

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.46 of 2013

JUDGMENT:

This appeal is filed by the unsuccessful plaintiff challenging the decree and judgment dated 07.9.2006 in A.S.No.410 of 2003 on the file of Court of XIII Additional Chief Judge, City Civil Court, Hyderabad, wherein and whereby the decree and judgment dated 04.8.2003 in O.S.No.2567 of 1999 on the file of the Court of III Junior Civil Judge, City Civil Court, Hyderabad, granting the relief of declaration and mandatory injunction in favour of the plaintiff was confirmed.

2. For the sake of convenience, the parties hereinafter will be referred to as they were arrayed in the suit.

3. The facts leading to filing of the present second appeal are briefly as follows: It is the case of the plaintiff that he is the owner and possessor of house bearing No.19-3-542/2 admeasuring 108 Sq.yards situated Aliabad, Alinagar, Hyderabad, by virtue of registered sale deed dated 20.12.1995 vide document No.1098 of 1995. On the south of plaintiff's house, there is a passage running from east to west admeasuring 6 feet wide and 99'4" length. The house of the defendant is situated on the south of the passage. The defendant had illegally and unauthorisedly encroached the passage to the extent of 6' wide and 13'6" length, thereby completely blocked the passage of the plaintiff. The defendant, having no right whatsoever, encroached the passage and constructed a room thereon. Due to the encroachment made by the defendant on the passage, the easementary right of the plaintiff had been adversely affected. The plaintiff got issued notice dated

10.3.1999 directing the defendant to remove the room on the encroached portion of the passage. Since the defendant had not removed the construction on encroached passage, the plaintiff filed the suit seeking declaration that the defendant encroached passage of about 6' and 13'.6" on the South of plaintiff's house bearing No.19-3-542/2, and consequential mandatory injunction directing the defendant to remove the construction.

4. The defendant filed written statement denying the averments made in the plaint *inter alia* contending that the defendant is owner and possessor of suit schedule passage and prior to his purchase, his vendor constructed a room on the west of the passage and the same has been shown in the sketch plan, since 1984. As such, the plaintiff has no right, title or interest over the said passage. The plaintiff, in order to grab the suit schedule passage, tried to open the back door of his house. The plaintiff purchased the house without verifying the link documents. Hence, the suit is liable to be dismissed.

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

1. Whether the plaintiff is entitled for a declaration as prayed for?
2. Whether the plaintiff is entitled for a mandatory injunction as sought for?
3. To what relief?

6. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A14 were marked. On behalf of the defendant, D.W.1 was examined and Exs.B1 to B4 were marked. Basing on the oral, documentary evidence and other material available on record, the trial Court decreed the suit declaring that

there exists suit schedule passage; consequently granted mandatory injunction directing the defendant to remove the structures on the common passage. Feeling aggrieved by the judgment decree of the trial Court, the defendant preferred A.S.No.410 of 2003 on the file of the Court of XIII Additional Chief Judge, City Civil Court, Hyderabad. Pending appeal, the defendant died and respondent Nos.2 to 7 herein came on record as his legal representatives. After reappraising the oral and documentary evidence available on record, the first appellate Court allowed the appeal, setting aside the decree and judgment of the trial Court. Hence, the present second appeal is filed by the plaintiff.

7. Heard the learned counsel for both the parties.

8. The questions of law raised in this second appeal are as follows:

1. Whether the first appellate Court is justified in allowing the appeal in spite of admission made by the defendant in his chief-examination about the existence of common passage? and
2. Whether the first appellate Court is justified in not drawing adverse inference against the defendant for non-production of Municipal Sanction Plan?

9. Both the points are interlinked with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts.

10. The following admitted facts can be culled out from the pleadings of both parties. The plaintiff is owner of the house bearing No.19-3-542/2, Aliabad, Alinagar, Hyderabad. There is a passage on the South of plaintiff's house running from East to West admeasuring 6' width and 99'4" length. The defendant is

having house on the South of the passage. The entire controversy revolves around, *whether the defendant constructed a room by encroaching 6' width and 13'.6" length of passage*. It is a settled principle of law that in a suit for declaration the plaintiff has to establish his case by preponderance of probabilities. It is equally settled principle of law that the plaintiff is not entitled for the relief of declaration basing on the weaknesses or lacunae, if any, on the part of the defendant.

11. In order to succeed in the suit, (1) the plaintiff has to establish that he is having right over the suit schedule passage; and (2) the defendant made construction within a period of three years immediately preceding to filing of the suit so as to seek the relief of mandatory injunction. The plaintiff examined himself as P.W.2. The father of the plaintiff was examined as P.W.1. P.W.3 is an independent witness. The defendant examined himself as D.W.1. Ex.A1 is the sale deed of the plaintiff. Ex.A2 is the plan. Exs.A3, A4 and A5 are the link documents of the plaintiff. P.Ws.1, 2 and D.W.1 are interested witnesses; therefore, the possibility of distortion of the facts by these witnesses, in order to suit their respective claims, cannot be ruled out completely.

12. As seen from the testimony of P.W.2, he purchased the house under Ex.A1 registered sale deed dated 20.12.1995. As seen from the testimony of P.W.1, one and half years after purchase of the house, his vendor entrusted the link documents of the house to him; thereafter, he came to know that the defendant constructed one room by occupying common passage. The suit was filed on 25.6.1999. At one stage, the plaintiff as P.W.2

deposed that by the time of purchasing the house by him under Ex.A1 sale deed, the defendant constructed the room. If that be so, the plaintiff ought to have filed the suit within three years from the date of purchase of the property i.e., on or before 19.12.1998. Even according to the plaint averments, the plaintiff got issued notice dated 10.3.1999 directing the defendant to remove the encroachment. In Ex.A1 sale deed and Ex.A2 plan, the southern boundary of the house of the plaintiff is mentioned as the property of the neighbour and thereafter the passage. In Exs.A3, A4 and A5 also, southern boundary of the plaintiff's house is shown as passage. In Exs.A1 to A5, it is not mentioned that the passage, which is situated on the South of the plaintiff's house is meant for common passage. There is no recital in these documents the plaintiff got right of ingress and egress through suit schedule passage.

13. The learned counsel for the appellant submitted that plaintiff has got easementary right over the suit schedule passage. In the plaint, there is no pleading that the plaintiff's vendor and thereafter the plaintiff has been using the suit schedule passage continuously for a period of 20 years without any interruption, thereby easementary right was accrued in his favour over the suit schedule passage. In the absence of such pleading, the plaintiff is not entitled to the relief of declaration by way of easement, in view of Section 15 of the Easements Act.

14. In order to appreciate the contention of learned counsel for the appellant, it is not out of place to extract hereunder the boundaries mentioned in the plaint schedule.

North	:	Property of the plaintiff
South	:	Property of the defendant
East	:	Passage
West	:	Graveyard

15. In the plaint schedule itself, the plaintiff in unequivocal terms admitted that southern side boundary is the property of the defendant. This clearly shows that the plaintiff has not verified the boundaries with reference to the link documents before purchasing the house. It is evident that that the plaint schedule is contrary to the schedule mentioned in Exs.A1 and A2 and the plaintiff filed the suit without mentioning the correct boundaries of the suit schedule passage.

16. The trial Court granted the relief of declaration in favour of the plaintiff on the ground that the defendant failed to establish that he is the owner of the suit schedule passage. Though the defendant has categorically stated that he is exclusive owner of the suit schedule passage, the trial Court has lost sight of this aspect and granted the relief of declaration. The trial Court decreed the suit without taking into consideration the fundamental principles of law. Any judgment delivered contrary to the fundamental principles of law is not sustainable. However, the appellate Court has considered all these aspects and allowed the appeal while dismissing the suit. The appellate Court made an observation that the plaintiff is not entitled for the relief of declaration without proper pleadings in the plaint and corresponding evidence. There is no whisper in the testimony of P.Ws.1 and 2 that they acquired easementary right over the suit schedule passage. The findings recorded by the appellate Court are based on sound reasoning and logical conclusion whereas the trial Court allowed the suit on

assumptions and presumptions. Once the plaintiff *prima facie* proves his right over the suit schedule passage, then the onus of proof shifts on the defendant. When the plaintiff himself failed to establish his right over the suit schedule passage, mere non-production of Municipal Sanction Plan by the defendant itself is not a valid ground to draw adverse inference against the defendant. I am fully endorsing the findings recorded by the first appellate Court. The first appellate Court is fact finding final court.

17. Having regard to the facts and circumstances of the case, I am of the considered view that the points raised by the learned counsel for the appellant-plaintiff will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law in this appeal.

18. In the result, the Second Appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

November 06, 2017.
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