

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.1701 OF 2011

JUDGMENT:

Aggrieved over that portion of the judgment and decree, dated 29.08.2011, rendered in A.S.No.245 of 2008 by the IV Additional District Judge, Visakhapatnam, setting aside the judgment and decree, dated 29.02.2008, rendered in O.S.No.3189 of 2004 by the II Additional Junior Civil Judge, Visakhapatnam, to the extent of granting relief of mandatory injunction, the plaintiff preferred the present Second Appeal. Admittedly, he had been successful in getting other reliefs from both the Courts below.

2. Heard Sri A. Madhava Rao, learned counsel for the appellant.

3. The controversy is very short and on hearing the arguments advanced by the learned counsel for appellant, since, it is opined that there is no substantial question of law involved and even on merits, the appellant – plaintiff cannot succeed, in view of an agreement entered into between her and respondent No.1 – defendant No.1, the appeal is taken up for disposal at the admission stage.

4. The appellant is the plaintiff, whereas the respondents are defendants in the O.S. before the trial Court.

5. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the O.S. before the trial Court.

6. Precisely to say, the plaintiff filed O.S.No.3189 of 2004 on the file of II Additional Junior Civil Judge, Visakhapatnam, requesting declaratory relief that she is the joint owner of a three feet lane existing between her house and the house of defendant No.1 with additional relief of mandatory injunction for dismantling the extension of parapet wall of the ground floor below the first floor extending over the said three feet lane and consequential perpetual injunction.

7. Before the trial Court, the plaintiff examined herself as PW.1 besides examining two more witnesses as PWs.2 and 3 and marked Exs.A1 to A11 to substantiate the case. On behalf of defendant No.1, he himself got examined as DW.1, besides examining one more witness as DW.2. It appears, no documentary evidence was let in by defendant No.1.

8. It is recorded by the trial Court in paragraph No.65 of the judgment that the plaintiff is not praying any relief against defendant Nos.2 to 5 and they are added as proforma parties to the Suit and, therefore, it did not incline to pass any orders against defendant Nos.2 to 5.

9. The trial Court, on appreciation of evidence let in by both sides, recording positive findings on issue Nos.1 to 4 in favour of the plaintiff, consequently, answered issue No.5, decreeing the Suit, in favour of the plaintiff granting all the reliefs against defendant No.1.

The relevant findings are that the plaintiff has got common right and interest over the suit schedule property and she is entitled to perpetual injunction and mandatory injunction, and thereby, directed defendant No.1 to remove the structures made by him over the suit schedule property within three months from the date of passing of the decree and, in case, defendant No.1 do not oblige, plaintiff is at liberty to remove the said impugned constructions, at her cost, and recover the same from defendant No.1.

10. Aggrieved over the said judgment and decree, dated 29.02.2008, defendant No.1 preferred A.S.No.245 of 2008 on the file of IV Additional District Judge, Visakhapatnam, where he succeeded in part to the extent of getting the relief of grant of mandatory injunction being set aside. The said finding and conclusion arrived at by the appellate Court aggrieved the plaintiff to prefer the present Second Appeal, challenging the same.

11. Learned counsel for the appellant would attack the contents in Ex.A4 – agreement entered into between the plaintiff and defendant No.1 and would submit that the conclusion arrived at by the appellate Court that defendant No.1 is entitled to raise construction beyond nine feet level is totally erroneous and the contents in Ex.A4 are misinterpreted by the appellate Court and hence, the substantial question of law in the present Second Appeal arises as to whether the

joint right in pathway restrains to construct slab in the space open to sky protracting over the pathway.

12. The admitted fact is that the plaintiff purchased 50.29 square yards of land out of 444.44 square yards from defendant Nos.2 to 4, which is not in dispute. The existence of lane between the house of plaintiff and defendant No.1 is also not in dispute, which constitutes the subject matter herein, and the said lane is the only way for ingress and egress to the plaintiff's house. But, to show that the plaintiff is joint owner to the extent of half of the lane vertically, unimpeachable evidence ought to have let in by the plaintiff before the Court, but, somehow, she herself filed Ex.A4. Admittedly, no relief in regard to Ex.A4 is sought for by the plaintiff. When the plaintiff, to substantiate her case, adduces evidence by filing Ex.A4 and getting it exhibited, certainly, she cannot now turn around and dispute the understanding arrived at under Ex.A4. The first appellate Court mainly concentrated on Ex.A4, since, the controversy before the first appellate Court was confined only to that limited extent. The finding recorded in paragraph No.20 of the judgment rendered by the first appellate Court, since, relevant in the present context, the same is extracted, which is thus:

“In this context it is useful to refer to the Commissioner's report filed along with photographs and as seen from the photos along with negatives submitted by the learned Advocate Commissioner

there are no permanent structures or hindrance in the common pathway and when he visited the suit property and noted down the physical features. He noticed there were no constructions in the first floor except right round parapet wall which was newly constructed at the time of his visit and he also noticed no soda machine and bottles were kept in the lane adjacent to the plaint schedule property on its western side. It is admitted that the 1st defendant constructed the ground floor and its slab protruded over the plaint schedule property to the length of 3 ft. but it does not cause any obstruction for the plaintiff to use the same for ingress-and-egress to reach her house from the road point on the northern side. As already stated supra, even as per Ex.A4 and also as admitted by the plaintiff in her cross-examination the parties are permitted to raise any construction at a height of 9 ft. from the ground level when the 1st defendant has not made any permanent construction in the plaint schedule property creating any hindrance for ingress-and-egress to the plaintiff and it is also provided under Ex.A-4 agreement to have any construction at a height of 9 ft. from the ground level, the construction of slab though protruded over the plaint schedule property over the joint lane, she cannot claim any mandatory relief as well as easementary right for the reasons stated above. The trial court utterly failed to appreciate the agreement between the parties and also the absence of any easementary right in favour of the plaintiff as claimed by her.”

13. It is true, certainly, the mandatory injunction to remove the construction of slab protruded over the suit schedule property cannot

be claimed in view of the understanding arrived at in Ex.A4, when it is not disputed by the plaintiff, and, in fact, an easementary right ought to have been claimed as observed by the first appellate Court. Of course, when Ex.A4 itself speaks about the right to pathway through the joint lane and when defendant No.1 is not depending on that way to use the lane, there is no reason to arrive at that the plaintiff ought to have got a right to be declared.

14. Be that as it may, the contents of Ex.A4 cannot be scored out. Certainly, it cannot be said that the plaintiff has joint right over the said property. Therefore, it cannot be said that the question of law now formulated is substantial question of law requiring adjudication. There is no merit in the present Second Appeal.

15. Accordingly, the present Second Appeal is dismissed. However, the parties are directed to bear their own costs. Miscellaneous Petitions, if any, pending in this appeal, shall stand closed.

A. SHANKAR NARAYANA, J

June 07, 2017.
MD