

THE HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.813 of 1999

JUDGMENT :

This Second Appeal, under Section 100 of C.P.C., is preferred by the appellant-plaintiff aggrieved by the judgment and decree dated 22.07.1999 in A.S.No.11 of 1998, passed by the Principal Senior Civil Judge, Tenali (for brevity "the lower appellate Court"), partly allowing the appeal suit, while reversing the judgment and decree dated 28.11.1997 in O.S.No.14 of 1993, passed by the Principal Munsif Magistrate, Tenali (for brevity "the trial Court"), decreeing the suit for declaration and directed the defendants for removal of obstructions and manure.

2. The appellant herein is plaintiff and the respondent Nos.1 to 3 are defendants in the suit O.S.No.14 of 1993. For the sake of convenience, the parties are referred to as they were arrayed in the suit O.S.No.14 of 1993 before the Trial Court.

3. Heard both sides at length in the Second Appeal and perused the entire material, including the plaint plan and the plan of the Commissioner correlating to it, but for in relation to Plot No.9, specifically to reflect, and from the objections filed to the Commissioner's report, in this regard, which are

covered by Exs.C-1 to C-4, and the rough sketch filed by defendant No.1 during trial and not with written statement and the entire oral and documentary evidence on record with reference thereto.

4. The plaintiff filed suit for the reliefs of (a) declaration that G, J, H, I (Plot No.9 of plaintiff plan) is the absolute property of the plaintiff; (b) further declaration that A, F, D, E (Plot Nos.2 and 3 of the plaintiff plan) gali is the joint gali of the plaintiff and the defendants; (c) mandatory injunction for removal of obstructions on A, F line of plaintiff plan; (d) further mandatory injunction for removal of obstructions in G, J, H, I (Plot No.9) of plaintiff plan; and (e) cancellation of the registered sale deed dated 18.01.1992 (Ex.A-3) executed by one Vennam Sitharamaiah in favour of Vadalasetti Venkateswarlu and defendant No.1.

5. As far as A, B, C, D gali (out of A, F, D, E) of the plaintiff plan, the trial Court decreed the suit on 28.11.1997, as referred to supra, for the reliefs of (1) declaring that the G, J, H, I (Plot No.9 of plaintiff plan) property is the absolute property of the plaintiff (granting relief (a) of plaintiff); (2) A, F, D, E gali of plaintiff plan (Plot Nos.2 and 3 of the plaintiff plan) is the joint gali of the plaintiff and defendants (granting relief (b) of plaintiff); (3) the defendants are directed to remove the obstructions on A, F line of the plaintiff plan and also to remove obstructions in G, J, H, N (Plot No.9) of the plaintiff plan

(granting reliefs (c) and (d), respectively, of plaint); (4) each party shall bear their own costs. However, the trial Court did not grant the relief (e) of plaint, which is for cancellation of Ex.A-3 – registered sale deed dated 18.01.1992 so far as A, B, C, D galli (Plot No.3) of plaint plan.

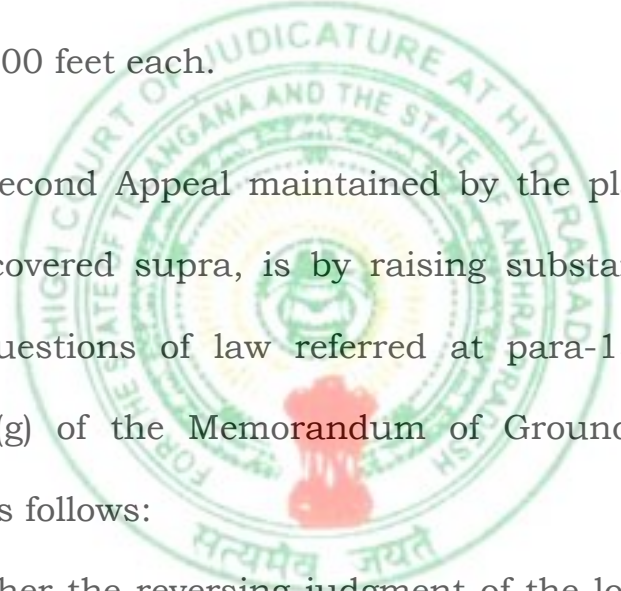
6. Aggrieved by the same, the 1st defendant maintained appeal suit in A.S.No.11 of 1998 on the file of the Principal Senior Civil Judge, Tenali, Guntur District, showing the plaintiff and the other two defendants as the respondents. The lower appellate Court from contest, as per the appeal suit decree dated 22.07.1999 referred to supra, allowed A.S.No.11 of 1998 in part viz., by setting aside the decree and judgment of the trial Court in O.S.No.14 of 1993, dated 28.11.1997 supra, with reference to the findings with regard to G, J, I, H (Plot No.9) of the plaint plan by dismissing the suit claim to that extent and by granting the consequential relief in favour of the appellant – 1st defendant by directing the appeal – 1st respondent (plaintiff) to remove the manure pit and haystack kept in Plot No.9. The appeal suit with regard to the rest of the reliefs is dismissed confirming the trial Court's judgment and decree by directing each party to bear their own costs.

7. Thus, what the trial Court granted from the plaint prayer reliefs (a) and (d), to that extent in relation to the plaint plan G, J, I, H for Plot No.9, is negated by the lower appellate Court by allowing the appeal suit to that extent and

in other respects, confirming the trial Court's decree and judgment.

8. It is impugning the said appeal reversal judgment of the lower appellate Court, as detailed supra, the present Second Appeal is maintained by the plaintiff. The *lis* covered by the Second Appeal is only in relation to the reversal findings and the judgment and decree of the lower appellate Court in relation to the plaint plan G, J, I, H (Plot No.9) of an extent of 8.00 square yards of north and south 9 feet each, and East and West 8.00 feet each.

9. The Second Appeal maintained by the plaintiff, within the scope covered supra, is by raising substantial grounds involving questions of law referred at para-15 as Ground Nos.(a) to (g) of the Memorandum of Grounds of Appeal, which are as follows:

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- (a) Whether the reversing judgment of the lower Appellate Court is sustainable under law in the light of the provisions of Section 107 of C.P.C.?
 - (b) Whether the lower Appellate Court can go into the question at the appellate stage though the said point was neither raised in the pleadings nor raised during the course of arguments before the trial Court or in the Memorandum of Grounds before the lower Appellate Court in respect of proof of Ex.A.4 – Sale Deed?
 - (c) Whether the lower Appellate Court is correct in arriving at a conclusion that since the vendor of Ex.A.4 – Sale Deed has not been examined the sale deed does not create any right or title in favour of the plaintiff?

- (d) Whether the lower Appellate Court is correct in coming to a conclusion that Ex.A.4 – Sale Deed has not been proved by examining the vendor of the document in the circumstances of the case when particularly Ex.A.4 – Sale Deed is dated 03.09.1961 and the suit was filed on 25.01.1993 i.e., after a period of 32 years, in the light of Section 90 of Evidence Act?
- (e) Whether the lower Appellate Court is correct in recording a finding that the plaintiff has not discharged his burden without considering the other oral and documentary evidence available on record?
- (f) Whether the lower Appellate Court is correct in making an observation that without seeking recovery of possession the relief of mandatory injunction is not maintainable though the plaintiff or the defendants averred in any part of the pleadings that the plaintiff was dispossessed from the plot in question?
- (g) Whether the lower Appellate Court is correct in observing that the plaintiff cannot seek for cancellation of the sale deed dated 18.01.1992 when he is not a party to the document though the recitals of the document substantially jeopardized his rights in respect of immovable property which is subject matter of the suit?

10. It is after hearing, the Second Appeal was admitted by this Court on 06.09.1999, saying that the above grounds raise substantial questions of law involved in framing the same, which are no more required repetition thereby. It is, while admitting the Second Appeal, interim injunction restraining the respondents/defendants from placing any

obstructions in G, J, I, H portion of the plaint plan (Plot No.9) of O.S.No.14 of 1993 pending further orders, was granted.

11. Coming to the factual back-ground of the Second Appeal *lis supra* in answering the same, the plaintiff filed the aforesaid suit stating that he is the absolute owner of the property in B, F, E, C (Plot No.2) and G, H, I, J (Plot No.9) of the plaint plan, as he purchased B, C, E, F galli (Plot No.2) on 30.03.1961 (Ex.A-1) under a registered sale deed from one Kakumanu Nagaiah and also as guardian of his minor sons, and since then he is in absolute possession and enjoyment of said galli using it for ingress and aggress. Subsequently, the 3rd defendant purchased Plot Nos.3 and 5 on 14.08.1961 (Ex.A-2) from the wife and sons of one Nagalla Venkata Ramaiah. It is the case of the plaintiff that since before the purchase under the sale deed *supra*, there was an understanding in vogue to use Plot Nos.2 and 3 of plaint plan commonly for ingress and aggress of men, carts and cattle and thereby created equal and tenement right for the said use through Plot Nos.2 and 3, including Plot No.5, by the plaintiff and defendant No.3 as also mentioned in the said sale deed dated 14.08.1961 (Ex.A-2) and thus, the plaintiff has been using Plot Nos.2 and 3 for ingress and aggress to his plot No.8, through Plot Nos.2 and 3 joint galli (plant plan A, D, E, F). Subsequently, in violation of his joint rights in the said galli and without his knowledge, the 3rd defendant sold away

plot Nos.3 and 5 to the 1st defendant under a registered sale deed dated 18.01.1992 (Ex.A-3) and the same is not valid so far as it relates to A, B, C, D galli. Plot No.4 of plaintiff belongs to 2nd defendant, who is the brother-in-law of 1st defendant, who is looking after the affairs and acting detrimental to the interest of the plaintiff and, at the instigation of 1st defendant, he erected a thatti fencing along A, B line and caused obstruction on B, F line by putting up bamboo poles, thereby obstructed the plaintiff for ingress and egress into A, F, E, D galli for ingress and egress of Plot Nos.8 and 9 of plaintiff, besides Plot No.7, as the vendor of the plaintiff of Plot No.9, by name Nagalla Venkata Ramaiah and his sons also left in Plot No.7 an extent of 7 yards, which is marked as J, I, M, N, without any consideration to the plaintiff. However, the 1st defendant trespassed into plot No.9 of the plaintiff in G, J, I, H of plaintiff plan and caused inconvenience to the plaintiff by keeping hayrick and cow dung in the said plot. Therefore, the plaintiff filed the aforesaid suit for declaration and mandatory injunction prayers referred to supra with further averments of got cause of action and entitled to the aforesaid reliefs.

12. The 1st defendant filed a written statement denying the plaintiff averments, stating that the plaintiff's maternal grandmother – Kakumanu Rajya Lakshamma purchased an extent of 56.6 yards of house with appurtenant site on the

southern side of Plot No.1 of plaint plan under the sale deed dated 25.03.1957 (Ex.A-7) from one Talluri Pitchamma, that the western side of the said site is described as 'Galli Bazar' of 1 ½ yards, which corresponds to Plot No.3 (A, B, C, D) of plaint plan. On the same day, she also purchased 56.6 yards of house and site on the southern side of above house under a registered sale deed, in which also the western boundary is described as 1 ½ yards Galli Bazar. The said Smt. Kakumanu Rajya Lakshamma gifted the properties to her eldest daughter – Vennam Kamaladevi under a Gift Deed dated 22.12.1959, reserving life interest and later executed a relinquishment deed in favour of her daughter, wherein the western boundary is described as property of Smt. Vennam Sitharamamma, which recital is wrong, as she has no site at all, except passage rights in the galli. Subsequently, Smt. Vennam Kamaladevi sold the said property to the 1st defendant under a registered sale deed dated 05.06.1989 (Ex.B-4), wherein the western boundary is described as site belonging to Sri Vennam Syamasundararao, which corresponds to plot No.3, with a right to the plaintiff to pass through the space on the western side of the schedule property to reach the southern side road. Subsequently, the said Smt. Vennam Kamaladevi executed a rectification deed dated 20.10.1989 (Ex.A-6) in favour of the 1st defendant in respect of the recital of western boundary, that the plaintiff has no right in plot No.3 and by mistake his name was

included in the rectification deed, that the 1st defendant purchased plot No.5 and also right of passage in plot No.3 and ever since he is in enjoyment of the said property. In the rectification deed also, the eastern boundary is corrected and there was no galli, as shown in item No.2 of the plaint plan, and the vendor of Plot No.5 has no right to create passage in Plot No.2. This defendant accepted execution of the rectification deed by Smt. Vennam Kamaladevi and the 3rd defendant without knowledge of true facts, that the plaintiff is not residing in the suit village and that the 1st defendant is a resident of northern locality of the village, which is at a distance of less than 4 furlongs from the suit property and that the plaintiff never exercised passage rights in plot Nos.2 and 3, that there is a vacant site in front of his house and also a road towards south and there is no necessity for the plaintiff to pass through Plot Nos.2 and 3, that he purchased plot Nos.3, 5, 6 and 9 from the 3rd defendant vide sale deed dated 18.01.1992 (Ex.B-1), wherein plot No.3 is described as item No.2, and plot Nos.5, 6 and 9 are described as item No.1 and hence the plaintiff is not entitled for any reliefs and hence sought for dismissal of the suit.

13. The 2nd defendant filed a separate written statement denying all the material allegations and stated that he is neither necessary nor a proper party to the suit.

14. Basing on the above pleadings, the trial Court framed the following issues for trial:

1. Whether the plaint plan marked Plots 2 and 3 (A, D, E, F) together constitutes galli?
2. Whether the plaintiff has a right of way through plots 2 and 3 (A, D, E, F) of plaint plan?
3. Whether plot No.9 of the plaint plan is owned by the plaintiff?
4. Whether the sale deed dated 18.01.1992 (Ex.B-1) executed by the 3rd defendant in favour of the 1st defendant is invalid so far as it relates to plaint plan marked A, B, C, D portion?
5. Whether the plaintiff is entitled for declarations in respect of plots 2 and 3 and 9 of plaint plan?
6. Whether the relief of mandatory injunction in respect of plot 9 of plaint plan can be granted without seeking possession of that plot?
7. Whether the plaintiff is entitled to the relief of mandatory injunction for removal of obstruction along A, F of plaint plan?
8. To what relief?

15. On behalf of the plaintiff, being the sole witness, he himself was examined as P.W.1 and marked Exs.A-1 to A-7, including those among which referred to supra. On behalf of the defendants, the 1st defendant was examined as D.W.1 and got examined one V. Syamasundararao and G. Venkatarao, as D.Ws.2 and 3, respectively, and got marked Exs.B-1 to B-12, including those among which referred to supra.

16. After considering the material and the evidence on record, both oral and documentary, the trial Court vide its

judgment and decree dated 28.11.1997 in O.S.No.14 of 1993, decreed the suit, holding that plot Nos.2 and 3 are the joint galli and the plaintiff is owner of plot No.9 of the plaint sketch and consequently, ordered for removal of obstruction placed on A, F line and the manure pit and hayrick stocked in Plot No.9.

17. The trial Court for the said findings in granting the reliefs, observed in answering the issues, that the 1st defendant admittedly filed Ex.B-3 plan belatedly (without even the date of preparation) and not with the written statement to give any credence and thereby the plan filed by the plaintiff and the plan filed by the Advocate-Commissioner (Ex.C-2) can be looked into in answering the rival contentions of the parties in the *lis*. It is also observed that Plot No.8 purchased by the plaintiff on 30.03.1961 (Ex.A-1) from Sri K. Nagaiah and his sons and Ex.A-5 source of title of the plaintiff's vendor – K. Nagaiah on 14.11.1954 for Plot No.8 shown as A-Schedule by 363 square yards, leave about B-Schedule of Ex.A-5, which is styled in Ex.A-1. However, there is a reference of using the passage with a width of 4.6 inches to reach Panchayat Road on South from Plot No.8. A-Schedule of Ex.A-5 = Schedule of Ex.A-1 = Plot No.8 of plaint plan and the passage is B-Schedule of Ex.A-5 referred as passage in Ex.A-1, which is in reference to her part of plaint plan A, F, E, D upto south road. The trial Court

further observed that Ex.A-5 – Sale Deed dated 14.11.1954 also refers to the using of passage for ingress and egress to the A-Schedule property, B-Schedule of Ex.A-5 to say the passage with 4.6 inches width, which is Plot No.2 of plaintiff plan, is in existence right from Ex.A-5 recitals of 1954, including from Ex.A-1 recitals of 1961 in favour of plaintiff by the predecessor in title under Ex.A-5 vendee, by name K. Nagaiah. There is a clear finding of the trial Court so far as existence of the plaintiff's right of passage from Plot No.8 through Plot No.2 for ingress and egress from within Panchayat Bazar, connecting it to B, F among A, F line. The trial Court observed from the above, at para Nos.14 and 15 of the judgment, at para No.16 onwards, that Ex.B-1 = Ex.A-3 Sale Deed dated 18.01.1992, under which the 1st defendant claims to have purchased Plot No.5 also with Plot No.3 of plaintiff plan covered by A, B, C, D from defendant No.3 to contend that Plot No.3 is not a gali, much less a joint gali, against the contention of the plaintiff of 3rd defendant to the sale of the 1st defendant under that document, but for Plot No.5 has no right to convey absolutely Plot No.3, which is a joint lane for passage. Ex.A-2 registered Sale Deed dated 14.08.1961 is, in fact, the source of title of 3rd defendant, who purchased the property covered therein from the wife and sons of Nagalla Venkatramaiah. Though sold him (Defendant No.3) under Ex.A-2 only Plot No.5 of plaintiff plan for defendant No.3 in turn to sell under Ex.B-1 = Ex.A-3 dated 18.01.1992,

instead of Plot Nos.5 and 3, that too, when Ex.A-2 Sale Deed dated 14.08.1961 obtained by the 3rd defendant from the predecessors in title speaks that Plot No.3 is a joint lane only for ingress and egress to reach Southern Bazar (connecting A, B of plaintiff plan) of 1 ½ yards width. The trial Court therefrom categorically observed with reference to the discussion in para Nos.16 and 17, continued in para No.18, while at para No.18 of the judgment that the so called Ex.B-1 = Ex.A-3 recital for Plot No.3 for the sale no-way binding on the plaintiff for the plaintiff's exercise of right of passage for ingress and egress, as the source of title to it covered by Ex.A-2 of defendant No.3 from his vendors in 1961 speaks that Plot No.3 is a joint line only and not an absolute property acquired thereunder by defendant No.3 to sell it to the 1st defendant under Ex.B-1 = Ex.A-3.

18. The trial Court therefrom observed that for the plaintiff's pleading, but for supported by oral evidence, there is no written agreement or understanding between the vendor of plaintiff and vendor of the 3rd defendant, respectively, to the plaintiff and 3rd defendant under the document mentioned supra of treating the respective Plot Nos.2 and 3 of plaintiff plan passages as common passage for all for ingress and egress. But, when Ex.B-1 for item No.2, which is among Plot Nos.5 and 3 of plaintiff plan southern boundary is mentioned initially as Babu Rama Murthy (plaintiff) gali, which clearly shows

that the same is a joint galli. However, in Ex.B-2 – Rectification Deed dated 05.02.1992 obtained by defendant No.1 from defendant No.3 (subsequent to Ex.B-1 = Ex.A-3 dated 18.01.1992), the said Eastern boundary for Plot No.5 of plaintiff plan is mentioned as site of well to some extent (plaintiff plan of Plot No.6) and Sri Vennam Babu Rama Murthy (plaintiff) for some extent. There is no change of Eastern boundary in the said Rectification Deed for item No.1.

19. Coming to the Southern boundary, in saying wrong description of Sri Vennam Babu Rama Murthy's (plaintiff) site to some extent and the joint lane of 1 ½ yards width with joint rights to the plaintiff and defendant No.1, in the Rectification Deed mentioned as some extent of plaintiff and some extent with 1 ½ yards width, in which the plaintiff got joint rights (Plot No.2) and some extent, in which the 1st defendant got joint right (Plot No.3 of 1 ½ yards width). It also refers the Southern boundary, on that day from Sri Vennam Sudhakar, Sri Maddula Venkata Rao (2nd defendant-cum-brother-in-law of defendant No.1) purchased the same site that reflects Plot No.4.

20. Even from the above, item No.1 of Ex.B-1 = Ex.A-3 vis-à-vis Ex.B-2 – Rectification Deed, for the same is Plot No.5 sale in favour of defendant No.1 by defendant No.3 and once it reflects the Eastern boundary as well site, Plot No.6 and the extent is mentioned for the Eastern boundary of item No.1 as

29 feet, it is the contest of even from the plaint plan Plot No.6 represents as between the boundary of Plot No.9 shown as 21 feet and there was Plot No.9 reference to 8 feet, total 29 feet, to decide whether the plaintiff is entitled to a declaration for Plot No.9 and equally for Plot No.7. In fact, Ex.A-2 schedule refers the source of title of defendant No.3 for sale under Ex.B-1 = Ex.A-3 to the plaintiff or to execute Ex.B-2 – Rectification Deed, that too the scheduled property towards North and West, there is 3 yards width joint lane, to pass from Southern side of Sankar Bazar, through which men, cattle and carts etc., move to the said item. It also refers that the same is a joint lane to that and to Sri Vennam Babu Rama Murthy (plaintiff) with equal rights. The 3 yards reflect at E, C, D line and F, B, A line of the plaint plan put together of Plot Nos.2 and 3 of plaint plan width of 3 yards, of which Plot No.2 is 1 ½ yards and Plot No.3 is 1 ½ yards width, respectively, which is suffice to say that defendant No.3 cannot claim much less through defendant No.3 by defendant No.1 under the sole Rectification Deed of A, F, E, D, which concerned of Plot Nos.2 and 3 of plaint plan, entirely, is not a joint lane or that the defendant has got only exclusive right in any part or totally in it. As such the contention cuts the said case of defendant No.1 and supported by defendant No.3, if any, from Ex.A-2 sale recitals supra.

21. Thus, the trial Court should have been considered this in saying that the plaintiff not only urged orally in his plea and evidence, but also proved from the source of title of defendant No.1 through defendant No.3. Thus, the very document clears the cloud of the plaintiff plan A, F, E, D, which consists of Plot Nos.2 and 3, is entirely a joint line, as contended and proved by the plaintiff. But, the lower appellate Court thereby, it appears, did not choose to interfere with the trial Court's judgment in this regard in relation to Plot Nos.2 and 3 of plaintiff plan, but for Plot No.9. so far as Plot No.9 from the recitals of Ex.A-3 = Ex.B-1 and Rectification Deed under Ex.B-2 is concerned, what the trial Court observed is, defendant No.1 purchased the plaintiff plan Plot No.1 from Smt. Vennam Kamala Devi, who is no other than the mother of the plaintiff, under the Sale Deed dated 05.06.1989 (Ex.B-4). The Western boundary mentioned as Smt. Vennam Sitaramamma and Vennam Kamala Devi got the property from her mother – Smt. Kakumanu Rajya Lakshmi, under Ex.B-5 registered Gift Deed and Ex.B-6 Relinquishment Deed. As per Ex.B-5, Western boundary is described as Plot No.4, whereas Ex.B-6 describes the Western boundary as Vennam Sitaramamma for Plot No.3. The recitals in it are contrary to the other. In fact, Ex.B-4 mentions the source of title of Smt. Kamala Devi as vendee under Ex.A-7 Sale Deed dated 25.03.1957 from Thalluri Pitchamma. Ex.A-7 sale deed measurement of South and North describes as

31.3 inches, whereas Exs.B-4, B-5 and Rectification Deed – Ex.B-6, as if rectification for Ex.B-4 reflected as if 39.3 inches and there is nothing to convey from what was got under Ex.A-7 in 1957 is for Plot No.1 of 31.3 inches only, including Exs.B-4, B-5 and B-6 as if 39.9 inches, by including Plot Nos.2 and 3 also and the other extent of 1.00 feet width cheruvu for water falling site on either side beyond F, E line on one side, and A, D line on the other side, if any. Thus, A, F, E, D of plaintiff plan, which covers Plot Nos.2 and 3, is absolutely a common joint lane for the plaintiff and defendant No.1 and defendant No.2, if any, for what was conveyed by defendant No.3 through defendant No.1 cannot claim therein any exclusive right, from the judgments of the two Courts below.

22. Now, coming to Plot No.9, leave about Plot No.7 of plaintiff plan, what defendant No.1 claims as part of purchased from defendant No.3 and what the plaintiff claims as his, the document relevant to refer is Ex.A-4, which is in favour of the plaintiff, which is a registered Sale Deed dated 01.09.1961 executed by the wife and sons of Sri Nagalla Venkata Ramaiah. The Schedule describes to put a way to the well on the Northern boundary to go to the well site by cleaning the same and to use the well water. It reflects, to reach the plaintiff plan Plot No.6 either by passing through Plot No.7 or Plot No.9 from Plot No.8 of the plaintiff plan, as the case may be,

and in the boundaries, the Eastern boundary described as the site of plaintiff with a measurement of 8 feet, it reflects that Plot No.7 was given to use the well water from Plot No.6 and what is sold is Plot No.9, the 8 feet width, which is J, I line of plaintiff plan to it, as between the boundary i.e., the boundary line between Plot Nos.9 and 7, and the Western boundary described of the site was sold to Smt. Vennam Sitaramamma, defendant No.3, which is reflected in Ex.A-2 discussed supra, and the measurement is mentioned as 8 feet. It reflects the plaintiff plan G, H line, which is a Western boundary to Plot No.9, and the Northern boundary described as the vendor's site of 9 feet width, which is the plaintiff plan H, I line, and Southern boundary also described as vendee's site i.e., part of Plot No.8 at G, J line. It clearly describes that the plaintiff is the owner, having purchased from the original owner, under Ex.A-4 for Plot No.9.

23. Thus, once such is the case, the vendee of the other side i.e., for Plot Nos.6 and 5 of plaintiff plan, cannot claim any rights in Plot No.9 of plaintiff plan, since that belongs to the plaintiff. The trial Court rightly appreciated the same and the lower appellate Court went wrong in reversing the well considered judgment of the trial Court. The substantial questions of law raised and formulated/framed in admitting the Second Appeal, for the above clinching documentary evidence on record in favour of the plaintiff, raise in

answering, particularly question No.(b) of Ex.A-4 – Sale Deed, which is dated 03.09.1961, during trial not in dispute by the 1st defendant as to the plaintiff's vendor's source of title, for the reason from self-same person, the 1st defendant's vendor the 3rd defendant, when purchased, cannot be disputed, that too it is a registered document of more than 30 years old for the suit filed on 25.01.1993 and the same is exhibited during trial long later, and when from existence of registered document is not in dispute and when the very vendor of the 3rd defendant and the plaintiff sold Plot No.9 to the plaintiff, what is remained to be sold is for Plot No.5 to the 3rd defendant and nothing beyond and there is no any right to the 1st defendant or 3rd defendant over the plaintiff's Plot No.9 and so far as 30 years old document and presumption is concerned, the law is fairly settled from the following expressions :

24. In HARIHAR PRASAD SINGH Vs. DEONARAYAN PRASAD¹ – it was also held by placing reliance upon the expression in BASANTH SINGH Vs. BRIJRAJ SADAN SINGH² - 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

¹ AIR 1956 SC 305

² AIR 1935 PC 132 (C)

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 UDDIN³ – 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. LAKSHMAMMA⁴, it was held referring to H. VENKATACHALA Vs. B.M. THIMMAJAMMA⁵ and DHANAPALA Vs. GOVINDARAJU⁶ 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 custody in saying that those are by production**

³ 2012 (6) SCJ 432

⁴ 1999 (2) ALT 553

⁵ AIR 1959 SC 443

⁶ AIR 1961 Madras 262

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.ADISESHAMMA Vs. RAMA RAO⁷.

25. Further, the Apex Court in STATE OF A.P. v. M/s. STAR BONE MILL & FERTILISER CO.⁸ also held on the principle of ‘no one gives what he has not got’ and ‘no one can bestow or grant a greater right or a better title than he has himself’, the latin maxims ‘*Nemo dat quid non habet*’ and ‘*Nemo plus juris tribuit quam ipse habet*’ and on the principle of ‘admissibility of ancient documents, dispensing with proof’ and in relation to appreciation of 30 years old sale deed, the presumption applies under Section 90 of the Indian Evidence Act, since this section does not weigh with the strict rules and

⁷ AIR 1973 AP 149

⁸ 2013 (2) SCJ 914

requirements of proof by giving rise to proof and genuineness by drawing presumption by reckoning the period backwards from the date of producing to the date of execution.

26. Even coming to the observation in relation to non-examination of any attesor or proof under Section 67 of the Indian Evidence Act, the two expressions of the Apex Court in *DATTATRAYA v. RANGNATH GOPALRAO KAWATHEKAR (DEAD) BY HIS LRs & OTHERS*⁹ and *SMT. HANS RAJI v. YOSODANAND*¹⁰ with reference to the scope of law that the executant shall be presumed to have executed the document with the knowledge of the contents in conveying the title therein, for the contrary to be proved is on that person, if at all chosen to dispute, then only the burden shifts to say that he got knowledge and conveyed and further when the sale deed relating to an immovable property is not a compulsorily attestable document, even attested by any witnesses, there is no requirement by law to examine any of the attestors for Section 68 of the Indian Evidence Act has no application, but for the compulsorily attestable documents from the attestation, where proof of execution of such a document denied, to examine atleast one of the attesor to prove. When there is no denial of such a document from the wording of the section, there is no need of examination of the attestors.

⁹ AIR 1971 SC 2548

¹⁰ AIR 1996 SC 761

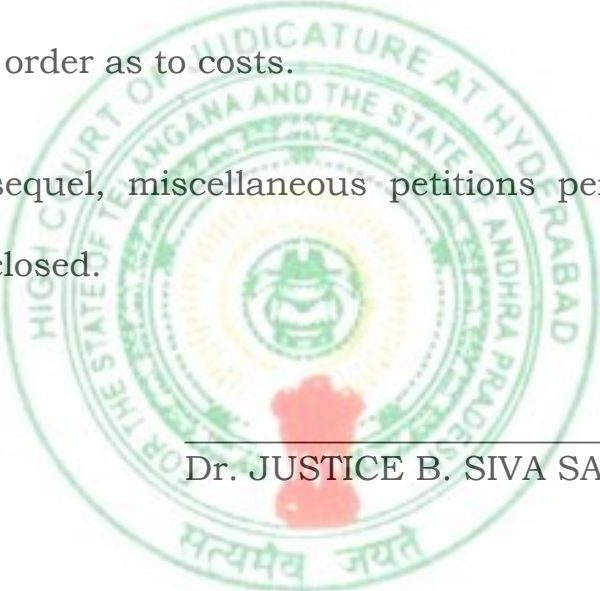
27. Further, as per the settled law, the presumption of 'possession follows title' can be drawn, unless it is rebutted, and 'title from possession' to draw the presumption applies where either party not proved title and not in other cases from a combined reading of Sections 110 and 114 of the Indian Evidence Act, as held in M/s. STAR BONE MILL & FERTILISER CO. (supra).

28. The lower appellate Court thereby went wrong in brushing aside Ex.A-4, which is more than 30 years old document, and to rely upon the subsequent documents for the vendor of 3rd defendant and the plaintiff, having sold Plot No.9 of plaintiff plan under Ex.A-4 to the plaintiff cannot sell again muchless to convey or claimed by him or by the 1st defendant through the 3rd defendant. Once such is the case, when Plot No.9 of plaintiff plan belongs to the plaintiff is established, for the plaintiff G, J, I, H, even referred as G, H, J, I or otherwise, there is nothing for the lower appellate Court to set aside that part of the finding of declaration of plaintiff's title over Plot No.9 of plaintiff plan, with the consequential mandatory injunction of removal of obstructions in the said Plot No.9, for which the plaintiff need not ask for possession of declaration, when the plaintiff claims right and possession and what were the obstructions made or anything laid is only trespass and not that tantamount to dispossession. The expression of the Apex

Court in para-5 of the judgment in SANT LAL JAIN v. AVTAR SINGH¹¹ itself is an answer to the same.

29. Accordingly, the Second Appeal is allowed, setting aside the judgment and decree dated 22.07.1999 in A.S.No.11 of 1998 of the lower appellate Court, reversing the trial Court's judgment and decree dated 28.11.1997 in O.S.No.14 of 1993 in part, insofar as Plot No.9 of plaint plan, for the declaratory relief with a consequential mandatory injunction relief and by restoring the trial Court's judgment and decree in all respects. No order as to costs.

30. As a sequel, miscellaneous petitions pending, if any, shall stand closed.



Dr. JUSTICE B. SIVA SANKARA RAO

20.01.2017.
Msr

¹¹ AIR 1985 SC 857

THE HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

SECOND APPEAL No.813 of 1999



20.01.2017
(Msr)