

**HON'BLE SRI JUSTICE M.SATYANARAYANA
MURTHY**

APPEAL SUIT No.1037 OF 1995

JUDGMENT:

The defendant in O.S.No.188 of 1983 on the file of Additional Subordinate Judge, Chittoor preferred this appeal against the decree and judgment dated 24-06-1995, wherein the trial Court declared the title of the plaintiffs while directing the 1st defendant to deliver vacant possession of the schedule property and to pay Rs.2,000/- being the future mesne profits from 1982 till the date of delivery of possession, Rs.21,350/- being the value of one lakh bricks with interest at 12% p.a. from 10.03.1981 with costs.

2. The ranks given to the parties before the trial Court will be adopted throughout the judgment for reference of convenience.

3. The 1st plaintiff filed the suit to declare that he is the owner of the schedule property and for delivery of vacant possession of the same and for recovery of Rs.6,000/- towards mesne profits for the period from 01-03-1981 till the date of suit and for recovery of Rs.2,000/- per annum towards future mesne profits from the date of suit till date of delivery of possession and recovery of Rs.1800/- being the value of coconuts taken away by

the defendant from item No.1 of the schedule property and for payment of Rs.600/- per annum from the date of trespass till the date of delivery of possession towards usufruct of coconut trees and finally for recovery of Rs.21,450/- being the value of one lakh bricks clandestinely removed and sold by the

1st defendant to third parties together with interest @ 12% per annum from 10-03-1981 till date of payment alleging that item No.1 of schedule property in Sy.No.235/5 to an extent of Ac.0-44 cents is the ancestral property of the plaintiff and it was allotted to the share of father of the

1st plaintiff in the partition among father of 1st plaintiff and his two elder brothers about 60 years ago and ever since, the plaintiff's father and after his demise in 1967, the

1st plaintiff has been in continuous possession and enjoyment of the same and paying land revenue to the Revenue Department and obtained pattadar passbook.

4. Item No.2 of the plaint schedule property in Sy.No.235/7 to an extent of Ac.0-15 cents was purchased by the plaintiff from the 1st defendant and his father Narayanaswami and brothers Peddabba and Mani under a registered sale deed dated 25-03-1976, ever since, the plaintiff is in continuous possession and

enjoyment of the same, paying land revenue to the department and obtained pattadar passbook and title deed from the Authorities concerned.

5. The plaintiff also perfected his title to item No.1 of the schedule property by adverse possession.

6. While the matter stood thus, in the year 1980 the plaintiff intended to construct a house in his land in Sy.No.236/3 situated at Kotha Gollapalle, hamlet of Nallisetipalle, the plaintiff laid foundation in the land in an extent of 33 feet x 30 feet. The plaintiff manufactured 1,00,000 bricks during April to June, 1980 in item No.1 of the schedule mentioned property i.e. in Sy.No.235/5 for construction of the house. He also pooled building material i.e. (8) windows, (4) door frames, (4) pairs of doors, (32) window doors and (8) almyrah frames for completion of construction of the house during months of February-March, 1981.

7. There was longstanding enmity between the plaintiff and the 1st defendant for the last five years and there were cases and counter cases between them. There were ill-feelings between the plaintiff and M.Chinnabba, senior paternal uncle's son of the plaintiff i.e. 2nd defendant herein on account of debt due of Rs.2,000/- by said M.Chinnabba to the plaintiff under a

promissory note, which is barred by limitation. To wreck vengeance against the plaintiff, the defendants colluded together and brought into existence a fictitious agreement of tenancy dated 02-03-1979, alleged to have been executed by the 2nd defendant in favour of the 1st defendant, under which, the 2nd defendant and the 1st defendant covering item No.1 and an extent of Ac.0-03 cents of item No.2 of the property mentioned in the schedule exclusively belongs to the plaintiff and the said fictitious agreement of tenancy was for five years and the 2nd defendant has no right in any part of the schedule property since he is not the owner of the property.

8. The 1st defendant filed a petition before Special Officer under A.P.Tenancy Act, the same was registered as A.T.C.No.1 of 1981 against the plaintiff and 2nd defendant for declaration of tenancy right and injunction, restraining the plaintiff and 2nd defendant from interfering with the 1st defendant's peaceful possession and enjoyment of the property based on agreement of tenancy. He also filed I.A.No.2 of 1981 for grant of temporary injunction and obtained *ex parte* order of interim injunction against the plaintiff on 18-02-1981 and thereafter I.A.No.4 of 1981 was filed to advance I.A.No.2

of 1981 and to dispose of the same. However, an order of *status quo* was passed, in the meanwhile.

9. In utter disregard of the *status quo* order, the 1st defendant trespassed into the schedule property clandestinely, unlawfully removed one lakh bricks manufactured by the plaintiff lying in item No.1 of the schedule property with the help of police constables and sold the same to third parties during the period from 01-03-1981 to 09-03-1981. The 1st defendant also clandestinely took away 600 coconuts from six coconut trees in item No.1 of the schedule property. Since 01-03-1981, the 1st defendant is continuing in unlawful possession of the property belonged to the plaintiff. Thereafter

Interlocutory applications were filed in the tenancy matter for violation of *status quo* order and ultimately, the tenancy petition was dismissed as it was not pressed, but without costs on 29-10-1983. Thus, the 1st defendant trespassed into the schedule property without any manner of right in the month of March, 1981 continuing in unlawful possession and enjoyment of the same. Neither the 1st defendant nor the 2nd defendant have got any right to continue in possession of the property and sold one lakh bricks manufactured by the plaintiffs in item No.1 for the purpose of constructing

house. Therefore, the possession of 1st defendant is illegal and wrongful and he is liable to deliver the vacant possession of the property to the plaintiff. The schedule property is fertile land and fetch annual income Rs.600/- per annum from the coconut trees. Therefore, claimed the reliefs stated above.

10. The 1st defendant filed written statement denying material allegations of the plaint *inter-alia* contending that the plaintiff is not the owner of the schedule property and he was never in possession and enjoyment of the same. It is specifically contended that item No.1 of the schedule property in Sy.No.235/5 in an extent of Ac.0-44 cents is the ancestral property that fell to the share of the father of 2nd defendant, from whom the 1st defendant obtained on lease in the year 1979 and later purchased the same under registered sale deed dated 05-02-1983. Item No.1 of the schedule property was never in possession and enjoyment of the plaintiff. The plaintiff by misrepresentation got entered his name in item No.1 of schedule property managing Karnam and Munsif of the village and obtained pattadar passbook and title deed.

11. The defendant denied the preparations made by the plaintiff for construction of the house and pooling of material including manufacture of one lakh bricks,

while contending that the defendant himself manufactured bricks in item No.1 of the plaint schedule property,

which was in his possession as tenant and with the permission of 2nd defendant and his brother for the purpose of business. Therefore, the alleged manufacturing of bricks etc., by the plaintiff is false. The criminal cases were disposed of by the Judicial Magistrate of II Class, Chittoor. The allegation that the agreement of tenancy

dated 02-03-1979 is fictitious is incorrect. The tenancy agreement dated 02-03-1979 is genuine and the 2nd defendant alone is the owner of item No.1 of the schedule property, which was in exclusive enjoyment of the 2nd defendant till it was leased out to the 1st defendant. Therefore, the plaintiff has no right over item No.1 of the schedule property and not entitled to recovery of item No.1 of the schedule property. The defendant admitted about sale of bricks, while denying theft of bricks. He also denied theft of more than 600 coconuts from six coconut trees in item No.1 of the schedule property during the year 1981. The coconut trees are of tender age not yielding any fruits. Therefore, the defendant is not liable to pay any amount towards the value of the bricks and coconuts. The defendant

also admitted that he is enjoying usufruct of coconut trees only from the date of purchase, but prior to purchase the 2nd defendant was alone enjoying usufruct of coconut trees. The income from coconut trees is about 100/- per year. In view of the purchase of the property, the 1st defendant is not liable to pay any amount towards the value of usufruct of coconut trees. The defendant never trespassed into the schedule property and he is in exclusive possession and enjoyment of item No.1 of schedule property being purchaser from the 2nd defendant. Therefore, his possession cannot be termed as unlawful or wrongful and finally prayed for dismissal of the suit.

12. The 2nd defendant filed written statement admitting the relationship between the parties, while denying the alleged acts of trespass and allegation of tenancy agreement etc., The 2nd defendant specifically asserted that the land in an extent of Ac.0-44 cents in S.No.235/5 and Ac.0-09 cents in S.No.235/7 belong to his family, as it was allotted to the share of his family during partition. Since the date of partition, the 2nd defendant and his family members were in possession and enjoyment of the same. The 2nd defendant denied allotment of Ac.0-44 cents in S.No.235/5 to the share of

the father of 1st plaintiff so also purchase of Ac.0-09 cents from him and his brother under registered sale deed and called upon the 1st plaintiff to put the same to strict proof. The 2nd defendant denied the alleged trespass of the 1st defendant into the schedule property without any manner of right, while contending that the 2nd defendant, being the owner of the property executed lease agreement dated 02-03-1979 in favour of the 1st defendant and since then, the 1st defendant was in enjoyment of the property as a tenant, later the 2nd defendant purchased the property under registered sale deed, subsequently the possession of the 1st defendant cannot be said to be illegal or wrongful and on the other hand, he was the tenant till 05-02-1983. Later, the 1st defendant became the owner of the property, as the purchaser under registered sale deed dated 05-02-1983 and prayed to dismiss the suit against the 2nd defendant.

13. On the basis of above pleadings, the trial Court framed as many as (14) issues and extracted as follows:

1. Whether the plaintiff is the absolute owner of the plaint schedule properties?
2. Whether the 2nd defendant was the owner of item No.1 of the plaint schedule properties and of an extent of Ac.0-09 cents in item No.2 of the plaint schedule properties as alleged by him?
3. Whether the agreement of tenancy alleged to

have been executed by the 2nd defendant in favour of 1st defendant on 02-03-1979 in respect of item No.1 of the plaint schedule properties and of an extent of Ac.0-09 cents in item No.2 of the plaint schedule properties is true, valid and binding on the plaintiff?

4. Whether the plaintiff manufactured one lakh bricks in item No.1 of the plaint schedule properties or whether the said bricks were manufactured by the 1st defendant as alleged by 1st defendant?
5. Whether the 1st defendant unlawfully trespassed upon the plaint schedule properties and whether he is continuing unlawful occupation of the same?
6. Whether the sale deed dated 05-02-1983 alleged to have been executed by 2nd defendant in favour of 1st defendant is true, valid and binding on the plaintiff and whether the 1st defendant can get any right over any of the plaint schedule properties by virtue of the said sale deed in his favour?
7. Whether the 1st defendant is not liable to pay plaintiff the value of the one lakh bricks belonging to the plaintiff and which were manufactured by plaintiff and which were illegally removed by the 1st defendant from item No.1 of the plaint schedule properties and at the rates claimed by plaintiff?
8. Whether the plaintiff is entitled for interest on the value of the bricks illegally removed by the 1st defendant from the date of their removal till date of payment?
9. Whether the 1st defendant is not liable to pay plaintiff past mesne profits of Rs.6,000/- in respect of the plaint schedule lands belonging to plaintiff and which are in the illegal occupation of the 1st defendant?
10. Whether the 1st defendant is not liable to pay plaintiff future mesne profits at Rs.2000/- per annum in respect of the plaint schedule properties from the date of suit till date of delivery of possession?
11. Whether the 1st defendant is not liable to pay plaintiff Rs.1800/- towards the value of the coconuts which were illegally carried away by him from the coconut trees belonging to the plaintiff and which are standing on the plaint schedule properties?

12. Whether the 1st defendant is not liable to pay plaintiff Rs.6,000/- per annum as future mesne profits in respect of the usufruct of the coconut trees standing on the plaint schedule lands from date of suit till the date of delivery of possession?
13. Whether the plaintiff is entitled for the relief of declaration and possession as prayed by him?
14. To what relief?

14. During trial, on behalf of the plaintiffs, PWs 1 to 3 were examined and marked Exs.A-1 to A-33 and on behalf of the defendants, DWs 1 to 3 were examined and marked Exs.B-1 to B-9.

15. Upon hearing argument of both the counsel, considering oral and documentary evidence on record, the trial Court decreed the suit declaring the plaintiffs' title to the schedule property, directing the 1st defendant to deliver vacant possession of the schedule property, within two months from the date of judgment and also directed the

1st defendant to pay Rs.2,000/- to the plaintiff being future profits from 1982 till the date of delivery of possession and past mesne profits, while declining to award any mesne profits prior to 1982. The 1st defendant is further directed to pay plaintiff Rs.100/- per year from 1981 till the date of delivery of property being the value of coconuts and to pay Rs.16,000/- towards value of bricks together with interest at 3% per annum thereon from March, 1981 till the date of payment.

16. Aggrieved by the said decree and judgment, the 1st defendant preferred this appeal on various grounds:

17. The main contentions of the 1st defendant in the grounds of appeal are that the burden heavily lies on the plaintiffs to establish their title independently. But the trial Court placed the burden on the 1st defendant alone erroneously and decreed the suit without any legal basis and thereby, committed an error. The trial Court did not refer the written arguments in a lengthy judgment running into (60) pages and non-consideration of written arguments filed by the parties is nothing but judicial impropriety. The trial Court did not refer the judgments of this Court reported in **Kanchi Subbamma and others v. Mannepalli Panchalaiah**^[1] and **Ambika Prasad Thakur v. Ram Ekbal Rai (dead) by his legal representatives**^[2] and it is nothing but judicial impropriety.

18. The trial Court finding out the lacunae, minor discrepancies in the evidence of defendants ignoring defects in the case of plaintiffs granted decree in their favour without establishing identity of the property by the plaintiffs which is *sine qua non* for grant of decree, declaring the title of the plaintiffs for recovery of

possession, but mostly based on commissioner's report for identification of the property on the ground, which is totally contrary to the principles laid down in **Kanchi Subbamma**(supra). Thus committed an error in decreeing the suit. The trial Court, however, granted decree under various heads, which is not supported by any evidence and the reasons assigned by the trial Court and the finding regarding payment under various heads is bereft of any reasons. Therefore, the judgment and decree of the trial Court are without any legal foundation and prayed to set aside the decree and judgment dismissing the suit by allowing this appeal.

19. Learned counsel for the 1st defendant (appellant) during the course of argument would submit that when there is a dispute with regard to identity of the property, it is for the plaintiffs, to establish the identity of the property by adducing evidence to the satisfaction of the Court and based on the Commissioner's report in tenancy matter, the Court cannot accept identity of the property. But the trial Court did not consider the said fact in proper perspective, though a specific contention was raised before the trial Court placing reliance on **Kanchi Subbamma**(supra). It is further contended that when the 1st defendant is in possession and enjoyment of the property as on the date of filing of the suit having

purchased from the 2nd defendant under registered sale deed, the presumption backwards and forward can be drawn. The defendants alone are deemed to have been in possession and enjoyment of the property, in view of presumption under Section 114 illustration (d) of the Indian Evidence Act, placing reliance on the judgment of the Apex Court in **Ambika Prasad Thakur** (supra). The major contention from the beginning is that item No.1 of the schedule property was allotted to the share of father of the 2nd defendant in the partition that took place about 60 years ago. Since then the father of 2nd defendant and thereafter the 2nd defendant were in continuous possession and enjoyment of the property and the same was leased out to the 1st defendant under lease deed and later sold the property under registered sale deed to the 1st defendant. At the same time, the plaintiffs also claimed that the property was allotted to the father of the deceased 1st plaintiff in the partition that took place about 60 years ago. In such case, onus of proof is on the plaintiffs to establish allotment of item No.1 of the schedule property to the share of father of the deceased 1st plaintiff and thereafter the 1st plaintiff succeeded the property after death of his father and continuous possession and enjoyment of the property till he was

allegedly dispossessed from the schedule property, but instead of calling upon the plaintiffs to discharge initial onus of proof, the trial Court placed initial onus of proof on the defendants, which is erroneous on the face of the record. In a suit filed for declaration, the plaintiff has to establish his positive case by adducing satisfactory evidence and not entitled to take advantage of weakness in the defence of defendants. But the trial Court based on the minor discrepancies in the evidence of defendants, falsely decreed in favour of the plaintiffs and such approach is against the settled principle of law and prayed to allow the appeal setting aside the decree and judgment in O.S.No.188 of 1983 on the file of Additional Subordinate Judge, Chittoor, dated 24.06.1995.

20. Per contra, the learned counsel for the plaintiffs (respondents) argued totally in support of evidence of the trial Court while contending that when the defendants set up a partition and allotment of item No.1 of the schedule property to the father of the 2nd defendant, it is the duty of the 2nd defendant to establish the same by producing satisfactory evidence. Even if when the partition is oral and the allotment was not reduced to writing at least by partition list, such ancient partition can be proved by oral evidence and the records

maintained in the Revenue Department by producing official records including payment of tax etc., Therefore, the plaintiffs have established their right and title to the property by producing voluminous documentary evidence and proved the ancient partition, allotment of item No.1 of the schedule property to the share of father of the deceased 1st plaintiff and later the 1st plaintiff purchased the property from the 1st defendant and his brothers under registered sale deed. Therefore, no further proof is required and that there is no error in the judgment of the trial Court and prayed to dismiss the appeal, confirming decree and judgment of the trial Court.

21. Considering rival contentions, after perusing oral and documentary evidence including the judgment of the trial Court, the points that arise for consideration are as follows:

1. Whether item No.1 of the schedule property was allotted to the share of father of the deceased 1st plaintiff in the partition that took place about 60 years? If so, whether the deceased 1st plaintiff succeeded the same from his father under intestate succession and after death of the 1st plaintiff, other plaintiffs succeeded the property?
2. Whether the plaintiffs are entitled to recover possession of the schedule property from defendants 1 and 2?
3. Whether defendants are entitled to recover value of the bricks, coconuts and profits?
4. To what relief?

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POINTS 1 AND 2:

22. These two points are interconnected to one another, therefore, I feel that it is appropriate to decide both these points under common discussion.

23. The specific case of the plaintiffs from the beginning is that item No.1 of the schedule property of an extent of Ac.0.44 cents in Sy.No.235/5 was allotted to the share of father of the deceased 1st plaintiff in the partition among father of the 1st plaintiff and his two elder brothers about 60 years ago. Since then, the father of the 1st plaintiff was in possession and enjoyment of the same till the date of his demise in the year, 1967 and thereafter the 1st plaintiff has been in continuous possession and enjoyment of the same by paying land revenue to the Revenue Department and obtained pattadar passbook. Similarly, item No.2 of an extent of Ac.0.15 cents in Sy.No.235/7 was purchased by the 1st plaintiff from the 1st defendant and his father, Narayanaswami and his brother, Peddabba and Mani under a registered sale deed dated 25.03.1976. The basis for claiming items 1 and 2 is allotment of item No.1 to the share of the father of the deceased 1st plaintiff and purchase of item No.2 under Ex.A2-sale deed, and also

claim of the 2nd defendant is that item No.1 was allotted to the share of his father in the partition about 60 years ago and it is an oral partition. In general, proof of ancient partition is difficult by producing any documentary evidence but the conduct, treatment of the property including payment of land revenue etc., are the relevant factors to be taken into consideration to establish ancient partition. The circumstances of the case are merely pieces of evidence, not conclusive proof of factum of partition. Partition is a new status, and when it is brought about by the consensus of members of a coparcenary, they must intend that their condition as coparceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, and intended to alter, their title to it. They must cease to be joint owners, and become separate owners. The mere ceasing of commensality and joint worship, the existence of separate transactions, the division of income or the holding of land in separate portions, or a mere definition of share in revenue and village papers, do not establish partition, unless such steps were taken with a view to carry out a partition. The question however is one of fact to be decided, with due regard to the cumulative effect of all the circumstances. Where there was an admission by the plaintiffs that disruption took place and the members were possessing

properties separately both in respect of agricultural land and residence, there cannot be any doubt that there had been a previous partition. The admission of severance in legal proceedings if not explained is cogent evidence of partition. Where a division in status has in fact taken place between the members of a family, the fact that one member continues to live jointly with the others and is described in suits and proceedings as being joint and even acts as karta is not necessarily inconsistent with their being divided members. Thus, to prove previous partition or ancient partition, the cumulative effect of the entire evidence on record is to be taken into consideration and when the defendants admitted about partition of the property in a legal proceedings is sufficient to accept the contention of the plaintiffs regarding partition of the property. The 2nd defendant in para-3 of the written statement specifically admitted about the partition and the judicial admission in para-3 of the written statement of the 2nd defendant is extracted hereunder for better appreciation:

“The allegations in para-3 of the plaint are false and the plaintiff is put to strict proof of the same. The lands in S.No.235/5 an extent of 0.44 cents and the land in S.No.235/7 an extent of 0.09 cents belongs to this defendant's family having fallen to the share of this defendant's family during partition. From the date of the partition the 2nd defendant and his family was in continuous possession and enjoyment of the same.”

24. The 1st defendant also raised a similar plea in para-3 last seven lines and the same is extracted here under:

“The defendant submits that the item No.1 of the suit schedule property i.e., S.No.235/5 of an extent of 0.44 cents is an ancestral property and it is fallen to the share of the father of the 2nd defendant from whom the 1st defendant has taken on lease from 1979 onwards and finally purchased the same by the registered sale deed dated 5-2-1983 after fulfilling all the necessary procedure required under the A.P.Tenancy Act.”

25. These judicial admissions are suffice to conclude that there was partition by severance status and the division of the property by metes and bounds for the reason that both deceased 1st plaintiff and 2nd defendant are claiming partition of the property but disputing allotment of item No.1 of the schedule property in Sy.No.235/5 of an extent of Ac.0.44 cents to the father of one another.

26. Thus both the defendants are claiming that item No.1 was allotted to the share of father of the 2nd defendant whereas the deceased 1st plaintiff claiming that it was allotted to the share of his father. Therefore, undisputed fact is that the property among father of the deceased

1st plaintiff, 2nd defendant and other brother was

partitioned. None of the parties disclose the exact date of partition but both are pleading oral partition. In those circumstances, I have no hesitation to accept the partition pleaded by both the parties. But allotment of property either to the father of the deceased 1st plaintiff or to the share of the 2nd defendant is in dispute and it is required to be examined based on evidence both oral or documentary by this Court. When a partition was affected and a particular item was allotted to the share of any of the members of the family, their names were mutated in the concerned records maintained by the Revenue Department if it is agricultural land, Municipality or Panchayat, if it is residential house and collect land revenue by the Revenue Authorities and property tax by the Municipality or Grampanchayat. Here, item No.1 of the schedule property is an agricultural land in an extent of Ac.0.44 cents and the partition admittedly took place long back. If the property was allotted to the share of father of the deceased 1st plaintiff or to the share of the father of the 2nd defendant, their names would have been mutated in the revenue records and collect land revenue from them in general. On the strength of mutation of names of father of the deceased 1st plaintiff or father of the 2nd defendant and other evidence like obtaining pattadar

passbook etc., the Court can accept allotment of property to the share of either father of the deceased 1st plaintiff or father of the 2nd defendant.

27. To substantiate the contentions of the plaintiffs, the 4th plaintiff was examined as P.W.1, as the 1st plaintiff died during pendency of the suit. As usual, in his examination in- chief asserted allotment of item No.1 of the schedule property in Sy.No.235/5 of an extent of Ac.0.44 cents to the share of his grandfather about 60 years i.e, father of the deceased 1st plaintiff and after death of his grand father, his father (the deceased 1st plaintiff) succeeded the same in 1967 and since then enjoying the property in their own right. In the cross examination of PW.1 except suggesting that item No.1 of the schedule property was allotted to the share of father of the 2nd defendant nothing has been elicited to discredit the testimony of PW.1 regarding allotment of schedule property to the share of his grandfather. Several suggestions were put to PW.1 that documents produced by the plaintiffs were concocted for the purpose of claiming title by filing this suit.

28. PW.2 is native of Kotha Gollapalle, where the property is situated. He testified in examination in chief that he is residing at Thenabanda Village for the last seven years, which is at a distance of four miles to the

suit property and in clear terms stated that the disputed property, in an extent of Ac.0.44 cents was in possession of the 1st plaintiff for the last 20 years and later it was forcibly occupied by the 1st defendant by dispossessing the 1st plaintiff and now the 1st defendant is in possession and enjoyment of the property. But did not testify the source of acquisition of property by the deceased 1st plaintiff in his examination in chief. In the cross examination of PW.2, the learned counsel for the defendants could elicit the boundaries of item No.1 of the schedule property. PW.3 is native of Pakam Village, near Gudiyatham. He spoke about manufacturing of bricks by the 1st plaintiff and it is not relevant for deciding the title dispute. Similarly, PW.4 is resident of Nallasiddanapalli Village, near K.G.Satram, spoke about manufacturing of bricks and his evidence is also not relevant for deciding the allotment of property to the share of the father of deceased 1st plaintiff.

29. The plaintiffs produced voluminous documentary evidence to substantiate their contention that item No.1 of the schedule property was allotted to the share of father of the deceased 1st plaintiff. Ex.A1 is the Ryot passbook of the deceased 1st plaintiff dated 27.07.1980 relating to item No.1 of the suit schedule

property in Sy.No.235/5 of an extent of Ac.0.44 cents was included in the holding of the deceased

1st plaintiff and collecting Rs.0.61ps. as land revenue and the 1st plaintiff was in possession and enjoyment of the same. The pattadar passbook was issued by Tahsildar of Bangarupalyam, where the schedule property is situated. Ex.A3 is bunch of land revenue receipts which consists of six land revenue receipts evidencing payment of land revenue from 1975 onwards. Even according to these receipts, the 1st plaintiff was paying land revenue for items 1 and 2 corresponding to patta Nos.271 and 267. Payment of land revenue for item No.1 is one of the circumstances to be taken into consideration to accept allotment of property to the share of father of deceased 1st plaintiff. Ex.A4 is the certified copy of petition in A.T.C.No.1 of 1981 and the allegations made therein in para-8 are relevant which shows that the 2nd respondent, M.Ramachandraiah(the deceased 1st plaintiff in the suit) due to enmity making hectic efforts to involve the applicant in many civil and criminal proceedings, though lease is in existence on the date of commencement of the A.P.Tenancy Act, 1956 amended in 1974. This document is of no assistance to the plaintiffs either to prove partition or allotment of item No.1 of the schedule

property to the share of the father of deceased

1st plaintiff. Ex.A5 is certified copy of the counter filed by the deceased 1st plaintiff, wherein he claimed item No.1 of the schedule property was allotted to the share of his father. It is only a self-assertion and it is of no avail to prove allotment. Ex.A6 is an unregistered and unstamped lease deed executed by the 2nd defendant, M.Chinnabba in favour of M.Sankaraiah, S/o Narayana Swami for a period of five years. But the document at best go to show that an extent of Ac.0.44 cents in Sy.No.235/5 and Ac.0.24 cents in Sy.No.235/7 were leased out to the 1st defendant. This is also of no avail. The plaintiffs further produced several affidavits and orders passed in A.T.C.No.1 of 1981 and they are of no use to establish the allotment of property to the share of father of deceased 1st plaintiff. Therefore, those documents need no consideration. The commissioner report marked as Ex.A12 is an important document to decide the identity of the property on ground but at best this report marked as Ex.A12 is useful to prove that the 1st plaintiff raised walls upto basement level in an extent of 33 feet x 30 feet out of Ac.0.11 cents and it is the case of the 1st plaintiff from the beginning that he raised construction upto basement level in the land belonging

to him whereas the defendants' contention is that the 1st defendant is carrying on manufacturing of bricks in item No.1 and never pleaded that construction was raised by either defendants 1 and 2. Exs.A12 and A13 substantiated the contention of the deceased 1st plaintiff to the extent of raising construction upto foundation or basement level in the property. Coming to the other documents, Ex.A14 is the extract of ROR, according to which, item No.1 in Sy.No.235/5 of an extent of Ac.0.44 cents registered was in the name of M.Rama Chandraiah and M.Krishnaiah. Ex.A15 is No.2 adangal along with FMB of Sy.No.235. As per F.M.B. of Sy.No.235, the total extent is Ac.8.96 cents and Sy.No.235/5 is only Ac.0.44 cents. 10(1) account i.e., cultivation account for the fasalis 1319, 1321, 1323, 1325, 1327, 1329, 1331 and 1336. Item No.1 of the schedule property is registered in the name of M.Kandappa, who was no other than father of the deceased first plaintiff. Ex.A14, ROR is a document prepared after due inspection in resurvey of the lands. If really, M.Kandappa was not the owner of the property, question of mentioning his name as pattadar in the ROR does not arise normally and that survey and settlement operations took place in the Village and conducted in accordance with the relevant rules. If there is any

mistake in the entries, the rival claimants can file their objections disputing the ownership of the property. But, strangely the defendants did not file any objections about the entries in the ROR. In the absence of any other evidence to disprove the entries in ROR, Ex.A15, the entries therein can be accepted and it is the best piece of evidence to conclude that the pattadar mentioned in ROR is owner of the property in view of law laid down by this Court in **M.B.Ratnam v. Revenue Divisional Officer**^[3], **Union Of India (Uoi) vs Vasavi Cooperative Housing..**^[4], **Lambadi Pedda Bhadr**^[5] **And Ors. vs Mohd. Ali Hussain**^[5] and **Guljar Singh v. Deputy Director Consolidation**^[6] it was held as under:

In **M.B.Ratnam** (supra) held as follows:

“51. The entries in the record of rights are made after holding public enquiries. The entries made in the record of rights carry with them a great evidentiary value, sometimes they constitute the only evidence available in order to establish one's title to the lands..”

In **Guljar Singh** (supra), at para-14 it was held as under:

“.....where the entries in the Revenue record are fictitious or forged or they were recorded in contravention of the statutory provisions contained in the U.P. Land Records Manual or other allied statutory provisions, the Deputy Director would have full power under Section 48 to re-appraise or re-evaluate the evidence on record so as to finally determine the rights of the

parties by excluding forged or fictitious revenue entries or entries not made in accordance with law.”

30. Exs.A16 to A24 are only the affidavits and petitions filed before the Special Officer under the A.P.Tenancy Act. But in all the documents the 1st plaintiff asserted that he is owner of the property and it was allotted to the share of his father in the partition that took place about 70 years ago. But they are of no assistance to the plaintiffs to prove the allotment of property. Exs.A27 and A28 are the notices and certified copy of E.P.No.199 of 1985 in A.T.C.No.1 of 1981 and they are not relevant to decide the real controversy. Ex.A29 is the certified copy of the order passed by the Tahsildar and Executive Taluk Magistrate, Bangarupalyam, in proceedings under Section 107 Cr.P.C. at best this proceeding is only helpful to prove that there are criminal and civil disputes between the plaintiffs and defendants. Similarly, the other documents i.e., orders passed in tenancy appeals and other documents established that there were disputes between plaintiffs and defendants since long time. The cumulative affect of the documentary evidence is that item No.1 of the schedule property was mutated in the name of M.Kandappa, father of deceased 1st plaintiff since long back and after his death, name of the deceased 1st plaintiff was mutated in the revenue

records and paying land revenue to the concerned Authorities while continuing in possession and enjoyment of the same. Added to that there was a long standing enmity between the plaintiffs and defendants and there were cases and counter cases between them. In view of long standing disputes, possibility of setting up claim by the defendants cannot be ruled out. The voluminous documents produced by the plaintiffs established that name of M.Kandappa, father of deceased 1st plaintiff was mutated in all revenue records including R.O.R. and paying land revenue for item No.1 in page No.267.

31. When adverted the evidence of defendants, they asserted that item No.1 of the schedule property was allotted to the share of father of the 2nd defendant and admitted the relationship between M.Kandappa and father of the 2nd defendant in his examination in chief. His grandfather owned and possessed 10 guntas of wet land and Ac.2.50 cents of dry land, which was in possession of his grandfather and he also purchased some more properties. In the cross examination dated 03.07.1992, D.W.1

(1st defendant) obtained the property on lease from the 2nd defendant and that when offered to sell the property, he purchased item No.1 of schedule property under

Ex.B1 dated 05.02.1983 and he also purchased item No.2 under Ex.B1. Later he obtained pattadar passbook from the Revenue Authorities and paying property tax to the Government. Ex.B2 is Ryotwari passbook, Exs.B3 to B5 are 10(1) accounts or No.2 adangals for fasalis 1386 and 1387. In the cross examination, DW.1 asserted that the suit schedule property was allotted to the 2nd defendant in the family partition and disclosed the boundaries of property in his cross examination. Thus the consistent evidence of DW.1 at best shows that the suit schedule property was allotted to the share of the 2nd defendant and it is totally contrary to the plea raised by him in para-3 of his written statement, which I extracted in the earlier paras. Further cross examination dated 27.10.1992, DW.1 admitted that he does not know the family partition between Chengal Rayudu and his brothers and the date of partition. However, there is partition of Ac.2.50 cents of dry land among Chengal Rayudu and his brothers and the suit schedule property is a part of Ac.2.50 cents dry land, which was partitioned among Chengal Rayudu and his brothers. In view of admissions in cross examination, the evidence of DW.1 is of no use to establish allotment of item No.1 of the schedule property to the share of father of the 2nd defendant. Strangely, in the cross examination at page

No.11, DW.1 admitted as follows:

“The plaintiff has got a house in the suit village. I have got a house in the suit village. The family of the plaintiffs owned six houses. On the eastern side of the house of the plaintiffs, there is a vacant site. Foundation laid down in the vacant site about five or six years back.”

32. This admission at best establish about raising of foundation for construction of a house. But this piece of evidence is relevant for deciding as to who manufactured bricks and sold etc.,

33. Coming to the evidence of DW.2, who is resident of Kotha Gollapalli Village, in his examination in chief asserted that he is a northern boundary owner of item No.1 of the schedule property and land of Narayana Swami (father of 1st defendant) is also situated on the northern side of item No.1. He denied about the lease and cultivation of land and spoke about the brick manufacturing etc., In the cross examination, he admitted that the partition of the property took place between his father and his brothers, prior to his birth and it was not in writing. Therefore, DW.2 also admitted about partition of the schedule property prior to his birth, who was aged 50 years by the date of examination on 25.02.1994. If that is accepted the partition took place long back and it is only ancient partition. The defendants produced only sale deed, lease deeds and adangals. But those

documents are of no use to establish the title to the property, since the sale took place subsequent to filing of tenancy petition and by then there were disputes and payment of tax for the subsequent period. Therefore, those documents at best show that the 2nd defendant sold item No.1 of the schedule property to the 1st defendant but no iota of evidence is brought on record that the 2nd defendant and his father paid land revenue for item No.1 of the schedule property as owners of the property. On the other hand, the voluminous documentary evidence produced by the plaintiffs could establish that the M.Kandappa, father of the 1st plaintiff was pattadar as per R.O.R., Ex.A14 and he paid land revenue to the Government during his life time. Thereafter, the deceased 1st plaintiff paid land revenue. If really, item No.1 was not allotted to the share of M.Kandappa, father of the deceased 1st plaintiff, question of mutating his name in the revenue records and payment of land revenue to the Revenue Department does not arise. Though, the 1st defendant contended that the property was allotted to the share of his father, no iota of evidence is brought on record at least payment of land revenue to the Government and mutation of name of father of the 2nd defendant as

owner of the property for item No.1 page No.267. In the absence of any evidence on record to establish allotment of item No.1 of the schedule property to the share of father of the 2nd defendant, the evidence brought on record by the plaintiffs is to be accepted.

34. Undisputedly, the initial onus of proof is on the plaintiffs to prove their case independently, when they are claiming declaratory relief under Section 34 of the Specific Relief Act, they cannot take advantage of weakness of the defence of defendants. As per the settled law declared in **Nagubai Ammal and others Vs. B.Shama Rao and others**^[7], **Mst.Rukhmabai Vs. Lala Laxminarayan and others**^[8] and **Nand Kishore Mehra Vs. Sushila Mehra**^[9].

35. In the present case, the plaintiffs established that the name of Kandappa, father of the deceased 1st plaintiff was mutated in all revenue records long back and paying land revenue and enjoying the property as owner of the same, considering oral and documentary evidence on record, I am of the considered view that the material brought on record by the plaintiffs established that item No.1 of the schedule property was allotted to the share of father of the deceased 1st plaintiff and on the other hand, the 2nd defendant miserably failed to

establish his independent case of allotting the property to the share of his father. In those circumstances, the trial Court rightly believed the plea of the plaintiffs that item No.1 of the schedule property was allotted to the share of father of the deceased 1st plaintiff and thereafter he succeeded and after his death, the other plaintiffs succeeded the property and they became owners of the property.

36. Item No.2, an extent of Ac.0.15 cents in Sy.No.235/7 purchased by the deceased 1st plaintiff during his life time under Ex.A2. This fact was not disputed by DW.1 purchased under Ex.A2 from the 1st defendant, his father and his brothers. In the cross examination dated 01.12.1992 at page No.10, DW.1 made a categorical admission about sale of item No.2 of the schedule property to the deceased 1st plaintiff under Ex.A2 as it was allotted to the share of the 1st defendant's family in the division of property and the same was sold to the 1st plaintiff. The categorical evidentiary admission, coupled with Ex.A2 established that the deceased 1st plaintiff became absolute owner of item No.2 of the schedule property. The 1st defendant allegedly purchased an extent of Ac.0.99 cents in Sy.No.235/7 from the 2nd defendant. Therefore, the

second item of the property purchased from 2nd defendant by the 1st defendant is nothing to do with the item No.2 of the schedule property. Therefore, the plaintiffs succeeded in establishing their title to item No.2.

37. As seen from the material on record, more particularly proceedings in A.T.C.No.1 of 1981, the defendants 1 and 2 denied title of the 1st plaintiff claiming independent title by 2nd defendant herein. Thus created a cloud on the title of the deceased 1st plaintiff and the suit is filed within two years from the date of denying title of the plaintiffs which gives rise to cause of action for filing of the suit by the deceased 1st plaintiff. When there is a cloud on the title of the plaintiffs, the deceased 1st plaintiff can seek discretionary relief of declaration under Section 34 of the Specific Relief Act. The relief of declaration under Section 34 can be granted to the plaintiffs if they approached the Court with clean hands. When the trial Court exercised discretion in the spirit of statute, fairly and honestly and in accordance with the rules and reasons and justice, Superior Court cannot interfere and reverse the judgment as held by the Apex Court in **Mysore State Road Transport Corporation v. Mirza Khasim**^[10].

While it is true that relief of declaration is discretionary, it is well settled that it is only if discretion is not exercised by the lower Court in the spirit of statute, the Court can interfere with the judgment of the trial Court. Thus, it means when the trial Court did not exercise its discretion judiciously, the appellate Court can interfere with the finding of the trial Court and pass appropriate decree for declaration by exercising discretion conferred on the Court under Section 34 of the Specific Relief Act. In the instant case, the trial Court rightly exercised its discretion in the spirit of the statute based on evidence on record. In such case, it is not permissible to interfere with the finding of the trial Court.

38. One of the contentions of defendants is that the identity of the property was not established by the plaintiffs and based on a commissioner's report the Court cannot accept the case of the plaintiffs and placed reliance on judgment reported in **Kanchi Subbamma** (supra). In the above judgment, the Single Judge of this Court held that based on commissioner's report, the identity of the property cannot be established and it is for the parties to establish the identity by adducing evidence and report of the commissioner is only a corroborative piece of evidence. This principle is of no relevance to the present facts of the case for the specific reason that the identity of the property was never

disputed by any of the defendants either in the written statement or in the evidence. Therefore, this contention holds no substance.

39. The other contention is that when the 1st defendant is admittedly in possession of the property, the theory of the presumption of backwards and forward under Section 114 illustration (d) of the Indian Evidence Act is to be applied and in support of his contention, the learned counsel for the defendants drawn my attention to a judgment reported in **Ambika Prasad(supra)**, in para-15 of the judgment, the Supreme Court discussed about the presumption under

illustration (d) of Section 114 of the Indian Evidence Act and held as follows:

'if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in illus. (d) to S.114. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this Section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India. This is rule of evidence by which one can presume the continuity of things backwards. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances'.

40. Even assuming for a moment that the

presumption under illustration (d) of Section 114 of the Evidence Act is available to the defendants, the evidence on record at best shows that the 1st defendant is in possession of the property as a tenant under father of the 2nd defendant. However, the contention that the 1st defendant was in possession and enjoyment of the property is not substantiated by any material. In such case, the presumption contained in illustration (d) of Section 114 of the Evidence Act would not extend any help to the defendants to accept that they are in continuous possession and enjoyment of the property from a long time. Even according to the principle laid down in the above judgment, an application of presumption depends upon various circumstances of the case. But in the present circumstances do not permit me to apply the rule of presumption backwards and forward contained in illustration (d) of Section 114 of the Evidence Act cannot be drawn.

41. On overall consideration of material on record, there is clinching evidence to establish the title of the plaintiffs for both items 1 and 2. Accordingly, the trial Court rightly exercised its discretion in a spirit of statute and granted a declaratory decree declaring the plaintiffs are owners of the property.

42. On reappraisal of entire evidence both oral and

documentary, I find no legal infirmity warranting interference of this Court in the finding recorded by the trial Court.

43. In view of my foregoing discussion, I find that the plaintiffs could establish that item No.1 of the schedule property was allotted to the share of Kandappa, father of the deceased 1st plaintiff in the partition and they were in possession and enjoyment of the property till 1st defendant takes forcible possession and the deceased 1st plaintiff purchased item No.2 of the schedule property under Ex.A2, which is an undisputed fact even according to the defendants. Hence, the finding of the trial Court is hereby confirmed declaring that the plaintiffs are owners of the schedule property. Accordingly these points are answered.

POINT No.3:

44. Admittedly, defendants 1 and 2 are in possession and enjoyment of the property and their possession is without any lawful entitlement or wrongful. In such case, when the plaintiffs established the title to the property, they are entitled to recover the possession of the property under Section 5 of the Specific Relief Act. In view of my findings on points 1 and 2, the plaintiffs are the owners of the schedule property and possession of the defendants is unlawful or without any

lawful entitlement. Hence, the defendants are liable to deliver vacant possession of the schedule property. Accordingly, this point is answered in favour of the plaintiffs and against the defendants.

POINT No.4:

45. The plaintiffs claimed value of one lakh bricks manufactured by him and clandestinely taken away by the 1st defendant allegedly but whereas the contention of the

1st defendant is that he himself manufactured bricks after obtaining necessary permission from the Authorities and sold the same. Therefore, the sale of bricks by the 1st defendant is not in dispute but who manufactured bricks is in dispute. Both parties adduced evidence in support of their contentions. However, the material on record established that the plaintiffs were in possession of item No.1 of the schedule property as on the date of filing tenancy petition No.1 of 1981 before the Special Officer under A.P.Tenancy Act and the bricks were manufactured in item No.1 of the schedule property. In the absence of proof of tenancy between defendants 1 and 2 and ownership of the

1st defendant, it is difficult to believe that the 1st defendant manufactured bricks and even did not file any proof in support of his contention that he obtained

permission to run brick kiln in item No.1 of the schedule property. When bricks (movables) were manufactured in item No.1 of the schedule property and that too the plaintiffs established that they raised construction upto foundation level in an extent of 33 feet x 30 feet, it is probable to accept that the plaintiffs manufactured bricks in their own site. Therefore, DW.1 who removed bricks being the value of one lakh bricks clandestinely removed by the 1st defendant from the schedule property the 1st defendant cannot be said to be owner of those bricks, in the absence of reliable evidence. Therefore, he is liable to pay the value of bricks as claimed by the plaintiffs. The trial Court after appraisal of entire evidence on record, rightly directed the 1st defendant to pay value of the bricks.

46. The defendant also claimed value of coconut yield from six coconut trees existing in item No.1 of the schedule property but whereas the contention of the defendants is that the coconut trees, which exist in item No.1 of the schedule property are of tender age not fruit bearing trees as on the date of alleged incident. But the plaintiffs miserably failed to establish that the coconut trees yielding coconut during the relevant period. In the absence of proof that the coconut trees are yielding coconut, it is difficult to believe the contention of the

plaintiffs that the

1st defendant removed coconut from six coconut trees clandestinely. But the trial Court without calling upon the plaintiffs to prove the age of the coconut trees and yield of each coconut tree, ordered payment of value of coconut.

47. The plaintiffs also claimed mesne profits from the schedule property on the ground that the possession of the 1st defendant is wrongful. As per my finding on points 1 and 2, the plaintiffs are the owners of the property and the 2nd defendant is incompetent to alienate the property since he is not the owner of the property. Therefore, the 1st defendant would not get better title other than what his vendor i.e., 2nd defendant had in item No.1 of the schedule property when the 1st defendant is claiming as owner of the property by virtue of Ex.B1 sale deed, he has to establish his title independently. But in view of my finding, he is not the owner of item No.1 of the schedule property. Therefore, his possession can safely be termed as wrongful and liable to pay mesne profits, which he realized from schedule property till delivery of vacant possession. Hence the trial Court rightly passed a decree in favour of the plaintiffs negating the contentions of defendants.

48. On discerning the entire material available on

record, I find no legal infirmity in the finding recorded by the trial Court except to the extent of price of coconut yield of coconut trees. Hence, the finding of the trial Court is confirmed in part directing the defendants to pay value of the bricks and to pay mesne profits on its ascertainment by filing an application under Order XXVI Rule 12 of Code of Civil Procedure, while declining to grant value of coconut trees clandestinely removed by the 1st defendant.

49. In view of foregoing discussion, I find no legal infirmity in decree and judgment of the trial Court warranting interference of this Court in the present appeal except to the extent of payment of value of coconut trees and usufruct thereof till delivery of possession of property by the 1st defendant whose possession is wrongful or without any lawful entitlement. Hence, the decree and judgment of the trial Court is modified declaring that the plaintiffs are the owners of item Nos.1 and 2 of the schedule property and the 1st defendant is directed to deliver vacant possession of the schedule property within two months from the date of this judgment, the 1st defendant has to pay value of one lakh bricks to the plaintiffs within two months from today and also liable to pay mesne profits from the date of dispossession i.e., 10.03.1981 till delivery of possession

on ascertainment by a commissioner but without costs in the circumstances.

50. As a sequel, the miscellaneous applications pending, if any, shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: .06.2015
pab

[\[1\]](#) 1977 APHC 236 = 1977 ALT 534 = MANU/AP/0266/1977

[\[2\]](#) A.I.R.1966 S.C. page 605

[\[3\]](#) 2003(1) ALD 826=2003(1) ALT 688

[\[4\]](#) 2002(5) ALD 532

[\[5\]](#) 2003 (4) ALD 673

[\[6\]](#) 2009(12) SCC 590

[\[7\]](#) AIR 1956 SC 593* (1)

[\[8\]](#) AIR 1960 SC 335

[\[9\]](#) (1995) 4 SCC 572

[\[10\]](#) AIR 1977 SC 747