

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.1022 OF 2002

JUDGMENT:

The unsuccessful plaintiffs in O.S.No.16 of 1987 on the file of the Principal District Munsif, Kandukur and appellants in A.S.No.34 of 1992 on the file of Senior Civil Judge, Kandukur, preferred this second appeal under Section 100 of C.P.C, challenging the dismissal of the suit by both the Trial Court and confirmed by the Appellate Court on various grounds.

2. For convenience of reference, the ranks given to the parties before the Trial Court in O.S.No.16 of 1987 on the file of the Principal District Munsif, Kandukur will be adopted throughout the judgment.

3. Suit was filed to declare the joint right and title of the plaintiffs and defendants 1 to 4, 8,13,14 and 15 in the plaint schedule kunta and for consequential permanent injunction restraining the defendants, their men and assignees from removing the plaint schedule kunta bund or trees thereon or annexing any portion of the plaint schedule kunta exclusively by the defendants.

4. Thirteen plaintiffs filed suit against fifteen defendants for the aforesaid reliefs. During pendency of the suit, the 6th defendant i.e. Molakalapalli Subbaiah died and his legal heirs were not brought on record before the Trial Court.

5. The case of the plaintiffs in nutshell is that the plaint schedule kunta comprised by Sy.Nos.813 and 814 of Palukur Village is a small private kunta locally known as 'Jinni Avula Kunta' (which will hereinafter be referred to as 'kunta') which is in existence for the past 4 or 5 generations, wherein, the water is stored, being used for irrigation and also for cattle feeding. The plaintiffs and defendants 1 to 4, 8,13 to 15 have been using the kunta to irrigate their lands for raising tobacco and other crops and usufruct of the trees grown on the bund in proportion to their shares. Further, neither the plaintiffs nor the defendants have exclusive right, possession or enjoyment of the kunta land or any part thereto. But, all the plaintiffs and defendants 1 to 4, 8,13 to 15 are entitled to enjoy every part of the bund which is in Sy.No.814 covered by the said kunta. But from the beginning the extent of the kunta is same and even if some exclusive land of some of the defendants is covered by the kunta, the respective owners lost their exclusive right, as it is enjoyed for the last 4 or 5 generations and the said land is merged in kunta. All the sharers are continuously and without any interruption enjoying the kunta peacefully and thus they acquired a prescriptive right over the land covered by S.No.814 along with S.No.813 of Palukur Village. The defendants did raise no objection at any point of time for joint enjoyment of water in kunta and sharing of the usufruct of the trees grown on the bund of the kunta. The plaintiffs prescribed their right to enjoy the usufruct on the bund, though it belongs to

the defendants. While the matter stood thus, the defendants started making attempts to cut the bund on the western side of the kunta with a view to annex a portion of the kunta to their lands situated to the west of the kunta. The defendants have no manner of right to demolish the kunta bund or to annex any portion of the kunta to their lands or to remove exclusively the trees on the bund, as preservation of kunta is essential for its proper enjoyment. Hence, the suit was filed claiming aforesaid reliefs.

6. The defendants 1,2, and 8 filed written statements and resisted the claim of the plaintiffs, *inter alia* contending that the Kunta exclusively lies in S.No.813 of Palukur Village and it's area is Ac.13-90 cents. The land in S.No.814 comprises of Ac.27-15 cents and it is an agricultural land being cultivated by the respective owners. On the Eastern extremity of S.No.814 the kunta lying in S.No.813 extends to an extent of about 30 cents. After excluding Ac.0-30 cents, the rest of the extent in S.No.814 will be about Ac.26-85 cents. The schedule annexed to the plaint and boundaries mentioned in it are not correct. The plaint schedule kunta lying in S.No.813 extends to West into S.No.814 to an extent of Ac.0-30 cents. This Ac.0-30 cents of land lying in S.No.814 belongs to defendants 1 to 4, 8,13 to 15 and the plaintiffs have no right, title, ownership or possession over Ac.0-30 cents. Thus, the defendants are entitled to enjoy the usufruct of trees on the bund on the western side of kunta and the plaintiffs are not entitled to

claim any right to enjoy the usufruct of trees or the trees grown on the bund or enjoy the bund.

7. The defendants specifically denied the alleged bar to demolish the kunta or remove the bund on the western side of kunta. It is specifically contended that, as none of the plaintiffs have got any right, title or possession over the land in S.No.814, the plaintiffs are not entitled to seek declaration for the land in S.No.814 and consequently not entitled to claim consequential relief of injunction and prayed for dismissal of the suit.

8. The defendants 3 to 5, 7,9 to 15 have adopted the written statement filed by defendants 1,2 & 8. 6th defendant had died during the pendency of the suit.

9. Based on the above pleadings, the Trial Court framed the following issues:

- 1. Whether the description of the schedule property in the plaint is correct?**
- 2. Whether the plaintiffs have got right, title or interest in the suit Kunta?**
- 3. Whether the plaintiffs are entitled for the declaration and injunction as prayed for?**
- 4. To what relief?**

10. During Trial, on behalf of the plaintiffs P.Ws.1 & 2 were examined, Exs.A-1 & A-2 were marked and on behalf of the defendants D.Ws.1 to 3 were examined, Exs.B-1 to B-7 were marked, and Exs.C-1 to C-7 were the documents marked by the Court.

11. Upon hearing arguments of both the counsel, the Trial Court decreed the suit. Aggrieved by the decree and judgment of the Trial Court, the defendants 1 to 14 (except D-6) preferred an appeal before the Senior Civil Judge, Kandukur in A.S.No.3 of 1992, which was allowed on 08.10.2002, setting aside the decree and judgment of the Trial Court with a direction to the defendants to receive the value of the trees as per their shares.

12. The decree passed by the Appellate Court is challenged before this Court raising several contentions questioning the dismissal of the suit by the Appellate Court and the following substantial questions of law are formulated by the appellants in paragraph 19 which are as follows:

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- (A) The Lower Appellate Court failed to consider vital and material evidence including documentary as well as oral on the record and it would amount to error on the substantial question of law and the finding of the lower appellate court or perverse.
 - (B) Whether Lower Appellate Court is correct in applying the principle laid down in the judgment reported in 2002 (2) ALD 436 and AIR 1972 Mysore 266 which are not at all applicable to the facts of the case and it amounts to erroneous application of law.
 - (C) Whether the Lower Appellate Court is correct in not considering and not giving any finding with regard to the contention of the plaintiff that the defendants have lost their exclusive right as the plaintiff are using the kunta and the bund which is extend to Sy.No.814 for the past 4

or 5 generation and therefore they have acquired prescriptive right.

- (D) Whether the Lower Appellate Court is correct in holding that the Kunta is not extended to Sy.No.814 in view of the admission by the defendants themselves that the Kunta is extended to an extent of Ac.0.30 cents in S.No.814 and they are cultivating only Ac.26.85 cents.
- (E) Whether the Lower Appellate Court is correct in treating the admission made by the defendants as only a failure to prove their title and not as an admission and also throwing the burden of proof on the plaintiffs.
- (F) Whether the Lower Appellate Court is correct in not properly considering the plan submitted by the commissioner which clearly shows that the Kunta and bund are extended to Sy.No.814 and it misread the report and plan submitted by the commissioner.

13. During pendency of this appeal, notices on the 2nd respondent in the appeal was not sent, despite ordering notice by order dated 24.10.2014, specifically directing the appellants to pay process and take steps, if any, against the 2nd respondent N.P.V Subbaiah, S/o P. Kondaiah, but no steps were taken and process fee was not paid, as directed by this Court and on the other hand it was reported that he died, in view of death of Subbaiah the appeal against the 2nd respondent was dismissed as abated by order dated 24.10.2014. But, the appellants without impleading the legal heirs of the deceased 2nd defendant, advanced argument before this Court.

14. The main contention of the learned counsel for the plaintiffs is that the bund in S.No.814 belongs to the plaintiffs and defendants and either of them are entitled to use the bund exclusively or enjoy the usufruct of trees grown on the bund. Based on Exs.A-1 & A-2, he claimed right over the property in S.No.814 i.e. bund to an extent of Ac.0-30 cents. Even if the plaintiffs are unable to prove their title to the property, i.e. Ac.0-30 cents in S.No.814, they perfected the right by prescription, in view of long usage of the bund by the plaintiffs and the defendants referred supra, for the last four generations. On this ground, they are not entitled to claim declaratory relief and consequential injunction.

15. Per contra, learned counsel Sri M.V. Pratap Kumar on behalf of Sri M.V.S. Suresh Kumar contended that Ac.0-30 cents of land i.e. western bund of kunta is extended towards west into S.no.814, which exclusively belong to the defendants and mere existence of a bund in an extent of Ac.0-30 cents and enjoying the same without any interruption or prescribing their right to enjoy the usufruct of the trees grown on the bund, the plaintiffs claim a joint declaration of right and title does not arise and in the absence of proof of requirement to prescribe the right or title by prescription in the absence of pleadings and proof of the right or title over the bund in an extent of Ac.0-30 cents, declaratory relief cannot be granted and the learned counsel places reliance on the judgments of

Madras and Kerala High Courts in **(Pannala) Subba Rao v. (Parupudi) Lakshmana Rao and another¹** and **C. Mohammed v. Ananthachari²**, in support of his contentions.

16. This Court while admitting the appeal by order dated 13.12.2002, formulated the following substantial question of law:

“Whether the admission of the defendants constitute a base to hold that the plaintiffs/appellants are in possession”

17. During hearing, it is brought to the notice of this Court that the 2nd plaintiff died during pendency of the suit and no legal heirs of the 2nd plaintiff were impleaded. During pendency of the second appeal before this Court, the 2nd defendant died and his legal representatives were not brought on record, despite direction issued by this Court.

18. It is also brought to the notice of this Court that D-2 & D-4 died during pendency of this second appeal and no steps were taken to implead the legal heirs of the deceased D-2 & D-4 before this Court and D-6 before the Trial Court or even before the Appellate Court, but claimed a joint decree declaring the joint right and title of plaintiffs and defendants 1 to 4, 8, 13 to 15. When the indivisible right or title is claimed in the property, in the absence of legal heirs of deceased defendants, 2,4 & 6, the entire suit would

¹ AIR 1926 Mad 728

² AIR 1988 Ker 298

get abated and based on the contentions, the substantial question of law formulated by this Court is answered herein below.

IN RE QUESTION

19. It is the contention of the plaintiffs that, during evidence, the witnesses who were examined on behalf of the defendants admitted that a portion of kunta is extended towards west in S.No.814, which is not being cultivated. Thus, taking advantage of the admission in the written statement, i.e a judicial admission and evidentiary admission, it is contended that the admission is sufficient to declare joint right and title of the plaintiffs and defendants 1 to 4, 8, 13 to 15 over an extent of Ac.0-30 cents in S.No.814 of Palkuru Village. No doubt, in the written statement, an admission is made that bund of the kunta is extended towards western side into S.No.814 covering an extent of Ac.0.30 cents, thereby, admitted about the existence of bund in the land in S.No.814. A similar admission is made during evidence of D.W-3. But, now, the question is whether such an admission is sufficient to declare the joint right and title of the plaintiffs and defendants over an extent of Ac.0.30 cents in S.No.814.

20. Admissions are of two types, one is judicial admission and another is evidentiary admission. Admissions are not conclusive proof, but the admissions estop the person who made such admission to contend otherwise. When a judicial admission is

made in the pleadings or in any document regarding a particular fact in issue, such fact need not be proved by adducing evidence in view of Section 58 of the Indian Evidence Act. It is settled law that admission is the best piece of evidence. The Supreme Court, in **“Sita Ram Bhau Patil Vs. Ramachandra Nago Patil³”**, held:-

“Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission.”

In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the Plaintiff.”

21. In another decision **“Nagubai Ammal and others Vs. B. Shama Rao⁴”** the Supreme Court held:-

“Admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the

³ AIR 1977 SC 1712

⁴ AIR 1956 SC 593

judgment in Slatterie v. Pooley (1840) 6 M & W 664, wherein it had been observed "What a party himself admits to be true, may reasonably be presumed to be so."

22. In "**Union of India (UOI) v. Ibrahim Uddin**⁵" the Supreme Court observed that admission are the best piece of evidence and can be relied on by the Courts in deciding any issue. In "**Amba Lal v. Union of India**⁶" the Constitution Bench of the Supreme Court held that for a decision to be based on admission, it must be in writing; and the admission is more satisfactory if a body entrusted with statutory functions takes necessary precautions when its decision is mainly to depend upon such admission.

23. In view of the principles laid down in the above judgment, if unequivocal judicial admission is made, it is sufficient to pass a decree. Here, the defendants while contending that they are the owners of the land in S.No.814, admitted that a portion of land in S.No.814 is higher in level than the land which is a bund of the tank. Mere raising height of the land to form a bund to treat flow of water into their land would not confer any right on the plaintiffs to enjoy the land covered by bund. Admittedly, the land purchased under Exs.A-1 & A-2 is only in S.No.813 and at best, they are entitled to claim joint right and title to the land covered by Exs.A-1 & A-2. Though, the bund is in S.No.814, still the owners of the land in S.No.814 are continuing as owners of the land covered by bund i.e. an extent of Ac.0.30 cents and they are entitled to enjoy

⁵ (2012) 8 SCC 148

⁶ AIR 1961 SC 234

the same in their own right and mere failure to cultivate the same would not give rise to confer any title on the plaintiffs along with the defendants. Even, the plaintiffs themselves contended that they perfected the right title of prescription. Title can be acquired either only by negative prescription and right title can be acquired by positive prescription. Negative prescription can be said to be an adverse possession and positive prescription is a right to enjoy the property belonging to the other. In negative prescriptions, the land owner ceased to be the owner due to operation of Section 27 of Limitation Act. But here, the plaintiffs did not claim that they perfected the title by adverse possession. Pleadings are the essential requirements to constitute adverse possession.

24. Learned counsel for appellants/defendants, drawn the attention of this Court to a judgment of Apex Court reported in **Chatti Konati Rao and others v. Palle Venkata Subba Rao**⁷, wherein the Apex Court re-stated the onus of proof and necessary ingredients would be proved to claim adverse possession, in Para No.14 and 15 held that *Animus possidendi* as is well known is a requisite ingredient of adverse possession and mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person, who claims adverse possession, is required to establish the date on which he came in possession, nature of

⁷ (2010) 14 SCC 316

possession, the factum of possession, knowledge of the true owner, duration of possession and that possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The Courts always take unkind view towards statutes of limitation overriding property rights. The plea of adverse possession is not a pure question of law but a blended one of fact and law.

25. In ***B. Leelavathi v. Honnamma and another***⁸, the Apex Court held that adverse possession is a question of fact, which has to be specifically pleaded and proved. In the absence of any plea of adverse possession, framing of an issue and evidence led on the point could not hold that the plaintiff perfected title by adverse possession.

26. The above two principles laid down by the Apex Court is with regard to the pleadings required where a claim is based on adverse possession and proof of those facts.

27. The pleading is the foundation for the claim of adverse possession or any right in the property and it is heart and sole of Civil cases. In the absence of any plea whatever evidence adduced either oral or documentary to support the contention of the

⁸ (2005) 11 SCC 115

plaintiff that he perfected his title by adverse possession cannot be looked into. The importance and purity of pleadings in Civil cases is highlighted by the Apex Court in ***Maria Margarida Sequeria Fernandes v. Erasmo Jack De Sequeria***⁹.

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

⁹ AIR 2012 SC 1727

75. *In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.*

77. *The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.”*

28. When the plaintiffs are claiming title by prescription, it is for the plaintiffs to plead and prove the requirements and establish their continuous possession for over a period of 12 years, after setting up hostile title to the knowledge of the owner.

29. A similar question relating to claim based on adverse possession came up before Privy Council in **Secretary of State for India v. Debendra Lal Khan**¹⁰, wherein it is held that it is the duty of the parties to plead and prove the requirements which are essential for claiming adverse possession; otherwise, the party, who set up adverse possession is not entitled to claim any right and the ordinary classical is that it should be ‘*nec vi, nec clam, nec precario*’ and possession required must be adequate in continuity, in publicity and in extent to show that possession is adverse to the

¹⁰ AIR 1934 PC 23

competitor. These three requirements mentioned in the above judgments are sine quo non to defend the claim of the plaintiff basing on adverse possession, in a suit filed for recovery of possession.

30. In ***S.M.Karim v. Bibi Sakina***¹¹ and in ***R. Chandevappa and others v. State of Karnataka and others***¹² and ***D.N.Venkatarayappa and another v. State of Karnataka and others***¹³, the Apex Court highlighted the crucial pleadings to constitute adverse possession and held that in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the land in question claiming right, title and interest in the land in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession. Therefore, it is obligatory on the part of the plaintiff to plead necessary requirements, more particularly, as to when the plaintiff set up hostile title against the defendant and his continuation for the period of 12 years from the date of such claim of hostile title. In the absence of such details, the evidence whatever adduced to constitute adverse possession is of no assistance to establish the claim of title by adverse possession over the immovable property.

¹¹ AIR 1964 SC 1254

¹² (1995) 6 SCC 309

¹³ (1997) 7 SCC 567

31. In the present case, the plaintiffs failed to plead the requirements to constitute adverse possession and failed to adduce evidence in support of perfection of their title by prescription. Even if any evidence is adduced without any factual foundation of such plea, the same cannot be looked into, to decide the *lis* before the Court. Thus, the plaintiff while admitting joint right of the defendants claimed perfection of title by all the plaintiffs and defendants. When the defendants are the owners, they cannot perfect their title by prescription over their land. Even to perfect title of prescription by the plaintiffs, the plaintiffs have to plead and prove the requirements as stated above. But here, the plaintiffs miserably failed to establish their case regarding perfection of title to the property by prescription. Thus, the plea of perfecting title over an extent of Ac.0-30 cents in S.No.814 which the defendants are claiming to be the exclusive owners while claiming declaration that the plaintiffs and defendants to declare their joint right and title is inconsistent. The only endeavour of the learned counsel for the plaintiffs is that, the admission of the defendants in the written statement is sufficient to declare the joint title of the plaintiffs and defendants over the bund. But, in view of the inconsistency between the plea raised in the plaint regarding perfection of title by prescription and relief claimed in the plaint, i.e. joint declaration of right and title over the property, relief of declaration of property by perfecting title by prescription cannot be granted.

32. The other part of the prayer is to declare joint right of the plaintiffs and defendants over the suit schedule property. Undisputedly, the defendants are the owners of the land in S.No.814 and merely because the bund is extended to an extent of Ac.0.30 cents in S.No.814, still, the ownership remained with the defendants and the plaintiffs may at best enjoy the right on the bund, subject to satisfying the requirements to constitute the a prescriptive right which is in the nature of positive declaration, governed by Section 15 of Easements Act. To claim right of easement by prescription, the plaintiffs have to establish that the property i.e. Ac.0-30 cents covered by bund in S.No.814 belongs to the defendants and that they are enjoying the right over the property for a statutory period of 20 years, continuing in possession without any interruption by the defendants who are claiming to be the owners of the property. Curiously, the plaintiffs claimed relief of declaration of joint right of the plaintiffs and defendants, but the defendants cannot prescribe their right under Section 15 of Easements Act on their own land. The term 'Easement' is defined under Section 4 of the Easement Act, as follows:

“An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own”

33. To claim right of easement either by prescription or customary or any kind of easement, the essential requirement is that the claimant has to enjoy a right to use etcetera on the property of other, that is known as servient tenement. The person enjoying the land is called the dominant owner and the land to whom it belongs is called as servient owner. The dominant tenement is the land belonging to kunta. But, the relief claimed by the plaintiffs is to declare rights of the plaintiffs and defendants over the property of an extent of Ac.0-30 cents covered by bund in S.No.814 does not arise in the present facts situation for the simple reason that the defendants cannot perfect their right by prescription under Section 15 of Easements Act on their own land.

34. Learned counsel for the respondents while laying much emphasis on the inconsistent pleas, drawn attention of this Court to the judgment of Apex Court reported in **Chapsibhai Dhanjibhai Danad v. Purushottam**¹⁴ and in the said judgment, the Supreme Court had an occasion to deal with the inconsistency of the pleadings while claiming a prescriptive right and lease, in paragraph 17 of the said judgment, the Supreme Court observed as follows:

“Parties to a suit are, it is true, entitled to make contradictory pleas in the alternative in their pleadings. But at the stage of the evidence, no serious attempt was made by the appellant to establish accession by adverse

¹⁴ AIR 1971 SC 1878

possession. On the contrary, the appellant sought to make out a case of easementary rights by prescription, a case incompatible with the claim of adverse possession where a party claims title over the land of another as his own and therefore there would be no dominant tenement claiming a right by prescription over a servient tenement. In this state of the evidence the Letters Patent Bench, in our judgment, was right in rejecting the claim of accession which the learned Single Judge had erroneously accepted.”

35. When the principle laid down in the above judgment is applied to the present facts of the case, in view of the inconsistency which I pointed out earlier in the claim of the plaintiffs, which are self contradictory, the plaintiffs are not entitled to claim relief. Similarly, in **(Pannala) Subba Rao's** case (referred supra) the Madras High Court had an occasion to deal with definition of 'Easement' under Section 4 of the Easements Act and it was perfectly made clear that no man could acquire easement in land which was his own.

36. The Madras High Court while pointing out the inconsistency in clear terms with reference to Section 4 to Easements Act, referred the matter to the Division Bench for answering the reference case, the owner of the land cannot acquire right of easement in his own land.

37. The learned counsel for the respondent Sri M.V. Pratap Kumar drawn attention of this Court to judgment of the Kerala High Court in **Ananthachari's** case (referred supra) to contend

that when the land belongs to the person who is claiming easement by prescription, the plea of ownership and plea of easement cannot travel together and such plea could be advanced alternatively in a suit. When the dominant and servient tenement are in the ownership and possession of the same person acts by him on the servient tenement are clearly referable to his possession of that tenant and hence, there cannot be any easement by prescription.

38. The purport of the principle laid down in the above judgment is that, the owner of the land cannot claim right of easement on his own land, in view of definition under Section 4 of Limitation Act and cannot prescribe right of enjoyment on his own land or the usufruct of the trees grown on his own land.

39. In the present facts of the case, the plaintiffs invented a theory of joint declaration of right and title, as they perfected right and title by prescription. Perfection of right is a positive prescription and perfection of title is a negative prescription. In case of positive prescription, question of extinguishment of title does not arise under Section 27, but in case of negative prescription, the title that vested on the owner after completion of 12 years i.e. continuation in possession of the property without any interruption over a statutory period of 12 years, after setting up adverse possession to the property to the knowledge of the real owner. But the relief claimed in the present suit is self contradictory and self destructive, since the plaintiffs did not limit

or confine to anyone of the pleas during evidence. On this ground alone, the plaintiffs are disentitled to claim relief in the present suit and the admissions pointed out i.e both judicial and evidentiary are not sufficient to establish the claim of the plaintiffs in view of the inherent defect in the claim, as pointed out by me in the earlier lines.

40. The suit was admittedly filed claiming joint right and title over the property by both plaintiffs and defendants, during pendency of the suit, the 6th defendant died and his legal representatives were not brought on record undisputedly. Apart from that, during pendency of the appeal, 4th defendant died and his legal representatives were also not brought on record. Similarly, during pendency of the second appeal, the 2nd defendant died and his legal representatives were also not brought on record. The main question is whether the relief claim is indivisible or joint in nature. The entire suit will abate for the reason of failure to implead the alleged joint right holder.

41. In **S. Amarjit Singh Kalra (dead) by Lrs. And ors and Smt. Ram Piari (dead) by L.Rs and ors v. Smt. Pramod Gupta (dead) by Lrs and ors with Sahib Singh Rathi and ors v. Smt. Gulab Sundri E(sic)ona (dead) by Lrs and ors**¹⁵, a similar question came up for consideration before the Apex Court and the Apex Court held that such non-impleadment of legal representatives of

¹⁵ AIR 2003 SC 2588

deceased parties to the suit does not provide for the abatement of the appeal against the other respondents even where, as against one such it has abated, but it is only the Courts which have held that in certain circumstances the appeal also would abate against a co-respondent as a result of abatement against the deceased respondent. The same would be the position of an appeal vis--vis the appellants, as in the other cases. Order XXII Rule 4 also was considered not to provide for abatement of the appeal(s) against the co-respondents of the deceased respondent and it was specifically observed therein that to say that the appeals against them also abated in certain circumstances is not a correct statement. It was held that the appeals against such other respondents cannot be proceeded against and, therefore, had to be dismissed, in certain circumstances.

42. Further, the Supreme Court in the above said judgment held as follows:

- (1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents

having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis--vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or

inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

43. In the facts of the above judgment, the land acquisition award was under challenge and for non-impleadment of legal representatives of the joint claimants who contended that the entire appeal is deemed to have been abated, but that was not accepted for the reason that they claimed distinct and independent claims who joined together for their convenience.

44. In view of the principles laid down in the above judgments, when a joint right and title is claimed by the plaintiffs on behalf of the plaintiffs and defendants themselves, it is not distinct and separate or indivisible right from one person to the other, on account of failure to implead the legal representatives of the deceased parties (referred supra), the entire claim would abate. Hence, for failure of the parties to implead the legal representatives of the deceased plaintiffs and defendants (referred supra), the whole claim is abated as the claim is indivisible, keeping in mind the nature of the claim made before the Trial Court, hence, I hold that the appeal has to be dismissed in toto by applying the principles laid down by the Apex Court (referred supra). On this ground also, the second appeal deserves to be dismissed.

45. Though, the learned counsel for the appellants mostly relied on the alleged admission, that would not confer any benefit on the plaintiffs, in view of the inherent inconsistency in the relief claimed by the plaintiffs in the suit. Hence, the admission either judicial or evidentiary is of no assistance to the plaintiffs to claim right in the suit schedule property. Accordingly, the substantial question of law is answered against the plaintiff and in favour of defendants.

46. In view of my foregoing discussion, I do find no ground warranting interference of this Court in the decree and judgment of the Trial Court by exercising jurisdiction under Section 100 of C.P.C, which is limited to substantial question of law and the second appeal is devoid of merits and deserves to be dismissed.

47. In the result, the second appeal is dismissed.

48. Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Date:18.10.2016

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