

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.219 OF 2011

JUDGMENT:

The unsuccessful plaintiff through out, in O.S. No.1418 of 1998 on the file of the Court of Principal Junior Civil Judge, Vijayawada, and in A.S. No.374 of 2005 on the file of the Court of VIII Additional District Judge (FTC), Vijayawada, preferred this appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC') on various grounds.

The ranks given to the parties before the trial court will hereinafter be adopted through out this Judgment, for convenience of reference.

The plaintiff filed suit in O.S. No.1418 of 1998 for declaration of passage shown as 'CDEF' in the plaint plan, as joint passage and for consequential permanent injunction restraining the defendants and their men from interfering with the plaintiff's usage of the said joint passage for ingress and egress and for mandatory injunction directing the first defendant to remove unauthorized construction i.e. stair case 'S' and wall 'W' shown in the plaint plan, annexed to the plaint.

It is the case of the plaintiff that he purchased the property shown as 'A' in the plaint plan from Sk.Ghouse Mohiddin under registered sale deed dated 05-11-1984. The property of the brother of the plaintiff is abutting the property of plaintiff, located on its North, shown as 'Z' in the plaint plan. The first defendant's property is located on the Southern side of the plaintiff's property, it is shown as 'B' in the plaint plan.

There is a joint pathway between the property of the plaintiff and defendant which was carved out by the predecessors in title of the plaintiff and defendants. The said joint passage has been in use since times immemorial. The second defendant's property shown as 'X' in the plaint plan, the third defendant is on the Eastern neighbour of the first defendant and his property is described as 'Y' in the plaint plan. The joint passage 'CDEF' measures 92' feet and it is the only path way for the plaintiff to reach David street- Municipal street located on the Eastern side of his property. The pathway left by the plaintiff on the Eastern side of his property shown as 'IGJK'. While the matter stood thus, the first defendant high handedly constructed stair case and wall shown as 'S' and 'W' in the joint passage and obstructed the plaintiff from using the passage for ingress and aggress. Therefore, the plaintiff filed the suit for the aforesaid reliefs.

The first defendant filed written statement denying the existence of 'CDEF' passage at any point of time, while contending that the property shown as 'CDEF' is exclusive property of the first defendant and that the plaintiff is not entitled to claim much less a right to use passage shown as 'CDEF'.

The second defendant also filed a separate written statement alleging that he purchased Eastern side property abutting the site of the plaintiff in the year 1967 along with joint path way located on the Southern side which is of 53' length and 2' width. The joint path way for the plaintiff and defendants is

of 92' length. The first defendant occupied the joint path way of the plaintiff. The third defendant occupied part of joint pathway, later there was a compromise dated 05.02.1995 in lieu of interference of elders, but the first defendant did not abide by the compromise and prayed to pass appropriate decree.

The third defendant filed written statement contending that the suit is liable for dismissal for non joinder of his wife. The property shown as 'Y' belonged to his wife-K.Vajram and one G.Satyavathi, who purchased the same under sale deed dated 29.07.1993 from one Kakula Anasuyamma. The plaintiff has right to use pathway of 53' length and 3' width which abuts the property shown as 'X' and the same is marked as 'GHLF' in the plaint plan. The plaintiff and the second defendant are nothing to do with the property of Peddireddy Raghavamma and the first defendant unauthorisedly put up pipes in the site of the wife of third defendant and prayed for dismissal of the suit.

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

1. Whether the plaintiff has right of passage through 'CDEF' passage?
2. Whether plaintiff is entitled to seek for declaration that 'CDEF' is joint passage?
3. Whether plaintiff is entitled for permanent injunction as prayed for?
4. Whether the plaintiff is entitled for mandatory injunction as prayed for?
5. To what relief?

During trial, on behalf of plaintiff, P.Ws.1 and 2 were examined and Exs.A.1 to A.4 were marked and on behalf of the

defendants, D.Ws.1 to 3 were examined and Exs.B.1 to B.13 were marked.

The trial court, upon hearing argument of both the counsel, held that the plaintiff failed to establish his right or title to the property either by express or implied grant or by prescriptive right and necessity to use the path way shown as 'CDEF'.

Aggrieved by the Decree and Judgment passed by the trial court, the plaintiff, being unsuccessful, preferred the appeal before the VIII Additional District Judge, (FTC), Vijayawada, in A.S. No.374 of 2005. The first appellate court, by Decree and Judgment dated 14.11.2007 affirmed the finding recorded by the trial court with regard to title and right to use alleged passage shown as 'CDEF' either by prescription or by easement by necessity and thus, recorded a concurrent finding by both the trial court and appellate court.

Aggrieved thereby, the present appeal is filed raising several contentions and formulated three substantial questions of law, they are as follows:

1. Whether the court below is justified in dismissing the suit for injunction in toto having held that the appellant/plaintiff can restrain the defendants from making construction in the passage shown in GHLF in the plaint plan.
2. Whether relief of permanent injunction could be dismissed in toto when the court below having held that the plaintiff has got right of three feet passage as per Exs.B.3 and B.13?

Heard Sri M.V.S. Suresh Kumar, learned counsel for the appellant, and Sri Rajasekar, learned counsel for the first defendant, who is contesting throughout the proceedings, at the stage of admission, with their consent.

IN RE. QUESTION No.1:

The first and foremost contention raised by the appellant/ plaintiff is that the trial court having held that appellant/ plaintiff can be restrained the defendants from the construction of stair case in the passage shown as 'GHLF' in the plaint plan, and there is no justification for dismissal of the suit for injunction. It is the case of the plaintiff that he is claiming right in alleged joint pathway shown as 'CDEF' and 'GHLF' is not disputed land.

The trial court and the first appellate court recorded a specific finding that no joint passage was in existence and the site shown as 'CDEF' belongs to the first defendant and it is purely a question of fact and this Court while exercising power under Section 100 of CPC cannot go into fact finding and disturb, unless those findings are perverse, but no such perversity is found.

Section 33 of the Indian Easements Act, 1882 permits the owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff. But Section 32 of the Easement Act deals with right of enjoyment without disturbance. According to

it, the owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person and whose right of easement is disturbed is entitled to approach the court for appropriate damages, perpetual injunction.

In the present case, the plaintiff produced his title deeds and nowhere there is a mention about existence of 'CDEF' passage, but it is on Southern side for ingress and egress to reach main road i.e., Municipal Road and apart from that there is an alternate passage shown as 'GHLF' on Eastern side. In such case, the plaintiff is not entitled to claim easement by necessity under Section 13 of the Easement Act. Therefore, question of claiming any right of easement by necessity does not arise and in fact, such easement arises only in circumstances, where the part of the property was sold to a third party, but in the present case, the property was sold to the plaintiff by its original owner and not by the same owner of the property purchased by defendants 1 to 3 and a third party cannot create any right of easement by necessity.

The plaintiffs also claimed right to use the passage, since it is in use since times immemorial that is by lost grant, but no evidence is brought on record, about existence of joint passage shown as 'CDEF' and its use since time immemorial. Even otherwise, when the plaintiff claiming right of easement by prescription, it is for him to establish that the passage is used for the last more than 20 years without any interruption by the owner of servient tenement, consequently, the plaintiff is not

entitled to claim right of easement by prescription under Section 15 of the Act.

The third alternative is joint ownership. The plaintiff is not claiming ownership over the land covered by 'CDEF'. Therefore, he is not entitled to claim joint right, claiming to be a joint owner to 'CDEF' path way. Since both the trial court and the appellate court rightly concluded that the plaintiff miserably failed to establish his right to use the alleged path way shown as 'CDEF' and dismissed the suit, this Court while exercising power under Section 100 of CPC, whose jurisdiction is limited to substantial question of law cannot interfere with the fact finding recorded by the trial court and the appellate court. Hence, I find no error in dismissing the suit. Accordingly, question No.1 is answered.

IN RE. QUESTION No.2:

One of the contentions raised in the grounds of appeal is that the suit cannot be dismissed, when the trial court held that the plaintiff has got right to three feet passage as per Exs.B.3 and B.13. Exs.B.3 and B.13 disclosed existence of 'GHLF' path way, but not 'CDEF'. At best, even in view of finding recorded by the trial court and the first appellate court in view of Exs.B.3 and B.13, the plaintiff is entitled to enjoy right in 'GHLF', but not in 'CDEF' and however, 'GHLF' is not a disputed passage and therefore, this Court need not examine the issue relating to right to use passage shown as 'GHLF', which is not the subject matter of the suit, however, if the plaintiff is aggrieved any disturbance of right of enjoyment of the passage, if any, existing

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in land shown as 'GHLF', is entitled to claim appropriate relief under Sections 32 and 33 of the Act. Hence, the trial court and the first appellate court did commit no error in holding that the plaintiff is not entitled to claim right of easement either by necessity or prescriptive or joint ownership in the 'CDEF' passage. Accordingly, question No.2 is answered.

In view of my discussion in substantial questions 1 and 2, I find no ground warranting interference of this Court while exercising jurisdiction under Section 100 of CPC.

In the result, the second appeal is dismissed, but in the circumstances without costs.

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

M. SATYANARAYANA MURTHY, J

Date: 18.08.2016
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