

***HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

+CCCA.No.119 of 1999

% 02-02-2018

Smt. Hussaini Khatoon and others

... Appellant/
Claimants

Vs.

\$ Madresat-Un-Noor-Li-thafeezil-Quran
Under Sharfia Educational and Welfare
Society, Saidabad, Hyderabad and others

... Respondents

! Counsel for the appellants: Sri P.Gangaiah Naidu

Counsel for the Respondents: Sri M.Papa Reddy and
Sri Bommana Rama Krishna

< Gist:

> Head Note:

? Cases referred:

1. 2006 (5) SCC 353

² 2012 (8) SCC 148

³ AIR 2005 SC 2813

⁴ 2013 (1) ALD 723

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CCCA.MP.No.740 of 2017

In/and

CCCA.No.119 of 1999

J U D G M E N T:

This is an appeal arises out of the judgment and decree passed in O.S.No.1068 of 1988 dated 29.04.1999 by the V Senior Civil Judge, City Civil Court, Hyderabad.

The facts of the case are as follows:

The suit OS.No.1068 of 1988 was filed against defendants 1 to 7 seeking a declaration that the plaintiffs are the owners of the suit schedule house bearing Municipal No.17-9-125, Kurmaguda, Hyderabad, for possession of the same; for past and future mesne profits with costs. During the pendency of the suit, the first defendant died and his legal representatives were brought on record as defendants 8 to 18.

The case of the plaintiffs as can be seen from the plaint is that: the first plaintiff is a school run by the second plaintiff society. Mohd.Zaheeruddin, the father of the defendants 2 to 7 was the owner of the suit schedule house. The first defendant obtained the suit house on lease from the said Mohd.Zaheeruddin, the original owner on 01.02.1961 for a monthly rent of Rs.60/-. The said Mohd.Zaheeruddin died on 08.01.1974 leaving behind the defendants 2 to 7, who

became owners of the suit house by succession. The defendants 2 to 7 executed a registered sale deed conveying title to the first plaintiff on 06.03.1978 and delivered possession. Attornment of tenancy was orally done immediately after execution of the sale deed and in writing on 05.04.1984. The plaintiffs then filed RC.No.336 of 1984 renumbered as R.C.No.1039 of 1986 for eviction against the first defendant on the ground of wilful default, acts of waste, *bona fide* personal requirement and denial of title. The said rent control case was dismissed on 20.04.1987 on the ground that there is *bona fide* title dispute giving liberty to the party to approach civil Court.

The defendants 2 to 7 prior to the sale of suit house in favour of the plaintiffs also filed a Small Cause Case being SC.No.505 of 1975 against the first defendant for recovery of arrears of rent of Rs.960/-. The first defendant resisted the suit basing on an agreement of sale dated 17.12.1973 said to have been executed by Mohd.Zaheeruddin. The said suit ended in a compromise on 27.08.1976 and as per the said compromise; the first defendant gave up his claim based on the alleged agreement of sale while promising to vacate on a particular date and on such vacation the plaintiffs agreed to give up the claim for arrears of rent. It is alleged that the first defendant tampered with the memo of compromise by adding some terms as if the plaintiffs therein agreed to refund

Rs.18,000/- on 25.07.1977; if not to receive Rs.4,000/- and to execute sale deed etc. The plaintiffs in the said suit got initiated departmental enquiry against the Court staff also for the above said tampering. The first defendant is continuing in possession of the suit house without paying the rent. The alleged agreement of sale is false and fabricated. The first defendant denied the title which is not *bona fide*. The plaintiffs are entitled for declaration of ownership, possession and for past mesne profits at the rate of Rs.60/- from 01.07.1985 to 30.06.1988 and future mesne profits at the rate of Rs.500/- from the date of the institution of the suit.

The deceased/first defendant during his life time resisted the suit and filed a written statement while admitting that Mohd.Zaheeruddin, father of defendants 2 to 7 was the original owner of the suit house. The said Mohd.Zaheeruddin entered into an agreement of sale with him on 17.12.1973 for a sale consideration of Rs.22,000/- and received Rs.18,000/-. Having entered into the above agreement of sale in respect of the suit house, Mohd.Zaheeruddin lost all his proprietary rights. The defendants 2 to 7 were neither capable, competent nor lawfully entitled to execute any sale deed and the sale deed dated 06.03.1978 executed by the defendants 2 to 7 in favour of the plaintiffs is sham document and not binding. Since 17.12.1973, his possession over the suit house is that of an owner and not a tenant. There was no tampering of

compromise memo in SC.No.505 of 1975. The plaintiffs cannot acquire better title than the defendants 2 to 7. By the date of the execution of the sale deed in favour of the plaintiffs, the defendants 2 to 7 had no title and therefore, he prayed for dismissal of the suit with costs.

The defendants 8 to 18, who were brought on record as legal representatives of the deceased first defendant did not choose to file any additional written statement, but filed a memo adopting the written statement of the first defendant which was already filed. The defendants 2 to 7 remained *ex parte*.

On the basis of the pleadings, the lower Court framed the following issues:

1. whether the plaintiffs are the owners of the suit house i.e., 6327/8/1 (old, 17.09.125 (new) situated at Kurmaguda, Hyderabad and are entitled for declaration of title in respect thereof?
2. whether the plaintiffs are entitled for eviction of D-1 and his men from the suit house and for relief of vacant possession of the same?
3. whether the plaintiffs are entitled for a sum of Rs.2,160/- towards mesne profits from 01.07.1985 to 30.06.1988 at the rate of Rs.60/- p.m.?
4. whether the plaintiffs are entitled for future mesne profits @ Rs.500/- p.m. as claimed ?

5. whether there is collusion in between the plaintiffs and defendants 2 to 7?
6. whether the plaintiffs have got no cause of action in filing the suit?
7. whether the court fee paid is insufficient?
8. whether this Court has jurisdiction to try the suit?

On behalf of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A.1 to A.15 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.17 were marked.

After an elaborate trial, the lower Court held that the plaintiffs are the owners of the suit schedule property. The defendants 8 to 18 were directed to vacate and deliver vacant possession and they were also directed to pay a sum of Rs.500/- per month as future mesne profits. It is this judgment and decree that is now assailed in the appeal.

I have heard Sri P.Gangaiah Naidu, learned counsel for the appellants and Sri M.Papa Reddy and Bommana Rama Krishna, learned counsel for the respondents.

The facts, which can be culled out from the record and the submissions of the learned counsel, are as follows:

(a) the property initially belong to one Sri Mohd.Zaheeruddin. Mohd.Zaheeruddin leased the property to the deceased-first defendant in 1961. The said

Zaheeruddin died leaving behind defendants 2 to 7 as his legal heirs. The first defendant-Abu Bakar Khan also died after the suit was filed and so defendants 8 to 18 who are his legal heirs have been brought on record. There is no dispute also about the existence of the suit schedule property; its dimensions etc.,

(b) the plaintiffs case is that they have purchased the suit schedule property through a registered sale deed dated 06.03.1978 (document No.5190/1978 from defendants 2 to 7). Hence, the plaintiffs are claiming title through the legal heirs of the original owner and the sale deed dated 06.03.1978.

(c) the defendants, who are in possession of the property, claim that they have a prior agreement of sale in their favour which is dated 17.12.1973. Therefore, they claim that their possession of the property is lawful and is pursuant to the said agreement.

As mentioned earlier, the suit is filed for a declaration of title and for eviction of the first defendant from the suit schedule property. Therefore, the findings of the lower Court with regard to the sale deed dated 06.03.1978 (Ex.A.3) in favour of the plaintiffs and with regard to the defendants agreement of sale dated 17.12.1973 (Ex.B.2) are the crux of this case. Both the learned counsel concentrated on these facts during the course of their submissions also.

It is the submission of the learned counsel for the plaintiffs that after the purchase of the property they have given Ex.A.8 notice dated 05.04.1984 informing the deceased/first defendant about the purchase of the property to which a reply was given on 05.05.1984(Ex.A.9). Thereafter, a case was filed in the Court of the Rent Controller bearing RC.No.1039/1986 for eviction of the first defendant from the premises. The Rent Controller, after examination of the pleadings etc., came to a conclusion that there is a genuine dispute about the title and accordingly he passed the order dated 28.04.1987, which is marked as Ex.A.12 holding that the denial of title of the eviction petition by the respondents is *bona fide* and the civil Court alone has jurisdiction to decide the same. Therefore, according to the learned counsel, the present suit was filed in 1988 for a declaration of title.

An issue that is pointed out in the course of submissions was also about a compromise that was affected between the parties in a Small Cause Case that was filed for realisation of the rents. This case was filed by the original land lords Mohd.Naziruddin and others in SC.No.505 of 1975 on the file of the Chief Judge, City Small Causes Court, Hyderabad. There is no serious dispute about the fact that a compromise was affected between the parties, but there is a dispute about the contents of the compromise. Ex.A.11 is the

contesting defendants' version of the compromise, whereas Ex.A.14 is the correct compromise as per the plaintiffs.

This issue was debated at length during the course of arguments before this Court and also in the lower Court. It is also in the evidence of the parties that there is some amount of dispute about the correctness of these documents and a departmental enquiry was also initiated against the clerk in the Court about this document. However, neither party could submit the final orders passed in the departmental enquiry wherein the said clerk was charged with tampering. The records in the said case; SC.No.505 of 1975 were destroyed in the year 1993 and the relevant G.O. published in the Hyderabad Gazette of the destruction of the records is also marked as Ex.A.13. The fact remains that the SC.No.505 of 1975 is filed for recovery of arrears of rent and nothing more. A compromise was affected in August, 1976 and a decree based on the compromise was passed, by which the said case was closed. A copy of the decree was however not filed by either of the parties. Therefore, this Court is called upon to decide on the correctness or otherwise of Ex.A.11 and A.14 based with the available evidence only.

Each of the learned counsels argued strenuously on the contents. This Court, after hearing the learned counsels and seeing the contents of the memos, comes to the conclusion that Ex.A.11 does not appear to be the correct compromise

memo, because of the inherent inconsistency between the paragraphs 2 and 3 of the memo-Ex.A.11, which was also pointed out by the plaintiffs counsel. If the agreement dated 17.12.1973 is allowed to stand, then the question of vacating the premises as stated in paragraph 3 should not arise. Paragraphs 2 and 3, when read together, do not appear to be logical. The case is filed for recovery of arrears of rent. Therefore, the compromise described in paragraphs 2 and 3 in Ex.A.14 appears to be more logical because only if the agreement of sale deed dated 17.12.1973 is given up, the first defendant will not have any claim over the property and will have to vacate the premises. Therefore, this Court is of the opinion that Ex.A.14 is the more plausible and correct compromise. The evidence of PW.3 which is as follows is relevant here:

“we entered into compromise with first defendant in the said suit as he was claiming suit schedule property through an alleged agreement of sale said to have executed by our father and incorporating the admission of first defendant that he has no right or interest in the property under agreement of sale.”

Even otherwise, this Court comes to a conclusion after hearing the learned counsels that the decision on the so-called compromise is not really material for deciding the present dispute, which is a suit for declaration of title. The plaintiffs are claiming their right to the property on the basis

of Ex.A.3 sale deed, which is a registered document that still stands. There is a presumption as noticed by the Hon'ble Supreme Court of India in ***Prem Singh and others v. Birbal and others***¹ that a registered document is valid

This registered sale deed was executed on 06.03.1978 by the children of the deceased owner. One of the attestors to the sale deed in Ex.A.3 is PW.1, who is the President of the second plaintiff society and he deposed about the same. In addition, the plaintiffs are also examined PW.3, who was summoned to give evidence. He deposed that he along with his brothers and sisters executed Ex.A.3 sale deed. He deposed about the contents also. Therefore, this Court is of the opinion that Ex.A.3 sale deed is validly proved as per law. The defendants in the suit raised a plea that it is a fabricated and concocted document, but there is no evidence to disprove the contents of Ex.A.3.

The crux of the defendants' case is that there is an agreement of sale in their favour, which is dated 17.12.1973 and is prior to the sale deed of the plaintiffs (Ex.A.3). This agreement dated 17.12.1973, according to the defendant, gives them a right over the plaintiffs. A copy of document said to be the agreement dated 17.12.1973 is filed as Ex.B.2. The counsel for the respondents strongly relied upon this document and stated that Ex.B.2 is a valid document and that therefore, his clients have a right in the property and it is

¹ 2006 (5) SCC 353

also his submission that the agreement was enforced by filing a suit for specific performance for which a decree was passed and in December, 1999 a sale deed was executed pursuant thereto on 03.01.2000. He filed a copy of the decree and of the sale deed along with an application (CCCA.MP.No.740 of 2017) to receive them as additional evidence. The same will be dealt with later in the judgment. But for now, the question for consideration is about the correctness or otherwise of the findings of the lower Court on the evidence adduced by both the parties.

Ex.B.2 in the opinion of the lower Court is not a reliable document. The Court noticed that there is no reason given why the original agreement is not produced and that the failure to produce the original agreement of sale is not explained. Even, the copy of the alleged agreement, which is filed as Ex.B.2 cannot be really called to be a certified copy for the reason that it starts with cause title of the suit SC.No.505 of 1975. If Ex.B.2 was really the copy of the original agreement, the preamble should disclose the names of the parties and nothing more. An examination of Ex.B.2 shows that it starts with the cause title of the case. In addition, as rightly noticed by the Court below, the agreement does not name the two witnesses who have supposedly signed the document. Unless the names of the witnesses and the names of the executants are mentioned, it cannot be presumed that the Ex.B.2 is replica of the original. The lower Court, in

paragraph 27, 31 to 33 of the judgment has correctly assessed the intrinsic worth of Ex.B.2 agreement, which is filed by the defendants and has come to a conclusion that the document filed cannot be considered to be a true copy of original agreement of sale.

It is also very important to note that the evidence in the lower Court reveals that the so-called agreement was not specifically enforced at any point of time prior to the impugned decree. The evidence of DW.1, more so, the cross-examination on 22.12.1998 is very clear, wherein the witness admits that his father never demanded the father of DWs.1 and 2 to execute the sale deed (the father of defendants). He admits that the father of defendants 2 to 7 died in the year 1974. He also admits that after the death of their father also defendants 2 to 7 were never demanded to execute a sale deed. He clearly admits that he did not file any suit for specific performance. The lower Court in paragraphs 34 and 35 rightly analyzed this issue and it came to a conclusion that there is no logical explanation given why a suit for specific performance is not filed. Even the notices said to have been issued Exs.B.3 and B.5 were not followed up with a suit for specific performance. The lower Court was thus right in coming to a conclusion that unless and until the suit for specific performance is filed and the agreement dated 17.12.1973 is upheld, the defendants cannot claim superior

title to the plaintiffs. This Court also agrees with these findings.

This Court is also of the opinion that whatever are the disputes about the correctness of Exs.A.11 and A.14, the compromise memo, in either manner or in either form does not confer “title” on the defendants. Their title can only be established in a suit in which the correctness of the agreement of sale is upheld or the sale deed executed in favour of plaintiffs Ex.A.3 is cancelled. Admittedly, no such judgment was placed before the lower Court when it delivered the impugned judgment. Even though a judgment in OS.No.4960 of 1998 was delivered on 01.02.1999, the same was not brought to the notice of the lower Court when it passed the impugned judgment on 29.04.1999.

An argument was also advanced about the doctrine of *lis pendens* and it was argued that the purchase of the suit schedule property under Ex.A.3 is hit by the doctrine of *lis pendens*. This Court holds that for the doctrine of *lis pendens* to be applied, the defendants should have filed the pleadings, order etc., to prove that the matter in issue in SC.No.505 of 1975 is directly related to the immovable property that is the subject matter of the present suit. In the absence of the said pleadings, decree/judgment etc., this Court cannot come to a conclusion that Section 52 of Transfer of Property Act and the doctrine of *lis pendens* applies to Ex.A.3 sale deed. Section 52 of the Transfer of Property Act does not annul the

conveyance or transfer, but merely renders it subservient to the rights of the parties to a litigation. The doctrine of *lis pendens* is therefore not applicable in the facts and circumstances of the present case.

For all the above reasons, this Court comes to a conclusion that the findings of the lower Court on the issue of title are clear. There is no ground made out to interfere with the findings of the lower Court on the correctness of Ex.A.3 and the failure of defendants to prove that there is a prior valid agreement in their favour. The fact that specific performance was not sought for, clearly negatives the case of the defendants. Ex.B.2 that is filed in this Court as the agreement dated 17.12.1973 cannot be treated as a correct or valid document.

For all these reasons, this Court concurs with the findings of the lower Court on the issue of title. The other issues of mesne profits etc., are not really argued by the learned counsels. This Court, on examination of the other findings also does not see any infirmity in the same and agrees with the findings of the lower Court.

The other issue that survives for consideration is the Application CCCAMP.No.740 of 2017 filed by the respondents 9 to 19 in the appeal to take on record the judgment dated 01.02.1999 in OS.No.4960 of 1998 and the certified copy of the sale deed dated 31.01.2000 executed by the learned VIII Junior Civil Judge, Hyderabad. These documents are a

certified copy of the judgment passed in OS.No.4960 of 1998 in respect of the suit schedule property and a sale deed executed by the Court pursuant to the decree. The counsel for appellants/defendants argued that these two documents are essential to prove the defendants' case. He pointed out that the plaint in this case was presented on 07.10.1998 and a decree was passed on 01.02.1999. The sale deed pursuant to this decree is executed on 31.01.2000.

This application was strongly resisted by the counsel for the respondents. Learned counsel filed a counter and vehemently argued that the conditions stipulated in order XLI, Rule 27 of CPC are not made out at all in this case. The learned counsel also pointed out that the document, which is now proposed to be filed as Ex.B.18 is a judgment in an *ex parte* decree dated 01.02.1999 that was passed granting specific performance. The learned counsel vehemently argued that this plaint was presented; heard and decreed during the pendency of the present suit OS.No.1068 of 1988. Counsel pointed out that the main witness DW.1 in this suit did not depose about the same. Mohd.Noor Imtiaz ali, who deposed as DW.1 is the third plaintiff in the suit OS.No.4960 of 1998. DW.1 started his chief-examination on 14.02.1998 and his evidence continued up to December, 1998. DW.2 was thereafter examined in December, 1998. Neither the filing of the suit OS.No.4960 of 1998 nor the pendency of the suit or of the execution petition were brought to the notice of the

Court below. The learned counsel rightly pointed out the decree in the present suit is given on 29.04.1999 and by then, the decree which is sought to be filed as Ex.B.18 was already passed. Therefore, his contention is that this entire exercise was done behind the back and that under Order XLI, Rule 27 CPC, this Court cannot allow these documents to be received because the conditions stated in the application do not fit into Order XLI Rule 27 a; (aa) or b of CPC. It is also pointed out that while the decree and sale deed are of the years 1999 and 2000 respectively, the MP to receive the documents was filed belatedly in 2017.

This Court finds substantial force in the argument of the learned counsel, because, Order XLI, Rule 27 of CPC does not permit the taking of additional evidence unless the lower Court has wrongfully refused to admit the same or the party producing the additional evidence could not introduce this evidence in the lower Court for the reasons enumerated in clause (aa) of Rule 27 of CPC.

Clause (b) of Order XLI, Rule 27 of CPC is also not applicable, because, this Court is of the opinion that the present appeal can be disposed off without the documents sought to be produced as Exs.B.18 and 19. The tests propounded in ***Union of India v. Ibrahim Uddin and others***² in paragraphs 36 to 52 are a complete answer. The Hon'ble Supreme Court clearly laid down as follows:

² 2012 (8) SCC 148

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

This court holds that the appellants/petitioners have suppressed this judgment and are now trying to bring it on record by filing an application under Order XLI Rule 27 of CPC. In addition, the learned counsel for the respondents in this interlocutory application and the appeal also relied upon ***Kasturi v. Iyyamperumal and others***³ stating that these people are not necessary parties and also relied upon ***Sangam Anantharavamma and others v. Peesapati Amaravathanulu***⁴ on the ground of limitation. These issues cannot be considered in the application for additional evidence, in the opinion of this Court. In view of the matter, this Court is of the opinion that the documents that are

³ AIR 2005 SC 2813

⁴ 2013 (1) ALD 723

sought to be filed cannot be taken on record because of the reasons mentioned earlier. None of the grounds specified in Order XLI Rule 27 of CPC are applicable. Hence, the application CCCA.MP.No.740 of 2017 is rejected.

For all these reasons, the judgment and decree of the lower Court is confirmed and the plaintiffs are declared to be owners. The defendants 8 to 18, the legal representatives of the deceased first defendant are directed to vacate and handover the premises within four months from the date of receipt of a copy of this order. Past and future mesne profits; arrears as ordered by the lower Court are confirmed.

The appeal is, therefore, dismissed with costs to the respondents 1 and 2 in the appeal, who are the plaintiffs. The appellant shall pay the costs of the suit and of the appeal to the respondents 1 and 2.

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

D.V.S.S. SOMAYAJULU, J

Date: 02.02.2018

KLP

Note: L.R. copy be marked.