

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND

THE HON'BLE SMT JUSTICE T. RAJANI

CCCA.Nos.105 of 1999 and 284 of 2007

DATED: 23.06.2017

Between

Mir Fazeelat Hussain (died) per LRs.

...APPELLANTS

And

Kalyannagar Co-op. Housing Society Ltd. and others.

...RESPONDENTS

COUNSEL FOR THE APPELLANTS: SMT. G. SUDHA

COUNSEL FOR THE RESPONDENTS: SMT. JONNA RAMANI



THE COURT MADE THE FOLLOWING:

COMMON JUDGMENT: (per the Hon'ble Smt Justice T. Rajani)

CCCA.No.284 of 2007:

Impugning the judgment of the Chief Judge, City Civil Court, Hyderabad in I.A.No.1309 of 2003 in O.S.No.157 of 2002 by virtue of which the Court below rejected O.S.No.157 of 2002, as being barred by principles of *res judicata*, the appellant comes before us by way of this appeal.

2. The appellant is the son of the deceased appellant Khatoon Bee, who was brought on record after the death of the original plaintiff, Mir fazeelat Hussain. The grounds on which the appellant assails the judgment of the court below are as follows:

The defendants 1 and 2 filed written statement but did not raise the question of *res judicata* and did not produce any document with regard to the same. The Kalyannagar Welfare Association, who got impleaded as defendant No.3, filed written statement. In the said written statement, the plea of *res judicata* was not taken and no issue was framed regarding *res judicata*. The third defendant against whom no relief is sought for in the suit has filed I.A.No.1309 of 2003 under Section 11 read with Section 151 of Civil Procedure Code, requesting the Court to dismiss the suit applying the principle of *res judicata* as the issues concerning the suit were already decided in O.S.Nos.1654 and 1655 of 1985. The third defendant had neither pleaded in the written statement nor filed copies of the plaint and written statement in the aforementioned suits, which are necessary to decide the issue of *res judicata*.

3. It is also pleaded that the learned Chief Judge, without following the well-established principles of law that *res judicata* must be expressly pleaded and if it is not, it will be deemed to have been waived, passed an erroneous order rejecting the suit.

4. At the hearing, though the counsel for the appellant extended her arguments, no authority or any legal support for the contention of the appellant, made in the grounds of appeal, that the plea of *res judicata* has to be taken in the pleadings itself, is brought forth.

5. However, from the grounds of appeal, the points that fall for consideration are as under:

1. Whether *res judicata* needs to be pleaded in the pleadings?
2. Whether failure to take such plea in the pleading would *estop* the defendants from raising it later on, during the pendency of the suit?
3. Whether the rejection of the suit at the instance of the third defendant is illegal?

POINTS No.1 and 2:

6. The first two points are interlinked and can be dealt with together. The defendants in the lower Court filed their written statements but specific plea of *res judicata* is not taken. However, the averments, constituting plea of *res judicata*, that the suit is not maintainable for the reason that an earlier suit between the parties decided the same issues which would arise in this case, are nevertheless made. The fact that O.S.Nos.1654 and 1655 of 1985 were decided prior to O.S.No.157 of 2002 is not disputed.

The impugned judgment is dated 21.04.2004 whereas O.S.Nos.1654 and 1655 of 1985 was decided and judgment was delivered on 31.08.1998 itself.

7. The plaint filed, in O.S.No.157 of 2002, is for the relief of declaration to declare the plaintiff as owner and possessor of the land admeasuring Ac.0.25 guntas in Sy.No.137, situated at Yousufguda village, Khairtabad Mandal and for perpetual injunction restraining the defendants from interfering with the enjoyment of the plaintiff over the said property. Initially, O.S.No.1654 of 1985 was filed only against the first defendant, who is the third defendant in O.S.No.157 of 2002. Later on, the defendants in the present suit were also added as parties. The relief sought for in O.S.No.1654 of 1985 is also for declaration that the plaintiffs are the owners of the land admeasuring Ac.3.35 guntas in Sy.No.137 situated at Yousufguda village and delivery of possession of the portions of the plaint schedule land shown in RED colour marked A, B and C in the plan filed along with the plaint and perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs. As aforementioned, the land admeasuring Ac.3.35 guntas includes the land against which declaration is sought for in O.S.No.157 of 2002. The pleadings in O.S.No.1654 of 1985 would show that the genesis of the dispute is Ac.0.25 guntas of land, which is, allegedly, occupied by the Water Works Department. Hence, when the issues, which are involved in O.S.No.157 of 2002, are already decided in O.S.No.1654 of 1985, they cannot be brought for decision before any other Court, in a later suit.

8. The point of *res judicata* has to be decided as a preliminary issue is the purport of a judgment of this High court M.V. NARASAMMA v. M. VENKATARATNAM¹. In the said case, the court came to deal with an application, under Article 227 of the Constitution of India, questioning the legality of the order passed by the Assistant Settlement Officer, Vizianagaram on 08.03.1962. The facts are that the respondent therein, filed an application under Section 56 of the Madras Estates (Abolition and Conversion into Ryotwari) Act seeking a declaration as to who is the lawful ryot. In those proceedings the petitioner raised an objection that in an earlier proceeding under Sections 11 and 15 of the Madras Estates Abolition Act, it was found by the Settlement Officer and the appellate authority that the respondent is a sub-tenant and that the petitioner is a tenant, granting ryotwari patta to the petitioner. That judgment being final and conclusive between the parties, it is not open to the respondent to re-agitate that question in a proceeding initiated under Section 56 of the Abolition Act. She separately filed an application and requested the Assistant Settlement Officer to treat this question as a preliminary question of law and decide it. The Assistant Settlement Officer rejected the petition, as it was opposed by the respondent, holding that this matter also can be decided finally with other issues. It was observed as follows:

“Under O. 14, r. 2 C. P. C. where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. While it is true

¹ AIR 1965 AP 12

that in a Civil suit which can come up before this Court on appeal, it is found always desirable for the trial Court to dispose of all the issues, it does not necessarily mean that an issue which goes to the root of the trial cannot be considered at the appropriate stage. If that interpretation is accepted the provisions of Or. 14, R. 2 will become nugatory. It is true that it is left to the discretion of the tribunal before whom proceedings are pending to determine whether the question of law is of that nature or not. But undoubtedly that discretion has to be exercised in a judicial manner.

Without assigning any reason, it cannot be stated by any tribunal that any issue which falls within the purview of O. 14, R. 2 C. P. C. will be heard only at the end of the trial. For example, S. 3 of the Indian Limitation Act obliges the Court to consider at the initial stage, whether the suit is time barred or not. Similarly a question of jurisdiction raised ought to be disposed of as a preliminary issue. On the same analogy any objection taken under Sec. 11 C. P. C. , i. e., objection as to *res judicata*, that objection has to be disposed of at the earlier stage of the suit. The opening words of Sec. 11 C. P. C. clearly stated that no Court shall try any suit or issue in which the matter was directly and substantially in issue in a former suit and was finally disposed of by a competent Court. The very purpose of this section will be defeated if it is uniformly insisted that such issues also should be tried at the end of the trial along with the other issues of fact. That wholesome principle referred to above is applicable where the preliminary issues do not reach the roots of the case.”

9. In this case, the docket of the Court below shows that even before the issues were framed in the suit, the third defendant filed an application to reject the plaint as having been barred by *res judicata*. In fact, the suit did not reach the stage of framing issues, and it was only awaiting the framing of issues. In such circumstance, it would not be reasonable to say that the application cannot be decided till the issues are framed in the suit or that a separate application with such

prayer is not maintainable. The principle underlying Section 11 CPC is to avoid conflicting decisions on the same issues. Defeating such principle, which accrues to the benefit of all the concerned, on technical grounds, would result in travesty of justice. The plaintiff did not appear to deny the contentions on the basis of which the application for rejection of suit is filed. When there is no denial, a situation of framing issues would not arise. Hence the Court below rejected the plaint as being barred by *res judicata*. If the plaintiff had appeared and contested the interlocutory application, perhaps the pleadings and the judgment in the earlier suit would have been filed by the petitioner therein. Hence, when there is denial of the facts, stated in the application, it would amount to admitting them.

Points 1 and 2 are answered accordingly.

POINT No.3:

10. The contention of the appellants that the third defendant is a third party and rejection of a suit, at its instance, is not at all tenable, is not sustainable, as the third defendant herein, who is the first defendant in O.S.No.1654 of 1985, has already contested the said suit and the suit was decided. When the same issues are raised in a subsequent suit, the third defendant has every right to get impleaded and was rightly impleaded and by his impleadment in the present suit, the third defendant ceases to be a third party. Hence, the third defendant cannot be termed as a third party and any order passed at its instance, cannot be contended to be illegal. Hence, with the above it can be concluded that the judgment of the Court below is sustainable.

The point is accordingly answered. The appeal is dismissed.

CCCA.No.105 of 1999:

11. This appeal is preferred against the judgment of the IV Senior Civil Judge, City Civil Court, Hyderabad in O.S.No.1654 of 1985 dated 31.08.1988. Though respondents 1 to 4 are shown in the cause title, the appellant in the memorandum of appeal does not press the appeal against respondents 2 to 4 stating that the appellant initiated separate proceedings claiming compensation for the land measuring Ac.0.25 guntas in Sy.No.137.

12. The aforementioned judgment is assailed on the following grounds:

(a) The Court below has appointed an Advocate Commissioner for the purpose of inspection of the land in Sy.No.137 of Yousufguda village, Hyderabad to note the physical features and demarcate an extent of Ac.2.00 guntas purchased by the Kalyannagar Co-op. Housing Society/first defendant in Sy.No.137 after getting it surveyed through officers of the Director of Survey and Land Records, Hyderabad. Accordingly, the Advocate Commissioner, after execution of the warrant, has submitted his report in detail, but the Court below did not take the same into consideration and caused great injustice to the appellants/plaintiffs.

(b) The first defendant society purchased the land admeasuring Ac.32.19 guntas in Sy.Nos.52, 138, 139 and 137 under registered sale deed dated 24.07.1964 from plaintiff No.1 and in view of that, the finding of the Court below that the plaintiffs failed to establish that they had valid title over the suit land is wrong. The Advocate

Commissioner in his report has categorically stated that the first defendant society is in possession of excess land admeasuring 10,960 sq. meters equivalent to about Ac.1.20 guntas in Sy.No.137 and an extent of 548.89 meters in Sy.No.53, which is not at all sold to the first defendant society. In view of the same, the finding of the Court below that the first defendant society had been in possession and enjoyment of the land, which they purchased in Sy.Nos.137 and 53, is wrong.

(c) Neither the first defendant society pleaded in the written statement that the suit is barred by limitation nor the Court below has framed any issue in that respect. In view of that, the finding of the Court below that the suit is barred by limitation is illegal.

13. The suit was originally filed only against the first defendant; defendants 2 to 4 were subsequently added but, unfortunately, no consequential amendments were made to the plaint seeking any relief or making any averments against defendants 2 to 4. On the above grounds, the appellant sought to set aside the judgment of the court below.

14. The averments of the plaint, in brief, can be mentioned for the benefit of proper appreciation of the facts of the case.

(a) The suit was filed by one Mir Fazeelat Hussain, who died during the pendency of the suit and plaintiff No.2 was brought on record as his legal representative. One Nawab Rayees Yar Jung, the father of the plaintiff, was the owner and pattedar of the lands bearing S.Nos.52, 53 and 137 to 144 situated at Yousufguda village,

and out of the total extent Ac.18.34 guntas in S.No.53, Ac.7.35 guntas were acquired by the Government for T.B. Hospital. The Hyderabad Water Works constructed a water tank in S.No.137 about 40 years ago on an extent of 25 guntas for supply of water to T.B. Hospital. Certain lands in other survey numbers were also acquired by the Government for A.G. Colony. Nawab Rayees Yar Jung during his life time and the plaintiff, who succeeded to the properties after his death, received compensation for the acquired lands.

(b) Nawab Rayees Yar Jung had sold Ac.4.08 guntas out of the total extent of Ac.10.3 guntas in Sy.No.137 to Dr. Mohd. Abdul Hai under a registered sale deed dated 26th Aban 1356 Fasli, who, in turn gifted the same to his brother Dr. Mohd. Abdul Khaliq on 07.06.1963. Thus, the plaintiff was in possession and enjoyment of Ac.11.26 guntas in Sy.No.52; Ac.10.15 guntas in Sy.No.138 and the remaining extent of Ac.3.38 guntas in S.No.53 excluding the road and the land occupied by T.B. Hospital and Ac.9.3 guntas in Sy.No.139 as owner since the death of his father.

(c) In or about January 1964 some of the office bearers of the defendant society approached the plaintiff for sale of some of his lands. After negotiations, an agreement was entered into between the plaintiff and the defendant on 08.03.1964 for sale of the lands bearing Sy.Nos.52, 138 and 139 admeasuring in all Ac.31.4 guntas but before the formalities for execution of the sale deed were completed, it was found, on taking actual measurements of the lands, that an extent of Ac.0.25 guntas in Sy.No.139 agreed to be sold to the defendant was in the occupation of the Electric Sub-Station. The defendant wanted a

part of Sy.No.137 to be included in the sale deed to cover the deficit area and it was agreed that an extent of Ac.2.00 guntas out of Sy.No.137 contiguous to Sy.No.138 should be included in the sale deed. Accordingly, the plaintiff executed a registered sale deed dated 24.07.1964 conveying to the defendant land in other survey numbers, including Ac.2.00 in Sy.No.137.

(d) The defendant filed O.S.No.194 of 1968 on the file of the V Additional Judge, City Civil Court, Hyderabad against one A.L. Sailoo and Mohd. Ibrahim and others for declaration of title and for possession of an extent of Ac.2.37 guntas in Sy.No.138 on the ground that the said persons encroached into the land. During the trial, a Commissioner was appointed and on the basis of his report, A.L. Sailoo and Mohd. Ibrahim Khan re-delivered Ac.0.32 guntas in Sy.No.138 to the defendant and consequently, O.S.No.194 of 1968 was dismissed.

(e) As the water tank constructed in Sy.No.137 was no longer in use and had become obsolete, the plaintiff applied to the Government on 22.06.1984 to release the extent of Ac.0.25 guntas and sent a copy of the application to the Special Deputy Collector, Land Acquisition, Hyderabad. The plaintiff filed all the relevant documents before the Metro Water Works. The officials of the Metro Water Works, who intended to grab the land, refused to take any action as the plaintiff did not accede to their illegal demands for release of the land. In the meanwhile, the Government proposed to acquire a part of Sy.No.137 for the Friends Cooperative Housing Society and the

plaintiff gave his consent on the premise that the Government did not require the land.

(f) The plaintiff is the absolute owner and possession of Ac.3.35 guntas in Sy.No.137 including the area covered by the water tank. The defendant had no manner of right or interest therein. Having failed to force the plaintiff to terms, the officials of the Metro Water Works had colluded with the members and office bearers of the defendant with malafide intention of depriving the plaintiff of his land and the defendant claiming that the land belonged to it, encroached into portions of land show in RED colour marked in A, B and C in the plan filed along with the plaint and had been trying to put structures thereon and to encroach upon the remaining open land shown in yellow colour in the plan filed along with the plaint. The plaintiff got issued a legal notice but no reply was given by the defendant. The plaintiff got surveyed the lands tentatively and it was found that the defendant encroached into the portions of Sy.No.137.

Hence, the suit seeking for declaration that the plaintiff is the owner of the land admeasuring Ac.3.35 guntas in Sy.No.137 and for delivery of possession and for perpetual injunction.

15. The first defendant society filed written statement denying the averments of the plaint and contended as follows:

The society and its members are in possession of the land, which were purchased by the society. The cistern is situated in the middle of the land, which is sold by the owner and open space was left out in the layout plan of the society for public purpose. Consequently,

the Municipal Corporation of Hyderabad and Water Works Department had constructed compound wall to develop water tank as permission was accorded by the Government. The society is in possession of only what the society had purchased and not in possession of any excess land. The person, who is contesting now, is not the legal representative of the plaintiff, who originally instituted the suit and had no right over the property, which was sold by Mir Fazirat Hussain.

16. The third defendant filed a separate written statement contending that the suit is not maintainable for want of statutory notice under Section 116 of the Hyderabad Metro Water Supply and Sewerage Act, 1989. The High Court in WP.No.11547 of 1988 dated 05.10.1993 gave a direction to the Secretary for Housing and Municipal Administration and Urban Development Department to issue notice to the plaintiff and defendant No.1 and concerned planning section of the Municipal Corporation of Hyderabad. After affording an opportunity to decide as to whether the property in question is part of the sale made in favour of the Kalyan Nagar Cooperative Housing Society Limited, defendant No.1 and as to whether it is part of layout. If it is found that the property, in question, is not the subject matter of the sale deed executed in favour of the Kalyan Nagar Cooperative Housing Society Limited and not included in the layout, compensation has to be paid by initiating proceedings under the Land Acquisition Act. If the property concerned is part of the sale and is part of the layout no compensation need to be paid. In pursuance of the above order and instructions of the Collector, the Chief City Planner, MCH, got surveyed the entire land covered by the layout of the first defendant society

where it is found that an area of 0.56 acres is covered by the existing water tank. It is quite clear from the sale deed executed by the plaintiff in favour the first defendant for which land layout was got approved, that it contains a reservoir and hence the question of ownership of plaintiff does not arise. It is stated that the first defendant society wrongly deposed in the affidavit stating that the area covered by the reservoir is excluded from the land under sale. There is a reservoir in the above mentioned land since time immemorial i.e. prior to 1946 AD, which can be confirmed from the registration and town planning wing of MCH. The plaintiff through his GPA holder filed O.S.No.1451 of 1993 against the third defendant society. The above case is pending trial. The second defendant adopted the written statement of the third defendant.

17. Heard the counsel on both sides. Before the lower Court, the plaintiff examined P.W.1 and got marked Exs.A1 to A13, while the defendants examined D.Ws.1 to 3 and got marked Exs.B1 to B20. P.W.1 is the GPA holder of the plaintiff.

18. The court below framed six issues and four additional issues. No issue was framed with regard to the notice that is alleged as necessary before filing a suit against defendants 2 to 4. The court, however, incidentally gave a finding on that aspect also. Order 14(1) CPC requires the Court to frame issue on every proposition of fact or law, which is affirmed by one party and is denied by the other. Defendant No.3 avers, in his written statement, that no notice, as required by section 116 of the Hyderabad Metropolitan Water Supply and Sewerage Act, is given before filing this suit.

In the cross-examination, P.W.1 admits the same. Hence, within the meaning of Order 14 CPC, no issue needs to be framed, as the plaintiff did not affirm the said fact in the pleadings and moreover, admits in the evidence. Moreover, even if no issue is framed, it does not result in fatality of the case, if evidence is adduced on the said aspect. In this case, the plaintiff, by admitting it, does not necessitate framing of an issue on that aspect. All the issues are incidental to the first issue framed by the Court below; may be with an exception of additional issue number one, which is held in favour of the plaintiff.

19. Hence the broad point that has to be decided in this case is:

Whether the plaintiff could prove that the first defendant encroached into Sy.No.137 and whether any declaration can be made that the plaintiff is the owner of Ac.3.35 acres in Sy.Nos.137.

20. A perusal of the impugned judgment, as contended by the plaintiff, shows that the learned Judge passed the impugned judgment without considering the Commissioner's report and dismissed the suit by holding that the plaintiff did not adduce any evidence to prove his title over the disputed land. It was also observed that P.W.1 did not state as to from which year she was in possession and enjoyment of the suit land and categorically stated that the defendants are in possession of the suit schedule property. The Court below held that the plaintiff having not filed the suit within 12 years from the date of purchase, the suit has to fail. It was also observed that as per the Hyderabad Metropolitan Water Supply and Sewerage Act, the plaintiff has to issue a statutory notice to the defendants before filing a suit but as no such notice was issued, the suit fails on that ground also.

21. At the hearing in this appeal, the counsel for the appellant contends that the failure of the Court below to consider the Commissioner's report is illegal. She also contended that the Commissioner's report is part of the record and hence, no separate marking of the Commissioner's report is required. The Court below, without being aware of the said legal position, failed to consider the Commissioner's report.

22. The law is too well settled that the Commissioner's report forms part of the record. It is only the party, who seeks to examine the Commissioner, has to call upon the Commissioner to give evidence before the Court. In this case, no such effort was made by any of the parties. The Commissioner's report, hence, can be looked into even at this stage, to see whether it leads to any different conclusion than the conclusion drawn by the Court below.

23. The observations of the Commissioner with regard to Sy.No.137 is that out of the total area of 1 hectare 39 Ar; 4289 meters, an area of suit land measuring 1 hectare 209 Ar; 60 sq. meters equivalent to about 10,960 sq. meters or about 1 acre 20 guntas in Sy.No.137, excluding 744 sq. meters is not covered by the sale deed of the defendant. Except observing as such, the Commissioner did not make any remark, as was made in respect of Sy.No.53. With regard to Sy.No.53, he observed, in the report, that after fixing the common boundary of Sy.Nos.138 and 53, it is found that the Kalyannagar Cooperative Housing Society had encroached upon an area of land in Sy.No.53, measuring 548 sq. meters. The observations with regard to Sy.No.137 are not made in a manner of understanding that there was

any encroachment made by the first defendant society in Sy.No.137. He reported that the area of Ac.2.00 acres in Sy.No.137 has not been marked with a boundary due to the fact that the plots are built up on the northern side boundary as well as on the common boundary of Sy.Nos.137 and 138. He observes that, in any way, there is an excess of 10,960 sq meters, which is equivalent to 1 acre 20 guntas in Sy.No.137, in which, according to the sale deed of the defendant, only 2 acres of land is sold to him by the plaintiff. But he does not say whether the first defendant is in occupation of the said excess land. The Commissioner's report also does not speak about any structures in the land of the plaintiff, to support the plea of the plaintiff made in the plaint that the defendant raised structures. Hence, the Commissioner's report does not help the plaintiffs to improve their case. The entire emphasis was on the Commissioner's report and the counsel contends that consideration of the Commissioner's report itself would quickly lead to a different conclusion. But, unfortunately, the report, even after close and careful scrutiny, does not bring forth any such material supporting the claim of the plaintiffs. During the cross-examination of D.W.2, the plaintiff took an admission that the commissioner's report speaks about encroachment in Sy.No.53. If the commissioner's report, as contended, had proved the alleged encroachment in Sy.No.137, the plaintiff would have certainly endeavored to elicit the same from D.W.2, as was done in respect of Sy.No.53. That itself would show that the Commissioner did not state about any encroachment in Sy.No.137. Absolutely, no fact supporting the case of the plaintiff is elicited from D.Ws.1 to 3.

24. Apart from the above, the contention of the first defendant that the plaintiff does not have any right to maintain this suit also seems to be cogent. First of all, the plaintiff, who originally filed the suit, himself does not plead as to how he enters the shoes of the legal heir of Nawab Rayees Yar Jung. In the third para of the plaint, it is averred that Nawab Rayees Yar Jung, during his lifetime and the plaintiff, who succeeded to his property after his death, have received compensation for the acquired land. The averments with regard to the rights asserted by the plaintiff are absolutely vague. In the fourth para, the averments are that Nawab Rayees Yar Jung sold Ac.4.08 guntas to Dr. Mohd. Abdul Hai under a registered sale deed and Dr. Mohd. Abdul Hai, in turn, gifted the same to his brother Dr. Mohd. Abdul Khaliq. It is simply averred that:

“Thus the plaintiff was in possession and enjoyment of Ac.11.26 guntas in Sy.No.52; Ac.10.15 guntas in Sy.No.138 and the remaining extent of Ac.3.38 guntas in S.No.53 excluding the road and the land occupied by T.B. Hospital and Ac.9.3 guntas in Sy.No.139 as owner since the death of his father.”

As to how the plaintiff, Smt. Khatoon Bee, is the legal representative of the first plaintiff is nowhere explained in the plaint and there are no consequential amendments made to the plaint after she was brought on record by virtue of orders dated 18.03.1996 in I.A.No.905 of 1995. The second plaintiff, even after the amendment, avers as if it is the first plaintiff, who is prosecuting the case and as if it is only against the first defendant. No relief is claimed against defendants 2 to 4, though they were added as parties.

25. The sale deed in favour of the second plaintiff can be seen in the record but the same is not marked before the Court, hence, absolutely there remains no evidence on the basis of which the *locus standi* of the second plaintiff for filing this suit can be understood and upheld.

26. The undisputed fact with regard to the Water Works Department occupying the disputed land relates to 40 years back. P.W.1, who is the GPA holder, states that the father of the plaintiff constructed water tank during his life time in an extent of Ac.0.25 guntas and hence the same is excluded from the sale deed of the first defendant, which is quite contrary to the pleadings, where in it is averred that it is the water works department which constructed the water tanks. The plaint is totally silent as to how the Water Works Department came to occupy the said land, whether with or without the permission of the plaintiff and whether any steps were taken to regularize the occupation of the Water Works Department to show that they were occupying the land with the permission of the plaintiff and hence, no adverse possession can be pleaded. There are several gaps in the frame of the suit. It is nowhere clearly stated as to what extent in Sy.No.137 remained with the plaintiff after the sale of 2 acres to the first defendant. The plaintiff states about the total extent of land in Sy.No.137 as Ac.10.03 guntas and that Ac.4.08 guntas is sold to Dr. Abdul Hai and suddenly jumps to speaking about his total possession in survey numbers other than Sy.No.137. The plaintiff further states that 2 acres was sold to the first defendant in Sy.No137 by way of sale deed dated 24.07.1964 and then states, that it is out of Ac.5.35 guntas, excluding Ac.0.25 guntas. How the land remaining in Sy.No.137 can be as much cannot be deciphered. As already observed, it is stated that the total

extent in the said survey number is Ac.10.03 guntas and that Ac.4.08 guntas is sold to Dr. Abdul Hai. If Ac.0.25 guntas also forms part of Sy.No.137, the extent cannot be Ac.5.35 guntas. It is also an inconsistent statement to say that the water tanks are in Sy.No.137, while stating that the land in Sy.No.137 is Ac.3.35 guntas including Ac.0.25 guntas covered by water tanks. The plaint lands us in total confusion because of the clumsy pleadings therein. There is a failure on the part of the plaintiff to issue notices to the Water Works Department, as is prescribed by the Hyderabad Metropolitan Water Supply and Sewerage Act. The averment in the plaint against the first defendant is that the first defendant is trying to encroach upon the land under inspection of the Water Works Department. In spite of such averment being made, in the first instance, the plaintiff did not choose to add defendants 2 to 4 as parties. The averments in the plaint and the evidence adduced by the plaintiff are as vague as vagueness could be and does not help the Court in coming to any other conclusion than the conclusion, which was drawn by the Court below.

27. The contention of the plaintiff that no issue is framed on limitation and hence the suit cannot be dismissed on that count, however, is supported by law. The question of limitation, when it becomes a mixed question of law and fact, needs an issue to be framed for its proof is the settled legal position. When the suit facts would necessitate the Court to frame an issue and if the question of limitation raised therein depends on proof of certain facts, then, no doubt, an issue on the question of limitation has to be framed by the Court. But, if from the pleadings, the Court is able to gather that the suit is barred by limitation, no issue, on limitation, needs to be framed

and the said principle is incorporated under Section 3 of the Limitation Act, 1963, which is as follows:

3. Bar of Limitation: - (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

Section 3 being subject to Sections 4 to 24 of the Act makes limitation a question of law. But, however, in this case, the plea of the plaintiff that there should be an issue on limitation seems to be in vain, since the lower Court did not render any finding to that effect. But, however, the suit fails for the other reasons, which are aforementioned. There are several gaps in the plaintiff's case, which remain unexplained.

28. Before concluding, in order to understand the ill-drafted plaint averments, at the cost of repetition, they are mentioned herein. In the third paragraph, it is stated that the father of the original plaintiff is the owner of the lands in several survey numbers including Sy.No.137 and out of the total extent of land in Sy.No.53 Ac.7.35 guntas were acquired for T.B. Hospital. The Hyderabad water works constructed water tank in Sy.No.137 about 40 years back. Part of the lands, in Sy.Nos.140 to 144, was also acquired by the government for A.G. Colony and for electric substation. Then the paragraph ends by stating that the father of the plaintiff and after his death, the plaintiff received compensation for the acquired lands. (When land in Sy.No.137 is also mentioned in the list of acquired lands, anyone would think that it is also acquired.) In the fourth paragraph the averments go to say that the father of the plaintiff sold Ac.4.08 guntas

towards north out of the total extent of Ac.10.03 guntas in Sy.No.137 and then the plaintiff goes on to state that, thus, the plaintiff was in possession of lands in Sy.Nos.52, 138, 53 and 139. He does not mention about Sy.No.137, thereby giving an understanding that after the sale, he is not in possession of any land in Sy.No.137. However, the land in Sy.No.137, after the sale of Ac.4.08 guntas out of Ac.10.03 guntas would be Ac.5.35 guntas. Out of that, 2 acres was sold to the society to make good the deficit of the agreed extent of sale. Then Ac.3.35 guntas remain. But in paragraph 5 it is averred that the water tanks are included in Sy.No.139, thereby making the whole case topsy turvy.

29. The plaintiff stated that O.S.No.194 of 1968 is filed by the defendant against one Sailoo and Mohd. Ibrahim Khan for declaration of land in Sy.No.138 and the plea taken by the defendants therein is that they are in possession of Ac.4.08 guntas in Sy.No.137. It does not relate to Sy.No.137, except for the plea taken by the defendants therein. Then it is stated that the plaintiff gave an application to the Government to release Ac.0.25 guntas as the water tanks are no more in use. (Letter not filed before the Court). On the advice of the Special Deputy collector, three documents pertaining to the land are filed before the water works department. But the water works department, in order to grab the land, did not take any action. (As to why the plaintiff did not pursue the same is not stated or explained) Then a proposal to acquire Ac.1.30 guntas in Sy.No.137 was made by the Government and the proceedings are pending. (The stage of the proceedings, whether they are pending or concluded is not stated in

the plaint or even in the evidence. Until such time declaration as sought for is not possible.) Then it is averred that the plaintiff is the owner of Ac.3.35 guntas including the area of Ac.0.25 guntas occupied by the water tanks. (The extent does not tally if the water tanks area is included.) The other allegation is that the water works department, having failed in bringing the plaintiff to terms, had colluded with the defendant and encroached into his land. (The very allegation is not comprehensible. The history of the litigation is that in spite of the plaintiff giving an application no action is taken and in spite of it no action was pursued by the plaintiff on the said application. In such case, there cannot be any grievance with the water works department, as they do not see any threat or at least immediate threat from the plaintiff. The motive for the defendant to collude with the water works department is not pleaded and no material, to make any assumption of motive, is placed by the plaintiff.)

30. It is also averred that defendant tried to put up structures. (The commissioner did not observe any traces of such efforts.) The sethwar filed, at the stage of this appeal, only shows the ownership of Nawaz Rayees Yar Jung to an extent of Ac.10.03 guntas in Sy.No.137. There is absolutely no proof regarding the flow of title to the present appellant. Mir Fazeelat Hussain is, however, shown as the son of Rayees Yar Jung. But how Khatoon bee got to be the legal representative of Fazeelat Hussain is not stated anywhere in the pleadings or in the evidence nor does P.W.1, who is the GPA holder of Khatoon Bee, explain the same. Hence, in view of the above, we do not see any basis on which the appellant can be declared as owner of

Ac.3.35 guntas in Sy.No.137 and any reason to interfere with the judgment of the Court below. The appeal is dismissed.

In the result, CCCA.Nos.105 of 1999 and 284 of 2007 are accordingly dismissed. As a sequel to the dismissal of the appeals, the miscellaneous applications, if any, shall stand dismissed infructuous. However in the circumstances of the case, no costs are ordered.

C.V. NAGARJUNA REDDY, J

June 23, 2017
DSK

T. RAJANI, J

