

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

APPEAL SUIT No.1729 OF 1999

JUDGMENT:

1. This Appeal, under Section 96 of Code of Civil Procedure, 1908 (for short, 'the C.P.C.'), is preferred against the judgment and decree dated 24.02.1999 passed in O.S. No.155 of 1987 by the Senior Civil Judge, Gudivada, Krishna District (for short, 'the trial Court').

2. Heard Sri Kowturu Pavan Kumar, learned counsel for the appellant-defendant. No representation on behalf of the respondent-plaintiff.

3. For the sake of convenience, the parties hereinafter are referred to as arrayed before the trial Court.

4. The plaintiff filed the suit against the defendant for delivery of vacant possession of the plaint schedule property, for recovery of Rs.7,000/- towards past damages and Rs.200/- per month towards future damages with costs. The plaintiff purchased the plaint schedule property under a registered sale deed dated 04.06.1964 for Rs.3,000/- from one Shaik Fareed Saheb and since then he has been in possession and enjoyment of the same. While the matter stood thus, the defendant filed O.S. No.187 of 1964 on the file of the District Munsif Court, Gudivada, against the vendor of the plaintiff *i.e.*, Shaik Fareed for specific performance of contract alleging that he purchased the plaint schedule property under an agreement of sale dated 18.06.1964 alleged to have been executed by Shaik Fareed for Rs.2,800/-. After full trial, O.S. No.187 of 1964 was dismissed on 23.12.1965 directing to refund the earnest money and Rs.200/- towards damages. Against the said judgment, plaintiff in O.S. No.187 of 1964 preferred an Appeal *i.e.*, A.S. No.58 of 1966 on the file of the Court of Subordinate Judge, Vijayawada, and the same was

dismissed on 30.08.1972 confirming the decree and judgment dated 23.12.1965 in O.S. No.187 of 1964. Again, the plaintiff in O.S. No.187 of 1964 preferred S.A. No.402 of 1973 before this Court and the same was also dismissed on 27.10.1975. Thus, the plaintiff in this case has been in possession and enjoyment of the plaint schedule property from 04.06.1964. In June, 1978 due to financial difficulties, the plaintiff shifted his residence to Gandigunta village and used to do business in cement rings etc., Taking advantage of the absence of the plaintiff, the defendant had wrongfully trespassed into the plaint schedule property in or about December, 1978. When questioned the trespass of defendant, he promised the plaintiff to vacate the premises as and when required. Thereafter, the defendant neither paid rents nor delivered possession of the plaint schedule property, the plaintiff filed the suit.

5. The defendant contested the suit before the trial Court by filing written statement denying all the averments made in the plaint and contended that the plaintiff brought into existence the sale deed dated 04.06.1964 only to defeat his rights over the plaint schedule property and the plaintiff was never in physical possession of the plaint schedule property. The Advocate Commissioner appointed in this case visited the suit schedule premises and found the articles belonging to the defendant were there. The defendant was never dispossessed from the suit schedule property, at any point of time. The defendant himself paid taxes to the panchayat and, for all practical purposes, he alone enjoyed the rights of the ownership over the plaint schedule property. The defendant acquired title over the plaint schedule property by adverse possession because of his continuous uninterrupted possession for a long time. Therefore, the plaintiff is not entitled for delivery of possession or any rent from the defendant. The finding in O.S. No.187 of 1964 will not operate as *res*

judicata, since its subject matter is altogether different from the subject matter of the present suit and there is no finding with regard to title of the plaintiff over the schedule property therein. The defendant could not give reply to the notice got issued by the plaintiff as he fell sick. The plaintiff schedule property would not fetch rent of Rs.50/- per month even if it was leased out to others and the plaintiff's claim for damages is excessive. Since the plaintiff is not in possession of the plaintiff schedule property since 12 years, he ought to have filed a suit for declaration of his title and possession; the Court fee paid was not correct and finally prayed to dismiss the suit.

6. Basing on the above pleadings, the trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled for the possession of the property?
2. Whether the plaintiff is entitled to profits? If so, at what rate?
3. Whether the decision in S.A. No.402 of 1973 on the file of High Court, Hyderabad, operates as *res judicata*?
4. Whether the defendant acquired title to suit property by adverse possession?
5. Whether the Court fee paid is not correct?
6. To what relief?

7. The trial Court, after considering the evidence of P.Ws.1 and 2, D.W.1 and the documents Exs.A-1 to A-6 and Exs.B-1 to B-3 and upon considering the material available on record, decreed the suit in favour of the plaintiff for delivery of possession of the plaintiff schedule property and awarded Rs.7,000/- towards past damages by granting three months time

for the defendant to deliver possession to the plaintiff. Challenging the said decree and judgment, the defendant preferred the present Appeal.

8. Learned counsel for the defendant-appellant would submit that the defendant is possessor of the suit schedule property; plaintiff has no right, title, interest over the same; the plaintiff was not in possession of the schedule property for more than 12 years prior to filing of the suit; the defendant perfected his title over the suit schedule property more than 12 years prior to filing of the suit. The trial Court had not appreciated the oral and documentary evidence placed on record on behalf of the defendant. The findings of the trial Court are contrary to law and facts of the case and ultimately prayed to dismiss the suit by allowing this Appeal.

9. No contentions were advanced on behalf of the respondent-plaintiff.

10. Now the **point** for determination is whether the impugned judgment and decree dated 24.02.1999 passed in O.S. No.155 of 1987 by the trial Court is liable to be set-aside?

11. **POINT:** There is record to **show** that the defendant filed a suit in O.S. No.187 of 1964 against the plaintiff and the vendor of the plaintiff by name Shaik Fareed stating that he purchased the suit schedule property from Shaik Fareed under an agreement of sale dated 18.06.1964 by paying an advance of Rs.400/-. The said suit was for specific performance of contract and was dismissed, which is evident from Ex.A-2 - certified copy of judgment. Aggrieved by the dismissal of the suit, the defendant-appellant preferred Appeal Suit No.58 of 1966 before the Subordinate Court, Vijayawada, which was also dismissed. Thereafter, the defendant filed Second Appeal No.402 of 1973 on the file of this Court and the same was dismissed. The oral and documentary evidence placed on record on behalf of the plaintiff-respondent clearly reveals that he purchased the suit

schedule property from Shaik Fareed and he is having title to the property. There is no record to show that the defendant is in lawful possession of the suit schedule property. The plaintiff has placed evidence on record to believe that the defendant entered into the possession of the suit land, in his absence in the month of December, 1978 and when he questioned the defendant to vacate the suit schedule property, the defendant promised to pay an amount of Rs.100/- p.m. as rent but failed to pay the same, vacate and deliver the possession of suit schedule property.

12. Admittedly, the sale agreement dated 18.06.1964 does not establish the title and any possession of the defendant over the suit schedule property. As per Ex.A-2 - certified copy of judgment in O.S. No.187 of 1964, the defendant was not in possession of the suit schedule property from 1964 onwards. Under the said agreement of sale, there is no mention of delivery of suit schedule property to the defendant. The submission of learned counsel for the defendant-appellant that the defendant has perfected his title over the suit schedule property by adverse possession is untenable. The ocular and documentary evidence placed on record on behalf of the respondent-plaintiff would show his title and peaceful possession over the suit schedule property. The entitlement and rights of the defendant over the suit schedule property were already negatived in O.S. No.187 of 1964. The oral evidence and Ex.A-6 notice issued by the plaintiff clearly established the encroachment made by the defendant over the suit schedule property. The trial Court had elaborately dealt with the entire evidence on record and appreciated all the facts and circumstances of the case and rightly decreed the suit in favour of the plaintiff against the defendant for possession of the suit schedule property and other consequential benefits. No infirmity is found in the judgment and

decree of the trial Court and the impugned judgment attained finality. The Appeal is devoid of merits and liable to be dismissed.

13. In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 24.02.1999 passed in O.S. No.155 of 1987 by the trial Court.

14. As a sequel, pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

Dr. SHAMEEM AKTHER, J

Date: 04.10.2017.
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