

THE HON'BLE Dr.JUSTICE B.SI VA SANKARA RAO

SECOND APPEAL No.428 of 2000

JUDGMENT

The second appeal is maintained by plaintiff No.4 including the second appeal respondents/appellants Nos.3 to 5 of O.S.No.107 of 1991 on the file of the Junior Civil Judge, Tadpatri against two defendants who are second appeal respondents Nos.1 and 2 for the relief of perpetual injunction against the defendants to restrain them and their men from interfering with the plaintiffs' peaceful possession and enjoyment of plaint AB schedule property and for mandatory direction to the defendants to close the doorway opened in the CD wall and in case of their failure, to get the same closed through the process of the court and for passing of such other reliefs.

2. Defendants Nos.1 and 2 by common written statement and additional written statement contested the suit opposing the plaintiffs' suit claim.

3. It was after full dressed trial from the evidence of plaintiffs Nos.4, 3 and 1 as PWs 1 to 3 and one Y.Fakruddin, Head Constable as PW 4, with reference to Exs.A1 to A4 partition deed between plaintiffs and defendants, dated 05.03.1983, gift deed executed by plaintiffs Nos.1 and 2 in favour of plaintiff No.3, dated 14.03.1983, rough plaint plan and rough sketch in Cr.No.11/1991 of Muchukota Police Station, dated 03.03.1991 and from the evidence on behalf of defendants, viz., DW 1, the 1st defendant and two more witnesses

i.e, Vadde Subbarayulu, business man and Vallur Balappa, neighbour of the said house property as DWs 2 and 3, and DW 4 the Advocate-Commissioner, appointed during trial with reference to Exs.B1 to B5 marked through him, viz., the commission warrant in I.A.No.465/1991, work memo on behalf of defendants, report and additional report of the Commissioner with plan; with reference to issues settled viz., (1) whether there is no door in the CD common wall?; (2) whether the defendants have no right to open any door in the CD common wall?; (3) whether the plaintiffs are entitled for the declaration and injunction as prayed for?, besides additional issues from the additional written statement pursuant to the amendment of the plaint, as to whether the defendants have opened the new CD wall after the filing of the suit? and whether the plaintiff is entitled for the mandatory injunction as prayed for?, the trial court dismissed the suit on 30.08.1994, holding that there is doorway to the CD wall which is an old one and not a new one to say that the defendants newly opened the CD wall after filing of the suit, much less during subsistence of the injunction order and that even in the partition deed, there is no whisper as to whether they open the doorway to CD wall or to close the doorway of the CD wall and the plaintiffs are not entitled to the said suit reliefs thereby.

4. It is aggrieved thereby all the four plaintiffs maintained A.S.No.17/1994 and the learned Senior Civil Judge, Gooty, by judgment dated 31.01.2000, from the rival contest and having formulated two points covered under Order 41 Rule 32 CPC for

consideration as to whether the plaintiffs are entitled for mandatory injunction for the removal of the doorway of the wall and whether defendants opened the doorway during the pendency of the suit, confirming the trial court dismissal decree and judgment, dismissed the appeal with costs, though the trial court did not award any costs.

5. It is impugning the same, plaintiff No.4 maintained the second appeal, referred supra, by raising the grounds including substantial questions of law that the judgment and decree of the lower appellate court confirming the trial court dismissal decree and judgment for the suit reliefs is unsustainable and the recitals of the partition deed no way shows existence of the doorway, the courts below were not right in dismissal of the suit, that too, having held that the CD wall is a common wall, to have any doorway for anyone exclusively to the common wall detrimental to or infringing the right of privacy of the other co-owner or co-sharer over the common wall and the findings that the doorway was in existence even prior to filing of the suit no way sustainable from the evidence on record, that the courts should not have drawn adverse inference from plaintiffs' non-seeking of appointment of advocate-commissioner to show that no doorway was in existence prior to filing of the suit, leave apart, the question of easementary of necessity even between co-owners and co-sharers for right of passage through the property of the other as servient heritage does not exist or alternative passage to reach their property, and the reasoning of the courts

below in dismissal of the suit is against to the evidence on record instead of decreeing the suit by directing for closure of the doorway to the joint wall.

6. This court admitted the second appeal on 16.06.2000 from perusal of the material on record and after hearing the counsel for the appellant/4th plaintiff supra, by saying the above referred grounds of appeal involving substantial questions of law and the order of the court shows, but for reproduction of those grounds, referred supra, outcome of application of mind which reads as follows:

“The learned counsel for the appellant contends that the finding of both the courts below that the impugned door was in existence even before partition between the parties is based on unwarranted presumption and that the courts below committed an error of law in drawing adverse inference from the fact of the plaintiff not having requested for appointment of a commissioner.

In view of the questions of law i.e., ground Nos.2, 3, 4, 5 and 6, the Second Appeal is admitted.”

7. Heard both sides at length and perused the material on record.

8. In the course of hearing none brought to the notice of the court necessitating for formulating any further substantial questions of law for decision as part of hearing.

9. The //s covered by the second appeal is from the substantial questions of law, involved supra.

10. Coming to the factual matrix in nutshell the case of the plaintiffs including the second appeal appellant/4th plaintiff is common, claiming originally for the relief of permanent prohibitory injunction to

restrain defendants Nos.1 and 2 from interfering with the plaintiffs' possession and enjoyment over plaint AB schedule property, and later amended for mandatory injunction relief to direct the defendants to close the doorway opened to the CD wall, that the plaintiffs Nos.3 and 4 and defendants Nos.1 and 2 are the children of plaintiffs Nos.1 and 2 and there was partition between plaintiffs and defendants covered by Ex.A1 registered partition deed, dated 05.03.1983, and plaintiffs Nos.1 to 3 have taken A-schedule properties of the partition deed, plaintiff No.4 has taken B-schedule properties of the partition deed, and defendants Nos.1 and 2 have taken C & D schedule properties of the partition deed. The ABCD house portion shown in the plaint plan was allotted to the plaintiffs jointly and it covers both plaint AB schedule properties corresponding to partition deed A & D schedule properties.

11. The 2nd defendant Suryanarayana sold away his house portion which is the southernmost to the 1st defendant. Thereby defendant No.1 including the share of defendant No.2 supra, got in the house plaint plan CDEF for, plaint plan ABCD portion belongs to the plaintiff. To the defendants side house portion shown as plaint plan CDEF there are two doorways existing as on the date of partition and as revealed from the partition deed recitals, viz., one door is opening towards south and another towards east. The above facts are not in dispute even from the written statement contest of the defendants, the evidence of which is being discussed hereafter.

12. Coming to the further facts, CD is a demarcating common wall in which for the plaintiffs ABCD portion and for the defendants CDEF portion to say they have equal joint rights to the common wall towards their respective portions with no right of any opening of doors or windows

to it. Pending suit for prohibitory injunction, plaintiffs obtained temporary injunction order and despite the same, since the defendants highhandedly opened new doorway to CD joint wall in the absence of plaintiffs, which made plaintiffs to seek mandatory injunction for its closure is their case. Plaintiffs Nos.1 and 2, who got 2/3rd share in the plaint A-schedule property, executed gift deed under Ex.A2, dated 14.03.1983 in favour of plaintiff No.3, whereunder for the house portion also, they created vested remainder rights by reserving life interest, possession and enjoyment. The defendants are trying to dispossess is their case.

13. The written statement of defendants Nos.1 and 2 is while admitting the relationship and respective shares fallen in partition deed, covered by Ex.A1 and the CD wall is joint, chosen to deny the allegation of their threatening to remove the CD wall or trying to occupy any portion of the plaint plan ABCD house portion. Their contest is that prior to Ex.A1, covered by partition of 1983, the family used to enjoy the entire house covered by plaint plain ABCDEF and CDEF portion fallen to the share of the defendants, was using as kitchen and for other purposes, and ABCD portion was using including for storing agricultural produce and implements and tethering cattle, and the doorway to the CD wall was there in existence since long before the partition effected in 1983 for the convenience enjoyment, and the doorway is intact with door frames, shutters and with locking. After 1983 partition supra, this doorway was being used by defendant No.1 for reaching his dung pit through the northern doorway of the ABCD house, and taking advantage of absence of recitals in the partition deed about its existence, the plaintiffs filed the suit falsely against the defendants alleging as if defendants are threatening to remove the wall or as if after filing of the suit the doorway was

highhandedly inserted in the absence of the plaintiffs. In fact, in the partition deed only the main door was mentioned and not the doorways inside the house portion. From which the existence of the doorway to the CD wall is now disputed by the plaintiffs with say of pending suit it was opened.

14. Item-8 of the B schedule property was alleged as sold away by plaintiff No.4 to one Vennapusa Adinarayana of Ammaladinne and thereby there is no cause of action for the plaintiffs to file the suit. As referred to supra, plaint was amended saying pending suit the doorway is opened to CD wall and despite demand by plaintiffs to close the same, the defendants are refusing to close the doorway opened recently in seeking the mandatory injunction.

15. From the additional written statement, the defendants are disputing the same while denying the said allegation that the doorway to the CD wall is opened after filing of the suit and after obtaining the injunction as false and a belated and engineered version and there can be no mandatory injunction that can be granted much less on those facts.

16. The conclusions and the findings of the trial court, as referred supra, and coming to the findings from discussion of the evidence, referred supra by the trial court, it is observed, particularly, from the judgment from paragraph No.11 onwards that, as per the evidence of PWs 1 to 3, the defendants who were proceeding towards eastern doorway from their portion fallen in the partition in 1983 including to go to manure pits, they tried to open a door to CD joint wall, suit filed and later in the absence of the plaintiffs, defendants highhandedly opened the doorway to the CD wall and seeking amendment of mandatory injunction for its closure.

17. The trial court observed that PW 3, who is no other than the father of plaintiffs Nos.3 and 4 and defendants Nos.1 and 2 supra, in the cross examination, deposed about the existence of the doorway to the CD wall and it is contended that even can be taken of said deposition of PW 3 to the above extent is a typographical mistake in recording of evidence. But plaintiffs did not choose to examine any independent witness of the neighbourhood to show that there was no doorway by the time of filing of the suit and it was opened by the defendants after filing of the suit and granting of injunction, and what PW 4, the Head Constable, Muchukota Police Station, who prepared rough sketch of the scene, covered by Ex.P4 in Cr.No.11/1991, stated that in the rough sketch the houses of PWs 1 to 3, plaintiffs and defendants were shown including the doorway to the plaintiffs, and the scene of offence is situated in front of main doorway, and not mentioned any doorway in between the houses of the plaintiffs and the defendants, for rough sketch no way mentioned inside doorways, thus, his evidence is of no use to the contest of the plaintiffs, for scene of offence of the crime is situated outside and in front of ABCDEF house.

18. For the alleged beating of the defendants by the husband of PW 2, PW 1 admitted of not filed any violation of the injunction application or giving any police report for the alleged doorway, if at all pending suit, and in violation of injunction opened at CD joint wall by the defendants. PW 1 further deposed that the doorway to CD wall is inside the house and even Ex.A1 partition deed did not show any inside doorways. PWs 2 and 3 deposed in their evidence that the door frame and shutters opened to CD joint wall are old. Neither any mason nor any carpenter whose assistance is required for opening the doorway by breaking opening any

portion of joint wall if at all done pending suit were not chosen to examine by the plaintiffs.

19. Plaintiffs cross examined two independent witnesses DWs 2 and 3, one is mason and the other is neighbour to the ABCDEF house property, besides PW 4 - Advocate Commissioner, who inspected the property. DW 1 deposed about the doorway to the CD wall was in existence since prior to Ex.A1 partition deed, as contended in the written statement of CDEF portion earlier was under use as kitchen with entry into it from the remaining house portion covered by plaint plan ABCD, for their convenient enjoyment and it is with shutters and door frame which are old. No doubt for further claim of defendants, they used to have access to the doorway to proceed into the ABCD portion of the plaintiffs to go towards further northern side area to the manure pits, for there is no such recital in the partition for providing right of access of easement by grant or by necessity or the like. As also suggested in the cross examination to DW 1 by the plaintiffs.

20. What DW 2 deposed as mason, constructed ABCD house of 17 or 18 years back, is that plaintiffs and defendants were not the owners of the plaint plan CDEF originally and it was four years after they constructed ABCD house purchased the CDEF house from Muslim people, and plaintiff No.1, father of plaintiffs Nos.3, 4 and defendants Nos.1 and 2 cause opened the doorway to the wall which is CD and he attended masonry work and he was paid wages @Rs.40/- per day for two days for erecting the doorway. He denied the suggestion of it was not he but one Dasanna constructed ABCD house for plaintiff No.1 or he is deposing falsehood.

21. What DW 3, the neighbour, having house within 100 yards away to the house of plaintiffs and the defendants supra, deposed is that

plaintiff No.1 cause constructed ABCD house first and later purchased CDEF house portion from Muslim people, and thereafter CDEF portion is used for kitchen and ABCD portion is using for keeping the agricultural produce and tethering cattle, and thereby to CD wall a doorway was opened within 15 days after the purchase of CDEF house portion from Muslim people by the 1st plaintiff and for the doorway opened DW 3 attended the masonry work.

22. DW 4, the Advocate-Commissioner, who visited the property, filed the reports with plan Exs.B3 to B5, deposed that the door frame and door shutter of the joint wall are age old and not new one. No doubt the Advocate Commissioner deposed that there is no privacy (to the persons of ABCD house portion and their inmates) to the plaintiffs if the doorway of the CD wall is opened, and the house of the plaintiffs in ABCD is higher in level to the house of the defendants CDEF of plaint plan. It is there from the trial court dismissed the suit claim for mandatory injunction.

23. What the appellate court observed in its confirmed judgment is in same line after elaborate discussion negating the claim of the plaintiffs/appellants, including on clarification in the evidence of PW 3 is of we have erected doorway instead of they have erected the doorway (we to mean plaintiffs and they to mean defendants).

24. Now coming to decide the second appeal, undisputedly from the recitals in Ex.A1 registered partition deed including from the evidence of DW 1, there is nothing in the registered partition deed providing any right of passage or access to the defendants from the plaint plan CDEF portion (fell to the share of the defendants in Ex.A1 partition deed) through any doorway from the CD joint wall to gain entry into the plaint plan ABCD portion of the plaintiffs. Once that is not there, it is immaterial whether

the doorway to the CD wall was in existence prior to the filing of the suit or erected after filing of the suit, though the evidence on record clearly shown not erected after filing of the suit, but in existence since prior to the filing of the suit including from the independent witness evidence that of PW 3, DW 3, Advocate Commissioner's report and what PWs 2 and 3 deposed of similar to the commissioner's report in saying the door frame and the door shutter of the CD joint wall erection are old one and not new one.

25. However, the fact remains from what the evidence of the Commissioner-DW 4 in the cross examination reveals of if the defendants gain entry through the said doorway by opening shutter through the CD joint wall into the ABCD portion or even opened the doorway shutter, there is no privacy to the inmates of the plaintiffs of the ABCD portion and that too, when there is no recital for any access even no recital about the existence of the doorway and its closure, the defendants cannot open the doorway shutter in existence though there is no provision made to close the same from the recitals of Ex.A1 partition deed. Once such is the case, when there is no purpose for the defendants to keep the doorway and the shutter to the CD joint wall that too, when it affects the privacy of the plaintiffs to conveniently enjoy their ABCD portion, instead of directing mandatory injunction for removal of the doorway and its shutter, plaintiffs are given liberty to put lock from their side to the shutter and if necessary, to put additional shutter or to close by erection of a wall or other permanent arrangement with any zinc sheet or wooden sheet protection closing the doorway to the CD wall, if necessary, through court of law, by virtue of this, for which the defendants cannot in any manner obstruct, and the Courts below should have granted the relief to that extent in

molding the relief for the same is not amounting to granting of higher relief, leave apart, the appellate court is entitled to mould the relief though cannot grant higher relief.

26. Accordingly, and in the result, the Second Appeal is allowed to the above extent, setting aside the dismissal decree and judgment of the trial court, confirming by the lower appellate court, and by granting the relief in the form of injunction to the plaintiffs by molding the relief of permanent injunction sought for in respect of not to the opening of doorway as not to be used, by also permitting the plaintiffs to put a lock and key from their side by erection of any provision to the shutter and doorway or to construct a wall closing that doorway from their side to prevent entry from CDEF portion of defendants into plaintiffs ABCD portion or at least to put a zinc sheet or wooden frame protective provision without gaining any entry or access to the defendants from that doorway of the CD wall into the plaintiffs ABCD portion, and if necessary, to close down the same through court of law by virtue of this second appeal judgment and decree, for which the defendants cannot cause any obstruction and if there is anything, the plaintiffs are entitled to execute by virtue of the permanent injunction since granted herein to that extent. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Dr. B. SI VA SANKARA RAO, J

Date: 12.06.2018
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