

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.743 of 2000

JUDGMENT:

This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the defendants 2, 4 to 10 and 11 is directed against the judgment and decree dated 20.07.2000 of the learned Senior Civil Judge, Chodavaram of Visakhapatnam District passed in A.S. no.10 of 1994. The learned Senior Civil Judge while dismissing the said first appeal had confirmed the decree and judgment dated 03.02.1993 of the learned Principal District Munsif, Chodavaram passed in O.S.no.272 of 1996 filed for declaration of right and title of the plaintiffs over the Ac.0.30 cents and Ac.0.15 cents in two items, i.e., a total of Ac.0.45 cents in Sy.No.124/3 in Lot I and Ac.0.36 cents, Ac.0.20 cents and Ac.0.20 cents, total Ac.0.76 cents in three items in Lot II, [patta no.375], more fully described in the schedule annexed to the plaint and for consequential relief of recovery of possession after evicting the defendants therefrom and for determination of future mesne profits.

2. I have heard the submissions of the learned Senior Counsel for the appellants/defendants 1 and 2 and the submissions of the learned counsel for the respondents 1 and 2/plaintiffs. The 3rd defendant is added as third respondent and he is stated to be not a necessary party. I have perused the material record.

3. The parties in this appeal shall hereinafter be referred to as 'the appellants' and 'the plaintiffs' for convenience and clarity.

4. At the time of admission of this second appeal, the substantial questions of law mentioned in ground nos. (a) to (f) of the memorandum of grounds of appeal were taken note of as the substantial questions involved in this appeal. The said questions read as under:

“a) Whether the decree and judgment of the lower appellate court in confirming the decree and judgment of the trial court and decreeing the suit for Declaration of title and recovery of possession, is legally sustainable?

b) Whether the courts below can ignore a specific mandatory provision

of law i.e, Order 23 Rule 4 C.P.C, and decree a suit for declaration of title and recovery of possession, when a similar suit against the same defendant seeking same relief with respect to the very same schedule properties was dismissed in O.S.96/72, without seeking permission to file any fresh suit?

c) In a suit for declaration of title and recovery of possession, in the absence of any cogent evidence, whether the courts below are legally correct in holding that title passes to the plaintiff by a mere inadvertent admission of the defendant?

d) Whether the lower Appellate Court is legally correct in dismissing the I.A filed for receiving additional evidence under Order 41 Rule 27 by holding that the application was filed belatedly, without even caring to peruse whether the ingredients of Order 41 Rule 27 are satisfied or not?

e) Whether the lower Appellate court is legally correct in dismissing the I.A filed for amendment of written statement, holding that it was filed belatedly, especially in the peculiar facts and circumstances of the case?

f) Whether a suit for declaration of title and recovery of possession can be decreed by the courts below merely basing on the weakness of the case of the defendant, even though the plaintiffs miserably failed to prove their case?"

(Reproduced verbatim)

5. The introductory facts are as follows:

The plaintiffs had brought a suit against the appellants and the 3rd respondent herein for declaration of their title in respect of the aforementioned plaint schedule lands and for recovery of possession of the same from the defendants after evicting the defendants therefrom and for mesne profits. The 2nd defendant had filed a written statement and had resisted the suit. The same was adopted by the 1st defendant. On the death of the 1st defendant, defendants 4 to 11 being his legal representatives were brought on record. Basing on the pleadings of the parties, the following issues and additional issue were framed by the trial court.

Issues:

1. **Whether the plaintiff is entitled to the declaration as prayed for?**
2. **Whether the plaintiff is entitled to permanent injunction as prayed for?**

3. **To what relief?**

Additional Issue:

Whether the suit is hit by *res judicata*?

At trial, PWs 1 to 3 were examined and exhibits A1 to A 8 were marked on the side of the plaintiffs. DWs 1 to 4 were examined and exhibits B1 to B15 were marked on the side of the defendants. On merits, the trial Court had decreed the suit of the plaintiffs as prayed for. The 1st appeal preferred by the present appellants/defendants, as already noted, was dismissed confirming the decree and judgment of the trial Court. Therefore, the appellants are before this Court.

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

In a suit for declaration of right and title and recovery of possession, not only the onus of proof but also the legal burden, which never shifts, are on the plaintiffs. However, the plaintiffs had failed to prove their right, title and interest in respect of the plaint schedule property. The courts below have wrongly cast the burden on the appellants. Even though the plaintiffs had failed to establish their title as required under law and also the right to recover possession of the plaint schedule property from the appellants, the courts below have erroneously decreed the suit of the plaintiffs taking into consideration the weakness of the appellants. The mandatory provisions of Order XXIII Rule 1(4) of the Code were not followed. Admittedly, the 1st plaintiff and the 2nd plaintiff together filed a similar suit against B.Gandappa (1st defendant herein) in O.S.No.96 of 1972 on the file of the Principal District Munsif, Chodavaram for declaration of title and possession of the very same properties and that suit was not pressed by the plaintiffs herein and hence that suit was dismissed on 27.09.1972. At the time of not pressing the said suit, no permission was sought from the said court to institute a fresh suit for the same reliefs in respect of the very same properties. Hence, the present suit filed for the same relief in respect of the same properties is not maintainable in view of the provisions of Order XXIII of the Code and in view of the judgment of this Court in **Devarapu Narasimharao v. Yerrbothula Peda Venkaiah**. The courts below ought to have seen that the present suit is hit by the provisions of the rules of Order XXIII of the Code. No cogent evidence proving the title was adduced. On an inadvertent admission that title

passed to the plaintiffs made by a defendant in the evidence was relied upon erroneously and that approach of the courts below is legally not correct. The lower appellate Court had erroneously dismissed the interlocutory application for receiving additional evidence solely on the ground that it was filed belatedly. The court below did not properly consider the law governing the application filed for according permission to adduce additional evidence. Even the application filed for amendment of written statement was also dismissed without taking into consideration the facts and circumstances, which are peculiar to the case, and by observing that it was filed belatedly. PW1 had admitted that he had executed a letter in the mediation and that they had withdrawn the suit O.S.no.96 of 1972 and that suit was dismissed as not pressed. Further, the courts below had grossly erred in ignoring the said admission and in holding that PW1 did not execute exhibit B14 letter. The courts below had grossly erred in ignoring the said admission and the provisions of law, which are applicable to the facts of the case, and in holding that the suit is maintainable and is not barred by law and principles of *res judicata*. The plaintiffs had failed to file any documentary evidence to show that part of the suit schedule properties are their ancestral properties. On the admission inadvertently made while drafting the written statement by the defendants' advocate without the instructions of the client, the suit shall not be decreed as such an admission is a weak piece of evidence without any evidentiary value. Title cannot be determined by mere admission in view of the judgment of the Supreme Court in **Ambika Prasad Thakur v. Ram Ekbal Rai (died) by his legal representatives and others**. The admission in the written statement was made inadvertently and by mistake by the advocate without instructions from any of the defendants and this aspect was asserted in the cross-examination of DW1. The submissions of the advocate made at the time of arguments clearly prove the same. These important aspects were ignored by the trial Court. The admission of facts made by a counsel is not binding on the appellants and is a weak piece of evidence and has no probative value. When an application in I.A.no.111 of 2000 seeking additional evidence; and, I.A.no.112 of 2000 are filed before the court below to rectify the wrong admission made in the written statement by seeking amendment, the Court below had erroneously dismissed the said applications. The reasons given by the Court below while dismissing the said applications are legally not valid. The appellants ought not to be penalised for the lapses of the counsel. Their application for amendment seeking rectification of the erroneous admission ought to have been allowed. It is the case of the appellants that the original defendant no.1-

Bora Gondappa (since died) was a drunkard and that taking advantage, the plaintiffs had managed to obtain his signatures on the documents without paying any consideration; and, this crucial aspect was ignored by the court below. The courts below did not properly appreciate the evidence of PWs 1 and 3 wherein there are discrepancies in respect of exhibit A1 registered sale deed, which is legally not valid. The courts below had failed to consider the plea of adverse possession of the appellants in the proper perspective. The courts below had erred in holding that the plaintiffs 1 and 2 were in possession and enjoyment of the suit schedule property prior to the suit. The trial court without formulating necessary points and without appreciating the evidence independently had dismissed the first appeal illegally and had failed to follow the procedure established by law while dismissing the first appeal.

4. On the other hand, the learned counsel for the respondents/plaintiffs, while supporting the judgment of the court below, had contended as follows:

Only an issue of *res judicata* was raised as an additional issue by the appellants before the courts below. They did not raise the plea based on Order XXIII before the courts below. For the first time that plea is raised before this Court. The said plea is a mixed question of fact and law and not a pure question of law and that therefore, it is impermissible for the defendants/ appellants to raise the said plea before this court in the second appeal in view of the narrow scope of Section 100 of the Code. The earlier suit was not withdrawn and was not dismissed as not pressed as being contended by the appellants. The admission made in the pleadings is a substantive piece of evidence and the admission is the best form of proof. The admission since made in the pleadings operates as estoppel. Further, the admission is unambiguous and clear. In fact, when the witnesses of the plaintiffs were examined, no suggestion was put to the PWs by the counsel for the defendants to the effect that inadvertently and without the instructions from the defendants the admissions were made in the written statement. Added to this, DW1 also did not state so in his examination-in-chief; and, this theory that the admissions were made, inadvertently and by mistake, by the counsel without instructions from the defendants was for the first time developed during the course of cross-examination of DW1 and as an afterthought. An application seeking the amendment of written statement to withdraw the admissions was filed belatedly during the pendency of the first appeal and not when

the suit was pending before the trial Court. The said application was filed only to get over the voluntary admissions made consciously by the appellants, who are fully aware of the facts. Now, the appellants cannot be permitted to raise any contentions that the admissions cannot be considered. They cannot be permitted to wriggle out of the admissions and defeat the valuable rights that are accrued to the plaintiffs. In view of the facts of the case, any attempts to get over the admission by making false allegations against the counsel is impermissible under law, as it causes prejudice to the plaintiffs. The 1st appellate court had recorded valid and sufficient reasons for disallowing the application seeking amendment and also the application filed for according permission to adduce additional evidence. None of the questions raised are pure questions of law. The questions raised are mixed questions of fact and law and not pure questions of law. The second appeal is devoid of merit and is liable to be dismissed.

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 plaintiff, in brief, is this:

The 1st plaintiff and the father of the 2nd plaintiff are brothers. The item no.2 of Lot I and items 1 and 3 of Lot II of the plaint schedule are ancestral properties of the plaintiffs. The 1st plaintiff and the father of the 2nd plaintiff have jointly purchased item no.1 of lot I and item no.2 of lot II of the plaint schedule from the 1st defendant under registered sale deed dated 02.12.1960 and had obtained possession of the same. The said sale deed is true, valid and binding on the appellants. The 1st plaintiff and the father of the 2nd plaintiff used to jointly enjoy the plaint schedule lands. They had subsequently partitioned the same. After the death of the father of the 2nd plaintiff, the 1st plaintiff used to manage the entire family properties and there is no conflict of interest between them. The plaintiffs have been in continuous and uninterrupted possession and enjoyment of the plaint schedule lands in their own right and are paying land revenue to the Government. The plaintiffs had also perfected their rights even by adverse possession. The appellants have no manner of right whatsoever. However, due to disputes, which had arisen prior to the institution of the suit, the defendant and one Bhooloka, who is a life convict, came to the plaint schedule lands and had high handedly and illegally trespassed into the

plaint schedule lands and had cut away banana plants raised by the plaintiffs in the plaint schedule lands and also beat the wife of the 2nd plaintiff. A criminal case in C.C.No.59 of 1986 is also pending on the file of the learned Additional District Munsif's court, Chodavaram. The defendants bore grudge and highhandedly and illegally trespassed into the plaint schedule land on 06.05.1986 and had denied the plaintiffs' title having dispossessed the plaintiffs. Hence the suit is filed.

6. The common defence of the defendants 1 and 2 is as follows:

One Bora Pydayya is the father of the 1st defendant and one B.Gondappa is the grandfather of Bora Gondappa (the 1st defendant). Bora Gondappa had four sons and a daughter by name Chellamma. The husband of Chellamma died when she is carrying Modamma, the wife of Bora Pydayya. Subsequent to the birth of Modamma, the said Chellamma eloped with one Issarapu Sahib. The said Chellamma begot Issarapu Appanna through the said Sahib. The 1st plaintiff and the father of the 2nd plaintiff are the sons of Issarapu Appanna and they are nephews of the 1st defendant. After the birth of the Issarapu Appanna, Issarapu Sahib had left Chellamma. Ever since, she came to the house of the Bora Pydayya, the father of the 1st defendant. The marriage of the Issarapu Appanna was performed by Bora Pydayya with his daughter Pydamma. The plaintiffs' father had no properties of his own and did not inherit any properties from his father Issarapu Sahib. Therefore, the plaintiffs did not acquire any ancestral properties through their father or their grandfather. The plaint schedule properties and some other properties are the ancestral properties of the 1st defendant and he had inherited those properties through his father after the partition with his brothers; and, ever since the defendants' family is enjoying those properties and so the plaint schedule properties are the ancestral properties of the 1st defendant. The father of the plaintiffs by name Appanna was brought up by the mother Chellamma in the house of the 1st defendant's father who is brother of the said Chellama. The 1st plaintiff's father Appanna used to assist the Bora Pydayya in the agricultural operations. The said Pydayya gave item no.2 of Lot I and items 1 and 3 of Lot II to the 1st plaintiff's father. The 2nd plaintiff used to live along with 1st defendant and his father. The plaintiffs used to enjoy the item no.2 of the Lot no.I and items nos.1 and 3 of Lot no.II. They were given separate possession and enjoyment about five or six years back. These

defendants never denied the title and possession of the plaintiffs over item no.1 of Lot No.1 and items 1 and 3 of Lot no.II. Insofar as item no.1 of lot I and item nos. 2 and 3 of lot no.II, the plaintiffs have no title or possession at any time and they are not entitled to any of the reliefs as claimed in the plaint. The marriage of the 2nd defendant was performed about 1 ½ years back. The daughter of Bhuloka was given in marriage to the 2nd defendant. During that time, the said Bhuloka asked the plaintiffs and the 1st defendant's father to give him a share alleging that he would also get a share in the properties. But the 1st defendant refused to do so. The plaintiffs were under the impression that these defendants are responsible for the acts of the said Bhuloka. The 1st defendant is a habitual drunkard and he is always in a drunken state. The 1st plaintiff and his brother taking advantage of the 1st defendant's weakness might have obtained some documents in their favour. The above said sale deed was never acted upon. Item no.1 of lot I and item no.2 of Lot II are in possession and enjoyment of the defendants with absolute rights and the said sale deed is a void document. The plaintiffs were never in possession. Even if the sale deed is proved to be true, the plaintiffs will not have any title as these defendants perfected their title by adverse possession. So, the plaintiffs are not entitled to any reliefs in regard to title or possession. The total extent of the land given by the 1st defendant is only Ac.0.30 cents. The defendants have no objection to pass a decree for item no.2 of Lot I and item nos. 1 and 3 of Lot II of the plaint schedule. In regard to item no.1 of Lot I and item no.2 of Lot II of the plaint schedule properties, the plaintiffs have to prove their title and possession and the plaintiffs have to prove the truth and validity of the sale deed. The plaintiffs had filed this speculative suit only to harass the defendants.

6.1 The defence of the defendants 4 to 11 in the additional written statement filed by them consequent on the death of the 1st defendant, in brief, is as follows:

The suit O.S.No.96 of 1972 was filed by the same plaintiff in respect of the same properties involved in the suit against the same defendant and the suit was dismissed on 04.11.1972 as adjusted out of court. Having waited for such a long period, the plaintiffs have filed the present suit in respect of the same schedule property. Hence, the suit is not maintainable.

7. To begin with, it is apt to mention that insofar as item no.2 of lot I and items nos. 1 and 3 of Lot II of the plaint schedule, both the courts below taking into consideration the admissions of the defendants 1 and 2 in their defence in regard to right, title and interest of the plaintiffs in respect of the said properties had held that the plaintiffs are entitled to a decree for declaration of title. Accordingly, the courts below had granted a decree in favour of the plaintiffs and against the 2nd defendant and the legal representatives of the deceased 1st defendant, who are the other defendants. The appellants are now contending before this court that the said admissions in the written statement of defendants 1 and 2 are not voluntary admissions and that the said admissions are not made on the instructions of the defendants 1 and 2 and that the same are only wrongly made by the advocate inadvertently and by mistake and without instructions from the defendants and that the said aspect was also asserted in the cross-examination of DW1 and the said aspect was also argued by the learned counsel at the time of arguments before the trial court and therefore, the said admissions in the written statement of the defendants 1 and 2 do not bind the defendants and that in any view of the matter, on mere admissions, the plaintiffs are not entitled to a decree for declaration of title and recovery of possession as admissions which are weak pieces of evidence and of weak probative value do not confer title on the plaintiffs in respect of the said items in lots I and II of the plaint schedule property. What is to be noted is that DW1 did not assert this plea in her examination in chief. This line of defence was also not suggested to PWs during their cross-examination. As per the admitted case of the appellants, this theory was introduced for the first time in the cross-examination of DW1. Even at the stage of the trial of the suit, no application for amendment of the written statement was filed and a bona fide attempt was not made to seek permission of the Court to withdraw or explain the admissions. Such an interlocutory application was only filed before the first appellate court during the pendency of the first appeal and that application was rightly dismissed by the Court below having regard to the facts and circumstances of the case. In the well considered view of this court, any contentions without a pleading and contrary to the pleading, particularly having effect of withdrawing the admissions is impermissible under law, particularly in the present context of this second appeal. In the written statement filed on behalf of both the defendants, while denying the right and interest of the plaintiffs over item no.1 of lot no.I and item no.2

of lot no.II of the plaint schedule property, the said defendants insofar as item no.2 of lot I and items nos. 1 and 3 of lot II of the plaint schedule property have specifically made admissions as follows:

“The said Pydayya gave item no.2 of Lot I and items nos. 1 and 3 of Lot II to the 1st plaintiff’s father. The 2nd plaintiff used to live along with 1st defendant and his father. The plaintiffs used to enjoy item no.2 of lot I and item nos. I and 3 of lot II. They were given separate possession and enjoyment about 5 or 6 years back. The defendants never denied the title and possession of the plaintiffs for item no.2 of lot I and items nos. 1 and 3 of lot II.”

“These defendants never denied title to the plaintiffs for item no.2 of lot I and item nos.1 and 3 of lot II. Therefore, these defendants have no objection to pass a decree for the above items. With regards to title for item no.1 of lot I and item nos. 2 and 3 of lot II, the plaintiffs have no title or possession at any time to and they are not entitled to any of the reliefs as claimed in the plaint with regard to those two items.”

Thus, in the written statement, the defendants have specifically denied the title of the plaintiffs in respect of item no.1 of lot I and item no.2 of lot II of the plaint schedule properties while making categorical admission of the plaintiffs’ title and possession in respect of item no.2 of lot I and items nos. 1 and 3 of lot II of the plaint schedule property and they have also specifically averred that the defendants are not denying the title of the plaintiffs in respect of the above said items of the plaint schedule property. These admissions are categorical and unequivocal and bind the defendants 1 and 2 and their successors-in-interest including the appellants. The contention of the plaintiffs is that these items of properties in lots I and II, in respect of which the defendants had admitted their title, are their ancestral properties. Therefore, they cannot be expected to file any document of title like sale deeds or any other documents *inter vivos*. Even their possession is also admitted over the said items of property of the plaint schedule. Moreover, this question being a blend of fact and law and not a pure question of law, cannot be countenanced in this second appeal in view of the narrow compass of Section 100 of the Code and more particularly, when the findings recorded by the courts below on this aspect are

plausible and probable and when in the facts and circumstances of the case, this Court is precluded from substituting another view even if such a view is possible. In fact, in the context of the present case, any view contrary to the view taken by the Court below is not possible. Therefore, the first contention of the appellants on the admissions in the written statement of the defendants cannot be countenanced. Order VIII Rule 5 of the Code mandates that every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. The law is also well settled that when the defendants admit the plaintiffs' claim, they cannot be permitted to cross-examine the plaintiff and their witnesses. It is apt to note that the law is also well settled that admissions in pleadings, which are unequivocal and categorical, are the best form of proof on which the parties can rely to succeed in the suit/defence. Moreover at this second appeal stage, the plaintiffs cannot be non suited for not otherwise proving their title for the reason that they had banked upon the admissions of the defendants and proceeded on the assumption that they would succeed on the admissions insofar as item 2 of lot I and items nos. 1 and 3 of lot II of the plaint schedule property. Had the defendants withdrawn these admissions by following the procedure established, perhaps, the plaintiffs would have had an opportunity to adduce other evidence to prove their title possessory/ancestral or otherwise. Since the admissions were very much available on record and are not withdrawn at a time when the matters are pending before the trial Court, the plaintiffs cannot be now non-suited by allowing the defendants to contend that the admissions are made by mistake or inadvertence and without instructions to the counsel or on the ground that they are not binding upon them and are insufficient to grant a decree in favour of the plaintiffs. As per the settled legal position, admissions made in the pleadings by a party in the same proceedings are conclusive and forms a substantive piece of evidence and operate as estoppel. The view of this Court gets reinforced from the decision in **Union of India v. Ibrahim Uddin and Another**. Therefore, the 1st contention advanced to counter the admissions in the written statement in the present context of the matter is devoid of merit and is liable to be rejected. The said contention is accordingly rejected.

8. Dealing with the issue of *res judicata*, it is not a pure question of fact and it is a

blend of fact and law. Both the courts below had recorded concurrent findings on the said issue. This Court finds no grounds calling for interference, more particularly when the earlier suit was disposed of, according to the submissions on behalf of the appellants, as withdrawn without the permission of the Court, but not on merits. Therefore, to the facts of the case the principle enshrined in the doctrine of *res judicata* is not attracted.

9. The Court below had framed a comprehensive point as to whether there are any grounds to allow the appeal and had dealt with in its judgment all the grounds taken in the memorandum of grounds of appeal filed before it and gave a decision supported by valid and cogent reasons. Therefore, the impugned judgment cannot be assailed on a mere procedural defect as there is sufficient compliance of the provision of Order XLI Rule 31 otherwise. The view of this court finds support from the ratio in the decision in **Gorrella Durga Vara Prasada Rao v. Indukuri Ram Raju and others**.

10. Dealing with the plea based on the provision of Order XXIII Rule 1 sub-rules (3) and (4) of the code, the learned senior counsel for the appellants would forcefully contend that a similar suit in O.S.no.96 of 1972 by the same plaintiffs against the same defendants seeking the same relief in respect of the very same properties was dismissed and at the time of getting the suit dismissed as withdrawn, no permission was sought to institute a fresh suit for the same relief in respect of the same property and was granted in the former suit and hence, the present suit is barred under law. On the other hand, the learned counsel for the plaintiffs would contend that the earlier suit was adjusted and that the compromise has nothing to do with the present suit and the earlier suit was not withdrawn as being contended by the defendants/appellants. It is necessary to first refer to the following provisions of law:

Sub-rule (3) and Sub-rule (4) of Order 23 Rule 1 and Section [12](#) of the Code of Civil Procedure read as under:-

Sub-rule (3):

Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect,

or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit

or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

Sub-rule (4):

Where the plaintiff -

(a) abandons any suit or part of claim under Sub-rule (1),

or

(b) withdraws from a suit or part of a claim without the

permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

Section [12](#):

Bar to further suit:- Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

On this aspect no plea was raised in the defence and no issue was framed by the trial court. In the well-considered view of this court, the present contention also is not a pure question of law and it is a mixed question of fact and law. A combined reading of the above provisions of law would make it manifest that where a plaintiff withdraws without permission his suit or part of the claim, he is disentitled to institute a fresh suit in respect of such cause of action. The word 'preclude', which occurs in sub-rule (4) means disentitlement to institute a fresh suit in respect of the same cause of action. This legal proposition finds support from the decision in **Devarapu Narasimhrarao v. Yerrabothula Peda Venkaiah**. Exhibit B15 shows that the suit O.S.No.96 of 1972 was adjusted out of court and therefore it is ordered that the suit is dismissed as adjusted out of court. It does not amount to abandoning the claim in respect of the said suit schedule properties. What was the adjustment is a question of fact and moreover, the schedule of the properties in the said suit would show that the two items of the property in the said suit relate to lands in Sy.No.151/A and Sy.Nos.224 and 225. Therefore, there is no material to hold that to the case on hand, the provisions of sub-rules (3) and (4) of Rule 1 of Order XXIII of the Code are attracted. This contention also being a mixed question of fact and law, this Court, in its well considered view, need not interfere with the concurrent findings of the courts

below.

10. Before parting with the case, it is to be noted that insofar as item 1 of Lot I and item no.2 of lot II, the material record shows that the 1st plaintiff and the father of the 2nd plaintiff had jointly purchased the said items of property under registered sale deed dated 02.12.1960 from the 1st defendant and they had also obtained possession and that since the date of said purchase, the said vendees were and are enjoying the properties by being in continuous possession as owners thereof. The courts below had concurrently held that exhibit A1 sale deed in respect of the above two items of the plaint schedule property is true, valid and binding on the defendants and that it being a thirty year old document the presumption in regard to its due execution and attestation can be safely be drawn. The defence of the defendants in the evidence is that the 1st defendant was a drunkard since 20 years. But, exhibit A1 was executed 30 years back, i.e., prior to the said 20 years time period.

11. Having thus analytically examined the evidence on record, this court finds that the courts below are justified in decreeing the suit of the plaintiffs as prayed for and that there is no substance in the substantial questions of law and that no substantial questions are involved and that this appeal is devoid of merit and is liable to be dismissed. The learned senior counsel for the plaintiffs having placed reliance on **Ibrham uddin** (3rd supra) would contend that in exceptional circumstances the High Court can interfere on a question of fact when factual findings are incorrect. However, in the case on hand, as already noted, there are no circumstances much less exceptional circumstances calling for interference with the findings of the court below which are supported by cogent and valid reasons.

12. Viewed thus, this Court finds that there is no substance in the substantial questions of law raised and that the decree and judgment of the court below, which are impugned, do not call for any interference and that the Second Appeal is devoid of merit and is liable to be dismissed.

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

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

M. SEETHARAMA MURTI, J

12th October 2015

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