(1996) 12 AP CK 0035

In the Andhra Pradesh High Court

Case No : C.C.C.A. No. 33/89 and C.M.P. 17068 of 1986

Afsar Khan APPELLANT

Vs

Col. Govindacharyula Narsing Rao, rep. by GPA Sri Govindacharyula Venugopal Rao RESPONDENT

Date of Decision : 05-12-1996

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (1997) 2 ALT 211 : (1997) 1 APLJ 135

Hon'ble Judges : P. Ramakrishnam Raju, J

Bench : Single Bench

Advocate : K. Pratap Reddy and S.A. Quddar, for the Appellant; C. Poornaiah, for the Respondent

Final Decision : Dismissed

Judgement

P. Ramakrishnam Raju, J.—The unsuccessful defendant is the appellant. The respondent-plaintiff filed the suit for declaration of his title and for possession of Plot No. 7 admeasuring 383.75 sq. yards of vacant site situated in Survey No. AD 51/4 and 51/2 of Bagh Amberpet, University Road within the limits of Municipal Corporation of Hyderabad, and for consequential relief of mandatory injunction to demolish the existing building in the suit site at the cost of the defendant.

2. The case of the respondent is that his father Sri Govindacharyula Ramarao purchased the plaint schedule site under a registered sale deed dt. 24-6-1963 from one P.V.P. Vithal Prasad. His father bequeathed the said property to him by his will dated 28-12-1975 which was duly probated in O.P. No. 243 of 1978. The respondent being the executor of the said will is competent to file the suit to safeguard the interest of himself and his brothers. As the appellant-defendant under ostensible plea of purchase from one Ramamohana Rao who has no title to the property seems to have obtained permission for construction of a multi-storeyed structure on the suit site and in pursuance thereof started construction. The respondent was serving in Indian Army and after his release, he was

employed in Iraq. The respondent came to Hyderabad for vacation in December, 1983 and noticed the same. Even the sanction for construction of the building was obtained by fraud and by misrepresentation. He issued a notice to the appellant on 30-1-1984, but no reply was received. Meanwhile the illegal construction has reached the level of first floor. Hence the suit.

3. Denying the material allegations, the appellant in his written statement contended that neither Mustaq Ali Khan nor Vithal Prasad was the owner of Survey No. 51/1, but the site belongs to Syed Ajam and others. But as seen from document No. 2001/60 dated 20-8-1960 Mustaq Ali Khan has included Survey No. 51/1 in the sale deed, although he has no right or title to survey No. 51/1. Hence the sale is not binding on the appellant. The respondent has nothing to do with the suit site as the appellant has not encroached any land of the respondent,

4. The respondent examined three witnesses on his behalf including himself as P.W.I, besides marking Exs. A-1 to A-10. The appellant did not examine any witness nor marked any documents. Exs.X-1 and X-2 were marked through P.W.3. The trial Court on a consideration of the material placed on record, decreed the suit, with costs.

5. The point for consideration is whether the decree and judgment of the trial Court is liable to be interfered with?

6. Point: As already stated P.W.I is the plaintiff-respondent.P.W.2 is the attestor of Ex.A-3 sale deed, dated 24-6-1963 executed by P.V.P. Vithal Prasad in favour of plaintiff''s father. Ex.A-4 is the plan attached to the sale deed. P.W.2 also figured as identifying witness before the Sub-Registrar at the time of registration of Ex.A-3. Further, he also attested another sale deed executed by the same vendor in favour of one Yerramilli Subramaniam marked as Ex.A-5. This sale deed relates to plot No. 9 which is an extent of 498.33 sq. yards which is abutting the suit plot on the Northern side. A Clerk working in the Office of Town Planner, Circle III, Municipal Corporation of Hyderabad, Barkatpura was examined as P.W.3. He produced Exs.X-1 and X-2 which are letter from the Director, Town Planning dated 19-4-1963 and the plan respectively. From the evidence of P.Ws. 1 and 2 it is clear that the plaintiff''s father G. Ramarao purchased plot No. 7 i.e., the suit plot under Ex.A-3 sale deed. Ex.A-6 is the certified copy of the sale deed for sale of Plot No. 8 and from the sketch attached to Ex.A-6, it is clear that plot No. 7 which is the suit plot is on the Eastern side of the site under plot No. 8. These documents are proved by P.Ws. 1 and 2. Even in the cross-examination of P.Ws. I and 2 nothing was elicited to discredit their testimony. The appellant did not examine anybody on his behalf. He did not even enter the witness box. Although notice was issued under Ex.A-8 office copy, the appellant having received the same under Ex. A-9 acknowledgment, he kept quite without issuing any reply. These circumstances, as rightly observed by the lower Court, would go a long way against the case of the appellant. Ex. X-1 is the letter addressed by the Director, Town Planning, Andhra Pradesh, Hyderabad to the Engineer, Municipal Corporation of Hyderabad on 19-4-1983 enclosing the

approved lay out plan for further action regarding the sanction of lay out for the vendor of the respondent. Ex.X-2 is the said plan enclosed which was signed by the director, Town Planning. Ex.A-10 is the Blue Print Plan. These things clearly show that the vendor of the respondent''s father was given approval for the lay out of the area in question by the Director, Town Planning, and from the evidence on record discussed above, it is clear that the respondent-plaintiff is entitled to seek for declaration and for vacant possession of the suit site.

C.M.P. No. 17068 of 1986:

7. This application is filed under Order 41, Rule 27 of the CPC to receive certain documents as additional evidence.

8. The petitioner in his application states that he purchased the said plot admeasuring 373 sq. yards under registered sale deed dated 20-5-1983, thereafter, he obtained Municipal permission and constructed a building and at present he is running a Marriage Hall. In fact his vendor purchased the said plot under a registered sale deed dated 11-8-1960. In the list of documents filed along with, the petition the description of the documents is given as

1. Registered sale deed dated 20-5-1983 purchased by the petitioner from his vendor:

2. Sanction plan by the Municipal Corporation in favour of the petitioner dated 6-9-1983:

3. Permission issued by the Municipal Corporation of Hyderabad on 27-7-1983: and

4. Receipt issued by the Municipal Corporation for payment of tax of Rs. 828/- under non-Agricultural Lands Assessment tax

9. Except stating that the petitioner''s vendor has purchased the site under registered sale deed dated 11-8-1960, neither the said sale deed nor a copy of it is filed.

10. In the counter-affidavit filed by the respondent, it is stated that the petition copy was served on the Counsel for the respondent on 11-11-1996 when the case was in the list for a long time, and in fact the appellant has suggested for a compromise and took time which did not ultimately materialise. The suit was filed on 14-2-1984, written statement was filed on . 19-8-1984 and decree was passed on 30-6-1987. Six months time was granted for removal of the building. Appeal was filed on 27-1-1988. The application for additional evidence was not filed till the appeal is actually taken up for final hearing. Therefore, there are no grounds to allow the application for additional evidence.

11. In the petition filed by the appellant for receipt of additional evidence, what all stated is that the original sale deed dated 20-5-1983 and the sanction plan could not be filed at the time of trial although they were referred to in the written statement and in order to determine the real question on merits, it is necessary

that the above documents be received in evidence. The documents could not be filed in the lower Court since the Advocate could not notice the date of hearing.

12. Before examining the merits of the petition a look at Order 41, Rule 27 of C.P.C is necessary which is extracted:

"27 (1). The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary,in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced'', or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

13. A reading of this Rule shows that the parties shall not be entitled to 35 produce additional evidence in the Appellate Court, but there are certain exceptions, they being (1) where the lower Court refused to admit evidence which ought to have been admitted; (2) in spite of exercising due diligence such evidence was not within his knowledge or could not be produced by him in the lower Court; (3) Appellate Court requires any document to pronounce judgment; (4) any other substantial cause.

14. It is not the case of the petitioner that the lower Court has refused the receipt of these documents which ought to have been received, or the evidence is not within his knowledge or could not be produced by him in spite of exercising due diligence. Of course, Sri K. Pratap Reddy, learned counsel for the petitioner submits that these documents are necessary to decide the real controversy between the parties and to enable the Court to pronounce judgment. He also submits that the documents may be received as additional evidence in order to prevent miscarriage of justice and since the mistake was committed by the counsel for the petitioner in the lower Court in wrongly noting the date of hearing and as such, the petition has to be allowed on the ground of any other substantial cause.

15. We shall examine whether the documents are necessary to enable the Court to pronounce judgment, or for any other substantial cause. The evidence on record clearly establishes that the respondent has title to the property. There are no gaps in the evidence of P.Ws. which throw any doubt or suspicion in the mind

of the Court so as to call for additional evidence.

16. A Constitution Bench of the Supreme Court in K. Venkataramaiah v. Seetharama Reddy AIR 1963 SC 1527, observed as follows;

"The requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable "us" to pronounce judgment. Apart from this, it is well to remember that the appellate Court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the Court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence " to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner, such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27 (1) (b) of the Code."

In a later judgment, the Supreme Court in Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others, , observed thus ;

"So far as the application of the appellants for additional evidence is concerned, it cannot be allowed in view of the well settled principles of law that the discretion given to the appellate Court to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in Order 41, Rule 27 of the Code of Civil Procedure. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discertion and the additional evidence so brought on the record will have to be ignored. The true test to be applied in dealing with applications for additional evidence is whether the appellate Court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced Arjan Singh v. Kartar Singh, (1951) 2 SCR 258 . In the instant case, we have not been able to experience any difficulty in rendering the judgment on the material already before us. Instead we feel that the prayer for adducing additional evidence has been made merely to fill up gaps on the basis of some revenue record which has been found by the Collector and the Commissioner to be spurious."

It is also relevant to notice the view expressed by another Constitution Bench of the Supreme Court in State of U.P. Vs. Manbodhan Lal Srivastava, , wherein the following observations are found:

"It is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage, and to fill in gaps. Of course, the position is different where the appellate Court itself requires certain evidence to be adduced in order to enable it to do justice between the parties."

17. In the light of the above decisions, it is clear that additional evidence shall not be received by the appellate court except in exceptional cases, the exercise of the power is not unbridled or unguided. The rule itself provides instances where the power can be exercised. Apart from specific given circumstances the rule also allows certain amount of discretion to the Court. However, such discretion has to be exercised in a judicious way and not arbitrarily and the power cannot be exercised contrary to the principles governing receipt of such evidence. In fact in Nath Singh v. Finl. Commissioner, Taxation, Puni (2 supra), the Supreme Court has left a note of caution that in case of improper exercise of discretion, the additional evidence brought on record will have to be ignored. The true test applied should be whether the trial Court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced.

18. As already seen the petitioner has not taken due diligence in coming forward with this application. It is not his case that the documents are not available with him for all these years. Although the suit was filed in 1984 and the written statement was filed on 19-8-1984, he did not file these documents along with the written statement. He did not even file these documents along with the appeal filed on 27-1-1988. Therefore, it cannot be said that the petitioner has acted with due diligence. That apart, the petitioner has merely filed the sale deed under which he purchased the site which is of the year 1983. He did not even file either the original or copy of the sale deed obtained by his vendor. Therefore, it cannot be said that the Court is unable to pronounce the judgment in the absence of additional evidence which is sought to be adduced. Judgment can be delivered on the basis of the evidence already brought on record. Sri K. Pratap Reddy, the learned counsel for the appellant also contends that the petitioner''s counsel noted wrong date of hearing, and therefore, could not attend the lower Court on the date fixed for hearing and lead evidence on behalf of the petitioner and consequently, the lower Court passed the judgment ex parte on the material available on record. The petitioner could immediately have filed an application in the lower Court to set aside the decree stating all these facts. Such a petition had it been filed it would have disclosed what exactly had happend leading to the judgment and the lower Court would have an opportunity to verify those facts, but instead of doing that, the petitioner has filed this appeal in this Court. This Court cannot verify the same at this length of time. However, Sri K. Pratap Reddy requests that the matter may be remitted back to the trial Court for fresh disposal with a direction to give an opportunity to the petitioner to adduce evidence.

19. I have given anxious consideration for this request and I feel that to remand the matter 12 years after filing the suit to the lower Court once again would certainly cause hardship to the respondent who had filed the suit and who was prosecuting the suit diligently. To set the clock back by 12 years, particularly

when the petitioner failed to conduct his defence diligently in view of the fatal defects pointed out above.

20. In applications filed for reception of additional evidence it is the duty of the Court to examine the documents to find out whether those documents prima facie advance the case of the petitioner and even if these documents are properly proved, they would not advance his case, then it would be improper exercise of discretion to allow their reception. As already stated the petitioner filed the sale deed under which he purchased the site which is of the year 1983. The respondent purchased the site under Ex.A-3 sale deed dt. 24-6-1963. As the sale deed of the petitioner is of subsequent origin from a different vendor unless the petitioner files the title deed of his vendor, he cannot establish the source of his title. Except stating that his vendor also purchased under a different sale deed, not even the certified copy of the said sale deed is produced. Therefore, I am of the view that even if the documents filed by way of additional evidence are received, the case of the petitioner would not be improved. On this ground also reception of additional evidence cannot be permitted.

21. Having regard to the above circumstances, I do not find any ground to allow this application.

22. As already seen there are no grounds to interfere with the decree and judgment of the lower Court. The appeal as well as Civil Miscellaneous Petition are accordingly dismissed, but in the circumstances without costs.

23. I accordingly agree with the lower Court that the respondent is entitled for mandatory injunction. Accordingly, the appellant is granted three months time for delivering vacant possession to the respondent.

