HIGH COURT OF ANDHRA PRADESH

Bench: Dr. V.R.K. Krupa Sagar, J

Date of Decision: 1st February 2024

SECOND APPEAL NO. 1128 OF 2010

AKKI TIRUPATHAIAH …APPELLANT(S)

VERSUS

YEDLAPALLI SUBBA RAO …RESPONDENT(S)

Legislation:

Section 100 of the Code of Civil Procedure (C.P.C.)

Subject: Dispute regarding the right of way and erection of pipelines and taps by the defendant in the plaintiff's property – Seeking mandatory injunction for removal of encroachment and fixing of property boundaries.

Headnotes:

Mandatory Injunction and Property Encroachment – Suit filed by appellant for removal of pipelines and taps erected by the respondent in appellant's property – Original suit decreed in favor of appellant, but reversed by the appellate court – Second appeal focuses on the legality of the mandatory injunction and property rights. [Paras 1-2, 4-5, 8, 10]

Burden of Proof and Right of Way Dispute – Argument over whether a declaration of title is necessary in cases of mandatory injunction – Appellant claims exclusive right over the disputed pathway, while the respondent asserts it belongs to the Gram Panchayat – Appellate court finds that the appellant failed to prove exclusive ownership. [Paras 3, 6, 10, 14-16]

Legal Principles in Granting Mandatory Injunction – Supreme Court precedents cited – Need for seeking declaration and recovery of possession in cases where property is under unlawful possession – Appellant's failure to seek such relief is a legal hurdle. [Paras 14-15]

Additional Evidence Consideration – Request for additional evidence in I.A.No.3 of 2019 denied – Documents related to sale and undertakings between the parties deemed not crucial for deciding the appeal – Parties advised to resolve through private settlement if possible. [Paras 18-19]

Decision – Second Appeal dismissed – Judgment of first appellate court confirmed – Parties granted liberty to seek remedies as per private undertakings if desired. [Para 20]

Referred Cases:

- Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar v. Chandran (2017) 3 SCC 702
- Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (1999) 3 SCC 722

Representing Advocates:

Sri Tagore Yadav Yarlagadda for appellant

JUDGMENT:

Plaintiff is the appellant in this appeal filed under Section 100 of Code of Civil Procedure (C.P.C.). Respondent No.1 is the original defendant in the suit. Respondent Nos.2 and 3 are added in this Court by virtue of orders dated 10.02.2020 in I.A.No.2 of 2019.

2. O.S.No.768 of 2006 is a suit where the prayer of the plaintiff was for a mandatory injunction seeking removal of two taps erected at point H1 and L and pipeline erected between these points in a length of 20 feet and a depth of 1 feet under the ground as defendant made such arrangements by encroaching into plaint schedule property. A further prayer was made to fix the boundaries between both parties in accordance with plaint plan. After due trial, learned I Additional Junior Civil Judge, Guntur by a judgment dated 17.06.2009 decreed the suit in favour of the plaintiff. Aggrieved defendant preferred A.S.No.373 of 2009. Learned III Additional District Judge, Guntur, by a reasoned judgment, allowed the appeal and set aside the trial Court judgment and consequently dismissed O.S.No.768 of 2006. It is in those circumstances, the plaintiff has preferred this second appeal.

3. On 03.02.2010 a learned Judge of this Court admitted the second appeal on these two following substantial questions of law:

1. Whether one has to compulsorily seek for declaration of title in all cases of mandatory injunction, even though when the dispute is not for title?

2. Whether the burden is only on the plaintiff to establish his right when it is causing public nuisance and obstructing the way or shifts to the defendant when the defendant claims that the land belongs to Gram Panchayat, he is entitled as a matter of right to illegally lay pipes without permission of Gram Panchayat?

An additional question that arises is:

3. Whether appellant made out a case for additional evidence prayed for in I.A.No.3 of 2019?"

4. The facts in which they came up for consideration require a mention here. The schedule appended to the plaint described an extent of 300 square yards consisting of a tiled house and a thatched shed and a hey-rick located in D.No.4-3-175 in Lalpuram Village of Guntur District. The southern boundary is shown as property of the defendant. Plaint narrates as to how the plaintiff secured ownership and possession over the plaint schedule property wherein he claimed to have got 150 square yards out of it under a registered sale deed dated 15.04.1985 and claimed to have succeeded to the remaining 150 square yards of the property. A plan is appended to the plaint describing the plaint schedule property as within ABCDEFGH. It is stated that on the west of this property there is panchayat bazar. For access to that for the plaintiff there is a nadava in AHFG which is exclusively meant for the plaintiff. The property of the defendant was on the western side. The defendant had a house and a compound wall. AH is the wall that divides the properties of both parties. Defendant without any manner of right over the nadava of the plaintiff laid the pipeline and fixed the taps and thus,

encroached into the property of the plaintiff. The right to ingress and egress exclusively exercised by the plaintiff is hindered by the acts of the defendant and therefore, the suit.

5. The defendant filed the written statement resisting the claim stating that the nadava claimed by the plaintiff is not exclusively owned by the plaintiff. Property of the defendant situate on the south of the plaintiff's property. For the defendant's property on northern side the eves space of the house of the defendant extends over the wall and that eves space exclusively belongs to the defendant and after obtaining due permission from the panchayat, he laid the pipeline and erected the taps within his own property. That the nadava claimed is panchayat bazaar. That the defendant never encroached on the property of the plaintiff. In fact, plaintiff was tying his buffaloes in the property of the defendant at the eves space and with a view to grab that this false suit is filed. He sought dismissal of the suit.

6. Learned trial Court settled the following issues for trial:

1. Whether the plaintiff is in possession of the plaint schedule property?
2. Whether the plaintiff is entitled for mandatory injunction as prayed for?
3. To what relief?

7. For plaintiff, PWs.1 to 4 testified and Exs.A.1 to A.7 were marked. For defendant, DWs.1 to 3 testified and Ex.B.1 was marked. In addition to that, Exs.C.1 to C.3 were marked through PW.4 who was the advocate commissioner.

8. After hearing arguments on both sides and on considering the material on record, the learned trial Court concluded that the contention raised by the defendant that the disputed nadava is a common lane belonged to the Gram Panchayat was not established as he failed to file any documentary evidence in that regard. It found that there is no other passage for the

plaintiff for his ingress and egress to the panchayat road. That the defendant failed to file documents indicating that he obtained permission from Gram Panchayat for laying water pipes through the disputed passage. It found that the defendant had no property beyond the northern side wall of his property. That erecting such pipelines and taps caused disturbance to the plaintiff and that is in violation of the neighbours' duty. That a neighbour should not disturb, by his acts, the others. Since the defendant illegally laid the pipes without any permission from the Gram Panchayat, they must be removed and therefore, mandatory injunction as prayed by the plaintiff had to be granted. It granted the relief of mandatory injunction. Be it noted, the other relief in the plaint is for fixing boundaries between the properties of both parties. The trial Court declined to grant the said relief stating that since the plaintiff did not seek declaration of title, such a relief could not be granted. The judgment of the trial Court presumptively considered the matter as if the dispute lane exclusively belonged to the plaintiff. The focus of the trial Court do not indicate paying any attention to the case set up in the plaint and as to whether plaintiff brought enough evidence on record to establish the case pleaded. Its focus was the pleadings of the defendant and as to how the evidence led by defendant did not establish such plea.

9. Learned first appellate Court on hearing the submissions on both sides and on considering the material on record, posed for itself the following points for its consideration:

1. Whether the finding of the Court below that lane is private land of plaintiff and defendant has no right to lay pipeline, is sustainable on law and facts and if not the same is liable to be set aside?

2. Whether the finding of the Court below that plaintiff is entitled for mandatory injunction simplicitor without seeking for declaration of title is sustainable on law and facts?

3. The findings of the Court below that plaintiff is entitled for the relief prayed is sustainable on law and facts, if not the same is liable to be set aside and the suit of the plaintiff is liable to be dismissed?

10. In the appeal, the learned III Additional District Judge reassessed the entire evidence and its effect on the disputed contentions and disagreed with all the findings of the trial Court and set aside that judgment and dismissed the suit. At paragraph No.16 the learned first appellate Court stated that the claim of the plaintiff that the nadava/lane exclusively belongs to plaintiff and therefore his claim is that it is a private lane and since that fact is disputed by the opponent the burden lies on the plaintiff to prove that this disputed lane exclusively belongs to him. It held that the plaintiff failed to prove it is a private lane and failed to prove that he holds exclusive and absolute rights over the disputed lane. It reached to these conclusions based on the following pieces of evidence. It stated that the total extent of the property claimed by the plaintiff is 300 square yards. On considering the evidence on record, the extent of disputed lane is found to be 196 square yards. If both these are put together it comes to 496 square yards. As per the evidence 300 square yards is shown in the plaint schedule and it is there the properties are there and there is no evidence to show that 196 square yards styled as nadava or lane forms part of these properties. At any rate it is not the claim of plaintiff that he owns 496 square yards. There is no evidence to show that all the structures in the plaint schedule property are within less than 300 square yards so as to accommodate 196 square yards of lane as part of it. It further considered the evidence of PW.3, the Sarpanch of the Village, who said that the disputed nadava/lane is not the private lane of plaintiff and it is panchayat lane. Be it noted here, the record does not indicate plaintiff seeking permission of the trial Court to question his own witness in cross-examination invoking Section 154 of the Indian Evidence Act. Thus, plaintiff's own witness gave evidence against the case of plaintiff. Learned first appellate Court further considered the evidence of PW.2 and the evidence of DWs.1 and 2 and concluded that not only the plaintiff but also those individuals and others have been using this lane. Based on assessment of this evidence, it held that the disputed lane does not exclusively belong to the plaintiff. Learned first appellate Court then considered the evidence of the advocate commissioner/PW.4 and the various reports and sketches filed by her as per Exs.C.1, C.2 and C.3 and stated that the first pipeline was found very much attached to the northern

side wall of the defendant. The second pipeline is away from it by 1½ inch. It further observed that the eves of the house of the defendant have a width of 8½ inches. From that evidence it recorded that the disputed pipelines and the taps were well under the eves of the house of the defendant. It stated that over the eves space of the defendant's house, the plaintiff could not lay a claim. After citing two rulings of this Court, at paragraph No.28 of its judgment, the learned first appellate Court stated that a relief for mandatory injunction simplicitor as claimed in the plaint cannot be granted at law since recovery of possession is not prayed for. It recorded that what was sought to be removed was found not within the property of the plaintiff and therefore the relief prayed by the plaintiff could not have been granted by the trial Court. Holding such view, it set aside the judgment of the trial Court and dismissed the suit filed by the plaintiff.

11. Sri Tagore Yadav Yarlagadda, the learned counsel for appellant, earnestly argued that the disputed nadava exclusively belongs to plaintiff and his brother and at any rate it does not belong to the defendant and it is not a public way or a panchayat bazar. In the grounds it is specifically urged that when there was no dispute with regard to title of the plaintiff, there was clear error on part of the first appellate Court in refusing to grant mandatory injunction on the sole ground that the declaration of title was not prayed for. In the grounds, it is specifically mentioned that the defendant failed to prove his contention that the disputed nadava belonged to panchayat and therefore, burden was on the defendant and as he failed to prove it the trial Court properly appreciated it and granted the relief for the plaintiff and the learned first appellate Court erroneously negatived such a well reasoned judgment of the trial Court. That the evidence on record clearly proved absence of any right, title and possession for the defendant beyond his northern wall. Trial Court's finding that the acts of the defendant in laying pipes and taps was illegal as it was without permission of Gram Panchayat and first appellate Court erroneously set aside such judgment.

12. Original defendant who was arrayed as respondent No.1 was served with a notice but he did not choose to appear and contest. Respondent Nos.2 and 3 were subsequently added and they were served with notices and appearance was made for respondent No.2, but there has been no prosecution in defence on all the earlier occasions when this matter was coming up for hearing. Thus, on behalf of the respondents none argued.

13. It is in the above context of the facts, the substantial questions of law raised have to be considered.

14. Point No.1:

"Whether one has to compulsorily seek for declaration of title in all cases of mandatory injunction, even though when the dispute is not for title?"

In the suit the appellant/plaintiff alleged that his property was encroached into by the defendant/respondent and having encroached into it he erected taps and pipelines and therefore, sought a mandatory injunction for removal of them. Thus, the admitted case of the plaintiff indicates that his property has been in the occupation of defendant. Despite the fact that the defendant was contesting the title and ownership of the plaintiff over the disputed area, the plaintiff did not choose to seek a relief for declaration. Be that as it may. Despite the fact that his property is under unlawful possession of defendant, the plaintiff did not seek for the relief of recovery of possession. During the course of arguments, against the two rulings cited in the impugned judgment of the first appellate Court, no contrary ruling is cited before this Court. At this juncture, one may notice what the Hon'ble Supreme Court of India had stated in Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar v. Chandran (2017) 3 SCC 702. Paragraph No.35 contains the statement of law and therefore, the same is extracted here:

"The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit."

15. Thus, the law is very clear that in a case of this nature failure to seek declaration and recovery of possession is a legal hurdle in granting any relief to a suitor. Therefore, the observations of the learned first appellate Court on principles of law are correct. Hence, they do not require any interference. Therefore, this point is answered against the appellant.

16. Point No.2:

"Whether the burden is only on the plaintiff to establish his right when it is causing public nuisance and obstructing the way or shifts to the defendant when the defendant claims that the land belongs to Gram Panchayat he is entitled as a matter of right to illegally lay pipes without permission of Gram Panchayat?"

The point formulated speaks about public nuisance. That sounds contrary to the very claim of the plaintiff since the appellant/plaintiff has been claiming that it is over his own property the respondent/defendant having erected pipelines and taps caused nuisance to him which is only private nuisance. The question raised requests the Court to see that since the respondent/defendant claimed that the disputed pathway is a pathway of Gram Panchayat, the burden is on the respondent/defendant to prove it.

Without there being any evidence, a reasoned judgment of the trial Court was set aside by the first appellate Court. For the following reasons, this Court has to record that there is no merit in this argument.

17. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (1999) 3 SCC 722 , the Hon'ble Supreme Court of India reiterated the law and held that the power of High Court sitting in second appeal to disturb the findings of fact rendered by the first appellate Court arise only if the High Court finds that in reaching to the conclusions the first appellate Court acted contrary to the mandatory provisions of applicable law or contrary to the law as pronounced by the Hon'ble Supreme Court of India or based on inadmissible evidence or without any evidence. If the first appellate Court arrived at factual conclusions based on evidence, it does not confer jurisdiction on the High Court to interfere with it except in the presence of instances as referred earlier. Their Lordships further stated that a substantial question of law is different from a substantial question of fact. The findings of the first appellate Court and the approach of the first appellate Court do indicate that it rightly placed burden of proof on plaintiff/appellant first to prove that the disputed nadava is a private lane as claimed by the plaintiff. After an elaborate discussion of evidence and giving cogent reasons, it found no material to agree with the plaintiffs' case and positively held that the disputed lane/nadava is not private lane and is not a property where plaintiff has any absolute or exclusive rights. Those findings are based on evidence and are reasonable and are the correct view of the matter and do not require any interference. The claim of the defendant/ respondent that it is a public way was also positively found to -be correct and for that finding first appellate Court relied on the very evidence of PW.3 and the evidence of DW.2 and the recitals in Ex.B.1. Therefore, those findings were also recorded based on evidence and they are supported by reasons. That cannot also be disturbed. Even if the defendant failed to prove his claim that the nadava is a public lane that by itself does not entitle the plaintiff to seek relief. It is to overcome that the appellant claims public nuisance which has never been the case set up in the plaint or evidence led by the plaintiff/appellant. It is in these circumstances; this Court finds no merit on part of the appellant and the question formulated does not really arise.

Therefore, this point is answered against the appellant.

18. Point No.3:

"Whether appellant made out a case for additional evidence prayed for in I.A.No.3 of 2019?"

I.A.No.3 of 2019 is an application filed under Order XLI Rule 27 C.P.C. by the appellant seeking to receive three documents as additional evidence and mark them as Exs.A.8, A.9 and A.10 in this appeal. Those documents are as follows:

1. Office copy of legal notice dated 25.11.2014 along with acknowledgments.
2. Certified copy of sale deed document No.3990/2015 dated 07.05.2015.
3. Notarized deed of undertaking dated 09.05.2018 (Original).

19. During the pendency of the appeal, the sole defendant and his family members by executing a registered sale deed sold out the properties to Sri K.Subba Rao and Sri S.Rama Rao. Those two purchasers were impleaded in this appeal as respondent Nos.2 and 3. The property which the defendant sold is the property of the defendant. The suit does not relate to the property of the defendant as such. Therefore, the purchasers of the property of the defendant cannot be said to be lis pendens purchasers. Learned counsel submits that the new purchasers/respondent Nos.2 and 3 have executed an oppudala patram dated 09.05.2018 and got it notarized and in this document executed in favour of the present appellant they have mentioned that in the property they purchased from the original defendant though the boundary is stated to be 36 foot, on taking measurements they found it is only 34.6 and hence they bound themselves stating that in the event of further alienation of this property by them, they would alienate only 34.6 and they have no claim over anything that is lying adjacent to their northern wall. They further mentioned that what was there adjoining the northern wall belonged to the plaintiff/appellant. Learned counsel seeks this document to be brought on record as additional evidence. Be it noted, the presence or absence of this document has no bearing for taking a decision in this second appeal. This subsequently emanated document does not require consideration in this appeal. Therefore, to take it as additional evidence there is no legal need. The submission of the learned counsel is that these admissions of respondent Nos.2 and 3 would vindicate the appellant's claim that from the northern wall of the defendant house the property belonged to the appellant and respondent Nos.2 and 3 had confined their own rights to the south of

this northern wall and in such an event the trial Court decree may be restored. Be it noted that a private settlement arrived at among the parties can be worked out by the parties themselves in pursuance of what is mentioned in the above said notarized document. The appellant/plaintiff is at liberty to obtain a relinquishment deed from the current owners and with their consent he can also take reasonable steps over the disputed pipeline and taps if law permits. What parties have outside concluded is in the form of a compromise and nothing prevented the parties to come over here and have the dispute resolved by way of a compromise. This very document indicates the terms between appellant and respondent Nos.2 and 3. Therefore, nothing prevented them to have the compromise recorded but that is not done. Before the trial Court and the first appellate Court these respondent Nos.2 and 2 are not parties. It is in these circumstances, this application has no merit and is liable to be dismissed and is dismissed accordingly.

20. In the result, this Second Appeal is dismissed. Consequently, the impugned judgment dated 16.07.2010 of learned III Additional District Judge, Guntur in A.S.No.373 of 2009 stands confirmed. Appellant and respondent Nos.2 and 3 are at liberty to work out their own remedies in terms of the notarized deed of undertaking dated 09.05.2018 if they so desire and the decree of the first appellate Court is not a legal hindrance for any such endeavour on part of them. There shall be no order as to costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.