

(1967) 02 AP CK 0003

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1031 of 1962

Garuda Satyanarayana

APPELLANT

Vs

Grandhi Venkatachalapathi Rao and Another

RESPONDENT

Date of Decision : 07-02-1967

Acts Referred:

Easements Act, 1882 — Section 13, 28, 30, 4

Registration Act, 1908 — Section 17

Transfer of Property Act, 1882 — Section 8

Citation : AIR 1969 AP 131

Hon'ble Judges : Gopal Rao Ekbote, J

Bench : Single Bench

Advocate : M.S.R. Subrahmanyam, C.V. Dikshitulu and M. Venkata Rao, for the Appellant; Advocate General and D. Satyanarayana, for the Respondent

Judgement

1. This second appeal is filed by the 2nd plaintiff, whose suit has been dismissed by both the Courts below.

2. The necessary facts in order to appreciate the contentions raised before me are that the 2nd plaintiff, who purchased the building from the official Receiver, the 1st plaintiff, instituted the present suit firstly for a declaration that the lane marked AKJH in the suit plan is joint: secondly, for a declaration that the landing space and a space of 2 feet beyond to the 2nd plaintiff; and thirdly for a declaration that he has got right of easement to light and air to all the doors and windows and finally for a mandatory injunction directing the defendant to demolish the wall B H-2 raised unauthorisedly by him. It was alleged inter alia that G. Krishnamurthy was the owner of a house situated in the main road. Anakapalle described in the plan attached to the plaint. It was the ancestral property of the said Krishnamurthy and his brothers. IN a partition, the said building fell to the share of G. Krishnamurthy. This Krishnamurthy was adjudged as insolvent in I. P. No. 5 of 1955 by the Subordinate Judge's Court. Visakhapatnam and his properties consequently were vested in the Official Receiver the 1st plaintiff. The 1st plaintiff brought this building to sale. The

second plaintiff purchased it for a sum of Rs. 18,000 on 5-4-1957. Possession of the building was given to the 2nd plaintiff on 5-5-1957 and a formal sale deed was executed and registered by the Official Receiver in favour of the 2nd plaintiff on 5-4-1958. The 2nd plaintiff, after he got the title and possession of the said building, fixed iron meshes and swing doors to the doors and windows. It was alleged further that on 16-8-1957 the defendant put up a wall adjacent to the doors and windows and thus obstructed the light and air of the rooms whose doors and windows were open on the side where the wall was constructed. The plaintiffs therefore consequently claimed the reliefs mentioned above.

3. The defendant admitted that there was a partition between him and his brother G. Krishnamurthy and that G. Krishnamurthy was adjudged as insolvent. He also did not dispute the fact that the building was purchased by the 2nd plaintiff from the Official Receiver. He however pleaded that under Exhibit B-3 dated 26-3-1953, G. Krishnamurthy permitted the defendant to erect the wall the effect of which may be to close the doors and windows. He also disputed that the lane AKJH jointly belonged to the 2nd plaintiff and the defendant. He claimed exclusive ownership of the said lane.

4. Upon these pleadings, the trial Court framed appropriate issues and after recording the evidence adduced by the parties dismissed the plaintiff's suit holding that the land AKJH belongs exclusively to the defendant, that Exclusively to the defendant, that Exhibit B-3 is true and genuine and is admissible in evidence. The 2nd plaintiff, who is the successor of the right, title and interest of G. Krishnamurthy cannot object now to the wall which was erected by the defendant.

5. The 2nd plaintiff therefore carried the matter in appeal. The same view was held by the appellate Court.

6. In this appeal, Mr. Subramanyam the learned counsel for the appellant argued that Exhibit B-3 is inadmissible in evidence because it is a document which falls within the ambit of Section 17(1)(b) of the Indian Registration Act & was compulsorily registrable and since it is not registered. It is not admissible in evidence.

7. Before I consider the correctness of this submission, it is necessary to keep in view Exhibit B-3, The relevant portion of Exhibit B-3 is as follows:-

"In our family partition brought about by Sri Thammine Sare Gari Gangaraju Garu, you got for your share the Bungalow and the other sheds therein and open site and I got for my share the building wherein Narayana Iyer as lessee had a coffee club and our brother Ramamurthy got to his share the two remaining shops adjoining my share. Our late father put up windows and door ways on the western and southern sides of the building that fell to my share and also drainage canal on the southern side in the site allotted to your share. But in our partition it was agreed that I should remove it. But subsequent to our partitions, you asked for its removal from time to time. But I assured you that with a view

not to cause any inconvenience to you, I gave "my building on lease with an arrangement that the doors and windows of my building should not be opened. Even so, lest we should forget the above conditions of our partitions, I execute this agreement agreeing to the following condition. Whenever there is inconvenience to you on account of the doors and windows on the southern and western side of my building or when you build buildings, you can, in site, build wall adjoining as you like and I shall not raise any objections."

8. A careful reading of this document would disclose that it refers to two things. Firstly, it refers to the earlier partitions whereat it was agreed that the windows and door-ways on the western and southern sides of the building would be removed by G. Krishnamurthy; and secondly G. Krishnamurthy permitted the defendant to carry on constructions in his site and build wall adjoining the wall mentioned in the document and carry on the construction as he likes and that the said Krishnamurthy shall not raise any objection. It will thus be plain that the document by itself does not declare, create or extinguish any right, title or interest in any immovable property. It merely refers to the fact of an agreement at the time of partition that the doors and windows would be removed and grants necessary permission to the defendant to carry on construction in whatever manner he likes although the result of it may be the closure of the windows and the doorways. The question which has to be considered is whether this document requires registration u/s 17(1)(b) of the Registration Act.

9. Both the Courts below have found that Exhibit B-3 is true and genuine and was not a brought up document. In view of that finding, which is binding upon me, I have to only consider the admissibility of this document.

10. It need not be doubted that in a partition if the building is allotted to G. Krishnamurthy which had doors and windows overlooking the site allotted to the defendant, unless there is a stipulation to the contrary, if the existence of doors and windows were necessary for the enjoyment of the said building G. Krishnamurthy would continue to have right to air and light coming to his building through these door-ways and the windows. An easement, apparent, continuous and necessary for enjoying the portion served from the transferor's land or from the other portion of the partitioned land will undoubtedly pass to the transferee or to the sharer to whose lot the property has fallen unless a contrary intention is expressed either in the instrument of transfer of partition or there has been a specific agreement in regard to that at the time of partition. Unless therefore, there was a stipulation to the contrary at the time of the partition, G. Krishnamurthy would be entitled to the same facilities of light and air that used to be attached to the building before it was partitioned. If Exhibit B-3 had not been there, the position would have been that G. Krishnamurthy could have enforced his right of easement to light and air against the defendant or anyone succeeding his title.

11. It cannot likewise be doubted that a right of easement over another man's property is an interest in the property, but it cannot be said that the dominant

owner has a right or title to the servient tenement. A right to easement does create an interest in the servient tenement, Such right of easement to light is expressly treated as an immovable property in Section 2(6) of the Indian Registration Act. What must follow is that an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property is a compulsorily registrable document u/s 17(1)(b). What has therefore to be seen is whether Exhibit B-3 extinguishes the right of easement which has accrued to G. Krishnamurthy.

12. The question whether a particular document purports or operates to extinguish any right, title or interest in property must be determined on a construction of such document and in deciding that question one has to take the document as a whole and construe it with reference to its terms. Such construction is to be determined by grammar and logic, the primary tools of interpretation, aided of course by accompanying circumstances which throw light on the meaning and intention of the parties concerned. If on such construction, the document is held as purporting or operating to extinguish the right or interest in immovable property of the value of Rs. 100 or upwards. It is compulsorily registerable under the said clause. On the other hand if it does not purport or operate to extinguish any right or interest, it is evident that it would not be a compulsorily registerable document.

13. It must be remembered that being a disabling provision, Section 17 must receive the strict construction and unless a document is clearly brought within its purview its non-registration would be no bar to the admissibility of the document in evidence. If there is any doubt on the matter, the benefit of such doubt must obviously be given to the person who wants the Court to receive the document in evidence.

14. It cannot be in doubt that the extinguishment of right or interest in immovable property may be effected by surrender or release or relinquishment of right or interest. It would of course not include a mere abandonment of right or interest. The words "which purports or operates to create etc." must be taken to mean "which in themselves purport or operate to create" These words refer to the immediate intention of the document and not to ultimate consequences or its collateral effects.

15. Carefully, read, Exhibit B-3 does not, in my view, by itself extinguish any right or interest in immovable property. The document did not purport to operate to extinguish any right or interest in immovable property. The fact that the indirect or ultimate effect of the document as it evidence of certain facts might prevent the plaintiff from prosecuting the suit successfully did not require the deed to be registered. Exhibit B-3 was never intended by the parties to extinguish the interest in immovable property, that is to say, the right of easement by or under the said document. IT merely refers to the earlier

agreement between the parties at the time of partition that G. Krishnamurthy will have no right of easement in so far as these door-ways and the windows on the two sides of the building are concerned and that the said Krishnamurthy will not enforce any such right nor will object to the construction carried on by the defendant, the effect of which might be to close the windows and door-ways. In do not therefore think that Exhibit B-3 required registration.

16. The distinction between a mere recital of a fact and something which in itself either creates or extinguishes a right or interest must always be borne in mind. The document merely acknowledges the fact that G. Krishnamurthy had agreed at the time of partition not to have the right of easement although he would have been normally entitled to on partition by virtue of Section 13 of the Easements Act. There was therefore no necessity of registering Exhibit B-3 See AIR 1932 55 (Privy Council)

17. In Sultan Nawaz Jung v. Rustomji Nanabhoy, ILR 20 Bom 704 at p. 715 it was held by a bench of the Bombay High Court in a case where the facts were somewhat similar;

"The document therefore, does not create, declare assign, limit or extinguish, whether in present or in future, any right, title or interest in immovable property. Its effect may be to prevent such a right being acquired, but it does not of itself or extinguish any such right....."

It is relevant to note that this decision went in appeal to the privy Council and was confirmed vide Sultan Nawaz Jung v. Rustomji N. Byramji Jiji Bhoy, ILR 24 Bom 156 (PC).

18. " In sher Mohammad v. Mt. Mahbub Begum, AIR 1936 Lah 905 in a similar case, it was held:-

"In our judgment this document does not require registration, It is an agreement by which Nazar Mohammad gave permission to Ghulam Mohammad, who obtained merely a vacant site, to build a house to be erected on hat site in any manner he cared. It is difficult to hold that this is an agreement with respect to immovable property or to find that the value of the immovable property involved is more than Rs. 100. It was merely written to clear up the situation as regards building on the vacant site which had already fallen to the share of Ghulam Mohammad. We, therefore, hold that the document does not require registration while in our opinion it must be interpreted to mean that no easement would be acquired by Nazar Mohammad or his representatives-in-interest with respect to the existing openings in that portion of the house which fell to Nazar Mohammad."

19. I am therefore satisfied that Exhibit B-3 does not fall within the ambit of Section 17(1)(b) of the Registration Act and was not a compulsorily registerable document. The lower Courts were therefore right in admitting the document in evidence and relying upon it.

20. Once this document is held to be admissible in evidence, then the plaintiff has no case. Both the Courts below have on appreciation of evidence found that the lane AKJH belongs exclusively to the defendant. It was also found that Exhibit B-3 is a true and genuine document and since it is declared as admissible in evidence the effect of that document is that G. Krishnamurthy, the 2nd plaintiff's predecessor in title, had agreed at the time of partition not to have and right of easement in regard to light and air through the door-ways and windows on both sides of the building. That apart, he gave permission to the defendant to construct the wall in any manner he liked although its effect may be to diminish the light and air coming through the windows and door-ways. The 2nd plaintiff therefore could not have acquired any right of easement to his building and since he has no right of easement, his relief in reference to that was rightly rejected by the two Courts below.

21. It was then contended that the defendant had partition lists in his possession and he did not produce them and therefore an adverse inference should be drawn from that, I do not think the argument can be effective. The lower Courts on appreciation of evidence have accepted the case of the defendant in so far as AKJH lane is concerned and I do not think I can re-appreciate the evidence sitting as I am in second appeal .

22. It was then contended that the 2nd plaintiff had no notice of Exhibit B-3. He has a bona fide purchaser without notice and therefore Exhibit B-3 is not binding upon him. This plea has not been raised in the plaint by the 2nd plaintiff. There was no issue and consequently there has been no finding of the Courts below on that question. I do not therefore think that I can permit the learned counsel to raise this question for the first time in the second appeal as it is not pure question of law.

23. Since no other argument was advanced, the result is, that the second appeal fails and is dismissed with costs. No leave.

24. Appeal dismissed.