THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.189 of 2003

JUDGMENT:

This Second Appeal under Section 100 of the Code of Civil Procedure by the unsuccessful plaintiffs 2 and 3 (since died) is directed against the decree and judgment dated 14.11.2002 of the learned Senior Civil Judge, Medak passed in A.S.No.5 of 2000. The learned Senior Civil Judge while dismissing the said appeal had confirmed the decree of dismissal and the judgment dated 09.12.1999 of the learned Junior Civil Judge, Medak passed in O.S.No.36 of 1986 filed for (a) declaration of title; (b) eviction of the defendants from the suit premises and recovery of the vacant possession of the suit schedule property in Sy.No.368 admeasuring Ac.1.32 guntas, which is inclusive of the house bearing Municipal No.1-12-33, situated at Medak; (c) declaration that the mutation proceedings issued, by the Municipal Council, Medak in CC.No.B2/1745/84 dated 12.12.1985, in the name of the defendant no.2 on the basis of invalid and illegal registered sale deed bearing no.2249 dated 09.11.1973 executed by Yarla Narsaiah, as invalid and illegal and not binding upon the plaintiffs; and (d) for costs.

2. I have heard the submissions of the learned senior counsel for the plaintiffs/appellants and the learned counsel for the respondents/defendants. I have perused the synopsis of points and citations filed by the learned counsel for the appellants.

3. Before proceeding further, be it noted that this second appeal was originally filed by the plaintiffs 2 and 3. During the pendency of this second appeal, both the said plaintiffs had died. Their legal representatives who are the appellants 3 and 4 are now prosecuting this appeal. They shall hereinafter be referred to as the plaintiffs/appellants. The 2^{nd} defendant/1^{st} respondent had also died during the pendency of this second appeal and her legal representatives were brought on record as respondents 2 and 3. The 2nd defendant in the suit is in fact the sole defendant, as the plaintiffs with the permission of the court deleted the 1st defendant from the array of parties in the suit. They shall hereinafter be referred to as the defendants/respondents. The plaintiffs 1 and 4, who did not join the appellants in preferring the appeal, are not added even as proforma respondents to this second appeal.

4. At the time of admission of this second appeal, this Court had taken note of the following questions of law mentioned in the memorandum of grounds of appeal as the substantial questions of law involved in this appeal. The said substantial questions of law are as follows:

> **1. Whether the plaintiff in a suit for recovery of possession on the basis of title is required to prove that the title continues to subsist as on the date of the suit when the defendant do not dispute the title of the plaintiff?**
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> **2. Whether the date of dispossession is relevant and material in a suit for recovery of possession based on title and on the face of admission of title of plaintiffs by the defendant?**
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> **3. Whether the tenant/defendant who is put into possession by the father of the plaintiff not as tenant can claim rival title or title by adverse possession without surrendering the possession to the person who put him in the possession?**
>
> **4. Whether the *ex parte* decree of decree of permanent injunction, i.e., restraining the persons in possession not to interfere in alleged possession would operate as *res judicata* in any manner when the person claiming under the decree admittedly was never in possession of the same?**
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> **5. Whether the admissions of the husband of the defendant that he is the tenant in the suit property and his conduct of payment of rent to the Court Commissioner in a partition suit interse family of the plaintiff will not entitle the plaintiff to decree of possession?**
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> **6. Whether the conduct of plaintiffs of not demanding the rent and allowing the tenant to use the property in any manner i.e, even allowing him to sub let could disentitle the plaintiffs to the relief of possession?**
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> **7. When husband of the defendant once enters into the property as tenant can the defendant after the death of her husband can sustain the plea of adverse possession with surrendering the possession?**
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> **8. Whether the facts which are not in dispute required to be pleaded?**
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> **9. Whether the findings of fact based on admission before the Trial Court can be set aside without filing any cross-objections?**
>
> **10. Whether the non-payment of rent by the tenant to the landlords sine long time can be assumed that the landlord has no title in the suit property?**
>
> **11. Whether the tenant of the defendant is permitted in law to**

plead justerti?

12. Whether the sale deed alleged to have been executed by Yarla Narasaiah in favour of the defendant and by late John Thimma Reddy in favour Yarla Balaiah are admissible without examining the vendors of said transactions?

13. Whether the examination of attestor of sale deed could prove the contents of the sale deed when the same are disputed without examining the vendor?

14. Whether Section 27 of the Limitation Act is independent to the plea of adverse possession and the plea of Section 27 of the Limitation Act can non-suit the plaintiffs merely on the fact of continuation of possession of the defendant for a period of 12 years or more?

15. That the finding of the Trial Court regarding acquiasance of right and title of the plaintiffs over the suit property in view of mere long standing possession of the respondent is illegal and contrary to the facts on record and law and hence liable to be set aside.

(Reproduced verbatim)

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

5.1 The case of the plaintiffs as per the averments in the amended plaint, in brief, is as follows:

The plaintiffs 1 and 2 (Augustine Reddy and J.A.Rajamma) (since died) are the heirs of one John Thimma Reddy. The said Thimma Reddy died in or approximately in 1341 F corresponding to 1931 leaving the principals of G.P.A herein as his heirs. The deceased Thimma Reddy was an employee of the erstwhile Hyderabad State; he had acquired considerable immovable properties. The suit property in two halves was purchased by Thimma Reddy during his life time from the two different purchasers. One portion was purchased from K.Krishna Somaiah for a consideration of Rs.100/- in the year 1931; and another half share was purchased from one Pendiyala Mallaiah. The suit properties are the properties of John Thimma Reddy. During his life time, he had constructed the suit house in accordance with the rules and regulations that were applicable at that time. Except the principals of the agent, the deceased John Thimma Reddy had not left behind any other living heir or heirs. The suit house has been in constructive possession and occupation through different tenants such as Cooperative office society, Teachers and more particularly one R.Venkateshwar Rao and also others from time to time and the rents were being enjoyed by the principals herein. Thus, the Principals' possession had been without let or hindrance from anyone. The Municipal Commissioner, vide proceedings in CC.No.B2/1745/84 dated 12.12.1985 had invalidly and illegally mutated the suit property in the name of the defendant no.2 on the basis of an alleged invalid and illegal registered sale deed dated 12.12.1973 executed for a sale consideration of Rs.12,000/- by one Yarla Narsaiah, S/o Balaiah, aged 55 years. Neither the 2nd defendant's vendor nor any one has saleable title and/or proprietary interest to transfer the property in favour of the 2nd defendant nor did the 2nd defendant acquire better title and possession through the sale deed, which is a defective document. The said proceedings were issued despite the objections placed by the principals before the Commissioner, Municipal Council, Medak. The Municipal Commissioner absolutely lacked in his powers to transfer and mutate the agricultural land in spite of its omission in registered sale deed. The municipal records and the property tax assessment register etcetera nowhere disclose either the name of the Narsaiah or any one from whom he claims but confirm about the ownership and title that exclusively vested with the principals of Thimma Reddy even till today. As a cloud was cast on the title, ownership and possession over the agent's principals in view of the invalid and illegal mutation proceedings of the Municipal Commissioner, the plaintiffs have approached the Court. The revenue as well as municipal records, right from the beginning till today, have been reflecting the name of the principals of the agent. At no point of time, the alleged Yarla Narsaiah had sought to obtain the necessary transfer for the suit property from whom he claims. So also the 2nd defendant. The 2nd defendant cannot acquire a better title, right and possession than her original transferee. The defendants had forcibly dispossessed the plaintiff from the suit schedule property after disposal of the temporary injunction application and on vacation of the temporary injunction orders. Therefore, the plaintiffs are compelled to seek the relief of recovery of possession also. The defendants are politically influential persons and are having influence with the higher ups of the Government machinery. The plaintiffs' possession as stated supra is continuous one. The defendants as a matter of fact have no absolute right, title or possession and their assertions in respect of the suit property are invalid and illegal. The mutation proceedings are void and not binding on the plaintiffs. Hence, the suit is filed.

5.2 I shall advert to the relevant defence of the defendants at the appropriate later stage while dealing with the issues involved in the substantial questions.

5.3 The trial Court had framed the following issues and additional issues for trial:

Issues:

1. Whether the suit is liable to be rejected on the ground that the plaint is not properly signed or verified as prayed?
2. Whether the suit is maintainable in law without complying the Rules 32 and 33 of Civil Rules of Practice?
3. Whether the suit is barred by limitation?
4. Whether the earlier judgment and decree in O.S.81/1967 on the file of this Court operate as res judicata and binding on the plaintiffs?
5. Whether the suit is properly valued and court fee paid is sufficient?
6. Whether the defendant forcibly dispossessed the plaintiff from the suit property after dismissal of the temporary injunction petition?
7. Whether the sale deed relied upon by the defendant is invalid, void and not binding on the plaintiffs?
8. Whether the Municipal Commissioner, Medak has no authority to mutate or transfer the suit property in the name of the defendant?
9. Whether the suit is bad for non-joinder and mis-joinder of parties?
10. Whether the defendant is in continuous possession of the plaint schedule property from 1957 to 1993 as tenant and as absolute owner since 1973 having purchased and perfected her title?
11. Whether this court has no pecuniary jurisdiction to entertain the suit?
12. Whether the plaintiffs are entitled to declaration as sought for?
13. Whether the plaintiffs are entitled to vacant physical possession of the plaint schedule property?
14. Whether the plaintiffs are entitled to future mesne profits at Rs.1,500/- per month?
15. Who is entitled to exemplary costs?
(As modified by order dated 20.01.1994)

Additional Issues:

1. Whether the tile over the suit property had ever passed either to Yarla Balaiah or his son Yarla Narsaiah during their life time?
2. Whether the suit house was in existence prior to execution of the sale deed alleged to have been executed by John Thimma Reddy in favour of Yarla Balaiah?
3. Whether the John Thimmareddy constructed the suit house in accordance with the then existing rules?
4. Whether the Municipal Council Medak can exercise powers either to mutate or cancel over the agricultural land?
5. As to whether the ex parte decree passed in O.S.No.81/1967 can override the preliminary decree already passed in O.S.2/1960 on the file of the Court of I Assistant Judge, City Civil Court at Secunderabad, without legal sanction?
6. Whether the sale deed dated 9.11.1973 executed by Yarla Narsaiah in favour of the defendant is legally valid and binding on the plaintiffs?
[Reproduced verbatim]

At trial, PW 1 was examined and exhibits A1 to A49 were marked. The defendant and her son were examined as DWs 1 and 2; and two other supporting witnesses were also examined as DWs 3 and 4 and exhibits B1 to B178 were marked on the side of the defendants. On merits, the trial Court had dismissed the suit of the plaintiff.

5.4 In the first appeal suit, the court below had framed the following points for determination:

1. Whether the plaintiffs are title holders of the suit schedule property and they are entitled for declaration as prayed for?
2. Whether the plaintiffs are entitled for recovery of possession?
3. Whether the plaintiffs' claim is barred by limitation?
4. Whether the sale deed in favour of the defendant is valid and binding on the plaintiffs?
5. Whether the suit is bad for non-joinder of necessary parties?
6. Whether this Court has no pecuniary jurisdiction to entertain the suit?
7. Whether the plaintiffs are entitled for mesne profits?
8. To what relief?

As already noted, the Court below had dismissed the first appeal suit. Therefore, the plaintiffs are before this Court by way of this second appeal.

6. The learned senior counsel for the plaintiffs/appellants had contended as follows:

The plaintiffs have clearly stated in their pleadings as to how they had acquired title to the plaint schedule property and had further adduced sufficient evidence to establish title of John Thimma Reddy to the suit property, which is also admitted. But the courts below had failed to appreciate the facts correctly and the evidence in proper perspective. When the title deed of the deceased defendant was disbelieved by the courts below, the courts below ought to have seen that it is for the said defendant to plead and prove her right to resist the claim of the plaintiffs and remain in possession of the property. No pleadings in that regard were urged by the said defendant and no evidence was also adduced. Therefore, the courts below ought not to have presumed anything in favour of the said defendant. The courts below had erroneously dismissed the claim of the plaintiffs/appellants by making a ground of adverse possession in favour of the deceased defendant even though no such plea of adverse possession was taken in the defence. The findings of facts recorded by the trial court which are adverse to the respondents were set aside even though no cross objections are filed. The respondents did not dispute the title of the plaintiffs/appellants. Therefore, the courts below ought to have decreed the suit. When the deceased defendant was a tenant and when the husband of the said defendant was put in possession of the property as a tenant by John Thimma Reddy, the defendant is not entitled to claim original title or title by adverse possession without first surrendering the possession of the leased out property to the person, who had put him in possession of the property. The courts below did not properly appreciate as to whether the findings in a suit for perpetual injunction operate as *res judicata* more particularly when the person claiming under the said decree was never in possession of the property. The courts below had ignored the conduct of the husband of the defendant and the fact that he is a tenant in the suit property and his further conduct in payment of rent to the Court Commissioner/Receiver in the partition suit. The courts below failed to properly consider the issue as to whether the conduct of the appellants in not demanding rent and allowing the tenant to use the property and in allowing to sub lease the property, disentitle the plaintiffs/appellants to seek the relief of recovery of possession. When the husband of the deceased defendant is a tenant, the aspect as to whether the said defendant can raise the plea of adverse possession after the death of her husband was not considered by the courts below. On mere non-payment of the rent by the tenant to the landlord, there cannot be any assumption that the landlord has no title to the property. The courts below ought to have seen that the plaintiffs/appellants had discharged the initial onus of proof, which is upon them and that when the onus to introduce evidence shifted to the defendants, no evidence much less, evidence worthy of credit was adduced, and therefore, the evidence on the side of the plaintiffs/appellants remained un-refuted. The 1st respondent had admitted the original title of late late John Thimma Reddy and even otherwise, the title of the late John Thimma Reddy over the suit schedule property was established. The appellants being the son and wife of late John Thimma Reddy had succeeded to the property on his death. The 1st defendant/1st respondent having claimed title and possession basing upon a registered sale deed dated 09.11.1973 had contended that earlier to 09.11.1973, her husband was the tenant of Yarla Narsaiah from 1957 till she had purchased the same under the said sale deed dated 09.11.1973. The sale deeds relied upon by the deceased defendant, i.e., the alleged sale deed executed by Yarla Narsaiah in favour of the said defendant and the sale deed by the John Thimma Reddy in favour of Yarla Balaiah are inadmissible and are not established as the vendors of the said transactions are not examined. Mere examination of an attestor is not sufficient when the execution of the document is disputed. The 1st defendant/1st respondent did not claim adverse possession but only claimed longstanding possession. Mere longstanding possession does not entail the said defendant/1st respondent to make any claim on the basis of the provision of Section 27 of the Indian Limitation Act and adverse possession. The plea based under Section 27 of the Limitation Act is independent to the plea of adverse possession and on the plea based on Section 27 of the Limitation Act, the courts below had erroneously non-suited the plaintiffs/appellants by merely considering the long possession of the defendants/respondents for a period of more than twelve years. The courts below had failed to consider that possession, however, long or longstanding possession does not confer any right on the party in possession. Late John Thimma Reddy sold the property to Balaiah within a short time after purchase by him casts a strong cloud on the title of the property, more particularly when the name of late John Thimma Reddy, as the owner and possessor continued in the revenue records even subsequent to the alleged purchase of the property by Balaiah. The document in favour of Balaiah is nothing but a created document. The trial Court expressed a strong suspicion in regard to the alleged sale deed by late John Thimma Reddy in favour of Balaiah. The court below, which did not consider the said findings of the trial Court, ought not to have held against the plaintiffs, more particularly, in the absence of any cross objections filed by the defendant/1st respondent. When the said transaction was doubted, the question of relying upon the said transaction does not arise. There is no required pleading to support the plea of adverse possession. Moreover, the claim of possession under the colour of title from the original owner and the plea of adverse possession are totally inconsistent with each other and therefore, the plea of adverse possession is not available to the 1st defendant/1st respondent. The courts below have made out a new case for the defendants for which there is no foundation in the pleadings. The courts below ought not to have given any credence to the *ex parte* decree in O.S.No.81 of 1967 which was obtained by misrepresentation and fraud. Neither Balaiah nor his son-Narsaiah was in possession of the suit property at any point of time. When they were not in possession, the question of delivery of possession to the defendant does not arise for consideration. There is evidence on record to show that the husband of the defendant/1st respondent was in possession of the suit property and that it is also admitted that he paid Rs.200/- to the Court Commissioner towards rent till 1973. The question of possession of Yarla Narsaiah and interference by the defendant in O.S.No.81 of 1967 does not arise and the facts brought on record establish the falsity of averment in O.S.No.81 of 1967. The courts below did not properly appreciate the facts and the legal position applicable and on the other hand, improperly appreciated the facts and evidence and applied inapplicable and incorrect propositions of law and erroneously dismissed the suit of the plaintiffs.

7. *Per contra*, the learned counsel for the respondents/defendants, while supporting the decrees and the judgments of the courts below, had contended as follows:

The present suit of the plaintiffs is misconceived, frivolous and vexatious and is liable to be dismissed with exemplary costs. The plaintiffs wantonly, wilfully and deliberately suppressed the material facts. The courts below have recorded the concurrent findings of facts on all the issues/points that were framed and that were relevant for consideration in the *lis*. It is incorrect to contend that the courts below did not consider the facts accurately and the evidence in proper perspective. Both the courts below have adverted to the oral and documentary evidence, in detail, and had recorded findings supported by reasons, which are valid and cogent. The well reasoned findings of the courts below do not call for any interference. The very contentions and the questions of law raised by the plaintiffs would show that the said contentions and the questions are based on facts and not even pure questions of law. No substantial questions of law are involved in the second appeal. The second appeal is devoid of merit and is liable to be dismissed.

8. Before proceeding further, it is necessary to refer to the decisions cited so that the relevant and applicable propositions of law can be kept in view while arriving at a just decision on the questions that are raised in this second appeal. Therefore, the facts and the ratios in the cited decisions are referred to infra.

(a) The decision in **Shankar Chakravarti v. Britannia Biscuit Co. Ltd. and another**[1] was relied upon in support of the proposition that if there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. In the cited decision, it was held as under:

> **"A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there**

> **is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party.............." "Where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question to proving something which is not pleaded. This is very elementary."**

It is also held that if a relief is asked for in the alternative that has also to be pleaded.

(b) The decision in **A.V.G.P.Chettiar v. T.Palanisamy Gounder**[2] was relied upon in support of the contention that parties must base their contentions on their pleadings. The Supreme Court in this cited decision had referred to the following ratio in the decision in Trojan & Co. v. Rm. N. N. Nagappa Chieettiar [AIR 1953 SUPREME COURT 235, para 22].

> **"It is well settled that a decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found."**

(c) In the decision in **Shivdev Kaur (D) by LRs v. R.S.Grewal**[3]**,** the facts reveal that when a question whether the appellant was a destitute was raised, it was held that such a question is a question of fact and that no factual foundation has ever been laid by the appellant before the courts below in that regard and that therefore, in the fact situation that issue does not require consideration.

(d) In the decision in **Sameer Kumar Pal and Another v. Sheikh Akbar and Ors**[4], the facts disclose that the High Court, in the impugned judgment, without any pleadings or basis had held that the property, namely, Madras Hotel is a joint family property. Therefore, the Supreme Court had held that the High Court erred in arriving at the said finding as neither there was any pleading nor it was the case of the respondents either before the trial court or the first appellate court.

(e) In the decision in **Malakayya and another v. Avati Buchamma**[5]**,** the facts reveal that a contention that a marriage was performed by Udiki form was raised, but, neither the custom of Udiki was pleaded nor were the valid requisites and essential ceremonies of such an Udiki form of marriage pleaded in the plaint. Therefore, this High Court had held that evidence on record cannot be used for establishing Udiki form of marriage, as it is now well established that in the absence of a pleading, no amount of evidence can be looked into.

(f) In **Kattinokkula Murali Krishna v. Veeramalla Koteswara Rao and others**[6], the Supreme Court had reiterated the settled principle of law that evidence not based on the pleadings can neither be permitted to be adduced nor can such evidence be taken into consideration.

(g) In **Union of India v. Surjit Singh Atwal**[7]**,** the facts of the case disclose that the defendant raised a plea of illegality of agreement without having so pleaded in the written statement; hence, the Supreme Court while agreeing with the High Court of Calcutta had held that to permit such a plea to be raised several years after the institution of the suit would greatly prejudice the plaintiff. While referring to Order VI Rule 8 of the Code, the Supreme Court had held as follows:

> **"Order VI, Rule 8 provides that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality of sufficiency in law of such contract. Order VIII, Rule 2 Civil Procedure Code prescribes that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law. In Kalyampur Lime Works Ltd. V. State of Bihar (1954 SCR 958) the Supreme Court reversed the judgment of the High Court on the ground that the High Court was not justified in allowing to be raised at the time of argument the question whether there was a contravention of Section 30 of the Government of India Act 1915. Reliance was placed upon Order VI, Rule 8 and Order VIII, Rule 2 of the Civil Procedure Code 1908."**

(h) In **Dr.K.L.Askari and another v. Nawab Mir Barkat Ali Khan @ Waleshan Prinice Mukkaram Jah Bahadur HEH the Nizam VIII**[8], a Division Bench of this Court on the aspect of requirement of specific pleadings had held as follows:

> **"It is true that on account of some defect in the pleadings, the substantive rights of the parties shall not be allowed to be jeopardized. Though the requirement of specific pleadings cannot be viewed in a hyper-technical manner, one cannot lose sight of the fact that a party to a suit be, he, the plaintiff or the defendant, must have a specific case of his own and in the absence of specific contention basing on which an issue is required to be framed, the party is not permitted to adduce evidence in regard to the said aspect. There may be errors or omissions in the pleadings, but it is obligatory on the part of the parties to plead material facts and at least from the substance of the plaint or written statement filed by a party, the Court must be in a position to understand as to what in fact the basic contention put forth by the party is."**

In this cited decision on the aspect of proof of a fact it was held as follows:

> **"A fact can be said to be proved either by positive evidence or from the admissions made by the parties or even from the circumstances derived from the pleadings and the evidence of both parties."**

On the aspects of possession, long possession, the onus of proof and the provision of Article 65 of the Limitation Act, which deals with suits for possession of immovable property based on title, it was held as follows:

> **"The principle that possession is a prima facie proof of title embodied in Section 110 of the Evidence Act operates only where in a suit filed under Section 65 of the Limitation Act, none of the parties is able to prove the title. But, when the title is either proved or admitted, Section 110 of the Evidence Act has no application and the presumption available therein shall not be drawn."**
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> **"Merely because a person is in possession of immovable property for a period of more than 12 years, he cannot acquire title to the said property unless he pleads and proves that he perfected his title by adverse possession."**
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> **"In a suit for possession based on title, the plaintiff is not required to prove that he filed the suit within twelve years from the date of dispossession."**

(i) In **A.Shanmugam v. Ariya Kshatriya Rajukula Vamsathu Madalaya Nandhavana Paripalanai Sangam**[9], the facts show that the appellant's father was engaged as a watchman on a monthly salary and was allowed to stay in suit premises and that after his death, the appellant, who is his son had continued to serve the respondent society as a watchman and was allowed to live in the premises which was owned by the respondent society. In this factual background, while reiterating the immense importance and relevance of purity of pleadings and the requirement of critical examination of pleadings by Judicial Officers or Judges, the Supreme Court had *inter alia* held that a watchman employed to look after the property can never acquire interest in the property irrespective of his long possession.

(j) The decision in **Garlapati Venkateswarlu (died) per LRs v. Divi Appalacharyulu**[10] was relied upon in support of the contention and proposition of law that a person who claims possession under colour of title from the original owner cannot plead adverse possession, as both the pleas are inconsistent with each other. In this cited case, this Court had held as follows:

> **"It is settled law that a person who claims possession under colour of title from an original owner, cannot plead adverse possession, as both pleas are inconsistent with each other. (See Arundhati Mishra v. Sri Ram Charitra Pandey, (1994) 2 SCC 29 and Karnataka Board of Wakf v. Government of India, 2004 (4) ALD 124 (SC) = (2004) 10 SCC 779).**

(k) In the decision in **L.N.Aswathama v. P.Prakash**[11]**,** the well settled legal position in regard to requirement of pleading and the onus of proof to establish a claim of title by prescription, that is, adverse possession for twelve years or more is reiterated as follows:

> **"To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by possession or possession without *anumus possidendi.* The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to**

operate until the former is renounced. Unless the person possessing the property has the requisite anumis to possess the property hostile to the title of the true owner, the period for prescription will not commence. (V i d e *P.Periasami v. P.Periathambi [(1995) 6 SCC 523], Md.Mohammad Ali v. Jagadish Kalita [(2004) 1 SCC 271] and P.T. Munichikkanna Reddy v. Revamma [(2007) 6 SCC 59]*

The facts of the cited case disclose that the defendant's case is that he was in possession as a tenant under one Gouramma from 1962, but, not under the plaintiffs and that he became the owner by purchasing the plot from the said Gouramma in the year 1985 and that his alternative case is that if Gouramma did not have title, his possession was hostile to the true owner in view of the fact that he had been in possession by setting up title in Gouramma and later in himself. Having regard to the contentions, the Supreme Court had held as follows:

> **"There is considerable force in the contention of the defendant provided he is able to establish adverse possession for more than 12 years. When a person in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant in this case are not inconsistent pleas but alternate pleas available on the same facts."**

Having so held the Supreme Court had rejected the contention of the plaintiffs that the plea of adverse possession is not available to the defendants.

(l) In the decision in **Bayyarapu Narayana Raidu and another v. Pagadala Varalaxmi**[12], this Court held that under the Indian Limitation Act, 1963, there has been a change in law and that in a suit attracting Articles 64 and 65 of the said Act, the plaintiff has only to prove his title and it is for the defendant to prove acquisition of title by adverse possession. It was also held that when the plea of adverse possession is not established and when it is not necessary as per the provisions of the Limitation Act, 1963 for the plaintiff to show that the plaintiff had filed the suit within twelve years from the date of the plaintiff's dispossession, it is not necessary to further decide the issue 'when the plaintiff was dispossessed from the plaint schedule property'.

(m) In the decision in **Karimullakhan v. Bhanupratapsingh**[13]**,** the facts reveal that the defendant neither stated the material facts on which the plea of prescriptive title is based nor the said plea in any precise form, but, had pleaded in the amended pleading that the plaintiff's suit is barred by time. Ruling that pleading is delightfully vague, the High Court of Nagpur had reiterated the settled legal position as under:

> **"It cannot be disputed that a party pleading a prescriptive title must state all the material facts on which that plea has been based."**

(n) In the decision in **D.N.Venkatarayappa v. State of Karnataka**[14]**,** while stating that the classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario,* the Supreme Court had further referred to the following ratio in **R. Chendevarappa v. State of Karnataka** [(1995) 6 SCC 309]:

> **"The law laid down by the Supreme Court fully applies to the facts of the present case. In the said case, while considering the claim of adverse possession of the purchaser of a granted land from the original grantee, the Supreme Court has observed that the person who comes into possession under the colour of title from the original grantee, if he intends to claim adverse possession as against the State must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period."**

(o) The decision in **Patel Naranbhai Marghabhai and others v. Deceased Dhulabhai Galbabhai and others**[15] was relied upon in support of the proposition that a suit for possession by the owner of the property will not be barred if the possession of the defendant is not adverse to him and that therefore, hostile title to the knowledge of the plaintiffs must be asserted and proved and that in the absence of proof of such hostile title, the plaintiffs are entitled to a decree as prayed for.

(p) The decision in **Tarnikanti Srinvas v. State Bank of**

India, Gandhi Nagar Branch, Vijayawada, Krishna District[16] was relied upon in support of the contention that 'what is not denied, need not be proved'

(q) In **Siddiquinissa Begum v. Shamsunnissa Begum**[17], this Court had held as follows:

> **"It is settled law that Article 59 of the Limitation Act, 1963, which prescribes period of limitation for filing a suit to cancel a document, applies only to voidable transactions and not void transactions. In Prem Singh and others v. Birbal and others, the Supreme Court had held that Article 59 would be attracted where a document is prima facie valid but where coercion, undue influence, misappropriation or fraud are asserted by the plaintiff which required to be proved; and that when a document is void *ab initio*, a decree for setting aside the same would not be necessary as the same is *non est* in the eye of law, as it would be a nullity.**

9. Now, the points are taken up.

10.1 To begin with, the case of the appellants/plaintiffs on the aspect of the title to the suit property/subject property is this: 'The plaintiffs 1 and 2 are the legal heirs of late John Thimma Reddy who had died approximately in the year 1931 leaving the principals of the GPA herein as his heirs and that John Thimma Reddy had purchased from two different purchasers, the suit property in two portions i.e., one portion from K.Krishna Somaiah for a consideration of Rs.100/- in the year 1931; and another half portion from one Pendiyala Mallaiah and that the suit properties thus belonged to late John Thimma Reddy and that, during his life time, he had constructed the suit house in accordance with the rules and regulations that were prevalent at that time and that he had left behind the principals of the agent and no other legal heirs and that after the death of the late John Thimma Reddy, the suit house has been in continuous possession and occupation through different tenants and that the rents were being enjoyed by the principals therein.'

10. 2 *Per contra*, the specific defence of the defendants/respondents 2 and 3, who are the legal representatives of the deceased 2nd defendant, in regard to the possession from 1957 as tenants till 1973 and acquisition of the ownership of the property in the year 1973 and ownership and possession since then is as follows: ‘The plaint schedule property was purchased by one late Y. Balaiah under an unregistered sale deed in or around the year 1931 from late John Thimma Reddy and ever since the date of the said purchase, the said Balaiah who is father of Y.Narsaiah was in possession; and, subsequent to him, Y.Narsaiah was in possession and enjoyment of the property. However, neither Narsaiah nor Balaiah took steps for mutation of the property in their names in the municipal records for the reason that they were in possession of the property without interference from any person. After the death of John Thimma Reddy in and around the year 1931, none of the legal heirs of late Thimma Reddy, who are educated persons had applied for mutation of the property in their names as they had not continued to be the owners of the property. In the year 1960, one of the Sons of late John Thimma Reddy, i.e., the 1st plaintiff herein (since died) had instituted a suit in O.S.No.2 of 1960 on the file of the learned I Assistant Judge, City Civil Court, Secunderabad for partition of the properties including the petition schedule property, amongst the legal heirs of late John Thimma Reddy. When the Court Commissioner-cum-Receiver, who was appointed in that suit, had auctioned the subject property, the 2nd defendant herein took part in that auction and became a highest bidder and had deposited 1/4th of the total consideration as earnest money deposit. At that stage, Narsaiah had instituted the suit O.S.No.81 of 1967 on the file of the court of the learned Munsif Magistrate, Medak for perpetual injunction against the plaintiffs herein and other legal heirs of late John Thimma Reddy and also against the Court Commissioner/Receiver appointed in the suit O.S.no.2 of 1960. That suit in O.S.No.81 of 1967 instituted by Narsaiah was decreed *ex parte* on 12.02.1969. Therefore, the 2nd defendant herein had made an application in I.A.No.711 of 1971 in O.S.no.2 of 1960 for return of the security deposit amount on the ground that the plaintiffs therein (i.e., including the plaintiffs herein) were neither the owners in possession of the suit property nor was the Court competent to conduct any auction of the suit properties. The said application was allowed by the said Court and the earnest money deposit was directed to be returned to the 2nd defendant. The 1st plaintiff herein had filed applications for condonation of delay and for setting aside the *ex parte* decree obtained by Narsaiah in O.S.no.81 of 1967. The said applications were dismissed on 20.10.1973 by the trial court. He had preferred a batch of revisions in C.R.P.nos.1571 to 1573 of 1973 before this Court and this Court had dismissed the said revision petitions on 06.12.1974. The 2nd defendant had purchased the property from the rightful owner-Narsaiah under a registered sale deed dated 09.11.1973 and continued in possession and enjoyment of the property. Till such purchase in the year 1973 under the original of exhibit A3, the 2nd defendant (since died) and her husband had continued as tenants in the property under the vendor. The plaintiffs had deliberately suppressed the material facts.' Thus the crux of the defence is that the defendants were in possession of the plaint schedule property from 1957 till the year 1973 as tenants under their vendor Narsaiah and that from the date of the purchase of the subject property from him in the year 1973 by the 2nd defendant, their possession was and is as owners thereof. The respondents/defendants also further urge that the suit was originally filed against one P. Ugender Rao (the 1st defendant) and his wife-the 2nd defendant and that the material record discloses that the 1st defendant-P.Ugender Rao was deleted from the array of the parties in the suit and that the suit was prosecuted against his wife-Hymavathi only and that it remains unexplained as to why the suit was not prosecuted against P.Ugender Rao, the husband of the 2nd defendant.

10.3 Be it first noted that even as per the case of the plaintiffs, late John Thimma Reddy who was said to have acquired the property [in two parts] did not admittedly acquire the said property under regular registered sale deeds. Admittedly, there is no valid document of title or a deed of conveyance or a document inter vivos in respect of the subject property in favour of late John Thimma Reddy. Therefore, in order to succeed in establishing their right, title and interest in respect of the subject suit property, the plaintiffs rely on the defence that Balaiah had purchased the property from late John Thimma

Reddy and contend that since the title of John Thimma Reddy is admitted, the plaintiffs need not prove any other aspects of their pleaded case and that they are entitled to succeed on the very defence taken by the defendants. Thus, the first contention of the appellants, in particular, is that the fact that the property originally belonged to late John Thimma Reddy is admitted and that the title of the plaintiffs, who are the successors of the said late John Thimma Reddy, is also admitted and that therefore, it is not necessary for the plaintiffs to prove that the title continued to subsist as on the date of the suit. *Per contra*, the core of the contentions of the respondents/defendants is that the 2nd defendant had not admitted the title of late John Thimma Reddy much less that of the plaintiffs and that in the defence of the 2nd defendant, she had specifically denied the title of the plaintiffs by *inter alia* contending that after Balaiah had originally purchased the property in the year 1931 from late John Thimma Reddy and that after the death of Balaiah in the year 1953, his son-Narsaiah had continued in possession and that from the said Narsaiah, the 2nd defendant had purchased the plaint schedule property under regular sale deed in the year 1973 and that therefore, the plaintiffs are neither having title nor possession since a very long time, i.e., from 1931 onwards and that therefore, the contention of the plaintiffs that their title is admitted is false and that on that score, the plaintiffs cannot contend that they are entitled to succeed in the suit for declaration of title without discharging the initial onus of proof, which is upon them, and also the legal burden, which never shifts.

10.4 In the light of the pleadings and the contentions, it is necessary to analytically examine in juxtaposition the pleadings and the evidence on this relevant aspect. The evidence brought on record takes us to a series of earlier events in regard to the prior litigations in respect of the subject property. The 1st plaintiff being the son of late John Thimma Reddy had first filed a suit in O.S.No.2 of 1960 on the file of the learned I Assistant Judge, City Civil Court, Secunderabad for partition of the properties of late John Thimma Reddy among his legal heirs. In that suit for partition, the subject property was one of the properties. The copy of the plaint in the said suit is exhibit B95. The copy of the written statement of the defendants 1 and 3 in the said suit is exhibit B97. In that suit a Commissioner-cum-Receiver was appointed for auctioning that suit properties and the subject property was also put to auction. The 2nd defendant became the highest bidder and had even deposited the earnest_money or security amount out of the auction sale amount into the Court. At that stage, Narsaiah, the Son of Balaiah, had filed the suit O.S.No.81 of 1967 on the file of the court of the learned Munsif Magistrate, Medak for perpetual injunction against the plaintiffs herein and other legal heirs of late John Thimma Reddy and also against the Court Commissioner/Receiver appointed in the suit O.S.no.2 of 1960. The copy of the plaint in that suit OS 81 of 1967 is exhibit B98. That suit in O.S.No.81 of 1967 instituted by Narsaiah was decreed *ex parte* on 12.02.1969. The copy of the decree in the said suit is exhibit B100. Exhibit B101-the copy of the docket discloses that the suit was decreed by a judgment dated 12.02.1969. The decree and judgment in the said suit have become final as the attempt of the 1st plaintiff herein to have the ex *parte* decree and judgment set aside ended in futility with the dismissal of the interlocutory applications by the trial Court and the batch of revision petitions by this Court. The copies of the orders in the said Revision petitions are exhibits B102 to B106. In fact, on the application in IA No. 711 of 1977 of the 2nd defendant, the auction sale held by the Court Commissioner/Receiver in the suit for partition was set aside and the 1/4th of the auction security amount was directed to be refunded to him. The copy of the order of the Court in the said application is exhibit B99. In the plaint in O.S.81 of 1967, the copy of which is marked as exhibit B98, Narsaiah had averred that John Thimma Reddy had died in the year 1933 and that after his death, neither his sons nor daughters resided at Medak and that they have been residing at Secunderabad and that during his life time, the said Thimma Reddy had sold the property to Balaiah, the father of Narsaiah, and that the property was delivered to Balaiah and that since about the year 1933 Narasaiah's father had continued in possession of the property till his death in the year 1953 and that after his death, the property had devolved upon Narsaiah and that he has been continuing in possession and enjoyment till the date of that suit. In that plaint, the right, title and interest much less subsisting title of the defendants therein including the plaintiffs herein was denied by Narasaiah. Thus, even by the year 1967, the Narasaiah, the vendor of the 2nd defendant, had asserted that the 1st plaintiff herein and the other legal representatives of late John Thimma Reddy were not the owners of the subject property and had denied the right, title and interest of late John Thimma Reddy and his legal representatives and had asserted title in himself and had claimed exclusive possession over the subject property; and admittedly his suit for perpetual injunction was decreed against the plaintiffs herein and other legal representatives of late John Thimma Reddy and that decree for perpetual injunction has become final. Therefore, the overwhelming evidence including the documentary evidence together with the decree for perpetual injunction granted by a competent civil court would make it evident that Narasaiah was in possession by the year 1967 and that he had denied title of late John Thimma Reddy and his legal representatives even by that year. Thus, Narsaiah's lawful possession over the subject property even by the year 1967 was confirmed by a decree for perpetual injunction is beyond the pale of any controversy. Subsequently, Narsaiah had sold the subject property under a regular registered sale deed dated 09.11.1973 to the 2nd defendant. The registration extract of the said sale deed is exhibit A3. In this sale deed, it was recited that Narsaiah's father is the absolute owner and that on the death of the father of Narsaiah, he had got the property as his share and that he has been in exclusive possession as owner. These material facts, which are sufficiently established by the overwhelming evidence on record, would show that the contentions of the plaintiffs/appellants that the defendants particularly the 2nd defendant had admitted the title of the plaintiffs in respect of the plaint schedule property is devoid of merit. On the other hand, the chronology of events borne out by the documentary evidence would show that the son of Balaiah by name Narsaiah who is the vendor of the 2nd defendant had denied the title and possession of the legal heirs of late John Thimma Reddy in his plaint in O.S.No.81 of 1967 and had obtained against them a perpetual injunction decree on 12.06.1969 itself in the said suit in respect of the present plaint schedule property. The said decree as already noted has become final. Therefore, at any rate, even by the year 1967, Narsaiah-the vendor of the 2nd defendant had denied the title of the legal heirs of late John Thimma Redddy including the sole plaintiff (since died) and the appellants herein and had later sold the property in the year 1973 to the 2nd defendant under a regular registered sale deed. In addition to this, the specific defence of the 2nd defendant is that since the date of the said purchase in the year 1973, the 2nd defendant is continuing in possession of the property as absolute owner exercising rights incidental to the ownership. Thereafter, the subject property was admittedly mutated in the name of the 2nd defendant and water and electricity connections were obtained in the name of the 1st defendant (since deleted from array of parties) in the year 1973 and the said connections are being continued in the name of the 1st defendant even till today. The pleadings as supported by evidence brought on record also disclose that the 2nd defendant had leased out the property to Food Corporation of India, a statutory body from 01.03.1974 onwards as the defendants had changed their place of residence from Medak to Hyderabad. Further, from the evidence brought on record it is evident that the Food Corporation of India was a tenant of the defendants till the end of 1985 continuously and that at the time of vacating the premises it had addressed a letter to the 2nd defendant asking her to take possession on 17.12.1985 and that accordingly vacant possession was delivered to the son of the 2nd defendant on 19.12.1985 on behalf of the 2nd defendant. The evidence also establishes that Vivekananda School was in possession of the suit property as a tenant under the 2nd defendant as on the date the written statement was filed. Therefore, mere admission of title of late John Thimma Reddy at one point of time in the long and distant past is of no avail to the plaintiffs as by the year 1967, Balaiah's son Narsaiah had denied ownership and possession of the legal heirs of late John Thimma Reddy including the sole plaintiff (since died) over the property by *inter alia* stating that late John Thimma Reddy had sold the property to his father Balaiah way back in the year 1931. The plaintiffs, in the absence of any valid document of title in favour of John Thimma Reddy *inter alia* rely upon the admission of the defendants to establish their case that John Thimma Reddy was the original owner of the property. That admission of the defendants is that Balaiah, long time back (i.e., several decades back, i.e., in 1933 or so) had purchased the property from John Thimma Reddy under an unregistered sale deed and that the said sale deed is admittedly filed in the earlier litigation. The law is well settled that when a party wants to rely upon an admission of the opposite party, it is impermissible to rely upon a portion of the admission, which is favourable and discard other portion, which is unfavourable. Therefore, the Court has to take into consideration the admission as a whole. If one has to go by the admission that Balaiah had purchased several decades back the subject property from John Thimma Reddy under an unregistered sale deed, i.e., a void document, the said aspect would go against the contentions of the plaintiffs, as a person coming into possession of the property under a void document acquires title by prescription after the prescribed period allowed under law for recovery of possession stands expired. This Court shall deal with the aspect of possession and adverse possession a little later. Be that as it may, the evidence brought on record supports the defence that Narsaiah came into possession of the subject property after the death of his father Balaiah. Further, the decree for perpetual injunction obtained as long back as in the year 1969 in the suit O.S.No.81 of 1967 filed by Narsaiah, the vendor of the 2nd defendant, would make it manifest that the plaintiffs' title was denied by the year 1967 and that the plaintiffs who had lost possession of the property had suffered a decree for perpetual injunction at the hands of the said Narsaiah. Therefore, the contention that the title of the plaintiffs was admitted by the defendants is devoid of merit and the rulings in regard to admissions and requirement of pleading do not advance the case of the plaintiffs any further.

12. This takes us to the aspect of possession. The plaintiffs in their pleadings had not claimed physical/khas possession of the subject property. Their claim is that they are in constructive possession. Their specific case is that the suit house has been in their constructive possession and occupation through different tenants such as Cooperative office society, Teachers and more particularly one R.Venkateshwar Rao and also others from time to time and that the rents were being enjoyed by the principals herein. On the other hand, the defence is that the defendants were in possession as tenants under Narsaiah, their vendor, till the 2nd defendant had purchased the property and that later from the date of the purchase of the suit property by the 2nd defendant under exhibit A3 in the year 1973 from Narsaiah, the defendants were and are in possession as absolute owners. The present suit is filed by the plaintiffs in the year 1986 though Narsaiah-the vendor of the 2nd defendant had denied the title of the plaintiffs in his plaint in O.S.No.81 of 1967 filed in the year 1967 itself. Further, in the instant suit, the relief of recovery of possession was subsequently added by way of an amendment as the suit was originally filed for declaration of title, confirmation of possession and perpetual injunction. The present defendants are claiming title through Narsaiah who had thus denied title of the plaintiffs herein even by the year 1967. Though the specific case of the plaintiffs is that the property was let out to cooperative office society and subsequently to R.Venkateshwar Rao and afterwards to some other tenants, the evidence brought on record, particularly the deposition of PW1 would show that ultimately the property was in the occupation of the husband of the 2nd defendant as a tenant since 1957-58. It is not the pleaded case of the plaintiffs that they had let out the property at any point of time to the husband of the 2nd defendant. Further, there is no pleading in the plaint that the property was let out by the plaintiffs to the Food Corporation of India and later to the husband of the 2nd defendant. Thus, without a foundation in the pleading, the plaintiffs had introduced evidence to the effect that the subject property/suit house was let out to Food Corporation of India and that subsequently, the Food Corporation of India had vacated the property and delivered possession of the property to their agent Jaigopal, and that he had sublet the premises to the husband of the 2nd defendant, without their consent. Neither the said R.Venkateswar Rao, who was said to be tenant nor Jaigopal, the person who was said to be an agent were examined by the plaintiffs. Obviously, this theory was introduced at trial without a foundation in the pleadings to explain away the long possession of the Food Corporation of India as a tenant under the 2nd defendant after the purchase of the property by the 2nd defendant in the year 1973 from Narsaiah. In regard to this aspect of possession, the defendants had specifically pleaded in the defence as follows: 'The property was leased out to Food Corporation of India, a statutory body since 01.03.1974 as the defendants have changed their place of residence from Medak to Hyderabad during that period. The Food Corporation of India was a tenant of the defendants till the end of the year 1985 continuously and at the time of vacating the premises had addressed a letter to the defendant no.2 asking her to take possession on 17.12.1985. Consequently, vacant possession was delivered to the said defendant's son on 19.12.1985 on behalf of the 2nd defendant. On the request of the defendant no.2 herein, the Food Corporation of India has undertaken to pay the arrears of electricity bill on 19.12.1985. The water and electricity connections were obtained in the name of the defendant no.1 in the year 1973 and the said connections are being continued in the name of the 1st defendant even till today.' It is also pleaded that at the time of filing the written statement, the suit schedule premises is under the occupation of Vivekananda School, a tenant of the defendants herein. A careful perusal of the evidence, particularly the exhibits B2 to B79 and B90 to B94 and B177 would clinchingly show that the Food Corporation of India was in possession of the suit premises as the tenant of the 2nd defendant and that it vacated the suit premises on 19.12.1985. DW4, an Officer concerned of the Food Corporation of India had deposed that the Food Corporation of India delivered possession to the husband of the 2nd defendant. The said fact is also evident from the contents of exhibit B177. The evidence also would show that the agent of the plaintiff had tried to trespass into the suit schedule property at that time and that cases were registered as is evident from exhibits A48 and 49. The evidence of DW4 on a plain perusal would make it manifest that the Food Corporation of India was a tenant of the 2nd defendant in the suit premises from March 1974 to 19.12.1985. It is pertinent to recall that the 2nd defendant had purchased the property in the year 1973 under the original of exhibit A3. The pleading of the defendants and the evidence brought on record also would show that after the Food Corporation of India had vacated the property, the property was leased out to Vivekananda School by the defendants. Therefore, even the constructive possession through the tenants as pleaded by the plaintiffs is not established by any evidence worthy of credit. Therefore, the courts below had recorded concurrent findings against the plaintiffs on this aspect. Therefore, neither lawful title of the plaintiffs as on the date of the suit nor even their long/constructive possession over the suit schedule property is established. The plaintiffs' failure to establish possession coupled with the perpetual injunction decree granted against the plaintiffs and others in the year 1969 in favour of Narsaiah, the vendor of the 2nd defendant, together with the fact that the said Narsaiah had sold the plaint schedule house to the 2nd defendant under a regular registered sale deed in the year 1973 are sufficient to safely hold that the plaintiffs were never in possession of the suit schedule property from 1967 onwards in any capacity. In view of the further fact that the plaintiff's plea of constructive possession is not established and that the husband of the 2nd defendant was in possession as a tenant of the property even prior to 1973 would only lead to one safe conclusion that Narsaiah, the vendor of the 2nd defendant, was having right, title and interest in the property as against the plaintiffs and other legal heirs of late John Thimma Reddy. The defendants had sufficiently established that Balaiah was in possession since a long time, i.e., from 1931 or so till his death in the year 1953 and that on his death his son-Narsaiah came into possession; and that the said Narsaiah having come into possession had continued in possession for a long time, and that later the 1st plaintiff brought a suit for partition and that on that the said Narsaiah having had filed the suit bearing O.S.no.81 of 1967 had denied the title and possession of the plaintiffs and had obtained a decree for perpetual injunction in the said suit in the year 1969 against the plaintiffs and other legal heirs of late John Thimma Reddy; and that, therefore, Narsaiah had thus got valid and perfect title by the year 1973 in which year he had sold the property to the 2nd defendant. Therefore, in the absence of either physical or constructive possession of the plaintiffs of the suit property since a very long time, i.e., since 1967 till the instant suit was instituted in the year 1986 coupled with the fact that the possession of the property was with Narsaiah and his tenants for a long time even prior to 1973 and the further fact that he having obtained a perpetual injunction had sold the property in the year 1973 to the 2nd defendant and that thereafter, the 2nd defendant had continued in possession and that the 2nd defendant had also leased out the property to Food Corporation of India would make it manifest that since 1973, the possession of the 2nd defendant is in the capacity of a owner exercising ordinary rights of ownership.

13. It is now necessary to also deal with the following contentions of the plaintiffs: 'The 2nd defendant was put in possession of the suit property as a tenant. By payment of rent admittedly to the Court Commissioner in the partition suit *inter se* among the family members of the plaintiffs, the husband of the 2nd defendant had admitted that he is a tenant in the property. His said conduct in payment of rent to the Court Commissioner is enough to show that he was allowed to use the property and was in possession of the property in the capacity of a tenant. Therefore, he cannot deny the tile of the plaintiffs. The 2nd defendant, who is his wife, also cannot deny the title of the plaintiffs. On mere non-payment of rents for a long time by the 2nd defendant/tenant to the landlords, it cannot be said that the landlords have no title. The tenant is precluded under law from denying the title of the landlords.' While dealing with these contentions, what is to be noted is that the courts below had concurrently held that there is no foundation in the pleading that the plaintiffs had let out the property to Food Corporation of India and that after the Food Corporation of India had vacated the property, the property was let out to the husband of the 2nd defendant. Therefore, any amount of evidence without foundation in the pleadings cannot be looked into, as per the settled legal position. Be that as it may, as already noted, the evidence on record would show that the Food Corporation of India was a tenant of the 2nd defendant and not the plaintiffs. Further, when a suit for partition was brought, the 2nd defendant's husband, who was in possession as a tenant by then having been inducted into possession by Narsaiah, had either offered to pay the rent to the Court Commissioner appointed in the suit for partition or in fact paid the rent to the said Commissioner is of no avail to the plaintiffs as by then the husband of the 2nd defendant was not a tenant under the plaintiffs. This contention is also devoid of merit for the reason that the husband of the 2nd defendant after having participated in the court auction and depositing the 1/4th security amount as the successful bidder had later withdrawn the said amount with the permission of the court by filing an interlocutory application by bringing to the notice of the Court the suit for perpetual injunction filed by Narsaiah. In fact, the 2nd defendant had later purchased the property from Narsaiah in the year 1973 after the suit of Narsaiah was decreed in the year 1969. When there is no pleading and proof that the husband of the 2nd defendant and the 2nd defendant are the tenants under the plaintiffs, the contentions that tenant cannot deny title without surrendering possession and the other contentions on the premise that the 2nd defendant is a tenant of the plaintiffs are all devoid of merit and do not merit consideration.

14. In this instant suit, there is no need in fact to go into the other contentions in regard to *res judicata* and deal with the question whether the *ex parte* decree in the perpetual injunction suit operates as *res judicata* as the courts below had concurrently held that the plaintiffs could not succeed in establishing their title and their right to recover the suit schedule property from the defendants. This Court on an analytical examination of the facts and evidence and for the reasons stated above finds itself in agreement with the said findings of the courts below. Be that as it may, the learned senior counsel for the plaintiffs/appellants while contending that an *ex parte* decree does not operate as *res judicata* had placed reliance on the following decisions:

(a) In **Ramji Gupta and another v. Gopi Krishan Agrawal (D) and**

others[18]**,** on the aspect of *res judicata,* it was held as follows:

> **'In order to operate as *res judicata,* the finding must be such, that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the Court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case, cannot be made the basis for a plea of *res judicata.* A question regarding title in a small cause suit, may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Causes Court, *res judicata* cannot be pleaded as a bar in the subsequent regular suit, for the determination or enforcement of any right or interest in the immovable property. (Vide *Dhulabai etc., v. State of MP and another,* AIR 1969 SC 78; Smt.Gangabai W/o.Rambilas Gilda v. Smt.Chhabubai W/o.Pukharajji Gandhi, (1982) 1 SCC 4 = AIR 1982 SC 20; *Life Insurance Corporation of India v. M/s.India Automiles & Co., and others,* AIR 1991 SC 884 and *Rameshwar Dayal v. Banda (Dead) through His LRs, and another,* (1993) 1 SCC 531 = 1993 AIR SCW 594)**

(b) In **Peruri Manikyamba @ Mani v. Agraharapu Veera Venkata Satyanrayana Murthy and another**[19]**,** the facts of the cited case disclose that in a suit for perpetual injunction simplicitor the plaintiff and defendant had relied upon the respective Wills. Having regard to the facts and pleadings in this cited case, this Court had held that the adjudication by the trial court upon the validity of respective Wills propounded by the plaintiff and the defendant is not proper. However in the cited decisions, this court had left it open to the 1st respondent to work out his remedies in accordance with law while allowing the appeal.

14.1 It is now necessary to refer to the decision of the Supreme Court in **Saroja v. Chinnusamy (D) by L.Rs**[20] wherein, the Supreme Court had considered the general principles of *res judicata* which have been incorporated in Section 11 of the code while dealing with the question 'Whether the High Court was justified in holding the *ex parte* decree passed in favour of Sarora and her minor children Suguthamani and Ramesh would operate as *res judicata* in the subsequently filed suit at the instance of the appellants and respondents'. While answering the said question, the Hon'ble Supreme Court had held as follows:

> "In this connection, reference can be made to a decision of Madras High Court in the case of *Arukkani Ammal v. Guruswamy* [The Law Weekly Vol.100 (1987) 707] which was also relied on by the first appellate court. The Madras High Court in that decision observed as follows:
>
>> It is also difficult to appreciate the view taken by the District Munsif that ex parte decree cannot be considered to be 'full decree on merits'. *A decree which is passed ex parte is as good and effective as a decree passed after contest. Before the ex parte is passed, the court has to hold that the averments in the plaint and the claim in the suit have been proved. It is, therefore, difficult to endorse the observation made by the Principal District Munsif that such a decree cannot be considered to be a decree passed on merits. It is undoubtedly a decree which is passed without contest; but it is only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court, that an occasion to pass an ex parte decree can arise.*
>
> (Emphasis supplied)
>
> We are in full agreement with this view of the Madras High Court holding that a decree which is passed ex parte is as good and effective as a decree passed after contest. A similar view has also been expressed by a Division Bench of the Allahabad High Court in the case of *Bramhanand Rai v. Dy. Director of Consolidation, Ghazipur* AIR1987All100.
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In conclusion, the Supreme Court had held in the cited case as follows:

> "This being the position and in view of our discussions made hereinabove, we hold that by virtue of the *ex parte* decree passed in the former suit, the subsequent suit filed by the appellant is hit by *res*

***judicata.*”**

A reading of the decision of the Supreme Court would show that an *ex parte* decree also would operate as *res judicata*.

14.2 It is discernible from the provision of law that in order to constitute *res judicata*, the following conditions must be satisfied -

1. There must be two suits - one former suit and the other subsequent suit;
2. The Court, which decided the former suit, must be competent to try the subsequent suit;
3. The matter directly and substantially in issue must be the same either actually or constructively in both the suits.
4. The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the former suit;
5. The parties to the suits or the parties under whom they or any of them claim must be the same in both the suits;
6. The parties in both the suits must have litigated under the same title.

In the case on hand, it is not in dispute that all the above conditions stand satisfied even though the decree in the perpetual injunction suit is an *ex parte* decree. That decree, in the well considered view of this court, operates as estoppel by record and precludes the plaintiffs from contending contrary to the decree that they are in possession of the property and that the defendants had trespassed into the property during the pendency of this instant suit.

15. Coming finally to the issue of adverse possession, as per the settled law which was already stated supra from the ratios in the decisions, the question of establishment of adverse possession by the defendants in order to non-suit the plaintiffs would arise if only the plaintiffs are successful in establishing their title to the property and right to recover possession from the defendants. In this case, the plaintiffs could not establish their title and their consequential right to recover possession from the defendants. In the case on hand, there is no need therefore to go into the issue of adverse possession. However, since a contention was raised, it is appropriate to deal with the same to give a quietus to the *lis*. Coming to the contention of the plaintiffs in regard to lack of adequate pleading in regard to adverse possession, what is to be noted is that in the additional written statement filed in reply to the amended plaint seeking recovery of possession, the defendants have clearly stated that the 2nd defendant has become the absolute owner of the suit property having purchased the same from Narsaiah in the year 1973 and that the 2nd defendant has been in continuous possession as absolute owner from the date of purchase, i.e., 09.11.1973 and that earlier the 2nd defendant was in possession as a tenant with her husband in the suit house having taken the same on lease from Narsaiah and that the suit for possession is clearly barred by time as the suit was filed more than 12 years after the 2nd defendant had purchased the property and 55 years after Thimma Reddy lost his possession and that the plaintiff and his principals have no valid title or possession over the suit properties since 1931 and from 08.12.1967 after the suit for perpetual injunction filed by late Narsaiah was decreed on 12.02.1969 against the plaintiffs and others and that under Section 27 of the Indian Limitation Act, the plaintiffs title is extinguished.' Therefore, the contention that there is no adequate pleading in the defence is not correct. The next contention is that since the defendants had claimed title under the sale deed of the year 1973 executed by Narsaiah the plea of adverse possession or acquisition of title by prescription is not open to the defendants as the said plea is inconsistent to the plea of title. In this regard, this Court had already referred to the ratio in the decision in **L.N.Aswathamma and another** (11 supra), wherein the legal position on a similar question was laid down. The facts of the instant case show that the defendants' case is that the husband of the 2nd defendant and the 2nd defendant were in possession as a tenants under Narsaiah from 1957 onwards but not under the plaintiffs and that the 2nd defendant became the owner by purchasing the suit schedule property from the said Narsaiah in the year 1973; and the defendants' alternative case is that if Narsaiah did not have title, their possession was hostile to the true owners in view of the fact that they had been in possession by setting up title in Narsaiah and later in the 2nd defendant. Having regard to the ratio in the decision of the Supreme Court referred to supra, which squarely applies to the facts of the case, the contention of the plaintiffs that the alternate plea of adverse possession or acquisition of title by prescription is not open to the defendants being inconsistent with the main plea stands rejected. Coming to the merits of this issue, it is to be first noted that in the suit for perpetual injunction in O.S.81 of 1967 which was filed by Y.Narsaiah against the plaintiffs herein and others, who are the legal heirs of late John Thimma Reddy, the plaintiffs herein and others who are the defendants therein had entered appearance and some of the defendants had also filed a written statement; however, the defendants including the plaintiffs herein had remained *ex parte* and ultimately, an *ex parte* decree was passed in the year 1969 in that suit. In the said suit the lawful possession of Narsaiah was upheld while granting a decree for perpetual injunction in his favour. In this suit of the year 1967, Narsaiah had clearly averred that the defendants herein are tenants in the property. Even the documents filed by the plaintiffs also show possession of the husband of the 2nd defendant over the suit schedule property as a tenant from 1960 onwards and the case of the defendants is that they were inducted into the property as tenants by Narsaiah; and, the evidence on record also would show that either the husband of the 2nd defendant or the 2nd defendant never paid any rent to the plaintiffs. The plaintiffs also did not plead and could not prove that they had inducted the husband of the 2nd defendant as a tenant into the property. Having purchased the property in the year 1973 the 2nd defendant had leased out the property to the Food Corporation of India is evident from exhibits B136 to B165, exhibits B172 to B174 and B175. In the written statement in that former suit, it was averred by the present plaintiffs that the property was leased out by them to one Venkateswara Rao and that without their consent he had leased out half portion to the husband of the 2nd defendant towards the end of 1958 or early 1959. Therefore, the possession of the husband of the 2nd defendant even by the year 1958 or 1959 was admitted by the plaintiffs. The defendants herein thus continued in possession for a long time as tenants till the 2nd defendant had purchased the property in the year 1973 is borne out by record. As per the evidence brought on record, no rents were paid to the present plaintiffs at any point of time by the 2nd defendant or her husband. On the other hand, the evidence would make it manifest that the defendants are the tenants under Narsaiah and therefore, the possession of the defendants as tenants and the constructive possession of Narsaiah over the suit schedule property since 1957/1958 onwards is totally hostile to the plaintiffs. The Court below had held that there is no proof that the plaintiffs were in possession of the property from 1933 to 1967. Therefore, to the extent that the plaintiffs are not either in khas possession or constructive possession of the suit schedule property is clinchingly established by the *ex parte* decree dated 12.02.1969 in the perpetual injunction suit and the evidence brought on record in this suit. Though Narsaiah had denied title of the plaintiffs and asserted title in himself and had obtained a decree for perpetual injunction in the year 1969, the plaintiffs did not bring a suit for declaration of title and recovery of possession till the possession which was hostile to them had blossomed into prescriptive title by way of adverse possession. The instant suit was brought belatedly in the year 1986, i.e., on 27.03.1986 that too, for declaration of title and confirmation of possession and later by way of an amendment the relief of recovery of possession was sought. Both the courts below had concurrently held that the defendants are in continuous possession of the plaint schedule property from 1957 to 1973 as tenants and as absolute owners since 1973 and that the suit is barred by limitation and that the plaintiffs are not entitled to recover vacant possession of the plaint schedule property from the defendants. The title by prescription is claimed by the defendants based on long possession and title acquired from Narsaiah under the sale deed dated 09.11.1973 and the extinguishment of the right of the plaintiffs and their predecessor John Thimma Reddy by virtue of provision of Section 27 of the Indian Limitation Act. As per the provision of Section 27 of the Indian Limitation Act, the law is clear that when a person acquires title by adverse possession and the real owners fail to recover possession from such occupant of the property within the statutory period, the right of the owners to such property stands extinguished at the determination of the period limited to the owners for instituting a suit for possession of the property. Therefore, this section of law of limitation not only bars the remedy of the real owners but also extinguishes their title/right to the property. Further, in the decision in **M. Lakshmi Devamma Vs. Land Acquisition Officer** [AIR 1985 AP 200] a Division Bench of this Court held as follows: "It is now well settled that in the case of an invalid or void sale the purchaser would be in possession and adverse to the title of the vendor and that even though the sale itself does not confer any title immediately still the vendee acquires a valid title on the expiry of 12 years from the date of sale by virtue of the provisions of Sec. 27 of the Indian Limitation Act read with Article 64 thereof. Therefore, even assuming for a moment that the title deed of the year 1973 is void, still the plaintiffs are liable to be non-suited.

15.1 The learned senior counsel for the plaintiffs lastly while placing reliance on a decision in **Vishwanath Sitaram Agrawal v. Sarla Vishwanath Agrawal**[21] had contended that while exercising the jurisdiction under Section 100 of the Code, this Court can interfere with concurrent findings of fact, which are not supported by evidence and when inferences are drawn in a stretched and unacceptable manner and when the findings can be said to be perverse. In the facts and circumstances of the case, this decision is not helpful to the plaintiffs/appellants as the concurrent findings of facts are well supported by evidence and reasons, which are valid and cogent and as there was no perversity either in appreciation of facts and evidence or application of propositions of law to the facts of the case.

16. Having regard to the reasons this Court finds that there is no substance in the questions raised and that the substantial questions are devoid of merit and that the judgments of the courts below wherein concurrent findings of facts well supported by positive and sustainable reasons are recorded do not brook interference.

17. In the result, the Second Appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this second appeal shall stand closed.

M. SEETHARAMA MURTI, J

16th November 2015
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[1] AIR 1979 SUPREME COURT 1652

[2] (2002) 5 Supreme Court Cases 337

[3] AIR 2013 SUPREME COURT 1620

[4] 2010 AIR SCW 5332

[5] AIR 1973 ANDHRA PRADESH 208 (V 60 C 59)

[6] 2010 (1) ALD 40 (SC)

[7] AIR 1979 SUPREME COURT 1701

[8] 2010 (4) ALD 244 (DB)

[9] 2012 (5) ALD 41 (SC)

[10] 2014 (1) ALD 634

[11] (2009) 13 Supreme Court Cases 229

[12] 2014 (2) ALD 176

[13] AIR 1949 Nagpur 265

[14] (1997) 7 Supreme Court Cases 567

[15] (1992) 4 Supreme Court Cases 264

[16] 2013 (2) ALD 382

[17] LAWS (APH)-2014-7-9

[18] 2013 (4) ALD 178 (SC)

[19] 2013 (5) ALD 629 (DB)

[20] AIR 2007 SC 3067

[21] AIR 2012 SUPREME COURT 2586