

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.172 OF 2019

JUDGMENT:

This appeal, under Section 100 of the Code of Civil Procedure, 1908, is filed by the appellant/defendant No.2 aggrieved by the judgment and decree, dated 12.12.2018 passed in A.S.No.58 of 2015 by the XXVII Additional Chief Judge, City Civil Court at Secunderabad, wherein the appeal filed by defendant Nos.2 and 3 was dismissed confirming the judgment and decree, dated 19.10.2015 passed in O.S.No.105 of 2004 by the XII Additional Senior Civil Judge (FTC), City Civil Court, Secunderabad.

2. Heard learned counsel for the appellant/defendant No.2, learned counsel for the respondent Nos.1 to 3/plaintiffs and perused the record.

3. The appellant herein is defendant No.2, whereas respondent Nos.1 to 3 herein are the plaintiffs, respondent No.4 is defendant No.1 and respondent No.5 is defendant No.3 in the Original Suit. The parties hereinafter are referred to as they were arrayed in the Original Suit before the trial Court.

4. The averments in the plaint are that the property bearing No.6-5-378 (old No.87) situated at New Boiguda, Secunderabad admeasuring 108 square yards belongs to late Anthony Hayes, paternal grand father of the plaintiff and maternal grand father of the defendant. He died on 10.10.1973 leaving behind one son

and five daughters as his legal heirs. All the legal heirs including father of the plaintiff and mother of the defendant entered into undertaking agreement and got executed registered partition deed in respect of the property of late Anthony Hayes. The suit schedule property fell to the share of Anthony John Hayes, who is the only son of late Anthony Hayes. During life time of said Anthony John Hayes, he allowed his sister, i.e., Melsi Mary Vincent and her husband to stay in the suit schedule property. The plaintiffs' father-Anthony John Hayes expired on 03.02.1984 and their mother expired on 12.10.2000 leaving behind the plaintiffs as legal heirs. Both Melsi Mary Vincent and her husband expired on 19.02.2001. The father of the plaintiffs during his lifetime used to visit the suit schedule property. The defendants mother Philomena Mary Thomas and the defendants developed mala fide intention and filed suit in O.S.No.735 of 2001 for injunction simplicitor. The plaintiffs filed the subject suit seeking declaration, possession, damages and consequential injunction.

5. Defendant No.1 was set *ex parte* and defendant Nos.2 and 3 filed written statement denying the case of the plaintiffs and taken a stand that the suit schedule property is in the possession of Melsi Marry Vincent and she is the absolute owner and she made an application to the Estate Officer for release of lease hold rights into free hold rights in her name and the entire taxes were paid by her. It is also contended that the plaintiffs have no

right over the suit schedule property and they were never in possession of the same for more than thirty years.

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

1. Whether the plaintiffs are entitled for declaration and possession of the suit schedule property?
2. Whether the plaintiffs are entitled for consequential injunction and damages as prayed for?
3. To what relief?

7. During trial, on behalf of the plaintiffs, P.Ws.1 and 2 were examined and got marked Exs.A.1 to A.29. On behalf of the defendants, D.W.1 was examined and Exs.B1 to B21 were marked.

8. The trial Court, after considering the oral and documentary evidence available on record, *vide* judgment and decree, dated 19.10.2015, decreed the suit with costs declaring that the plaintiffs are having title over the suit schedule property and they are entitled for vacant peaceful physical possession of the suit schedule property within two months from the date of the suit and the plaintiffs are entitled for damages at the rate of Rs.2,500/- from May 2001 to November, 2003 and also future damages from November, 2003 to till realization of peaceful possession from the defendants.

9. Aggrieved by the said judgment and decree, defendant Nos.2 and 3 filed A.S.No.58 of 2015 before the first appellate Court.

10. The first appellate Court, after hearing both sides, framed the following points for consideration:

1. Whether the respondents/plaintiffs are entitled for declaration and possession of the suit schedule property?
2. Whether the respondents/plaintiffs are entitled for delivery of vacant possession?
3. Whether the respondents/plaintiffs are entitled for damages @ Rs.2,500/- per month for illegal occupation of the suit schedule property by the defendants from May, 2001 till November, 2003 and future damages from the date of filing till the peaceful possession of the suit schedule property, is handed over/delivered by the defendants to the plaintiffs?

11. The first appellate Court, having examined the oral and documentary evidence, *vide* impugned judgment and decree dated 12.12.2018, dismissed the Appeal Suit by confirming the judgment and decree, dated 19.10.2015 passed in O.S.No.105 of 2004 by the XII Additional Senior Civil Judge (FTC), City Civil Court, Secunderabad.

12. Aggrieved by the same, the present appeal is preferred by the appellant/defendant No.2.

13. There cannot be any dispute that, under the amended Section 100 of 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 or 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 finding – are some of the questions, which involve substantial questions of law.

14. Having argued for sometime, learned counsel for the appellant/defendant No.2 made a request to grant sometime to vacate the suit schedule premises.

15. As seen from the evidence on record, the Court below elaborately discussed the entitlement of the appellant/defendant No.2 with regard to the adverse possession over the suit schedule property. There is no document to substantiate that there was any adverse possession. Further, the trial Court while determining the *lis* held that the possession of the appellant/defendant No.2 was permissive and rightly decreed the suit for declaration of title and possession and the same was rightly confirmed by the first appellate Court. No substantial

question of law emerges for determination in this appeal under Section 100 of C.P.C. There is no perversity in the impugned judgment and decree. There is nothing to take a different view. The Second Appeal is devoid of merit and is liable to be dismissed.

16. Since a request is made to grant sometime to vacate the suit schedule premises, the appellant/defendant No.2 is directed to vacate the suit schedule premises and deliver the same to the respondents/plaintiffs within a period of three months from today. Further, the appellant/defendant No.2 is directed to file an undertaking memo to that effect within two weeks from today before this Court as well as the trial Court. If such an undertaking is not filed within the stipulated time, the respondents/plaintiffs are entitled to proceed with the execution of the decree.

17. With the above direction, this Second Appeal is dismissed.

Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed. There shall be no order as to costs.

Date: 10.01.2020
ssp

Dr. SHAMEEM AKTHER, J