

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL Nos.237 and 238 OF 2014

COMMON JUDGMENT:

S.A.No.237 of 2014 is filed by the defendant assailing the decree and judgment dated 29.06.2013 in A.S.No.155 of 2010 on the file of the Court of XIII Additional District Judge, Krishna at Vijayawada, wherein and whereby the decree and judgment dated 15.03.2010 in O.S.No.1370 of 2007 on the file of the Court of the I Additional Junior Civil Judge, Vijayawada, granting decree in favour of the plaintiff was confirmed.

S.A.No.238 of 2014 is filed by the unsuccessful plaintiff assailing the decree and judgment dated 29.06.2013 in A.S.No.156 of 2010 on the file of the Court of XIII Additional District Judge, Krishna at Vijayawada, wherein and whereby the decree and judgment dated 15.03.2010 in O.S.No.1870 of 2008 on the file of the Court of the I Additional Junior Civil Judge, Vijayawada, dismissing the suit filed by the plaintiff for declaration and mandatory injunction was confirmed.

2. In the trial Court as well as the first appellate Court, both the matters heard together and common judgment was delivered. The parties to the appeals and the point involved in both the appeals are one the same, though the reliefs sought are different. If declaration suit i.e., O.S.No.1870 of 2008 is allowed injunction suit i.e., O.S.No.1370 of 2007 is liable to be dismissed. In order to avoid confusion and conflict of judgments, this Court is also inclined to dispose of both the appeals by this common judgment.

3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court in O.S.No.1870 of 2008.

4. The facts leading to filing of the present appeals are briefly as follows: The plaintiff is the absolute owner of Flat No.TF-2, third floor of Vyshnavi Towers, Satyanarayanapuram, Vijayawada. The plaintiff purchased the said flat in Group Housing from Smt. Kalidindi Varalakshmi, wife of Rangaraju under a registered sale deed dated 24.06.2000. The defendant is also the owner of Flat No.TF-1 in the same floor on the eastern side of the plaintiff's flat. The defendant also purchased the said flat from her vendor by name one Smt. Kalidindi Varalakshmi, wife of late Ranga Raju under a registered sale deed dated 21.02.2003. As per the recitals of sale deed obtained by the plaintiff, the northern boundary is mentioned as common passage for ingress and egress to the plaintiff and the flat owners of TF-3 and TF-4 and the common corridor is meant for the common purpose for all the flat owners and the common stair case, which is leading from east to north covering the flat of the defendant is in joint possession and enjoyment of all the flat owners. While so, in the month of August, 2006, when the plaintiff was out of station, the defendant and her husband installed iron grills closing the aerial space in the common corridor and fixed door way and closed the door under lock and key obstructing the plaintiff and his family members from using the common corridor from north to east. The plaintiff got issued a legal notice to the husband of the defendant on 27.09.2006 and also copy to the builder of M/s.Vyshnavi Constructions calling upon him to remove the iron grills and door

way in the plaint schedule property. The defendant got issued a reply notice on 10.12.2006 with false and untenable allegations. The defendant filed O.S.No.1370 of 2007 against the plaintiff seeking perpetual injunction. Hence, the suit for declaration and mandatory injunction.

5. The defendant filed written statement *inter alia* contending that the plaintiff has no right whatsoever in the northern side corridor. It is the case of the defendant that the flat owners in the first and second floors installed iron grills and iron mesh on parapet wall in front of their respective portions. It is the further case of the defendant that 'ABCD' plaint plan pathway is not common passage; therefore the plaintiff is not entitled for the relief of declaration and consequential mandatory injunction. Hence, the suit is liable to be dismissed.

6. The defendant in O.S.No.1870 of 2008 filed O.S.No.1370 of 2007 against the plaintiff (appellant herein). The averments made in the plaint and written statement in O.S.No.1370 of 2007 are almost identical to the plaint and written statement in O.S.No.1870 of 2008; therefore, there is no need to reproduce the pleadings in the second suit.

7. Basing on the above pleadings, the trial Court in O.S.No.1870 of 2007 framed the following issues:

1. Whether the plaintiff is entitled to declaration in ABCD plaint plan pathway?
2. Whether the plaintiff is entitled to mandatory injunction and also permanent injunction as prayed for?
3. To what relief?

In O.S.No.1370 of 2008, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for permanent injunction?
2. To what relief?

8. The trial Court clubbed O.S.No.1370 of 2007 and O.S.No.1870 of 2008 and recorded evidence in O.S.No.1870 of 2008, which is a comprehensive suit. On behalf of the plaintiff, PWs.1 to 5 were examined and Exs.A.1 to A.5 were marked. On behalf of the defendant, DWs.1 to 5 were examined and Exs.B.1 to B.8 were marked. Through advocate commissioner, Exs.C1 and C2 and Ex.X.1 were marked.

9. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that ABCD plaint plan pathway is not the common corridor; therefore, the plaintiff is not entitled for the relief of declaration; consequently, dismissed the suit. The trial Court decreed O.S.No.1370 of 2007 granting perpetual injunction in favour of plaintiff and against the defendant. Feeling aggrieved by the decree and judgment dated 15.03.2010, the plaintiff in O.S.No.1870 of 2008 and defendant in O.S.No.1370 of 2007 filed A.S.Nos.155 of 2010 and 156 of 2010 respectively. The first appellate Court, after reappraising the oral and documentary evidence available on record, arrived at a conclusion that the plaintiff in O.S.No.1870 of 2008 is not entitled for the relief of declaration and mandatory injunction and the plaintiff in O.S.No.1370 of 2007 is entitled for perpetual injunction; consequently dismissed both the appeals. Hence, the present second appeals.

10. Learned counsel for the appellant strenuously submitted that the Courts below have not properly considered the recitals of Exs.A.2 and A.3 and dismissed the suit and appeals on assumptions and presumptions. Learned counsel for the respondent strenuously submitted that no question of law is involved in these appeals; therefore, the same are liable to be dismissed at the admission stage. He further submitted that the Courts below have rightly considered Exs.A.2 and A.3 sale deeds of parties and arrived at a conclusion that the plaintiff is not entitled for the relief of declaration.

11. The substantial questions of law that arises for consideration in these second appeals are as follows:

1. Whether the findings recorded by the Courts below are perverse as the same are not based on any evidence or not?
2. Whether both the Courts below misconstrued Section 8 of the Transfer of Property Act or not? and
3. Whether the Courts below committed grave error in not considering the orders of this Court dated 15.03.2010 in W.P.No.1735 of 2010, wherein this Court directed the defendant in O.S.No.1870 of 2008 to remove the grill, or not?

12. In order to appreciate the rival contentions, this Court is placing reliance on the judgment of the Hon'ble apex Court in **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, wherein while considering the scope of Section 100 of CPC, it was held at paragraph No.16 as follows:

16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of

¹ (2010) 13 SCC 216

those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari v. Purshottam Tiwari*, (2001) 3 SCC 179); *Sarjas Rai v. Bakshi Inderjit Singh*, (2005) 1 SCC 598; *Manicka Poosali v. Anjalai Ammal*, (2005) 10 SCC 38; *Sugani v. Rameshwar Das*, (2006) 11 SCC 587; *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545; *P. Chandrasekharan v. S. Kanakarajan*, (2007) 5 SCC 669; *Kashmir Singh v. Harnam Singh*, (2008) 12 SCC 796; *V. Ramaswamy v. Ramachandran*, (2009) 14 SCC 216 and *Bhag Singh v. Jaskirat Singh*, (2010) 2 SCC 250.)

13. Let me consider the facts of the case on hand, in the light of the above legal principles.

14. The plaintiff and the defendant have purchased their respective flats in Vyshnavi Towers, Satyanarayanapuram, Vijayawada from the common vendor under the registered sale deeds dated 24.06.2000 and 21.02.2003 respectively. It is a settled principle of law that in a suit for declaration, the plaintiff may succeed or fail basing on the strength or weaknesses of his/her case. It is equally settled principles of law that the Court cannot grant the relief of declaration in favour of the plaintiff basing the weakness or lacuna on the part of the defendant. In order to succeed the suit, the plaintiff has to establish that the suit schedule property is the common property of the plaintiff and defendant. It is not in dispute that the defendant installed the iron grill at point 'AB' and iron mesh at the parapet wall. The grievance of the plaintiff is that by installing the iron grill and iron mesh, the

defendant prevented him and other flat owners from using the corridor for the purpose of ingress and egress. A perusal of the testimony of witnesses clearly reveals that the flat owners in the first and second floors installed iron grills in front of their flats and iron mesh at the parapet wall. The same fact was admitted by the builder-cum-one of the executants of Ex.A2. The plaintiff has been claiming the relief of declaration basing on Exs.A.2 and A.3 sale deeds. As per the recitals of Ex.A.2 northern corridor is shown as a common passage. As per the recitals of Ex.A.3, the northern portion is not shown as a common corridor. The plaintiff purchased the property in the year 2000, whereas the defendant purchased the property in the year 2003. The plaintiff has taken a specific plea in the plaint that in his absence, the defendant installed the grill in the month of August 2006. In the cross-examination, PW.1 in unequivocal terms admitted that he was present at the time of installation of the grill. In order to overcome the latches on the part of the plaintiff, he has taken a false plea in the plaint that in his absence the defendant installed the grill. This material available on record clinchingly establishes that the plaintiff did not raise any objection at the time of installing iron grill and iron mesh. The admission made by the plaintiff coupled with the recitals in Ex.A.3 negatives his contention that the suit schedule property is the common passage. The sale deeds filed by the plaintiff are no way helpful to establish that the suit schedule property is the common passage. The trial Court, after considering the oral and documentary evidence, arrived at a conclusion that the plaintiff failed to prove his title over the suit schedule property and dismissed the suit. The first appellate Court, after

reappraising the oral and documentary evidence, without being influenced by the findings of the trial Court, arrived at a conclusion that the plaintiff failed to establish that he has right over the common passage and dismissed the appeals. It is needless to say that that first appellate Court is the fact finding final Court.

15. The findings recorded by the Courts below are based on oral and documentary evidence. The Courts below have assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the Courts below. Having regard to the facts and circumstances of the case, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are perverse.

16. The next point urged by the learned counsel for the appellant is that both the Courts below have not considered the scope of Section 8 of Transfer of Property Act.

17. A perusal of Section 8 of the Transfer of Property Act at a glance reveals that the transferee is entitled for all rights in the property which the transferor was enjoyed including the right of easement. There is no pleading in the plaint that the plaintiff acquired the right over the suit schedule property by way of easement. Any amount of evidence without pleading is of no use. Suffice it to say, no party to the civil proceedings is entitled to urge any point, for the first time at the stage of second appeal.

18. The other point urged by the learned counsel for the appellant is that this Court by orders dated 15.03.2010 in W.P.No.1735 of 2010 directed the defendant to remove the grill.

The plaintiff did not take any steps to file this order either before the trial Court or the appellate Court. At the time of arguments, learned counsel for the respondent submitted that a Division Bench of this Court by judgment dated 26.12.2013 in Writ Appeal No.1989 of 2013 set aside the orders in W.P.No.1735 of 2010. That fact was not disputed by the learned counsel for the appellant. In such circumstances, non-consideration of the order dated 15.3.2010 in W.P.No.1735 of 2010 is of no consequence. Viewed from any angle, the plaintiff is not entitled for the relief of declaration and consequential relief of mandatory injunction. Admittedly the plaintiff in O.S.No.1370 of 2007 installed iron grill and iron mesh on parapet wall. He filed the suit seeking perpetual injunction restraining the defendant not to interfere with the installation of iron grill and iron mesh. Both the Court below held that the plaintiff in O.S.No.1370 of 2007 is entitled for perpetual injunction. The concurrent findings recorded by the Courts below are based on oral and documentary evidence. There are no grounds much less valid grounds to interfere with the well considered decrees and judgments of the courts below.

19. Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited supra, this Court is of the considered view that the points urged by the learned counsel for the appellant 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 is involved in these two appeals.

20. In the result, both the Second Appeals are dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in both the Second Appeals shall stand closed.

T. SUNIL CHOWDARY, J

Date: 02.11.2017

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