**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

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**SECOND APPEAL No.302 of 2016**

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**JUDGMENT:**

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This Second Appeal is preferred challenging the judgment and decree dt.29-02-2016 in A.S.No.106 of 2012 of the Additional District Judge, Narsapur, West Godavari District setting aside the judgment and decree dt.10-11-2010 in O.S.No.216 of 2000 passed by the Principal Junior Civil Judge, Narsapur, West Godavari District.

2. The appellant herein is defendant in the suit. The respondent/plaintiff is his younger brother.

3. The respondent/plaintiff filed the suit against the appellant for declaration of his title over the plaint schedule property, for recovery of possession of the plaint schedule property and also future profits towards damages for use and occupation of the schedule property.

4. The plaint schedule property is an extent of Ac.0.50 cents of land in R.S.No.465/6 of Rustumbada village, Kollabattula Vari Street,

28th ward of Narsapur Municipality.

5. The parties will hereafter be referred to as per their array in the suit.

6. In the plaint, the plaintiff contended that the defendant was the eldest male member of the joint family consisting of himself, defendant and another brother Venkateswara Rao and was acting as Manager of the said joint family; an extent of Ac.1.00 cents out of Ac.9.08 cents in R.S.No.465/6 was purchased by defendant with his separate funds under registered sale deed Ex.A1/dt.12-01-1987; that he intended to start a poultry firm under the name and style M/s.Radha Krishna Poultries; and since he was not having sufficient funds to start the said poultry firm, he requested the plaintiff to join in the same as a partner. The plaintiff contended that he agreed to the same and decided to invest in the ratio of 1:1. He contended that since the defendant could not contribute the capital equally with the plaintiff, and since he also needed money for discharging his debts, the defendant offered to sell Ac.0.50 cents on the northern side out of Ac.1.00 cents of land purchased by defendant on 12-01-1987, and as the plaintiff offered to purchase the same at the highest price of Rs.7,500/-, a registered sale deed Ex.A2/dt.21-09-1988 was executed in his favour and possession was delivered to the plaintiff. He contended that Ac.1.00 of land purchased by defendant on 12-01-1987 was not the partnership asset and it was always treated as defendant's exclusive property. According to

him the defendant was misappropriating the income derived from the joint family properties and also from the partnership business and so he asked the defendant to render accounts for the profits of the firm, that a deed of dissolution of firm Ex.B8/ dt.14-08-1991 was executed between the parties in which the defendant with an ulterior motive included Ac.1.00 of land purchased by him as if it was the partnership asset, and he was made to sign the said deed without disclosing the actual contents of the document and he signed it without going into the same on account of fraud played by defendant. He contended that he himself applied on 14-06-2000 for grant of pattadar pass book and title deed and the matter was under enquiry by the Mandal Revenue Officer, Narsapur. He contended that the defendant did not deliver the original of Ex.A2 sale deed and retained it with him and taking advantage of the same, attempted to obtain pattadar pass book and title deed for the above property. He stated that he wrote to the Mandal Revenue Officer, Narsapur on 08-07-2000 requesting him not to issue the same to defendant. After referring to the suit notice dt.26-07-2000, the reply notice dt.09-08-2000 and rejoinder notice dt.17-08-2000, the plaintiff contended that he did not contribute any amount at the time of purchasing the Ac.1.00 of property by the defendant under Ex.A.1 – Sale Deed dt.12.01.1987, and that he had only purchased Ac.0.050 cents from the defendant under Ex.A.2 by paying valuable consideration. He contended that Ex.B.8 did not confer any right on the defendant; and Ex.X.4 – Compromise Deed, dt.06.07.1991 on which the defendant is placing reliance was not a completed promise and there was no concluded contract between himself and the defendant.

7. The defendant filed written statement denying these allegations. He denied that he was ever in management of the joint family properties, and stated that he was staying in Martair and Penumantra villages and he had no opportunity to manage them, and the plaintiff alone was in possession thereof and was cultivating and managing the joint family properties. He claimed that although Ex.A.1 – Sale Deed dt.12.01.1987 was executed in his favour, half of the sale consideration for the purchase of the Ac.1.00 of the land under that sale deed was contributed by plaintiff also, and this was done with a view to start poultry farm business. He also claimed that bank loans were obtained for starting poultry farm under the name and style of M/s. Radhakrishna Poultries, from the Bank of India, Narsapur Branch. He contended that the plaintiff, in his written statement filed in O.S.No.92 of 1991 before the Senior Civil Judge, Narsapur, admitted that the purchase of Ac.1.00 of land under Ex.A.1 – Sale Deed was a joint purchase in the name of the defendant, that subsequently the plaintiff raised a dispute with the defendant that even though he contributed half of the sale

consideration that went into the purchase of Ac.1.00 of land, the defendant had obtained the sale deed in his exclusive name instead of joint names of both plaintiff and defendant, that plaintiff demanded that a sale deed for fifty cents out of Ac.1.00 should be executed in his favour towards his half share and thereafter, he executed Ex.A.2 – Sale Deed in favour of plaintiff for ostensible consideration of Rs.7,500/-. He denied that he received any consideration under Ex.A.2 – Sale Deed from plaintiff. He stated that even though the sale deed mentioned that possession of the Ac.0.50 cents was given to plaintiff, in fact possession was not delivered, and the plaintiff never had possession of this land. He contended that even though this extent was sold to the plaintiff under Ex.A.2, the sheds being used for the poultry farm were in existence on it and the said structures were not sold to plaintiff since the partnership in the poultry farm business was continuing with the plaintiff. He alleged that the entire Ac.1.00 extent of land was purchased only for the purpose of partnership business; that plaintiff was an active partner in the partnership business and regularly verified the accounts; and denied that the defendant had withdrawn any amounts or diverted funds from the partnership business towards his other businesses. He alleged that the plaintiff, who was managing the entire joint family properties, had not rendered proper account of the income realized from the joint family properties, and that was the root cause for the disputes between them. He stated that there was no written deed of partnership for doing the poultry farm business and the partnership was only oral. He alleged that Ex.B.8 - Dissolution Deed was executed to resolve the disputes clarifying that all assets and liabilities vest with the defendant including the entire Ac.1.00 of land as per schedule appended thereto and partition of the joint family properties was also affected on 02.08.1991 under Ex.A.30. He stated that the plaintiff was an Advocate and was aware of the law and his story that he did not go through the contents of Ex.B.8 dt.14.08.1991 cannot be accepted. He alleged that in O.S.No.92 of 1991, the plaintiff had admitted about having knowledge of the contents of Ex.B.8 and he is now *estopped* from contending otherwise. He contended that the original of Ex.A.2 was with him at the time of execution of Ex.B.8 – Dissolution Deed since the entire property including the plaint schedule property was allotted to him under the said document and the plaintiff had nothing to do with Ex.A.2 thereafter. The conduct of plaintiff in allowing the structures relating to the poultry business on the plaint schedule property even after he purchased the Ac.0.50 cts under Ex.A.2 till the filing of the suit in the year 2000 itself indicates that the plaintiff had acquiesced in the title of defendant. Lastly, he contended that the entire property of Ac.1.00 acre purchased under Ex.A.1 including the plaint schedule property is a separate property of the defendant and the plaintiff had no right, title or interest over the property and he is not entitled to any relief in the suit. Alternatively, he also contended that Ex.A.2 is only a nominal document and no title passed thereunder to the plaintiff.

8. The trial court framed the following issues :

> *"1. Whether the plaintiff is entitled to the declaration as prayed for ?*
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> *2. Whether the plaintiff is entitled to eviction of the defendant from the plaint schedule property and for delivery of possession of the same ?*
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> *3. Whether the plaintiff is entitled to the future damages for use and occupation of the schedule property by the defendant ?*
>
> *4. Whether sale consideration Rs.15,000/- for the property covered by registered sale deed dated 12-1-1987 was equally contributed by the plaintiff and the defendant ?*
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> *5. Whether the entire Ac.1-00 land was in possession of the partnership firm during continuance of the partnership firm as alleged in the written statement ?*
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> *6. Whether the entire extent of Ac.1-00 was purchased for the purposes of partnership firm and whether the entire extent was treated as partnership asset ?*
>
> *7. Whether the suit is correctly valued ?*
>
> *8. To what relief ?"*

9. Before the Trial Court, the plaintiff examined PWs.1 to 6, and marked Exs.A.1 to A.34 and Ex.X.1 to X.4.

10. The defendants examined DWs.1 to 3 and marked Exs.B.1 to B.11.

11. By judgment dt.10.11.2010, the Trial Court dismissed the suit. It held that under Ex.A.1 dt.12.01.1987, the defendant paid the entire sale consideration of Rs.15,000/- to his vendor and the plaintiff was in no way concerned with the payment of sale consideration to the vendor of Ex.A.1. It observed that there was no admission in the written statement in O.S.No.92 of 1991 by the plaintiff that he also contributed half of the sale consideration for purchasing Ac.1.00 of land under Ex.A.1; that the defendant did not examine his vendor under Ex.A.1 to show that part of the sale consideration was contributed by the plaintiff; and merely because the plaintiff was also an attestor and identifying witness to Ex.A.1, it did not mean that the plaintiff allowed the defendant to purchase the property of Ac.1.00 under Ex.A.1 in the defendant's name. It also held that the extent of Ac.1.00 of land purchased under Ex.A.1 was not hypothecated to the Bank of India and if really this land was an asset of the firm, there was no need to mortgage some other property of the defendant for the said loan transaction. It then considered Ex.A.2 and held that the evidence of DWs.2 and 3 did not indicate that sale consideration under Ex.A.2 for purchase of the Ac.0.50 cts from the defendant by the plaintiff did not take place in their presence, and since the plaintiff failed to discharge

this burden that payment of sale consideration of Rs.7,500/- under Ex.A.2 was made to the defendant, it has to be concluded that Ex.A.2 is a nominal document. It held that the plaintiff had full knowledge about the contents of Ex.B.8 – Dissolution Deed and then only he signed it and the schedule to Ex.B.8 disclosed that the extent of Ac.1.00 purchased under Ex.A.1 would vest in the defendant and it binds the plaintiff. It held that though Ex.B.8 deed of dissolution of Firm is not a conveyance, it binds the plaintiff and confers absolute rights on the defendant over the Ac.1.00 of land mentioned therein including the plaint schedule property. It held that though this Ac.1.00 of land was not purchased for the purpose of the poultry firm business which was self-acquired property of the defendant, when this land is mentioned in Ex.B.8 as falling to the share of defendant and the plaintiff signed on it, it became the property of defendant. It also observed that Ex.B.8 was executed in 1991 itself; that nothing prevented the plaintiff from seeking possession of the plaint schedule property immediately, and so he cannot seek declaration of title without proving that he purchased the property. It therefore concluded that the plaintiff is not entitled to relief of declaration of title or recovery of possession or damages.

12. Challenging the same, the plaintiff filed A.S.No.106 of 2012 before the Additional District Judge,

Narsapur.

13. By judgment dt.29.02.2016, the said appeal was allowed with costs, and the judgment of trial court was set aside.

14. The lower appellate court extracted the findings of trial court and referred to evidence of the parties and held that at the time of executing Ex.A.2, the defendant did not include the sheds which belonged to the partnership firm which are located on the said land, and if really this property was treated as partnership asset the defendant could not have executed Ex.A.2 in favour of plaintiff in his individual capacity. It held that in view of Ex.A.2, the plaintiff is the ostensible owner of the property and he is the real owner thereof. It observed that the burden of proof lies on the defendant to establish that Ex.A.2 is a nominal document and not on the plaintiff and the trial court wrongly placed the burden of proof on the plaintiff in spite of the fact that the defendant admitted execution of Ex.A.2. It further observed that the burden of proof that the plaint schedule property was also a partnership asset and was treated as such was also upon the defendant, and the fact that O.S.No.92 of 1991 (the suit filed by the Bank of India for recovery of dues of the partnership firm) was based on a mortgage, but the said mortgage was not of the plaint schedule property shows that it was not a partnership asset. It also observed that

written arguments submitted by plaintiff were not considered by the trial court, and the plaintiff is entitled to both the relief of declaration as well as relief of recovery of possession.

15. Challenging the same, the present Second Appeal is filed.

16. Heard Sri S.R. Sanku, counsel for appellant.

17. The counsel for appellant raised the following substantial questions of law :

> *"1. Whether the Respondent / Plaintiff, being a practicing Advocate, is not prohibited under Rule 47 of the Bar Council of India Rules 1975, from personally engaging himself in any business ?*
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> *2. Since the Respondent /Plaintiff is a partner in the Firm called the Radha Krishna Poultries, in issue, drawing profit in the ration of 1 : 1, he, being a practicing Advocate not prohibited from carrying out such profit receiving business, under the said Rule 47 and whether the Respondent / Plaintiff is not prohibited from instituting the very O.S.No.216/2000, which is opposed to the public policy under the said Rules that an Advocate cannot engage himself in business, the dispute regarding which cannot be the subject matter of the Plaint / Suit and that the very Suit ought not have been numbered, rejecting the very Plaint itself at the threshold, as, by way of the Suit based on a prohibited business, is the Plaintiff not trying to perpetuate his illegality, which is not the business of the Courts of Law, as the Courts of Law do not have the Jurisdiction to entertain Suits based on the material prohibited by the law, disentitling the litigants to any relief ?*
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> *3. Since the Partnership Firm stood dissolved under Ex.B.8 deed of dissolution dated 14-08-1991, is the instant Suit i.e., O.S.No.216/2000, not hopelessly barred by Limitation Act, 1963, which was filed 9 years after the Exhibit*

*B.8 Deed of Dissolution dated 14-08-1991 ?*

*4. Whether the Respondent / Plaintiff is disentitled to prefer the instant Suit in view of his approbation and reprobation, flowing out of the doctrine of Election under Section 35 of the Transfer of Property Act, 1882 ?*

*5. Whether the Respondent / Plaintiff proved, coercion, undue influence and fraud and misrepresentation and lack of his consent when executed Ex.B.8 deed of dissolution dated 14-08-1991, preceded Ex.X.4 compromise deed dated 06.07.1991, as required under section 10 to 23 of the India Contract Act 1872 ?*

*6. Whether the Respondent / Plaintiff is not estopped from instituting the very Suit, in view of the doctrine of estopple, doctrine of waiver and doctrine of acquiescence, in view of the Ex.B.8 and Ex.X.4, which make writ large his, having given up all his rights over the Suit Scheduled property ?*

*7. Whether the Respondent / Plaintiff having not got cancelled Ex.X.4 and Ex.B.8 under Section 31 of the Specific Relief Act, is he entitled to prefer the instant Suit ?*

*8. Whether the Respondent / Plaintiff is entitled to file the instant Suit in view of the prohibition under Section 69, 40 and 14 of the Indian Partnership Act, 1932 ?"*

18. I will deal with these points as under.

19. From the facts narrated above, there is no dispute that an extent of Ac.1.00 of land in Survey No.465/6 was purchased by the defendant under Ex.A.1 dt.12.01.1987. In this land, poultry farm business under the name and style M/s.Radha Krishna Poultry Farm was started by defendant. The said business is admitted to be in partnership with plaintiff and it is the contention of defendant that the said partnership was dissolved under Ex.B.8 dt.14.08.1991, and one of the terms of the said

Dissolution Deed was that the extent of Ac.1.00 in R.S.No.465/6 is taken over by defendant. It is also admitted that a suit O.S.No.92 of 1991 was filed by the Bank of India against the firm M/s. Radha Krishna Poultry Farm for recovery of money, and in that suit the plaintiff was arrayed as 3rd defendant and he filed Ex.B.1 statement denying his liability, admitting that the Firm stood dissolved and the assets and liabilities of the firm also devolved on the defendant herein, who was 2nd defendant in that suit. However, there is also no dispute that the extent of Ac.1.00 purchased under Ex.A.1 was not mortgaged to the said Bank, and other properties of the defendant were mortgaged to the said Bank on the basis of which the said suit was filed.

20. The plaintiff has sought relief of declaration of title and recovery of possession on the basis of Ex.A.2 from the defendant. The defendant has admitted execution of Ex.A.2 sale deed in favour of plaintiff.

21. The contention of defendant is that at the time when the extent of Ac.1.00 was purchased under Ex.A.1 sale deed dt.12.01.1987, the plaintiff had also contributed half of the sale consideration and that at the instance of plaintiff, Ex.A.2 was executed in favour of plaintiff by him in recognition of plaintiff's half share in the Ac.1.00 of land purchased under Ex.A.1. This being the pleading of defendant, it is not open to defendant to contend either

that Ex.A.2 was executed nominally in favour of plaintiff or that Ex.A.2 is not supported by consideration.

22. Also when the defendant raised the above pleas, the burden of proving the fact that the document Ex.A.2 was executed nominally in favour of plaintiff by him or that sale consideration did not pass under the said document should have been put on defendant by the trial court (**N.M.Rayalu Ayyar vs. STM Vairavan Chettiar**[1]). The defendant had given no reason why he executed ExA.2 sale deed in favour of plaintiff in respect of the Ac.0.50 cts cents of land, a portion of the Ac.1.00 cts purchased under Ex.A.1.

23. The trial court relied on certain statements in the evidence of attestors of Ex.A.2 with regard passing of consideration under Ex.A.2. This approach of the trial court is erroneous because it is settled law that the attestors of a document need not know the contents of document (**Pandurang v. M.Thukaram**[2]) and also need not always be a witness to the passing of consideration under the sale deed. The trial court's finding in this regard that Ex.A.2 is not supported by consideration in view of the evidence of the attestors, in my considered opinion, is contrary to law and cannot be sustained for the above reasons.

24. As regards the plea of defendant that the plaintiff

in O.S.No.92 of 1991 (filed by Bank of India for recovery of dues of the firm M/s.Radha Krishna Poultry Farm in which the plaintiff and defendant admitted to be partners) is concerned, the said suit was filed on the basis of mortgage by the said Bank against plaintiff and defendant but the land purchased under Ex.A.1 was not subject matter of the mortgage. If it had been partnership asset, it would have been mortgaged to the said Bank. The plaintiff's statement in O.S.No.92 of 1991 on which much reliance is placed by defendant is to the effect that the entire assets were allotted to defendant and the entire liabilities were also to be borne by defendant. If the plaint schedule property was never made a partnership asset, it cannot be said that the above statement in the written statement of plaintiff as a defendant in O.S.No.92 of 1991 amounts to an admission by him that the plaint schedule property is a partnership asset.

25. That apart, the contention of defendant that under Ex.B.8 – Deed of Dissolution of partnership, the entire extent of Ac.1.00 including the plaint schedule property purchased by him under Ex.A.1 was allotted to him and therefore title passed to him is untenable, because even if there is any such statement in Ex.B.8, since Ex.B.8 is an unregistered document, title does not pass to defendant from the plaintiff as regards the Ac.0.50 cents of land which the defendant had earlier sold to plaintiff under Ex.A.2. In **Ambika Prasad v. Ram Ekbal**

**Rai**[3]**,** the Supreme Court has held that title cannot pass by admission.

26. Thus, unless there is a registered conveyance from plaintiff to defendant conveying the Ac.0.50 cts which the plaintiff had purchased under Ex.A2, title cannot pass to defendant either under Ex.B.8 or under Ex.X.4 - alleged compromise set up by defendant.

27. There is no plea of adverse possession raised by defendant in the written statement to defeat the title of plaintiff which he had acquired under Ex.A.2 sale deed in respect of Ac.0.50 cents of land alienated to him by defendant. It is the admitted case of defendant that he is in possession of the property. Once title is found to be with plaintiff under Ex.A.2, and plaintiff has not been divested of title under any registered conveyance in favour of defendant subsequently, the plaintiff would be entitled for the reliefs of declaration of title as well as for the recovery of possession.

28. Therefore, I am of the opinion that the lower appellate court rightly allowed the appeal and held in favour of plaintiff.

29. As regards the contention of defendant in the Second Appeal that plaintiff being a practicing Advocate, he could not have engaged himself in any business in view of the prohibition under Rule 47 of the Bar Council of

India Rules, 1975 is concerned, it is too late in the day for defendant to raise this plea since he was the one who requested plaintiff (who is his own brother) to be a partner in the said business and even according to defendant, the said Firm was dissolved on 14.08.1991. Therefore, at this point of time, the plaintiff cannot be non-suited on the said plea so as to benefit defendant.

30. Moreover, defendant's plea in the written statement was that even though plaintiff paid half of the sale consideration for purchase of the Ac.1.00 land, the sale deed was obtained by defendant only in his (defendant's) name excluding plaintiff. Being an elder member of the family he ought not to have resorted to this and attempt to defeat the right of plaintiff in the plaint schedule property. Therefore, the defendant's conduct is not *bona fide* since he clearly tried to appropriate the entire Ac.1.00 of land to himself excluding plaintiff even though, according to him, the plaintiff contributed half of the sale consideration.

31. The plea that the suit O.S.No.216 of 2000 filed by plaintiff and barred by limitation is also not tenable since the suit is not based by the plaintiff on the premise that the plaint schedule property is a partnership asset. In fact, it is the plaintiff's specific case that it is not a partnership asset. Since the defendant did not raise any plea of adverse possession and was unable to prove his superior

title to plaint schedule property, and since the suit was filed on 08.09.2000 within the period of twelve years from the date of acquisition of title by plaintiff under Ex.A.2 dt.21.09.1988, the suit was well within the limitation and cannot be said to be barred by limitation.

32. The doctrine of election under Section 35 of the Transfer of Property Act, 1882 pleaded by defendant has no application to the present facts of the case. Such a provision cannot defeat the suit filed by plaintiff once it is proved that he had title to the plaint schedule property and was entitled to recovery of possession.

33. The plea of *estoppel* raised in the grounds of Second Appeal by the defendant is also not tenable since there cannot be *estoppel* against the provisions of the Transfer of Property Act, 1882 and the Registration Act, 1908, which provide for conveyance of title only through a registered document.

34. The suit filed by plaintiff cannot also be said to be barred by Section 69 of the Indian Partnership Act, 1932 since the plaint schedule property was never a partnership asset.

35. For the above reasons, I do not find any merit in the Second Appeal and it is accordingly dismissed. No order as to costs.

36. As a sequel, the miscellaneous petitions, if any

pending, shall stand closed.

**JUSTICE M.S.RAMACHANDRA RAO**

Date: 19-07-2016
Vsv/Ndr/*

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[1] MANU/TN/0654/1934 (DB)

[2] AIR 1922 PC 20

[3] AIR 1966 SC 605