

**Mohd. Basheeruddin and ors. Vs. Mohd. Giasuddin and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/440818](http://sooperkanoon.com/440818)

**Court :** Andhra Pradesh

**Decided On :** Apr-22-2003

**Reported in :** 2003(6)ALD377; 2003(5)ALT508

**Judge :** P.S. Narayana, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

**Appeal No. :** SA No. 303 of 1994

**Appellant :** Mohd. Basheeruddin and ors.

**Respondent :** Mohd. Giasuddin and ors.

**Advocate for Def. :** Mohd. Ashfaquddin, Adv. for Respondent No. 1 and ;S. Balchand, Adv. for Respondent Nos. 2 and 3

**Advocate for Pet/Ap. :** C.V. Mohan Reddy, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**P.S. Narayana, J.**

1. The unsuccessful defendants in both the Courts below are the appellants in the present appeal. The 1st respondent as plaintiff instituted O.S. No. 1112 of 1978 on the file of the Second Assistant Judge, City Civil Court, Hyderabad for declaration

of title in relation to the suit property admeasuring 150 sq.yards situated at Regdan Lakdi Ka Adda outside Yakutpura, Hyderabad which is a part and parcel of the old Survey No. 65/1 an new Survey No. 87/1 Talab Chanchalum, Yakutpura, Hyderabad and now which is eastern portion of H.No. 17-3-757/1. The appellants herein as defendants resisted the suit by filing a written statement in detail and on settlement of issues, the Trial Court had recorded the evidence of P.Ws.1 and 2, D.Ws.1 to 3 and marked Exs.A-1 to A-3 and Exs.B-1 to B-38 and after recording the findings, ultimately decreed the suit with costs. Aggrieved by the same, defendants 1, 3 and 4 had preferred A.S. No. 188 of 1989 on the file of the Chief Judge, City Civil Court, Hyderabad and the appellate Court by judgment dated 31-1-1994 had dismissed the appeal with costs. Aggrieved by the same, the present appellants had preferred the present second appeal.

2. Sri Rudra Prasad, the learned Counsel representing the appellants with all emphasis had submitted that the approach of the Courts below especially in appreciating the prior common judgment in O.S. No. 57 of 1971 and O.S. No. 2002 of 1975 on the file of the IV Assistant Judge, City Civil Court, Hyderabad is totally erroneous. The learned Counsel also had pointed out that the findings recorded in S.A. Nos. 910 and 1020 of 1981 which were filed as against A.S. Nos. 175 and 179 of 1979 on the file of the Additional Chief Judge, City Civil Court, Hyderabad which in fact were preferred against the judgment and decree made in O.S. No. 57 of 1971 and O.S. No. 2002 of 1975 on the file of the IV Assistant Judge, City Civil Court, Hyderabad and had contended that in these second appeals, a clear finding had been recorded that the plaintiff had not established title and in the light of the same a suit for ejectment filed by the plaintiff is bound to fail. The learned Counsel also had pointed out to Grounds (a) to (e) specified under Ground No. 10 as substantial questions of law involved in the second appeal. The learned Counsel also had pointed out that the appellate Court had framed two points for consideration and while recording findings on point No. 1, the appellate Court had adopted a totally erroneous approach in interpreting the findings recorded in the prior proceedings.

3. Per contra, Sri Balachand, the learned Counsel representing the 1st respondent/ plaintiff had taken me through the findings recorded by both the

Courts. The learned Counsel in all fairness had submitted that no doubt in the prior second appeals, a finding had been recorded that the title was not established. But, however, the learned Counsel had explained the same in detail stating that under peculiar circumstances inasmuch as the suit was based on possessory title initially and inasmuch as possession was clearly established, the party might have thought at the relevant time, the question of going into title at that stage may not be essential at all. The learned Counsel also pointed out that the suit was instituted as O.S. No. 57 of 1971 and the sale deed dated 27-11-1994. The learned Counsel while taking me through the findings recorded by both the Courts below in a meticulous way had submitted that no doubt, in the light of the findings there is some ambiguity though voluminous documentary evidence had been adduced by both the parties, apart from the oral evidence. But, however, with all emphasis, the learned Counsel contended that the very defence of the appellants/defendants is on the strength of an unregistered document which, in fact, had been disbelieved in the prior proceeding and in the light of the subsequent event, this Court can definitely take note of the same and affirm the findings by declaring the title of the plaintiff and also by granting the relief of possession as prayed for by the 1st respondent/plaintiff in the present second appeal.

4. Heard both the Counsel and also perused the oral and documentary evidence adduced by both the parties.

5. For the purpose of convenience the parties are referred to as arrayed in the original suit. As already referred to supra, the 1st respondent/plaintiff instituted O.S. No. 1112 of 1978 for declaration of title and recovery of possession of the plaint schedule property and also for mesne profits. The averments made in the plaint are as hereunder:

'That the plaintiff had occupied 520 sq. yards of land situated at Mohalla Regdan outside Yakutpura, Hyderabad some where in the year 1955. This piece of land is a portion of Survey No. 87/1, subsequently it was found that one Nawab Mohboob Hyder Khan s/o late Nawab Farooq Ali Khan was the owner of suit property. The Plaintiff became his tenant for some time and ultimately he purchased the above said 520 sq. yards which is now part of H.No. 17-3-756/21 along with six huts. The

house was constructed by the plaintiff by his own expenses in 1956 or 1957. That the plaintiff purchased the above said 520 sq. yards from its owner Nawab Mahboob Hyder Khan through registered sale deed dated 27th November, 1974. Though the plaintiff perfected his title by adverse possession somewhere in the year 1957 itself against one and all he purchased the property from the said vendor to avoid further complications and litigations. The plaintiff allowed his son namely defendant No. 5, herein to start a firewood stall on portion 'A' of the said land, defendant No. 5 subsequently let out the said piece of land to Mohd. Sirajuddin, defendant No. 4 herein and consequently defendant No. 5 filed O.S. No. 83 of 1971 against defendant No. 4 for possession and recovery of rents. The said suit is now pending on the file of 9th Assistant Judge. In fact the suit property which is subject-matter of O.S.No. 83 of 1971 on the file of the 9th Assistant Judge, City Civil Court, Hyderabad is the property belonging to this plaintiff and the plaintiff alone is entitled to take possession thereof. During the said period the defendants 1 to 4 tried to encroach upon some more open land on southern side of portion 'A' which is shown as portion 'B' in the above said plan. The plaintiff herein filed suit for perpetual injunction suit bearing O.S.No. 57 of 1971 pertains to land shown as 'B', in the above said rough sketch plan and it was pending disposal in the Court of the 9th Assistant Judge, Civil Court, Hyderabad. The said portion 'B' is roughly for 25 sq. yards. The plaintiff was not having the registered sale deed in his favour at that time and he filed the suit on the basis of his possession for more than 15 years and more. Defendant No. 1 having filed forged Sale Deed for Rs. 95/- claimed ownership over the entire property and consequently the injunction order was vacated. Thereafter the defendants 1 to 4 have stealthily occupied a further area of about 25 sq. yards just behind the above 125 sq. yards which is now shown in the rough sketch plan as portions 'A' and B-1. The boundaries of the suit property are as follows:

East: Firewood stall belonging to Smt. Balamani W/o Narsimhari.

West: Remaining portion of land of H.No. 17- 3-357/1.

North: Cement Road (Yakutpura to Chunne Ki Bhatti)

South: Portion 'B' of H.No. 17-3-357/1.

The defendants 1 to 4 are real brothers and the name of second defendant is just like this plaintiff. Taking undue advantage of similarity of names etc., the defendant No. 1 posing himself to be the land lord filed a false eviction suit R.C. No. 424/Evi/of 1970 against his real brother i.e., second defendant herein on the file of Principal Rent Controller, Hyderabad and obtained collusive eviction decree and ultimately came to evict the plaintiff herein. The plaintiff preferred claim petition E.A.No. 11 of 1971 which was allowed with cost after full contest. Thus the plaintiff and his tenants were found to be in actual physical possession of the entire property purchased by the plaintiff herein. The Commissioner was also appointed to make local investigation and he filed his report along with a plan. Subsequently the defendant No. 1 herein filed suit for declaration of ownership and possession, mesne profits and perpetual injunction against the plaintiff his sons and tenants. The suit is numbered as O.S. No. 2002 of 1975 and is pending disposal on the file of the IV Assistant Judge, City Civil Court, Hyderabad. All the above said three suits O.S. No. 83 of 1971, O.S. No. 57 of 1971 and O.S. No. 2002 of 1975 are now transferred to 9th Assistant Judges Court on administrative grounds. As the defendants are in illegal possession of 150 sq.yards of land belonging to plaintiff, they are bound to pay mesne profit at least at the rate of Rs. 30/- per month. Hence the suit.'

'The defendants Nos. 1, 3 and 4 filed a written statement denying the plaint allegations and alleging mainly as follows: That the first defendant purchased open piece of land admeasuring 170' x 45' equal to 7650 sq. feet i.e., 850 sq. yards equivalent to 697 sq. metres situated at Regdan Lakdi Ka Adda outside Yakutpura, Hyderabad forming part of the Survey No. 65/1 and 2 (old) new Survey No. 87/1 to 5 of Moze Talab Chanchalum, which land now bears Municipal. No. 17-3-757/1 though sale deed dated 29-9-1956 executed by Sri Narayana S/o Sri Ramachander Bhagwat in favour of defendant No. 1. Prior to the sale of the said land the defendant No. 1's vendor remained in peaceful possession, use and enjoyment of the said land as the sole and absolute owner. On the date of sale of the said land the first defendant's vendor delivered the actual possession of the said land to the first defendant and ever since than the first defendant remained in peaceful and continuous possession, use and enjoyment of the same without any interference from any corner. That prior to the defendant's vendor, Nawab Farooq

Ali Khan was the sole and absolute owner of the said land and the said Nawab had gifted the said land to the first defendant's vendor more than 33 years back from the date of filing this written statement. That the first defendant has been shown in possession of the aforesaid 850 sq. yards of land in the village records. Further as the owner, the first defendant has been paying the land revenue of the aforesaid 850 sq. yards of land, the property stands in the name of the first defendant in the records of M.C.H. and he has been paying the property tax of the said property. After the first defendant purchased the said land he constructed temporary thatched rood huts thereon and let out the same to his tenants on rent. Ultimately the first defendant let out the said property to his younger brother name Mohd Giasuddin, second defendant herein on rent of Rs. 9/- per month under an oral rental agreement and the defendant No. 2 started his fire-wood business in the said property having obtained licence to run the firewood business in the said property in his name from the Corporation. The said Mohd. Giasuddin, paid the rent of the said property to the first defendant till December, 1968 and thereafter he withheld the rent of the said property hence the relations in between the defendant No. 1 and defendant No. 2 became strained. That the plaintiff having his hope of success in O.S. No. 83 of 1971 filed a false application in O.S. No. 83 of 1971 to implead defendants 1 and 2 as the defendants in the said suit in I.A. No. 931 of 1974 and the same has been dismissed on 9-4-1975 after contest. Thereafter the plaintiff herein filed an I.A. to implead him in the area of the plaintiff in O.S. No. 83 of 1971 but the said petition is also dismissed after full contest. Thus having failed in his evil attempts the plaintiff has now rushed to this Court and filed the instant bogus suit with the sole intention to trouble and harass these defendants. Hence it is prayed that the suit may be dismissed with cost to the defendants herein and as the suit filed is false, frivolous, baseless and vexatious, compensatory costs be granted to the defendants herein from the plaintiff.'

'The second defendant filed a written statement denying the plaint allegations and alleging mainly as follows: That the first defendant let out the land and huts to different persons on rent and got the benefit therefrom. Ultimately this defendant obtained the land in question and huts and started the firewood business having obtained the licence in his name. Some time later the relations in between the first defendant and this defendant turned strained and in view of the circumstances this

defendant let out a portion of the property that was in his possession to the plaintiff herein and since then only the plaintiff came into possession thereof but it is not the subject-matter of this suit. The plaintiff is trying to take undue advantage of the family disputes in between this defendant and the first defendant. Hence it is prayed that the suit may be dismissed with compensatory costs to this defendant.'

6. The defendant No. 5 having been called absent and set ex parte on 17-10-1978.

7. On the strength of the respective pleadings of the parties, the following issues were settled.

(1) Whether the plaintiff is the owner of the suit property?

(2) Whether the defendants have encroached into the suit site as alleged by the plaintiff?

(3) Whether the plaintiff is entitled for the declaration as prayed for?

(4) Whether the plaintiff is entitled for the possession of the suit property?

(5) Whether the plaintiff is entitled for the mesne profits and if so at what rate?

(6) Whether the suit is not properly valued and correct Court fees is not paid?

(7) Whether the defendants 3 and 4 are not necessary and proper parties to the suit?

(8) Whether the defendants are entitled for compensatory costs?

(9) Whether the plaintiff has no cause of action?

(10) To what relief?

8. As already referred to supra, the evidence of P.Ws.1 and 2, D.Ws.1 to 3 was recorded and Exs.A-1 to A-37 and Exs.B-1 and B-38 were marked and ultimately the suit was decreed. It may be relevant to note that Ex.A-37 is the judgment in S.A. Nos. 910 of 1981 and 1020 of 1981 dated 13-6-1986. As already referred to

supra, defendants 1, 3 and 4 had preferred A.S. No. 188 of 1989 on the file of the Chief Judge, City Civil Court, Hyderabad and the appellate Court had framed the following points for consideration:

(1) Whether the plaintiff has no title to the suit property?

(2) Whether the plaintiff is not entitled to recover the suit property?

9. The appellate Court relying upon the judgment made in A.S. Nos. 170 and 175 of 1979 marked as Ex.A-2 had arrived at a conclusion that the 1st respondent/plaintiff is entitled to the relief as prayed for. No doubt, the oral and documentary evidence also had been discussed by both the Courts. However, on the admitted facts by both the parties especially in the light of the prior judicial proceedings, the principal question involved in the present second appeal is whether the plaintiff is entitled to the relief of declaration of title, possession and mesne profits as prayed for?

10. In the light of the findings recorded in the prior second appeals Ex.A-37, the following substantial questions of law were pointed out in the second appeal which are as hereunder.

(a) Whether the common judgment in O.S. No. 57 of 1971 and O.S. No. 2002 of 1975 on the file of the IV Assistant Judge, City Civil Court, Hyderabad operate as res judicata against the 1st respondent herein.

(b) Whether the 1st respondent can again re-agitate the question of title with regard to the property alleged to have been purchased by him under Ex.A-25, when it is declared by virtue of the common judgment that he has no title.

(c) Whether the Courts below were right in decreeing the suit, in spite of the declaration in the above said common judgment that the 1st respondent has no title over the schedule property.

(d) Whether the judgment of the Court below is not vitiated inasmuch as it came to an erroneous conclusion that the property mentioned in O.S.No. 57 of 1971 and O.S.No. 2002 of 1975 is the same as is mentioned in the above suit.

(e) Whether the judgment of the Court below is not liable to be set aside for non-application of mind and perverse appreciation of the facts and circumstances of the case.

11. At the outset, before advertng to the other aspects, it may be relevant to have a look at Ex.A-37 in the second appeals between the same parties. This Court had observed as follows:

'Upon the respective contentions, the only substantial question of law that arises for consideration is whether the Courts below are right in granting perpetual injunction against the 1st defendant-appellant from interfering with the plaintiff- 1st respondent's possession over the plaint schedule property in O.S. No. 57 of 1971. The appellate Court considered the evidence of the parties adduced and held that though the title sought to be established by the plaintiff-1st respondent has not been established, he was found to be in possession and in support thereof, the Courts below relied not merely on oral evidence but also the documentary evidence, Exs.A-6 to A-9, the tax receipts issued by the Municipal Corporation. It is a finding of fact based on an appreciation of evidence. Payment of tax evidences proof of possession. There is an application filed in the Court of the Rent Controller for ejectment of the plaintiff (1st respondent herein) and therein the plaintiff has established his possession and the Rent Controller found that there is no jural relationship of landlord and tenant. Under those circumstances, the possession of the 1st respondent-plaintiff was upheld by the Rent Controller, There is evidence of the Commissioner's Report establishing that on the date when he went to make an enquiry pursuant to the warrant issued by the Trial Court, the 1st respondent-plaintiff was found to be in possession. It is now well-settled that though the Commissioner has not been examined, his report being part of the record, can be looked into. From this, it is clear that the 1st respondent-plaintiff has been in possession of the plaint schedule property. It is a concurrent finding of fact based on evidence and need no interference.'

12. In the light of the findings recorded above, it is not in controversy between the parties that title was not established in the prior judicial proceeding. However, it is no doubt well explained now stating that inasmuch as the suit was then based only

on possession and subsequently, the sale deed was obtained. Most probably, the 1st respondent/plaintiff thought that if the relief of permanent injunction protecting his possession was granted, it would be sufficient at that stage and in those circumstances the said decision was delivered. I had given my anxious consideration to the findings recorded by both the Courts and also the elaborate oral evidence and voluminous documentary evidence relied on by both the parties. It is no doubt true that several of the documents relied upon by the parties had been relied even in the prior judicial proceeding. But, however, in the prior litigation in the second appeals Ex.A-37, a finding had been recorded relating to title that under what circumstances and why such a finding was invited, these are all matters to be well explained by the parties. It is needless to say that in a suit for ejectment the burden of proving title is on the 1st respondent/ plaintiff. No doubt, at present the 1st respondent/plaintiff is relying upon a title deed. In the light of the said finding recorded in the second appeals marked as Ex.A-37 in the prior judicial proceeding, this Court is of the opinion that further evidence to clarify the real stand of the parties definitely may be essential for arriving at the just conclusion. Hence, to give an opportunity to both the parties to let in further evidence in this regard, the judgments and decrees of both the Courts below are hereby set aside and the matter is remanded to the Court of first instance, i.e., the Second Assistant Judge, 'City Civil Court, Hyderabad for the purpose of affording opportunity to both the parties to let in further evidence on the aspect of title especially in the light of the findings recorded in Ex.A-37. Accordingly, the judgments and decrees of both the Courts below are hereby set aside and the matter is remanded to the Second Assistant Judge, City Civil Court, Hyderabad for the purpose of affording opportunity to both parties to let in further evidence especially on the question of title.

13. It is brought to my notice that the suit is a very old one and it is needless to mention that the Court of first instance shall make an endeavour to dispose of the suit at the earliest point of time preferably within a period of six weeks from the date of receipt of a copy of this order.

14. In the light of the background of the finding recorded in Ex.A-37, the second appeal is accordingly allowed to the extent indicated above. No order as to costs.

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