

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

S.A.No.11 of 2007

Between:

Tata Seshaiiah

... Appellant

and

1. Maruboyina Sankaramma and two others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 22.12.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether His Lordship wish to
see the fair copy of the Judgment? Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

+ S.A.No.11 of 2007

% 22.02.2017

Between:

Tata Seshaiah

... Appellant

and

1. Maruboyina Sankaramma and two others.

.... Respondents

! Counsel for Appellant : Smt. M.Bhaskara Lakshmi

**^ Counsel for Respondent No.1 : Smt. K.Sesharajyam
for Smt. Deepika Gadde**

^ Counsel for Respondent No.3 : G.P. for Arbitration (AP)

^ Counsel for Respondent No.2 : Not necessary vide C.T.

< Gist:

> Head Note:

? Cases referred:

1. (2005) 10 SCC 38
2. (2007) 14 SCC 138
3. (2010) 12 SCC 740
4. AIR 1975 Allahabad 341
- ⁵ 1988 (2) Law Summary 223
- ⁶ AIR 1969 AP 136
7. 2011 SCC Online AP 778 = 2012 (2) ALD 692

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.11 of 2007

JUDGMENT:

This Second Appeal is preferred by the appellant/1st defendant in O.S.No.204 of 1991 aggrieved by the Judgment and Decree dated 15.07.2005 in A.S.No.2 of 1999 passed by the IV Additional District Judge, Nellore, whereby and whereunder the learned Judge allowed the appeal filed by the plaintiff and set aside the Judgment and Decree dated 03.11.1998 in O.S.No.204 of 1991 passed by the III Additional Junior Civil Judge, Nellore, filed for permanent and mandatory injunction.

2) The parties in this Second Appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case is thus:

a) The plaintiff's case is that she owns Ac.0-48 cents of wet land in Sy.No.571-1A of Brahmadevi village, Muthukur Mandal having purchased under Ex.A.1—sale deed. There was a road running from East to West towards Southern side of the land purchased by her. 1st defendant and his son i.e, 2nd defendant, who are residing jointly adjacent to the land of plaintiff, constructed a house in the road margin illegally. The defendants dug trenches adjacent to the road berm and also encroached into 2½ Ankanams of plaintiff's land. When the husband of the plaintiff objected, defendants closed the drainage channel which was in existence since long time. The rain water from the land of plaintiff passes through that drainage channel and if it is closed, the rain water gets stored in the

land of plaintiff and submerge the crop raised in the land and cause severe loss. The plaintiff and her husband approached the village Sarpanch—Kaliki Ramana Reddy complaining the illegal acts of the defendants and when the village Sarpanch along with some other elders visited the spot on 01.06.1981, the defendants temporarily stopped the construction. However, the defendants were making hectic efforts to proceed with the construction.

Hence the suit.

b) As per the orders in I.A.No.206 of 1998, plaint was amended seeking the relief of mandatory injunction directing the defendants to remove the constructions made in the suit schedule site pending orders passed in I.A.No.374 of 1991.

c) Defendant No.1 filed written statement admitting that there was a road margin of 15 feet width and the drainage channel in the road margin used for passing water from the village to the fields. He denied that the defendants entered the road margin and closed the drainage channel and made preparations to construct a stone walled house. He also denied that defendants dug trenches and encroached into the land of plaintiff and closed the drainage channel, thereby giving scope for submergence of plaintiff's land and crops. It is contended that there was no such diminution of value of land of plaintiff with the alleged construction made by defendants, as the houses of defendants and others were in existence since past 20 years. It is submitted that defendants along with 59 others occupied the road margin adjoining the plaintiff's land and they raised

their houses and that they were in uninterrupted possession and enjoyment of the properties. Due to heavy rains in 1984, the houses were damaged and all the persons dug trenches and raised stone walls and laid cement sheeted roofing to the houses. In the year 1989 and also in 1991, there was cyclone resulting in damage of the houses of the defendants and others. It is contended that the husband of the plaintiff intends to knock away 20 Ankanams house site of defendants and threatened 1st defendant to vacate the house to form layout for his land and sell the same as house plots by offering Rs.1,000/- to the 1st defendant. As the 1st defendant disagreed, the husband of plaintiff lodged a complaint with the police against the 1st defendant and on enquiry they found 1st defendant was in possession of the property since 20 years and hence taken no action. It is also contended that plaintiff encroached into 2½ Ankanams house site of 1st defendant and making false claim against him. There was a way of 40 feet x 20 feet to facilitate the movements of the vehicles from road to the land of plaintiff and hence there was no obstruction caused to the plaintiff.

d) After amendment of the plaint claiming relief of mandatory injunction, the 1st defendant filed additional written statement reiterating his earlier written statement and denied that defendants raised construction after filing of the suit.

e) Basing on the above pleadings, the Trail Court framed the following issues on 10.10.1991:

- i) *Whether the Plaintiff is entitled for permanent injunction?*
- ii) *To what relief?*

f) On 14.10.1998, the following additional issues were framed:

i) Whether the Plaintiffs are entitled to the Mandatory Injunction for removal of the defendants' house?

ii) To what relief?

g) During trial, PWs.1 to 5 were examined and Exs.A.1 to A.10 were marked on behalf of plaintiff. DWs.1 and 2 were examined and Exs.B.1 to B.14 were marked on behalf of defendants. Exs.X1 to X7 were marked in the evidence of PW.4.

h) After hearing both sides and basing on the oral and documentary evidence, the Trial Court dismissed the suit.

i) Aggrieved, the plaintiff filed A.S.No.2 of 1999 before the IV Additional District Judge, Nellore and the said appeal was allowed decreeing the suit for perpetual and mandatory injunction for removal of the constructions made in the suit schedule site.

Hence the instant Second Appeal by defendant No.1.

4) While admitting the appeal, this Court framed the following substantial questions of law:

1) Is the court below right in granting relief of permanent injunction to the plaintiff when there is no evidence on record to show that the Appellant herein has encroached into the land of plaintiff and the evidence is that the plaintiff herself has encroached?

2) Is the Appellate Court right in giving a finding contrary to the pleadings and evidence?

3) *Is the Appellate Court right in giving a finding that the constructions made by the Defendants are obstructing the ingress and egress of the plaintiff to public pathway only basing on the pleadings when there is no evidence to establish the same?*

4) *Is the Appellate Court right in misconstruing the evidence on record both oral as well as documentary?*

5) *Is the Appellate Court right in ignoring the legal aspect that even assuming that the Defendants have raised unauthorized construction, the remedy for the plaintiff is under separate proceedings in appropriate forum and the civil court has no jurisdiction?*

5) Heard arguments of Smt. M.Bhaskara Lakshmi, learned Senior Counsel for appellant; Smt. K.Sesharajyam, learned Senior Counsel for Smt. Deepika Gadde, learned counsel for respondent No.1 and learned Government Pleader of Arbitration (Andhra Pradesh) for respondent No.3. Respondent No.2 is not necessary party in this appeal vide cause title.

6a) Fulminating the judgment of the first appellate Court, learned senior counsel Smt. M.Bhaskara Lakshmi would firstly argue that the judgment of the first appellate Court is perverse in the sense that it has not taken into consideration the evidence on record against the plaintiff. In expatiation, she would submit that the oral evidence of PW4 and Exs.X1 to X7 would clearly depict that apart from the defendants and others, the plaintiff herself has, encroached a portion of the road margin and constructed thatched house. When plaintiff herself is a trespasser, she has no moral or legal right to harp that defendants have trespassed and caused obstruction to her right of way to her land. In fact, the trial Court has given clear

finding to the effect that plaintiff is a trespasser and therefore she does not deserve the equitable relief of injunction. However, the first appellate Court without considering the evidence on record as well as the finding of the trial Court, but only considering that defendants have constructed house on the berm of the road, granted injunction on erroneous appreciation of facts and evidence. Learned counsel cited the following decisions to canvass that the erroneous appreciation of facts and evidence by the appellate Court would amount to perversity which can be set right in the Second Appeal.

*1. Manicka Poosali v. Anjalai Ammal*¹

*2. Abdul Raheem v. Karnataka Electricity Board*²

*3. Dinesh Kumar v. Yusuf Ali*³

b) Secondly, with regard to obstruction allegedly caused by the house of defendants to approach to the land of the plaintiff, learned senior counsel would argue that since plaintiff herself is a trespasser as submitted earlier, she cannot harp against defendants about obstruction. Even assuming that there is some obstruction, still there is no total blockade, in view of the fact that there is a passage by the side of house of defendants to approach to the land of the plaintiff. The argument that public have right on every inch of public property will not come to the aid of plaintiff because she herself is a trespasser of road margin to some extent. She thus prayed to allow the appeal and set aside the judgment of the appellate Court.

¹ (2005) 10 SCC 38

² (2007) 14 SCC 138

³ (2010) 12 SCC 740

7a) Per contra, while supporting the appellate Court judgment, learned senior counsel Smt. K.Sesharajyam would firstly argue that the admission of defendants coupled with the concurrent finding of both the Courts below is that the defendants constructed house on the road margin blocking the passage to the plaintiff's land from the road. The said concurrent finding of fact is suffice to grant mandatory injunction in favour of plaintiff as she is entitled to use every inch of public property. In that view, the Second Appeal is liable to be dismissed in *limini* as it does not involve any substantial question of law.

b) Secondly, she argued that it is preposterous to contend that plaintiff had encroached upon road margin. The evidence of PW4 in this regard is only a passing remark without any proof. On the other hand, his evidence would show that there is drainage between the land of plaintiff and house of defendants. That being so, the question of plaintiff crossing the drainage and encroaching the road margin does not arise. Further, in Ex.X3, the sentence to the effect *plaintiff—Sankaramma herself occupied road margin* was pen-written but not a typed one. The said sentence was only an interpolation without initials of the Deputy Executive Engineer. Hence, the authenticity of the said sentence is highly doubtful one. Therefore, the plea of encroachment by the plaintiff is not believable. She would further argue that when alleged encroachment made by the plaintiff is discarded, what will remain for consideration is whether the defendants constructed house on the road margin blocking the passage to the plaintiff's land or not. On this point, apart from the cogent evidence adduced by the plaintiff, the own admission of defendants is writ large.

Defendants indeed constructed house in the road margin blocking passage to the land of the plaintiff. Merely because some passage is available abutting their house to approach to the plaintiff's land, that cannot be a ground to deny injunction to plaintiff. The public will have every right to use every inch of public property and that right is a natural right but not prescribed by easement. To buttress her argument, she relied upon the following judgments.

1. *Mst. Bhagwanti v. Mst. Jiuti*⁴

2. *S Someswar Rao v. S.Tirupatamma*⁵

3. *Movva Butchamma v. Movva Venkateswararao*⁶

c) She alternatively argued that even assuming that the plaintiff too encroached upon the road margin and made some constructions that will not disentitle her to get injunction. The authorities may take action against her for removal of encroachment made by the plaintiff in a separate proceedings. Thus, the learned senior counsel prayed to dismiss the Second Appeal.

8) Learned Government Pleader for Arbitration (AP) who appeared for third respondent argued that both the plaintiff as well as defendants encroached berm of the road passing between Brahmadevi and Pottempadu and made constructions and the same is evident from Ex.X7—survey report of Assistant Engineer and also the evidence of PW4. In that view, one trespasser cannot maintain injunction against

⁴ AIR 1975 Allahabad 341

⁵ 1988 (2) Law Summary 223

⁶ AIR 1969 AP 136

another trespasser. She submitted that Government was contemplating to take suitable action and thus prayed to pass suitable orders in the appeal.

9) **Substantial Questions 1 to 4:** These questions can be taken up together as they relate to correctness of appreciation of facts and evidence made by first appellate Court. It is the argument of learned senior counsel for appellant that the Trial Court basing on the evidence on record, held, plaintiff has encroached road margin and made constructions. However, defendants did not encroach into plaintiff's property, but they too made constructions on the road margin and therefore, the plaintiff who is an encroacher, does not deserve mandatory injunction. However, the appellate Court on a wrong appreciation of facts and evidence held that since the defendants constructed the house blocking the passage from plaintiff's land to the main road, plaintiff deserved mandatory injunction. In the process, the lower appellate Court failed to consider the evidence on record showing that plaintiff also encroached upon the road margin to some extent and constructed a thatched house by the side of defendants' house. When plaintiff herself is an encroacher, she cannot claim the equitable relief of injunction against the defendants. It is also her argument that when the finding of the lower appellate Court is vitiated due to non-consideration of crucial evidence on record, it can be said as perverse finding and the High Court in the Second Appeal can set at naught its judgment.

10) I have given my anxious consideration.

a) In *Manicka Poosali's* case (1 supra) the Apex Court referred its earlier judgment in *Govindaraju v. Mariamman* [(2005) 2 SCC 500] wherein it is held that the High Court while exercising its powers under Section 100 C.P.C. on re-appreciation of the evidence cannot set aside the findings of fact recorded by the first appellate Court unless the High Court comes to the conclusion that the findings recorded by the first appellate Court were perverse i.e. based on misreading of evidence or based on no evidence.

b) In *Abdul Raheem's* case (2 supra) it was observed that consideration of irrelevant fact and non-consideration of relevant fact would give rise to substantial question of law. It was further observed that reversal of a finding of fact arrived at by the first appellate Court ignoring vital documents may also lead to a substantial question of law.

c) In *Dinesh Kumar's* case (3 supra) the Apex Court observed that Second Appeal is maintainable basically on a substantial question of law and not on facts. However, if the High Court comes to the conclusion that the findings of fact recorded by the courts below are perverse being based on no evidence or based on irrelevant material, the appeal can be entertained and it is permissible for the Court to re-appreciate the evidence.

Thus, the substance of the above precedential jurisprudence is that if the verdict of the first appellate Court is vitiated by perverse finding due to non-consideration or misconsideration of the material evidence on record, the High Court in the Second Appeal can interfere with. It has now

to be seen whether the judgment of the lower appellate Court is vitiated by perversity.

11) I have gone through both the judgments. The trial Court dismissed the plaintiff's suit on the prime finding that defendants did not encroach upon plaintiff's property but both the plaintiff and defendants encroached the road margin and made construction and therefore, plaintiff cannot seek for mandatory injunction. Whereas, the lower appellate Court held that since the defendants constructed house on the road margin blocking the passage to the plaintiff's land from the road, plaintiff deserve mandatory injunction. In view of this dichotomy, it is pertinent to know:

- i) *Whether defendants have encroached upon plaintiff's property and also road margin causing obstruction to the plaintiff?*
- ii) *Whether plaintiff has encroached upon the road margin and made construction?*

12) In para-4 of the plaint it is pleaded that the defendants were intending to construct a house on the road margin and they have no right to make such unauthorized construction. They dug trenches on the Northern side encroaching 2½ Ankanams of the land of the plaintiff. In para-4(a) it is pleaded that the defendants constructed asbestos sheet roofed house in the trenches dug before filing of the suit even after serving of the orders passed by the trial Court in I.A.No.374 of 1991. Thus, the plaintiff took a specific plea that defendants encroached upon the road berm and also her site in an extent of 2 ½ Ankanams and made illegal construction of house towards South of her land. However, in the evidence of PW1, he did not depose about defendants encroaching into property of

plaintiff. He only stated about their constructing house on the road margin. The plaintiff did not adduce any oral or documentary evidence to establish that the defendants encroached into 2½ Ankanams of her land. Therefore, the trial Court rightly observed that the defendants have not encroached into the land of the plaintiff. So far as defendants constructing house on the road margin is concerned, the defendants themselves admitted in their pleadings and evidence that themselves and some others have occupied the road margin and raised thatched houses about 30 years back and when those huts were damaged, they constructed stone walls with asbestos roof.

13) Plaintiff's encroachment is concerned, though she vehemently denied, the evidence of PW4 and Exs.X3 and X7 would clearly show that plaintiff too encroached a portion of the road margin and raised thatched hut by the side of house of defendants. PW4 is the Executive Engineer, Panchayat Raj, Nellore. He produced Exs.X1 to X7 during his evidence and stated that the entire road margin was occupied by encroachers including the plaintiff. In the cross-examination he stated that there is a drainage lane between the land of plaintiff and house of defendants. Basing on the same, it was argued that when the drainage lane intervenes the land of plaintiff and road margin on which defendants constructed the house, the question of plaintiff encroaching the road margin by crossing the drainage lane does not arise. This argument is only partly correct. To the immediate North of road there is a road margin on which the defendants constructed the house. To the further North there exists the drainage and to the North of the drainage the land of plaintiff is situated. Therefore, in the Northern direction, there is no scope for encroachment

by the plaintiff as contended. However, the encroachment was made by the plaintiff on the Eastern side of the defendants' house. In Ex.X7 letter addressed by Assistant Engineer, Mothkur to Deputy Executive Engineer he mentioned that by the side of defendants' house plaintiff occupied road margin by constructing a thatched house including the site 10 meters x 5.3 meters. The Deputy Executive Engineer also inspected the road and submitted a letter to the Executive Engineer under Ex.X3 wherein he too mentioned that plaintiff herself occupied some portion of the road margin. Of course, he mentioned this fact in pen-written form. In view of similar report given by Assistant Engineer under Ex.X7, the authenticity of Ex.X3 can be accepted. Therefore, it is clear that plaintiff has also encroached a portion of the road margin and raised a hut. In fact the hut is visible in the photos filed by the plaintiff. Thus, both plaintiff and defendants are the encroachers of road margin.

14) The law relating to the right of the public on public roads and other public properties and also law relating to the status of encroachers of the roads is no more res integra. It is trite law that once it is a public road, passage or rasta, whole, every part of it and every inch of it retains its character as such. Then, the public will have right to pass through on every inch of public road, passage or rasta. Any person who has a house abutting to public road is entitled to access to the road and if any obstruction is made by any person, special damage can be presumed to be caused to such person and he will deserve injunction. An obstructionist cannot advance obdurate argument that even after his encroachment, some space is left for public to pass through. He cannot judge the method and

manner as to how a public right shall be exercised (vide *Mst. Bhagwanti's* case(4 supra); *S. Someswar Rao's* case(5 supra) and *Movva Butchamma's* case(6 supra)).

15) However, an encroacher of a public property stands on a different footing. Having encroached upon a portion of the public rasta, an encroacher cannot harp against another person that he encroached another part of public rasta and caused obstruction to him. It would amount to *pot calling the kettle black*. An encroacher also cannot maintain a suit for injunction against another encroacher for, the *sine qua non* for affording equitable relief of injunction is that the plaintiff must approach the Court with clean hands.

16) This Court in *Talari Nageswar Rao v. Nakkal Pushpavathi*⁷ reiterated the above legal point thus:

“Para-9...The substantial question of law which is involved in the instant case arises for consideration is that admittedly the houses of the plaintiffs are situated in road margin which they are not supposed to occupy and construct the houses, can they seek the relief of mandatory injunction against the defendants 1 and 2, the appellants herein for removal of their houses which are also said to be situate in road margin. The learned first appellate Court expressed the view that if the houses of the plaintiffs are situate in road margin, any villager can approach the Gram Panchayat or the Court for removal of the said houses but the defendants cannot resist the suit filed by the plaintiffs since their houses are constructed encroaching the road margin.

⁷ 2011 SCC Online AP 778 = 2012 (2)ALD 692

Para-10 *The said finding recorded by the learned first appellate Court, in my considered view, is totally erroneous and contrary to law. The plaintiffs who are guilty of constructing houses in road margin cannot maintain the suit against the defendants for the relief of mandatory injunction on the ground that the defendants' houses were built encroaching upon the road margin....”*

17) In the instant case, the plaintiff like defendants, occupied a portion of the road margin and raised a hut. In that view, she cannot make a complaint against them and seek for mandatory injunction. Unfortunately, the lower appellate Court did not consider the evidence on record touching the aspect of plaintiff's encroachment. Therefore, I am constrained to hold that its judgment is vitiated by perversity and hence liable to be set aside.

These questions are answered accordingly.

18) **Substantial Question No.5:** Learned counsel for appellant submitted that it is not her argument that Civil Court has no jurisdiction but her point is that when equally efficacious relief is available, the Court shall desist from granting injunction under Section 41(h) of Special Relief Act. In view of her submission, substantial question No.5 has become redundant. So far as the point of argument raised by her is concerned, learned counsel has not vivified as to the availability of the so-called equally efficacious relief to the plaintiff other than seeking for injunction in the suit. It is altogether a different aspect that plaintiff does not deserve injunction as she being an encroacher of the road margin. However, that has nothing to do with Section 41(h) of Specific Relief Act. So, the said argument cannot be accepted.

19) In the result, this Second Appeal is allowed by setting aside the judgment and decree passed by the lower appellate Court in A.S.No.2 of 1999. Consequently O.S.No.204 of 1991 on the file of III Additional Junior Civil Judge, Nellore, is dismissed. No costs.

20) Before parting it must be made clear that this judgment will not restrain the Government authorities to initiate appropriate proceedings to evict the concerned encroachers by following due process of law.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

Date: 22.12.2017
Scs/Murthy



U. DURGA PRASAD RAO, J