

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS APPEAL Nos.431 AND 432 OF 2018

COMMON JUDGMENT:

These two Civil Miscellaneous Appeals, under Order XLIII, Rule 1 of the Code of Civil Procedure, 1908 (for short 'Code') are filed by respondent No.4 - defendant No.4 in I.A. No.1435 of 2016 in O.S. No.427 of 2016 and petitioner in I.A. No.570 of 2018, aggrieved by the orders, dated 22.01.2018 and 16.04.2018, respectively, passed by the learned VII Additional District Judge (Fast Track Court), Visakhapatnam.

2. The appellant in both these appeals was respondent No.4 in I.A. No.1435 of 2016 in O.S. No.427 of 2016, and petitioner in I.A. No.570 of 2018 in I.A. No.1435 of 2016 and defendant No.4 in the suit, and respondent No.1 herein, who is plaintiff in the aforesaid suit, filed the petition - I.A. No.1435 of 2016 under Order XXXIX, Rules 1 and 2 of the Code, to restrain the respondents therein from interfering with their peaceful possession and enjoyment over the plaint schedule property including plying of their vehicles through the plaint schedule property by erection of iron poles at the places shown as B & C and E & F, during pendency of the suit. Whereas, I.A. No.570 of 2018 was filed before the trial Court by the appellant herein, who is respondent No.4 in I.A. No.1435 of 2016 under Order XXXIX, Rule 4 read with 151 of the Code to modify or set aside the interim injunction granted in I.A. No.1435 of 2016. But, the trial Court passed separate orders in both the

petitions on different dates granting the temporary injunction in I.A. No.1435 of 2016, while dismissing the petition in I.A. No.570 of 2018 filed by the appellant herein.

3. Aggrieved by those two independent orders, dated 22.01.2018 and 16.04.2018 passed in I.A. Nos.1435 of 2016 and 570 of 2018, respectively, both these appeals are preferred by respondent No.4 - defendant No.4 under Order XLIII, Rule 1 of the Code, challenging the proprietary and legality of the orders passed by the trial Court.

4. Respondent No.1 herein is the plaintiff in O.S. No.427 of 2016, while appellant and respondent Nos.2 to 4 are defendants in the said suit before the trial Court.

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

6. The plaintiff before the trial Court filed the petition - I.A. No.1435 of 2016 under Order XXXIX, Rules 1 and 2 of the Code, alleging that it is an Association known as "M.A.N. Nagar Residents Welfare Association". Peesa family was the owner of an extent of Acs.1-09 cents in Survey No.319/2B of Madhurawada Village. Sri Mandapati Surya Venkata Krishnam Raju and the said Peesa family developed a residential Layout with seven (07) Flats each on East and West Side of 33 Feet road in the above land in the name of his father. The layout was duly approved by the Madhurawada Panchayat during 1999.

i) The owners of the plots in the said Layout formed into a society under the name and style 'M.A.N. Nagar Residents Welfare Association' and it was duly registered with Society No.1474 of 1999. Some of the members of the said Association sold their plots/houses in the said Layout to others.

ii) During 2010, owners of the Plots/Houses in the Layout changed the name of the Association as "Sri Sairam Colony Welfare Association", which is the plaintiff in the suit. The said society is duly registered with the Registrar of Societies, Visakhapatnam as Society No.734 of 2010.

iii) As there was no approach road to the Layout from 60 feet VUDA Main Road, to provide a direct approach road to the Layout, the predecessor of the plaintiff i.e., M.A.N. Nagar Residents Welfare Association, through its President, Sri Mandapati Surya Venkata Krishnam Raju, purchased an extent of 238 square yards in Survey No.317/1 covered by Patta No.2665 of Madhurawada village from its owner, Sri Chukka David S/o Issac under a registered sale deed, dated 16.08.1999, which was registered as document No.985 of 1999 in the Sub-Registrar office, Madhurawada. The said Association with its funds developed the said land by laying a 33 feet road, constructing the drainage canals on both sides of the road and erecting street lights on both sides of the road. The association also constructed a compound

wall around its site and erected a gate at the entrance of the road to develop the colony as a gated community.

iv) Ever since the date of purchase in August, 1999, the members of the earlier association and the plaintiff have been exercising absolute rights of ownership over the land and the road developed by it and exclusively using the road for ingress and egress from the main road to the knowledge of the general public without any interference from anyone.

v) While the matter stood thus, Visakhapatnam Urban Development Authority (VUDA) acquired the southern side land measuring 40 square yards covered by Survey No.317/1 for road widening during 2013, and the plaintiff has been in exclusive possession and enjoyment of the net extent of land covered by the road, drainage canals and the electrical poles measuring 198 square yards, which is shown as A, B, C and D in the rough sketch annexed to the plaint.

vi) Defendant No.1 intended to construct Residential Apartments in the land in Survey No.315, situated to the north of the plaintiff's colony, and as there was roundabout approach road to the said land and to have an easy and direct approach to the site, defendant No.1 requested the plaintiff to permit them to use the schedule property and 33 feet road of the plaintiff association so as to ply their vehicles to carry the construction materials to its site and executed an agreement, dated 08.12.2010 to that effect, and agreed to construct a compound

wall on the northern side of its site from East to West and further specifically agreed not to give any permission to others to use the plaintiff schedule property without the consent of the plaintiff. Thus, defendant No.1 used the site and the road with the permission of the plaintiff and, therefore, the enjoyment of the road was only a permissive enjoyment.

vii) In terms of the agreement, dated 08.12.2010, the plaintiff removed part of the compound wall at the place shown as E&F in the rough sketch annexed to the plaint and permitted defendant No.1 to use the road only for shifting construction material. Defendant No.1 constructed three apartments by name TEJA Grand, TEJA Heights and SURYA Residency. However, after completion of the construction, the plaintiff is in exclusive enjoyment of the plaintiff schedule property, and the defendants have no right to use the same.

viii) In the month of November, 2014, defendant No.2 started construction of Apartments in the site situated to the north of the site belonging to defendant No.1 and in view of roundabout approach road to its site, defendant No.1 colluded with defendant No.2 and illegally and unlawfully without permission of the plaintiff association and in gross violation of agreement, dated 08.12.2010, demolished a part of the compound wall situated on the northern side of its site at the place shown as H & I to facilitate defendant No.2 to use the suit schedule property to ply its vehicles for carrying construction material to the construction site. Thereupon, a notice, dated 24.11.2014 was got issued by the plaintiff to defendant Nos.1 and 2 complaining about the

violation of terms and conditions of agreement, dated 08.12.2010, but defendant No.2 played fraud falsely showing the plaint schedule property of the plaintiff association as public road and submitted the Building Plans to defendant No.5 - Greater Visakhapatnam Municipal Corporation, for approval. Defendant No.5 without verifying the records, blindly and illegally sanctioned the Building Plans in violation of the provisions of Municipal Corporation Act, and the plaintiff got issued legal notice dated 09.02.2015 to defendant No.5 questioning approval of the building plan for the proposed construction by defendant No.2 in violation of Municipal Corporation Act, but no action was taken. Therefore, the plaintiff association was constrained to file suit O.S. No.595 of 2015 pending on the file of the learned VI Additional Senior Civil Judge, Visakhapatnam against defendant Nos.1, 2 and 5 for permanent injunction restraining defendant Nos.1 and 2 from using the plaint schedule road, and obtained an interim injunction order in I.A. No.426 of 2015, dated 22.04.2015 and it is still subsisting.

ix) To circumvent the interim injunction order, defendant Nos.1 and 2 devised dubious means and defendant No.2 transferred its rights in the Apartment to defendant No.3, who started construction in the Apartment. The plaintiff filed I.A. No.98 of 2016 to implead defendant No.3 and its Managing Partner, Gedela Srinivasa Rao, as defendant Nos.4 and 5 to the suit - O.S. No.595 of 2015. Defendant No.3 has been using the plaint schedule property for plying its vehicles inspite of the caution notice. Defendant No.4 also started construction of Apartment

in the site situated to the north of the site belonging to defendant No.1 and illegally and unlawfully plying its vehicles through the plaintiff schedule property without any right and authority and consent of the plaintiff association.

x) Since the suit schedule property is the exclusive property of the plaintiff and the residents of three apartments, viz., TEJA Grand, TEJA Heights and SURYA Residency were permitted to use the plaintiff schedule property for ingress and egress to their respective apartments, and no others have any right to use the plaintiff schedule property. Defendant Nos.2, 3 and 4 have no right to use the plaintiff schedule property for plying their vehicles with material without permission of the plaintiff association and raised an objection for plying their vehicles, thereupon, there was a quarrel among them, and thereby to protect the property of the plaintiff, they filed the suit for permanent injunction along with an application under Order XXXIX, Rules 1 and 2 of the Code for grant of temporary injunction during pendency of the suit.

7. The trial Court initially, granted ad-interim injunction and ordered notice. On appearance, defendant No.3 filed counter denying the material allegations, *inter alia*, contending that MAN Nagar Residents Welfare Association was the owner of the suit land and that the plaintiff is not the owner. While admitting about filing of the suit - O.S. No.595 of 2015 and obtaining orders in I.A.No.426 of 2015, it is stated that it is not a party to the said petition.

i) It is further contended that itself i.e., M/s. Ascent City Homes, represented by its Managing Partner entered into an agreement with Sri S. Srinivasa Rao and others for construction of apartment and obtained approvals. The said Srinivasa Rao and others executed development agreement with irrevocable General Power of Attorney in its favour and the plaintiff is Secretary to Sri Sairam Colony Welfare Association. The plaintiff filed suit against M/s. Teja Developers and two others in O.S. No.595 of 2015 and interim orders were obtained. But, as per the Flexy Board put up by the plaintiff in Sy.No.317/1 (part) is not in existence as it was purchased by M.A.N. Nagar Residents Welfare Association for the purpose of laying a road and said association never transferred any rights to the plaintiff.

ii) Defendant No.3 is a developer - cum - General Power of Attorney Holder for S. Srinivasa Rao and others, and the said Srinivasa Rao purchased the property in the year 2000 from S. Sambireddy, who, in turn, purchased the property in 1991 from P. Sambasiva Rao and all these persons were enjoying the road without any obstruction by any one including the plaintiff. The GVMC also granted permission and recognized the 30 feet road existing as shown in the plan and the GVMC also invested the amounts and constructed canals by the side of the road, so also electricity board erected electricity poles, also provided electrical transformers, connections to apartment and also to the individual houses.

iii) It is further contended that there was a road in existence for the last more than fifteen (15) years and width of the road is 30 feet, the same is being used by the public and it is not a private road and, therefore, the plaintiff has no right to restrain the defendants from using the road to reach the main road from their residential houses and that defendant No.3 is entitled to enjoy the road from the apartments; that defendant No.3 has no other road to reach the main road, and requested to dismiss the petition.

8. I.A. No.570 of 2018 is filed under Order XXXIX, Rule 4 read with 151 of the Code by defendant No.4 to vacate the ad-interim injunction granted in I.A. No.1435 of 2016 in O.S. No.427 of 2016 on the grounds urged in the counter referred above. Therefore, to avoid repetition, the allegations made in the counter extracted above are suffice to decide the real controversy between the parties.

9. During inquiry, no oral evidence was adduced, but marked Exs.P-1 to P-16 on behalf of the plaintiff before the trial Court, and no documents were marked on behalf of the appellant - defendant No.4 or any other defendants in I.A. No.1435 of 2016, which was filed by the plaintiff. But, in I.A. No.570 of 2018, which was filed by the appellant - defendant No.4, no oral evidence was adduced on either side, but on behalf of defendant No.4, who is petitioner in the said I.A., Exs.P-1 to P-5 were marked, whereas Exs.R-1 to R-24 were marked on behalf of plaintiff.

10. Aggrieved by the orders passed by the trial Court in I.A. No.1435 of 2016 and I.A. No.570 of 2018, these two Civil Miscellaneous Appeals are preferred. The grounds in both the appeals are identical. Therefore, to avoid repetition, it is appropriate to advert to refer the grounds in both the appeals.

11. The trial Court did not consider Ex.P-1 - sale deed in proper perspective as it was bought for the purpose of creating access to the property of plaintiff from 60 feet road and it was extended to other properties in due course by the Municipality while granting permission for construction, and that the trial Court ought to have seen that while approving the plan for construction to defendant No.4, the Municipality has taken the existing road as an access to the connecting 60 feet road.

i) It is also contended that 30 feet road was laid in due course of time, and due to long usage by the residents of the colony, it became a public road and vested the road with the Municipality. Therefore, the plaintiff cannot claim exclusive right to enjoy the road.

ii) It is also contended that the trial Court failed to consider the three requirements for grant of injunction, they are; i) *prima facie* case; ii) balance of convenience; and iii) irreparable injury likely to be suffered by the parties in case of injunction is granted and committed a grave error in dismissing the petition filed by defendant No.4 while making the ad-interim injunction as absolute till the disposal of the suit.

iii) It is also contended that various documents produced before the trial Court are not considered in proper perspective and committed a serious error which warrants interference of this Court by exercising power under Order XLIII, Rule 1 of the Code and requested to set aside the orders passed in both I.A. Nos.1435 of 2016 and 570 of 2018 in O.S. No.427 of 2016.

12. The plaintiff filed the petition under Order XXXIX, Rules 1 and 2 of the Code for grant of temporary injunction during pendency of the suit - O.S. No.427 of 2016 restraining the defendants including defendant No.4 from interfering with their peaceful possession and enjoyment over the plaint schedule property, to prevent plying of vehicles through plaint schedule property by erection of iron poles at the places shown as B & C and E & F as shown in the rough sketch annexed to the plaint. Defendant No.4, who is appellant herein, filed I.A. No.570 of 2018 under Order XXXIX, Rule 4 read with 151 of the Code to discharge, vary or set aside the orders of interim injunction granted in I.A. No.1435 of 2016. The plea of defendant No.4 in both I.A. No.1435 of 2016 and in I.A. No.570 of 2018 is one and the same.

13. During hearing, for different reasons, two different set of documents were marked in both I.As. In I.A. No.1435 of 2016, Exs.P-1 to P-16 were marked on behalf of the plaintiff, whereas in I.A. No.570 of 2018, Exs.R-1 to P-24 were marked on its behalf. The documents marked in 'R' series in I.A. No.570 of 2018 and 'P' series in I.A.

No.1435 of 2016 are filed by the plaintiff before the trial Court. But, whereas, in I.A. No.1435 of 2016, no documents were marked on behalf of defendant No.4, who is appellant herein, but marked in 'P' series as Exs.P-1 to P-5 on his behalf.

14. When two petitions are filed, one for grant of temporary injunction, and the other is for discharge, vary or set aside the ad-interim injunction granted by the trial Court, the normal procedure to be followed by the Presiding Officer of the Court is, to hear both the petitions and pass a common order marking the documents, if any, produced before it. Instead of following the normal procedure, the Presiding Officer of the trial Court adopted a different procedure and marked two different set of documents in two petitions and decided both the petitions by separate orders on different dates. Marking of documents independently in both the petitions is an error and it would cause much inconvenience not only to the trial Court, but also to the appellate Court to refer those documents while deciding the appeals by the appellate Court and the petitions by the trial Court. Therefore, the procedure adopted by the trial Court is an irregular. Similarly, marking of documents in 'R' series and 'P' series is contrary to Rule 115 of the Civil Rules of Practice.

15. Though the trial Court disposed of both the petitions independently, the documents produced by the appellant marked as Exs.P-1 to P-5 in I.A. No.570 of 2018 were not considered in I.A.

No.1435 of 2016. Similarly, Exs.R-17 to R-24 marked in I.A. No.570 of 2018 on behalf of the plaintiff were not considered in I.A. No.1435 of 2016.

16. In deciding both the petitions in separate inquiry is a serious irregularity and this Court can exercise power to set right such irregularity by exercising power under Order XLIII of the Code. When Exs.P-1 to P-16 alone were marked in I.A. No.1435 of 2016, the documents marked as Exs.P-1 to P-5 in I.A. No.570 of 2018 cannot be considered when both the petitions are independently decided. Similarly Exs.R-17 to R-24 in I.A. No.570 of 2018 though Exs.R-1 to R-16 are the same documents marked as Exs.P-1 to P-16 in I.A. No.1435 of 2016, but, on account of marking the documents in two different series in two petitions, it is difficult to consider those documents by the appellate Court.

17. Therefore, the procedure adopted by the trial Court is irregular and the orders, dated 22.01.2018 and 16.04.2018 in I.A. No.1435 of 2016 in O.S. No.427 of 2016 and I.A. No.570 of 2018 in I.A. No.1435 of 2016 in O.S. No.427 of 2016, respectively, passed by the learned VII Additional District Judge (Fast Track Court), Visakhapatnam, based on such irregular procedure, are hereby set aside while remanding I.A. Nos.1435 of 2016 and 570 of 2018 to the trial Court with the following direction.

- a) The trial Court is directed to hear both the petitions and pass a common order;
- b) The trial Court is directed to consider marked documents strictly adhering Rule 115 of the C.R.P.;
- c) Mark the documents either in I.A. No.1435 of 2016 or in I.A. No.5760 of 2018 as 'A' and 'B' series to avoid confusion in consideration of those documents to come to a just and independent conclusion; and
- d) The trial Court is directed to dispose of the said petitions within a period of two (02) months from the date of receipt of a copy of this order.

18. With the above direction, both these Civil Miscellaneous Appeals are allowed. However, in the circumstances of the case, there shall be no order as to costs.

Consequently, Miscellaneous Applications, if any, pending in the appeals, shall stand closed.

M. SATYANARAYANA MURTHY, J

November 30, 2018
Mgr