

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.391 OF 2016

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment dated 18.01.2016 passed in A.S. No.44 of 2011 on the file of the IX Additional Chief Judge, City Civil Court, Hyderabad (for short, 'first appellate court'), wherein the first appellate court, while dismissing the appeal, confirmed the judgment and decree dated 07.12.2010 passed in O.S. No.1022 of 2007 (Old O.S. No.2109 of 2005) on the file of the Principal Rent Controller-cum-XII Junior Civil Judge, Hyderabad (for short, 'the trial court'). The original suit was filed by the 1st respondent herein-plaintiff for cancellation of registered sale deed dated 31.05.2002 executed by the 2nd respondent herein-1st defendant in favour of the appellant-2nd defendant and also directing the 2nd respondent-1st defendant authorities to execute a registered sale deed in favour of the 1st respondent herein-plaintiff as per the agreement of purchase dated 15.12.1973 in respect of the plaint schedule property.

2. Heard the learned counsel for the appellant-2nd defendant, the learned counsel for the 1st respondent-plaintiff, apart from perusing the material on record.

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

4. To adjudicate the *lis* and to answer the substantial questions of law, it is necessary to refer to the relevant pleadings of the parties.

(a) The plaintiff averred in the plaint that he is the allottee of the flat LIG B-8/F1 ground floor, situated at Sanjeev Reddy Nagar, Hyderabad, allotted by the 1st defendant on hire purchase basis and the plaintiff executed an agreement

with the 1st defendant for purchase of the said flat on 15.12.1973 and was also paying instalments. The plaintiff was residing along with his joint family at Ramgopalpet and was unmarried and so he nominated the 2nd defendant as his nominee, who is his brother-in-law, and at request of his sister, he permitted his sister to stay in the suit schedule flat out of affection and good faith and also asked his sister to reside in the suit schedule flat by paying instalments in lieu of the rent by her to the plaintiff. The 2nd defendant was paying instalment of the said flat in the name of the plaintiff to the 1st defendant. The government has issued G.O.Ms.No.67 dated 08.09.2001 permitting third parties to get transfer of the A.P.Housing Board Houses in their favour on the basis of any agreement of sale by the original allottee in their favour. Therefore, by taking advantage of the said G.O., the 2nd defendant created and forged an agreement and got transferred the suit schedule property in his favour by way of sale deed dated 31.05.2002. After coming to know the said fact, the plaintiff made several representations to the 1st defendant authorities to cancel the registered sale deed in favour of the 2nd defendant and also issued a notice dated 08.10.2004, but the 1st defendant did not respond. The plaintiff issued a legal notice under Section 68 of the A.P.Housing Board Act calling upon the 1st defendant to take steps to cancel the sale deed and he also issued legal notice to the 2nd defendant and the 2nd defendant has let out the suit schedule flat to the 3rd defendant and enjoying the rents. The plaintiff never executed any agreement of sale in favour of the 2nd defendant and the 2nd defendant created the agreement of sale by forging the signature of the plaintiff and got transferred the property in his favour in collusion with the official of the 1st defendant. The plaintiff has given a representation to the 1st defendant on 27.08.2002, who convened a meeting on 20.01.2003, but the 2nd defendant did not appear before the authorities and even the 1st defendant has not cancelled the document.

(b) The defendants 1 and 3 remained *ex parte* and the 2nd defendant filed written statement denying all the averments made in the plaint and contended that the plaintiff executed an agreement of sale in his favour on 31.12.1973 stating that the 2nd defendant paid Rs.2,400/- out of Rs.12,500/- and the balance amount of Rs.10,100/- is to be paid in instalments to A.P.Housing Board and the said agreement was signed in the presence of late father of the plaintiff and two younger brothers. Since 1974 onwards, the 2nd defendant has paid entire instalments and got registered sale deed in his favour and also mutated his name in the MCH records and paying municipal taxes in his name and also obtained electricity connection in his name. After purchase of the property, the 2nd defendant has let out the premises to the 3rd defendant. Originally the plaintiff was allotted the suit schedule flat, but he has no money to pay instalments at that time and so the plaintiff executed an agreement of sale in favour of the 2nd defendant. The plaintiff is no way concern with the suit schedule property.

(c) Basing on the pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for cancellation of the sale deed dt.31.5.2002 by way of mandatory injunction prayed by the plaintiff?
2. Whether the plaintiff is entitled for specific relief of agreement dt.15.12.1973 in respect of the plaint schedule property?
3. To what relief?

(d) The trial Court after considering the evidence of P.W.1 and C.W.1 (Handwriting Expert) and the documents Exs.A.1 to A.19 marked on behalf of the plaintiff and the evidence of D.Ws.1 and 2 and the documents Exs.B.1 to B.25 marked on behalf of the 2nd defendant, decreed the original suit, vide judgment dated 07.12.2010, for cancellation of the registered sale deed dated 31.05.2002

executed in favour of the 2nd defendant by the 1st defendant and directed the 1st defendant to execute a registered sale deed in favour of the plaintiff after receiving balance amount payable by the plaintiff to the 1st defendant. Aggrieved by the said judgment and decree, the 2nd defendant preferred A.S. No.44 of 2011 and the first appellate court, while dealing with the matter, vide judgment and decree dated 18.01.2016, was pleased to dismiss the appeal by confirming the judgment and decree passed by the trial Court. Challenging the said decree and judgment passed by the first appellate court, the 2nd defendant preferred the second appeal.

5. Learned counsel for the 2nd defendant-appellant herein would contend that both the Courts below erroneously gave findings ignoring the third party registrations permitted in law by virtue of G.O.Ms.No.67 of Housing (HB II) Department dated 08.09.2001 of the A.P.Housing Board and the amendment of the A.P.Housing Board (Allotment, Management and Sale of HIG, MIG, LIG and EWS houses or flats) Regulations, 1997; the trial Court failed to call for the records of the A.P.Housing Board relating to the suit schedule property for deciding the suit; the entire balance amount of sale consideration was paid by the 2nd defendant in terms of agreement deed between the 2nd defendant and the plaintiff dated 31.12.1973 without any default and in addition to the same, 7% of transfer fee as directed by the A.P.Housing Board was paid apart from registration fee and other expenditure in compliance of the third party registrations, as contemplated by the aforesaid G.O.Ms.No.67 dated 08.09.2001; the plaintiff waived all his rights and liabilities in respect of the suit schedule property in favour of the 2nd defendant by executing an unregistered agreement dated 31.12.1973 and also delivered the peaceful possession and enjoyment of the suit schedule property to the 2nd defendant; both the Courts below erred in decreeing the suit in favour of the plaintiff; the findings of both the Courts below

are perverse; and ultimately, prayed to allow the second appeal by setting aside the findings of both the Courts below.

6. Learned counsel for the plaintiff-1st respondent herein would contend that both the Courts below rightly decreed the suit in favour of the plaintiff basing on the evidence available on record; there are no grounds to interfere with the findings of both the Courts below since they are well reasoned and based on evidence and record; no substantial questions of law do arise for determination in this second appeal; and ultimately, prayed to dismiss the second appeal.

7. While admitting the Second Appeal on 28.09.2016, this Court framed the following substantial questions of law for consideration:

01) Whether the plaintiff/first respondent herein is entitled to seek cancellation of sale deed dated 31.05.2002 executed by the first defendant/second respondent herein in favour of the appellant, when the plaintiff/first respondent is not a party to the sale deed dated 31.05.2002?

02) Whether the plaintiff/first respondent herein is entitled for consequential relief of execution of registered sale deed in pursuance of the agreement of purchase from the first defendant/second respondent without seeking relief of specific performance of agreement of purchase?

8. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact nor on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly

arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse findings are some of the questions, which involve substantial questions of law.

9. There is no dispute with regard to the relationship between the plaintiff and the 2nd defendant. There is also no dispute that the plaintiff was the original allottee of the suit schedule flat situated at Sanjeev Reddy Nagar. The suit schedule flat was allotted to the plaintiff by the 1st defendant-Housing Board. The contention of the 2nd defendant is that he purchased the flat allotted to the plaintiff under an agreement of sale dated 31.12.1973 and paid an amount of Rs.2,400/- out of total sale consideration of Rs.12,500/-, agreed to pay the balance amount of Rs.10,100/- by way of instalments, as agreed by the plaintiff under the agreement between the plaintiff and the 1st defendant-Housing Board. The 2nd defendant had paid the instalments due to the 1st defendant-Housing Board.

10. D.W.2 is none other than the real brother of the plaintiff. His evidence is that Ex.A.19-lease-cum-agreement of sale dated 15.12.1973 was executed by the plaintiff. D.W.2 in toto supported the case of the 2nd defendant with regard to the purchase of the suit flat and payment of part sale consideration and also payment of instalments to the 1st defendant-Housing Board. The trial Court and the first appellate court had given findings with regard to the disputed signature on lease agreement dated 15.12.1973 in red ink marked as Q-1 to Q-6 and as compared with the admitted signatures of the plaintiff on sale agreement dated 31.12.1973 marked as S-1 and S-2 and the opinion of the handwriting

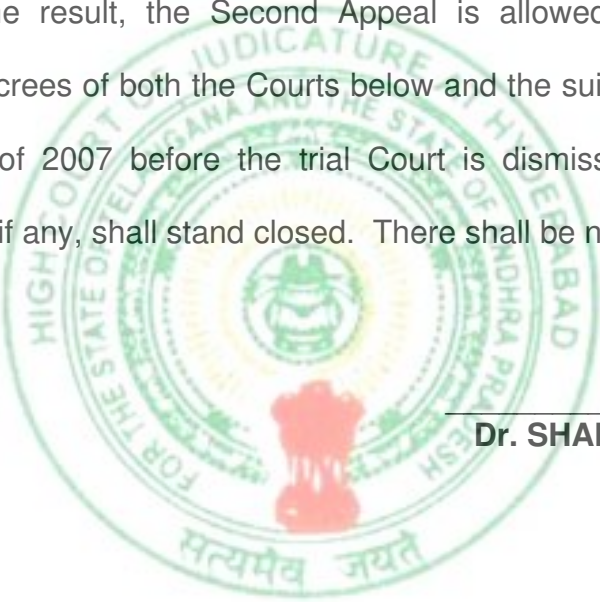
expert (C.W.1) that the signatures are in different hands on both the sets of documents. Ex.C.1 is the report of the handwriting expert (C.W.1). The evidence of C.W.1 is only an opinion. He is not the direct witness to the transaction set up by the 2nd defendant with regard to the purchase of the suit schedule flat under an agreement of sale dated 31.12.1973. D.W.2 is none other than the real brother of the plaintiff. There is no reason for D.W.2 to depose false against the plaintiff and to support the case of his brother-in-law, i.e., the 2nd defendant. Admittedly, the plaintiff has not paid the instalments due to the 1st defendant-Housing Board with effect from 31.12.1973. The 2nd defendant is the person who paid the instalments to the 1st defendant-Housing Board and the possession of the suit schedule flat is with the 2nd defendant. When the 2nd defendant had approached the 1st defendant-Housing Board to transfer the subject flat in his favour, the 1st defendant-Housing Board and its officials had followed the requisite rules in terms of the G.O.Ms.No.67 dated 08.09.2001 and ultimately, on receipt of entire sale consideration and payment of requisite fee and other charges, transferred the suit schedule house in favour of the 2nd defendant. The original sale deed was submitted by the 2nd defendant to the 1st defendant-Housing Board authorities in terms of G.O.Ms.No.67 dated 08.09.2001. The specific contention of the plaintiff is that the 2nd defendant forged Ex.A.19-lease-cum-agreement of sale. When there is specific evidence of D.W.2 with regard to the genuineness of Ex.A.19, no credence can be given to the evidence of handwriting expert examined as C.W.1 and the report given by him under Ex.C.1. Generally, no person will ask a tenant to pay the instalments due to the Housing Board or landlord in lieu of paying monthly rent. Further, the monthly/quarterly/half yearly/yearly instalments would much more than the rental value. It is also appropriate to state that during the last two decades, there is enormous increase in the property value. It can be safely concluded that the plaintiff with mala fide intention had put up a different signatures in size,

structures, etc., on Ex.A.19-lease deed. The evidence of D.W.2, who is attestor of Ex.A.19, establishes the genuine transaction entered between the plaintiff and the 2nd defendant. Under these circumstances, it cannot be said that Ex.A.19-lease-cum-agreement of sale dated 15.12.1973 is a forged and fabricated by the 2nd defendant in order to knock away the suit schedule flat. Both the Courts below had placed much reliance on the evidence of the handwriting expert (C.W.1) and his opinion marked as Ex.C.1 and came to erroneous conclusion. The findings of both the Courts below are perverse. The judgments and decrees passed by both the Courts are unsustainable in law and are liable to be set aside.

11. In the result, the Second Appeal is allowed, setting aside the judgments and decrees of both the Courts below and the suit filed by the plaintiff in O.S. No.1022 of 2007 before the trial Court is dismissed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

Date: 23.10.2018

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Dr. SHAMEEM AKTHER, J