
(2006) 09 AP CK 0121
In the Andhra Pradesh High Court
Case No : SA No. 273 of 1996

Maddirala Babu Rao and Another	Vs	APPELLANT
Mandluri Venkaiah and Others		RESPONDENT

Date of Decision : 19-09-2006

Acts Referred:

Specific Relief Act, 1963 — Section 41

Citation : (2007) 1 ALD 372

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : P. Sri Rama Murthy, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri Seshagiri Rao, the learned Counsel representing the appellants-defendants 4 and 5 and Sri Srinivas, the learned Counsel representing the 1st respondent-plaintiff.

2. This Court on 14.5.1996 made the following order:

Admit in view of the substantial questions of law mentioned in Para 6 of the grounds mentioned. Notice.

In Ground No. 6, a, b, c and d, the following substantial questions of law were raised in this second appeal, which are as hereunder:

(a) In a suit for mandatory injunction for demolition and removal of the constructions of the defendant the plaintiff has to plea and prove the legal right of easement and in the absence of the same the relief of the mandatory injunction ought not to be granted.

(b) u/s 41 of the Specific Relief Act the mandatory injunction for demolition of existing structures ought not to be granted when the plaintiff kept quite for number of years (vide judgment of the High Court of A.P. in the S.A. No. 400 of

1969, dated 3.11.1970.

(c) u/s 41 of the Specific Relief Act, grant of mandatory injunction for removal of the structures of the defendant ought not to be granted in the absence of proof of plaintiffs right to the property in question and user of the same.

(d) The discretionary relief of mandatory injunction cannot be granted without considering the hardship and loss that would be result thereby to the opposite party.

3. Sri Seshagiri Rao, learned Counsel representing appellants-defendants 4 and 5 would contend that when the title deed relied upon by the 1st respondent-plaintiff does not refer to any of the rights in relation to "Y" marked galli, granting relief in relation thereto cannot be sustained. The learned Counsel also would submit that it is not as though the steps in question are constructed afresh, but the steps, in fact, had been in existence and it is only just further repairing or modifying the old steps and in this view of the matter also and after a long lapse of time confirming the relief of mandatory injunction as granted by the Court of first instance and also the appellate Court, if carried out, the appellants-defendants 4 and 5 would be put to serious loss. The learned Counsel in all fairness would submit that no doubt judgment in S.A. No. 400 of 1969, dated 3.11.1970 had been referred to in the substantial questions of law and the said judgment relates to the claim of easementary rights and also the relief of mandatory injunction, where under the questions of acquiescence, estoppel, limitation etc. had been considered and decided. The learned Counsel, however, with all emphasis would conclude that the relief of mandatory injunction being discretionary and equitable relief, in the peculiar facts and circumstances, any direction for removal of the steps at this juncture would cause serious prejudice to the rights of the appellants-defendants 4 and 5.

4. Per contra, Sri Srinivas, learned Counsel representing the 1st respondent-plaintiff in the suit had taken this Court through the findings, which had been recorded by the appellate Court, and would maintain that keeping all the facts and circumstances in view, the decree of the Court of first instance was slightly modified. The learned Counsel also had explained the recitals in Ex. A1 and the boundaries referred to in Ex. A2 and the findings recorded in relation thereto at paragraph 14 of the judgment of the appellate Court. The Counsel also would point out that the report of the Advocate-Commissioner also would in a way support the stand taken by the 1st respondent-plaintiff.

5. Heard the learned Counsel and perused the findings recorded by the Court of first instance and also the appellate Court.

6. The parties hereinafter would be referred to as plaintiff and defendants for the purpose of convenience.

7. The plaintiff filed the suit O.S. No. 62 of 1985 on the file of I Additional District Munisf, Ongole, praying for the relief of mandatory injunction for the removal of

"S" marked steps and "SI" marked canal and Cuddapah slab and "Y" marked lane and for permanent injunction restraining the defendants from ever encroaching the "A4" marked passage.

8. It was pleaded in the plaint as hereunder:

The plaintiff and 2nd defendant are brothers and they are the owners of A series shown in the plaint plan and A 4 is the joint passage meant for passage of men and cattle and the 1st defendant is the owner of B series properties and B is the house, B 1 is the kitchen and B 2 and B 3 are the vacant sites belonging to the 1st defendant. Originally A and B items belonged to one Madiraju Pitchaiah and his brother Narasaiah and the father of the plaintiff purchased A series property under a registered sale deed on 25.7.1954 from Mukthinuthalapati Venkamma and her husband Gopalakrishnaiah and ever since, he had been enjoying A series property exercising the right of passage to A marked place. The B series property were purchased by the 1st defendant from one Panduranga Rao, the adopted son of Subbaramaiah. There are X and Z marked bazaars to reach A and B series and to reach the northern Z bazaar from A and B series and A4 marked place is only the passage to reach A, A 1, A 2 and A 3 from X, Y and Z bazaars and lane and A4 is the exclusive property of the plaintiff and 2nd defendant.

While so, about 4 days before filing of the suit, the 1st defendant arranged steps at S marked place encroaching portion of X marked bazaar and 2 days back, he arranged Cuddapah slabs in the Y marked lane and the 1st defendant also got arranged a canal shown as SI on the adjacent southern side of his wall with a view to send out used and sullage water into SI marked canal. The 1st defendant or his vendors have absolutely no right to send out the sullage water into A 4 marked place and the raising of steps at S marked place and arranging SI marked canal amounts to violation of plaintiffs exclusive right of A 4 marked place and causes obstruction and inconvenience for free passage of men and cattle and hence the suit.

9. The 1st defendant filed the written statement substantially denying the allegations. It was also pleaded that originally the place shown as X in the plaint originally belonged to the 1st defendant and it is situated from the south of the "X" marked place and Y is a lane situated towards north of X marked site and the site shown as X as well as lane shown as Y are exclusively belongs to the 1st defendant and neither the plaintiff nor the 2nd defendant no right whatsoever and the plaintiff after passing through A4 marked lane should enter into X marked site and used to go towards southern bazaar and the plaintiff never used the lane shown as Y at any point of time nor is there any necessity to go through the lane Y. The defendants denied about the arrangement of steps at X marked place encroaching a portion of the X marked bazaar. The plaintiff has got right of passage alone in A 4 marked passage and the 1st defendant as well as the owner of the house to the south of A 4 have got the right of caves water in A4 marked site and even prior to the construction of the terraced building, there was a tiled house and there was a sluice as well as the canal and also the steps. Originally

the canal was under the ground level at the time of construction of tiled house and used water from the house of the 1st defendant used to flow through the sluice placed to the southern wall of the tiled house used to flow through that canal and as time passed, due to the raise in the ground level, there was some obstruction for the free flow of water and to avoid the falling of the earth into the canal, the level of the canal towards southern side is raised and so also at the time of the construction of the building old steps were given finishing touches and thus the canal as well as the steps are there since a long time and they are in no way causing obstruction to the plaintiffs ingress and egress to the A4 marked passage and hence prays to dismiss the suit with costs.

10. Defendants 2 and 3 in the suit remained ex parte.

11. On the strength of the above pleadings, the following issues were settled by the Court of first instance:

1. Whether the plaintiff is entitled to the mandatory injunction as prayed for?
2. Whether the plaintiff is entitled to the permanent injunction as prayed for?
3. To what relief?

12. During the pendency of the suit, the Defendant No. 1 died and Defendants 4 and 5, who were then minors, were added as legal representatives of the deceased-defendant No. 1, represented by the mother and guardian, as per the orders in I.A. No. 3248 of 1987, dated 8.1.1988. Before the Court of first instance, P Ws. 1 to 3 were examined. The mother and guardian of defendants 4 and 5 were examined as DW1, and DWs. 2 and 3 were also examined and Exs. A1 and A2 were marked. The Court of first instance, on appreciation of the evidence available on record and also taking into consideration the report of the Advocate-Commissioner, decreed the suit with costs as prayed for granting two months time to defendants to remove the constructions from the date of decree and in the event of failure, the plaintiff was given liberty to remove those constructions. Aggrieved by the judgment and decree, defendants 4 and 5 had carried the matter by way of appeal A.S. No. 109 of 1993 on the file of Additional District Judge, Ongole and the appellate Court, after framing the point for consideration at paragraph 7 "Whether the plaintiff-1st respondent is entitled for the reliefs of mandatory injunction and permanent injunction as prayed for in the plaint", proceeded to discuss the evidence available on record commencing from paragraphs 8 to 17 and ultimately came to the conclusion that the appeal to be dismissed with costs, however, modifying the direction with regard to SI marked canal to the effect that defendants 4 and 5 appellants 1 and 2, shall convert S1 marked canal into a closed canal by covering the same with slabs or bricks. Aggrieved by the same, defendants 4 and 5 had preferred the present second appeal.

13. As far as the modification made by the appellate Court, the same had not been challenged and hence the said modification in a way had attained finality.

14. The Court of first instance and also the appellate Court appreciated the evidence available on record, i.e., the evidence of PWs. 1 to 3 and DWs. 1 to 3, Exs. A1 and A2 and also the report of the Commissioner and recorded concurrent findings relating to the factual controversies between the parties. Submissions at length were made by the respective Counsel on record relating to the recitals in Exs. A1 and A2 and the boundaries referred to in Ex. A2 and the findings recorded by the Court of first instance and also the appellate Court. The plaintiff filed a rough plan along with plaint. The 2nd defendant is the brother of the plaintiff. The father of the plaintiff purchased the properties covered by A, A1, A2 and A3 under Ex. A1 registered sale deed, dated 25.7.1954 and the plaintiff is occupying the house in plot A and the site in plot A1 and the 2nd defendant is in occupation of the house in plot A2 and the site in plot A3. There appears to be some prior litigation, but the particulars of details of the said litigation had not been furnished. It is needless to say that the plaintiff is claiming his rights on the strength of Ex. A1. The deceased-1st defendant is the owner of plots B, B 1, B 2 and B 3 and in plot B 3 there used to be a tiled house and after demolishing the tiled house, the 1st defendant constructed a terraced house. Plot B is the house portion, plot B 1 is the kitchen and plots B2 and B3 are the vacant sites of the 1st defendant. Ex. A2 is the registration extract of the sale deed, dated 7.7.1980, under which the 1st defendant purchased the property in question. X and Z are the bazaars lying on the south and north respectively. Y is the joint lane connecting X and Z, in which the plaintiff and defendants 1 and 2 have a right of passage. Several submissions in relation to the plan and also the topographical features had been made. The learned Judge had taken into consideration the recitals of the sale deed-Ex. A1 and also boundaries specified in Ex. A2 and recorded the findings at paragraph 14 of the judgment.

15. The main ground of attack by the Counsel representing the appellants defendants 4 and 5 is that the rights relating to the Y marked galli had not been referred to at all in Ex. A1 and hence no rights as such in relation to the said property be inferred or drawn in favour of the plaintiff in the absence of evidence. It may be appropriate to have a look at the findings recorded by the appellate Court in this regard in Paragraph 14, which reads as hereunder:

In Ex. A1 sale deed standing in the name of the plaintiffs father, there is no indication about the rights in Y marked galli. Since Y marked gaily is stated to be a public gaily, the question of reciting rights of passage therein the sale deed does not arise. In Ex. A1 it was specifically mentioned that the property purchased thereunder comprised of three gadies of passage site located towards East of the house property. The said passage is nothing but plot A4. Plot A4 is the exclusive site belonging to the plaintiff and the 2nd defendant. The 1st defendant did not claim any rights in plot A4. Insofar as Y marked gaily is concerned, in Ex. A2 sale deed in favour of the 1st defendant, the eastern boundary was shown as the gaily, bazaar, and the southern bazaar is also shown as gaily bazaar. It undoubtedly shows that Y marked place is a gaily bazaar and it does not form part of the property purchased by the 1st defendant under Ex.A2,

sale deed. Therefore, the 1st defendant had no right to spread Cuddapah slabs in Y marked gaily. According to the plaintiff, the cattle are falling while passing through Y marked gaily because of slippery nature on the Cuddapah slabs. DW. 1 did not say that S marked steps were the old steps or were reconstructed in the place of the old steps. She says that S marked steps are in front of A4 marked gaily and that to the south of their southern wall there is 1.1/2 feet projection. The defendants could not prove the same.

16. The learned Judge also had taken into consideration the report of the Commissioner apart from the other oral evidence available on record in addition to the documentary evidence Exs. A1 and A2. It is no doubt true that the Counsel representing the appellants-defendants 4 and 5 with all emphasis contended that in the pleadings specifically it was pleaded that these were old steps and such old steps alone had been replaced and when such steps have been in existence for sufficiently a long time, the relief of mandatory injunction at this distant point of time cannot be granted. I had given my anxious consideration to the deposition of DW1 in particular, but DW1 had not deposed anything on this aspect that is what even the appellate Court had pointed out at paragraph 14 of the Judgment. It is true that the dilapidated nature of the building and the other facts had been referred to by DW. 1. When DW. 1 had not specifically disposed about this aspect, these findings recorded by the appellate Court cannot be said to be perverse findings or findings based on no evidence. It is needless to say that all other questions raised are more or less concerned with the concurrent factual findings recorded by both the Courts below and hence in the absence of acceptable evidence, the ground that after a long lapse of time, the discretionary equitable relief of mandatory injunction cannot be granted, cannot be a sustainable argument in the light of the concurrent findings recorded by both the Courts below in this regard.

17. As already referred to supra, the modification granted by the appellate Court had attained finality and hence the same is left undisturbed by this Court. In all other respects, the findings recorded by the Court of first instance and also the appellate Court are hereby confirmed.

18. In view of the foregoing discussion, the second appeal is bound to fail.

19. In the result, the second appeal is dismissed. Inasmuch as the parties have been fighting this litigation in relation to ingress and egress and disturbance to cattle etc., the parties to the litigation to bear their own costs.