

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

SECOND APPEAL Nos.66 of 1999 & 1036 of 1998

COMMON JUDGMENT:

The unsuccessful plaintiff in O.S.No.25 of 1985, who is also the unsuccessful defendant in OS.No.38 of 1985 brought these two Second Appeals under Section 100 of the Code of Civil Procedure assailing the decrees dated 08.06.1998 and the common judgment in A.S.No.32 of 1992 and A.S.No.52 of 1992 passed by the learned Additional District Judge, Khammam. The learned Additional District Judge while dismissing the said appeals had confirmed the decrees dated 27.02.1992 and the common judgment passed in the aforementioned suits by the learned Principal District Munsif, Khammam.

2. In these appeal suits, the parties shall hereinafter be referred to as 'the appellant' and 'the respondent'. The 1st defendant in the appellant suit shall be referred to as 'the Municipality'.

3. To begin with it is apt to note that the appellant herein as plaintiff brought the suit O.S.No.25 of 1985 against the first defendant-The City Municipality, Khammam and the second defendant-Kommoju Narasimha Chary, i.e., the respondent herein for a declaration that grant of permission in favour of the second defendant by the first defendant Municipality for construction of a compound wall around the house and open yard of the plaintiff bearing no.3-4-169 situated at Gandhi Nagar, Khammam, which is shown in the plaint schedule is void, arbitrary and illegal and to issue a mandatory injunction directing the 1st defendant i.e., the Municipality to grant permission to the plaintiff/appellant to construct a compound wall around the house and open yard, which is shown in the plaint schedule and award costs. On the other hand, the second defendant in the aforementioned suit, i.e.,

the respondent herein brought the other suit O.S.No.38 of 1985 against the plaintiff in the first mentioned suit i.e., the appellant herein to declare that the respondent herein is the owner of the suit schedule property, i.e., 166.66 square yards, more fully described in the schedule annexed to the plaint and to direct the appellant to vacate and put the respondent in vacant possession of the same. Trials were separately conducted in both the suits. In the suit of the appellant which is the first suit, she was examined as PW1 and exhibits A1 to A18 were marked on her side. One V.S.Vara Prasad was examined as DW1 and exhibits C1 to C3 were marked. In the suit of the respondent the respondent was examined as PW1 and exhibits A1 to A14 were marked on his side and the appellant and her husband were examined as DWs 1 and 2 and exhibits B1 to B13 were marked. It appears from the record that after the trials were partly separately conducted, the suits were consolidated. The trial Court, by its common judgment rendered on merits had dismissed the suit of the appellant and decreed the suit of the respondent for title and for recovery of vacant possession from the appellant. The court below had dismissed both the appeals preferred by the appellant. Therefore, the appellant had brought these two Second Appeals.

4. I have heard the submissions of the learned counsel for the appellant-Vijaya and the learned counsel for the respondent-Narasimha Chary. No submissions were made on behalf of the Municipality. I have perused the material on record.

5. At the time of admission of these second appeals, the following substantial question of law was formulated:

“Whether the judgments and decrees of the Courts below are vitiated and are liable to be set aside for the reason that the onus of proof is wrongly cast on the appellant/defendant in O.S.No. 38 of 1985 though the said suit is filed by the plaintiff for declaration of title and recovery of possession and the legal position envisages that in such a suit, the burden lies on the plaintiff and that

the plaintiff is not entitled to succeed on the weakness of the defendant?

6. To adjudicate the *lis* and answer the substantial question, it is necessary to refer to the pleadings of both the parties:

7. The averments in the plaint in O.S. No.25 of 1985 filed by the appellant and her defence in the other suit filed by the respondent, which are common may be stated in brief as follows:

The appellant is a bonafide purchaser of open site with a hut in an extent of 166.66 sq yards situated at Gandhi Nagar, Khammam, more fully described in the schedule of the plaint in O.S. No.25 of 1985. Having purchased the same for a valuable consideration, she had come into possession of the said property. She had removed the old existing hut and had constructed a Mangalore Tiled building at a cost of Rs.1,50,000/- and has been enjoying the same as absolute owner and possessor. The Municipality having acknowledged the fact had made relevant entries in the municipal records as to the ownership of the appellant and has been collecting taxes. The appellant had applied for permission to construct a compound wall around her building and the open yard. She had paid the requisite fee vide receipt dated 06.08.1984. While so, it was learnt that the respondent-Narasimha Chary who is having no concern whatsoever with the house or the open site of the appellant had mischievously applied for permission to construct a compound wall around the house and open yard of the appellant. Having come to know of the said fact, the appellant had filed an objection petition informing the Municipality that it cannot grant any permission for construction of compound wall to the respondent. In the meanwhile, the respondent had filed a caveat petition before the Court (trial Court) on 19-08-1984 showing a plot of open site as his own property. Immediately, the plaintiff had got issued a legal notice to the Municipality as well as the respondent on

01.09.1984. To the surprise of the appellant, she had received a memo dated 27.08.1984 stating that as per the advice of the Municipal Standing Counsel, permission for construction of compound wall is being granted to the respondent. The appellant had sent a reply dated 17.09.1984 to the said memo of the Municipality stating her objection that there cannot be any permission in favour of the respondent for construction of compound wall around the property of the appellant and a copy of the said reply was also sent to the respondent. She had also informed the Municipality and the respondent that she is proceeding with the construction of the compound wall around her house and open yard as shown in the schedule as no such permission is required for construction of a compound wall. The Municipality had sent a memo dated 31.10.1984 informing the appellant that her application for construction of compound wall is rejected as permission was already granted to the respondent. The respondent had influenced the Municipality through certain persons having close access to the seat of administration in the Municipality and had managed to obtain permission in his favour. The appellant alone is entitled to get permission for construction of the compound wall around her property. Therefore, she had filed the suit for declaration that the permission granted by the municipality to the respondent for construction of the compound wall around the property of the appellant is void, arbitrary and illegal and for a mandatory injunction to direct the Municipality to issue permission to the appellant only for construction of the said compound wall. The respondent is the owner of the plot measuring 166.66 square yards by virtue of purchase from one B.Raghava Rao under registered sale deed and that the respondent's predecessor in title was assigned the said property and that the respondent had lived in that site for some time and that this appellant had illegally occupied the said plot are all false allegations. The property was never assigned to the vendor of the respondent and the respondent and his vendor were never in possession of it at any point

of time. The predecessor-in-interest of this appellant, who was the owner and possessor of the suit plot with hut therein for more than 40 years had sold the same to this appellant. The respondent suit for declaration of title and recovery of possession is barred by time. The respondent is conveniently silent in his pleadings as to when he was dispossessed from the property. He is conscious and is having knowledge of the appellant's claim of ownership and possession and the possession of her predecessor for more than 12 years. There is no such open site in existence as claimed by the respondent.

8. The respondent while resisting the suit of the appellant had filed the other independent suit for declaration of his ownership and recovery of possession of the said suit schedule site from the appellant. His case in the plaint in his suit and the defence in the suit of the appellant may be stated in brief are as follows:

The appellant and the respondent are owners of the adjacent plots, each plot measuring about 166.66 sq yds. The respondent had purchased his plot under the registered sale deed dated 10.02.1961 from one B. Raghava Rao. Ever since the date of his purchase, he was in peaceful possession and enjoyment of the said property, which is more fully described in the schedule annexed to the plaint in O.S.No.38 of 1985. The said Raghava Rao, the vendor of the respondent, got the said plot from the Municipal Council through 'Kabala'. After purchase of the said site, the respondent had constructed a small hut and had lived in it for some time. He had also applied for permission for construction of a compound wall. The appellant had filed an objection petition stating that permission for construction of compound wall shall not be granted to the respondent, but, should be granted to the appellant only. The Municipality having conducted an enquiry and having satisfied with regard to the ownership and possession of the respondent over the subject site had granted permission to the respondent for construction of the compound

wall while rejecting a similar request of the appellant. The appellant having failed in her attempt to obtain permission for construction of the compound wall around the site of this respondent had illegally occupied the said site taking advantage of the helplessness of the respondent and the support of some vested interests in the locality. Being placed in a helpless condition the respondent had brought the suit O.S.No.38 of 1985 for declaring that he is the owner of the suit schedule property/the subject site and to direct the defendant to vacate the same and deliver vacant possession of the same to the respondent.

9. I have carefully gone through the pleadings and the oral and documentary evidence brought on record.

10. The substantial question of law, which is formulated, is already referred to supra. In view of the compass of Section 100 of the Code of Civil Procedure, the decision in the Second Appeal shall be confined to the scope and ambit of the said question.

10.1 The learned counsel for the appellant would contend that the appellant-Vijaya is the absolute owner of the site with the building thereon and that the respondent-Narasimha Chary has nothing to do with the same and that the appellant had first constructed a hut and that later she had removed the same and had constructed Mangalore Tiled Building and that she was and is enjoying the site with the building thereon and that having paid the requisite fee to the Municipality she had applied for permission to construct a compound wall around her said property and that while the matter stood thus, the respondent who has no concern with the site of the appellant had also applied for permission to construct the compound wall around the subject property and that the Municipality without considering the objections filed by the appellant had granted permission to the respondent to construct a compound wall by arbitrarily rejecting the request of the appellant for permission to construct the compound wall

and that in the caveat lodged by the respondent, he had denied the right of the appellant and that in the circumstances she was constrained to file the suit and that as a counterblast to her suit, the respondent had brought his suit alleging falsely that the appellant had trespassed into his site. He would further contend that the suit by the respondent is one for declaration of title and recovery of possession and that the said suit is a comprehensive suit and that he had failed to prove his right, title and interest over the property and had further failed to discharge the legal burden, which is upon him, and that, therefore, he was not entitled to the reliefs of declaration and recovery of possession, but, the Courts below without properly appreciating the facts and the evidence and having wrongly cast the onus of proof on the appellant had erroneously decreed the suit of the respondent and dismissed the suit of the appellant, and that, therefore, the appeals deserve to be allowed.

10.2 On the other hand the learned counsel for the respondent-Narasimha Chary while supporting the concurrent findings in the judgments of the Courts below had contended that the Courts below had recorded well-reasoned findings and had answered all the issues in both the suits in favour of the respondent and that except contending that the onus is wrongly cast upon the appellant, she could not make out a case and that the law is well settled that when both parties adduced evidence, the abstract principle of onus of proof pales into insignificance and that the Court has to weigh and evaluate the evidence brought on record and arrive at a just conclusion and that the Courts below had exactly done the same by accurately considering the facts and appreciating the evidence in proper perspective and that the question that is being sought to be raised as a substantial question is not a substantial question and that there is no substance in the said question and that, therefore, the appeals are liable to be dismissed being devoid of merit.

10.3 The subject matter of the suits is 166.66 sq. yards of site. Both the parties are making a claim of ownership to the said site. However, the appellant did file a suit for declaration of her title. Both the parties have applied for permission for construction of compound wall around the said property. While overruling the objections of the appellant, the request for permission of the respondent for construction of compound wall was considered and permission was granted to the respondent while refusing to grant permission to the appellant to construct the compound wall. Even before the suits are filed the respondent had admittedly lodged a caveat petition against the appellant *inter alia* claiming that the subject plot of open site is his own site. In spite of claiming ownership over the subject site by the respondent, the appellant had only brought the suit for a declaration that the action of the Municipality in granting permission for construction of compound Wall to the respondent is arbitrary, void and illegal and for a mandatory injunction to grant permission for construction of compound wall to her; but, she did not seek any relief of declaration of title to the subject property. On the other hand the respondent had brought the other suit for declaration of title and recovery of possession stating that the appellant had illegally occupied his property. The appellant had *inter alia* contended in her defence in the suit of the respondent that the respondent and his so-called predecessor in title were never in possession of the said site at any point of time during the past 12 years and that the appellant and her predecessor were and are in continuous constructive possession and enjoyment of the subject site for last 40 years by claiming ownership openly and to the knowledge of the respondent and his so-called vendor and that, therefore, the suit of the respondent is hopelessly barred by limitation and that the respondent's plaint is conspicuously and conveniently silent as to when the respondent was actually dispossessed from the subject site and that the respondent is conscious of the fact that the appellant is the owner of the subject site and that she and her predecessor were and are in

possession of the same for more than 12 years and that no such open site as claimed by him is in existence on the spot.

10.4 Before proceeding further, it is pertinent to note that the following issues are framed in the two suits.

Issues in the suit of the Respondent:

- 1) *Whether the plaintiff is entitled to decree as prayed for?*
- 2) *Whether the plaintiff and his predecessor was never in possession of the suit schedule property at any time?*
- 3) *Whether the defendant is the bonafide purchaser of suit schedule property and in possession since 40 years and constructed the house?*
- 4) *To what relief ?*

Issues in the suit of the Appellant:

- 1) *Whether the plaintiff is entitled for declaration as prayed for?*
- 2) *Whether the plaintiff had encroached the land of D2?*

(Reproduced verbatim)

10.5 No doubt, as rightly contended on behalf of the appellant the initial onus of proof, as well as, legal burden, which never shifts are on the respondent, as he had brought his suit for declaration of title and recovery of vacant possession of the same from the appellant. The respondent's case is that in the year 1960, the Municipality had assigned the subject open site in an extent of 166.66 sq yds to one B. Raghava Rao through a 'Kabala' under exhibit A5 and that afterwards the said Raghava Rao, who was in possession and enjoyment of the said site, had sold the same to the respondent under exhibit A1- Registered sale deed dated 10.02.1961, and that, afterwards the respondent had made an application to the Municipality for permission

to construct a temporary house at plot no.314 and that permission was accordingly accorded to him on 12.09.1961 under exhibit A3 with approved plan and that having constructed a hut he had resided therein for some time and that later he had made an application to the Municipality for permission to construct a compound wall around the existing house bearing no.3-4-169 and at that juncture the appellant had filed objection petition under exhibit C1 stating that the said house belongs to her and that permission cannot be given to the respondent and that after enquiry, the Municipality had rejected the request of the appellant for permission for construction of compound wall and accorded permission to the respondent as requested and that ultimately the appellant had trespassed into site of the respondent and that, therefore, he had brought the suit. He had also exhibited exhibit A6-the plan annexed to exhibit-A5 certificate, exhibit A7- the encumbrance Certificate issued by the Sub-Registrar's office and exhibit A8-the Ownership certificate dated 12.10.1984 issued by the Municipality and exhibits A9 to A14 house tax payment receipts. **Per contra** the appellant while denying the title of the respondent and his predecessor in interest had contended that the assignment made in favour of Raghava Rao, the vendor of the respondent, was cancelled by the Municipality by a resolution dated 16.02.1961 and that one Chandraiah was in possession of the plot and that from the Chandraiah her father had purchased the said plot and that later she had come into possession and enjoyment of the same that for the last several years she was and is enjoying the property and that when the respondent had illegally applied for permission to construct a compound wall around her property, she had raised an objection, but the Municipality had illegally rejected her objection petition and had refused to grant permission to her to construct the compound wall and had arbitrarily granted permission to the respondent to construct the compound wall. She had also exhibited exhibit B1-the ownership certificate dated 27.08.1984 issued by the municipality, exhibits B2 to

B4-the tax payment receipts, exhibits B5 to B7-the tax demand notices, exhibit B8-the copy of Caveat petition lodged by the respondent, exhibit B9-the copy of the notice dated 01.09.1984 issued by her, exhibit B10- the reply notice issued by the respondent, exhibit B11- the appellant's father's reply notice dated 17.09.1984, exhibit B12-the copy of appellant's letter addressed to the Municipality taking exception to the permission granted to the respondent for construction of the compound wall and exhibit B13-the true copy of the resolution dated 16.02.1961, under which, the Municipality cancelled the assignment in favour of Raghava Rao, the vendor of the respondent.

10.6 Exhibit A5 is the document of assignment i.e., the assignment certificate, under which the subject site was initially assigned to Raghava Rao, the vendor of the respondent. No doubt, exhibit B13-the resolution passed by the Municipality on 16.02.1961 would show that the assignment in favour of the said Raghava Rao was cancelled. Under this resolution, the Municipality had resolved to cancel the assignment not only in favour of the said Raghava Rao, the vendor of the respondent, but also the assignment in favour of another person by name Ch. Mahalakshmi and to issue 'Kabala' to one N. Chandraiah and one M. Lacham. However, both the Courts had concurrently held that there is no evidence brought on record to show that in pursuance of the said resolution, the Municipality had resumed possession of the plot from Raghava Rao, the original assignee who was in possession, and that after such resumption of possession the possession of the said plot was given to Chandraiah, the subsequent assignee and that there is no evidence also brought on record to show that any 'Kabala' or assignment certificate was issued to the said Chandraiah and that the names of the assignees Chandraiah and Lacham were entered in the Municipality records. Further the appellant claims that after cancellation of assignment in favour of Raghava Rao, a fresh assignment in favour of Chandraiah, was made and that Chandraiah became the owner of the said plot and that he

had sold the same to her father and that latter she had come into possession of the same. But she had not examined either Chandraiah or her father. Be that as it may, the Municipality had also granted permission to the respondent to construct a temporary hut over the suit plot under exhibit A3-Municipal permission dated 12.09.1961. Had the Municipality acted upon the resolution dated 16.02.1961 under exhibit B13 whereunder the assignment in favour of Raghava Rao was cancelled any permission under exhibit A3 dated 12.09.1961 would not have been subsequently given to the respondent to construct a hut. Exhibit A3 is the approved plan for construction of the said hut. Therefore, from the said exhibit A3 and exhibit A4-the approved/sanctioned plan of the respondent and the evidence brought on record, it is clear that the Municipality did not act upon the resolution under exhibit B13 canceling the 'kabala' issued in favour of Raghava Rao and another and that on the other hand the Municipality had continued to recognize the right of the respondent over the said site as owner and possessor. It is apt to restate that the respondent had purchased the subject site under exhibit A1 registered sale deed dated 10.02.1961 from Raghava Rao, the original assignee. Exhibit A1 sale deed which is of the year 1961 contained a recital that said Raghava Rao had delivered the possession of the subject site to the respondent. Exhibit A7-the Encumbrance Certificate dated 25.7.1984 discloses that the suit plot stands in the name of the respondent. The Municipality had also issued the ownership certificate dated 12.10.1984 under exhibit A8 to the respondent. Though it has got no probative value, it has got its own significance in the facts and circumstances of the case. Though the appellant claims that her father had purchased the property from Chandraiah, the subsequent assignee, she could not produce any title deed in favour of her father. In her pleadings, she did not mention the name of her predecessor in title, but, in her evidence, for the first time, she had stated that her father had purchased the subject plot from Chandraiah about 20 years

back; where as in exhibit C1, her objection petition submitted to the Municipality, she had stated that one Syamala Krishnaiah S/o Chandraiah resided in the schedule plot till 1986 and she had purchased from Syamala Krishnaiah in the year 1980. The contents of the same are not undisputed. But in her cross-examination she had categorically stated that she does not know who is Syamala Krishnaiah and had further stated that she had never stated at any time that she had purchased the suit schedule property/subject site from Syamala Krishnaiah. Therefore, she disowned her statement in exhibit C1 submitted by her to the Municipality. It is relevant to note that exhibit C1 was produced by the Municipality on the summons issued by the trial Court. Further, the appellant had also submitted exhibit C2-the certified copy of the registered sale deed to the Municipality along with exhibit C1. It shows that she had purchased a plot from Syamala Krishnaiah on 21.02.1983; but, she did not plead and prove as to how Syamala Krishnaiah acquired title to the subject site to convey the same to her under the original of exhibit C2. Though the appellant had contended that by spending huge sum of Rs.1,50,000/- she had constructed a Mangalore Terraced building in the said site, she did not plead the year of construction. When exhibit C2 shows that the plot was purchased from Syamala Krishnaiah in the year 1983, her claim that she had constructed a house, that too without obtaining Municipal permission, even before her purchase under the original of exhibit C2 cannot be countenanced. In her exhibit C1 application, which is an objection application submitted to the Municipality, she did not mention about the construction of house by her by spending Rs.1,50,000/-. Even in her examination in chief she did not state that she had constructed a house. On the other hand, in her cross-examination she had stated that she had only changed the roof of the existing hut, which consisted of two rooms. Nonetheless, as rightly stated by the learned counsel for both the sides the Municipality has given two ownership certificates: One to the respondent under

exhibit A8 dated 12.10.1984; and, the other to the appellant dated 27.04.1986. However, subsequently, the Municipality having conducted enquiry, had granted permission for construction of compound wall to the respondent by overruling the objections of the appellant and by refusing to grant permission to her for construction of compound wall. Both the parties had also produced Municipal tax payment receipts and according to the evidence of the appellant, since 1984, the Municipality was not accepting taxes from her. Thus, the evidence on the side of the respondent would show that the original assignee Raghava Rao, to whom the property was originally assigned under exhibit A5 in the year 1961, had sold the suit schedule plot to him under exhibit A1 sale deed in the year 1961 and that though there was a resolution under exhibit B13 canceling the assignment in favour of the said Raghava Rao and another, there was no evidence brought on record that the said resolution was acted upon, and that on the other hand the evidence brought on record would lay bare that the Municipality had granted permission to the respondent to construct a hut in the subject site and had also approved his plan, as is evident from exhibits A3 and A4 and that the Municipality had also issued the ownership certificate to the respondent and that later when rival claim was made for construction of compound wall, the Municipality having conducted an enquiry had approved the application filed by the respondent for permission to construct compound wall, while rejecting a similar application of the appellant. Therefore, on application of the test of preponderance and probabilities, the evidence brought on record would sufficiently show that the respondent has got a better title and that the appellant could not establish the right or title of her father or her predecessor in interest in respect of the suit site and that the appellant having taken inconsistent stands could not prove her case. In the well considered view of this Court, in the respondent's suit for possession based on title, he had established his case by creating a high degree of probability that he has a right, title and interest in the

property and is entitled to recover possession of the suit schedule property from the appellant. On the other hand, the appellant could not prove her case or dislodge the established case of the respondent.

10.7 The ratio in **R.V.E.Venkatachala gounder v. Arulmigu Visweswaraswami and V.P Temple and another**^[1] which squarely applies to the facts of the present case reads as follows:

In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in A. Raghavamma and Anr. v. Chenchamma and Anr., [1964] 2 SCR 933 , there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which, never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiffs title.

On a careful analysis of the evidence in juxtaposition with the pleadings this Court finds that the concurrent findings recorded by the Courts below in favour of the respondent, while decreeing the suit of the respondent and dismissing the suit of the appellant are justified and do not call for any interference in these second appeals.

10.8 Having thus analyzed the evidence and the pleadings, this Court is satisfied that neither the burden is wrongly cast nor there was misappreciation of evidence or inaccuracy in consideration of the facts, and that therefore, there is no substance in the substantial question raised and no such question is involved in the second appeals, and that therefore, these Second Appeals are devoid of merit and deserve to be dismissed.

11. In the result, these two Second Appeals are dismissed. There shall be no order as to costs. The appellant is granted a time of two months from today to deliver vacant possession of the plaint schedule

property to the respondents. Failing compliance, the respondents are at liberty to recover possession in accordance with the procedure established by law.

Miscellaneous petitions pending, if any, in these appeals shall stand closed.

JUSTICE M. SEETHARAMA MURTI

09th September 2015
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THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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SECOND APPEAL Nos.66 & 1036 OF 1999

09th September, 2015

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