

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.673 OF 2016

JUDGMENT:

The present Second Appeal is preferred by the plaintiff having been unsuccessful throughout and coming up for admission.

2. Heard Sri V. Hari Haran, the learned counsel for the appellant and Sri P. Narsing Rao, the learned counsel for the respondents.

3. For convenience sake, the parties are hereinafter referred to as they were arrayed in the Original Suit.

4. The plaintiff, who is the appellant in the present Second Appeal, filed the suit in O.S. No178 of 2014 on the file of XI-Junior Civil Judge, City Civil Court at Secunderabad seeking the relief of perpetual injunction restraining the 1st defendant from interfering with his peaceful possession and enjoyment over an extent of 50 sq. yards, which is shown as suit schedule property and the 1st defendant is the adjoining owner on the Eastern side.

5. The plaintiff purchased the said plot with dilapidated house under Registered Sale Deed, dated 9.8.1971, from Smt. Zainab Bee and two others. The said Zainab Bee, in fact, purchased the said property earlier on 18.1.1960, from Dilwar Khan under a Registered Sale Deed bearing Document No.52/1960. When the plaintiff intended to raise wall on the Eastern side between her house and the

house of the defendant, which the 1st defendant constructed about three years prior to the suit, the 1st defendant unjustly interfered and obstructed the erection of compound wall/parapet wall. Thus, she was compelled to file Civil Suit, even lodging complaint with Station House Officer, Bowenpally Police Station. The plaintiff states that, since the extent is less than 100 sq. yards, no permission was necessary for construction of house.

6. The first defendant, on the other hand, set up the counter claim that three feet area over which the plaintiff encroached and started raising structures in fact belongs to her and the plaintiff was unauthorizedly raising constructions with the help of her son and others and even the plaintiff dug the bore well in the North-eastern corner, and on objection being taken on 23.3.2014 the plaintiff stopped the work and again started the work with the help of police, and, therefore, she got issued legal notice to the plaintiff and her son Nazar Sharif on 26.3.2014, but the plaintiff got managed to return it. This is the main controversy between the parties.

7. The defendant has also set up the plea that parapet wall continues to exist and wicket gate also which was raised with the help of police after 29.3.2014. The 1st defendant will be deprived of free light and air and parking of her vehicles which has been enjoying for the last 30 years being in possession thereof purchased from her mother-in-law in 2008 and even her mother-in-law has been in possession since 1945 onwards.

8. A rejoinder is filed by the plaintiff denying the allegations leveled by the defendants.

9. The following issues have been settled for trial before the trial Court.

- “(1) Whether the plaintiff is entitled for the relief of perpetual injunction?
- (2) Whether the 1st defendant is entitled for mandatory injunction?
- (3) To what relief?”

10. The plaintiff herself examined as P.W.1, whereas the 1st defendant herself examined as D.W.1 and also Exs.A-1 to A-16, B-1 to B-9 were respectively, were marked on their behalf. Exs.X-1 to X-13, which are the photos taken by the Commissioner appointed by the Court, and Ex.X-14 the CD respectively are marked regarding the physical features of the suit property.

11. The learned trial Court, having dealt with elaborately and having found that the case of the defendant is based on Ex.B4 - certified copy of Sale Deed bearing Document No.1718/2008 under which the defendant purchased the property, and also the contents of Link Document marked as Ex.B5 – certified copy of Sale Deed bearing Document No.92/1978 along with plan and photos, recorded a finding that the plaintiff is not entitled to right over the three feet width space, which is disputed lane, and thereby dismissed the suit

while allowing the counter claim by judgment and decree dated 15.12.2015.

12. Aggrieved over the same, the plaintiff preferred A.S. No.14 of 2016 on the file of I-Additional Chief Judge, City Civil Court at Secunderabad. It is clear that the plaintiff challenged the judgment and decree in O.S. No.178 of 2014, but no separate appeal is preferred so far as the decree allowing counter claim made by the defendants is concerned.

13. The Appellate Court, having re-apprised the evidence on record let in by both parties, recorded a positive finding that the plaintiff failed to prove that the open area between her house and the house of the defendant is part and parcel of the property, which she purchased under Ex.A1 – Certified Copy of Sale Deed, dated 9.8.1971 and simultaneously recorded that the 1st defendant has got every right to erect upon the place and thereby confirming the judgment and decree passed by the trial Court observing that the 1st defendant is entitled to mandatory injunction to remove the bore well and roof over the disputed lane, which is established as per the measurements in Ex.B4. Even the application in I.A. No.865 of 2016 filed under Order 41 Rule 27 of C.P.C. by the appellant was dismissed by assigning satisfactory reasons in paragraph-28 of the judgment.

14. Aggrieved over the same, the present Second Appeal is preferred.

15. The learned counsel for the appellant would submit that the trial Court went wrong in making observation that the bore well was sunk on the South-eastern corner, though, in fact, as per the Commissioner's report the bore well was sunk in North-eastern corner, more particularly in three feet width area which constitutes the property in dispute between the parties.

16. In fact, the contents of Ex.A-1 and Exs.B-4 & B-5 are the crucial, basing on which the trial Court as well as the appellate Court recorded findings and rendered the judgments.

17. When the concurrent findings of fact have been recorded, the whole burden rests on the appellant and the appellant is obligated with duty to show that the findings recorded by both the Courts below are utterly perverse and invariably warrant interference. In that direction, absolutely there is nothing on record to support the stand taken by the plaintiff/appellant.

18. The learned counsel, no doubt, has come forward stating that there cannot be any sanction of plan being granted by Cantonment Board, as the constructions are not prohibited, without there being any sanction where the area is less than 100 sq. yards and since the property covered by Ex.A2 admeasures 50 sq. yards, there was no necessity to obtain any sanction order and sanction plan for construction of house by the plaintiff. He fairly admits that Ex.A1 does not contain the extent and only boundaries are shown. It is no

doubt true when there is conflict between the extent and boundaries, boundaries shall prevail, but in case of this nature where *prima facie* perpetual injunction is sought, incidentally, the title requires a probe in which direction the plaintiff is absolutely unable to prove Even Ex.A1 does not show that a plan is annexed thereto. In such an event the plaintiff cannot take advantage of any lapses on the part of the defendants and seek to grant the relief prayed for. Thus, even on merits, there is no case for the plaintiff to succeed in the present Second Appeal. This apart, when the plaintiff has not chosen to file appeal against the decree relating to grant of counter claim by the trial Court and it would, certainly, attract the principle of *res judicata*.

19. Thus, viewed from any angle, there is absolutely no merit in the present Second Appeal.

20. The Second Appeal is, therefore, dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions if any pending in the Second Appeal shall stand closed.

A. SHANKAR NARAYANA, J

Date: 06.06.2017

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