

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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SECOND APPEAL.NO.552 OF 2016

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JUDGMENT:

The unsuccessful plaintiffs in O.S.No.187 of 1990 and appellants in A.S.No.145 of 2001 preferred this second appeal challenging the concurrent findings recorded by both the Trial Court in O.S.No.187 of 1990 and the First Appellate Court in A.S.No.145 of 2001, dismissing the suit.

The plaintiffs filed suit for declaration of their title over the plaint schedule property and also for consequential relief of possession of the same, based on the title, alleging that originally the property belongs to late Chandrarao (husband of the 1st plaintiff). The plaintiffs 2 & 3 are the sons of late Kola Apparao, S/o Venkanna and the said Venkanna has two sons by name Apparao and Kola Latchumayya through one wife and two more sons by name Ranganaikulu and Narayana, through another wife and that they all divided their family properties during their life time long ago. Further, Latchumayya died issueless and one half of his property was taken by Ranganayakulu and Narayana and that the other half was taken by Apparao. Thus the suit schedule property fell to the share of Apparao and that he constructed a thatched house in Item-1 of the plaint schedule and was living in it and that Items 2 & 3 were enjoyed by him by raising vegetables. Further, Apparao went to Bombay after securing job and used to visit Srikakulam occasionally. The thatched house was in possession and enjoyment of the plaintiffs and they were paying tax to the concerned departments, including house tax, non-agricultural tax. The plaintiffs have entrusted the job of management of the suit

properties to his cousin brother Kola Venkatarao, s/o Ranganayakulu and their maternal aunt Maddi Soramma and they are in constructive possession and enjoyment of the property as owners, whereas the defendants without any manner of right are claiming title over the property. The defendants set up title to the property in their individual capacity, claiming possession over the property since long time, while denying the other allegations made by the plaintiffs.

Based on the pleadings, the Trial Court framed six issues. During the Trial, on behalf of the plaintiffs P.Ws 1 to 3 were examined and Exs.A-1 to A-16 were marked and on behalf of the defendants D.Ws 1 to 3 were examined and Exs.B-1 to B-26, besides marking Exs.X-1 & X-2.

Upon hearing argument of both the counsel for the plaintiffs and the defendants, the suit was dismissed only on the ground that the plaintiffs were not examined as witnesses but examined their power of attorney holder by name Jogi Sumathi as P.W.1 and failed to establish their title to the property.

Aggrieved by the decree and judgment, the plaintiffs preferred A.S.No.145 of 2001 on the file of the Additional Senior Civil Judge, Srikakulam, who dismissed the appeal by confirming the findings recorded by the Trial Court and on the sole ground that the party to the suit i.e plaintiffs did not enter into witness box and thereby failed to discharge the initial onus of proof that rests on the plaintiff to establish title to the property.

Challenging the concurrent findings recorded by both the Trial Court and the Appellate Court, the present second appeal is filed under Section 100 of the Civil Procedure Code, raising several contentions.

At the time of admission, with the consent of both the learned

counsel for the appellant and the respondents, the matter was heard.

But, the issue raised before this Court is non-examination of the party to the suit i.e plaintiffs is not fatal, since a fact can be proved by examining a competent witness who can speak about the facts or based on that facts of the case. Therefore, the findings of the Trial Court and the Appellate Court are erroneous. This issue is no more *res integra*.

In view of the judgment of the Supreme Court in **S. Kesari Hanuman Goud v. Anjum Jehan and Ors.**^[1], the Apex Court while placing reliance on the judgment of this Court in Vidhyadhar v. Manikrao & Anr.^[2]; Janki Vashdeo Bhojwani v. Indusind Bank Ltd.^[3]; M/S Shankar Finance and Investment v. State of A.P & Ors.^[4]; and Man Kaur v. Hartar Singh Sangha^[5] held that it is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 of Civil Procedure Code empower the holder of the power of attorney to “act” on behalf of the principal. The word “acts” employed therein is confined only to “acts” done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term “acts”, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has performed any “acts” in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined.

Even in **Vidhyadhar’s case** the Supreme Court considered the

effect of non-examination of the party to the suit, since the adversary will have no chance to cross-examine, to elicit anything in his favour and when a party to the suit did not enter into the witness box offering for cross-examination, an adverse inference has to be drawn under Section 114 of the Indian Evidence Act.

The power of attorney holder in the present case is a distant relative and not entitled even to depose on behalf of the plaintiffs taking advantage of Section 120 of the Indian Evidence Act. However, the facts pleaded in the plaint are not within the knowledge of P.W.1 and to prove such facts only the plaintiffs are competent witnesses. Therefore, non-examination of any of the plaintiffs as witnesses before the Trial Court is fatal and their failure to offer themselves for cross-examination by adversary would lead to adverse presumption under Section 114(g) of the Indian Evidence Act. Hence, the conclusion arrived by the Trial Court that the plaintiffs miserably failed to prove their positive case that they are the owners of the schedule property by examining anyone of the plaintiffs as witness before the Trial Court. Therefore, I do not find any illegality in the findings recorded by the Trial Court and the contention raised by the appellants would not give rise to question of law, much less, substantial question of law.

Therefore, I find no ground to interfere with the concurrent findings recorded by both the Trial Court and the Appellate Court and the second appeal deserves to be dismissed.

In the result, the second appeal is dismissed at the admission stage itself, confirming the concurring findings recorded by the Trial Court in O.S.No.187 of 1990, which was confirmed by the First Appellate Court in A.S.No.145 of 2001.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:26.07.2016

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- [\[1\]](#) (2013) 2 SCR 750
 - [\[2\]](#) AIR 1999 SC 1441
 - [\[3\]](#) (2005) 2 SCC 217
 - [\[4\]](#) AIR 2009 SC 422
 - [\[5\]](#) (2010) 10 SCC 512