

THE HONOURABLE SRI JUSTICE M.LAXMAN

SECOND APPEAL No.285 OF 2002

JUDGMENT:

1. The present appeal has been directed against judgment and decree dated 18.12.2001 in A.S.No.418 of 1998 on the file of the Court of the IX Additional Chief Judge, City Civil Court (Fast Track Court) at Hyderabad (for short, 'first appellate Court'), wherein and whereby the judgment and decree dated 21.09.1998 passed in O.S.No.5233 of 1995 by the Court of the III Junior Civil Judge, City Civil Court, Hyderabad (for short, 'trial Court'), was confirmed. The said suit, filed by the appellant herein for declaration and mandatory injunction in respect of the suit schedule property, was dismissed. The present appeal is at the instance of the plaintiff.

2. The appellant herein is the plaintiff and the respondent herein is the defendant in the said suit. For the sake of convenience, the parties are referred to as they were referred to in the suit.

3. The sum and substance of the case of the plaintiff is that he is the absolute owner and possessor of house bearing No.15-8-446, consisting of double storied building,

situated at Feelkhana, Hyderabad. According to the plaintiff, a common lane exists between the properties of the plaintiff and the defendant. The defendant, by encroaching upon the common lane, had constructed a staircase, due to which the property of the plaintiff is damaged and his right to air and light has been deprived. In those circumstances, the plaintiff filed the present suit.

4. The case of the defendant is that there is no common lane, as pleaded by the plaintiff. He has made constructions on his land and he has not encroached any land of common lane. The plaintiff has no right to prevent the defendant from his rightful enjoyment over his property by seeking declaration and mandatory injunction and prayed to dismiss the suit.

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

“1. Whether the plaintiff is entitled for the reliefs of declaration and perpetual injunction as prayed for?

2. Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for?

3. To what relief?”

6. The plaintiff in order to prove his case, examined PW.1 and relied upon Exs.A-1 to A-18. On behalf of the

defendant, DW.1 was examined and relied upon Exs.B-1 to B-4.

7. Both the Courts below concurrently found that the plaintiff failed to establish that there is existence of common lane in between the properties of the plaintiff and the defendant, and consequently, held that the plaintiff is not entitled for any declaration and mandatory injunction. Challenging the same, the present Second Appeal is filed at the instance of the plaintiff.

8. This Court, by referring to ground Nos.6 and 8 of the memorandum of grounds, admitted the appeal, but such a procedure is not in tune with Section 100 of CPC and also the decision of the Apex Court, as per which, the Court hearing the Second Appeal has to frame the substantial questions of law. Therefore, the following substantial question of law is re-framed:

“ Whether the findings of the Courts below in denying the mandatory injunction in spite of the construction made by the defendant which affects the light and air to the plaintiff's house property suffer from any perversity?”

9. Heard learned counsel for both sides on the above substantial question of law.

Findings on the substantial question of law:

10. There is no dispute that both the Courts below concurrently held that the suit property is not a common land and the plaintiff failed to establish that the construction of the defendant in the suit property is a common land, which was being enjoyed by the plaintiff and the defendant jointly. Such findings cannot be interfered by this Court in the present appeal.

11. The only question that arises in the present appeal is whether the plaintiff can seek mandatory injunction for removal of the illegal construction of the defendant over the suit property which affects the rightful enjoyment of the plaintiff over his property, more particularly affecting his right to air and light?

12. A suit for removal of illegal construction is maintainable at the instance of the private party if it is shown that such illegal construction affects the right of the plaintiff. If personal injuries are not made out, the relief of the plaintiff falls under the public injury, and for that, a different procedure has been contemplated under the Civil Procedure Code.

13. The main grievance of the plaintiff is that on account of the illegal construction made by the defendant, his property was damaged and his enjoyment to the light and air has been prevented. It is to be noted that the right of light and air is deprived not from the land of his own but he is claiming such enjoyment of rights from the neighbour's land. Therefore, the plaintiff requires to plead and prove that he has easement of light and air from the neighbouring land owner and he has been enjoying such a right within the prescriptive period.

14. In the present case, the pleadings of the plaintiff are lacking with regard to claim of easement and completion of prescriptive period so as to perfect his right of easement. In the absence of such pleadings, it cannot be held that the act of the defendant has affected any personal right of the plaintiff. Therefore, the plaintiff cannot maintain the suit for violation of construction by the defendant and his remedy is otherwise. Therefore, both the Courts below rightly came to the conclusion in denying the relief of mandatory injunction. I do not find any perversity in the findings of the Courts below. Accordingly, the substantial question of law is decided.

15. In the result, the appeal is dismissed, confirming the judgment and decree dated 18.12.2001 in A.S.No.418 of 1998 on the file of the Court of the IX Additional Chief Judge, City Civil Court (Fast Track Court) at Hyderabad. There shall be no order as to costs. Miscellaneous petitions, if any, pending, shall stand closed.

M.LAXMAN, J

Date: 10.08.2022
TJMR