

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.363 OF 2017

JUDGMENT:

Questioning the concurrent findings recorded by the Courts below, all the four (4) defendants in O.S. No.106 of 2009 preferred the present Second Appeal. The respondent herein is the sole plaintiff.

2. For the sake of convenience, the parties are hereinafter referred as arrayed in the original suit.

3. A few facts, which are necessary to advert to for disposal of the present second appeal at the admission stage, are that a suit in O.S. No.106 of 2009 was filed by the plaintiff viz., Chilagani Sudarshan for eviction of the defendants from the *mulgi* in the ground floor bearing Municipal No.5-157/3, situated at Mancherial Town and Mandal, Adilabad District, within specific boundaries. The request was resisted by the defendants disputing the arrears of rent and challenging the suit notice dated 16.07.2008, issued under Section 106 of the Transfer of Property Act, 1882, on the main ground that it was defective. In turn, they (defendants in O.S. No.106 of 2009) filed O.S. No.131 of 2011 for grant of perpetual injunction restraining the plaintiff from interfering with their possession and enjoyment over the very same *mulgi*. Both the suits were jointly tried and disposed of by the learned Principal Senior Civil Judge, Mancherial, by the common judgment dated 28.03.2016. Before him, PWs.1 and 2 were examined

and Exs.A-1 to A-29 were marked on behalf of the plaintiff; and DWs.1 and 2 were examined and B-1 to B-61 were marked on behalf of the defendants.

4. The following five (5) issues were settled for trial.

- “(1) Is the notice dated 16.07.2008 terminating the tenancy by the end of August, 2008 is bad under law?
- (2) Did the defendants pay the entire arrears of rent?
- (3) Is the plaintiff entitled to damages at Rs.18,000/- per month from the date of suit?
- (4) Is the plaintiff entitled to the relief of eviction of the defendants from the schedule property?
- (5) Relief?”

5. The learned trial Court, having tendered findings in favour of the plaintiff in O.S. No.106 of 2009, decreed the suit with costs, directing the defendants to handover the suit *mulgi* within three (3) months from the date of judgment and to pay the rents at the rate of Rs.13,200/- (Rupees thirteen thousand two hundred only) per month from 01.02.2008 till the date of filing of the suit after deducting the amounts paid by them. A further direction was given to the effect that the plaintiff shall file a separate petition under Order - XX Rule 12 of the Code of Civil Procedure, 1908, towards *mesne* profits / damages from the date of filing the suit till recovery of possession of the *mulgi*

as per the prevailing rates at the relevant time. Consequently, dismissed O.S. No.131 of 2011.

6. Aggrieved over the aforesaid findings recorded, the defendants preferred A.S. No.13 of 2016 on the file of II Additional District Judge, Mancherial. It appears, the defendants preferred the said appeal against the judgment and decree in O.S. No.106 of 2009 and did not prefer any appeal against the portion of the judgment which lead to dismissal of their suit in O.S. No.131 of 2011 (old O.S. No.112 of 2008 on the file of Junior Civil Judge, Mancherial), and thus, attained finality.

7. Leaving apart, either principle of *res judicata* would apply or otherwise, still, in view of the concurrent findings tendered by the Courts below, the judgment under appeal does not warrant interference since apparently, it does not suffer from any patent illegality.

8. In the grounds of appeal, the appellants formulated the following questions of law:

“a) Whether the courts below were justified in decreeing the suit holding that Ex-A3 legal notice dated 16-07-2008 terminating the tenancy by the end of August 2008 is a valid one and whether it can be constructed as a quit notice as contemplated under section 106 of transfer of property Act. The Ex-A3 notice was only a legal notice issued to vacate the premises. The recitals in the notice do

not constitute a valid quit notice as contemplated under section 106 of the transfer of property Act and as such without there being any finding as to whether the Ex-A3 notice is valid under law or not, the decree granted by the trial court and confirmed by the lower appellate court cannot be sustained and the same is liable to be set aside.

b) Whether the appellate court acted legally in confirming the decree passed in O.S.No.106/2009 holding that the appeal was filed only in respect of quantum of rent though the memorandum of ground of appeal reveal that the Ex-A3 notice issued by the Respondent/plaintiff is not as per the provisions of sec 106 TP Act and as such the judgment of lower appellate court confirming the decree and judgment passed by the trial court is liable to be set aside.

c) Whether the lower appellant (*Sic.* appellate) court was justified in dismissing the appeal without properly appreciating the facts and evidence as raised in the memorandum of grounds of appeal. It is mandatory for the appellate court to assess the evidence of the parties independently and consider the relevant points that arise for adjudication basing on the evidence since the lower appellate court is the final court of fact and the same is required under order XLI rule 31 of C.P.C.

d) Whether the lower appellate court was justified in not framing a point for determination that whether the Ex-A3 notice issued by the Plaintiff can be construed as a quit notice as required under section 106 of the transfer of property Act, though

it is specifically pleaded in the Memorandum of grounds of appeal. It is mandatory for the lower appellate court to frame the same as a point for determination as required under order XLI rule 31 C.P.C. and as such the judgment and decree of the lower appellate court is liable to be set aside on that ground alone.”

9. Heard Sri T. Lakshminarayana Reddy, learned counsel, appearing for Sri C. Sharan Reddy, learned counsel for the defendants (appellants), and Sri P.V. Narayana Rao, learned counsel for plaintiff (respondent).

10. Perused the material on record.

11. The learned counsel for the defendants would attack the findings recorded by the first appellate Court contending that though, number of grounds were agitated, the first appellate Court, somehow, projected that the learned counsel for the defendants before it, has argued only point about quantum of rent payable by the defendants and the same is factually incorrect and that that has been the reason, the grounds in the present appeal have been raised, which require advertence.

12. The learned counsel for the plaintiff would submit that the finding recorded by the first appellate Court in paragraph No.9 is based on appreciation of evidence and there was no need for the first appellate Court to write, what had not transpired and that the

submissions of the learned counsel for the defendants have no basis in advancing such an argument.

13. It is appropriate to extract the relevant portion from paragraph No.9, which is thus:

“The only point argued before this court is about quantum of rent payable by defendants. The plea of defendants that they took number of shops initially and later surrendered some shops and retained the present shop is not believable by the evidence adduced by the defendants themselves. Ex. B1 shows that defendants paid rent at rupees 12,000/- per month up to the end of March 2008. Immediately thereafter defendants filed OS 112/2008 on the final (*Sic.* file) of Junior Civil Judge, Mancherial, which was the later transferred to Senior Civil Judge Court, Mancherial and renumbered as OS 131/2011. It was clubbed with OS 106/2009 and common trial was conducted and common judgment was pronounced. OS 131/2011 was dismissed. No appeal was preferred against judgment in OS 131/2011 and it has become final. There is no evidence on record to show that defendants were in possession of any other shops than the suit schedule at any time. Exhibit B1 shows that rent was paid at rupees 12000 per month up to December, 2007. The finding given by learned senior civil judge that rent payable from January 2008 is rupees 13,200/- month is also supported by exhibit B1 in which there is an entry that rent payable from January, 2008 is 10% extra, which comes to rupees 13,200/- per month. So the contention that rent payable by the defendants is

only rupees 5,000/- per month is not acceptable. There is no defect in the finding given by the Learned Senior Civil Judge on that aspect also. But it appears that careful verification of entries in Ex.B1 shows that rent was paid by the defendants for and up to the month of March 2008 also in 2 installments. Later they filed suit seeking permanent injunction against plaintiff. So the direction given to defendants to pay rent from January 2008 is to be modified. They are liable to pay rent only from the month of April 2008. Except that modification to be done I do not find any other modification to be done to the findings given by learned Senior Civil Judge, Mancherial. As such the appeal is liable to be dismissed and the point is held in the negative.”

14. Now, yet another submission made by the learned counsel for the defendants is that there has been breach of mandatory provisions of Order - XLI Rule - 31 of CPC since no points have been formulated, which alone is sufficient to set aside the decree and judgment under challenge and to remit the matter to the first appellate Court.

15. To support the argument, learned counsel places reliance on the decision of the Hon’ble Supreme Court in **Syeda Rahimunnisa v. Malan Bi**¹ and refers to the observations contained in paragraph Nos.22, 24, 29, 39 and 42. What has been observed by the Hon’ble Supreme Court relates to appreciation of evidence in that case.

¹ AIR 2016 SC 4653

16. In the present case, as could be seen from the portion extracted from the judgment rendered by the first appellate Court, the first appellate Court was specific that the only point argued on behalf of the defendants was in regard to quantum of rent. When such an observation finds place in the judgment, whether can it be disbelieved or can be given a go-bye, merely on the alleged ground that the grounds agitated are not adverted to by the learned first appellate Judge, and, on the other hand, projected, as if, only one point was argued in regard to quantum of rent payable by the defendants, certainly, such an argument is impermissible in view of the law laid down by the Hon'ble Supreme Court in **State of Maharashtra v. Ramdas Shrinivas Nayak**². The Hon'ble Supreme Court lays down that the Judges' record was conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else. The Hon'ble Supreme Court opined that the Court could not launch into inquiry as to what transpired in the High Court. It would be profitable to refer to what has been held by the Hon'ble Supreme Court in paragraph Nos.4 and 7, which are thus:

“4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any

² AIR 1982 SC 1249

such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in *Somasundaran v. Subramanian*, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in *Madhusudan v. Chandrabati*, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile

and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

4-A. In *R. v. Mellor* (1858) 7 Cox CC 454 Martin B was reported to have said: "we must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity".

5. In *King Emperor v. Barendra Kumar Ghose*, (1924) 28 Cal WN 170 : (AIR 1924 Cal 257) (FB), Page, J. said.

“..... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version.”

6. In *Sarat Chandra v. Bibhabati Debi* (1921) 34 Cal LJ 302 : (AIR 1921 Cal 584), Sir Asutosh Mookherjee explained what had to be done :

“It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge

without delay and ask for rectification or review of the judgment”.

7. So the judges, record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.

17. Therefore, the submission made by the learned counsel for the defendants is misconceived and does not deserve any consideration at all. The defendants are wholly unsuccessful in showing that the judgment and decree rendered by the first appellate Court are tainted with illegality warranting interference. Thus, even on merits, there is no case for the defendants.

18. The present Second Appeal fails and is, therefore, dismissed, at the admission stage itself. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in the appeal stands closed.

A. SHANKAR NARAYANA, J

June 5, 2017.
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