

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

C.M.A.No.1162 of 2012

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JUDGMENT

This Civil Miscellaneous Appeal under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (for short, 'the Code') by the unsuccessful plaintiff/petitioner is directed against the order dated 06.07.2012 of the learned III Additional Chief Judge, City Civil Court, Hyderabad passed in I.A.No.1050 of 2012 in O.S.No.270 of 2012 filed under Order XXXIX Rules 1 and 2 read with Section 151 of the Code for a temporary injunction restraining the defendants from making constructions in the petition schedule premises situated at Tawakkal Nagar, Yellareddyguda, Ameerpet, Hyderabad more fully described in the Schedule annexed to the petition.

2. The parties in this appeal shall hereinafter be referred to as plaintiff and defendants for convenience and clarity.

3. I have heard the submissions of the learned counsel for the plaintiff and the learned counsel for the defendants 1 and 3 and the learned counsel for the 2nd defendant.

4. The basic facts necessary for consideration, in brief, are as follows:

The sole plaintiff had filed the suit against the defendants 1 to 3 for declaration that the plaintiff is the owner of the site with superstructure admeasuring 15' x 20' equivalent to 33.33 square yards which is shown as E, B, G and F now in the possession of the first defendant and an equal extent of site, which is shown as F,G,I and H now in the possession of the second defendant and an equal extent of site, which is shown as H, I, C and J now in the possession of the third defendant as per the schedule and the plan appended to the plaint and to direct the

defendants 1 to 3 by way of a mandatory injunction to remove the structures and deliver the vacant possession of the said respective plots to the plaintiff and for costs. The defendants 1 and 3 together and the defendant No.2 are resisting the suit. Along with the suit, the plaintiff had also filed an Interlocutory Application for temporary injunction to restrain the defendants from making any constructions in the properties. The defendants 1 and 3 together and the 2nd defendant by filing separate counters had resisted the said application of the plaintiff. At the time of enquiry, exhibits P1 to P14 and R1 to R19 were marked. On merits, the trial Court had dismissed the application of the plaintiff. Therefore, the plaintiff is before this Court.

5. The learned counsel for the plaintiff would submit as follows: 'The suit is filed for declaration and recovery of possession of the extents of the properties in the respective possessions of the defendants after directing them by a mandatory injunction to remove the constructions and hand over the vacant possession of the same. In spite of the fact that a comprehensive suit is filed and that a temporary injunction for the limited purpose of maintaining *status quo* was sought to restrain the defendants from making constructions, the trial Court had erroneously dismissed the said petition without properly appreciating the facts and the scope of the enquiry. The trial Court ought to have seen that if the defendants are restrained from making constructions, the *status quo* in regard to the constructions thereon would be maintained; and, that generally, injunctions are granted to maintain and not alter the *status quo*. Without proper appreciation and any discussion supported by reasons, the trial Court had discarded the exhibits in 'P' series particularly, P6, P7 and P13, which proved the possession and enjoyment of the plaintiff over the remaining property. The trial Court ought to have appreciated the fact that the defendants had never disputed that the plaintiff is having title in respect of 360 square yards of

site. There is also no dispute in regard to the fact that when an encroachment was made by some parties, a suit in O.S.No.1362 of 1981 filed for eviction was decreed in favour of the plaintiff and that the plaintiff had obtained possession of that suit schedule property after filing E.P.No.17 of 1982. And, afterwards, the plaintiff had raised a room on the North-West corner of the total extent and had expanded the construction thereafter. In the circumstances, the plaintiff's title is undisputed. The trial Court wrongly had relied upon exhibit R1, which is nothing to do with the suit schedule property. The trial Court ought to have noted that it does not contain patta number and survey number of the property and that exhibit R2 is a sale deed executed by one Zahra Bee, who is no way concerned with the present suit and the property. The trial Court ought to have seen that the second defendant had failed to establish his plea that the plaintiff is in no way concerned with the suit property. The second defendant having contended that the plaintiff had entered into an agreement with defendants 1 and 3 for creating a common lane and selling the same had failed to establish the extents of property covered by any such an agreement. The said document, if any, has not seen the light of the day. None of the documents filed by the defendants do advance their case in this application for temporary injunction where the scope is very limited. The trial Court ought to have further seen that *status quo* orders were granted in favour of the plaintiff and were in force for a long time. The Commissioner, who was appointed by the Court below, had also filed a report. However, even before the Commissioner had filed a report, the trial Court had passed the impugned order. Therefore, by virtue of the impugned order miscarriage of justice had occasioned causing irreparable injury to the plaintiff.

6. On the other hand, the learned counsel for the defendants 1 and 3 and the 2nd defendant supported the orders of the Court below by

reiterating the contentions of the respective defendants. They had contended, *inter alia*, that the plaintiff having pleaded that she had allowed the defendants to stay in the premises had failed to prove the alleged plea and that the documents under exhibit 'R' series had sufficiently established the defence of the defendants and that therefore, the trial Court has rightly held that the plaintiff neither has a *prima facie* case nor balance of convenience in her favour and had rightly dismissed the petition.

7. Now, the point for determination is – 'Whether the plaintiff had made out valid and sufficient grounds and satisfied the cardinal principles for granting a temporary injunction as prayed for?; And, if so, whether the order impugned is liable to be set aside?

8. The facts leading to the filing of this appeal and the contentions of both sides are already stated supra.

9. The case of the plaintiff is this;

She had purchased, for valid consideration, 360 square yards of schedule site, which is shown as A,B,C,D in the plaint plan, under exhibit P1, a registered sale deed dated 01.05.1980. She along with her family members is residing in her ancestral house at Begum Bazar. Taking advantage of the said fact, some unsocial elements had encroached into the site of an extent of 60 square yards and had raised a hut and started living in it. On that, the plaintiff had brought against the said encroachers, a suit in O.S.No.1362 of 1981 on the file of the III Assistant Judge, City Civil Court, Hyderabad and the said suit was decreed on 21.09.1981 and the possession of that encroached property was delivered to the plaintiff after evicting the encroachers pursuant to the proceedings in E.P.No.17 of 1982. In the circumstances, the plaintiff thought of raising a house in the entire schedule property. However, due to increase in the cost of construction, she had constructed only a single

room on the North-West corner and the said house was assessed to tax in the year 1995. The plaintiff had intended to expand the area of the constructed room and make the property fit for occupation of her family; and plaintiff had accordingly applied to the Municipality and had obtained a sanctioned plan. She had later got removed the existing single room and got constructed a house in an extent of about 200 square yards with ground and first floors and had started residing in the ground floor with her children. Her husband and her second son are residing in their ancestral house at Begum Bazar. About 10 years ago, the defendants and some more persons have approached the plaintiff stating that they have no place to live. Therefore, they were permitted to live in the vacant site of the plaintiff by raising huts in the fringe of the site. They had also undertaken at that time that they would remove the huts and deliver possession of the vacant site to the plaintiff as and when required by the plaintiff. When there was increase in the number of the members of the family of the plaintiff and the need for requirement of more accommodation was felt, the plaintiff had requested the defendants 1 to 3 to remove the encroachments made by them in an extent of 300 square feet each as shown in the plaint plan. The defendants have got their own site on the Eastern side of the above encroached portions as shown in the plaint plan. In spite of repeated demands, the defendants did not vacate the site of the plaintiff. The second defendant having agreed to deliver possession and remove his building had all of a sudden started construction on the site afresh. The first defendant is only having a tin sheet shed with earthen walls partly plastered with cement. The 3rd defendant is having a tin sheet shed originally; and, he had later converted it into a small terraced room. They have no manner of right to continue in the respective properties. Therefore, the suit is filed for declaration, mandatory injunction, recovery of possession and other reliefs. In the circumstances, if the constructions are made during the pendency of the suit the plaintiff suffers irreparable loss.

10. The defendants 1 and 3 in their defence contended *inter alia* that they had purchased their respective properties under registered sale deeds and that the plaintiff has no manner of right whatsoever over their properties and that the contentions of the plaintiff that they had occupied her properties are incorrect.

11. The second defendant in his counter had contended that one Mohd. Osman, who is his natural elder brother, had entered into an agreement of sale with Kauser Parveen, w/o Zaheer Parvez for a total sale consideration of Rs.4,000/- on 28.01.1977 and that the said Mohd. Osman had also executed a receipt for Rs.1,600/-, which was paid towards part payment under the agreement of sale, and that on 24.11.1982 the said Kauser Parveen had executed a sale deed in favour of Mohd. Osman vide document No.7797/1981 dated 28.01.1977 and that electricity service connection was also obtained for that part of the suit site in the year 1978 in the name of Mohd. Osman and that his name was also entered in the municipal records and that the said Mohd. Osman, who is no other than the natural elder brother of this defendant, had gifted his property to this defendant out of love and affection by executing a memorandum of gift and that since then, the second defendant is in possession and enjoyment of his part of the suit site as absolute owner thereof. It is further contended on behalf of the second defendant that the plaintiff and defendants 1 and 3 had entered into an agreement and that under the said agreement, a common lane was sold by the plaintiff to defendants 1 and 2 and Mohd. Osman after receiving Rs.10,000/- from each purchaser and that this defendant had started construction of a house in his own property and that, therefore, the plaintiff has no manner of right to seek an injunction to stop the construction.

12. I have given thoughtful consideration to the pleadings and the facts. I have noted the submissions. I have gone through the contents of

the documents exhibited viz., P1 to P14 and R1 to R19. The plaintiff claims the house in her possession in the suit site and the properties in the respective occupations of the defendants 1 to 3 out of the suit site as belonging absolutely to her having been purchased by her on 01.05.1980 under exhibit P1. She also pleads that when at an earlier point of time, a part of her property was encroached by some persons, she had filed a suit and had obtained a decree under exhibit P13 and that later, the encroachers were got evicted from the property and the possession of the encroached portion was delivered to her pursuant to the execution proceedings in the said suit under exhibit P14 and that exhibits P1, P13 and P14 together are sufficient to establish a *prima facie* case; and, that the defendants, who were poor people, had approached her and made a request to permit them to stay in the property and that on permission accorded, they had raised huts in the fringe of the site of the plaintiff and that the defendants having thus entered into the properties in their respective possessions had made temporary constructions about 10 years back and had later refused to vacate the properties in their respective possessions even after requests of the plaintiff though they had originally undertaken that they would vacate their respective properties and deliver possessions of the same as and when demanded by the plaintiff and that the defendants are highhandedly making constructions of permanent nature without any manner of right and that, therefore, the plaintiff is constrained to file the suit and the present application to restrain them from making constructions.

13. The defendants 1 and 3 by relying upon the regular registered sale deeds claim ownership to the properties in their respective possessions. The second defendant also claims that his brother had purchased the portion of the suit site in his occupation on 28.01.1977 by virtue of sale deed on 28.01.1977 from one Parveen and that later, he had obtained an electricity service connection to the said site in the year 1978 and that

subsequently his brother had gifted the property to him and that he is making constructions in his site.

14. *Prima facie*, the permission said to have been given by the plaintiff to the defendants to stay in her property by raising huts at the fringe of the site is an oral permission and that permission was admittedly given about 10 years prior to the suit, even according to the case of the plaintiff. According to the further case of the plaintiff, the second defendant is making pucca constructions in the portion of the suit site which is in his occupation and the first defendant is only having tin sheet shed with earthen walls partly plastered with cement and that the third defendant, who was initially having only tin sheet shed had later converted it into a small terraced room and that he is still having a original tin sheet shed on the Eastern side. Though the plaintiff appears to have obtained a decree for eviction against some third parties in a former suit for recovery of the encroached portion of her site, the same will not have any bearing on the claims and rival claims at this stage as even according to the plaintiff, the defendants are in permissive possession of the respective portions in their occupations and as the defendants are denying the case of the plaintiff by setting up right, title and interest independently to the portions in their respective occupations. The defendants are in settled possession of their respective portions for a considerable time and during the period of about 10 years and more, the plaintiff had never objected to their making some sort of permanent constructions even though her case is that they have entered with a request to construct huts and live thereon.

15. As rightly contended by the learned counsel for the defendants since the plaintiff had sought a mandatory injunction in the suit, no loss or injury would ensue to her even if the constructions are allowed to go on and remain as such as the defendants would be called upon to remove the constructions in case of her ultimate success in the suit.

Further, exhibit 'R' series documents would show that the Municipality had issued demand notices for payment of house taxes and that electricity connections were also obtained by the defendants for the properties in their respective possessions and that electricity consumption charges as well as water charges were and are being paid. Thus, on an analytical examination of the facts and the documentary evidence, this Court is of the considered view that the defendants, who are in possession since a sufficiently long time, cannot be restrained by way of temporary injunction not to proceed with the constructions. In the well considered view of this Court, the plaintiff could not establish a *prima face* case, which is a *sine qua non*, for grant of a temporary injunction. Therefore, this Court finds that there is no merit in the appeal and that the appeal is liable to be dismissed. Though the plaintiff claims title to the entire property under exhibit P1, the said issue about the title of the plaintiff and her right to recover possession will have to be judged on merits after full fledged trial and there is no need at this stage to go into contentious issues and record any findings which will have a bearing on the merits of the issues involved in the suit. However, to meet the ends of justice, it would be just and fair to make it clear and observe that any constructions, which the defendants had made and would be making in the property, which is the subject matter of the suit, shall be subject to the final result of the suit, and that in case of the ultimate success of the plaintiff, the defendants would not be entitled to claim any equities and shall be liable to either deliver the properties in their respective possessions with the constructions thereon or after removing the same at their respective expenses before delivering possession.

16. In the result, the Appeal is dismissed confirming the order and decretal order of the Court below subject, however, to the following observations:

(a) Any constructions which the defendants had made and would

be making in the properties in their respective occupations shall be subject to the final result of the suit;

(b) And in case of the ultimate success of the plaintiff, the defendants would not be entitled to claim any equities and shall be liable to either deliver the properties in their respective possessions with the constructions thereon or after removing the same at their respective expenses before delivering the suit property to the plaintiff.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

05th August, 2015

sj