

(2003) 07 AP CK 0088

In the Andhra Pradesh High Court

Case No : Second Appeal No. 495 of 1992

Marina Venkataswami @ Musalayya

APPELLANT

Vs

Marina Rama Murthy

RESPONDENT

Date of Decision : 11-07-2003

Acts Referred:

Citation : (2003) 6 ALT 367

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : M. Lakshmana Sarma, for the Appellant; Not Appeared, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—The plaintiff in O.S.No. 265/1980 on the file of the Principal District Munsif, Ramachandrapuram is the appellant in this Second Appeal.

2. Plaintiff filed the suit for a declaration that he is the owner of the red marked portion shown in the plaint plan and for mandatory injunction for removal of the obstruction made in the D marked portion and P marked portion shown in the plaint plan on the Eastern lane and to restrain the respondent from opening a door way from the portions shown as D-1 or D-2 in the plaint plan into the Eastern lane. Subsequently he sought the additional relief of a mandatory injunction to remove the Lavatory and bathroom constructed by the respondent in the lane, connecting the Marinavari Street and Chilikivari Street shown as S-1 and S-2 in the plaint plan. The respondent contested the suit. The appellant besides examining himself as P.W.I examined two witnesses as P.Ws.2 and 3. The respondent besides examining himself as D.W.1 examined two other witnesses D.Ws.2 and 3 and marked Exs.B-1 to B-9. Exs.C-1 to C-3 are the Commissioner's report and plan. The Trial Court partly decreed the suit without costs granting mandatory injunction for removal of the bathroom and lavatory shown as S-1 and S-2 in the plaint plan and dismissed the other reliefs sought by the appellant. Aggrieved by the mandatory injunction granted against him, the

respondent preferred A.S.No. 1/1989 on the file of the Subordinate Judge, Ramachandrapuram. The appellant did not prefer any Appeal, or Cross-objections in A.S.No. 1/1989 in respect of the reliefs refused by the trial court. So the dismissal of the suit refusing to grant the other reliefs sought by the appellant became final. The first appellate court by the judgment under appeal allowed appeal of the respondent and dismissed the claim relating to mandatory injunction for removal of lavatory and bathroom shown as S-1 and S-2 in the plaint plan. Hence this second appeal.

3. Heard both sides.

4. The contention of the learned counsel for the appellant is that since the application of the appellant seeking leave of the court to amend the plaint by including the relief of mandatory injunction of removal of the bathroom and lavatory shown as S-1 and S-2 in the plaint plan was allowed, the amendment relates back to the date of the suit, and so the fact that the appellants did not make any amendment in the body of the plaint, as to when the cause of action for seeking the relief of mandatory injunction for removal of the bathroom and lavatory shown as S-1 and S-2 in the plaint plan, arose would be of no consequence, because the cause of action arose as on the date mentioned in the cause of action paragraph. It is also his contention that since the respondent did not prefer revision against the order allowing the amendment, that order became final and so the respondent cannot be permitted to question the amendment at a later stage. He further contended that since the appellant came to know about the constructions shown as S-1 and S-2 at a subsequent date, he could not seek the relief of mandatory injunction earlier and so the first appellate court erred in refusing the relief of mandatory injunction and dismissing the suit in toto.

5. It is no doubt true that when a petition for amendment is allowed normally it relates back to the date of the plaint. But the other contention of the learned counsel for the appellant that the respondent not questioning the order of the trial court allowing the amendment in the revision would preclude the respondent from questioning the same in an appeal, has no force. As long back as in 1960 the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, case held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay appeal was not taken, can be challenged in an appeal or the final decree or the order in the main proceeding. So the party aggrieved by an interlocutory order in the trial court can always question the propriety of that interlocutory order in the appeal against the decree ultimately passed in the suit by the trial court. So the respondent had every right to question the propriety of the order allowing the amendment of the plaint by the trial court seeking mandatory injunction.

6. The learned first appellate Judge on the ground that the plaint is not specific as to when the disputed lavatory and bathroom were constructed, and since the appellant who alleged even in the original plaint that the respondent caused obstruction to reach Chalikivari street by constructing bathroom and lavatory

shown as S-1 and S-2, did not seek the relief of mandatory injunction for removal of those structures at the time of filing of the suit and thought it fit to include the said relief of mandatory injunction subsequently by way of an amendment held that he cannot be granted the relief of mandatory injunction. Since the portions shown as S-1 and S-2 in the plaint plan i.e., the bathroom and lavatory, the demolition of which was ordered by the trial court were in existence even by the time of filing of the suit the above finding of the first appellate Court cannot be found fault with because one of the grounds for refusing mandatory injunction is laches on the part of the party seeking such a relief. Mandatory injunction can be refused in cases where the party seeking such relief does not come to Court with clean hands. The first appellate Court, by giving cogent reasons as to why the appellant is not entitled to the mandatory injunction for removal of the portion shown as S-1 and S-2, allowed the appeal. Appellant in fact is guilty of laches. By his failure to seek the relief of mandatory injunction for removal of the Lavatory and bathroom, though available to him at the time of filing of the suit, appellant should be deemed to have acquired those constructions. Acquiescence also is one of the grounds for refusal of the relief of mandatory injunction. Therefore, the first appellate Court refusing the relief of mandatory injunction for removal of the lavatory and bathroom shown as S-1 and S-2 cannot be said to be erroneous.

7. So, I find no merits in this Second Appeal and hence this Second Appeal is dismissed, but in the circumstances without costs.