

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

S.A.No.1320 of 2018

Date:02.11.2018

Between.

Moyya Danial Pratap,
S/o Late Anandrao and
seven others.

.....Appellants

And.

Ravada Victor Lauranson,
S/o Late Venkata Ramana
and eight others.

.....Respondents

Counsel for the appellants: Mr. A.Sai Naveen

The Court made the following:



JUDGMENT: (*per Hon'ble Sri Justice C.V.Nagarjuna Reddy*)

This Second Appeal arises out of concurrent findings of fact recorded by the Courts below in E.A.No.272 of 2009 in E.P.No.145 of 2006 in O.S.No.620 of 1994 on the file of the I Additional Senior Civil Judge, Visakhapatnam and A.S.No.156 of 2011 on the file of the IV Additional District Judge, Visakhapatnam.

I have heard Mr. A.Sai Naveen, learned counsel for the appellants, and perused the record.

The respondents filed O.S.No.620 of 1994 for declaration of title and eviction of the appellants from the suit schedule property. The suit was decreed by the trial Court. Aggrieved by the same, the appellants filed A.S.No.214 of 2001, which was dismissed by the lower appellate Court on 15.11.2005. Thus, the said decree has attained finality. The respondents have filed E.P.No.145 of 2006 for execution of the said decree by delivering the suit schedule property. The appellants have filed E.A.No.272 of 2009 objecting to the said E.P. and also filed E.A.No.273 of 2009 for appointing an Advocate-Commissioner for noting down the physical features of the suit schedule property. Both the said applications were dismissed by the trial Court. The lower appellate Court confirmed the said order of the trial Court. Feeling aggrieved by the order to the extent relating to E.A.No.272 of 2009, the appellants have filed this Second Appeal.

The crux of the issue in this Second Appeal is whether the plea of the appellants advanced at the stage of arguments before the trial

Court, viz., that the respondents have sought delivery of suit schedule property along with 30 square yards of property belonging to the appellants was supported by pleadings and evidence.

The trial Court held that the appellants have not made such an averment in the affidavit filed in support of the E.A.

I have carefully perused the said affidavit. Para-5 thereof reads as under:

“I further submit that in fact a case is pending before the Hon’ble High Court, Hyderabad, vide O.S.No.404/95, A.S.No.71/2003,SARS.No.26785/2005, S.A.No.1563 of 2005, SA.No.2989/2005. The same fact is well known to the respondents/D.Hrs. Notices were also served on the respondent all these reasons it is better to know the illegal acts and construction of the wall by respondent. Photographs are also filed along with this petition. The same may be perused and appoint an Advocate-Commissioner to note down the physical features and to note down the new constructed brick wall. Due to the brick wall, my family members especially ladies are suffering to use bath rooms and lavatory. My entire family is suffering for ingress and egress to the bath rooms and lavatory due to that acts, the respondents violating the natural justice.”

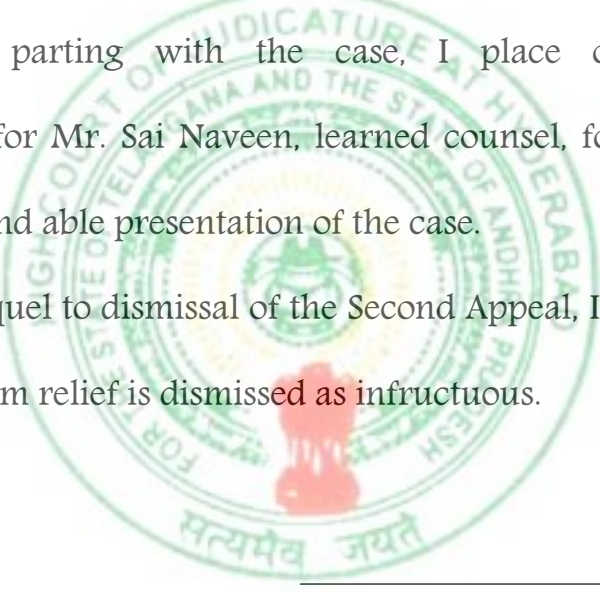
Mr. Sai Naveen, learned counsel for the appellants, admitted that no specific plea was raised in the E.A. that the respondents have encroached 30 square yards of land belonging to the appellants. He, however, submitted that even in the absence of such a specific plea, the Court below ought to have appointed an Advocate-Commissioner to ascertain the said fact.

In my opinion, when the party fails to raise a specific plea regarding the alleged encroachment, he cannot insist upon appointment of an Advocate-Commissioner to ascertain a fact which is not pleaded by him. Both the Courts below concurrently found that the appellants failed to plead and prove that their property was encroached by the respondents and that the delivery warrant covers such encroached property.

For the afore-mentioned reasons, the Second Appeal is without any merit and the same is, accordingly, dismissed.

Before parting with the case, I place on record my appreciation for Mr. Sai Naveen, learned counsel, for his thorough preparation and able presentation of the case.

As a sequel to dismissal of the Second Appeal, I.A.No.1 of 2018 filed for interim relief is dismissed as infructuous.



JUSTICE C.V.NAGARJUNA REDDY

02nd November, 2018

DR