it is not a disputed fact. Therefore, the claim of the defendants/ appellants is barred under Section 11 of CPC.

26. The plaintiff sought for only permanent injunction under Section 38 of Specific Relief Act, 1963, which is purely

discretionary relief, but at the same time, this Court need not go into title and record a finding attaching finality, but this court can go into title incidentally for a limited purpose for deciding lawful possession.

27. The counsel for the defendants/appellants mainly contended that the rectification deed-original of Ex.A.2 would not confer any right on the plaintiff to claim exclusive right over the alleged lane (nadava) of six feet width, except for a limited purpose for deciding the lawful possession.

28. In fact, original of Ex.A.1 was obtained for an extent of 102 square yards wherein but Eastern boundary was mentioned as lane (Nadava). Later rectification deed - original of Ex.A.2 was obtained excluding the path described as lane (nadava), but the actual extent covered by Ex.A.1 is inclusive of the alleged lane (nadava), when they find a mistake in the boundaries, a rectification deed was obtained from the original owner under original of Ex.A.2. However, there is no change in the extent of land purchased under the original of Ex.A.1, when there is a dispute with regard to the boundaries, the extent will prevail and if the extent is in dispute, the boundaries will prevail.

29. Therefore, considering the extent covered by original of Ex.A.1, it can safely be held that he is in lawful possession and enjoyment of the property as on the date of filing the suit and when he is in lawful possession, the defendant being a third party is not entitled to interfere with the peaceful possession and enjoyment of the schedule property. When the defendant made an attempt to interfere or invade or infringe the legal right of the

plaintiff to continue in possession of the property, (vide Section 38(2) of the Specific Relief Act) the court can grant permanent injunction restraining the defendants and their men from interfering with possession and enjoyment of the schedule property of the plaintiff.

30. Hence, I find that the plaintiff/ respondent is in lawful possession and enjoyment of the property and that the defendants/ appellants made an attempt to interfere, infringe or invade the legal rights of the plaintiff/ respondent. Thereby the trial court rightly granted permanent injunction restraining the defendants/ appellants and their men from interfering with the peaceful possession of the plaintiff over the schedule property.

31. Finally, learned counsel for the appellant submitted that the liberty may be given to redress his grievance to an appropriate forum, though the suit filed by the defendants in O.S. No.525 of 2005 was finally decided against the defendants in second appeal in S.A. No.1056 of 2011 and having lost their claim as defence in the written statement in the present suit.

32. Hence, the Judgment of this Court will not come in the way of the defendants to approach authorities, if any, to redress the claim of the defendants/ appellants. But on over all consideration of the entire material on record, I find no grounds to interfere with the concurrent finding of both the trial court and the first appellate court.

33. The defence set up by the defendants/ appellants in the written statement is hit by Section 11 of CPC and the defendants are not entitled to claim any right in lane (nadava)

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either by way of restrictive easement under Section 7 of Easement Act or under Section 184(2) of Andhra Pradesh Municipality Act, but he can proceed against the persons who violated under section 183 of the Andhra Pradesh Municipality Act in an appropriate forum.

34. With the above, the appeal is dismissed at the stage of admission. No costs.

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

Date: 05.08.2016
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M. SATYANARAYANA MURTHY, J

