

THE HON'BLE SRI JUSTICE A.VENKATESHWARA REDDY
CITY CIVIL COURT APPEAL NO.93 OF 2003

JUDGMENT:

The unsuccessful plaintiff has filed this appeal assailing the judgment and decree dated 31.01.2003 in O.S.No.220 of 1997 on the file of the learned II Senior Civil Judge, City Civil Court, Hyderabad.

2. The plaintiff Lord Shiva (Deity) of Umamaheshwara Devasthanam represented by its next friend and President Sri N.Krishna has filed the Original Suit in O.S.No.220 of 1997 for perpetual injunction. Subsequently, it was amended to include the relief of declaration and possession.

3. The trial Court, after full length of trial and on appreciation of oral and documentary evidence available on record, answered all the issues against the plaintiff holding that the plaintiff has failed to establish the title and possession in respect of suit schedule property and not entitled for declaration or recovery of possession as prayed for and accordingly, the suit was dismissed.

4. Feeling aggrieved by the impugned judgment and decree, this appeal is filed by the unsuccessful plaintiff.

Pleadings of the plaint:

5. The plaintiff Umamaheshwara Devasthanam represented by its next friend and President has filed the Original Suit claiming that plaintiff is the absolute owner of the suit schedule property bearing municipal No.1-8-588/21, admeasuring 82 Sq.Yards situated at Achaiahnagar, Azamabad, Hyderabad with precise boundaries as mentioned in the plaint. The area people of Achaiahnagar are the regular worshippers and devotees of Lord Shiva (Deity) of Umamaheshwara Devasthanam and a committee was also constituted in the year 1997. The plaintiff also requested the Endowments Department to look after the affairs of the temple. Local leaders including local MLA used to visit and pay respects and it is an important temple. While so, the defendant Nos.1 to 3 colluded with each other and took law into their hands, started creating obstacles in the day to day affairs of the temple. Though the Government through the Andhra

Pradesh Housing Board has acquired the land, the suit land was not acquired because of the temple. But the defendants on 24.01.1997, 25.01.1997 and 26.01.1997 tried to encroach into the temple and that when the plaintiff has lodged a complaint with the police and filed the present suit for perpetual injunction, the temporary injunction was vacated. Thereafter defendant No.3 has filed an application in I.A.No.237 of 1997 directing the plaintiff to deliver vacant possession. The trial Court has dismissed the same on 26.03.1997. The matter was carried to the High Court wherein as per the orders in CMP No.3785 of 1997, plaintiff was directed to deliver the possession and as such, the defendant No.3 has obtained possession of the suit schedule property only as per the orders of the High Court. An Advocate Commissioner was also appointed for local inspection. Meanwhile, the defendant No.3 by suppressing the fact of taking delivery of possession of suit schedule property by virtue of the Court orders in O.S.No.2762 of 1980 on the file of the learned II Assistant Judge filed Execution petition and claimed delivery of possession as such the suit was amended for declaration of title and delivery of possession. The plaintiff is not a party

to the suit in O.S.No.2762 of 1980, it is a collusive suit filed only to prevent the plaintiff from using the suit schedule property. Meanwhile E.A.No.335 of 2001 in E.P.No.67 of 2000 was filed on the file of the II Assistant Judge and irrespective of the result of CMASR No.17800 of 1997 the 3rd defendant has taken possession of the suit schedule property as per the orders of the High Court and that the defendant No.3 is bound to restore the possession. Accordingly, prayed for declaration of title and recovery of possession of suit schedule property.

6. Defendant No.3 alone contested the Suit. Defendant No.3 has filed a detailed written statement and additional written statement. Though defendant No.1 has filed written statement, he did not choose to enter into the witness box and subsequently, he was set ex-parte. Defendant Nos.2, 4 and 5 remained absent and they were set ex-parte.

Main averments of the written statement filed by defendant No.3:

7. The plaintiff and defendant No.1 have colluded with each other and filed this false suit with an intention to

prevent this defendant from realizing the fruits of decree in O.S.No.2762 of 1980 dated 06.08.1996, which was confirmed by the High Court in the Second Appeal. She is the absolute owner of the suit schedule property, having purchased the same under registered sale deed dated 14.07.1980, she has also obtained temporary injunction against the defendant No.1 therein. Pending that suit, in violation of temporary injunction orders, the 1st defendant therein has constructed a small Shiva Temple on 28.02.1981 midnight. As such, the plaint in O.S.No.2762 of 1980 was amended claiming relief of declaration and delivery of vacant possession. The defendant No.3 herein has also filed I.A.No.255 of 1981 in that suit for interim direction against the defendant No.1 to remove the illegal constructions and by the orders dated 07.03.1981 the trial Court has ordered status quo to be maintained. Ultimately, that suit in O.S.No.2762 of 1980 was decreed on 21.12.1982 directing the defendant No.1 to remove Shiva temple and deliver vacant possession of the suit schedule premises. The first appeal was preferred and it was dismissed by the learned Additional Chief Judge-cum-Special Judge for SPE and ACB Cases, Hyderabad on

16.08.1983 and confirmed in the second appeal vide S.A.No.757 of 1983 before the High Court. While so the 1st defendant in collusion with the plaintiff has registered a society on 07.01.1997 and got filed the present suit, obtained interim injunction with false allegations, it was vacated on 26.03.1997 and thereafter, the plaintiff has filed CMA SR No.17800 of 1997 before the High Court and the same was dismissed on 22.01.1999. Meanwhile, this defendant has filed E.P.No.26 of 1999 for execution of the decree wherein the 1st defendant has filed a counter stating that the plaintiff has filed CMA in the High Court against the orders dated 26.03.1997 in E.P. and it is not maintainable. This defendant has also filed counter. Finally, the High Court has dismissed CMA SR No.17800 of 1997 for default. In E.P.No.67 of 2000 the Court has directed the Bailiff for delivery of possession. Finally, E.A.No.402 of 2000 was filed for break opening the lock with police aid. These petitions were allowed and possession was delivered to her. However to stall the Execution proceedings, the plaintiff has filed CMP No.4835 of 2001 in CMA SR No.17800 of 1997 to condone the delay of 745 days in filing the petition, the Court has finally

dismissed the said application and thereafter the plaintiff has filed E.A.No.355 of 2001 and E.A. No.356 of 2001 in E.P.No.67 of 2000 to stay the execution and for redelivery of possession which were dismissed by the trial Court and the possession was already delivered to the 3rd defendant.

Issues:

8. Based on the above pleadings, the trial Court has framed the following decisions:

(1) Whether the plaintiff is entitled for the reliefs of declaration as well as injunction as prayed for?

(2) To what relief?

Additional issue:

Whether the suit is barred by principle of resjudicata?

Subsequently, issue No.1 was re-casted as under:

Whether the plaintiff is entitled for declaration and direction to defendant No.3 for delivery of suit schedule property?

Evidence and findings of the trial Court :

9. During trial, on behalf of plaintiff, PWs.1 to 3 are examined, Exs.A1 to A52 documents are marked. On

behalf of defendants, the contesting 3rd defendant herself got examined as DW1, Exs.B1 to B8 documents are marked.

10. The trial Court, after hearing both sides and on appreciation of the oral and documentary evidence available on record, answered both the issues in favour of the 3rd defendant and against the plaintiff holding that the plaintiff failed to establish the title and the possession over suit schedule property and not entitled for declaration and recovery of possession.

11. Feeling aggrieved by the impugned judgment and decree, this appeal is filed.

12. Heard learned counsel on both sides. Learned counsel for the appellant/plaintiff has submitted detailed written arguments. The submissions made on either side have received due consideration of this Court.

Points for consideration :

13. In the light of the rival contentions and the evidence available on record, the following points stood for consideration:

(i) Whether the plaintiff is entitled for declaration of title and recovery of possession as prayed for?

(ii) Whether the judgment and decree impugned is sustainable?

(iii) To what relief?

Point Nos.(i) to (iii):

Since all these points are interrelated, for the sake of convenience and considering the material available on record, it is proposed to answer them together as under:

14. The case of the plaintiff, as can be seen from the averments in the plaint and evidence of PWs.1 to 3 is that there was a temple of Lord Shiva in the schedule property since long time and the defendants have tried to interfere with the possession of the plaintiff and in-fact the defendant No.3 has removed the Lingam and Idols and she has filed Execution petition and possession was delivered in her favour. Accordingly, prayed for declaration of title and recovery of possession in respect of the suit schedule property.

15. Whereas, the simple case of the defendant No.3 is that she has purchased the suit schedule property under

the original of Ex.A1 sale deed dated 14.07.1980. When the defendant No.1 herein tried to interfere with her possession, she has filed O.S.No.2762 of 1980 on the file of the learned II Assistant Judge and obtained perpetual injunction. During pendency of the suit, the defendant No.1 has clandestinely installed Shiva Lingam and built a small temple on 28.02.1981 in violation of the temporary injunction orders. Thereafter, she has amended the prayer for recovery of possession and the suit was decreed. As per the orders in I.A.No.255 of 1981 the defendant No.1 was directed to remove the said temple. Ex.B.2 is copy of the petition. Ex.B3 is the copy of the order dated 07.03.1981 in I.A.No.255 of 1981. The defendant No.3 has also given a complaint to the police. Finally that suit O.S.No.2762 of 1980 was decreed on 06.08.1986. It was confirmed by the first appellate Court and the High Court in the Second Appeal, possession was delivered to her and she is in exclusive possession and enjoyment of the suit schedule property and the suit is not maintainable.

16. On behalf of plaintiff, the next friend of the plaintiff is examined as PW1, one local Poojari is examined

as PW2 and Treasurer of the temple is examined as PW3. PW1, in his evidence in chief-examination reiterated the entire plaint averments and Ex.A1 to A52 documents are marked. Ex.A.1 is Valuation Certificate, Exs.A2 to A7 are photographs, Ex.A8 is the sketch plan, Ex.A9 is the passbook, Ex.A10 is the resolution dated 20.01.1997, Exs.A11 to A16 are the copies of counter affidavit and the orders, receipts in claim petition, whereas Exs.A17 to A20 are the photographs and again A24 to A26 are photographs, Exs.A27 to A29 are the negatives, Ex.A21 is the certified copy of Assessment Register for the year 1984-91, Ex.A22 and A23 are the General Power of Attorney documents, Exs.A34 to A42 are photographs of which Exs.A43 to A51 are the negatives and Ex.A52 is the resolution dated 05.01.2001. Thus, majority of the documents, that are filed on behalf of the plaintiff, are the photographs and negatives, copy of the counter, copy of the order in I.A.No.236 of 1997 and in E.A.No.354 of 2001 and copy of legal notice etc.

17. PW2 testified that he knows both the parties to the suit and he has not filed any document to show that

Temple Committee has appointed him as Poojari and paid salary. PW2 fairly admitted that he does not know when the temple was constructed, whether it was constructed by defendant No.1 on 28.02.1981 or by the plaintiff society.

18. PW3 Treasurer of the Temple Committee supported the evidence of PW1. This witness stated that he has not filed any receipts in proof of collection of donations for construction of the temple and stated that by the time he started living in that locality the temple was in existence.

19. On behalf of contesting defendant, she herself got examined as DW1 and in her evidence Exs.B1 to B8 documents are marked. Ex.B1 is certified copy of the sale deed dated 14.07.1980 wherein she has purchased the suit land from one C.Prameshwar, she has filed O.S.No.2762 of 1980 on the file of the II Junior Civil Judge, City Civil Court, Hyderabad. The witness stated that during pendency of the said suit when there was temporary injunction order was in force, the 1st defendant has clandestinely built Shiva temple in suit schedule property, then she has filed I.A.No.255 of 1981 requesting the Court

to pass orders directing the 1st defendant to remove the temple. Ex.B3 is the said application in I.A.No.255 of 1981. Ex.B4 is the copy of the complaint, lodged by her before Police, Chikkadpally through her Advocate on 30.04.1981. Ex.B5 is another copy of the complaint dated 30.04.1981 given to the Commissioner. After construction of the temple she has filed I.A.No.1875 of 1981 amending the prayer for removal of the temple. Copy of the said application is Ex.B6. After full length of trial, the suit was decreed on 06.08.1986. Ex.B7 is the certified copy of the judgment and the same was confirmed by the High Court in Second Appeal on 30.1.1996. The witness stated that the said judgment was also reported in noted Law Journals and that when she has filed E.P.No.26 of 1997, during pendency of the said E.P. the present suit was filed. Defendant No.1 was in possession of the suit schedule property from 28.02.1981 to 28.03.1997. She has also filed a criminal case vide CC No.108 of 2000 against defendant No.1. In E.P.No.67 of 2000 delivery warrant was issued. Finally the property was delivered to her.

20. In the cross-examination DW1 has stated that defendant No.1 was Poojari for certain period and in the year 1981 defendant No.1 has constructed the temple, she was not informed about the orders of High Court for performing daily poojas and that she did not remove Lingam and Nandi in question. She has clearly stated that her vendor has delivered the possession of the suit schedule property to her on the date of execution of original of Ex.B1 and that in the Execution petition, as per the orders of the High Court the property was delivered to her.

21. On a careful appreciation of oral and documentary evidence discussed above, undisputedly, the defendant No.3 has filed O.S.No.2762 of 1980 for perpetual injunction, during pendency of this suit, she also amended the prayer for recovery of possession directing the defendant No.1 for restoration of possession alleging that defendant No.1 clandestinely built a small temple in violation of the temporary injunction orders. The judgment and decree dated 06.08.1996 in O.S.No.2762 of 1980 was confirmed by the High Court in the Second Appeal,

thereafter she has filed E.P.No.67 of 2000. After much difficulty pursuant to the orders of the High Court, possession was delivered after break opening the locks. This aspect of the case of defendant No.3 is established with her evidence as DW1 and contents of Exs.B1 to B8. The plaintiff having filed the Original Suit for perpetual injunction, in view of subsequent developments, got amended the suit for declaration of title and recovery of possession. However, the oral evidence of PWs.1 to 3 and contents of Exs.A1 to A52 is not sufficient to hold that plaintiff temple was in existence at any point of time before 28.02.1981. The evidence of PWs.2 and 3 does not inspire any confidence, whereas, PW1 being a party to the suit is an interested witness. It is alleged by DW1 that there is collusion between plaintiff and the 1st defendant and in fact at the instance of defendant No.1 alone the present suit is filed by the plaintiff committee and that no such committee was in existence at any point of time.

22. Be it stated that defendant No.1 having filed the written statement, denying the plaint averments, did not choose to enter into the witness box to speak the contents

of written statement filed by him on oath, thereby avoided cross-examination by the other side. This by itself is sufficient to draw an adverse inference under Section 114(g) of Evidence Act against the defendant No.1 holding that the defence set up by him is not correct (**Vidhyadhar Vs. Manikrao and another¹**).

23. In a suit for declaration of title and recovery of possession, the burden is always on the plaintiff to make out and establish a clear case for granting such declaration and the weakness if any of the case set up by the defendants will not be a ground to grant such relief. The plaintiff have to succeed on the strength of their own case by adducing sufficient evidence irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against the defendant No.3 in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited (**Union of India and others Vs. Vasavi Co-operative Housing Society Ltd., and others²**).

¹ AIR 1999 SC 1441

² 2014 (2) SCC 269

24. Let me now examine the oral and documentary evidence discussed above on the touchstone of the principles laid in the above decision in to present suit for declaration of title and recovery of possession. There is no oral and documentary evidence adduced on behalf of plaintiff to show that when the property was either allotted or acquired for construction of that temple. Though plaintiff has filed Exs.A1 to A52, none of these documents relate to the title and possession of the plaintiff over the suit schedule property. As such evidence of PW1 cannot be given any credence. Similarly, the evidence of PW2, who is claiming to be the Poojari does not inspire any confidence and nothing is found in his evidence to show that he worked as Poojari of the temple at any point of time. Equally the evidence of PW3 is not worthy of any credence and cannot be relied upon.

25. Whereas, the contesting defendant (defendant No.3) herself got examined as DW1, Exs.B2 to B8 documents are marked. With this oral and documentary evidence she is able to establish that she has purchased suit schedule property under Ex.B1. She has also filed

Original Suit No.2762 of 1980, on the file of the II Assistant Judge, City Civil Court, Hyderabad, which was decreed by the trial Court, during pendency of that suit, when there was violation of temporary injunction orders by the 1st defendant, she has filed an application for removal of Shiva temple, restoration of possession, prayer made by her was allowed, the judgment and decree in O.S.No.2762 of 1980 was confirmed even in the Second Appeal vide S.A.No.125 of 1985 by the High Court. Subsequently, defendant No.3 has filed E.P.No.67 of 2000, possession was delivered.

26. The plaintiff has suppressed the material facts of defendant No.3 filing O.S.No.2762 of 1980 and getting delivery of possession in the execution proceedings, filed the present suit for bare injunction and subsequently got it amended for declaration of title and recovery of possession, did not approach the Court with clean hands, not entitled for the discretionary, equitable remedy of declaration of title. Therefore, viewed from any angle, the oral and documentary evidence adduced on behalf of plaintiff is not sufficient to establish the essentials for declaration of title or for recovery of possession. I do not find any infirmity or

irregularity in the findings recorded by the Court below and the judgment impugned does not warrant any interference by this Court and it is sustained. Accordingly, point Nos.(i) to (iii) are answered in favour of the defendants and against the plaintiff/appellant.

27. In the result, the appeal is dismissed confirming the judgment and decree dated 31.01.2003 in O.S.No.220 of 1997 on the file of the learned II Senior Civil Judge, City Civil Court, Hyderabad in its entirety.

However, in the circumstances of the case, there shall be no order as to the costs. As a sequel, miscellaneous applications, if any pending, shall stands closed.

A.VENKATESWHARA REDDY, J

29-11-2022
Abb