

**THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

**S.A.No. 377 OF 1998**

**JUDGMENT:**

The second appeal is maintained by the sole plaintiff-appellant against six respondents, out of two defendants no other than brother-in-law and sister of the plaintiff, including legal-heirs of defendant No. 1 who died pending appeal, against the concurrent findings but for with little deviation against dismissal of the suit claim of the plaintiff on dated 25-08-1995 in O.S.No. 99 of 1988 on the file of the Court of District Munsif, Pithapuram, for the relief of declaration of title and for consequential relief of possession and with profits of the plaint schedule property which is a vacant house site bounded by East: Road 22', South: Site of Gollapalli Trasu 22', West: House and site of the defendants 18' 6" and North: Pathway set apart by the defendants for ingress and egress to their house and site 23' 6" of Gollaprolu Panchayat Village, 15<sup>th</sup> block, Pithapuram Taluk, East Godavari District, Andhra Pradesh, based on Ex.A3 registered settlement deed dated 24-08-1958 said to have been executed by his mother P.Mahalakshamma, which she said to have got title pursuant to registered sale deed in her favour under Ex.A1 23-01-1952 for two items which include the plaint schedule property (*supra*) as second item, while saying under exclusive possession and enjoyment settled in his favour subject to life interest reserved by her, and having got title and possession from her death on 23-06-1987, also came into possession and while so enjoying, the defendants allegedly illegally trespassed into the property on 26-12-1987 and failed to vacate despite elders' advice and even to Ex.A4 legal notice but for with Ex.A5 false reply disputing the plaintiff's title and entitlement to possession and by setting up sale in favour of

defendant No. 2 by the said Mahalakshamma, their mother, under Ex.B1 registered sale deed dated 26-05-1966 and referring to earlier */is* in O.S.No. 162 of 1953 on the file of the Court of Senior Civil Judge, Kakinada, for plaint schedule property allotted to the share of Mahalakshamma, their mother, however saying that without right of alienation (certified copy of suit register extract, decree and judgment including of appeal Exs.A2, B2 and B3), with further claim of said sale deed set up by the defendants is collusive and from contest by the defendants pursuant to the reply *supra* with reference to the documents including Ex. X1 dated 02-01-1959, evidence of plaintiff P.W.1 and one Y.Seshagirirao-P.W.2, defendant No. 2-D.W.1, and brother of plaintiff and defendant No. 2 by name P.Venkata Subbarao as D.W.2, whose evidence is to the effect of their mother Mahalakshamma was not in a fit mental condition and Exs. X1, A1 and A3 are not valid documents, the trial Court since dismissed the said suit claim, having also went unsuccessful in A.S.No. 24 of 1995 on the file of the Court of Senior Civil Judge, Pithapuram, dismissal judgment dated 05-03-1998.

2. Though the second appeal is pending since 1998 without admission including from dismissal earlier for not getting ready and consequential restoration, from the substantial questions of law after hearing on restoration framed by this Court on 16-09-2015 in admitting the same are as follows:

- "1. *Whether the findings of the trial Court that Ex. A3 registered settlement deed is void and the further finding of the Court below that the said document is not acted upon and is not true, valid and binding on the defendants are erroneous and are vitiated by improper appreciation of evidence and misapplication of law?*

2. *Whether the Courts below were in error in dismissing the suit of the plaintiff for declaration of title and recovery of possession ignoring the fact that the settlement deed is a 30 year old document and the plaintiff is entitled to rely upon the provision under Section 90 of the Indian Evidence Act?*
3. *Whether the decrees and judgments of the Courts below are vitiated by perversity in appreciation of facts and the evidence brought on record?"*

3. Pursuant to the substantial questions of law formulated in admitting the second appeal, arguments advanced by learned counsel for the unsuccessful appellant *supra* vis-à-vis learned counsel for the respondents at length.

4. Heard and perused the material on record.

5. Before coming to the facts further in deciding the said questions of law formulated *supra*, from the respective arguments in sitting against the legality and correctness of the impugned judgments of the Courts below with the concurrent findings contended as devoid of merits and vitiated by perversity in appreciation of evidence on record with counter arguments of the concurrent findings are supported by reasons and there is nothing to sit against much less to deviate or differ to the conclusions, it is necessary to mention the scope of law on the second appeal from the latest expression of the Apex Court dated 30.03.2016 in Civil Appeal No. 3190 of 2016 (arising out of S.L.P. (Civil) No. 6662 of 2016) in ***Raghavendra Swamy Mutt Vs. Uttaradi Mutt***<sup>1</sup> which reads as under:

"To appreciate the controversy, it is seemly to refer to Section 100 CPC."

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<sup>1</sup> (2016) 4 MLJ 10 (SC)

A plain reading of Section 100 CPC makes it explicit that the High Court can entertain a second appeal if it is satisfied that the appeal involves a substantial question of law. More than a decade and a half back, in ***Ishwar Dass Jain Vs. Sohan Lal***<sup>2</sup>, it has been ruled that after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

In ***Roop Singh Vs. Ram Singh***<sup>3</sup> the Court had to say thus

“It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC.”

In ***Municipal Committee, Hoshiarpur Vs. Punjab SEB & Others***<sup>4</sup>, it has been categorically laid down that "the existence of a substantial question of law is a condition precedent for entertaining the second appeal and on failure to do so, the judgment rendered by the High Court is unsustainable. It has been clearly stated that existence of a substantial question of law is the sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

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<sup>2</sup> (2000) 1 SCC 434

<sup>3</sup> (2000) 3 SCC 708

<sup>4</sup> (2010) 13 SCC 216

In ***Umerkhan Vs. Bismillabi alias Babulal Shaikh and others***<sup>5</sup>, a two Judge Bench was constrained to ingeminate the legal position thus “in our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question.”

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<sup>5</sup> (2011) 9 SCC 684

In ***Ram Phal Vs. Banarasi and others***<sup>6</sup>, from which Mr. Nariman, learned senior counsel, has drawn immense inspiration, the two-Judge Bench was dealing with a case where the High Court had granted an interim order by staying the execution of the decree but had not framed the substantial question of law. In that context, the Court held:-

“... However, the High Court granted interim order by staying the execution of the decree. It is against the said order granting interim relief the respondent in the second appeal has preferred this appeal. This Court, on a number of occasions, has repeatedly held that the High Court acquires jurisdiction to decide the second appeal or deal with the second appeal on merits only when it frames a substantial question of law as required to be framed under Section 100 of the Civil Procedure Code. In the present case, what we find is that the High Court granted interim order and thereafter fixed the matter for framing of question of law on a subsequent date. This was not the way to deal with the matter as contemplated under Section 100 CPC. The High Court is required to frame the question of law first and thereafter deal with the matter. Since the High Court dealt with the matter contrary to the mandate enshrined under Section 100 CPC, the impugned order deserves to be set aside.”

To meet the reasoning in the afore quoted passage, Dr. Dhawan and Mr. Venkataramani with resolute perseverance submitted that the decision

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<sup>6</sup> (2003) 11 SCC 762

in ***Ram Phal*** (*supra*) is distinguishable as it does not take note of Order XLI Rule 5 and Order XLII Rule 1 CPC.

It has to be made clear that the Court for the purpose of passing an *ex parte* order is obligated to keep in view the language employed under Section 100 CPC. ***It is because formulation of substantial question of law enables the High Court to entertain an appeal and thereafter proceed to pass an order*** and at that juncture, needless to say, the Court has the jurisdiction to pass an interim order subject to the language employed in Order XLI Rule 5(3). It is clear as day that the High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an *ex parte* order, it does not empower it not to formulate the substantial question of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in ***Ram Phal*** (*supra*). Therefore, the High Court has rectified its mistake by vacating the order passed in IA No. 1/2015 and it is the correct approach adopted by the High Court. Thus, the impugned order is absolutely impregnable.

Having so concluded, we would have proceeded to record dismissal of the appeal. But in the obtaining facts and circumstances, we request the High Court to take up the second appeal for admission and, if it finds that

there is a substantial question of law involved, proceed accordingly and deal with IA No. 1/2015 as required in law. Needless to say, the interim order passed by this Court on earlier occasion should not be construed as an expression of any 18 opinion from any count. It was a pure and simple ad interim arrangement. Resultantly, the appeal, being sans substance, stands dismissed with no order as to costs.

From the above scope of law, since substantial questions of law involved formulated, now coming to the core of the contentions from the pleadings and evidence and proof of the facts concerned, as per **M.C.Shetalwad**, the Civil Procedural Law is based on the theory that there must be a full disclosure by each party of his case to the other, that rival contentions (in the pleadings) must be reduced as quickly as possible to the form of clear & precise points or issues for decision and there must be a prompt adjudication by the Court on those points. Justice delays not so much due to defects in procedure but by faulty application.

**Coming to burden of proof and onus probandi with reference to pleadings and appreciation of evidence,** it was held by the Apex Court in ***Kalwa Devadatham Vs. Union of India***<sup>7</sup> that the question of onus probandi is certainly important in the early stages of the case. It may also assume important where no evidence at all is let in on the question in dispute by either side. In such a contingency, the party on whom the onus lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and

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<sup>7</sup> AIR 1964 SC 880

truth or otherwise of the case must always be adjudged on the evidence led by the parties, burden of proof in such matters, loses its importance and pales its significance- also vide ***A.Raghavamma Vs. Chenchamma***<sup>8</sup> & ***Smt. Premlatha Vs. Arahant Kumar Jain***<sup>9</sup>. Thus, what is necessary is party shall aware of the plea and let in evidence for the Court to give finding from the hearing covering the lis, but not outside the scope, irrespective of who led what evidence by make use of entire evidence on record. It was also held in some of the expressions that even alternative remedy not pleaded if entitled, Court can grant it where it is appropriate to do so. In ***Balasankar Vs. Charity Commissioner, Gujarat***<sup>10</sup> at para-19-it was similarly held that, burden of proof pales significance when both parties adduced evidence and it is the duty of the court to appreciate the entire evidence adduced by both sides in deciding the lis; also on the aspect as to party proved in possession of best evidence is bound to produce the same to throw light on the lis and to unfold any truth and thereby cannot take shelter on the abstract doctrine of burden of proof saying burden not on him to prove by filing the material document or producing the material witness-as laid down in ***NIC Vs. Jugal Kishore***<sup>11</sup> and ***Lakhan Sao Vs. Dharam Chowdary***<sup>12</sup>. Vide also ***Karnesh Kumar Vs. State of UttarPradesh***<sup>13</sup> & ***Gopalakrishnaji ketkar Vs. Mahammad Haji Lathief***<sup>14</sup>, which followed the privy council's expression in ***Murugesan Pillai Vs. G.S.P.***

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<sup>8</sup> AIR 1964 SC 136

<sup>9</sup> AIR 1973 SC 626

<sup>10</sup> AIR 1995 SC 167

<sup>11</sup> AIR 1988 SC 719 (B)

<sup>12</sup> 1991 (3) SCC 331

<sup>13</sup> AIR 1968 SC 1403

<sup>14</sup> AIR 1968 SC 1413

***Sannadhi***<sup>15</sup> that “a practice has grown in Indian procedure those in possession of important document or information lying by, trusting to the abstract doctrine of onus of proof, and failing, accordingly, to furnish to the Courts best material for its decision. With regard to third parties this may be right enough- they have no responsibility for the conduct of the suit but with regard to the parties to the suit it is, in their Lordship’s opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition, held that if a party in possession of best evidence which throws light on the issue in controversy withholds it, the Court ought to draw an adverse inference against him from non filing of the material document or non producing of the material witness, notwithstanding the fact that onus of proof not lie on him or because he was not called upon to produce it, by relying on the abstract doctrine of onus of proof”. Same is relied upon in ***Sri Venkateshwara Oil Company Vs. Guduru Jalaja Reddy***<sup>16</sup>.

**Coming to appreciation of evidence and interference by superior Court** concerned; it was also laid down in this regard by the three Judge Bench of Apex Court in ***Iswar Prasad Misra Vs. Mohammad Isa***<sup>17</sup> that, Judicial experience shows that in adjudicating upon rival claims brought before the Courts, it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of the conflicting contentions and circumstances are similarly pressed into service. In such a case, it is no doubt, the duty of the

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<sup>15</sup> AIR 1917 PC 6 at 8

<sup>16</sup> 2002 (1) ALD 182 DB

<sup>17</sup> AIR 1963 SC 1728

judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities and decide within which exactly the truth lies. The impression formed by the judge about the character of evidence will ultimately determine the conclusion which he reaches.

In fact, **it could be unsafe to overlook the fact that all judicial minds may not react in the same way to said evidence** and it is not unusually that evidence which appears to be respectable and trustworthy to one judge may not appears to be so to the other. That explains why in some cases courts of appeal reverse conclusions of facts recorded by trial Courts on its appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case acts as a sobering factor and leads to the use of temperate language in recording judicial conclusions. Judicial approach in such a cases will always be based on the consciousness that one may make a mistake; that is why the use of unduly strong words in expressing conclusion---- in our opinion, the use of such intemperate language may in some cases tend to show either lack of experience in judicial matters or an absence of judicial poise and balance--. **Judges are not computers and thus bound to call in aid their experience in life and test with probabilities – vide - *Chaturbhuji Pande Vs. Collector, Rayagarh*<sup>18</sup>.**

It is also held that in assessing the value to be attached to oral evidence, particularly as Judge of fact, it is open to the appellate Judges to test the evidence placed before them on the basis of probabilities, irrespective of lack of effective or no cross examination by opposite party, Court is not bound to rely, if

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<sup>18</sup> AIR 1969 SC 255

probabilities show otherwise, but for to consider in the facts if so to construe as admission from facts deposed supported by plea not disputed in cross examination as a rule of essential justice. *Vide - A.E.G.Carapiet Vs. A.Y.Derderian*<sup>19</sup>.

**Rules of justice require that the party cross examining must put the crucial and important part of his case to the witness of the other side in his cross-examination** and if no question is put to the witness in the cross examination with regard to a certain fact challenging the same, then such fact has to be presumed to be true. No doubt for that conclusion it is to be seen, whether there is any pleading in this regard and in the absence of which, merely because the attention of the said stray sentence of the witness, inadvertently not drawn attention while cross-examination to put a question on it by itself does not amount to admission but for to read the entire evidence as a whole to cull out such is the admission or not from non-testing by cross-examination of said sentence – *vide - Shri Ravinder Kumar Sharma Vs. RFA 757/2002 16 State of Assam*<sup>20</sup>.

Thus, in appreciation of evidence, Judges are bound to call into aid their experience and knowledge of human affairs, depending upon facts and circumstances of each case and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required the necessary inferences and conclusions from the

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<sup>19</sup> AIR 1961 Calcutta 359

<sup>20</sup> 1999 SAR (Civil) 837

broad probabilities and preponderances from the overall view of entire case to judge as to any fact is proved or not proved or disproved.

Coming to the proof of facts out of the facts in issue to the extent of relevant facts concerned, it depends upon the nature of the *//s* and in civil matters proof is always by preponderance of probabilities. In ***RVEE Gounder Vs. RVS Temple***<sup>21</sup>, the Apex Court held that, in civil cases the proof is by preponderance of probabilities for including in suits relating to ejectment or declaration of title or for possession; and the onus shifts from initial burden on the plaintiffs if able to establish from preponderance of probabilities for entitlement, on the defendant to rebut the same including with specific claim on their part if any. It is in explaining the earlier propositions of law that, in a suit for ejectment, plaintiff shall win or lose his case only on his own strength principle, since it does not mean the onus of proof is static and always on the plaintiff or it shall never shifts on the defendant even if the plaintiff is able to establish his case from preponderance of the probability as to what is meant by proved, not proved or disproved required for the above expressions with reference to Section 3 of Evidence Act without going into the other components of “may presume, shall presume and conclusive proof”, from the very definition, proved and disproved to say not proved is when it is neither proved nor disproved. It requires considering the matters before the Court on any fact for either believes it to exist or does not exist (which is by direct evidence), or considers its existence so probable that a prudent man ought, under the circumstance of a particular case to act upon supposition that it exists or does

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<sup>21</sup> 2003 (8) – Supreme Today – 194 at 196

not exist (which is by circumstantial evidence). At paras-25-29 of the judgment, the Apex Court clearly held that in a suit for ejectment once plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lies on the plaintiff shall be held to have been discharged so as to prove the plaintiff's title. What is meant by proved, not proved or disproved with reference to Section 3 of the Evidence Act was discussed in detail by the division bench of this Court in ***N.K.Somani Vs. Punam Somani***<sup>22</sup>. It is also needful to note the difference between legal burden(as per pleadings) and evidentiary burden- how it shifts during trial under Sections 101-103 of the Evidence Act- vide ***Vasu Vs. Syed Yason S Quadri***<sup>23</sup> that was quoted with approval by the Apex Court in ***Bharat B & D. M. Co. Vs. Amin Chand Pyarala***<sup>24</sup> and in ***Hiten P.Dalal Vs. Bratindranath Benarji***<sup>25</sup>.

**It is also important to appreciate a fact with reference to the context in which it is stated, rather taking it as conclusive.** It is relevant to recollect as part of appreciation of evidence with reference to the pleadings as part of discovering truth, the well laid down expression of the three judge bench of the Apex Court in ***Mrs. Rukhmabai Vs. Lala Laxminarayana***<sup>26</sup> at para-19 by relying upon the Privy council's expression ***Alluri Venkatapathi Raju Vs. Danthuluri Venkata Narasimha Raju***<sup>27</sup> that, it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance

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<sup>22</sup> 1998 (5) ALD 349

<sup>23</sup> AIR 1987 AP 139 (FB)

<sup>24</sup> AIR 1999 SC 1008

<sup>25</sup> AIR 2001 SC 3897

<sup>26</sup> AIR 1960 SC 335

<sup>27</sup> AIR 1936 PC 264

of the true position; and there **it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.**

**Court is not confined merely to look into the form of the transaction between the parties** concerned; the well laid down expression of the Apex Court in ***Provident Investment Company Limited Vs. Court of I.T.***<sup>28</sup> at para-3 speaks in this regard that, Court is not confined merely to look into the form of the transaction between the parties (in giving effect to the legal rights and obligations there under), but the true legal position that arises out of it (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that the Court may even look at the surrounding circumstances in construing the fact covered by oral statement or document, with reference to the substance and subject to the limitations for admissibility of oral over documentary evidence under Sections 91 and 92 of the Evidence Act.

**Burden of appellant/cross-objector** concerned; no doubt, the burden of showing that the judgment or even a finding therein under a challenge in appeal is wrong or incorrect either wholly or in part lies on the appellant and same is also the proposition in the course of the cross-objections as the cross-objectors are at par with appellants so far as their contentions in the cross-objections concerned, in the course of the cross-objections in shifting the burden on them, from hearing the main appeal. Coming to the powers of the 1<sup>st</sup> appellate Court in this regard concerned, more particularly from Order XLI, Rules 33 and 24 C.P.C. and from several expressions of the Apex Court including -

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<sup>28</sup> AIR 1954 Bombay 95

**Koksingh Vs. Deokaba<sup>29</sup>; Gaisi Ram Vs. Ramji La<sup>30</sup>** and **Madan Lal Vs. Yoga Ba<sup>31</sup>**; the appellate Court is competent to grant relief if finds appropriate on any facts though that was not granted by the trial Court in rendering complete justice and prevent to the extent possible scope for further litigation and to give finality to the /is.

In **Nirmalabalaghosh Vs. Balaichandghosh<sup>32</sup>** (three judge Bench) - it was held that Order XLI Rule 33 is undoubtedly expressed in terms which are wide but it has to be applied with discretion, and to cases where interference in favour of appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. ---The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from----by failure of the respondent to prefer appeal or to take cross-objections, the respondent has allowed the part of the trial Court's decree to achieve a finality which was adverse to him.

**Coming to the proof of documents** – Once a document is properly admitted, the contents of those documents are also admitted in evidence, though those contents may not be treated as conclusive evidence-*vide* **P.C. Purushothama Reddiar Vs. Perumal<sup>33</sup>**. It is also the settled law that the question of mode of proof is a question of procedure and is capable of being waived. It is to say when original not produced but copy of it for no objection raised after admissibility, the objection cannot later be raised being deemed

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<sup>29</sup> AIR 1976 SC 634

<sup>30</sup> AIR 1969 SC 1144

<sup>31</sup> 2003 (5) SCC 89

<sup>32</sup> 1965 (3) SCR 550

<sup>33</sup> AIR 1972 608

waived; whereas proof of contents of the document is being substantive, the non-raising of objection is not a waiver *vide R.V.E. Venkatachala Gounder Vs. A.V. & V.P.Temple*<sup>34</sup> and *Dayamathi Bai Vs. K.M.Shaff*<sup>35</sup>.

**Nature of Documents:** Documents may contain either unilateral or bilateral dispositions or even with reciprocal. Further, testamentary or non-testamentary. Further, transfer of rights or division and separation of existing or joint rights. Further, any dispositions, transfer of rights or creating rights may be either present or future. Furthermore, it affects the rights of even non parties to the documents at times like in boundary recitals.

**Construction of Documents/instruments:** Generally in construing instruments, Court must have regard not only to the presumed intention of the parties but also to the meaning of the words which they have used-*vide V.S.Talwar Vs. Premchandra*<sup>36</sup> at para-7.

**Interpretation of Documents:** Every instrument has to be so interpreted as to accord with the intention of its maker having regard to the language used; though one cannot ignore actual words used and go after the supposed intention of maker, since that would amount to entering the arena of speculation, but all the same said principle is unexceptionable-*vide Hind Plastics Vs. Collector of Customs*<sup>37</sup> at para-17.

**Coming to the admissibility and relevancy and probative value of recitals of the boundaries etc., in documents:** Recital in a document of neighboring land, referring one of its boundary as suit land and it belongs to a

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<sup>34</sup> AIR 2003 SC 4548

<sup>35</sup> AIR 2004 SC 4082

<sup>36</sup> AIR 1984 SC 664

<sup>37</sup> (1994) 5 SCC 167

particular person, for the person to rely on it, is not legal evidence and the same is not even admissible under Section 32(2) of the Evidence Act- vide **in re Daddapaneni Narayanappa**<sup>38</sup>. It was held in **Karupaanna Konar Vs. Rangaswami Konar**<sup>39</sup> that, a mere statement of boundary cannot be classed with any of the verbs in Section 13 of the Evidence Act of created, modified, recognised, asserted or denied and is therefore not admissible; the same is not even admissible under Section 32(3) of the Evidence Act as it is a statement and not the document containing the statement that must be against the proprietary interest of the person making it. It was held further that the lower court influenced by the idea of the document is an ancient one and the recitals obviously not intentionally false and are therefore presumably true; having overlooked the fact that parties making statements which are not material to their interests have no occasion to be accurate. In **Ramacharandas Vs. Girijachanddevi**<sup>40</sup> it was held that the recitals in a document would operate as an estoppel against the author of the document. The only restriction in this regard is that, **an estoppel is confined to the transaction covered by the document and the recital cannot be treated as an estoppel in a collateral transaction. Even this principle has several ramifications-** For Example: if the deed is fairly old, the recitals cannot be altogether discarded and such recitals gain sufficient weight with the passage of time even as regards collateral transactions. This however depends upon the facts and circumstances of each case. An important area of interpretation of documents is the realm of the nature of the document. Ascertainment of nature of document including from

<sup>38</sup> 1910 Indian Cases page – 286 (Madras)

<sup>39</sup> AIR 1928 Madras 105 (2) at page 106

<sup>40</sup> AIR 1966 SC 323

the contents and attending circumstances, intention of the executant (unilateral) and parties to it (bilateral) assumes importance as law prescribes different patterns and procedures for different types of transactions covered by the documents and its execution and proof. It was laid down in ***Rangayyan Vs. Inasimutthu***<sup>41</sup> that, recitals of the boundaries in a document inter-parties is admissible as a joint statement of the parties executed it to act as admission, where as recitals of a document between a party and stranger is relevant against the party as an admission but is not admissible in his favour unless the fact recited is deposed by executants of the document in Court to act as a corroborative evidence under Section 157 of the Evidence Act or to contradict under Sections 145 & 155(3) of the Evidence Act; whereas recitals as to boundaries in the document between third parties, it is not ordinarily admissible to prove possession or title as against a person, who is not party to the document, but for at best to corroborate or to contract. The probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from “0” to clinching evidence as the case may be from material on record of the respective cases-See also ***Umarapartvathy Vs. Bhagvathy Amma***<sup>42</sup>.

**Documents executed *ante-(pre-liti)*, *pendenti* and *post-litem motam*:** In ***Harihar Prasad Singh Vs. Deonarayan Prasad***<sup>43</sup> - it was held in para-5 that recitals in the documents executed ***ante (pre-liti) litem motam*** and ***inter parties*** held of considerable importance and their probative value as against them is high from the recital of private lands of the proprietor (which

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<sup>41</sup> AIR 1956 Madras 226

<sup>42</sup> AIR 1972 Madras 151

<sup>43</sup> AIR 1956 SC 305

includes de facto/dejure) in assertion of their title and for its admissibility under Section 13 of the Indian Evidence Act. It was however, observed that the respondents are right in contending that the recitals cannot be considered as admissions by the mortgagees as they were executed by the mortgagors. It is also held in **Rangayyan** (*supra*) that depending upon the recitals in the documents executed *ante-pre, pendent* and *post-litem motam* and from nature of recitals and other circumstances of between inter parties or third parties; the probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from “0” to clinching evidence as the case may be from material on record of the respective cases. In **Dolgobinda Paricha Vs. Nimai Charan Misra**<sup>44</sup>-it was held that-it is also well settled that statements or declarations before persons of competent knowledge made **ante litem motam** are receivable to prove ancient rights of a public or general nature. The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post **litem motam** would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being **ante litem motam** they must not only be before the actual existence of any controversy.

**Presumption of thirty years old document:** In **Harihar Prasad Singh** (*supra*) – it was also held by placing reliance upon the expression in

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<sup>44</sup> AIR 1959 SC 914

***Basanth Singh Vs. Brijraj Sadan Singh*<sup>45</sup> - regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act**

that, a presumption can be raised only with reference to original document and not to copies thereof. If the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorize the raising of a presumption as to the existence of authority on the part of the agent to represent that person. In ***Union of India Vs. Ibrahim Uddin*<sup>46</sup>** – it was held regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act, that the presumption is in respect of genuineness of a document as regards signature, execution and attestation, but not as regards the correctness of the contents of the document. In ***T. Ramesh Vs. Lakshamma*<sup>47</sup>**, it was held referring to ***H.Venkatachala Vs. B.M. Thimmajamma*<sup>48</sup>** and ***Dhanapala Vs. Govindaraju*<sup>49</sup>** and extracts from **Tailor's Law of Evidence & Halsbury's Law of England** that, law recognizes a conclusive presumption in favour of due execution of insured deeds and Wills when those instruments are 30 years old and are unblemished by any alterations and are produced from natural custody, they are said to be proved themselves.

**A bare production is sufficient and the scribe and witnesses being presumed to be dead and in the absence of circumstances of suspicion to have been duly sealed, attested, delivered or published according to their purport, when those are above 30 years produced from proper**

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<sup>45</sup> AIR 1935 PC 132 (C)

<sup>46</sup> 2012 (6) SCJ 432

<sup>47</sup> 1999 (2) ALT 553

<sup>48</sup> AIR 1959 SC 443

<sup>49</sup> AIR 1961 Madras 262

custody in saying that those are by production said to be proved themselves. The proper custody is in the custody of a person, who might be reasonably and naturally be expected to have possession of them. It would be dangerous no doubt for the courts to draw presumption of due execution mechanically on the face of the documents purporting to be 30 years old; and coming from proper custody in as much as the presumption dispense with proof of due execution, thereby the Court must act with extreme caution and utmost circumspection from the language used “**May presume**” in Section 90 of the Evidence Act conferring judicial discretion to be exercised by the Court in drawing the presumption. **It is within the judicial discretion of the Court having regard to facts and circumstances of each case.** See also *Ch.Adishesamma Vs. Rama Rao*<sup>50</sup>.

**Attestation of a document is when to attribute knowledge of its contents:** In *Pandrang Krishnaji Vs. N. Tukaram*<sup>51</sup>- it was held on how far mere attestation of a document is to attribute knowledge of its contents and whether to say he attested with knowledge and consented to the transfer, that the attestation of a deed by itself estops a man from denying nothing whatsoever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put to word alone for the purpose of establishing that a man consented to the transaction which the document effects. **Mere attestation does not affect as an estoppel, for attestation does not fix the attesting witness with knowledge of contents of the**

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<sup>50</sup> AIR 1973 AP 149

<sup>51</sup> AIR 1922 PC 20

**document or implying consent for the contents of the document, unless it is established by the independent evidence that to the signature was attached the express condition that it was intended to convey something more than mere witnessing to the execution and was meant as involving consent to the transaction - vide *Rajyammal Vs. Sabhapathi*<sup>52</sup> & *Pandrang* (*supra*).**

Section 3 of the Transfer of Property Act, defines attestation in relation to an instrument (to mean non-testamentary-though same analogy applies to testamentary with reference to Section 63 of the Indian Succession Act), means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary. As per the Apex Court's expression in *Abdul Jabbar Vs. Venkata Shastry*<sup>53</sup> – to **attest is to bear witness to a fact**. The essential **conditions of a valid attestation** are that two or more witnesses have seen the executant sign or affix his mark to the instrument, or have seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature

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<sup>52</sup> AIR 1945 PC 82

<sup>53</sup> AIR 1969 SC 1147

or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants to bear the witness to this fact, it is essential that the attesting witness has put his signature animus attestandi that is for the purpose of attesting the signature of the executant. See the discussion supra of mere attestation is not suffice to attribute knowledge of contents.

As per **Section 68 among Sections 68 to 71 of the Indian Evidence Act**, regarding of the proof of an attested instrument(other than **Will**), it is unnecessary to call any attesting witness in the case of compulsory attestable deed, unless execution of the deed is specifically denied by the person by whom it purports to have been executed. If the execution is specifically denied one attesting witness must be called upon to prove the deed-if there be one alive and subject to the process of the Court. If the attesting witnesses are dead their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression as the case may be(under Sections 47 & 67 and or Sections 45 r/w.51 and or Section73 of the Evidence Act).

The nomenclature given by the parties to the transaction in question is not decisive, but the contents and the intention of the executant, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. One need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. The real and the only reliable test for the purpose of finding out whether the document constitutes a

**Will** or a gift/settlement is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest *in praesenti* in favour of the beneficiaries or it intended to transfer interest in favour of the beneficiaries only on the death of the executant.

The Apex Court in ***Kashibai and another Vs. Parwatiba***<sup>54</sup> held at paras 10 and 11 that Section 68 of the Indian Evidence Act shows that the attestation and execution are the two different acts one following the other. There can be no valid execution of a document, which is required by law to be attested, without the proof of its due attestation; in case of no denial, no proof is required as per Section 68 of the Indian Evidence Act and likewise for 30 years old document, the Court can draw presumption as discussed *supra*. However, the said principles have no application to Wills in view of the specific provision under Section 63 of the Indian Succession Act.

From the above position of law coming to the facts, the relationship between the sole plaintiff by name Peddisetti Apparao and defendant No. 2-respondent No. 2 as brother and sister and they are the children along with D.W.2 – P.Venkata Subbarao of P.Mahalakshamma and late Satteyya not in dispute and later defendant No. 1 – respondent No. 1, no other than husband of defendant No. 2, died pending first appeal and their children as respondent Nos. 3 to 6 are impleaded also not in dispute. From the pleadings and evidence in answering the issues as to the plaintiff's entitlement to the relief of declaration and possession, the document the plaintiff mainly placed reliance is Ex.A3 registered settlement deed dated 24-08-1958, same is the original document. Mahalakshamma, their mother, admittedly died intestate on 23-06-1987, which

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<sup>54</sup> 1995 (6) SCC 213

is about 28 years 10 months after execution of said settlement deed. The said Mahalakshamma in her lifetime did not dispute genuineness of the said settlement. For gift/settlement, what is required to prove under the Transfer of Property Act, 1882 (for short, 'the Act of 1882'), is transfer of title and ownership by the donor to the donee/settlee and even at the time of transfer of title and ownership, settler may reserve life interest by keeping possession for enjoyment during her lifetime and for that, there is no prohibition nor it can be said a gift without possession and right of enjoyment forthwith is not valid for. What is required is execution of document by donor/settler transferring title and ownership and acceptance of the same by the donee/settlee and also from the language of Section 6 of the Act of 1882, property of any kind may be transferred except those mentioned in clause (a-i). Once there is giving by transfer of ownership and title and its acceptance, the gift is complete and right vests even possession and enjoyment is postponed and once right is vested, it will not divest unless there is a provision for revocation within the purview of Section 126 of the Act of 1882 for happening of any specified event or contingency as a condition subsequent attached to the gift/settlement to determine. The law is very clear in this regard from the expression of the Apex Court in ***K.Balakrishnan Vs. K.Kamamma***<sup>55</sup>, reiterated in the recent expression in ***Renikuntla Rajamma (died) by L.Rs. Vs. K.Sarwanamma***<sup>56</sup>, on reference by holding the earlier expression in ***Naramadaben Maganlal Thakker Vs. Pranjivandas Maganlal Thakker Pranjivandas Maganlal***

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<sup>55</sup> AIR 2004 SC 1257

<sup>56</sup> 2014 (1) LS 109 SC

**Thakker<sup>57</sup>.** *Contra* is not good law in clarifying transfer of immovable property including by gift settlement requires registered instruments from reading of Section 17 of the Registration Act, 1908, and Sections 122 and 123 of the Act of 1882. However, these provisions do not make the delivery of possession of immovable property as an additional requirement for the gift/settlement to be valid and effective. Thus, delivery of possession is not an essential pre-requisite for making of the valid gift/settlement and it is open to the donor/settler to transfer by gift title and ownership in the property and at the same time reserves its possession and enjoyment to herself during her lifetime which is not prohibited by law. Thus, what the defendants' contest including from evidence of defendant No. 2 – D.W.1 of her mother in her lifetime executed Ex.B1 registered sale deed dated 26-05-1966 in her favour concerned, once defendants also contest that her mother was in a sound and disposing state of mind and capable of entering into contract for transfer by gift or sale or otherwise, it falls to draw presumption backwards of her mental condition with competency and capacity to contract traced back to Ex.A3 registered settlement deed dated 24-08-1958. Thus, any property covered by Ex.A3 registered settlement deed if covered by subsequent sale deed by the selfsame settler as vendor, to claim for Ex.B1 sale deed title thereunder, on the basic principle that no one can convey a better title than what he/she has on that date, for if gift once proved of title vests from transfer of ownership and title to the son out of love and affection for certain property, the title by acceptance of gift vests on the donee/settlee even possession and enjoyment postponed since nowhere divest apart from said settler/donor never disputed, even it is shown Ex.B1 sale deed duly executed for

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<sup>57</sup> (1997) 2 SCC 255

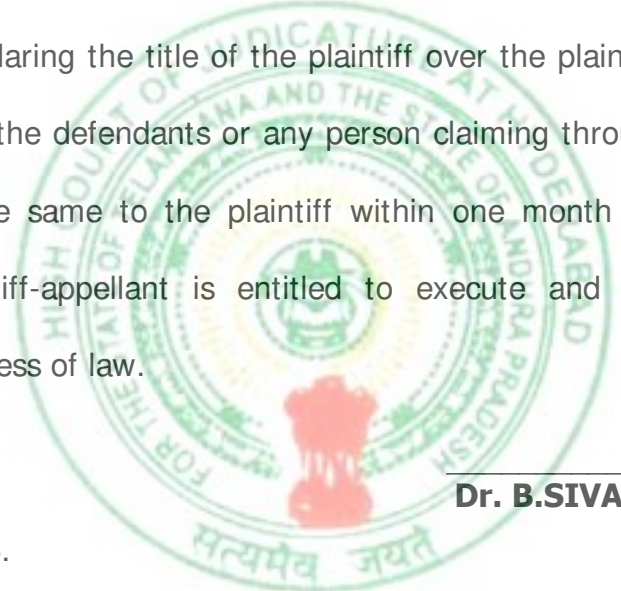
any property covered by the earlier settlement, for the vendor having no title by then to that extent cannot convey and the vendee cannot get right and title. In the lifetime of said vendor pursuant to the earlier gift having divested title but for continuing in possession and enjoyment that cannot be construed as adverse to the settlee/donee but for from out of her death to claim right of possession and enjoyment over the property for the title already conveyed by gift settlement, thereby even the vendee of Ex.B1 sale deed came into possession finally by stepping into the shoes of the original settler/donor as vendor and thereby same cannot be in the eye of law adverse possession much less to extinguish right by prescription for no animus and hostile title against the true owner from very recitals of gift settlement. Once the donor of Ex.A3 so called vendor selfsame of Ex.B1 proved died intestate undisputedly on 23-06-1987, the right of the plaintiff to claim possession from death of the settler life interest reserve holder to resume any person from possession starts therefrom and the suit filed within one year is with no lapse of time to recover possession from the defendants with the claim by the plaintiff of defendant No. 2 allegedly trespassed subsequent to death of their mother. Even so called alleged trespass not proved, once entitled to possession after death of the settler, who reserved life interest, possession and enjoyment for plaintiff's entitlement as settlee from whoever in possession, plaintiff entitled to recover possession. Only thing now therefrom to decide is whether said gift settlement Ex.A3 is proved or not. The evidence of P.W.1 is that his mother executed the gift and he accepted the same and so far as the attesters to the said Ex.A3 original settlement concerned, it is deposed that the scribe is no more and one of the attesters is also no more and the other attester, aged about 85 years, is totally bedridden not even in a position to move out of

bed and in the lifetime of his mother, his mother did not even cancel the gift settlement Ex.A3 and she was during her lifetime in possession. P.W.2 also deposed that Mahalakshamma alone was in possession in her lifetime till her death and after her death, P.W.1-plaintiff taken possession and planted trees in the site. As per P.W.1, when he was about to construct a wall around suit site after lifetime of his mother by carting stones, defendants illegally trespassed into the suit site on 26-12-1987 as mentioned in Ex.A4 legal notice saying defendants dismantled the boundary wall and constructed a latrine by trespass, from reply is by claiming under Ex.B1 sale deed from their mother in 1966 and constructed latrine and planted trees. Even D.W.2, the elder brother of P.W.1 and D.W.1, deposed about defendant No. 2 purchased under Ex.B1 part of the property covered by the suit site from their mother Mahalakshamma. Once same is the case, from very evidence of D.W.1 – defendant No. 2 and D.W.2, their brother, show their mother was in a sound and disposing state of mind by 1966 as on the date of Ex.B1 and adequate to presume her sound and disposing state of mind with competency to contract even previously including by date of Ex.A3 settlement of 1958 as discussed *supra* and therein once right vested, there is no divesting much less to again execute any sale deed. What further D.W.2 deposed if any of even by then of 1966 their mother is not in sound and disposing state of mind is obscure to believe. Undisputedly even in the suit filed by D.W.2 in O.S.No. 162 of 1953 under Ex.B2 judgment and decree, she contested as one of the defendants along with other person plaintiff and she was not shown as not in a sound and disposing state of mind and not capable of contracting with any mental imbalances to represent by any next friend much less later even in the appeal A.S.Nos. 115 and 153 of 1956 under Ex.B3

judgment of the year 1960. Suffice to say by 1958 by the time of Ex.A3 settlement, she was in sound and disposing state of mind with competency to contract, capable of transferring the property for which she got title traced from Ex.A1 sale deed dated 23-01-1952 when she purchased from one Gollapalli Suryakantham and others with competency to contract. Further, once it is a registered document of 29 years life but with months gap by the time of death of Mahalakshamma in 1987 and the suit filed in 1988 and by the time the document marked in the evidence of P.W.1 as rightly observed by the lower Courts, it was a document of 30 years covered by presumption under Section 90 of the Indian Evidence Act, 1872 (for short, 'the Act of 1872'), and the legal position referred *supra* clearly speaks to draw the presumption as it is the original and the existence of original from a registered document cannot be disputed and when the scribe died, one of the attesters died and another attester totally bedridden not in a position to move from bed even to depose, suffice to say it is a fit case to draw the presumption under Section 90 of the Act of 1872 that was not appreciated from the facts by the Courts below. There is nothing to show Ex.A3 registered settlement deed is void. Merely because the executant of the settlement deed, subsequent to the settlement deed even alienated any portion out of her property including by stretching into the property covered by the settlement deed, it cannot be said the settlement is not acted upon. As from law referred *supra*, the gift is valid and right of the settler diverts by vests in the settlee even possession and enjoyment postponed from the very execution transferring title and ownership and acceptance. The original document with plaintiff itself is suffice to say the gift was accepted and once the same is the case, even in the lifetime of the settler, who reserved life interest

enjoyment with possession, any alienations made *contra* to the gift for no right as already divests the right, those are not binding if at all anything covered by any extent of the settlement deed and that cannot be taken as settlement is not acted upon.

Having regard to the above conclusions arrived by the Courts below, *contra* to it are vitiated by perversity in appreciation of the evidence on record with reference to the fact and law, thereby, the concurrent findings, devoid of merits, are liable to be set aside and, accordingly, set aside and the second appeal is allowed, however in the circumstances with no costs and with no profits, while declaring the title of the plaintiff over the plaint schedule property and by directing the defendants or any person claiming through them to deliver possession of the same to the plaintiff within one month from today, failing which the plaintiff-appellant is entitled to execute and recover possession through due process of law.



**Dr. B.SIVA SANKARA RAO, J**

Date: 26-12-2016.

JSK