

HON'BLE SMT. JUSTICE P.SREE SUDHA

SECOND APPEAL Nos.314 AND 318 of 2010

C O M M O N J U D G M E N T

1. Second Appeal No.314 of 2010 arises out of the judgment dated 05.02.2010 passed by the learned III Additional Chief Judge, City Civil Court, Hyderabad, in A.S.No.332 of 2008 confirming the judgment and decree dated 29.08.2008 passed by the learned XII Junior Civil Judge, City Civil Court, Hyderabad, in O.S.No.5851 of 2004. The said suit was filed by the plaintiffs therein seeking specific performance of an agreement dated 13.10.2003 and granting a permanent lease for suit mulgi in terms of the above agreement. By the judgment dated 29.08.2008, the trial Court dismissed the suit.

2. Second Appeal No.318 of 2010 arises out of the judgment dated 05.02.2010 passed by the learned III Additional Chief Judge, City Civil Court, Hyderabad, in A.S.No.333 of 2008 confirming the judgment and decree dated 29.08.2008 passed by the learned XII Junior Civil Judge, City Civil Court, Hyderabad, in O.S.No.5833 of 2004. The said suit was filed by the respondents herein seeking decree for eviction of the defendants therein from 'A' schedule property, mesne profits at the rate of Rs.10,000/- per month for

wrongful use and occupation of the subject property. By the judgment dated 29.08.2008, the trial Court decreed the suit partly.

3. In Second Appeal No.318 of 2010 learned counsel for the appellants would contend that the quit notice dated 17.09.2004 issued under Section 106 of Transfer of Property Act is not valid and that the suit is barred by time. He would further assert that there is no proper termination of lease as there is a contract for delivery of a built-up area of 192 square feet and thus the eviction notice is void and infructuous. He would also assert that the trial Court failed to appreciate the terms and conditions of Ex.A2 agreement executed between the parties and wrongly held it as unenforceable and framed the following substantial questions of law.

- a) Whether the Lower Appellate Court committed substantial errors of substantial questions of law in confirming the judgment and decree of the Trial Court?
- b) Whether the notice dated 17.09.2004 issued under Section 106 of Transfer of Property Act is valid?
- c) Whether the suit is barred by time?
- d) Whether the judgment and decree of the Lower Appellate Court is in violation of Order 41, Rule 31 C.P.C.?

- e) Whether the respondents/plaintiffs are entitled for perpetual injunction against the appellants in respect of B-Schedule property?
- f) Whether the respondents/plaintiffs are entitled for mesne profits?
- g) Whether the respondents/plaintiffs are entitled for eviction of appellants/defendants from A-Schedule Property?
- h) Whether the Lower Appellate Court being the fact finding court is justified in confirming the judgment and decree of the trial court without considering the documents, evidence, and submissions made by the appellants in its perspective, independently, except saying that the lower court after elaborate discussions both oral and documentary evidence, came to a right conclusion holding that the respondents/plaintiffs are entitled for permanent injunction in respect of B-Schedule Property and rightly passed eviction decree in respect of plaintiff A-Schedule Property and there is a valid quit notice and the suit is not barred by time and findings cannot be disturbed.?

4. In Second Appeal No.314 of 2010 learned counsel for the appellants would contend that both the Courts below wrongly held that the agreement of sale is opposed to the public policy as per Section 23 of the Contract Act and the trial Court without framing an issue in respect of the legality of Ex.A1 agreement dated 13.10.2003 erroneously decided it is one sided, no valid consideration and Ex.A1 is not enforceable, and thus, the reasoning and findings are unsustainable apart from framing the following substantial questions of law:

- a) Whether the appellants are entitled for specific performance of agreement dated 13.10.2003?
- b) Whether the appellants are entitled for perpetual injunction against the respondents?
- c) Whether the Lower Appellate Court committed errors of substantial questions of law in confirming the judgment and decree of the trial Court?
- d) Whether the judgment and decree of the Lower Appellate Court is in violation of Order 41, Rule 31 of C.P.C.?
- e) Whether the Lower Appellate Court being the fact finding court is justified in confirming the Judgment and Decree of the trial court without considering the documents, evidence and submissions made by the Appellants in its perspective, independently?
- f) Whether the agreement of sale is opposed to the public policy as postulated under section 23 of the Contract Act?
- g) Whether the Judgment and Decree of the courts below is in violation of the settled principles of law?

5. The facts before the trial Court, in brief, are as follows:

O.S.No.5833 of 2004 was filed for eviction. The legal representatives of the first plaintiff brought on record as plaintiffs 2 to 4. Originally the first plaintiff-Dr.S.Mohan Rao filed this suit against the first defendant-S.P.Mallaiah, who died and his legal representatives were brought on record as Defendants 2 to 6. In fact Dr.S.Mohan Rao-first plaintiff was the owner and lessor of the premises bearing house No.5-8-326/9, Nampally, Hyderabad, and

he let out the mulgi to the first defendant-S.P.Mallaiah, and the rental agreement dated 06.07.1989 was entered originally for eleven (11) months and after expiry of the period he was continued in the mulgi on an oral lease. The initial rent for the premises was Rs.500/- per month and later it was enhanced from time to time as on that date and was paying Rs.1,200/- per month. In the plaint the plaintiff specifically stated that the tenancy is an oral tenancy and it commences from month to month and expires on the last date of the month. The rents shall be payable on or before 10th of every succeeding month. As the first plaintiff intended to construct multi-storeyed building in the premises, he along with the developer approached the first defendant and entered into an agreement dated 13.10.2003 and promised to allot a new shop room in an extent of 192 square feet in the said new construction. The plaintiff would aver that the first defendant was creating nuisance in the construction of the building and also interfering with the construction activities, and as such, he was compelled to keep an area of 50 square yards open place where the shop proposed to be allotted to the first defendant was to be constructed. Due to the interference of the first defendant, the plaintiff sustained monetary loss and in view of the breach of the conditions of the agreement stood frustrated, he issued a quit

notice under Section 106 of the Transfer of Property Act, 1882 on 17.09.2004, which was received by the first defendant on 24.09.2004 and he gave reply notice on 27.09.2004. He also stated that the defendants were illegally demanding for sale of the newly constructed shop or otherwise threatened to cause physical harm to the plaintiff and his men. As the first defendant has no right, claim or interest over the suit schedule property, he filed the suit seeking eviction.

6. The first defendant filed his written statement stating that he was a tenant since 1963 with a rent of Rs.60/- per month and it was gradually enhanced to Rs.1,200/- per month and that he was a permanent tenant, and as such, both parties entered into an agreement on 13.10.2003 and it was also clearly mentioned in the second page of the said agreement, and hence, the question of tenancy from month to month is denied. He would further state that even today he is intending to abide by the terms of agreement and ready to withdraw the suit O.S.No.5851 of 2004 filed by the defendant if the plaintiff gives an undertaking to comply with the terms and conditions of agreement dated 13.10.2003. He requested to read the contents of the plaint in O.S.No.5851 of 2004 filed by him for specific performance of agreement as part and parcel of this written statement. He would also submit that he

is aged about 81 years and no other source of income except the present business. He would also submit that the builder P.Ravikanth Reddy attempted to remove him from the possession of the suit mulgi and plaintiff also creating confusion by saying A & B Schedule property and that they are trying to pull down the structure of the defendants. The plaintiffs have not left out any area much less 50 square yards open as stated by the plaintiffs in the plaint and thus this suit for eviction is void, premature and is liable to be dismissed. He also stated that B-Schedule property adjacent to H.No.5-8-326 was owned by Dr.S.Padma Rao who is not a party to the suit. The plaintiffs and the builder approached him and agreed to allot a new mulgi admeasuring 12 x 16 feet ie., 192 square feet. Accordingly an agreement dated 13.10.2003 was executed, but the plaintiffs are trying to interfere with the possession by putting supporting beams and also damaging the roof by putting centring poles.

7. There is no dispute regarding the relationship of land lord and tenant between the first plaintiff and the first defendant and even during the pendency of the suit both of them died and their children were brought on record as their legal representatives and contested the matter.

8. An agreement dated 13.10.2003 was entered into between Dr.S.Mohan Rao-plaintiff and the builder Mr.Ravikanth Reddy and Mr.S.P.Mallaiah-first defendant. The trial Court observed that as per Ex.A.1 rental agreement executed on 06.07.1989 between the first plaintiff and the first defendant, the period mentioned in it was lapsed, but the first defendant is being continuing his possession without renewing Ex.A.1. It was also observed that there is no renewal of the rental agreement between both the parties. The land lord has every right to determine the tenancy under due process of law. D.W.1 was only a tenant and he is in occupation of the mulgi bearing No.5-8-326/9 in the capacity of a tenant, even if the mulgi is going to be constructed is allowed or not as per Ex.A.2, his status as a tenant will not be changed or effected and thus it was held that the plaintiffs are entitled to terminate the tenancy and D.W.1 has no manner of right to interfere with the lawful possession of P.W.1 and his family members. With regard to the claim of mense profits, the Court below did not grant and the plaintiffs were directed to file a separate petition under Order 20 Rule 12 CPC and the defendants were directed to vacate and handover the vacant possession to the plaintiffs within three months from the date of the order and thus the suit was decreed partly.

9. The appellate Court confirmed the judgment and held that there was valid quit notice.

10. O.S.No.5851 of 2004 was filed by the tenant seeking specific performance of an agreement dated 13.10.2003 against the land lord and both of them are represented by their legal representatives. The plaintiff-tenant in the suit would submit that the first defendant entered into a Development Agreement on 28.11.2001 with him for construction of a commercial complex. The first and second defendants approached him and entered into an agreement dated 13.10.2003 for allotment of a new mulgi in the proposed newly constructed complex. They also agreed to furnish a copy of the sanctioned plan and development agreement to the plaintiffs. He would further assert that he has prerogative to choose any other shop out of the share of the second respondent, if the shop in the share of the first defendant is not suitable to plaintiff, for which the first defendant gave an undertaking dated 10.10.2003 to the effect that he is a permanent tenant since forty years and thus agreed to give the same plinth area in the newly constructed multistoried complex. The defendants commenced the construction but failed to earmark or identify the portion to be given to the first plaintiff. When the talks were going on, the

defendants issued legal notice dated 17.09.2004 and thus he filed suit for specific performance.

11. The defendants in their written statement asserted that they have not executed any letter of undertaking dated 10.10.2003. There was no difficulty in identifying the proposed shop as the plaintiffs were well aware that the first defendant got only two shops in the ground floor. One shop was already constructed and the remaining to be constructed was meant to be given on lease to the plaintiffs and that the site plan was available with the Supervisor of the building and that when they gave a quit notice dated 17.09.2004 reply was given on 27.09.2004 with false allegations. The defendants would further aver that the property which is proposed to be let out to the plaintiffs under the agreement is not in existence as on the date of filing the suit and there cannot be a relief of specific performance of a non existant property. They also contended that the first plaintiff and his sons were demanding sale deeds to be executed in favor of the first plaintiff at a price fixed by them in respect of the proposed shops and then only they will allow the defendants to proceed with the further construction. As there is a demand, which is contrary to the agreement, the agreement became unenforceable and as such

they filed the suit for eviction and in I.A.No.1220 of 2004 interim order were granted in their favour.

12. The trial Court considering the evidence of both the parties, the provision of the Indian Contract Act and the terms and conditions of the agreement, observed that there is no valid consideration and no certainty in the terms and conditions of the agreement. The terms of the agreement appears to be one sided and the common intention of the parties is lacking in between the plaintiffs and the defendants, and the parties to Ex.A.1 are no more. There is no existence of the mugi in the newly constructed building. The tenant has no *locus standi* to dictate the terms and conditions to the land lord. No property was allotted to P.W.1 as on the date of Ex.A.1 and he was only a tenant on a monthly rent of Rs.1,200/-. The concept of permanent tenancy is not available and accordingly dismissed the suit. The said order was confirmed by the appellate Court holding to the effect that the agreement is not enforceable as there is no property in existence and permanent tenancy is unknown to law and there is no certainty of the terms and conditions in the agreement and that no consideration was mentioned in Ex.A1, and thus, it is not enforceable in law.

13. From the above, this Court feels it reasonable to extract the terms and conditions of the agreement dated 13.10.2003 for the sake of convenience.

- i) That the First Party and the Second Party have agreed to allot a new mulgi admeasuring 12' x 16' = 192 Sft. in the new complex to be constructed in Mulgi No.5-8-326/9, Public Garden Road, Nampally, Hyderabad, to the third party.
- ii) That the existing mulgi admeasuring 12' x 16' = 192 Sft. will be continued under the possession of the third party herein till the new complex is ready for occupation.
- iii) That the rent shall be Rs.1200=00 (Rupees One Thousand and two hundred only), with an increase of Rs.50/- (Rupees fifty only) per year.
- iv) That the third party shall pay the same monthly rent of Rs.1200=00 per month with enhancement of Rs.50/-.
- v) That the first and second parties shall furnish a Xerox copy of the Sanctioned plan and the Development Agreement to the Development Agreement to the third party herein for proper identification and perusal.
- vi) That the tenancy of the third party shall be month to month tenancy reckoned as per the English Gregorian Calendar and will be exclusive of Electricity and Water charges.
- vii) That the first party and second party shall be liable to deliver and handover the vacant physical possession of the New Constructed mulgi after completion of the complex within (18) months from the date of this Agreement and the third party shall be entitled to occupy the same under existing terms and conditions.
- viii) That the third party is also entitled, to choose any other shop, out of the share of the second party, in the

event the shop in the share of the first party is not suitable to him.

- ix) That any loss caused to the third party due to violation of this Agreement Clauses, the first and the second parties, are liable to compensate the third party, not only for the loss, but also for the disturbance of his business, apart from damages.
- x) In case of breach of any other terms, the third party shall be entitled to enforce this agreement in the proper court of law.'

14. Now it is for this Court to see whether there is any substantial questions of law arises for consideration in these Second Appeals.

15. Admittedly, there is no dispute regarding the relationship between the parties as landlord and tenant and also in respect of execution of agreement of lease between plaintiff, builder and the tenant. It appears from the facts on record that the sons of the tenant demanded for execution of sale deed for the newly constructed mulgi infavour of their father and interfered with the construction activities of the new commercial complex, and thus, the landlord issued quit notice dated 17.09.2004 and also filed suit for eviction of the mulgi. As a result of which, the tenant also filed suit for specific performance. Both the suits were decided by the same Presiding Officer on the same day, but in different judgments. It is a fact that the tenant was residing in the said

mulgi from 1963 onwards. As the tenant was continuing the tenancy for a longer period, the landlord along with the developer approached and promised him to allot the new mulgi of the same dimension in the newly constructed complex to that effect they also executed an agreement in writing and permitted the tenant to continue in the possession of the old mulgi till the allotment of the new mulgi and asked him to pay the rent at the rate of Rs.1200/- per month with an enhancement of Rs.50/-. They promised to furnish the xerox copy of the sanctioned plan and the development agreement of the building for proper identification and also promised to deliver and handover vacant possession of the newly constructed mulgi within eighteen months from the date of agreement. They further gave him liberty to choose any other shop in the share of the second party/builder if the shop in the share in the first party is not suitable to him. Even in the written statement filed by the landlord he clearly admitted that there is no difficulty in identifying the proposed shop. The first party will get only two shops in the ground floor, one shop was already constructed and remaining is to be constructed, which is meant to be given to the tenant. It is to be noted that after filing of the cases by the landlord and tenant, both were expired and the litigation was continued between the children of both the parties. It was on

record that the children of the tenant insisted the landlord to execute the sale deed regarding the new mulgi in the name of tenant, and thus the landlord initiated steps to evict the tenant and accordingly filed the suit for eviction.

16. The reasoning of the trial Court that there is no valid consideration, no certainty of the terms and conditions and no identity of the property is not proper. The agreement entered into between the parties is only to an extent of allotment of a new mulgi in the commercial complex with the same dimensions as he was a tenant for them for a longer period. But, as per the facts on record the sons of the tenant insisted for execution of the sale deed and thus the agreement of lease between the parties stood frustrated and became unenforceable. As the tenant was vacated by due process of law, he was no more a tenant and there is no obligation on the part of the landlord to provide him another mulgi in the newly constructed building. Admittedly, he is the owner of the property and the tenant has no right or claim over the property and he cannot restrain the owner to construct a new building and cannot interfere with the physical possession of the property. No doubt, the agreement was entered originally between the landlord and tenant due to the long relationship of more than forty years, but the sons of the tenant were hasty and greedy, the agreement

stood frustrated and the tenant was duly evicted and the suit for specific performance of the agreement of lease became unenforceable as there was no concept of permanent tenancy. The trial Court accordingly dismissed the suit for specific performance and allowed the suit filed for eviction and it was confirmed by the appellate Court. As there is no substantial questions of law involved in these two second appeals, this Court needs no interference. Accordingly, the appeals are liable to be dismissed.

17. In the result, both the second appeals are dismissed. However, there shall be no order as to costs.

18. Pending miscellaneous petitions, if any, shall also stand dismissed in the light of this final judgment.

14th MARCH, 2022.
PGS

P.SREE SUDHA, J.