

HONOURABLE DR. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.37 of 2019

JUDGMENT:

The second appeal came for before admission from the appearance of both sides and from the hearing as to involvement of any substantial questions of law to formulate.

Heard and perused the material on record.

The substantial questions of law raised in the grounds of second appeal from Paras 16 as grounds 1 to 4 the following are:

i) When admittedly, Mulgi property covered by Municipal No.5-1-760 has gone in passage and surrendered to the Municipal Corporation Authorities and the plaintiff does not have any document to show that he has retained 3 square yards after surrendering the entire extent of the property and suit schedule property described to be part of 5-1-760 situated at Bank Street, Kothi, Hyderabad, the plaintiff is entitled to declaration of title and ownership of the property.

ii) When Ex.A-2 note was issued alleging that appellant is the tenant and in the evidence plaintiff-PW.1 stated that his suit is based on Ex.A2 document only, whereas, the plaint allegations are altogether different is not on the basis of claiming any relief on termination of tenancy, the plaintiff is entitled to relief of declaration of title and possession.

iii) Whether, suit for declaration for title is maintainable, since, the plaintiff denied suggestion that defendant is not his tenant and plaintiff PW.1 stated in his evidence that he has mentioned in the plaint that status of defendant is different, when compared to status mentioned in Ex.A2, which was admittedly, issued as per his instructions.

iv) Whether the findings recorded and conclusions arrived at by the Courts below are

perverse, since, the relevant evidence and admissions of PW.1 plaintiff have not been even referred and considered by Courts below disentitling him to the relief sought in the suit.

The suit O.S.No.1787 of 2011 was filed by the respondent herein Mukund Das against the defendant/appellant herein Radhe Shyam Mishra to vacate and handover vacant possession of the plaint schedule property and to pay damages at Rs.5,000/- per month from date of suit till delivery of possession which plaint schedule described of 2 shutters of 10'x2'x12'(height)/2'x2'x12' height on the western side of ground floor entrance part of door No.5-1-760, Khushal Market, Kothi, Bank Street, bounded by North-main road, South-M.No.5-1-759/1 to 9, East-passage (access to building) and West-plaintiff's property M.No.5-1-759. The claim in nutshell in the plaint of plaintiff is the absolute owner of the same and defendant friend of plaintiff's son approached in 1995 to accommodate him and out of that permitted in the schedule property, the 2 shutters fixed on the intervening wall of door No.5-1-759 and 760 on the western side of the entrance in the ground floor, that this property shown in the schedule supra of plaint form part of western side of entrance on ground floor and converted part of entrance way by fixing the 2 shutters. The plaintiff even demanding to vacate including by legal notice failed to comply in cause issuing reply denying the claim with contention of not tenant under plaintiff, with claim of in 1994 it was agreed that he was asked for any interest in the amount given to be returned and shall not any municipal rent and at no point of time defendant paid amount towards alleged mortgage nor there was

agreement for payment of interest. The contention of plaintiff of so called oral mortgage untrue and no way sustain for such a claim.

In the reply the defendant filed his written statement opposing the suit claim saying it is his own right in the possession and also perfected title by adverse possession with enjoyment for more than 18 years to the knowledge of plaintiff and one and all and never a tenant and for the notice of July 2011 given reply and defendant is not friend of plaintiff's son as alleged and plaintiff has no right over the passage and defendant enjoying the schedule property in his own right and the plaintiff and his 2 sons having taken Rs.4,00,000/- from the defendant in the presence of witnesses for Kidney ailment and transplantation of Sudeep M. Shah and other requirement of Ajit M. Shah for brain hemorrhage and hospitalized in Yashoda Hospital and for plaintiff's heart treatment came with a false claim in the plaint and there is no cause of action and description of the plaint schedule not correct, leave about rejoinder of the plaintiff to said written statement which speaks further about the defendant filed writ petition in the High Court against the plaintiff and APCPDCL seeking direction to remove electricity meter which in the name of Sudeep M. Shah in the schedule property and the alleged Rs.4,00,000/- loan transactions is untrue.

The trial Court having framed two issues as to entitlement to the vacant possession by plaintiff from defendant so also damages else to what relief.

From the evidence of plaintiff-PW.1 and his son Sudeep M. Shah-PW.2 with reference to Exs.A1 to A13 and defendant-DW.1 and one Vishnukant Chandak-DW.2 with no documentary

evidence observed that Ex.A5 is the partition final decree in OS.No.47 of 1969 and the compromise therein covered by Ex.A6 and the memorandum of part partition covered by Exs.A7 & A8 with certified copy of plan of old house No.748 filed in partition suit Ex.A9 with original sanction plan for construction-Ex.A10 besides defendant writ petition certified copies of vakalat and affidavit in W.P.No.29982 of 2011 as Exs.A11 & A12. The claim of plaintiff is the suit schedule 2 shutters is part of the property of plaintiff door No.5-1-759 with no separate door number and the license/permission is oral with no rent and it is 2 to 5 feet away from malgi No.5-1-759 which identity not in dispute by defendant including in cross examination by plaintiff for not a case of landlord and tenant relationship and the effort by defendant of PW.1's cross examination of schedule property not part of sanctioned plan of plaintiff property and plaintiff has no title over it or its passage and the claim of him as D1 and as if got any possession of his own right and plaintiff is not owner of it, the electricity service connection in whose name stands for the suit premises he could not answer, leave about in the writ petition filed by him against APCPDCL confronted to him what defendant claimed of Rs.4,00,000/- given to the plaintiff with no documentary evidence and not notice given demanding return of amount at any time and he claims constructed the shop in the vacant space by spending amount and the so called lending to plaintiff was in 1987, the so called construction in 1994 no way co-related that too without obtaining any municipal permission and not even paid taxes in his name with no claim over it and what DW.2 deposed of he did business from he was settled readymade

agreements for past 7 to 8 years and what the reply Ex.A3 of the defendant of which the property orally mortgaged to defendant when he lent Rs.4,00,000/- for the so called medical aid of plaintiff and his 2 sons and failed to produce any evidence regarding said mortgage it clearly establishes his occupation is with permission of plaintiff and he is estopped from denying right of plaintiff under Section 116 of the Evidence Act and thereby liable to be vacated.

The defendant unsuccessfully impugned in AS.No.130 of 2016 said findings of trial Judge who having formulated the points for consideration observed that writ petition filed not against the Assistant Engineer of APCPDCL and also against the plaintiff herein in the relief sought not to disconnect the electricity supply for the schedule property as can be seen from Ex.A12 and the so called lending and oral mortgage not proved by any evidence for no any even demand by any written notice.

The impugment herein against the concurrent findings by raising the substantial questions of law supra are the area of 2 shutters covered is by the passage surrendered to Municipal Corporation for nothing shown by plaintiff retained 3 square yards after surrendering that extent as part of door No.5-1-760 to seek any right of ownership over the property with title and the Ex.A2 notice is given as a tenant and the evidence different by saying not as tenant though denied the suggestion given to PW.2 not a tenant. In fact from entire perusal of the material there are no any substantial questions of law involved much less to say any perversity in the appreciation of evidence or the concurrent finding devoid of merits in the factual matrix to say it is only license and not any lease much less with any liability to pay rent, leave about

no proof regarding even a single pie paid and receipt obtained, leave about the electricity connection is standing in the name of the plaintiff and his sons and not in the name of defendant for the claim of defendant of he himself at his own occupied that area covered by the 2 shutters kept on its face absurd for electricity connection not standing in the name and he paid no encroachment tax even taken as part of rent from is very say of that was dedicated to the municipality by the plaintiff of the same situated between door Nos.5-1-759 & 760 respectively when that part also originally belonged to plaintiff. Even taken for arguments sake municipality is the owner from the dedication of the area as rent rightly or wrongly, when plaintiff permitted defendant as licensee the question of liability to pay any amount in the absence of any stipulation, but for if at best if at all a gratitude to what was invested by defendant to which plaintiff including from any investment for construction by defendant or plaintiff the 2 shutters for no evidence forthcoming of anybody paid any encroachment tax or obtained any permission, even the estoppel applies against the licensee need not be from relation of landlord and tenant the mere mention as tenant or licensee will not make to say as if it is a mountain out of the mole hill much less to interfere with the concurrent findings much less to coming any conclusion of devoid of merits, but for to say defendant is only a licensee and liable to be vacated and as to right denying title of plaintiff that too with permissible possession cannot claim adverse possession though so far as finding of the trial Court liable for damages for use and occupation to be set aside of Rs.5,000/- per month.

With these observations, the Second Appeal before admission rather than admission or dismissal in relation to it as no substantial question of law involved, disposed of with the modification of no liability for any use and occupation charges till date of trial Court decree but for therefrom at Rs.5,000/- per month till vacated by granting 9 months time from today to vacate and file undertaking to that effect before the trial Court, by affidavit of not to create any third party interest and to pay all arrears at the above rate within two months after adjustment of whatever paid and for non-payment consecutively for two months automatically entitles to eviction by execution.

Pending miscellaneous petitions, if any, shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 28.03.2019
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