

THE HON'BLE SMT. JUSTICE ANIS

SECOND APPEAL No. 1119 OF 2011

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, is directed against the judgment and decree, dated 22.02.2011, passed in A.S.No.12 of 2004 on the file of the VI Additional District Judge (Fast Track Court), Narsapur, whereunder and whereby the judgment and decree, dated 27.02.2004 passed in O.S.No.446 of 2003 on the file of the Principal Junior Civil Judge, Narsapur, were set aside by allowing the appeal.

2. The appellants are the defendants and the respondents are the plaintiffs before the trial Court. For better appreciation of facts, the parties are hereinafter will be referred to, as they are arrayed before the trial court.

3. The plaintiffs filed the suit for declaration of title to the open site shown in the plaint plan Ex.A.6 as 'EADF' which is situated on the eastern side of the plaintiffs' property and for recovery of possession of the aforesaid open site after ejecting the defendants from it.

4. The brief averments made in the plaint are as follows:

The plaintiffs are brothers. The first defendant and the fourth defendant are the son and daughter of one late Meka Dorayya respectively. The defendants 2 and 3 are the sons of

4th defendant. The plaintiffs are the owners of 'EBCF' property, whereas the defendants are the owners of 'GEFH' property. In between the plaintiffs and the defendants' property, the suit site 'EADF' is situated. Three windows of the plaintiffs fixed in the wall P & S.

According to the plaintiffs, while constructing a tiled manduva house, the ancestors of the plaintiffs left open two yards site on the eastern side of their house for the sake of vaasthu and the said site is situated in between the plaintiffs and the defendants' property. According to the plaintiffs, there used to be an old wall EF which was collapsed in the Godavari floods in the month of August, 1986 and thereafter no wall was constructed by the plaintiffs. There is a gate in between E & A wall and through that gate, the plaintiffs and their family members used to enter into the open site. The rain water from manduva house was also being discharged through 'EADF' open site into the northern side road. The plaintiffs got arranged underground pipes in 'EADF' open site adjoining their house wall for letting out rain water into northern side road. The water pipes for taking protected water were also fixed to the outer wall of P & S.

The defendants, with a view to claim title over the open site, closed EA gate in the first week of February, 1995. When the plaintiffs questioned their highhandedness, the defendants proclaimed that the open site belongs to them and the plaintiffs have no right to use the said site and that the

plaintiffs have no right to enter into the 'EADF' open site through EA gate. Hence, the plaintiffs filed the present suit.

5. The second defendant filed Written Statement and the same was adopted by the defendants 1, 3 and 4. According to the defendants, one Meka Veeramma, who is the wife of Meka Dorayya, purchased 140 Sq. yards of vacant site under a registered Sale deed dated 19.01.1936. The disputed site 'EADF' does not belongs to the plaintiffs and it is a part of 140 Sq. yards purchased by the said Meka Veeramma. Meka Dorayya died about 25 years back. One Edara Anjaneyulu is the husband of 4th defendant. After the death of Meka Dorayya and during the lifetime of his wife Meka Veeramma, the said Anjaneyulu got constructed a thatched house in the said 140 Sq. yards and their family has been residing in it. After the death of Meka Veeramma, the said Anjaneyulu and his sons, who are the defendants 2 and 3, removed the thatched house and got constructed a tiled house therein leaving some vacant place on all four sides. The said tiled house stands mutated in the name of Anjaneyulu in the gram panchayat records. The first defendant was never in possession and enjoyment of the said 140 Sq. yards and he is nothing to do with the same.

According to the defendants, the rough plan filed by the plaintiffs is not showing the features of suit locality and it is not a correct one. The plaintiffs or their predecessors have

not left any site on the eastern side of their tiled house. There was never any old wall in between EF points and also there was never any gate in between EA points. The open site was never used by the plaintiffs or their ancestors. The warrandas of defendants 2 and 3 are situated in 'EADF' open site and they are meant for cooking. The defendants came to know that Meka Veeramma gave permission to the plaintiffs for fixing underground pipes adjoining the tiled house. Likewise, the plaintiffs were permitted by 4th defendant and her husband to fix GI pipes to their eastern wall to take fresh water. The defendants are having not only title but also possession over the suit site and the non-existence of even one door to enter into the suit site is sufficient to say that the plaintiffs have no right in the 'EADF' site. The plaintiffs, who are rich and influential persons in the village, requested the defendants 2 to 4 to sell 'EADF' open site and when the defendants refused to sell the same, the plaintiffs filed the present suit. The defendants 2 to 4 have been in possession and enjoyment of 'EADF' open site for the last 20 years and perfected their title to the said site by adverse possession. Therefore, prayed the Court to dismiss the suit.

6. Basing on the above pleadings, the following issues have been settled by the trial Court for trial:

1. Whether the plaint plan is correct?

2. Whether the defendants 2 to 4 perfected their title to the EADF portion of the plaint plan by way of adverse possession?
3. Whether the plaintiffs are entitled for the declaration of their title in EADF portion of the plaint plan as prayed for?
4. Whether the plaintiffs are entitled for the EADF portion of the plaint plan as prayed for?
5. Whether the plaintiffs are entitled for the EADF portion as prayed for?
6. To what relief?
7. To substantiate the case of the plaintiffs, PWs 1 and 2 were examined. On behalf of the defendants, DWs 1 and 2 were examined. Exs.A.1 to A.6 were marked on behalf of the plaintiffs and Ex.B.1 was marked by consent. Further, Exs.C.1 to C.4 got marked by the Court.
8. After considering the oral and documentary evidence and upon hearing both sides, the trial Court held that the plaintiffs have to prove that what extent of site is in their possession; what extent of site is short with reference to their documents; what extent of site is in possession of defendants excluding EADF open site; and what extent of site the defendants are in possession including EADF open site, and without proving all these facts through an advocate-

commissioner and a qualified surveyor, the plaintiffs completely depended upon the circumstances stated in the plaint. The trial Court also held that the plaintiffs failed to prove that the open site belongs to them and that it is a part of their property, and thereby dismissed the suit.

9. Aggrieved by the judgment and decree of the trial Court, the plaintiffs filed A.S.No.12 of 2004 before the VI Additional District Judge (Fast Track Court), Narsapur. The first appellate Court, after considering the evidence of PW3 and Exs.C.5 to C.12 including the advocate-commissioner's report, held that the suit site is part and parcel of the plaintiffs' property and the plaintiffs have title over the suit site. It is further held by the first appellate Court that the defendants admitted the title of the plaintiffs, but took a plea that they perfected title by way of adverse possession. The first appellate Court after framing the points, viz., 1) Whether the plaintiffs got title over EADF site of the plaint plan?; 2) Whether the defendants 2 to 4 perfected their title to EADF portion by way of adverse possession?; 3) Whether the plaint plan is not correct?; 4) Whether the plaintiffs are entitled for declaration and for consequential relief of possession as prayed for?; and 5) Whether there are sufficient grounds to set aside the decree and judgment of the trial Court?, allowed the appeal and set aside the decree and judgment, dated 27.02.2004, passed in O.S.No.446 of 2003.

10. Aggrieved by the reversal judgment of the first appellate Court, the defendants preferred the present Second Appeal.

11. This Court vide its order dated 18.01.2017, admitted the second appeal on the following substantial question of law:

“Whether the first appellate Court reversed the judgment and decree passed by the trial Court basing on the report of the Advocate-Commissioner in deciding title and possession of the property?”

12. The learned counsel for the appellants/defendants argued that the first appellate Court failed to appreciate the oral and documentary evidence produced by the defendants and by merely relying upon the advocate-commissioner's report, the first appellate Court decided the title to the suit site, and prayed the Court to allow the second appeal.

13. On the other hand, the learned counsel for the respondents/plaintiffs argued that the first appellate Court rightly considered the evidence of PW3, who is an advocate-commissioner and who took the assistance of the mandal surveyor, got measured the properties of both the parties and found that the defendants are in possession of 195.20 Sq. yards instead of 140 Sq. yards., and thereby rightly allowed the appeal and directed the appellants herein to deliver the possession of the suit site. It is further argued that the judgment of the first appellate Court is based on oral

and documentary evidence and the defendants have not made out any case to interfere with the findings of the first appellate Court, and finally prayed the Court to dismiss the second appeal.

14. Now, the point that would arise for consideration in this second appeal is whether the appellants have proved the substantial question of law as framed above?

15. **POINT:**

A perusal of the record shows that there is no dispute that the plaintiffs' property is shown as 'EBCF' in Ex.A.6 and the defendants' property is shown as 'GEFH' in the plan. The disputed site is situated in between the plaintiffs' property and the defendants' property and it is shown as 'EADF'. The plaintiffs are claiming title and sought recovery of possession of 'EADF' open site. There is no dispute that the plaintiffs are the brothers. The first defendant and the fourth defendant are the son and daughter of late Meka Dorayya respectively. The defendants 2 and 3 are the sons of 4th defendant.

16. The trial Court categorically held that the plaintiffs failed to prove the extent of the property under Exs.A.3 and A.4 in their possession and likewise no steps have been taken to prove the exact extent of the defendants' property under Ex.B.1.

17. In the first appellate Court, the second advocate-commissioner was appointed to measure the sites of both the parties with the assistance of Mandal Surveyor. The learned advocate-commissioner took the assistance of Mandal Surveyor, visited the suit schedule property, took measurements and filed the report under Ex.C.8 and plan Ex.C.9. The advocate-commissioner in his report observed that as per the title deeds of the plaintiffs - Exs.A.3 and A.4, they should have 336 Sq. yards, but after taking the measurement of the site, the plaintiffs are in enjoyment of only 258 Sq. yards. Further, the property of the defendants also measured as per Ex.B.1 and as per Ex.B.1, the defendants are the owners of 140 Sq. yards. After the measurements, the advocate-commissioner found that the defendants are in possession of 195.20 Sq. yards in excess of 55.20 Sq. yards site. The advocate-commissioner further observed that as per the enjoyment, the defendants are in possession of excessive site of 55.20 Sq. yards and shortfall in the case of plaintiffs.

18. In the plaint, the plaintiffs claimed that the suit schedule property belongs to them and also specifically pleaded that the eaves of the tiled house extended upto one yard to the East of PS wall. Further, the ancestors of the plaintiffs allowed the suit site and constructed the tiled house for the sake of vaasthu and this was supported by the evidence of PW3 – advocate commissioner who was examined

at the appellate stage. PW3 stated that the roof of the plaintiffs projected upto three feet on the eastern side. The advocate-commissioner also observed in his report that the drainage pipes were arranged in the suit site to let out the rain water from the manduva and also found that the water pipes on the eastern side of the house wall of the plaintiffs to take protected water. These observations in the report were admitted by DW1 in the cross-examination. Apart from the drainage pipes and fresh water pipes, DW1 also admitted that there are three windows of the plaintiffs on the eastern side wall. In view of the specific measurements taken by the advocate-commissioner, the first appellate Court rightly held that the plaintiffs have title over 'EADF' site and accordingly the appeal was allowed.

19. Admittedly, when the second advocate-commissioner was appointed, the appellants herein have not challenged the order passed by the learned District Judge. Therefore, the order passed for appointing the advocate-commissioner became final and now at the stage of second appeal, the appellants cannot question the appointment of second advocate-commissioner and marking of advocate-commissioner's report and plan under Exs.C.8 and C.9. Therefore, the appellants have not made out any case to set aside the decree and judgment passed by the first appellate Court. Further, the appellants failed to prove the substantial

question of law framed by this Court. Hence, the Second Appeal is devoid of merit and is liable to be dismissed.

20. Accordingly, the Second Appeal is dismissed. No costs. Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

ANIS, J

MARCH 23rd, 2017.

Anr



THE HON'BLE SMT.JUSTICE ANIS



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23.03.2017

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