

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.303 of 2013

JUDGMENT:

This appeal is filed by the defendant, under Section 100 CPC, assailing the judgment and decree dated 27.11.2012 passed in A.S.No.191 of 2009 on the file of the Court of II Additional Senior Civil Judge, Kakinada, wherein whereby the decree and judgment dated 16.04.2008 passed in O.S.No.590 of 2001 on the file of I Additional Junior Civil Judge Court, Kakinada, granting declaration of easementary right and consequential mandatory injunction in favour of the plaintiff, was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. Heard the learned counsel for the appellant and perused the record.

4. The facts leading to filing of the second appeal are briefly as follows: The plaintiff is the owner of the building bearing D.No.3-17-48 situated in Godarigunta, Kakinada Town, which originally belongs to Nadakudithi Dhana Lakshmi. The said Dhana Lakshmi is the mother of the plaintiff as well as the defendant. The defendant is the owner of the building bearing D.No.3-17-48/A situated to the south of the plaintiff's house. The mother of the plaintiff executed a registered will on

23.08.1990 bequeathing the property with a mangalore tiled house in favour of the plaintiff. There are three windows opening towards the defendant's house. All the three windows have been in the same position ever since the building was constructed more than 40 years back. The plaintiff's house is receiving light and air through these three windows from the side of the defendant's house. The defendant and her husband developed animosity against the plaintiff for the reasons best known to them. The defendant took hectic efforts to close the windows. Due to the covering of windows with a tin sheet and a thick cloth, light and air are not coming into plaintiff's house, which causes much inconvenience to the plaintiff. The plaintiff himself and his predecessor in title have acquired the easementary right of light and air through these windows from the side of defendant's house by using the same since more than 40 years. The defendant has no right to obstruct the light and air to the plaintiff's house. The plaintiff got issued a legal notice on 25.04.2001 to the defendant with a request not to obstruct the light and air to the plaintiff's house. The defendant did not choose to issue reply and filed caveat. Hence, the suit.

5. The defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the plaintiff and the defendant are having equal rights over the suit schedule property, therefore, the plaintiff is not entitled to seek the relief of perpetual and mandatory injunctions. It is absolutely false to state that the mother of the plaintiff and

defendant executed a Will in favour of the plaintiff in respect of the suit schedule property. This defendant accepted the request and permitted that plaintiff to open the windows. A person will not get easementary right after construction of a new house by removing the old house. This defendant filed O.S.No.932 of 2001 on the file of this Court for removal of the said windows. Hence, the suit is liable to be dismissed.

6. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the suit is bad for non-joinder of necessary and proper parties?
2. Whether the plaintiff is entitled to the relief of declaration as prayed for?
3. Whether the plaintiff is entitled to the relief of consequential mandatory injunction, as prayed for?
4. To what relief?

7. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A12 were marked. On behalf of the defendant, D.W.1 was examined and no documents were marked.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court decreed the suit in favour of the plaintiff. Feeling aggrieved by the judgment and decree of the trial Court, the defendant preferred A.S.No.191 of 2009 on the file of II Additional Senior Civil Judge Court, Kakinada. The first appellate Court, after considering the material available on record afresh, arrived at a conclusion that the plaintiff is entitled for the relief of declaration and

consequential mandatory injunction and dismissed the appeal. Hence, the present second appeal.

9. The following admitted facts can be culled out from the pleadings of both parties.

10. The defendant is the own sister of the plaintiff. The mother of the plaintiff and defendant purchased the suit schedule property under Ex.A1 registered sale deed dated 12.02.1971. The house of the defendant is situated on the south of the plaintiff's house. The entire controversy revolves around two aspects. (1) Whether the mother of the plaintiff and defendant executed a Will in favour of the plaintiff? and (2) Whether the plaintiff got the easementary right to seek the relief of declaration?

11. In the written statement the defendant has taken a specific plea that her mother did not execute any Will in favour of the plaintiff. It is a settled principle of law that the burden of proof lies on the propounder of the Will to dispel the suspicious circumstances surrounding its execution. As per the testimony of P.W.1, his mother executed Ex.A2 Will on 23.08.1990 bequeathing the suit schedule property in his favour. P.W.3 is one of the attestors of Ex.A2 Will. By examining P.Ws.1 and 3 and by marking Ex.A2, the plaintiff clearly established the execution of Ex.A2 Will in his favour by his mother.

12. It is the case of the plaintiff that his mother purchased the property under Ex.A1 registered sale deed dated 12.02.1971. As

per the recitals of Ex.A1, the mother of the plaintiff and defendant purchased the tiled house. Even as per the testimony of D.W.1, the tiled house consisting of three windows projecting towards the house of the defendant. It is the case of the plaintiff that the defendant is making hectic efforts to remove the windows. It is the further case of the plaintiff that the defendant erected a pole with a tin sheet preventing the light and air to the house of the plaintiff. The fact remains that the mother of the plaintiff purchased the tiled house way back in the year 1971. From 1971 till the date of filing of the suit in the year 2001, the plaintiff has been getting the light and air through these windows, which were projected towards the house of the defendant. The testimony of P.W.2 reveals about the existence of tiled house and the three windows to it. His testimony further reveals that the defendant closed the windows on the south of the plaintiff's house with wooden poles covering tin sheet.

13. Apart from P.W.1, the defendant is the competent person to depose whether the plaintiff got the easementary right or not. For the reasons best known, the defendant did not choose to come into witness box in order to substantiate her stand and offer herself for cross-examination by other side. Except the averments made in the written statement, nothing is proved to establish the stand of the defendant. On the other hand, the oral and documentary evidence adduced by the plaintiff clearly establishes that the plaintiff is getting light and air through the

windows, which were closed by the defendant. The defendant has no right whatsoever to close the windows. The material available on record clinchingly establishes that the plaintiff established his easementary right.

14. Having regard to the facts and circumstances of the case, this Court is of a considered view that the plaintiff established his easementary right in respect of the suit schedule property. The Courts below considered the oral and documentary evidence and arrived at a conclusion that the plaintiff established his easementary right; therefore, he is entitled for the relief of declaration and consequential mandatory injunction. 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.

15. The first appellate Court is the fact finding final Court. In the light of the foregoing discussion, 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 and liable to be set aside.

16. In **Municipal Committee, Hoshiarpur v. Punjab Seb**¹, while dealing with the scope of Section 100 CPC, the Hon'ble Apex Court held at paragraph No.16 as follows:

16. 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

¹ (2010) 13 SCC 216

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.

17. Having regard to the facts and circumstances of the case, there is no question of law much less substantial question of law involved in this appeal. Hence, the second appeal is liable to be dismissed.

18. Accordingly, the Second Appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

20.11.2018
Rns

T.SUNIL CHOWDARY, J

