

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.102 OF 2013

JUDGMENT:

This Second Appeal is filed under Section 100 of C.P.C., by the unsuccessful plaintiff, assailing the judgment and decree dated 08.08.2012 passed in A.S.No.211 of 2009 on the file of the Court of the I Additional District Judge, Guntur, wherein and whereby the judgment and decree dated 22.08.2008 passed in O.S.No.511 of 2006 on the file of the Court of the Principal Junior Civil Judge, Guntur, dismissing the suit filed by the plaintiff for perpetual injunction, 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. The facts leading to filing of the second appeal, in nutshell, are as follows:

The house bearing Door No.118-4 of Etukuru Village originally belongs to the ancestors of the plaintiff. Defendant Nos.1 and 2 are having a house towards the east of the suit schedule property. There is a passage in between the house of the plaintiff and defendants, which exclusively belongs to the plaintiff. The plaintiff is intending to construct a drainage channel on north of his house for free flow of drainage water. The defendants without any right whatsoever interfering with the suit schedule passage, which belongs to the plaintiff. Hence, the suit.

4. The first defendant filed written statement denying all the averments made in the plaint *inter alia* contending that the suit is

not maintainable for non-impleading of necessary and proper parties. It is further contended that the passage exclusively belongs to the first defendant. The second defendant filed a memo adopting the written statement filed by the first defendant.

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

1. Whether the suit is not maintainable as contended by the defendants?
2. Whether the suit is barred for non joinder of necessary parties?
3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
4. To what relief.

6. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.4 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Ex.B.1 was marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff failed to establish that he is the exclusive owner of the common passage and consequently, dismissed the suit.

8. Feeling aggrieved by the judgment and decree of the trial Court dated 22.08.2008, the plaintiff preferred A.S.No.211 of 2009 on the file of the Court of the I Additional District Judge, Guntur. The first appellate Court, after reappraising the oral and documentary evidence available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the plaintiff failed to establish that he is the exclusive owner of the suit schedule passage and consequently,

dismissed the appeal. Hence, the unsuccessful plaintiff preferred the present second appeal.

9. Heard Sri B.Narasimha Sharma, the learned counsel for the appellant, and perused the material available on record.

10. The substantial question of law urged by the learned counsel for the appellant is as follows:

The findings recorded by the Courts below are perverse;
therefore, it is a fit case to allow the appeal.

11. It is needless to say that the burden of proof lies on the plaintiff to establish that he is the exclusive owner of the suit schedule passage and the defendants are interfering with the same without any right whatsoever. To substantiate the case, the plaintiff examined himself as PW.1. The plaintiff also placed reliance on the oral testimony of PWs.2 and 3 and Exs.A.1 and A.2. The possibility of distortion of the facts by PW.1 cannot be ruled out completely. Even as per the recitals of Exs.A.1 and A.2, the suit schedule passage is not the exclusive property of the plaintiff. The oral testimony of DW.1 coupled with recitals of Ex.B.1 clearly reveals that the suit schedule passage is not the exclusive property of the plaintiff. As per the recitals of Ex.B.1, the passage in question is a common passage. When the plaintiff claims exclusive right over the suit schedule passage, he ought to have filed a suit for declaration and consequential relief of perpetual injunction. For one reason or other, the plaintiff did not seek the relief of declaration. In the absence of declaration, it may not be possible for the Court to declare that the suit schedule passage exclusively belongs to the plaintiff. In the cross-examination, PW.1 in

unequivocal terms deposed that the suit schedule passage is the common passage. The testimony of PW.1 negates his own contention. As rightly pointed out by the learned counsel for the appellant, the Court shall not place reliance on a stray sentence in the cross-examination of the witness. I am fully agreeing with the contention of the learned counsel for the appellant. Appreciation of evidence does not mean placing reliance on a stray sentence in the testimony of the witness. It is needless to say that the Court has to take into consideration the overall facts and circumstances of the case in order to arrive at a just and reasonable conclusion. As observed earlier, Exs.A.1 and A.2 are no way helpful to the plaintiff to establish his case. On the other hand, the recitals of Ex.B.1 support the version of defendants and negate the contention of the plaintiff. A perusal of the record reveals that the trial Court has not dismissed the suit basing on the stray sentence in the cross-examination of PW.1. The trial Court considered the material available on record in the light of the provisions of the Indian Evidence Act and dismissed the suit. The first appellate Court reappraised the oral and documentary evidence available on record and arrived at an independent conclusion that the plaintiff failed to establish that the suit schedule passage exclusively belongs to him. Once the plaintiff fails to prove his right over the suit schedule passage, he is not entitled for the relief of perpetual injunction restraining the defendants from interfering with the suit schedule passage. If the findings recorded by the Courts below are based on no evidence or based on evidence, which is not legally admissible, then this Court can treat those findings as perverse. If the findings recorded by the Courts below are perverse, certainly

this Court can set aside those findings while exercising the jurisdiction under Section 100 of C.P.C. The findings recorded by the trial Court as well as the first appellate Court are based on evidence much less legally admissible 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. There is no question of law much less substantial question of law is involved in this appeal. Hence, the appeal is liable to be dismissed.

12. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs.

13. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 25.10.2018
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T. SUNIL CHOWDARY, J

