

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.707 of 1999

JUDGMENT:

This appeal under Section 100 of the Code of Civil Procedure, 1908 by the unsuccessful plaintiffs is directed against the decree and judgment dated 15.07.1999 of the learned Senior Civil Judge, Suryapet of Nalgonda District passed in AS.No.1 of 1997. The learned Senior Civil Judge while dismissing the said appeal had confirmed the decree and judgment dated 20.11.1996 of the learned District Munsif at Suryapet passed in OS.No.351 of 1993 filed for

(a) cancellation of the decree dated 12.06.1990 granted in OS.No.417 of 1990 on the file of the learned District Munsif, Suryapet only in respect of Ac.1.23 guntas out of the present suit land; (b) grant of a perpetual injunction in respect of Ac.3.17 guntas at Malipur village of Thirmalgiri Mandal more fully described in the schedule annexed to the plaint in the present suit and (c) for costs.

2. The 1st appellant/1st plaintiff had died during the pendency of this appeal. His legal representatives were brought on record as appellants 10 and 11.

3. I have heard the submissions of the learned counsel for the appellants/plaintiffs ('the plaintiffs, for brevity) and the learned counsel for the respondents/defendants ('the defendants', for brevity). I have perused the material record.

4. At the time of admission of this second appeal, the following substantial questions of law were formulated.

1. Whether the Courts below are justified in upholding the decree in OS.No.417 of 1990 in view of the precedents in AIR 1996 Supreme Court 196 and 1994 (1) ALPJ.

2. Whether the lower courts are justified in upholding oral exchange contrary to the letter and spirit of Sec.118 of I.P. Act and Sec.17 of Registration Act.

3. Whether the lower courts are justified in accepting oral evidence regarding exchange contrary to letter and spirit of Sec.92 of Evidence Act.

4. Whether the lower courts are justified in accepting the two diametrically inconsistent pleas regarding source of acquisition of title by respondents viz., purchase through simple sale deed and exchange.

5. Whether the lower courts are not in error in not appreciating the oral and documentary evidence in the aspect of fraud to avoid Stamp Act and Registration Act.

6. Whether the lower courts are justified in upholding the decree in OS.No.417 of 1990 though it is apparent from the admission of PW-1 in evidence that the said suit is collusive and fraudulent.

7. Whether the lower courts are correct in upholding the title decree in OS.No.417 of 1990 based on simple sale deed, which is not a recognized mode of Transfer of property in the eye of law.

(Reproduced verbatim)

5. To adjudicate the *lis* and answer the said substantial questions of law, it is necessary to refer to the pleadings of the parties and the facts that lead to the filing of this second appeal by the plaintiffs.

5.1 To begin with, the case of the plaintiffs, in brief, is this:

The plaintiffs are the joint owners and possessors of an extent of Ac.3.17 guntas of dry land in S.No.247/AA, K.No.268 at Malipuram village of Thrimalgiri Mandal, which is more fully described in the schedule annexed to the plaint. A major chunk of the suit land is situated on the Northern side of PWD road leading from Suryapet to Jangaon. A rough sketch is also filed showing the location of the suit land. The ancestor of the parties one Ganta Lachaiah @ Lachi Reddy had three sons by names Chandra Reddy, Veera Reddy (the 1st plaintiff) and Ratna Reddy. All of them constituted a Hindu joint family. Their family had ancestral and joint family immovable and movable properties. The suit land is one of such properties of that family. The suit property fell to the share of Lachaiah. On his death, about 50 years back, his said three sons had succeeded to the plaint schedule property and had continued in joint possession and enjoyment of all the properties including the plaint schedule property. The plaint schedule property is a pasture/grazing land. The three brothers had partitioned the properties about 30 years prior to the suit. However, the plaint schedule property was kept joint as it is useful for grazing their cattle and for common use. The 1st defendant is the father of the defendants 2 to 5. They had possessed lands near and adjacent to the plaint schedule land. They are inimically disposed of towards the plaintiffs since a long time due to family and village feuds. The plaintiffs 2 to 6 are the sons of the 1st plaintiff, who is one of the three brothers. The 1st plaintiff's brother-Chandra Reddy had died about 15 years prior to the suit leaving behind him his three sons, who are the plaintiffs 7 to 9. The 3rd brother of the 1st plaintiff by name Ratna Reddy had died about 13 years back. The marriages of

the two daughters of Ratna Reddy-the 3rd brother of the 1st plaintiff, were performed long time back and they had happily settled with their husbands about 20 years prior to the suit. The said Ratna Reddy had disposed of his properties before his death. As such, the plaintiffs 1 to 9 are continuing in the joint possession and enjoyment of the plaint schedule land and are using it for grazing purposes. In the patta of the suit land, the names of the three brothers are recorded under khatha nos.41, 205 and 133 respectively. The respective extents of lands in the said khatha numbers are Ac.1.06 guntas, Ac.1.06 guntas and Ac.1.05 guntas. On 16.07.1993, the plaintiffs had obtained the copies of pahani patrikas for the years 1990-91 and 1991-92 from the Mandal Revenue Office, Thirumalagiri wherein the name of the 1st defendant is mentioned in the possession column to the extent of Ac.1.23 guntas; and, in regard to an extent of Ac.1.29 guntas only the name of plaintiff no.8 representing the plaintiffs was mentioned. Having come to know of the wrong entry in favour of the 1st defendant, the plaintiffs had approached the MRO, Thirumalagiri and had raised an objection in that regard. On a further enquiry, it was learnt that the defendants 1 and 2 herein had jointly obtained a false decree in OS.No.417 of 1990 on the file of the District Munsif Court, Suryapet against the 1st plaintiff and one G. Indra Reddy in respect of Ac.1.23 guntas out of the suit land and also another extent of Ac.2.10 guntas out of S.N.252/AA and that with the help of the said decree, they had got their names respectively entered in the revenue records. Thereafter, the plaintiffs had obtained the certified copies of the decree, the plaint and the written statement in the said suit on 25.08.1993. The said decree is brought into existence behind the back of the plaintiffs with a malicious intention to knock away Ac.1.23 guntas out of S.No.247/AA which is a portion of the suit land in OS.No.417/1990. This land of Ac.1.23 guntas is the item no.1 of the present plaint schedule property in a total extent of Ac.3.17 guntas. The defendants 1 and 2 herein, who are the plaintiffs in the suit - OS.No.417/1990 have not filed any documents in the said suit to establish their title in respect of item no.1 of the present plaint schedule property, which is the property in question. The averments in the plaint and written statement in the said suit are false, fictitious and baseless. That suit was filed by the defendants 1 and 2 herein by suppression of actual facts. In the said suit, the defendants 1 and 2 herein did not state as to how they have come into possession of the suit land i.e., Ac.1.23 guntas of land. They made a bare mention that they came into possession of the land long time back. The defendants 1 and 2 herein in their said plaint had averred that they have perfected title over the two items of the land of that suit. The plaint in

that suit was silent as to the mode and nature of possession and also cultivation and interferences. The 1st plaintiff herein has not received any suit summons in the said suit nor did he engage any advocate to file vakalat and written statement. The thumb impressions on the vakalat and written statement filed on behalf of the 1st plaintiff in the said suit are forged and fictitious. The decree in the said suit was obtained by misrepresentation and fraud. The 1st plaintiff alone has no entitlement to sell the said Ac.1.23 guntas of land. All the plaintiffs are having undivided interest in the property. The 1st plaintiff is a nominal (joint) pattadar in respect of land in S.No.247/AA along with his two brothers. The extent of patta standing in his name is only Ac.1.06 guntas. The true copy of the choufasala for the years 1990-91 and 1991-92 is also filed along with the other documents to prove the case of the plaintiffs. Therefore, the decree in OS.No.417/1990 obtained by the defendants 1 and 2 herein against the 1st plaintiff herein in respect of an extent of Ac.1.23 guntas out of the present suit land is likely to have adverse affect on the rights and interests of the plaintiffs herein in future. The plaintiffs are in possession and enjoyment of the suit land. Due to the strategic location of the suit land, the defendants 1 and 2 have cast their evil eye on the suit land and have conspired to usurp the same at any cost. With such evil designs, they had brought into existence the decree in OS.No.417 of 1990. Under the guise of the said decree, the defendants 1 and 2 herein are making all attempts to occupy the suit land and cause irreparable loss to the plaintiffs. Hence, the decree passed in OS.No.417/1990 is liable to be cancelled to the extent of Ac.1.23 guntas, which is item no.1 of the present suit land. One week prior to the suit, a request was made to the defendants in the presence of elders to co-operate for cancellation of the decree and amicable settlement. They had refused to do so. Three days prior to the suit, the defendants along with their supporters had rushed to the suit land and made serious attempts to plough and dig trenches and occupy the same; but, the said acts were resisted by the plaintiffs. The defendants 1 and 2 had left the place threatening that they would come again and occupy the land which is a valuable piece of land. Hence the suit is filed.

5.2 On the other hand, the defence of the defendants in the written statement filed through the second defendant, in brief, is as follows:

The material allegations in the plaint are false. The plaintiffs are not the joint owners and possessors of the suit land in a total extent of Ac.3.17 guntas situate in S.N.o.247/AA of Malipuram village of Thirumalagiri Mandal. The plaintiffs are only owners to an extent of Ac.1.34 guntas situate in S.No.247/AA but not Ac.3.17 guntas. The defendants are the owners and possessors of Ac.1.23 guntas in S.No.247/AA as per the following boundaries: 'EAST: Land of the plaintiff, WEST: Land of Jonna Venkat Reddy; NORTH: Land of the defendants; SOUTH: Road'. It is true that the suit property is a pasture/grazing land. It is false to say that the entire suit schedule property is in joint possession of the plaintiffs. In the partition between the parents of the 1st plaintiff and the first defendant, the land situate in S.No.247 i.e., Ac.11.09 guntas fell to the share of the father of the 1st plaintiff. A small extent of Ac.3.17 guntas fell to the share of the father of the 1st plaintiff. After the death of the father of the 1st defendant, his share was being enjoyed by all the defendants. This partition had created problem in regard to roads. To settle this problem, the 1st plaintiff and his brothers Chandraiah, Rathnaiah and the father of the 1st defendant by name Ramasani Anthaiah had orally entered into an agreement in the presence of Ganta Satyanarayana Reddy and Ganta Krishna Reddy. They had decided to exchange Etoor Thummadure Bavigunta Pampu wet land by taking Malipuram dry land to provide roads to the properties of the defendants. As per the agreement, the 1st plaintiff and his brother got Ac.0.20 guntas of wet land from the share of the father of the 1st defendant. The 1st defendant's father got a total extent of Ac.2.00 guntas of land i.e., Ac.1.23 guntas in S.No.247/AA and Ac.0.17 guntas in S.No.188 of Malipuram village. This arrangement occurred during the lifetime of Ganta Chandraiah, Ganta Rathnaiah and Ramasani Anthaiah. Since then and till his death Ramasani Anthaiah was in possession; and after his death, the defendants are in possession and enjoyment of the suit land to an extent of Ac.1.23 guntas and another Ac.0.17 guntas in S.No.188. The said particulars were also entered in the Sethwari book on the name of Ramasani Rangamma, the wife of the said Anthaiah. The defendants are in possession and enjoyment of an extent of Ac.1.23 guntas out of the suit land since 50 years. The copies of the pahani patrikas, which are filed by the defendants, establish their case that they are in possession and enjoyment of the

said extent of Ac.1.23 guntas out of the suit land. The continuous adverse possession against the plaintiffs also proves the ownership of the defendants. Ancestors of the parties arrived at a mouje (oral) agreement amicably, which provided road to the land of the defendants. These defendants are inimically disposed of towards the plaintiffs is incorrect. Patta of the suit land is recorded in the name of Chandra Reddy, Veera Reddy and Rathna Reddy is denied. It is false to say that the decree in OS.No.417/1990 is a false decree and that under the guise of the said decree the defendants had got their names entered in the revenue records. All the allegations made in regard to OS.No.417/1990 in the present suit plaint are false. The 1st plaintiff, who is a defendant in OS.No.417 of 1990 on the file of District Munsiff's Court, Suryapet voluntarily received summons, engaged an advocate and wilfully filed a written statement admitting the possession and enjoyment of the plaintiffs therein to an extent of Ac.1.23 guntas out of the present suit schedule land and another extent of land also and had further admitted for granting the relief in regard to the rectification of records. The said Court was pleased to pass a decree in favour of the defendants 1 and 2 herein. After filing of the said decree before the revenue authorities, a thorough enquiry was made; and, after satisfying about the long standing possession of the defendants 1 and 2 herein, the records were rectified as per the provisions of the Record Of Rights Act. The allegation that the 1st plaintiff alone is not entitled to sell the land or suffer a decree and that he had retired as kartha of the family about 20 years prior to the suit are all denied. The decree in OS.No.417/1990 proves the ownership and possession of the defendants. The defendants are in possession of the said land continuously for over 50 years and are enjoying the said land by paying the land revenue. The defendants had never tried to occupy the land and never threatened the plaintiffs as alleged in the plaint. The said allegations are invented for the purpose of the suit. The suit may be dismissed.

5.3 Taking into consideration the above pleadings, the trial Court had framed the following issues for trial.

- 1. Whether the decree in OS.No.417/90 to an extent of Ac.1.23 guntas out of the suit land in Sy.No.247/AA is liable to be cancelled?**
- 2. Whether the plaintiffs are entitled for perpetual injunction as prayed for?**
- 3. To what relief?**

5.4 At trial, the 2nd plaintiff and his supporting witnesses were examined as PWs1 to 3 and exhibits A1 to A9 were marked on the side of the plaintiffs. On the side of the defendants, the 2nd defendant and his supporting witnesses were examined as DWs1 to 3 and exhibits B1 to B21 were exhibited.

5.5 On merits, the trial Court had partly dismissed the suit of the plaintiffs i.e., insofar as the relief of cancellation of the decree in OS.No.417 of 1990 in respect of Ac.1.23 guntas of land in S.No.247/A out of total extent of Ac.3.17 guntas. However, the trial Court had partly decreed the suit by granting a perpetual injunction restraining the defendants and their servants etcetera from interfering with the plaintiffs' peaceful possession and enjoyment of Ac.1.34 guntas out of the suit schedule land. As already noted, the first appeal filed by the plaintiffs was dismissed by the Court of first appeal. Therefore, the aggrieved plaintiffs are before this Court.

6. In view of the facts narrated *supra*, the crux of the dispute in this *lis* is now confined to Ac.1.23 guntas out of the plaint schedule property which is stated to be item no.1 of the plaint schedule property and also the relief of cancellation of decree in OS.No.417/1990 on the file of the District Munsif Court, Suryapet (hereinafter referred to as 'the former suit') obtained by the defendants 1 and 2 herein against the 1st plaintiff herein insofar as the said extent of land out of total extent of Ac.3.17 guntas of land of plaint schedule property. It is pertinent to note that the decree in the former suit was also granted in respect of another extent of Ac.2.10 guntas of land out of S.N.252/AA and that other property is not a subject matter of this present litigation. One Ganta Indra Reddy who was a co-defendant of the 1st plaintiff herein in the said former suit is not a party to this present litigation.

7. The learned counsel for the plaintiffs had contended as follows: 'The 1st plaintiff, who is more than 80 years of age and who was not acting as kartha of the family since 25 years prior to the filing of the suit is only a nominal pattadar of land in an extent of Ac.1.23 guntas. He had no exclusive right or possession over the said disputed land. All the plaintiffs are joint owners and possessors of the said extent of land. The decree in OS.No.417 of 1990 is a fraudulent and fictitious decree. Since the 1st plaintiff is only a pattadar of Ac.1.06 guntas of land and as that property is the joint family property of all the plaintiffs, the Court ought not to have passed a decree for Ac.1.23 guntas against the 1st plaintiff and in favour of the defendants 1 and 2

herein in the former suit. The defendants are pleading in their defence a theory of exchange of lands which is oral and are contending that as per the said exchange agreement, the 1st plaintiff and his brother had got Ac.0.20 guntas of wet land from the share of the father of the 1st defendant and that the 1st defendant's father in turn had got a total extent of Ac.2.00 cents of land i.e., Ac.1.23 guntas in S.No.247/AA and Ac.0.17 guntas in S.No.188 of Malipuram village and that this arrangement had occurred during the lifetimes of Ganta Chandraiah, Ganta Rathnaiah and Ramasani Anthaiah. Thus, they contend that they have got the present Ac.1.23 guntas in S.No.247/AA and Ac.0.17 guntas in S.No.188. The said extent of Ac.0.17 guntas was not included by the defendants 1 and 2 herein in the schedule in their former suit. DW1 had also admitted that the patta to the extent of Ac.1.06 guntas in favour of the 1st plaintiff was nominal and that the plaintiffs 2 to 9 were in possession and enjoyment of the suit land. In the former suit the 1st plaintiff herein, who is one of the defendants, did not voluntarily sign the vakalat and did not engage an advocate to defend him in the said suit. His thumb impressions were obtained on blank papers and the same were utilised in the former suit filed by the defendants 1 and 2 herein. In the decree that was obtained by the defendants 1 and 2 in the former suit there is another extent of land related to Ganta Indra Reddy with whom and with whose property the present plaintiffs are not concerned. The present plaintiffs are only concerned with the present subject land of Ac.1.23 guntas which is one of the items in the former suit for which the decree was also granted. The Courts below have given undue importance to the entries in the pahani patrikas and had placed erroneous reliance on the entries in the revenue records though it is settled law that the said entries do not confer or take away title in respect of immovable properties. The defendants 1 and 2 herein did not have common pre existing right in Ac.1.23 guntas of land. They have fraudulently filed the former suit and rights were created in their favour for the first time under the said decree. Therefore, the decree in the former suit insofar as Ac.1.23 guntas in their favour requires registration. Even when the suit is not contested by the defendants and even when the plaintiffs' case is admitted, the Court is obliged not to pass a decree without verification of the averments in the plaint and the proof of the pleaded case as required under law. The decree in the former suit was obtained by the defendants 1 and 2 herein against the 1st plaintiff herein and another by misrepresentation and suppression of facts. The Courts below have ignored the admissions made by the witnesses in their oral

testimonies. The defendants had contended in their written statement that as the earlier partition created problems, there was an amicable settlement, and that accordingly, there was an agreement to exchange Etoor Thjummadure Bavigunta Pampu by taking Malipuram dry land to provide road to the properties of the defendants and that as per the agreement, the 1st plaintiff and his brothers got Ac.0.20 guntas of wet land from the share of the father of the 1st defendant and the 1st defendant's father had got a total extent of Ac.2.00 guntas of land i.e., Ac.1.23 guntas in S.No.247/AA and Ac.0.17 guntas in S.No.188 of Malipuram village. But, this aspect was not mentioned by the defendants 1 and 2 herein in the plaint in the former suit. They also did not mention about the exchange of Ac.0.20 guntas of wet land in S.No.188. They are claiming possession based on simple sale deed. The defendants did not file a copy of the pahani of the property related to Etoor village showing possession of Ac.0.20 guntas of the land allegedly exchanged with the plaintiffs. The alleged re-partition is not established. The decree in the former suit which created rights in an extent of Ac.1.23 guntas for the first time in favour of the defendants 1 and 2 herein requires registration and unless the said decree is registered the same cannot be looked into. Since the 1st plaintiff herein has no title he could not have conveyed title to the defendants 1 and 2 herein and, therefore, the decree in the former suit does not confer any right, title and interest on the defendants 1 and 2 herein in respect of Ac.1.23 guntas of land. There is no consistency in the case of the defendants. The decree in the former suit insofar as the present subject matter i.e., Ac.1.23 guntas of land with which the plaintiffs are concerned, is liable to be cancelled as prayed for and the plaintiffs are entitled to a perpetual injunction as prayed for in respect of Ac.1.23 guntas of land but not for Ac.1.34 guntas of land only as admitted by the defendants. Hence, the second appeal may be allowed.'

8. On the other hand, the learned counsel for the respondents/defendants having supported the concurrent findings in the judgments of the courts below had stated that there is no necessity to interfere with the judgments of the courts below which are rendered after recording concurrent findings supported by cogent and valid reasons. He would further submit that the substantial questions of law raised and formulated by this Court at the time of admission of the second appeal would show

that all those questions are mixed questions of fact and law and not pure questions of law and that some of the contentions based on the provisions of Transfer of Property Act and the Registration Act etcetera are raised for the first time in the second appeal and it is impermissible to raise new questions in the second appeal without any foundation in the pleadings and also in the absence of any issues framed by the trial Court and that the plaintiffs are intending to cast the onus of proof on the defendants though the onus of proof is upon them to prove that they are entitled to seek the relief of cancellation of the decree in the former suit insofar as Ac.1.23 guntas of land which is the subject matter of dispute. He had finally urged that there is no substance in the substantial questions of law and that the appeal is devoid of merit and is liable to be dismissed.

9. Having regard to the compass of the substantial questions, it is necessary now to reiterate precisely the pleadings of the plaintiffs insofar as the relief sought for, for setting aside the decree in the former suit obtained by the defendants 1 and 2 herein against the 1st plaintiff herein in respect of Ac.1.23 guntas of land which is item no.1 of the present plaint schedule property. The said case of the plaintiffs, in brief, is this: 'The defendants 1 and 2 herein, who are the plaintiffs in the suit - OS.No.417/1990 have not filed any documents in the said suit to establish their title in respect of item no.1 of the present plaint schedule property, which is the property in question. The averments in the plaint and the written statement in the former suit are false, fictitious and baseless. That suit was filed by the defendants 1 and 2 herein by suppression of actual facts. In the said suit, the defendants 1 and 2 herein did not state as to how they have come into possession of the suit land i.e., Ac.1.23 guntas of land. They made a bare mention that they came into possession of the land long time back. The defendants 1 and 2 herein in their said plaint had averred that they have perfected title over the two items of the land of that suit. The plaint in that suit was silent as to the mode and nature of possession and also cultivation and interferences. The 1st plaintiff herein has not received any suit summons in the said suit nor did he engage any advocate to file vakalat and written statement. The thumb impressions on the vakalat and written statement filed on behalf of the 1st plaintiff herein in the said suit are forged and fictitious. The decree in the said suit was obtained by misrepresentation and fraud.' The defence of the defendants herein on this aspect is in the nature of denial of the case of the plaintiffs and positive assertion in support of the said decree granted by a competent civil Court in the former suit.

10. I have carefully perused the oral and documentary evidence which is relevant for consideration. Since the plaintiffs are seeking cancellation of a decree in the former suit obtained by the defendants 1 and 2 herein against the 1st plaintiff herein in respect of Ac.1.23 guntas in S.No.247/AA it is necessary to first refer to the certified copy of the decree under exhibit A1 and also the copies of the plaint and the written statement under exhibits A2 and A3. A perusal of the plaint in the former suit would show that the said suit was brought by the defendants 1 and 2 herein against the 1st plaintiff herein and another Indra Reddy *inter alia* stating as follows: "They came into possession of the suit lands long back having purchased through a simple sale deed from the defendants. Since then the plaintiffs are in exclusive possession and enjoyment of the suit land openly, uninterruptedly and to the knowledge of all and the defendants. Due to enormous and rapid growth, the value of the suit lands had increased several folds. Recently when the plaintiffs enquired about other matters in revenue department, incidentally they came to know that the names of the defendants by mistake are being continued as pattadars for the suit land. Immediately, the plaintiffs had approached the defendants and requested them to get the wrong entries rectified. But the defendants had dragged the matter on false and fictitious grounds and finally on 19.04.1990 they have denied the title of the plaintiffs and threatened to dispossess the plaintiffs from the suit land. Hence, the suit is filed to declare the plaintiffs as owners and possessors of the suit land and to restrain the defendants and their men by an injunction from interfering with possession of the plaintiffs over the suit land." It is apt to note that though the former suit is filed in respect of an extent of Ac.2.10 cents in S.No.252/AA also, the parties to this *lis* are now not concerned with the said extent and the 2nd defendant Ganta Indra Reddy in the said suit; and the parties to this *lis* are only concerned in this appeal in regard to Ac.1.23 guntas in S.No.247/AA of Malipuram village. The certified copy of the written statement filed by the defendants in the former suit reads as follows: "The plaintiffs are the owners and possessors of the suit land bearing no.252/AA, Ac.2.10 guntas and in S.No.247/AA Ac.1.23 guntas of dry land situate at Malipuram village. The boundaries for S.No.252/AA are as follows: 'EAST: land of Ganta Malla Reddy; WEST: land of Subhadramma; NORTH: land of Rama Chandraiah and SOUTH: Plaintiff's land.' The boundaries for S.N.247/AA are as follows: - 'EAST: Land of Ganta Janardhan Reddy; WEST: Plaintiff's land; NORTH: Plaintiff's land and SOUTH: Road.' It is true that the names of the defendants are

wrongly noted in the records of rights in column no.11 and 16 of the pahani in stead of the names of the plaintiffs. The plaintiffs had purchased the land Ac.3.33 guntas of dry land long back from the defendants. Since they are in actual possession, the defendants have no objection to rectify the records. Hence, the defendants pray to decree the suit without any costs.” Having regard to the written statement with admissions of the defendants, that former suit was decreed. The operative portion of the decree in the said former suit reads as follows:

“This suit coming for final disposal before me in the presence of Sri B. Prabhakar, advocate for the plaintiffs and of Sri T. Narsi Reddy, advocate for the defendants, the defendants having filed written statement admitting the suit claim this Court Doth order and Decree the suit of the plaintiffs follows:

- 1. That plaintiffs is/are hereby declared as owner and possessor of the suit schedule land/house.**
- 2. That the defendants, their servants, agents, relatives and workmen are and be hereby permanently restrained from interfering with possessions of the plaintiff over the suit schedule land.**
- 3. Parties to bear their own costs.”**

[Reproduced verbatim]

However, the certified copy of the judgment in the former suit is not exhibited. Thus, from a reading of exhibits A1 to A3 it is clear that the defendants 1 and 2 herein, who are the plaintiffs in the former suit, were granted a decree not only in respect of the present Ac.1.23 guntas but also in respect of some other land after taking into consideration the fact that the 1st plaintiff herein, who is the first defendant in the said suit, and another defendant in that suit had categorically admitted that the lands were sold to the defendants 1 and 2 herein long time back and that they are entitled to have their names entered in the revenue records in respect of the lands purchased by them and that they have no objection to rectify the records and decree the suit without costs. Subsequent to this decree only, the names of the defendants 1 and 2 were entered in the revenue records in respect of the decree schedule land in the former suit and the defendants 1 and 2 had started paying land revenue in their names. It is not in dispute before this Court that the defendants 1 and 2 were also granted pattadar pass books and title deeds and the same are exhibited as exhibits B18 to B21 before the trial Court. Thus, the decree granted in the former suit was also acted upon. The plaintiffs, who are seeking the cancellation of the decree in the former suit, mainly contend that the defendants 1 and 2 herein in the former suit did

not file any documents; the said contention need not be countenanced as the decree in the former suit was granted on admissions made in the defence and as admissions are the best form of proof which can be relied upon by the opposite parties. In paragraph no.11 of the present plaint, the plaintiffs alleged as follows: - "It is submitted that the defendant no.1 in OS.No.417/1990 did not receive any summons in the said suit. Nor did he engage any advocate to file vakalat and written statement. The thumb impressions on the vakalat and the written statement are forged and fictitious. As such the very said suit is false, fictitious and vexatious and that the defendants herein have obtained impugned decree in their favour by misrepresentation and playing fraud upon the Court." It is important to note that the 2nd defendant in the former suit who also had suffered the decree, which is being sought to be cancelled, is not seeking cancellation of that decree insofar as he is concerned and his property covered by the said decree. When he is prepared to abide by the decree and when he is not challenging the said decree on the same lines or grounds as the plaintiffs herein, it is not possible to hold that the said decree was obtained by misrepresentation and fraud and is liable to be set aside, as such a course would amount to setting aside the decree insofar as the 2nd defendant therein though he is willing to abide by the decree. Though the decree obtained against the 1st plaintiff herein is being sought to be cancelled by advancing contentions which are stated supra, the 1st plaintiff, who is a vitally important witness was not examined in this suit to substantiate the pleaded case of the plaintiffs. He did not enter the witness box and state that he did not sell the property to the defendants 1 and 2 long time back and that they are not in possession of the property. He did not also venture to depose to state that the thumb impressions on the vakalat and the written statement in the former suit are not of his and that the same are fabricated. Even assuming for a moment that he is an aged man and is not able to come to Court, nothing prevented the plaintiffs herein from examining the 1st plaintiff on commission. No steps were taken to examine the 1st plaintiff on commission. The law is well settled that if a party fails to enter into the witness box and does not present himself for cross examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act. The view of this Court gets reinforced from the decision in **Iswarbai C.Patel Vs. Harihar Behera reported in 1999(3) Supreme 121**. Therefore, the non examination of the 1st plaintiff is fatal to the case of the

plaintiffs. Be that as it may.

10.1 PW1/the 2nd plaintiff who was examined on behalf of the plaintiffs, in the well considered view of this Court, is not competent to speak in regard to the former suit to which he is not a party and from the side of the plaintiffs, the 1st plaintiff is only the competent person in the matter. PW1 asserted that the 1st plaintiff herein, who is one of the defendants in the former suit did not receive suit summons and did not engage a counsel and did not file a written statement admitting the suit claim in that suit. It is to be reiterated that the pleading is also to the effect that the thumb impressions of the 1st plaintiff herein on the vakalat and in the written statement in the former suit are forged and fabricated. However, it was elicited in the cross examination of DW1 that he and the 1st plaintiff gave instructions to the counsel at the time of drafting the plaint in the former suit and that on their instructions the plaint and the written statement was prepared and that they had put the thumb marks on white papers and that it was represented that afterwards written statement would be prepared on signed papers. Therefore, during trial, it is admitted that the thumb impressions on the written statement are that of the 1st plaintiff but the written statement was prepared on a white paper on which the thumb impressions were taken. Taking advantage of this admission of DW1 it was sought to be contended that the decree in the former suit is liable to be cancelled. However, in the pleadings in this suit, which are already referred to supra, it is not pleaded that the written statement in the former suit was prepared on white papers containing thumb impressions. Even PW1 also did not state so in his evidence. Therefore, the admission of DW1 which has no foundation in the pleadings of the plaintiffs and which is not the pleaded case of the plaintiffs is not going to advance the case of the plaintiffs any further.

10.2 The next contention of the learned counsel for the plaintiffs is that under the decree in the former suit a right in immovable property was created for the first time and that under the decree a pre existing right was not declared and therefore, the decree requires registration and hence, when that decree is not registered, the property covered by the decree is not affected and no title had vested in the defendants 1 and 2 herein in respect of the subject property as per the provision of Section 17 of the Indian Registration Act and hence, the defendants 1 and 2 have no valid title and interest in Ac.1.23 guntas of the plaint schedule property. Before

dealing with this contention, it is necessary to refer to the following decisions which are relied upon. (1) **Bhoop Singh v. Ram Singh Major** was relied upon in support of the proposition that a decree which purports to create a right or title in the plaintiff for the first time and not declaring a pre existing right requires registration and that when the defendant files a written statement admitting the claim of the plaintiff to be correct, decreeing the suit in such a situation is covered by Order 12 Rule 6 and not by Order 23 Rule 3, which deals with compromise of suit, whereas the former is on the subject of judgment on admission. (2) In **Calcutta Pinjrapole Society v. Bengal Metal Industries & others** the High Court of Calcutta held that if the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs.100/- or upwards in favour of any party to the suit the decree or order would require registration. (3) The decision in **Ashutosh Saha and another v. Mohammad Yusuf Ali and others** was also relied upon in support of the contention that the decree declaring title and creating a right for the first time in the property requires registration and in the absence of registration of the decree, it does not affect the interest in the property and, therefore, even if the decree in the former suit declaring the title of the plaintiffs is held to be not liable for cancellation, still it cannot be looked into as it is inadmissible for want of registration and did not affect the interest in the property covered by the decree in the former suit. It is to be noted that in this cited case, a Full bench of Patna High Court had held that an unregistered document agreeing to exchange immovable property (which otherwise requires compulsory registration under Section 17 of the Registration Act) would not vest any title or affect the same in the said property. There is also no dispute with the settled propositions of law. However, in the facts peculiar to the case and the reasons assigned supra, the ratios in the decisions are not helpful to the plaintiffs for the reasons going to be assigned infra among other reasons. Though this contention of the appellants in the instant case is a legal contention, this contention is not a pure question of law. It is a blend of fact and law for the reason that a sale deed requires registration, if only the immovable property to which it relates is of the value of Rs.100/- and upwards. Similarly, in case of a decree declaring a right to immovable property and creating right and interest for the first time under the decree and not recognising a pre existing right also, such a decree requires registration if only the immovable property to which it relates and which it affects is of the value of Rs.100/- and upwards. The pleadings in the decree in the former suit would show that the property including the property in the present dispute were sold long time back by

the 1st plaintiff herein and another to the defendants 1 and 2 herein and that since the date of such sales the defendants 1 and 2 herein were and are continuing in possession and enjoyment of the property but their names were not entered in the revenue records. There is no evidence brought on record as to what was the date of that sale in the distant past which was prior to the decree in the former suit under exhibit A1. There is no evidence brought on record to disclose that the value of the property sold at a time long prior to exhibit A1 decree was of a value of Rs.100/- or upwards. It is to be reiterated that under Section 17 of the Registration Act a document of sale shall be registered if the immovable property to which it relates is of the value of Rs.100/- and upwards. Even though the total value of the two properties covered by exhibit A1 decree was mentioned as Rs.3,060/- in the former suit of the year 1990 the said valuation is not going to help the cause of the appellants as what is relevant is the value of the present Ac.1.23 guntas as on the date when it was sold long time back under an oral sale to the defendants 1 and 2 herein as the said sale coupled with long possession and the admissions of the 1st plaintiff herein and another in the former suit was the basis for granting the former decree under exhibit A1. Therefore, when the sale had taken place a long time back under a simple sale deed and the value of the property as on that date is not a matter of pleading and evidence brought on record, the contention that the decree that was granted pursuant to an admission of a sale transaction which had taken place long time back requires registration cannot be countenanced. Assuming for a moment that the decree under exhibit A1 insofar as it declared title of the defendants 1 and 2 herein required registration, it is to be noted that under the said decree in the former suit not only the relief of declaration of the title but also the relief of perpetual injunction was granted by recognizing long possession of the defendants 1 and 2 herein which was admitted by the 1st plaintiff herein and another, who are the defendants in the former suit. Therefore, the decree insofar as the relief of perpetual injunction, which does not require registration, in any view of the matter, is binding and enforceable and can be relied upon by the defendants 1 and 2 herein. The decision in **Ambika Prasad Thakur v. Ram Ekbal Rao** was relied upon in support of the proposition that the admission of the 1st plaintiff in the former suit is not binding on the other plaintiffs. What is to be noted is that this present suit is neither a suit for declaration of title of the plaintiffs nor a suit for partition on the ground that the other plaintiffs have a share in the property sold by the 1st plaintiff to the defendants

1 and 2 in respect of which a decree was granted in the former suit. The plaintiffs also did not seek declaration of title even though a cloud is cast on the title to the property, which is the subject matter of the present second appeal. Therefore, on an analytical consideration of the facts and the evidence, this Court finds that the Courts below are justified in holding that the plaintiffs are not entitled to the relief of cancellation of the decree in the former suit insofar as the present extent of Ac.1.23 guntas i.e., item no.1 of the plaint schedule property and that the decree can be acted upon.

10.3 It is apt to note that when the defendants 1 and 2 herein are having a decree dated 12.06.1990 in the former suit and the plaintiffs herein are aware of the said decree even prior to the filing of this suit, they had only sought cancellation of the decree insofar as it related to the disputed property but did not seek a declaration of title even though a cloud is cast on the title, which the defendants are claiming.

10.4 Having obtained a decree for perpetual injunction also in the former suit, the defendants 1 and 2 have got the property mutated in their names and admittedly their names are entered in the revenue record. The 1st plaintiff herein had admitted the long possession of the defendants 1 and 2 herein in the former suit. Even exhibits A8 and A9-copies of pahanies for the years 1990-91 and 1991-92, which are filed by the plaintiffs, on a perusal would show that the defendants 1 and 2 are recorded as possessors of the disputed land. Similarly, exhibits B13 to B17 which are of the years 1979-80, 1980-81, 1982-83 and 1989-90 also support the case of the defendants that they are in possession of the land not only as on the date of the decree in the former suit but also prior to the decree. The exhibits B1 to B10-cist receipts particularly B2 to B7 on a perusal would show that the 1st defendant paid cist for the years 1987 to 1992 in respect of the lands in survey no.247/AA besides the lands in other survey numbers. If the total extent of Ac.3.17 guntas in S.No.247/AA is of the plaintiffs and the defendants 1 and 2 have nothing to do with any part of the said land, the revenue records ought not to have contained their names and they would not have paid the cist on the land. Therefore, the evidence brought on record would lay bare that the defendants 1 and 2 are in possession of the plaint schedule property. Challenging the entries in the revenue record as not binding on the plaintiffs, the learned counsel had contended that the entries in revenue records were changed without notice to the plaintiffs, who are having interest and whose rights are affected, and that therefore, the said entries are not

binding and have no evidentiary value. The following decisions- (1) **Chinnam Pandurangam v. Mandal Revenue Officer, Serilingampalli mandal** and (2) **Veeramachaneni Ramchander Rao v. Tahsildar, Chityal Mandal** were relied upon in support of the proposition that whenever a request for entering the names in Record of Rights pursuant to a decree or otherwise is entertained by an officer concerned, such request cannot be processed and granted without following the procedure contemplated in A.P. Rights In Land and Pattadar Passbooks Act and that issuance of notice to persons who are interested in or affected by such amendment of the entries of Record of Rights is mandatory and that in this case on hand no notice was ever given to the plaintiffs before entering the names of the defendants 1 and 2 in the records pursuant to the decree in the former suit. In this suit, the plaintiffs did not seek any relief for rectification of entries in the revenue records/record of rights. The plaintiffs also did not initiate any proceedings for cancellation of the revenue entries by following the procedure contemplated under the special statute. Therefore, the decisions are not helpful to the plaintiffs. Reliance was also placed on the following decisions. (1) In **Union of India and others v. Vasavi Co-op. Housing Society Ltd& others** the Hon'ble Supreme Court while referring to its earlier decisions held as follows: -

'This Court in several judgments has held that revenue records do not confer title. In Corporation of the City of Bangalore v. M. Papai and another [(1989) 3 SCC 612] it was held that 'it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law'. In Guru Amarjit Singh v. Rattan Chand and others [(1993) 4 SCC 349] this Court has held that 'that the entries jamabandi are not proof of title'. In State of Himachal Pradesh v. Keshav Ram and others [(1996) 11 SCC 257] this court held that 'the entries in revenue papers, by no stretch of imagination can form the basis of declaration of title in favour of the plaintiff'.

(2) In **State of Andhra Pradesh v. Star Bone Mill and Fertiliser Company** it was held that revenue record is not a document of title and it merely raises a presumption in regard to possession and that revenue records do not confer title for the reason that they merely show possession of a person. There is no dispute with the propositions of law. However, the Courts below placed reliance on the revenue records only to accept the defence that the defendants are in possession. The defendants are claiming title incidentally based on a decree of competent court and not merely based on the entries in the revenue records. Moreover, the Courts below refused to grant the relief of cancellation of decree granted in favour of the

defendants 1 and 2 herein in the former suit before accepting the entries in revenue records.

11. Having analysed the entire documentary evidence in proper perspective and giving reasons providing positive support to the findings, the Courts below had held concurrently that the defendants are in possession of the disputed land and not the plaintiffs. Having regard to the reasons, this Court finds that the plaintiffs are not entitled to the relief of perpetual injunction as prayed for in the suit.

12. Dealing with the final aspect that the defendants pleaded exchange in the defence while claiming a right in respect of the subject property, the learned counsel for the plaintiffs would contend that the defence of exchange is neither proved nor legally valid as any exchange of immovable properties requires a registered document and that in the absence of a registered document the oral exchange pleaded by the defendants cannot be accepted. In this regard, the learned counsel further urged that the defendants had pleaded in their defence a theory of exchange of lands which is oral and had contended that as per the said exchange agreement, the 1st plaintiff and his brother had got Ac.0.20 guntas of wet land from the share of the father of the 1st defendant and that the 1st defendant's father in turn had got a total extent of Ac.2.00 cents of land i.e., Ac.1.23 guntas in S.No.247/AA and Ac.0.17 guntas in S.No.188 of Malipuram village and that this arrangement had occurred during the lifetime of Ganta Chandraiah, Ganta Rathnaiah and Ramasani Anthaiah, but, the defendants could not prove the said exchange. He had also urged that out of the above extents, Ac.0.17 guntas in S.No.188 is not subject matter of the former suit. He would further contend that the plea of oral exchange is untenable as any exchange of immovable property shall only be by a document which is registered. Admittedly, Ac.0.17 guntas is not the subject matter of the former suit or the present suit. Insofar as Ac.1.23 guntas, the Courts below had held that the decree in the former suit is valid and that the defendants are in possession of the said land. This Court having gone through the pleadings, the evidence and the reasoned findings of the Courts below finds itself in agreement with the said findings which are sustainable both under facts and in law. The decree in the former suit was granted in respect of Ac.1.23 guntas which is one of the properties of the transaction of exchange. It is to be reiterated that there was an earlier partition according to the plaintiffs and that after that partition, there was an exchange of properties long time back and that under that said exchange agreement, which is oral, the defendants 1

and 2 herein had got the land which is subject matter of the present */is*. The value of the property as on the date of exchange is also not pleaded and established to show that the value of the property is Rs.100/- or upwards as on the date of the exchange. Be that as it may. Since a decree was obtained under exhibit A1 subsequent to the said exchange pleading oral sale etcetera and as this Court had held supra that the Courts below are justified in not granting the relief of cancellation of exhibit A1 decree and that, in any view of the matter, the said decree under exhibit A1 is enforceable at the instance of the defendants 1 and 2 herein insofar as it related to grant of perpetual injunction, the contention in regard to non registration of the exchange agreement, which oral exchange agreement was much prior to exhibit A1-decree, pales into insignificance and any contentions on that score to cancel exhibit A1-decree do not merit consideration. Therefore, this Court need not examine the validity of exchange which had taken place long time back since a decree was already granted in respect of the said land. Further, reliance was also placed on the following ratio in the decision in **Sneh Gupta v. Devi Sarup and others**:

Title to a property must be determined in terms of the statutory provision. If by reason of the provisions of the Hindu Succession Act, 1956 the appellant herein had derived title to the property along with her brothers and sisters, she cannot be deprived thereof by reason of an agreement entered into by and between the original plaintiff and the contesting defendants. If a party furthermore relinquishes his or her right in a property, the same must be done by a registered instrument in terms of the provisions of Indian Registration Act.

In this matter, the decree under exhibit A1 in favour of the defendants 1 and 2 is held not liable to be cancelled and it is also alternatively held that the said decree is enforceable and is hence binding on the plaintiffs insofar as it related to the relief of perpetual injunction. In this suit of the plaintiffs it is not necessary to further investigate into the title of the defendants or alternatively the title of the plaintiffs as the suit of the plaintiffs is not one for declaration of title or partition and is only one for cancellation of a former decree and for a perpetual Injunction. Hence the ratio in the decision is not applicable to the facts of the case.

13. Before parting with the case, it is to be stated that the learned counsel for the plaintiffs placed reliance on the following decisions and also certain decisions dealing with the scope and ambit of section 100 of the Code. In **Naganna B. Ningappa v. Shivanna B. Ningappa** the High Court of Karnataka held to the effect that when once there was a partition, the joint character of property comes to an end and each of the party would become exclusive owner of the property allotted to him

and if there is any further exchange of the properties between the parties it is to be done necessarily by a registered document as per the provision of Section 17 of the Registration Act. In **Durga Das v. The Collector and others** the Supreme Court held that mutation entries do not confer any title to the property and that it is only an entry for collection of the land revenue from the person in possession and that title to the property should be on the basis of the title they acquired to the land and not by mutation entries. In **Easwari v. Parvathi & others** the scope and sweep of powers of High Court under Section 100 of the Code was dealt with and it was held that it is settled law that the High Court can interfere in the second appeal when finding of the first appellate court is not supported by evidence and that the High Court is not precluded from reversing the order and judgment of the lower appellate court if there is perversity in the decision due to mis-appreciation of evidence. This decision was also relied in support of the contention that there is no absolute ban on the High Court in the second appeal to interfere with the facts. The decision in **Sebastia Luis Fernandes v. K.V.P. Shastri and others** was relied upon to emphasise the scope, the limitation of jurisdiction and the powers of second appellate court under Section 100 of the Code and it was contended that whenever there is misconstruction of a document or wrong application of principles of law in construing a document, it gives rise to a question of law and that a substantial question of law arises when the decision rendered on a material question violates the settled position of law. The decision in **Yadarao Dajiba Shrawane v. Nanilal Harakchand Shah** was also relied upon in support of the proposition that when there is consideration of inadmissible evidence and ignorance of material evidence and admissions and concessions made by witnesses or parties by the Courts below, the High Court can interfere in the second appeal. There is no dispute in regard to the propositions of law dealing with the jurisdiction of this Court in a second appeal and also the sweep of powers of this court under Section 100 of the Code. Suffice, if it is stated that these principles are kept in view while determining the questions, which are raised as substantial questions of law in this second appeal.

14. There is one more aspect which was canvassed by the learned counsel for the defendants 1 and 2 by placing reliance on Section 34 of the Specific Relief Act, which reads as under:

Discretion of court as to declaration of status or right.—

Any person entitled to any legal character, or to any right as to any

property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Having placed reliance on the said provision of law, the learned counsel for the defendants 1 and 2 had contended that both the Courts had concurrently held that the plaintiffs are not in possession of Ac.1.23 guntas of land and that no grounds are made out for interfering with the said finding; and therefore, the failure of the plaintiffs to seek the relief of recovery of possession while seeking the relief of cancellation of decree is fatal to their case as they are not in possession and still they had only sought perpetual injunction as if they are in possession and not the relief of recovery of possession. As rightly urged, the Courts below had recorded concurrent findings of fact supported by valid and cogent reasons that the defendants 1 and 2 are in possession of Ac.1.23 guntas, which is the subject matter of the present second appeal. Therefore, even assuming that the plaintiffs are entitled to the relief of cancellation of the decree in the former suit, the suit is liable for dismissal as not maintainable as they are not in possession of the subject property and had failed to seek the relief of recovery of possession. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so. There is also no dispute with the propositions of law in the following decisions: (1) In **Ram Saran and Anr. v. Smt. Ganga Devi**, the Supreme Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section [34](#) of Specific Relief Act, 1963 and, thus, not maintainable; and (2) In **Vinay Krishna v. Keshav Chandra and Anr.**, the Supreme Court had dealt with a similar issue where the Plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. In view of above provision of law and the ratios in the decisions, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief. Though this contention was raised by the learned counsel for the defendants 1 and 2, as rightly pointed out by the learned counsel for the

plaintiffs, the main relief is not a declaratory relief but only a relief sought for cancellation of a decree in the former suit. In reply, the learned counsel for the defendants 1 and 2 contends that the relief of cancellation of decree incidentally is a declaration that the said decree is not valid and binding on the plaintiffs. Be that as it may, the evidence on record does not support the plea of the plaintiffs that they are in possession of the subject property and on the other hand, the evidence brought on record would show that the defendants 1 and 2 were and are in possession since a long time. Therefore, the suit insofar as the relief of perpetual injunction in respect of the subject matter of the property is not maintainable and, therefore, the Courts below are justified in dismissing the suit insofar as the said disputed extent of property.

15. Having analysed the pleadings and the evidence, this Court is satisfied that neither the onus of proof was wrongly cast nor there was non consideration and misappreciation of evidence. Conversely, the Courts below considered the facts accurately and the evidence in proper perspective before recording well reasoned findings which are sustainable both under facts and in law. Viewed thus, this court finds that none of the questions raised in this second appeal merit consideration and that there is no substance in the said questions and that the second appeal which is devoid of merit is liable to be dismissed.

16. In the result, the Second Appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, pending if any, in this second appeal shall stand closed.

M. SEETHARAMA MURTI, J

5th October, 2015

Vjl