

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal Nos.1008 of 2010

JUDGMENT:

The unsuccessful 3rd defendant in OS.No.2070 of 1987 had brought this second appeal assailing the decree and common judgment dated 22.07.2010 of the learned X Additional Chief Judge (Judge, Fast Track Court), City Civil Court, Hyderabad passed in As.No.477 of 2004 and AS.No.604 of 2004 insofar as the common judgment related to the dismissal of AS.No.477 of 2004 arising from the before-mentioned suit. The learned Additional Chief Judge while dismissing the said two first appeals had confirmed the decrees and common judgment dated 30.08.2004 of the learned IV Senior Civil Judge, City Civil Court, Hyderabad in the aforementioned suit and OS.No.2068 of 1989.

2. I have heard the submissions of the learned counsel for the appellant/3rd defendant and the learned senior counsel for the respondents 3 to 5/plaintiffs 3 to 5. I have perused the material record.

3. One Eswaramma (since died) and Siva Koti (since died) had originally brought the suit-OS.No.2068 of 1989 (Old OS.No.3413 of 1986) for a perpetual injunction against the defendants-Salamma and Yadagiri. The other suit-OS.No.2070 of 1987 was also brought by late Eswaramma and late Sivakoti against Salamma, the 6th respondent herein and the 2nd defendant-Ch. Sharada. During the pendency of the former suit-OS.2068 of 1989, the plaintiffs 3 to 5 were brought on record as per orders dated 20.02.2003 in IA.No.248 of 2003. In OS.No.2070 of 1987 on the death of the 1st plaintiff-Eswaramma and the death of the 2nd plaintiff-Siva Koti, the plaintiffs 3 to 5 were brought on record as the legal representatives of Sivakoti as per orders dated 07.03.2003 in IA.No.249 of 2003. In the said latter suit, the 3rd defendant i.e., the present appellant-Saraswati Bhagat was impleaded as per

orders dated 18.06.1990 in IA.No.811 of 1989. On the death of the 2nd defendant-Ch. Sharada, the defendants 4 to 9 were brought on record as the legal representatives of the 2nd defendant as per orders dated 07.03.2003 in IA.No.249 of 2003. Plaintiff no.2 in the present suits i.e., Siva Koti had earlier filed OS.No.530 of 1985 against Sivalingam, Salamma, Yadagiri, Eswaramma and one Kamala Bai for partition of house property bearing nos.14-3-130 and 14-3-129 situate at Goshamahal. In the said suit he had claimed that Sivalingam is his father and that the present subject property is in his possession and that of his mother- Eswaramma, but, did not ask for any relief in respect of the present subject property. Since the contentions raised by the contesting defendants in the said suit and the present two suits are one and the same, all the three suits were consolidated and evidence was recorded in OS.No.530 of 1985 for disposal by a common judgment. After completion of joint trial, all the three suits were dismissed by a common judgment dated 24.06.1997. Against that common judgment, the plaintiff/s carried the matters in OS.No.2068 of 1989 and 2070 of 1987 in appeals – AS.No.292 of 1997 and 293 of 1997. The learned XII Additional Chief Judge had allowed the appeals which are filed against the present two suits and remanded both the suits for fresh disposal. However, no appeal was preferred against the decree dismissing the suit OS.No.530 of 1985. After remand, in the present two suits, PW4 was examined and further documents in exhibits A27 to A34 were marked. No further evidence was adduced by the defendants. Therefore, the evidence recorded in OS.No.530 of 1985 and the additional evidence that was recorded was taken into consideration for deciding the two suits, afresh. After remand, the trial Court had decreed both the present suits. As already noted, the first appeals in AS.No.477 of 2004 and 604 of 2004 were dismissed confirming the common judgment of the trial Court, which was rendered after remand. The 3rd defendant in OS.No.2070 of 1987 had preferred this second appeal only assailing the decree dated 22.07.2010 passed in AS.No.477 of 2004 by the Court below whereby the Court below had confirmed the decree and judgment dated 30.08.2004 in OS.No.2070 of 1987 originally on the file of IV Senior Civil Judge, City Civil

Court, Hyderabad. Therefore, the subject matter of the present second appeal is only the subject matter of the suit-OS.No.2070 of 1987.

4. At the time of admission of this appeal, the grounds nos.3 to 10 mentioned in the memorandum of grounds of appeal were taken note of. However, the learned counsel for the appellant had stated at the time of hearing that the questions already formulated need not be considered and that they may be eschewed from consideration and that in the place of the said questions, the substantial questions of law, which are involved, may be reframed. Accordingly and as desired, the questions earlier framed are deleted. After hearing the learned counsel for both the sides, the following substantial questions of law were formulated by this Court.

1. **Whether the suit for declaration of ownership and injunction is maintainable on the basis of adverse possession by the plaintiff?**
2. **Whether any sale deeds executed in violation of the Prohibitory Order of the Hon'ble Court are valid?**
3. **Whether the property purchased by the husband in the name of the wife amounts to benami transaction and whether such a plea of benami transaction is open to the plaintiff?**
4. **Whether the plaintiff, who is in permissive possession, is entitled to plead adverse possession and seek the reliefs claimed in the suit?**

5. To adjudicate the *lis* and answer the above substantial questions of law, it is necessary to refer to the pleadings of the parties.

6. The parties shall hereinafter be referred to, to the extent necessary, with their names for convenience and clarity.

6.1 To begin with, it is to be noted that Eswaramma (the 1st plaintiff-since died) and Siva Koti (the 2nd plaintiff-since died) had brought this suit against Salamma (1st defendant-since died), Ch. Sharada (2nd defendant-since died) and Saraswati Bhagat (3rd defendant-appellant herein) for declaration that the above said plaintiffs are the owners and possessors of house bearing

door no.14-3-46 situate at Goshamahal and for a perpetual injunction restraining the said defendants from enforcing the sale deed dated 29.09.1986 against the plaintiffs or persons claiming under them and for costs.

6.2 The averments in the amended plaint, in brief, are as follows: - Eswaramma is the wife of one late K. Sivalingam. Siva Koti is their son. Eswaramma and Siva Koti are the owners and possessors of the plaint schedule residential house. The same was purchased benami in the name of Salamma by the said K. Siva Lingam. The entire money for the purchase of the above said house in the name of Salamma was given by Sivalingam. Salamma had never exercised any right of ownership over the said house property; but, Sivalingam alone had exercised rights of ownership over the said house. About 37 years prior to the filing of this suit, certain disputes had arisen between Eswaramma and her husband-Siva Lingam in regard to payment of maintenance. Eswaramma had filed an application under Section 488 of the Code of Criminal Procedure for maintenance. The same was dismissed on some technical grounds. The findings in the order of the criminal Court are wrong and do not bind the civil Court. The elders of the community were unhappy over the cruelty that was being meted out to Eswaramma and Sivakoti by Sivalingam. In the year 1955, the elders of the community had, therefore, summoned Sivalingam and with his consent directed Sivalingam to give away the house bearing no.14-3-46 i.e., the plaint schedule property to Eswaramma. Since then Eswaramma and Sivakoti were and are living in a portion of the house and the rest of the house was being let out to tenants. From the rents being received from the portion of the house, they were maintaining themselves. Sivakoti is working as a salesman in a cloth shop at Malakpet. Eswaramma and Sivakoti have been thus living in the suit schedule house ever since 1955 as owners and possessors and are paying taxes, cess etcetera since a long time. Even otherwise, Eswaramma and Sivakoti had perfected their title to the said property by adverse possession. While so, Sivalingam had died on 27.09.1985 at Hyderabad leaving behind him Eswaramma and Sivakoti as his only legal

representatives. During the lifetime of Sivalingam, Sivakoti had filed a suit- OS.No.530 of 1985 for partition in respect of certain properties and had obtained an injunction against Sivalingam and Salamma to restrain them from alienating the properties in the said suit on the file of I Additional Judge, City Civil Court, Hyderabad. During the pendency of the said suit, Salamma and one Yadagiri who were on inimical terms with Eswaramma and Sivakoti had started harassing them in one way or the other. The 1st defendant- Salamma had no right, title and interest in the suit house exclusively owned and possessed by Eswaramma and Sivakoti. The said defendant-Yadagiri is a total stranger to Eswaramma and Sivakoti and is not related to Sivalingam. At the instance of Salamma, the said Yadagiri came to the plaint schedule house in September 1986 at about 12:30 PM along with a group of antisocial elements and made an attempt to dispossess Eswaramma and Sivakoti from the said house by force. The said attempt was resisted. The said Yadagiri having been instigated by the said Salamma had threatened to come again and take possession of the property by force. Hence, Eswaramma and Sivakoti had filed OS.No.3413 of 1986 and had obtained an interim injunction against Salamma and Yadagiri from the Court of VI Assistant Judge, Hyderabad. Sivakoti had also lodged a complaint in writing with the Commissioner of police complaining about the unlawful activity of Yadagiri and his associates. Since Salamma and Yadagiri were unable to dispossess Eswaramma and Sivakoti from their house, they had started devising devious methods to harass them. Salamma has not been in possession of the plaint schedule house at any time before or after the sale deed of the year 1955. While so, Yadagiri along with few a goondas came to the suit schedule house on 27.09.1986 and got painted a notice, on the outer walls, that the house would be auctioned on 28.09.1986, which was a Sunday. On the said date, Eswaramma and Sivakoti brought to the notice of the auctioneer that they are the owners of the house and that the same could not be put to public auction at the instance of Salamma who was not the owner. The auctioneer who was a stooge of Salamma and Yadagiri had brushed aside the objections and had conducted auction unlawfully on the said date. No bidders had come forward. However, the auctioneer prepared a fictitious list

of bidders as though bidding had taken place. Salamma, who is the step mother of Sivakoti, colluded with Yadagiri and contrived to complicate the matter with the help of one Ch. Rajappa who is a court bird. Yadagiri and Rajappa in collusion with each other created a sale deed dated 29.09.1986 in favour of the 2nd defendant-Ch. Shararada, wife of Rajappa. The said sale deed dated 29.09.1986 is a fictitious document executed by a person who had no authority to sell the house. The sale deed is not binding on Eswaramma and Sivakoti and is liable to be cancelled. Eswaramma and Sivakoti had perfected title to the suit house by being in possession as absolute owners since 1955 to 1987 and are paying property tax, electricity consumption charges and water cess etcetera to various departments. Salamma was never in possession of the suit house. The sale deed dated 29.09.1986 does not convey any title to the said Ch. Shararada, wife of Rajappa. Hence, the plaintiffs-Eswaramma and Sivakoti are constrained to file a suit for declaration of title and perpetual injunction restraining the defendants from enforcing the sale deed dated 29.09.1986 against the plaintiffs or persons claiming under them.

6.3 Salamma and Sharada together filed a written statement contending *inter alia* as follows: - 'The plaint averments are false. Eswaramma is not the legally wedded wife of Sivalingam. Sivakoti is not the son of Sivalingam. They are not the owners of the suit schedule house. The said property was purchased benami by Sivalingam in the name of Salamma is false. Salamma is the true and lawful owner of the suit house having purchased the same under a registered document and she has rightly conveyed the said house property to Sharada, the 2nd defendant. The order of the Court in the maintenance proceedings is binding on Eswaramma and Sivakoti as the said order has become final. They cannot contend contrary to the findings of the Criminal Court. The suit house was not purchased with the funds of K. Sivalingam. Salamma had always exercised her right of ownership. Eswaramma and Sivakoti were permitted to live in the said house and they were earlier paying rents to Sivalingam and later to Salamma. The said tenancy was oral. Sivalingam left behind Eswaramma and Sivakoti as his

legal heirs is false. Salamma and the legally adopted son Yadagiri are the only legal heirs of Sivalingam. It is true that OS.No.530 of 1985 is filed. Eswaramma and Sivakoti are only the tenants in the property. They do not have title. The question of their perfecting title by adverse possession does not arise. K. Yadagiri is not a stranger. The auction was lawfully conducted and Sharada became a successful bidder and therefore, the auction sale was knocked down in her favour. The auction list prepared by the auctioneer is genuine. The suit for declaration without challenging the registered sale deed of Salamma is not maintainable. The registered sale deed in favour of Sharada conveys absolute title to her. Therefore, Sharada is the lawful owner and her sale deed is perfectly legal and is binding on Eswaramma and Sivakoti and all concerned. The husband of Eswaramma does not belong to the community of Sharada. The suit is barred by limitation and is not maintainable as the suit is filed after expiry of 37 years.

6.4 The 3rd defendant-Saraswati Bhagat filed a written statement stating as follows:

She had purchased the schedule property in the year 1989 under registered sale deed dated 13.04.1989. Sivakoti is a tenant of a portion of the suit schedule property on a monthly rent of Rs.500/-. After her purchase in the year 1989, the tenancy of Sivakoti was attorned to her. The plaintiffs are strangely claiming that they are the owners of the entire schedule property. Admittedly, Sivakoti is in occupation of the property as a tenant and his mother-Eswaramma might be staying along with him in the property. When rents are not paid this defendant had filed RC.43 of 1990 on the file of II Additional Rent Controller, Hyderabad and an *ex parte* eviction order was passed. Delivery of the property was obtained through Court. Later, on the application of Sivakoti the *ex parte* order was set aside. He had contested the rent control case by denying the jural relationship. The above RC was dismissed. The CRP preferred was also dismissed. During the pendency of the CRP, the old structures in the property collapsed. Subsequently, Sivakoti had raised temporary structures. Eswaramma and Sivakoti had denied the title in respect of the property with a *mala fide* intention. This defendant had

filed a suit for declaration, possession and damages and perpetual injunction in OS.No.1725 of 1999 on the file of II Senior Civil court, Hyderabad. The said suit is pending. The plaintiffs are not entitled for declaration of title as they have neither title nor continuous uninterrupted possession over the property. The suit is filed to harass the defendants and enrich themselves.

6.5 Having regard to the above pleadings, the following issues were framed for trial.

1. Whether the valuation of the suit and Court fee paid are not correct?
2. Whether the suit is barred by limitation?
3. Whether the suit as framed is not maintainable?
4. Whether the suit house belonged to Sivalingam and he gave it away to the 1st plaintiff?
5. Whether the plaintiffs perfected their title to the suit property by adverse possession?
6. Whether the 1st defendant was the absolute owner of the suit property and the sale by her in favour of the 2nd defendant is valid and binding?
7. Whether the sale deed in question is invalid and unenforceable against the plaintiffs?
8. Whether the plaintiffs are entitled to the declaration of title and consequential reliefs?
9. To what relief?

Since three suits were consolidated as already noted, the evidence was recorded in OS.No.530 of 1985. Sivakoti and his supporting witnesses were examined as PWs1 to 4. Yadagiri and the supporting witnesses of the defendants were examined as DWs1 to 3. Exhibits A1 to A34 and B1 to B32 were exhibited. Exhibit X1 was also exhibited.

7. Now the substantial questions are taken up.

8. The learned counsel for the appellant had contended as follows:

After the death of Salamma, Yadagiri, who is her legal heir, was not

impleaded as a co-defendant to the suit filed by Eswaramma and Sivakoti. Therefore, the suit against Salamma stood abated for not taking steps to bring on record Yadagiri as the legal representative of deceased Salamma. Since no decree can be passed against a dead person, the decree, if any, passed is a nullity. Eswaramma is not the wife of Sivalingam and Sivakoti is not their son. Salamma is the wife of Sivalingam. Yadagiri is their adopted son. Salamma purchased the house property for valuable consideration under sale deed dated 11.08.1955. The copy of the said sale deed in Urdu is exhibit B27 and its English translation is exhibit B27A. The contention that her husband Sivalingam had purchased the suit house property under the said sale deed benami in the name of Salamma is false. If the husband pays part of the sale consideration under the sale deed, it cannot be presumed that since the consideration was paid by the husband, the sale transaction under registered sale deed in favour of Salamma is a benami sale transaction. Eswaramma and Sivakoti are not the owners of the property. They were never put in possession of the property at the instance of elders as alleged in the plaint. The said contention is not established. The relationship of Eswaramma and Sivakoti with Sivalingam is also not established. The criminal Court in the maintenance proceedings had recorded a categorical finding against Eswaramma and Sivakoti. Eswaramma and Sivakoti are only tenants in the property. They had earlier paid rents to Sivalingam. After his death they had paid rents to Salamma. Salamma who was the owner has got every right to sell the property. She being the absolute owner of the suit house property had conveyed the same under a registered sale deed dated 29.09.1986 in favour of Sharada. The copy of the sale deed is exhibit B26. Subsequently, Sharada had conveyed the same to the appellant/3rd defendant/Saraswati Bhagat by executing a registered sale deed dated 13.04.1989. The copy of the said sale deed is exhibit B25. After the remand of the suits and during the pendency of the suit Salamma sold the property to Sharada and Sharada sold the property to the appellant herein. Therefore, the appellant-Saraswati Bhagat was impleaded as 3rd defendant in the suit. The trial Court had erroneously decreed the suit holding incorrectly that the oral and documentary evidence proves that Eswaramma and Sivakoti

perfected their title over the suit schedule property by adverse possession. Persons claiming adverse possession are not competent under law to institute a suit for declaration of title. Long possession by itself is not sufficient to prove adverse possession. No suit lies for declaration of ownership on the basis of adverse possession. The law is well settled that declaration of ownership of land on the basis of adverse possession cannot be sought by plaintiff. Eswaramma and Sivakoti are only in permissive possession. Permissive possession never matures into adverse possession. During the pendency of the suit, the appellant herein-Saraswati Bhagat had filed R.C.No.43 of 1990 against Sivakoti and the said rent control case was ultimately dismissed on the ground that there is no landlady and tenant relationship and the disputes have to be determined in a civil Court. Rent Appeal in RA.No.788 of 1994 was also dismissed. The revision preferred before this Court in CRP.No.1278 of 1999 against the decision in R.A.No.788 of 1994 was also dismissed stating that in any view of the matter the parties have already approached the civil Court, which is the appropriate forum for adjudication of the title over the disputed premises. The court below had erroneously confirmed the decree and judgment of the trial Court without properly appreciating the evidence and the legal position applicable. Possession however long is not going to be adverse to the rights of Salamma and the successive purchasers from her. It is pertinent to note that Eswaramma and Sivakoti are claiming possession not on title but based on long standing possession and on the ground that they are living in the schedule property in their own right having got it from Sivalingam towards maintenance. A person cannot claim title as well as adverse possession.

The two pleadings are mutually exclusive being inconsistent. Both the Courts erroneously decided the cases on the basis of possession of Eswaramma and Sivakoti and by erroneously observing that exhibit A6 notice states that Eswaramma was a tenant. No documents are filed to prove that Sivalingam gave the property towards maintenance. At any rate, Eswaramma and Sivakoti entered possession of the property with the consent of Sivalingam. The court below having held that Eswaramma and

Sivakoti could not establish their relationship as legally wedded wife and son of Sivalingam ought to have held that the question of giving the suit schedule property by Sivalingam towards maintenance to them does not arise. The Courts below have not taken into consideration the judgment in OS.No.530 of 1985. Adverse possession can at best be a defence as per the provisions of the Limitation Act and does not confer a right to seek declaration on the basis of adverse possession. Though there is an injunction order, the execution of the sale deed in violation of the injunction order is not invalid. Therefore, the sale deeds executed by Salamma in favour of Sharada and in turn by Sharada in favour of Saraswati Bhagat-appellant when prohibitory orders are in force are still valid and not void. The Courts below wrongly and contrary to law had held that the sale deeds are void ignoring the provision of law under Section 52 of the Transfer of Property Act which deals with *lis pendens*. At any rate, Eswaramma and Sivakoti could not establish the necessary ingredients to establish adverse possession and consequently their alleged title by virtue of adverse possession. The judgments of the courts below are based on wrong assumptions and non consideration of material evidence and improper appreciation of pleadings and erroneous consideration of legal position applicable to the facts. The Courts below have cast the burden wrongly upon the appellant/3rd defendant.

8.1 He placed reliance on the following decisions.

1. Thomson Press (India) Limited v. Nanak Builders and investors private limited and others ^[1]
2. Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale and others ^[2]
3. Kanakarathanammal v. Loganatha Mudaliar and another ^[3]
4. Dilbagrai Punjabi v. Sharad Chandra ^[4]
5. Dinesh Kumar v. Yusuf Ali ^[5]
6. Gurdwara Sahib v. Gram Panchayat village Sirthala and another ^[6]
7. P.T.Munichikkanna Reddy and others v. Revamma and others ^[7]
8. A.S.Vidyasagar v. S.Karunanandam ^[8]
9. Maria Margarida Sequeira Fernandes v. Erasmo Jack de sequeira (dead) through LRs ^[9]

10. Thakur Bhim Singh (dead) by LRs and another v. Thakur Kan Singh [\[10\]](#)

11. Sebastio Luis Fernandes (Dead) through LRs. V. KVP Shastri (Dead) through LRs [\[11\]](#)

9. On the other hand, the learned counsel for the respondents/plaintiffs having supported the concurrent findings in the judgments of the courts below had stated that none of the questions raised are pure questions of law and that they are only a blend of facts and law and that no substantial questions of law are involved and that there is no necessity to interfere with the decree and common judgment of the courts below which are rendered after recording concurrent findings supported by cogent and valid reasons. He had contended that the findings in the maintenance order of the criminal court are not binding on the civil court as rightly held by the Courts below and that even assuming that the property is of Salamma, when her husband Sivalingam had given possession of the property to Eswaramma and Sivakoti a very long time back in the year 1955, she had kept quiet and did not take any steps for recovery of possession and that she had taken a false plea of tenancy and the said plea could not be proved by her or the purchasers from her during the pendency of the proceedings and that as against her who is claiming to be the real owner, the plaintiffs-Eswaramma and Sivakoti by being in adverse possession had perfected title by prescription and that as per the provision of Section 27 of the Limitation Act her right, title and interest, if any, was divested and got extinguished as the title vested in Eswaramma and Sivakoti by prescription and adverse possession as per law. He had prayed for dismissal of the second appeal.

10. I have carefully gone through the pleadings and the evidence and I have noted the submissions. Sivakoti was examined as PW1 and he had reiterated the pleaded case. He had exhibited exhibits A1 to A34. Yadagiri who was said to be the adopted son of Sivalingam and Salamma was examined as DW1 and one Rameswarlal and the husband of Saraswati Bhagat-the appellant herein were examined as DWs2 and 3. Exhibits B1 to

B32 were marked.

10.1 To begin with, what is to be noted is that Sivakoti, one of the two plaintiffs in the present suit had earlier filed a suit in OS.No.530 of 1985 for partition of certain house properties claiming that he is the son of Eswaramma and Sivalingam. In that suit, he had also impleaded Salamma, the wife of Sivalingam. When that suit was also disposed of by a common judgment in the first round, the trial Court held that Sivakoti could not establish that he is the son of Sivalingam and Eswaramma and that Eswaramma is the legally wedded wife of Sivalingam and that the subject house property is the ancestral property of Sivalingam and that Sivalingam had purchased the property bearing door no.14-3-29 benami in the name of his wife Salamma. In the said judgment, dated 24.06.1997, which is a common judgment in the said suit and the present two suits, the trial Court had also held that the evidence on record goes to show that house no.14-3-130 is the self acquired property of Sivalingam and that the property bearing house no.14-3-129 is the property of Salamma, his wife and that, therefore, Sivakoti is not entitled to seek partition. In the earlier suit for partition, Sivakoti did not include the present suit schedule property and he had claimed that the present suit schedule property is in his possession and that of his mother-Eswaramma and, therefore, excluded the present suit schedule property from the suit for partition. Therefore, the dismissal of OS.No.530 of 1985 is not going to affect the final result of the present suit on merits.

10.2 Since the suit is one for declaration of title based on long settled and adverse possession and acquisition of prescriptive title by such long adverse possession, the onus of proof and the legal burden, which never shifts, are on the plaintiffs. The case of the plaintiffs is that Eswaramma is the wife of Sivalingam and that Sivakoti is their son and that on account of serious disputes Sivalingam had neglected to maintain them and that on that they had filed a case for maintenance but the same was dismissed and that later elders of the community who were unhappy about the cruel treatment being meted out by Sivalingam to Eswaramma and Sivakoti had summoned him in the year 1955 and with his consent directed him to give the present suit

schedule house no.14-3-46 to Eswamma and Sivakoti and that accordingly he had given away the said property to Eswamma and Sivakoti and that since then they were and are continuing in a portion of the property and maintaining themselves by giving on rent the remaining portion of the house and that they were and are living in the house as owners and possesors by paying taxes, cesses etcetera in respect of the house and thus they had perfected title by adverse possession and that on account of filing of the earlier suit for partition one Yadagiri who is a stranger tried to interfere with the possession at the instance of Salamma and, therefore, the suit was brought for declaration of title and perpetual injunction not to enforce the sale deed executed by Salamma. On the other hand, the defence of Salamma and Sharada, the first purchaser from Salamma, are that Salamma is the owner of the property and that the findings of the criminal Court in the maintenance case that Eswamma and Sivakoti had no relationship with Sivalingam are binding on the parties and that Salamma, as the owner of the property, had alone exercised the rights of ownership and that the said Yadagiri is not a stranger but he is the adopted son of Salamma and Sivalingam and that Eswamma and Sivakoti are tenants and they were earlier paying rents to Sivalingam and later to Salamma and that Salamma, being the lawful owner, had sold the house property to Sharada and that the sale deed executed by her is perfectly valid and binding on the plaintiffs and that the sale deed in favour of Sharada was executed as she was a successful bidder in an auction conducted. It is apt to note that the 3rd defendant-Saraswati Bhagat is a subsequent purchaser from Sharada. The rent control proceedings initiated by her were dismissed holding that there is no landlady and tenant relationship and in the CRP it was also observed that the matters are subjudice before a civil Court and the civil Court is competent to adjudicate the title.

10.3 In this background what is to be noted is that the other suit-OS.No.2068 of 1989 filed by Eswamma and Sivakoti for a perpetual injunction against Salamma and Yadagiri was decreed by the common judgment of the trial Court. By the impugned common judgment both the appeals were

dismissed. The appellant herein by name Saraswati Bhagat who is claiming title through Salamma did not prefer an appeal against the common judgment passed by the first appellate Court insofar as it related to the confirming of the decree of the trial Court in the aforementioned suit while dismissing the corresponding first appeal –AS.No.604 of 2004. Be that as it may.

10.4 The plaintiffs are admittedly in possession of the suit schedule house. They are claiming to be in possession since 1955. They are also pleading that they are exercising rights of ownership as absolute owners and as per the evidence on record, the property was mutated in their names and they are paying property taxes. The defence of the defendants is that Eswaramma and Sivakoti were inducted as tenants during the life time of Sivalingam and Sivalingam received rents till his death and that subsequently, Salamma had also received rents. As already noted, the crux of the case of the plaintiffs is that by adverse and long possession, they had acquired title by prescription and that after lapse of the statutory period the right of Salamma in the property stood extinguished. In this context, it is necessary to refer to the contents of exhibit A6 notice got issued by Salamma to Eswaramma, the 1st plaintiff herein. In the said notice, Salamma had got stated that she is the owner of the suit schedule house and that in the year 1966 Eswaramma had taken the same on a monthly rent of Rs.20/- and that the tenancy is a oral tenancy and that Eswaramma is liable to pay the arrears of rent in a sum of Rs.720/- from 01.04.1982 to 31.03.1985. In reply under exhibit A7 dated 15.04.1985 got issued by Eswaramma, she had denied the claim of Salamma and had asserted her case as pleaded in the plaint and had also stated that she and Sivakoti are in possession since 1955 and that while occupying a portion of the house they are enjoying the rents from the remaining portion of the house and that they are also paying taxes and other charges in respect of the suit house. Admittedly, the house property was purchased under exhibit B27 sale deed dated 22.07.1955 and the said sale deed is in the name of Salamma. Therefore, it is to be further examined as to whether Eswaramma and Sivakoti were inducted as tenants into the property in the year 1966. Nevertheless, the evidence brought on record shows that Eswaramma and

Sivakoti were and are in possession of the suit house since long prior to 1966. Yadagiri, who is said to be the adopted son of Salamma in his evidence, had stated that one Balayya was the original owner and that Balayya had let out the premises to Eswaramma and that after purchase in a Court auction of the house by Sharada, Eswaramma had continued as a tenant. However, the case of the plaintiffs-Eswaramma and Sivakoti is that after purchase of the property in the year 1955 itself Sivalingam gave away the possession of the house property to them at the intervention of elders. Therefore, there is no consistency in the case of Salamma. There is no documentary evidence that Eswaramma and Sivakoti were inducted as tenants in the year 1966. PW2 had stated that he knows Sivalingam since childhood and that the schedule property was given to Eswaramma and Sivakoti by Sivalingam who was by then living in an adjacent house bearing no.14-3-130, in which his father was a former tenant, and that the said house was subsequently purchased by Sivalingam. However, no suggestions were given to this witness in line with the defence of the defendants that the property was not given by Sivalingam and that the plaintiffs are only tenants. PW3 was examined to say that he was a tenant in the portion consisting of two rooms in the suit house under Eswaramma and Sivakoti-the plaintiffs during 1970-75 and that he had paid rents to the plaintiffs. Further, the evidence brought on record would show that Eswaramma and Sivakoti were and are in possession since a time that is much earlier to 1966. In-fact, exhibit A1 is a receipt issued by the Municipal Corporation of Hyderabad (MCH) for the payment made for issuing the certified extract of the property tax assessment register for the period from 1951 to 1994. Exhibits A2 to A5 are the certified extracts of property tax assessment register issued by MCH for the years from 1951 to 1994; 1957 to 1966; 1967-82; and 1982 to 1994 respectively which show that taxes are being paid in the name of Sivalingam by Eswaramma and Siva koti. There are also documents in 'A' series like exhibit A8-notice by MCH of the year 1982, A9-Tax payment receipt dated 10.03.1983 in the name of Siva koti, A10 & A11-Two Municipal tax bills, A17 and A18-water bills, of the years 1957 and 1961, A16 & A19-electricity bills of 3/1962 and 12/1962, A15-letter dated 12.02.1962 issued by the Electricity

Board, A20- notice issued by the Water Works department dated 03.08.1967 and A21-Electoral Card which show long and continuous possession of Eswaramma and Siva koti. The said documents disclose that they are continuing in possession at any rate since 1955 in assumed character of owners and exercising peaceably the ordinary rights of ownership. Electricity service connection was also obtained way back in the year 1962 in the name of Siva koti, the 2nd plaintiff. It is to be noted that the present suit was filed in the year 1987 i.e., after lapse of 32 years period from 1955. The defence that the plaintiffs-Eswaramma and Siva koti were inducted as tenants from 1966 is not established and is obviously false and invented to explain away the long possession of the plaintiffs which is adverse to the interest of Salamma. The overwhelming oral and documentary evidence available on record inspires confidence and probablises the case of the plaintiffs- Eswaramma and Siva koti. There is no evidence on record to accept that Salamma exercised any kind of ownership rights over the suit house since the date of her purchase in the year 1955. She was neither in possession nor paid taxes to MCH or any other departments like APSEB or Water Works. The fact that the relationship of the plaintiffs- Eswaramma and Siva koti with Sivalingam is not established is all the more supportive to the case of the plaintiffs who are claiming adverse possession and prescriptive title against the Salamma who had sold the property to Sharada (D2) and who in turn had sold to Sarswathi (D3/the appellant herein). Salamma had sold away what ever interest she had by executing a sale deed in favour of Sharada even by the year 1986; hence, on her death in the year 1990, there was no need to bring on record Yadagiri as her legal representative in this Suit; and hence the question of abatement does not arise, more particularly when he was already a party to one of the suits amongst the three suits, which are consolidated.

10.5 Turning to the contention that the two sale deeds obtained respectively by Sharada from Salamma and from Sharada by the appellant/Sarswati Bhagat are not illegal and not void *ab initio* despite the fact that the said sale deeds were obtained notwithstanding the orders of injunction and during the pendency of the suit, it is to be noted that the said contention is legally correct

as it is settled law that any transfer pendente lite is neither illegal nor void *ab initio* but remains subservient to the rights eventually determined by the Court in the pending litigation. This contention of the counsel finds support from the decision in **Thomson Press (India) Limited** (1 supra). Further in the decision in **Kanakarathanammal** (3 supra) the facts show that a wife had purchased property through consideration that proceeded from her husband; however, his subsequent conduct disclosed that title of the property vested in the wife. In this back drop of facts it was held that in ordinary Hindu Families the property exclusively belonging to a Hindu Female member would be managed by the manager of the family and hence, the fact that the Husband was in possession and management of the property or that he was receiving the rents does not affect the position. The decision was rendered on the facts peculiar to the cited case. In **Thakur Bhim Singh** (10 supra) the two kinds of Benami Transaction that are recognised in India and the principles governing the determination of the question whether a transaction is a benami transaction or not were summarised. In the decision in **Viswanath Bapurao Sabale** (2 supra) it was held that there is a presumption that a registered document is validly executed and therefore, *prima facie* a registered document would be valid in law. Reverting to the facts of this case it is necessary to restate that this Court proceeded on the assumption that the property was purchased by Salamma in the year 1955 under a sale deed and that the transaction under the sale deed in her name is not benami and that the sale deeds of the subsequent purchasers are not void and not illegal but remain subservient to the rights that are to be eventually determined in the pending litigation. The next three decisions viz., **Dilbagrai Punjabi** (4 supra), **Sebatio Luis**

Fernandes (11 supra) and **Dinesh Kumar** (5 supra) are relied upon on the aspect of scope of High Court's Power under section 100 of the Code. There is no dispute with the propositions in the said decisions. On the aspect of adverse possession reliance was placed by the learned counsel for the appellant/3rd defendant on the decisions in **P.T. Munichikkanna Reddy** (7 supra), **A.S. Vidyasagar** (8 supra) and **Maria Margarida Sequeira Fernandes** (9 supra). I have gone through the decisions. In these decisions

the concept and nature of adverse possession, the factual requirements of the plea of adverse possession, the ingredients of adverse possession, and the tests to determine the same and the principles engraved in the maxim *nec vi, nec clam* and *nec precario* were emphasised. Turning to the instant case facts, it is to be reiterated that both the Courts below having considered the facts accurately and the relevant evidence in the right perspective had recorded concurrent findings of fact on the issue of adverse possession and held that the plaintiffs-Eswaramma and Siva Koti had perfected title to the suit schedule house by adverse possession. There was neither misreading nor non consideration of the material evidence or neither misapplication of the relevant principles of law nor misconstruction of facts by the Courts below. The findings are sound and cannot be termed as perverse by any standards. This Court having examined the evidence in juxtaposition with the facts found that the Courts below are justified in recording the said finding in favour of the plaintiffs and against the defendants including the appellant herein. The issue concerning adverse possession is not a pure question of law and it is a blend of fact and law. In the facts and circumstances of this case when such a view is plausible and probable it is impermissible to substitute any contrary view, even if one such view is probable, though in the case on hand any contrary view is not possible and unwarranted. Therefore, there is no reason to interfere with the findings of the Courts below on the issue of adverse possession, which are supported by valid and cogent reasons.

10.6 Now the vitally important contentions advanced on behalf of the appellant/3rd defendant, which requires examination and consideration are as follows: 'Declaration of ownership on the basis of adverse possession cannot be granted. The claim of ownership by adverse possession can only be made by way of a defence when the plaintiffs herein are arrayed as defendants in the proceedings against them. Hence, the suit for declaration of title filed by the plaintiffs on basis of adverse possession is liable to be dismissed after setting aside the decrees and judgments of the Courts below.' In support of this contention reliance was placed on the decision in **Gurudwara Sahib** (6 Supra) and it was forcefully contended that the Courts

below had erred in granting a decree for declaration of title to the plaintiffs- Eswaramma and Siva Koti on the basis of the claim of adverse possession.

In this cited decision the facts are as follows:

‘The Appellant is the original Plaintiff. It had filed the suit for decree of declaration to the effect that it had become owner of the suit property by adverse possession. Declaration was also sought to the effect that the Revenue record showing ownership of Respondent No. 1 herein i.e. Gram Panchayat (Defendant in the suit) is liable to be corrected in the name of the Appellant and the auction already held by the Gram Panchayat of the land in dispute is null and void. Consequential relief of permanent injunction restraining Gram Panchayat from dispossessing the Appellant from the disputed land was also prayed for. This suit was partly decreed by the trial court granting relief of injunction. First Appeal against that part of the judgment whereby relief of declaration was denied was dismissed by the learned Additional District Judge and the Second Appeal preferred by the Appellant has also been dismissed by the High Court of Punjab and Haryana vide judgment dated 22nd September 2011. The Appellant had, therefore, filed a civil appeal before the Supreme Court with the plea that its suit be decreed in entirety and had claimed ownership by adverse possession on the ground that it is in possession of the land in dispute for sufficiently long period which fact has been established and, therefore, its suit could not be dismissed.’

In the above factual back drop, the Supreme Court held as follows:

‘There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the Plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the Appellant and the Appellant is arrayed as Defendant that it can use this adverse possession as a shield/defence.

The learned senior counsel for the contesting respondents/LRs of the deceased plaintiff contended that the Judgment of the Supreme Court was rendered on the facts of the case and that there is no binding ratio and that the decision cited has no application to the facts of the instant case. He had further pointed out to the operative portion of the judgment of the Supreme Court in support of the contention that the Supreme Court had granted a decree of injunction and therefore, it is obvious that the Supreme Court permitted the appellant therein to use the claim of adverse possession as the

basis in that suit insofar as the relief of perpetual injunction and, hence, it follows that in a given set of facts of a case, adverse possession can be a basis for the reliefs claimed in a suit filed by the persons claiming adverse possession and it need not always be used as a shield or defence. The last paragraph of the cited decision reads as under:

As the Appellant is in possession of the suit property since 13.4.1952 and has been granted the decree of injunction, it obviously means that the possession of the Appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the Appellant seeking relief of declaration has been dismissed, in case the Respondents file suit for possession and/or ejection of the Appellant, it would be open to the Appellant to plead in defence that the Appellant had become the owner of property by adverse possession. Needless to mention at this stage, the Appellant shall also be at liberty to plead that findings of issue 1 to the effect that the Appellant is in possession of adverse possession since 13.4.1952 operates as res-judicata. Subject to this clarification, the appeal is dismissed.

He had further placed reliance on the provision of Section 27 of the Indian Limitation Act and had contended that on the expiry of the statutory period of limitation and on the failure of Salamma to sue for recovery of possession of the immovable property viz., the suit house, Salamma's right to the property stood extinguished and the right and interest in the property absolutely vested in the plaintiffs-Eswaramma and Siva Koti and that they had thus acquired title by prescription, which is a valid title and interest enforceable even against Salamma, in view of the extinguishment of her right to the property under the provision of the Limitation Act. Section [27](#) of the Limitation Act reads as follows:

27. Extinguishments of right to property - At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Dealing with the essence of the provision, the Supreme Court, in **Prem Singh and Ors. v. Birbal and Ors** [\[12\]](#) held as under:

'Limitation is a statute of repose. It ordinarily bars a

remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits.'

In **Ramchandra Dagdu Sonavane (dead) by LRs and others v. Vithu Hira**

Mahar (dead) by LRs and others ^[13] a bench of three Hon'ble Judges of the Supreme Court had re-iterated the settled legal possession as under: 'The period of limitation provided under Section 27 of the limitation Act, if a right to property is not exercised within twelve years from the date on which the cause of action accrues to him, he would lose his right of remedy under the Limitation Act.' Therefore, the law of limitation also supports the case of the plaintiffs-Eswaramma and Siva Koti that they had acquired title by prescription and that the title or right of Salamma to the schedule property stood extinguished on the determination of the period limited to her for instituting a suit for possession of the property. Therefore, the above said provision of law not only extinguished the right to property of Salamma but also had vested the plaintiffs-possessors with the title to the property. There is one more dimension to this case. In spite of the established facts that Eswaramma and Sivakoti having entered into possession way back in 1955 and had started exercising rights of ownership and were and are enjoying the property in their own right, neither Sivalingam during his life time nor Salamma till her death had instituted a suit for declaration of her title with consequential relief or for recovery of possession. When Salamma's title and right to the schedule property stood extinguished and the plaintiffs-Eswaramma and Sivakoti had acquired title by adverse possession and prescription, no title was available to Salamma to convey the same to her purchaser -the 2nd defendant-Sharada under registered sale deed dated 29.09.1986 as by that time the right to suit schedule property of Salamma stood extinguished and her remedy to sue for recovery of possession was

barred by law of limitation. The law is well settled that no one can convey a better title than what he has. Therefore, no valid title and interest in the suit schedule property passed to the 2nd defendant-Sharada from Salamma whose right was extinguished by operation of the provision of Section 27 of the Limitation Act; and, as a sequel it must be held that no title passed from the 2nd defendant-Sharada to the appellant/3rd defendant-Saraswati Bhagat, and, therefore, the title remained vested with Eswaramma and Sivakoti and hence, they are entitled to continue to remain in property. On their deaths, their legal representatives are entitled to continue to remain in the property. The ratio in **R.V.E.Venkatachala gounder v. Arulmigu Visweswaraswami and V.P Temple and another**^[14] which squarely applies to the facts of the present case reads as follows:

In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in *A. Raghavamma and Anr. v. Chenchamma and Anr.*, [1964]2SCR933 , there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which, never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiffs title.

11. Having regard to the reasons, this Court finds that the plaintiffs-Eswaramma and Sivakoti have been able to create a high degree of probability to shift the onus onto the defendants and on that the defendants particularly the 3rd defendant/appellant had failed to discharge the onus and hence, the burden of proof lying on the plaintiffs-Eswaramma and Sivakoti shall be held to have been discharged so as to amount to proof of their title to the plaint schedule property. As a sequel, it must be held that the plaintiffs-Eswaramma and Sivakoti, who are entitled to continue to remain in possession are entitled to the reliefs claimed in the suit.

12. 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.

13. 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 also stand dismissed.

M. SEETHARAMA MURTI, J

12th October, 2015
Vjl

[\[1\]](#) (2013) 5 SCC 397

[\[2\]](#) (2009) 12 SCC 101

[\[3\]](#) AIR 1965 SC 271

[\[4\]](#) 1988 (Supp) SCC 710

[\[5\]](#) (2010) 12 SCC 740

[\[6\]](#) (2014) 1 SCC 669

[\[7\]](#) (2007) 6 SCC 59

[\[8\]](#) 1995 Supp (4) SCC 570

[\[9\]](#) (2012) 5 SCC 370

[\[10\]](#) (1980) 3 SCC 72

[\[11\]](#) (2013) 15 SCC 161

[\[12\]](#) AIR 2006 SC 3608

[\[13\]](#) (2009) 10 SCC 273

[\[14\]](#) AIR 2003 SC 4548