

(2007) 09 AP CK 0086
In the Andhra Pradesh High Court
Case No : SA No. 1030 of 1998

Muddamsetti Satyanarayana (died) and Muddamsetty Apparao	APPELLANT
Vs	
Donkana Thavudu	RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

Citation : (2008) 1 ALD 569

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

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; A.G. Seetharam, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Srinivas Rao representing Sri M.V.S. Suresh Kumar, learned Counsel for appellants and Sri Seetaram, learned Counsel representing the respondent.

2. The following substantial questions of law arise for consideration in this second appeal:

1. Whether judgment and decree in O.S. No. 51 of 1977 as confirmed in AS No. 5 of 1982 do not estop the respondent from claiming any rights to draw water from Nadimikantam Tank?

2. Whether the suit for damages could be decreed on the basis of report of the Commissioner filed in another suit without examining him and whether the respondent can rely upon Ex. A-2 without examining the Commissioner in the later suit?

3. Whether the plaintiff is entitled for damages without establishing his right to draw water and whether the suit for damages could be decreed on the basis of hypothetical figures without there being any evidence?

3. Submissions at length were made by the respective Counsel representing the

respective parties in this second appeal.

4. The learned Counsel for appellants had pointed out to the respective pleadings of the parties and the evidence available on record and would maintain that when absolutely there is no acceptable evidence available on record, passing a decree for Rs. 5,000/- together with interest @ 12% per annum from the date of suit till the date of decree and 6% per annum from the date of decree till realization cannot be sustained. The learned Counsel also would submit that even otherwise the report of the Commissioner Ex. A2 in Crl. M.P. No. 1082 of 1983 in C.C. No. 349 of 1987, which was marked as Ex. A3 in O.S. No. 69 of 1987 on the file of District Munsif at Amadalavalasa, cannot be relied upon in this suit, since this is not the report of the Commissioner pertaining to the suit, and hence, the findings recorded, being the findings on such material, are liable to be set aside.

5. Per contra, Sri Seetaram, learned Counsel representing the respondent, would submit that in the light of the facts and circumstances and also the concurrent findings recorded by both the Court of first instance and also the appellate Court, the said findings not to be disturbed in a second appeal. The learned Counsel also would submit that it is no doubt true that the report of the Commissioner in yet another matter had been relied upon and the Commissioner was not examined. But, however, there is other ample evidence available on record to sustain the findings and hence, the findings not to be disturbed in a second appeal.

6. Heard both the Counsel and perused the findings recorded by the Court of first instance and also the findings recorded by the appellate Court.

7. The substantial questions of law, which arises for consideration in the second appeal, already had been referred supra.

8. The parties hereinafter would be referred to as plaintiff and defendants as shown in O.S. No. 106 of 1987.

9. The plaintiff filed the suit for recovery of Rs. 5,000/- towards damage caused to his crop raised in the plaint schedule property in the years 1983 and 1984 and also for other appropriate reliefs. The Court of first instance, in the light of the respective pleadings of the parties and having settled the issues, recorded the evidence of P.Ws. 1 to 3 and D.Ws. 1 and 2 and marked Exs. A1 to A8 and Ex. B1 and ultimately, came to the conclusion that the plaintiff is entitled to a decree. Aggrieved by the same, the matter was carried by way of appeal A.S. No. 33 of 1994 on the file of District Court, Srikakulam, which was renumbered as A.S No. 74 of 1994 on the file of Principal Subordinate Judge, Srikakulam, and the appellate Court confirmed the findings recorded by the Court of first instance and dismissed the appeal, hence, the present second appeal.

10. It was pleaded in the plaint that the defendants were the owners of the plaint schedule property and they sold the same to Nanupatruni Appalanaidu and others under a registered sale deed dated 31.7.1962 along with easementary

rights and also rights to take water. Subsequently, the above property was sold by Appalanaidu and others to this plaintiff and his father under registered sale deed dated 15.6.1970, and since then, the plaintiff is getting water to his lands i.e., plaint schedule property. From the tank known as Nadimikandyam, which is only the source of water, the water will first enter into the defendants' lands and then flow into the plaint schedule land through a channel situated in the lands of the defendants. Subsequently, differences arose between the parties and as the matter stood thus, on 4.10.1983 at about 9.30 a.m., when the plaintiff was at the land watering the paddy crop, he found defendants closing the flow of water and when plaintiff questioned, they beat him. Due to lack of water, the standing paddy crop sustained damage of one garce 20 putties. The plaintiff filed a Criminal Case against the defendants in which a Commissioner was appointed and estimated the lands at such quantum. Then the plaintiff filed a suit OS No. 462 of 1984 on the file of District Munsif's Court, Srikakulam for mandatory injunction for removal of the bund, which is erected by the defendants. In 1984 also, the defendants caused the same acts and caused damage of the crop similarly, hence, the plaintiff filed the suit for recovery of the damage caused by the defendants to his crop for two years in respect of expected yield of 50 putties per year at the rate of Rs. 50/- per putti of paddy.

11. The defendants pleaded inter alia in the written statement that Nanupatruni Papanna never took water to his land to the plaint schedule property and the defendants are not aware of the purchase of the lands by plaintiff from the said Appalanaidu. The suit lands had never been irrigated by the waters of the tank known as Nadimikandyam and the said Nadimikandyam is a private tank of the defendants and these defendants used to cultivate their lands with the water that was stored in the said tank, which is their personal tank. The source of water for the plaint schedule land is the excess water that overflowed from the lands of the defendants. The defendants allowed the excess water only. The plaintiff cannot claim as a matter of right any water to his land. Due to drought, the defendants' tank was not filled up and the defendants have not allowed any water to other lands as there is no water to overflow. Previously, the first defendant filed OS No. 51 of 1977 against one Guna Suryanarayana and another and the said suit was dismissed and on appeal, the Subordinate Judge, Srikakulam upheld the defendants' rights to take water and catch fish in the said tank and the present plaintiff is the nephew of Guna Satyanarayana, who got filed O.S. 462 of 1984. The plaintiff is put to strict proof that the plaint schedule property yields 50 putties of paddy and suffered loss. The value of paddy claimed is excessive. The defendants denied the fact of causing loss to the plaintiff in respect of his crop.

12. On the strength of these pleadings, the following issues were settled:

1. Whether the plaintiff is entitled to recover damages for causing diminution of water supply to the lands of the plaintiff as prayed for?
2. Whether the suit is not maintainable under law?

3. To what relief?

13. On behalf of the plaintiff, PWs. 1, 2 and 3 were examined and Exs. A1 to A8 were marked. On behalf of the defendants, DWs. 1 and 2 were examined and Ex. B1 was marked.

14. The Court of first instance recorded the findings in detail and ultimately decreed the suit. The appellate Court in an appeal aforesaid framed the point for consideration at Para 10 and proceeded to discuss the oral and documentary evidence available on record and confirmed the findings recorded by the Court of first instance, hence, the present second appeal.

15. The appellate Court at Para 15 observed as follows:

An Advocate-Commissioner was appointed in Crl. M.P. No. 1082/83 in Calender Case No. 349/83, who visited the suit schedule lands on 13.1.1984. D.Ws. 1 and 2 in their evidence have categorically admitted and Ex. A2, Commissioner's report shows the presence of both the plaintiff and the defendants at the time of the visit of the Advocate-Commissioner. In the presence of both the parties, the Advocate-Commissioner executed commission warrant. The Commissioner's report, Ex. A2 corroborated by the evidence of P. Ws. 1 to 3 and admitted by D.Ws. 1 and 2 established that the water from Nadimkainam Tank is flowing through the lands of the defendants on the eastern side into the lands of the plaintiff. The Commissioner has also noted that the source of water for cultivation of the plaintiff's land is Nadimkainam Tank. The water from the said tank should flow through its eastern channel enter into the lands of the defendants and through the cutting of the eastern bunds and then enter into the plaintiff's land and thereafter into the defendants' lands and from there into the plaintiff's other bit of land, which is shown as item No. 1 of the Commissioner's plan attached to his report, Ex. A2.

It is no doubt true that Ex. A2 is the certified copy of the Commissioner's report with plans in Crl. M.P. No. 1082 of 1983 in CC. No. 349 of 1987 marked as Ex.A3 in O.S. No. 69 of 1987 on the file of District Munsif at Amadalavalasa.

16. In Vemuseti Appayamma Vs. Lakshman Sahu, , it was held that report of the Commissioner is a part of record and can be considered as evidence irrespective of the fact whether Commissioner is examined as witness or not. It is pertinent to note that the Commissioner was not appointed in this suit. The Commissioner's report and plan in Crl. M.P. No. 1082 of 1983 in CC No. 349 of 1987, which was marked in yet another suit OS No. 69 of 1987, was marked as Ex. A2. When that being so, without examining the Commissioner, if findings are recorded solely on the basis of such report of the Commissioner, may be such decree and judgment cannot be sustained. On a careful analysis of the oral and documentary evidence available on record, apart from Ex. A2, there is ample evidence of PW. 1 well supported by PWs. 2 and 3, which had been discussed in elaboration. Ex. A1 is the certified copy of the sale deed, dated 15.6.1970, Ex.A3 is the certified copy of judgment in OS No. 69 of 1987, dated 17.9.1990, Ex. A4

is the certified copy of decree in O.S. No. 51 of 1977 on the file of Principal District Munsif, Srikakulam, dated 8.12.1980, Ex. A5 is the certified copy of decree in AS No. 5 of 1982 on the file of Principal Subordinate Judge's Court, Srikakulam, Exs. A6 and A7 are the postal acknowledgments, Ex. A8 is the notice. As against this, the evidence of DWs. 1 and 2 is available on record. Ex. B1 is the certified copy of No. 2 of Adangal, dated 21.1.1994.

17. In the light of the findings recorded, this Court is satisfied that the Court of first instance and also the appellate Court are not justified in recording certain findings on the strength of Ex. A2, but however, inasmuch as, in the light of the other oral and documentary evidence available on record, concurrent findings had been recorded by both the Court of first instance and also the appellate Court. This Court is of the considered opinion that the said findings except the findings relating to the report of the Commissioner referred to supra cannot be found fault, and accordingly, they are hereby confirmed.

18. Certain submissions were made that, however, the quantum awarded is on the higher side. In the light of the findings recorded by both the Court of first instance and also the appellate Court, this question also cannot be permitted to be agitated in a second appeal in the light of the concurrent findings.

Accordingly, the second appeal shall stand dismissed. No order as to costs.