

(1982) 11 AP CK 0023

In the Andhra Pradesh High Court

Case No : S.A. No. 107 of 1979 and C.M.P. 13495 of 1982

Ramgopal Kalantri and Others

APPELLANT

Vs

G. Ganand

RESPONDENT

Date of Decision : 01-11-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : AIR 1983 AP 401

Hon'ble Judges : Ramaswamy, J

Bench : Single Bench

Advocate : M. Rama Mohan Rao and R. Renukadevi, for the Appellant; K. Sridhar Rao, for the Respondent

Judgement

1. The plaintiff is the appellant. He filed the suit in the trial Court initially for permanent injunction restraining the defendant from blocking the gate marked AB on the southern side of the plaintiff's house and later on, amendment sought for a mandatory injunction directing the defendant to remove the constructions made by him blocking the gate marked AB and the constructions made on the compound wall. The trial Court decreed the suit issuing mandatory injunction directing the defendant to remove construction blocking the gate marked AB and to remove in front of the gate and across the compound wall of the plaintiff's premises running east to west of the H. No 1-7-192 situated at Bakaram. Hyderabad within a period of three months from the date of this decree and granted perpetual injunction restraining the defendant his agents and all other persons claiming through him from blocking the gate marked Ab and from making any construction in front of the gate and across the compound wall running from east to west on the plaintiff's premises referred to above. Challenging that decree, the respondent went in appeal. The lower appellate Court allowed the appeal, and dismissed the suit. As against the dismissal of the suit, this second appeal has been filed.

2. Most of the material facts not in dispute leading to the filing of the suit are as

follows:- the plaintiff is the absolute owner of the premises bearing No. 1-7-192, situated at Bakaram hyderabad by virtue of a registered sale deed dated 17-9-1955. There exists a gate on the southern side of the compound wall marked Ab in the plaint plan. It opens into the road beyond the open space. It has been in existence even long prior to 1956. The plaintiff has been using this gate as ingress and egress from his house into the road situated on the southern side as usual passage. But the defendant in the first week of July 1974, started making construction of a wall blocking the gate and thereby obstructing his right of passage of ingress and egress from his house into the road on the southern side. According to the plaintiff these actions of the defendant are unwarranted, unauthorised and without any manner of right whatsoever though he informed of the same to the Municipal corporation by a complaint. No action was taken by the Municipal corporation preventing the defendant from making construction blocking the existing gate. The defendant has no manner of right or authority to block the said passage and the gate which was in existence long prior to 1956. In para 5 of the plaint, in the cause of action portion he had specifically stated that "the cause of action arose on 1-12-1974 when the defendant started construction blocking the gate and thereby preventing the right of ingress and egress to the plaintiff". As stated earlier in the first instance he filed the suit for a mere perpetual injunction but subsequently when construction was completed in the interregnum he filed the application for amendment of the plaint seeking for relief of mandatory injunction and that permission was granted.

3. In the written statement filed by the respondent/defendant the facts that the gate is in existence prior to 1956 and that the appellant/plaintiff has been using this gate as an ingress and egress from his house into the road existing on the southern side and that the gate is in existence at the AB place of the plaint plan on the southern side are not disputed. It is also stated so in the course of the arguments in this appeal. It is also not disputed that the defendant constructed the wall in the interregnum and that it completely blocks the AB gate; thereby the right of ingress and egress of the appellant/plaintiff from that gate into the southern road from the house of the plaintiff is completely obstructed and closed. The material contention in the written statement filed by the defendant is that the plaintiff has his gate on the eastern side opening in 10 feet line. The defendant denied the other allegations made. Even in the additional written statement filed by the defendant what all has been stated is: "it is not true as alleged that the defendant has constructed the wall blocking the gate marked AB subsequent to the filing of the suit and the same is denied". In paragraph 2 in the additional written statement he stated that "the plaintiff is not entitled for direction as prayed and no direction can be given to the defendant to remove the construction blocking the gate marked AB and remove all the constructions that are made in front of the gate and across the compound wall running from East to west of the House bearing No. 1-7-192 Bakaram, Hyderabad. The defendant has legally constructed the wall after obtaining the approval of the Municipal corporation of Hyderabad". From these averments in the written statement it can

be safely concluded that there is a wall constructed by the defendant and it blocks the gate marked Ab and that it is in front of the gate and across the compound wall running from east to west of the house of the plaintiff. It was constructed lawfully as per the sanction granted by the Municipal corporation.

4. Here it may be straightway stated that the suit is laid on the basis of the title by the plaintiffs and the defendant denied the right of the plaintiff. The trial Court on that basis framed appropriate issues and after adduction of the evidence by both the parties on consideration of it, decreed the suit and granted the reliefs as stated earlier. Against the said decree the defendant respondent carried the matter in appeal. The appellant Court non-suited the plaintiff on the ground that the plaintiff has not been able to establish that the site to the south of the plaintiff's building is either of the Government site or that of the masjid but it belongs to G Ramaiah through whom the respondent/ defendant is deriving title as successor. There is no right of way provided to anasuyabai, the plaintiff's vendor under the sale deed Ex. B 1 in which she purchased the plaintiff's property from G. Ramaiah. Therefore the plaintiff cannot claim any right of way through the site of the respondent/Defendant to reach the main road on the south from his building. The appellant/plaintiff had not acquired any right of way. The appellate Court thus nonsuited the plaintiff on two grounds viz., the plaintiff did not establish his right and that his vendor did not have any right of way and that therefore the plaintiff cannot acquire higher right than what his vendor had.

5. In this second appeal when it has come up for hearing before me on 21-10-1982, I have carefully gone through all original sale deeds. The entire property originally belongs to one pentiNarayana Reddy, son of Butchireddy. He sold 372 square yards of the land under Ex. B-4 to G. Ramaiah for valuable consideration. Out of it G. Ramaiah in his turn sold under Ex. B. 1 234 square yards to Smt. D. Anasuyabai and the boundaries described in Ex. B 1, to the south is the land of G. Muttaiah and Rasta (way) this Muttaiah, is none other than the father of Ramaiah the plaintiff purchased the same land under Ex. A-7 on 17-9-1956 from the said anasuya Bai. In the plan annexed to the sale deed Ex. A-7 it is shown as if there exists a road straight adjacent to the plaintiff's house on the southern side and it is named University road.

6. On a consideration of the documents referred to above it emerges that the balance of 138 square yards of land still remains with G. Ramaiah, the vendor of Anasuya Bai. It is not in dispute that this land is situated to the south of the plaintiff's house. Therefore it admits of no doubt that the extent of it admits of no doubt that the extent of 138 square yards is existing on the southern side of the house of the plaintiff and it belongs to Ramaiah through whom the respondent/defendant lays claim to it.

7. On perusal of these documentary evidence vis-a-vis the pleadings I entertained a doubt whether the lower appellate Court is justified in negating the claim of the plaintiff for the right of way without raising any issue regarding right of easement and whether I am justified to go into that question. The lower

appellate Court also gave a finding that there exists a way to the plaintiff on the lane adjacent on the western side leading up to the main road on the south. Obviously on that basis it nonsuited the plaintiff. The learned counsel for the appellant contended that this question did not crop up during arguments but gave finding while rendering Judgment. So it is without giving any opportunity and that there is no basis opportunity and that there is no basis for the finding given and that the finding is not sustainable to decide my-self whether it may be justified to go into the question of the right of easement on the basis of the record or whether I have to remand the case to the lower appellate Court for proper consideration and to satisfy my conscience whether the plaintiff has as a fact really a right of way on the western side as found by the Appellate Court I directed the learned counsel for the appellant to find out from his party whether really there exists a gate from the above house of the plaintiff into the road on the western side on the next date of hearing I. E., on 22-10-1982 the learned counsel for the appellant stated that there exists a gate on the western side but that is not the usual gate that is being used for ingress and egress into their house. They had a large open land and the house is facing southern side and that the gate is being used as of right even long prior to 1956.

8. On 22-10-1982. The learned counsel for the appellant stated before me that he filed an application for amendment of the plaint to permit the plaintiff to raise the plea of easement of tight of way by prescription. He also stated that he served a copy of the affidavit on the learned counsel for the respondent. When I enquired the learned counsel for the respondent also stated that he received a copy of the petition and affidavit to enable him to file a counter-affiavit to the petition , I adjourned the case. It cam up again before me on 29-10-1982 and the petition is also posted.

9. Therefore the real question for consideration in this case on the basis of the undisputed facts stated in the plaint and the documentary evidence on record is whether the plaintiff has got a right of way and whether that right has been acquired by prescription As stated earlier the appellate Court found that the plaintiff's vendor did not acquire any right of way under Ex. B.1 the document of title and that the plaintiff did not acquire higher rights than what his vendor had. There is no issue riased in this regard. The learned counsel for the appellant contended that amendment is thus necessitated and can be allowed even at the stage of the second appeal in the interests of Justice and that an opportunity may be given to the plaintiff to substantiate his contention.

10. This application for amendment being C.M.P. No. 13 495/82 has been opposed by the respondent contending inter alia. That it is not a bona fide application. This application was filed when the Court entertained a doubt in the couse of hearing and that there is an abnormal delay in filing the application and that the delay in filing the application has not been satisfactorily explained and that therefore the application has to be dismissed in limine. Upon the facts and circumstances in this case the further question for consideration before deciding

the earlier question of right of easement of the plaintiff is whether I should allow this application filed under order 6, Rule 17, C.P.C. at this stage. Their lordships of the Supreme Court in the decision reported in Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, have held that the Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, have held that the rules of procedure are intended to be handmaid to the administration of justice and a party cannot be refused the just relief merely because of some mistake, negligence, inadvertence or even the infraction of the rules of procedure. The court always gives leave to amend the pleadings or a party applying was acting mala fide or that by this blunder he caused injury to his opponent which may not be compensated for by an order of costs, however negligence or carelessness may have been the cause. Just omission however late, the proposed amendment may be allowed if it can be made without injustice to the other side. In view of the law laid down by their lordships of the Supreme Court. While respectfully following the above law. I have to consider whether the defendant suffers any injustice in allowing this application for the amendment. I have already stated that the averments made in the plaint regarding the existence of the gate AB on the southern side prior to 1956 and the use of it as ingress or egress into the road on the southern side from the house of the plaintiff has not been denied. It is also admitted that the wall was constructed blocking completely the right of way. The only matter of dispute was when it was constructed. But that question as to when it was constructed need not be gone into now in this petition. As a matter of fact it is unnecessary.

11. The real question is whether there is any foundation laid in the pleadings regarding the right of easement by prescription. The facts stated earlier and the cause of action specifically referred to in para 5 of the plaint clearly indicate that the plea of right of easement can be raised on the above undisputed facts. It is contended by the learned counsel for the respondent that the plea was not specifically raised and therefore permission for amendment at this belated stage cannot be entertained. It is now well settled position of law that the pleadings cannot be construed (sic) and that they should be liberally and broadly construed to give relief to the party. It is also well settled position of law that facts not denied must be taken to have been admitted. Taking these facts having been admitted I consider that no prejudice will be occasioned to the defendant if this application for amendment is allowed.

12. In Ganesh Trading Co. Vs. Moji Ram, their lordships of the Supreme Court have held that (at p. 485):

"Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties and to prevent deviation from the course which litigation on particular causes of action must take".

The application for amendments are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense cause to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued. The dictalaid down by their Lordships of the Supreme Court in the decision referred to supra lends assurance to conclude that in the ultimate result of rendering substantial justice the approach and animation of the Court would be to prevent miscarriage of justice the procedural wrangles or cobwebs should not be the impediments in this process. They should be surmounted to eliminate obscurity or dubiety in the pleadings by permitting amendment of pleadings to enable the opposite party to meet the case squarely. But it would be without causing irremediable injury or prejudice to the opposite party since parties pin their implicit faith in the Court that their just legal wrong would be redressed and justice be meted out to them. In view of my finding that there is no prejudice caused to the respondent-defendant, if I allow this application, since the facts stated in the plaint remained uncontroverted and so are deemed to have been admitted, the application for amendment can be allowed. Even in second appeal there are instances where this Court has allowed amendment of the pleadings to give an opportunity to the parties to substantiate their rights in dispute In second Appeal No. 1172/51 dated 18-7-1955, the hon"ble sri justice umamaheswaram. Has allowed the application for amendment and directed the party to make suitable amendment of the plaint. I am therefore of the opinion that to meet the ends of justice to render substantial justice this application for amendment is to be allowed and I hold that the petitioner has made out a case to order amendment of the plaint as prayed for in C.M.P. No. 13495 of 1982.

13. It is contended by the learned counsel for the respondent that this application cannot be entertained when it was filed during the course of arguments and that it lacks bona fides on the part of the plaintiff. He relies upon the decision reported in U.P. Government Vs. J.R. Bhatta, for the said proposition In that case also a suit was filed for declaration that the order of compulsory retirement from service of the plaintiff was illegal. The suit was dismissed and it was carried in appeal. When arguments were going on an application for amendment of the plaint to include a further alternative relief of arrears of salary was sought for. On the facts in that case the learned Judges have dismissed that application but the facts in that case have no application to the present case since the facts in this case are not in dispute.

14. The next decision relied on by the learned counsel for the respondent is Bhagavatula Gopalakrishnamurthi and Others Vs. Dhulipalla Sreedhara Rao and Another, . That was a case where in a suit for partition and possession the plaintiffs are seeking that the insolvent and official receiver in whom the lands are vested under the provisions of the insolvency Act have no right to sell his share. In the first instance it was contended that the half share in the property

belongs to the father alone and does not) vest in the official receiver and that the official Receiver has no power to sell the entire lands including the share of the plaintiff. While the suit is pending the legislature has intervened and amended the law by giving the power to the official Receiver to sell the entire property including the undivided share of the son. Subsequently an application for amendment was made to introduce the facts, which according to the plaintiff, necessitates to hold that the sale is not supported by consideration etc. The trial Court allowed the petition. When revision petition was filed a single Judge of the Madras High Court took the view that new facts which were not taken originally in the plaint cannot be allowed. I am afraid that the law laid down is now eroded by the law laid down by their lordships of the Supreme Court in *Ganesh Trading Co. Vs. Moji Ram*, I am bound by the law laid down by their Lordships of the Supreme Court therefore I cannot follow the decision reported in *Bhagavatula Gopalakrishnamurthi and Others Vs. Dhulipalla Sreedhara Rao and Another*, .

15. The next decision which the learned counsel for the respondent relied on is reported in *Nagaprasadarao v. State of A. P.* (1970) 2 AnWR 49 a decision rendered by my learned brother, Alladi Kuppaswamy, J. (As his Lordship then was). Therein it is being contended that the plaintiff has no right to institute the suit as there is no privity of contract between the plaintiff and the defendant. But that plea was not taken either before the trial Court or in the Appellate Court though it was pending for a long time. In view of the fact that there is no satisfactory explanation offered, the learned Judge did not permit to raise that plea by way of an amendment to the written statement. It is distinguishable on facts. But in this case the plaintiff has specifically stated the necessary facts in the plaint even originally filed and the cause of action also is based on the infringement of his right of ingress and egress from the gateway marked AB on the southern side by the unauthorised actions of closure and the interference by the defendant and those facts have not been denied. The only question is: whether the delay has been satisfactorily explained as stated earlier, in the trial Court they proceeded on the basis of the title. But in the appellate Court the plaintiff was non-suited on the ground that the plaintiff's vendor has not acquired any right of easement through Ex. B-1. That finding was given without any issue or without any opportunity to the parties. The real question in this case is only the right of easement. Though the petition was filed during the course of arguments but on these undisputed facts, I am of the view that the delay by itself, is not fatal, to file an application for amendment provided the ends of justice will be met by appropriately awarding costs to the defendant.

16. In this case no doubt the party went for trial with the averments made in the plaint but the plaintiff should have sought for an amendment to plead the right of easement and an issue should have been raised but the plaintiff allowed it to proceed merely on the basis of the title. But the appellate Court when it interfered to non-suit the plaintiff on the ground that the plaintiff's vendor did not acquire right of easement, should have given an opportunity to amend the

plaint but at that stage also it was not done. Therefore I am of the view that the plaintiff should be made liable to pay costs to the defendant, -costs incurred by him during trial as well as first appellate Court. If these costs are ordered to be paid to the defendant, the defendant does not suffer any prejudice. As a condition I am also of the view that irrespective of the result in the suit the plaintiff should not be awarded costs in the trial Court after remand of this appeal. If these conditions are imposed, I am satisfied that no injustice will be done to the defendant. Accordingly I set aside the decree of the Appellate Court. The suit is ordered to be restored by the trial Court. The suit is ordered to be restored by the trial Court. The decree of the trial Court also is set aside and the trial Court is directed to frame appropriate issue on the right of easement and the parties are at liberty to adduce evidence afresh both oral and documentary and the suit will be disposed of according to law. The second appeal is allowed accordingly but without costs. The court-fee paid shall be refunded to the plaintiff-appellant.

17. C.M.P. No. 13495/ 82 is allowed subject to the payment of Rs. 100/- to Sri. K. Sridar Rao the learned counsel for the respondent and the costs of Rs. 100/- has been paid to the learned counsel in my presence, in open Court. Since I am allowing this application for amendment of the plaint, the defendant is at liberty to file his additional written statement.

18. Appeal allowed.