

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.455 OF 2000

JUDGMENT:

The defendant in O.S. No.46 of 1985 is the appellant in the present second appeal.

2. Respondent herein filed suit in O.S. No.46 of 1985 on the file of the Principal District Munsiff, Sattenapalli, for mandatory injunction directing the appellant herein to remove the wall between 'X' and 'Y' points shown in plaint plan and sought for permanent injunction restraining the appellant and his men from in any way interfering with her peaceful possession and enjoyment over the plaint schedule property.

3. The respondent - plaintiff was unsuccessful before the trial Court, but she was successful in the Appeal Suit No.51 of 1992 on the file of the Principal Senior Civil Judge, Narasaraopet, preferred by her, whereby and where-under, the appeal suit was allowed, by judgment, dated 08.03.2000, setting aside the judgment and decree, dated 03.04.1992, passed in O.S. NO.46 of 1985 and granting decree for mandatory injunction and perpetual injunction.

4. Heard Sri B. Chinnapa Reddy, learned counsel for the appellant - defendant, and Sri G. Srinivasa Rao and Sri K. Gani Reddy, learned counsel for the respondent - plaintiff.

5. The appellant herein is the defendant in the aforesaid suit, while respondent is the plaintiff.

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

7. Since it is a reversal judgment, a few relevant facts are necessary to advert to in order to trace out the source of title and the physical features of the property as on the date of filing the suit when compared with the physical features as were available and obtained when the extents were purchased by the plaintiff and the defendant.

i) The plaintiff claims that her husband - Somu Satyanarayana purchased the plaint schedule property from one Grandhi Alivelu Mangamma under a registered sale deed, dated 22.08.1970 for consideration of Rs.4,000/- and he was put in possession on the same date and that portion was let out to tenants and he executed his last Will and Testament, dated 01.05.1980 in a sound disposing state of mind in plaintiff's favour bequeathing the schedule property and some other property and died on 22.06.1980. She took possession of the schedule property and enjoyed the same in her own right.

ii) She would allege in the plaint that the defendant during the life time of her husband in the year 1971, filed a suit for partition in O.S.No.46 of 1971 on the file of the very same Court against Grandhi China Adudeyya, Somu Satyanarayana and others claiming that he purchased the half share in the schedule property from one Grandhi

Kotamma, wife of China Venkayya under a registered sale deed, dated 02.09.1970. The said suit was dismissed on contest, holding that Grandhi Kotamma had no title to sell the half share in the schedule property. When the defendant preferred Appeal in A.S. No.79 of 1977 on the file of the Principal Subordinate Court, Narasaraopet, he was unsuccessful. Therefore, he preferred the second appeal on the file of this Court, which was pending on the date when the trial Court disposed of the present suit. But, however, he lost the second appeal also when appeal was pending before the appellate Court as could be seen from the observations made by the appellate Court.

8. The whole dispute relates to construction of wall between points X and Y by the defendant encroaching an extent of land in a width of 9" all along between X and Y points as shown in the plaint map. There is no need to refer to other allegations in regard to the rejoinders twice filed by the plaintiff answering the amendments introduced by the defendant in his written statement.

9. The defendant, in his written statement, claimed that there was an old wall existing in a width of 24" which was a mud wall, and when it was collapsed about ten years prior to the institution of the suit, he raised a wall in a width of 6". Therefore, he got 9" space towards his share and he did not encroach into the land belonging to the plaintiff, and the plaintiff unjustly claiming mandatory injunction and also perpetual injunction. That has been the substance of the entire case set out by him in his written statement.

10. The trial Court on the basis of the pleadings available on record, initially, settled the following two issues on 28.07.1986 thus:

- “1. Whether the plaintiff is entitled to the mandatory injunction?
2. To what relief? ”

i) Again on 20.09.1991, the trial Court settled the following additional issue:

“Whether the plaintiff’s premises is correctly described by metes and bounds?”

ii) Then again the trial Court framed yet another additional issue thus:

“Whether the plaintiff is entitled to permanent injunction as prayed for?”

11. In order to substantiate their respective cases, the plaintiff examined PWs.1 to 4 and marked Exs.A-1 and A-2, whereas, the defendant examined himself as DW.1 and another witness as DW.2 and marked Exs.B-1 to B-3. The commissioner, who submitted report, was examined as PW.4 and related documents have been marked as Exs.C-1 to C-6.

12. The trial Court appreciating the evidence on record, somehow, even entered into the arena of deciding whether the Will was genuine and then negated the claim made by the plaintiff recording all findings against her. No doubt, the trial Court went on discussing the evidence of PWs.1 to 4 and DWs.1 and 2, but obviously, it appears that the trial Court, somehow, went wrong in

appreciating the evidence in proper perspective. This would be adverted to a little later after adverting to what has been held by the learned appellate Judge and, thus, ultimately, dismissed the suit, by judgment and decree, dated 03.04.1992. In fact, the suit relates to the year 1985 and the parties have been litigating for the past more than 32 years.

13. Aggrieved over the said judgment and decree, the plaintiff preferred the regular first appeal as mentioned in the above. The appellate Court, of course, formulated the points for consideration having referred to relevant facts and the matter in controversy, the evidence let in by the parties respectively, and the findings recorded by the trial Court. The appellate Court having found from the evidence of DWs.1 and 2 and PWs.1 to 4, upheld the Will as no suspicious circumstances have been brought on record by the defendant. Thus, the finding recorded by the trial Court was overturned. Thereafter, the appellate Court has dealt with the reliefs claimed in the suit by the plaintiff.

i) The learned appellate Court, on an independent analysis of evidence of DWs.1 and 2, found that a mud wall in a width of 24” was, originally existing between the houses of defendant and DW.2, who is the adjacent house owner of defendant on western side, and when it was demolished, a mud wall in a width of 6” was raised and, thus, both of them got 9” space i.e., defendant got 9” space towards western side, whereas DW.2 got 9” towards eastern side. On the same

analogy, the learned appellate Court also viewed that the mud wall in a width of 24" existing earlier between the houses of plaintiff and defendant when collapsed, the defendant raised a cement brick wall in 6" space. The defendant, in fact, encroached 9" area of the plaintiff's site in 24" common mud wall existing earlier, and thereby found that there is truth in the allegations made by the plaintiff and, therefore, held that the plaintiff is entitled to both mandatory and perpetual injunctions as requested and, accordingly, he allowed the appeal and set aside the judgment and decree passed by the learned trial Court by granting decree.

14. The said judgment and decree have been under challenge in the present second appeal.

15. The learned counsel for the appellant - defendant, Sri B. Chinnapa Reddy, would submit that the judgment rendered by the appellate Court is unsustainable for the reason that no distinct points have been formulated touching mandatory injunction and perpetual injunction and even the appellate Court failed to notice that the said reliefs, without seeking a declaratory relief cannot be maintained and, therefore, it is according to him that these two points would constitute substantial questions of law and, thus, supported the findings recorded and the judgment and decree passed by the trial Court and requests to set aside the judgment of the lower appellate Court.

16. In fact, on 07.07.2000, when the present second appeal was admitted, this Court recorded that ground No.3 in the grounds of

present second appeal constitutes substantial questions of law, but, however, distinctly the same was not formulated. Therefore, it is necessitated to formulate the following substantial questions of law.

- i) Can a judgment be pronounced without framing issues and without determining the points for consideration, and for want of formulation of points for determination, can judgment be treated as a judgment in the eye of law?
- ii) Whether a suit mandatory injunction and perpetual injunction without seeking relief of declaration is sustainable, particularly when the contesting party is admittedly in possession and enjoyment over the property?

17. So far as the title over the properties of respective parties is concerned, there is no dispute since title deeds have been filed. In fact, there was no relief seeking declaration for the reason in Ex.A-1, it is clearly mentioned as observed by the appellate Court that the wall between the plaintiff and defendant portions was in a width of 24", which was collapsed being an old mud wall, and after its collapse, there remained site in 24" width all along between X and Y points and PW.1 and DW.1 are entitled to equal extent of site in place of collapsed joint wall, but the defendant while constructing a cement brick wall with 6" width on the extreme eastern side of collapsed mud wall increased site by 18" though, he is actually entitled to 9" and, therefore, the excess site which the defendant encroached was to the

extent of 9'' in width between X and Y points, which belongs to the plaintiff. In fact, the appellate Court based on the Commissioner's report and his evidence as he was examined as PW.4 through whom Exs.C-1 to C-6 were marked found from Exs.C-1 and C-2, which are Commissioner's report and the plan that the defendant constructed the wall through XY without leaving any space or site towards share of the plaintiff in the site on the collapsed mud wall; encroachment according to Ex.C-2 plan is to a length of 6'' and width of 9''; that making the width of the defendant's site increasing XY wall is 7'.10''; the evidence of DWS.1 and 2 as admitted by PW.1 goes to establish that on the southern side, the defendant raised a tiled pancha resting on the XY wall and further south of it the vacant site of defendant is with napa stones and he is using it by opening F door way; whereas the southern vacant site of plaintiff is with earth and there is no napa stones; the advocate commissioner in his report mentioned that PW.1 and DW.1 admitted that on the southern side of both plots A, B at points C and D, there is a wall running to west in which DW.1 opened a door way and using it as a backyard; the Commissioner further noticed that XY wall was constructed, about 20 days prior to his visit, in a line with the eastern edge of the joint wall and the tiled vasara is resting on the newly constructed wall between XY; he also answered the defendant's work memo, wherein he stated that by construction of cement brick wall with 6'' width a space of 9'' was added to him on account of the replacement of the old wall; the commissioner also noticed the construction of 6'' cement brick wall by defendant on the

eastern edge of joint wall thereby increasing his site by 9””; in all the evidence of PW.1 and PW.4 and Exs.C-1 and C-2 and the recitals in Ex.A-1 will establish that the defendant encroached 9” of site of the plaintiff by constructing a compound wall on the extreme western edge of the plaintiff’s site, and also certain other observations have been made by analyzing the evidence of DW.1 as regards DW.1 increasing his site all along 9” by constructing joint wall in 6” at the eastern edge from the old compound wall and held that the trial Court, somehow, overlooked it and recorded a wrong finding, and thereby held the point in favour of the plaintiff setting aside the judgment and decree passed by the trial Court and granting decree in favour of the plaintiff, directing the defendant to remove the wall between XY points as shown in the plaint plan within three months from the date of judgment by way of granting injunction and also granted perpetual injunction restraining the defendant and his men in any way interfering with the plaintiff’s peaceful possession and enjoyment over the schedule property.

18. The main contention of the learned counsel for the appellant - defendant herein is, that the appellate Court did not properly appreciate the evidence on reappraisal and went wrong in recording a finding that the defendant encroached 9” site of the plaintiff though, in fact, 9” site got by the defendant was on account of construction of 6” wall in place of 24” mud wall earlier existed and

this aspect was not properly considered by the appellate Court, and thereby rendered a wrong finding which is liable to be set aside.

i) His further submission is that the appellate Court did not adhere to the mandatory provisions of Rule 31 of Order XLI of the Code of Civil Procedure, 1908 and failed to determine the points for consideration distinctly and, therefore, the judgment rendered by the learned lower appellate Court cannot be construed as a judgment in accordance with the provisions of CPC, and on this short ground also, the second appeal is to be allowed setting aside the judgment and decree.

19. Per contra, the learned counsel for the respondent - plaintiff would support the findings recorded by the lower appellate Court contending, the very fact that the Commissioner's Report and evidence of PW.1, besides the evidence of DW.1 showing that new wall was raised by the defendant at the extreme eastern edge of the old existing mud wall would clearly indicate that the defendant encroached 9" site which the plaintiff would have got as the joint wall width was reduced to 6" from 24" mud wall existing hitherto.

20. Adverting to the submissions of the learned counsel for the defendant that proper points for determination have not been framed by the appellate Court, it is to be stated that a comprehensive point has been formulated and it is not as though that no point for determination was formulated. Under the comprehensive point, the appellate Court

distinctly dealt with proof of Will propounded by the plaintiff and the suit dispute for mandatory injunction and perpetual injunction. When the point determined was formulated as a comprehensive point, it cannot be said that there has been violation of provisions of Rule 31 of Order XLI of CPC. Therefore, there is no merit in that submission.

21. Now, turning to the reliefs of mandatory injunction and perpetual injunction granted by the appellate Court, a comprehensive reading of evidence of PWs.1 to 4, more particularly, evidence of PW.1, PW.4 and DWs.1 and 2 and Exs.C.1 to C.3, it is abundantly clear that the present wall constructed by the defendant is on the extreme edge of eastern side which hitherto existing 24” mud wall. When a joint wall was sought to be raised after collapse of earlier mud wall due to rains, as contended by the defendant, he ought to have sought the consent of the plaintiff and cannot take undue advantage of physical absence of the plaintiff as the portion was in occupation of the tenants of plaintiff and raise a wall encroaching 9” space all along to which plaintiff is entitled in 18” leaving 6” width wall which ought to be constructed in the middle of 24” leaving 9” on either side i.e. towards west and east from the common wall. This one circumstance is sufficient to condemn the defence set up by the defendant. The evidence on record was properly reappraised by the learned lower appellate Court and, certainly, does not suffer from any patent illegality or legal infirmity giving rise to formulate substantial question of law. When the findings recorded by the appellate Court

on the Will as well as controversy in relation to encroachment while raising new cement brick wall by the defendant is based on proper appreciation of evidence on record on reappraisal by the learned lower appellate Court, certainly, it cannot be said that the findings recorded are utterly perverse. Therefore, there is no merit in the present second appeal.

22. Thus, the present Second Appeal is dismissed confirming the judgment and decree, dated 08.03.2000, passed in A.S. No.51 of 1992 by the learned Principal Senior Civil Judge, Narasaraopet, whereby and where-under, the judgment and decree, dated 03.04.1992, passed in O.S. No.46 of 1985, by the Principal Junior Civil Judge, Sattenapalli are set aside decreeing the suit for the aforesaid reliefs. In the circumstances, both parties shall bear their own costs.

As a sequel thereto, miscellaneous applications, if any pending in the second appeal, stand closed.

June 07, 2018.
Mgr

A. SHANKAR NARAYANA, J