

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

S.A.No. 198 OF 2016

JUDGMENT:

The appellant in A.S.No. 21 of 2015 on the file of the Court of VII Additional District Judge, Bodhan ('the Appellate Court' for short), preferred this appeal challenging the decree and judgment dated 07-12-2015, whereby and whereunder the Appellate Court dismissed the appeal confirming the decree and judgment dated 01-05-2015 passed in O.S.No. 65 of 2010 on the file of the Court of Senior Civil Judge, Bodhan (for short, 'the trial Court').

The appellant was the 1st defendant, respondents 1 and 2 were the plaintiffs and the 3rd respondent was the 2nd defendant before the trial Court. The ranks given to the parties before the trial Court will be adopted throughout this judgment for convenience of reference.

The plaintiffs filed suit O.S.No. 65 of 2010 on the file of the trial Court; for declaration that they are the owners of eastern side compound wall, for removal of construction raised in the ground floor by way of mandatory injunction and for damages; contending that they are the owners of suit house, surrounded by compound wall, having purchased the same under registered sale deed No. 7709 of 1992 dated 22-10-1992; later, western portion of the house was also purchased by them under registered sale deeds 2056 of 1993 dated 29-05-1993 and 4794 of 2004 dated 21-08-2004; as they were away to their house due to their education at Hyderabad, the 1st defendant, taking advantage of their absence, raised construction with the support of eastern side compound wall in the ground floor and also raised structure for up-stair without leaving any setback and without permission from the municipality; and despite objection, the 2nd defendant-municipality did not take any action to stop the illegal constriction.

The 1st defendant filed written statement denying material allegations *inter alia* contending that his mother Saidunnisa Begum was the original

owner of house bearing No. 2-4-723 in an extent of 311.11 square yards within specified boundaries; she gifted the same to the 1st defendant under registered gift deed bearing document No. 1369 of 1999 dated 03-04-1999; later, the 1st defendant applied for approval of plan for construction of building; after obtaining approval of plan and permission to construct residential house on 19-07-1999, the 1st defendant constructed house strictly adhering to the approved plan; later, the 1st defendant obtained permission for raising additional construction on the existing residential building; again on 27-09-2010, the 1st defendant obtained permission for raising construction on the first floor and, accordingly, constructed but no objection was raised about the construction. It is further contended that, after completion of major part of construction, the plaintiffs conveniently demolished the compound wall, which is 3' away to the building towards west of the 1st defendant's house, and filed the present suit. The 1st defendant left 3' setback towards west of the house but, on account of removal of compound wall, the setback could not be identified; the plaintiffs are not entitled to claim any of the reliefs and, therefore, prayed for dismissal of the suit.

The 2nd defendant also filed written statement with inconsistent plea contending that construction by the 1st defendant was unauthorized as it was without any permission but later admitted that the 1st defendant obtained permission for construction of first floor *vide* permission dated 27-09-2010 on the existing ground floor and prayed for dismissal of the suit.

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

1. *Whether the plaintiffs 1 and 2 are entitled for declaration of title that they are the absolute owners of eastern side compound wall of the suit schedule house?*
2. *Whether the plaintiffs are entitled for mandatory injunction directing*

the first defendant to remove the structures raised on the ground floor abutting the eastern side compound wall of the plaintiff's house without leaving any mandatory set-back?

3. *Whether the plaintiffs are entitled for directing the second defendant/Municipality to remove the illegal structures of the 2nd defendant shown by him in blue color in the rough sketch filed along with the plaint?*

Before the trial Court, on behalf of plaintiffs, P.W.1 was examined and got marked Exs.A1 to A10. On behalf of the 1st defendant, the 1st defendant himself was examined as D.W.1 and got marked Exs.B1 to B6 but no evidence was adduced on behalf of the 2nd defendant.

Upon hearing argument of both counsel, the trial Court, while deciding issue Nos. 1 to 3 by common discussion, again framed questions in para No. 10 of the judgment; ultimately concluded that the plaintiffs are the owners of the wall on which the 1st defendant raised construction; and, therefore, granted all the reliefs of declaration, mandatory injunction and liquidated damages of Rs.15,000/-.

Aggrieved by the decree and judgment passed by the trial Court, the 1st defendant alone preferred appeal A.S.No. 21 of 2015. The Appellate Court framed only two points for consideration in para No. 18 of the judgment which are extracted hereunder:

1. *Whether the plaintiff is entitled for mandatory injunction for removing the house-wall constructed by defendant No. 1 on the alleged compound wall of the plaintiff in eastern side of his house?*
2. *To what relief?*

Though the 1st defendant challenged the decree and judgment granted by the trial Court denying ownership of the plaintiffs over the wall on eastern side of the plaintiffs' house so also mandatory injunction and damages, the Appellate Court framed only one point for consideration and decided the legality of mandatory injunction granted by the trial Court in the entire discussion. Therefore, the 1st defendant filed the present appeal

raising various contentions which include competency of P.W.1 to testify on behalf of the plaintiffs being power of attorney holder and admission of the plaintiffs in Ex.A5 letter submitted to the 2nd defendant, wherein the plaintiffs specifically admitted that the 1st defendant, without leaving setback, constructing wall adjacent to the wall of the plaintiffs. Similarly, the 1st defendant questioned the decree and judgment in the appeal on the ground that the Appellate Court, without appreciating the various contentions, erroneously concluded that in the absence of any pleading in the written statement about competency of P.W.1, the same cannot be looked into which is totally contrary to the settled principle of law and the trial Court did not appreciate the evidence on record in proper perspective. The 1st defendant framed several substantial questions of law *i.e.* from 'a' to 'n' in para No. 16 of the grounds of appeal. Finally, the 1st defendant prayed to set aside the decree and judgment passed by the trial Court in O.S.No. 65 of 2010 which is confirmed by the Appellate Court in A.S.No. 21 of 2015.

At the stage of admission, both counsel submitted their argument in the main appeal itself to avoid delay in disposal of the appeal.

Learned counsel for the 1st defendant, while reiterating the grounds urged in the grounds of appeal, drawn attention of this Court to the contents of Ex.A5 so also *lacunae* in the decree and judgment passed by the Appellate Court.

Per contra, learned counsel for the plaintiffs supported the findings recorded by the trial Court and the Appellate Court in toto and prayed to dismiss the appeal.

Before advertng to the contentions, it is appropriate to decide the legality of the findings recorded by the trial Court even without deciding the other contentions regarding competency of P.W.1 to testify before the trial Court, being power of attorney holder, and judicial admission in Ex.A5. Undisputedly, the plaintiffs filed suit O.S.No. 65 of 2010 claiming the

aforesaid reliefs. The trial Court framed appropriate issues based on pleadings; decided the issues, answering in favour of the plaintiffs; and granted decree as follows:

1. *That the suit of the plaintiffs is decreed with costs. It is hereby declared that the plaintiffs are the absolute owners of the compound wall to the east of the plaintiffs' house and which is depicted in Ex.B6 photographs to a height of 4 feet. D1 is hereby directed to remove the illegal structure raised over and above the ground floor level on this wall of plaintiffs and shall also remove the pillars erected at 5 places as shown in Ex.A8 sketch within 2 months from today failing which the plaintiffs are at liberty to execute the decree. D1 is further directed to pay damages of Rs.15,000/- to the plaintiffs.*
2. *That the defendants do pay a sum of Rs.8,728/- to the plaintiffs towards costs of the suit.*

The decree and judgment of the trial Court were assailed before the Appellate Court but curiously the Appellate Court framed only one point for consideration and decided the legality of mandatory injunction granted by the trial Court for removal of house wall constructed by the 1st defendant on the alleged compound wall of the plaintiffs on eastern side. The operative portion of the decree of the Appellate Court is as follows:

That the Appeal is dismissed, but without costs.

That the Judgment and decree dated 01-05-2015 in O.S.No. 65 of 2010 passed by learned Senior Civil Judge, Bodhan is confirmed.

It is curious to note that the plaintiffs, though claimed relief of declaration and mandatory injunction, valued the suit at Rs.1,05,000/- and Court fee of Rs.3,526/- under Section 24 (d) of the Andhra Pradesh Court Fee and Suits Valuation Act, 1956 (for short, 'the Act of 1956'), was paid while paying Court fee of Rs.1,086/- under Section 20 of the Act of 1956 on the relief of damages for Rs.15,000/-. Reliefs of declaration and mandatory injunction were not separately valued by the plaintiffs. However, the same Court fee was paid by the 1st defendant in the appeal before the Appellate Court and sought to set aside the entire decree and judgment including declaration, mandatory injunction and damages. The Appellate Court simply

dismissed the appeal without recording any finding as to the legality of the declaratory decree and damages but recorded a finding on mandatory injunction. Unless declaratory relief is granted, declaring that the plaintiffs are the owners of eastern wall of their house, relief of mandatory injunction cannot be granted and, similarly, confirmation of decree for damages does not arise unless the plaintiffs established that they are the owners of eastern side compound wall on which the 1st defendant allegedly raised construction and sustained loss on account of it but the Appellate Court did not frame any point for consideration regarding validity and legality of the decree declaring that the plaintiffs are the owners of eastern side compound wall and decree for damages granted by the trial Court.

The 1st defendant, though challenged the decree and judgment of the trial Court which was confirmed by the Appellate Court, simply paid Court fee of Rs.4,620/- under Section 49 of the Act of 1956. The total value of all the reliefs claimed before the trial Court, the Appellate Court and this Court is one and the same and the Court fee paid on all the reliefs is also one and the same but this would not disentitle to claim relief in this appeal.

When the 1st defendant challenged the decree and judgment of the trial Court in O.S.No. 65 of 2010 which was confirmed by the Appellate Court in A.S.No. 21 of 2015, the Appellate Court is under obligation to decide all the questions that came up for consideration before the trial Court with some seriousness which they deserve but the Appellate Court, even without adverting to the pleadings of both the plaintiffs and the defendants, mechanically confirmed the decree and judgment only by deciding the issue relating to validity and legality of the decree and judgment for mandatory injunction without touching the other parts of the decree relating to declaration and damages. Thereby, the Appellate Court committed serious error in deciding the appeal and it is nothing but disowning its responsibility to decide the issues before it. Thus, the decree and judgment of the

Appellate Court confirming the decree and judgment of the trial Court in toto is *ex facie* erroneous and the same is liable to be set aside and is, accordingly, set aside.

In the result, the appeal is remanded, setting aside the decree and judgment dated 07-12-2015 passed in A.S.No. 21 of 2015 on the file of the Court of VII Additional District Judge, Bodhan, by exercising power under Order XLI Rule 23-A of the Code of Civil Procedure, 1908, and the Appellate Court is directed to frame appropriate points for consideration to decide legality of the decree declaring that the plaintiffs are the owners of eastern side compound wall of their house and legality of the decree awarding damages of Rs.15,000/- and record appropriate findings within a period of six months from the date of receipt of a copy of this judgment. Both the parties are directed to appear before the Appellate Court on 08-06-2016 and permitted to raise any contention challenging the decree and judgment of the trial Court subject to pleadings and permissibility. Pending miscellaneous petitions, if any, in this appeal shall stand closed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 26th April, 2016.

JSK