

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

APPEAL SUIT No.689 OF 2011

AND

TRANSFER APPEAL SUIT No.612 OF 2012

COMMON JUDGMENT:

Both the appeals are directed against the common judgment dated 18.07.2011 rendered in two separate suits i.e., O.S. No.188 of 2008 and O.S. No.94 of 2009, by the learned Senior Civil Judge, Mangalagiri.

2. The plaintiffs, who are common in both the suits, did not succeed for the reliefs they prayed and that, that was the reason, the former appeal is preferred before this Court, whereas the latter appeal was originally preferred to the District Judge's Court, at Guntur. It was originally numbered as 'A.S. No.89 of 2012', and subsequently by order of this Court dated 06.06.2012 in Transfer C.M.P. No.185 of 2012, it was withdrawn and taken on file by this Court as Transfer A.S. No.612 of 2012 to dispose of with A.S. No.689 of 2011.

3. O.S. No.188 of 2008 was originally filed by one Putrevu Manikyamma seeking the reliefs of declaration of title and recovery of possession of the suit schedule properties and for consequential reliefs of cancellation of registered gift deed document No.103 of 1985 dated 11.01.1985, registered gift deed document No.6035 of 2000 dated 27.11.2000 and registered rectification deed dated 19.01.2001 and for

4. In O.S. No.94 of 2009, the very same plaintiff sought partition of plaint schedule properties into three equal shares and for allotment of one such share to her and to put her in possession of the same and for ascertainment of future profits on a separate application.

“A- Schedule Property (Items 1 to 3):

In S.No.676/2A and 2B

Ac.0-42 Cents
Ac.0-04 ½ cents
Ac.0-06 cents
Ac.0-52 ½ cents.

B- Schedule Property (Single item):

In S.No.677 Ac.0-13 Cents”

6. In O.S. No.94 of 2009, description of plaint schedule properties are shown thus:

“Item-1 (Single item only) Extent: Ac.0.26 cents

Field No.35 – Nowluru Revenue Village – Yerrabalem Panchayat limits – Mangalagiri Taluk – Guntur District, Agricultural land – Registration District, Guntur Sub-Registration Mangalagiri – patta No.262 – Survey No.676/2A Ac.0.26 cents Kondakalava – not subjected to family division during 1942 r/w. Exhibit A-1 bounded by:

East: Circar Road – South to North Yerrabelm to Penumaka.

North: Land of Defendant No.1 in S.No.676/1,

Comprising of Acs.2.12 cents only.

West: Plaintiff lands in S.No.677

South: Plaintiff land in S.No.676/2A.

Item-2 (Single item) Extent : Ac.0.37 cents

Field No.35 – Owluru Revenue Village – Yerrabalem Panchayat limits – Mangalagiri Taluk – Guntur District, Agricultural land – Regn. District, Guntur Sub-Registration Mangalagiri – Patta No.262 – Survey No.677 – Extent Ac.0.37 cents Kondakalva connected to S.No.676/2A rain water flow – Not subjected to family division during 1942 r/w. Ex.A.1 bounded by:

East: Land of the plaintiff in S.No.676/2A

North: Land of plaintiff in S.No.677

West: Plaintiff land in S.No.677

South: Land of defendant No.1 devolved on him by Will from his junior paternal uncle P.Anjaneyulu @ Abbaraju

Total extent : in S.No.676/2A = Ac.0.26 cents +

in S.No.677 = Ac.0.37 cents = Ac.0.63 cents”

7. The learned Senior Civil Judge taken up both the suits for joint trial and recorded evidence.

8. In O.S. No.188 of 2008, the following issues were settled for trial:

- “1) Whether the suit is barred by limitation?
- 2) Whether the gift deed dated 11-1-1985 was obtained by playing fraud on the plaintiff by saying that it is only Will?
- 3) Whether the plaintiff is entitled to the relief of declaration as prayed for?
- 4) Whether the plaintiff is entitled to the permanent injunction?
- 5) To what relief?”

9. In O.S. No.94 of 2009, the following issues were settled for trial:

- “1) Whether the plaint schedule property is existing?
- 2) Whether the plaintiff is entitled for partition of plaint schedule property into two equal shares and allotment of one such share to the plaintiff and put the plaintiff in possession of the same?
- 3) Whether the plaintiff is entitled to mesne profits?
- 4) To what relief?”

10. During trial, the sole plaintiff, who instituted both the suits, was examined as PW.1, plaintiff No.3 was examined as PW.4, PW.3 is the son of the counsel on record for the plaintiffs, PW.2 is the

Mandal Revenue Officer, Mangalagiri, and marked Exs.A-1 to A-35, besides marking Exs.X-1 to X-3 through the Mandal Revenue Officer. On behalf of the defendants, the sole defendant in O.S. No.94 of 2009 who is arrayed as defendant No.2 in O.S. No.188 of 2009, was examined as DW.1 and marked Exs.B-1 and B-2.

11. During pendency of the suits, the sole plaintiff Smt. Putrevu Manikyamma died. Her death took place on 19.08.2009. Therefore, plaintiff Nos.2 and 3 were brought on record as legal representatives of the original plaintiff in O.S. No.188 of 2008. In fact, three defendants were arrayed, whereas defendant No.2 in O.S. No.188 of 2008 alone figures as sole defendant in O.S. No.94 of 2009.

12. In the three paper books filed by the appellant, the plaint copy in O.S. No.188 of 2008 is not enclosed. Only the plaint in O.S. No.94 of 2009 is occurring in one of the three paper books. When the decree in O.S. No.188 of 2008 is seen, though, the extents are mentioned so far as Schedule - A property is concerned, item Nos.1 to 3, and, one item in Schedule - B property referred to in the above, but specific details are not occurring.

13. A schedule is filed showing as schedule of properties in an unnumbered interlocutory application in O.S. No.188 of 2008, but only description of item Nos.1 and 2 of Schedule - A is to be found and not item No.3 and the property covered by Schedule - B.

14. Reason in mentioning all these aspects is to know whether the schedule properties shown in plaint schedules in both the suits are identical or distinct in view of the fact that in O.S. No.188 of 2008, the relief sought for is for declaration of title and consequential reliefs of cancellation of registered gift deeds and rectification deed besides perpetual injunction and in O.S. No.94 of 2009, the relief claimed is for partitioning the plaint schedule properties in to three equal shares and to allot one such share to the plaintiffs.

15. In paragraph No.3 of the judgment, the learned Senior Civil Judge would mention that, though, the reliefs claimed in both the suits are different, they relate to common suit schedule property. It is necessary, at this stage, to extract what has been stated by the learned Senior Civil Judge in paragraph Nos.3 and 4, thus:

“3. Originally, the 1st plaintiff who died on 19-8-2009, filed both the suits for the aforesaid reliefs for the common suit schedule property. The 2nd defendant in O.S.188/2008 is the sole defendant in O.S.94/2009. Plaintiffs 2 and 3 in both the suits are brought on record, consequent upon death of the 1st plaintiff. ‘

4. It has become a difficult task for the court to understand the pleadings of plaintiffs in both the suits, more particularly, the plaint averments in O.S.188/2008. Be that as it may, with great difficulty, it could understand the sum and substance of the pleadings of plaintiffs and are narrated briefly as follows:-.....”

16. Adverting to the issues dealt with by the learned trial Judge, he has taken up issue Nos.1 and 2 in O.S. No.188 of 2008 i.e. the relief for declaration of title and cancellation of gift deeds and rectification deed, and referring to the admission made by PW.1 in her cross-examination that she filed counter in I.A. No.730 of 2009 in O.S. No.149 of 2009 on the file of Junior Civil Judge, Mangalagiri, stating that she gifted Ac.0-42 cents of land to defendant No.1 and also basing on the admission made by plaintiff No.3 as PW.4 that 'it is true that for the last 40 years, the litigation in respect of the schedule property has been going on and that the suits and counter suits were filed against each other,' and then referring to further admission made by the deceased plaintiff that the suit schedule property was in possession and enjoyment of defendant No.2 for the last (40) years and that the suit schedule property was never in joint possession and it was in exclusive possession of defendant No.2, arrived at that, knowledge can be imputed to deceased plaintiff, who executed original of Ex.A-6 in favour of defendant No.1 and that defendant No.1 became absolute owner of the suit schedule property by virtue of original of Ex.A-6 and had been in possession and enjoyment of the suit schedule property till it was conveyed to defendant No.2 under the original of Ex.A-6 registered gift deed dated 27.11.2000, and thereby held that the suit is barred by time for seeking declaration of title of plaintiff No.1 over the suit schedule property and consequential relief to cancel Exs.A-6, A-7 and B-1. Then the learned

trial Judge recorded that in view of clear admissions made by PW.1 as to due execution of original of Ex.A-6 in favour of defendant No.1 concerning the plaint schedule property, the plaintiffs failed to prove and establish that the defendant No.1 misrepresented her and obtained the original of Ex.A-6 from plaintiff No.1 and accordingly held issue Nos.1 and 2 against the plaintiffs. Consequently, the learned trial Judge tendered findings on issue Nos.3 and 4 against the plaintiffs holding that the plaintiffs are not entitled to declaration of title and perpetual injunction.

17. The learned trial Judge then taken up issue Nos.1 and 2 in O.S. No.94 of 2009 and held that the result in the said suit depends on the result in O.S. No.188 of 2008, and the relief sought for in the suit in O.S. No.188 of 2008 and the reliefs sought for in O.S. No.94 of 2009 filed by the deceased plaintiff No.1 are inconsistent to each other as in O.S. No.188 of 2008 the plea of plaintiff No.1 was that she was absolute owner of the plaint schedule properties, and, therefore, sought declaration of title, whereas her plea in O.S. No.94 of 2009 is that she is entitled to half share in the suit schedule properties and, therefore, opined that the plaintiffs are non-suited and, thereby, recorded findings on issue Nos.1 and 2 against the plaintiffs and consequently on issue No.3 recorded finding that the plaintiffs are not entitled to mesne profits and thereby dismissed both the suits.

18. Dismissal of both the suits, aggrieved the plaintiffs, and, therefore, they have preferred the present appeals challenging the findings recorded and the decrees passed by the learned trial Judge.

19. Heard Sri P.N. Jagan Mohan Rao, learned counsel for the appellants in both the appeals, and Smt. V. Dyumani, learned counsel for the respondents in both the appeals, and perused the material on record.

20. In A.S. No.689 of 2011, the following grounds have been agitated:

“GROUNDS OF APPEAL
UNDER ORDER-47 RULE-2 C.P.C.

1. O.S.NO.94 of 2009 filed by the deceased plaintiff after filing O-S.NO.188 of 2008(Declaratory suit) praying Half-to-Half partition of the un-divided extent of this plaint schedule Items shown as item Nos.1 and Item Nos.2 pertaining to Survey Nos.676/2A and 677 being the deceased plaintiff and defendant No.2 are the surviving legal heirs to the late father of the deceased plaintiff Ex.A1.

2. The un-divided extents vide Ex.A1 and A2 are as follows:-

In S.No.676/2A(fallen to the deceased plaintiff through Item -1 of her late father is of Ac.0-26 cents, plaint Schedule after making divisions to each of property the 5 sharers at Ac.01-06 during 1942 (ExA-1) comes to Ac.09-30 cents out of the actual extent on

field Ac.05-61 cents. In this Ac.0-05 cents for well fell into the share of the original (Sic. Original) land lord himself and this well site was not subjected to partition/division during 1942. So the share of the original land lord of Ac.01-11 cents. Balance out of Ac.5-61 (Ac.05-35 divided) is left with Ac.0-26 cents in S.No.676/2A in the share devolved to deceased plaintiff.

IN S.No.677 (Total extent is of Ac.03-85 cents)

Item-2 of Sch. During 1942 5 shares were divided @ Ac.0-69 $\frac{3}{4}$ cents which comes to Ac.03-48 cents. Balance of Ac.0-37 cents was un-divided as per Ex.A1.

3. The trial court below committed (Sic. Committed) grave error holding that it is significant that the result of this partition suit depends on the suit result of O.S.NO.188 of 2008 is bad in Law due to lack of application of Judicious mind (para No.27 of judgment)

4. The court below misconceived and dismissed the suit holding that the 2nd defendant became the absolute owner of the 2 items of the suit schedule by virtue of Ex.A-7 though the executant of A-7 have no title rights conferred (Sic. conferred) on him by Ex.A-6 in executing Ex-A7 as was relied upon by the learned trial court. Also the trial court missed to answer as

how the Defendant No.2 became the absolute owner wholly on the suit schedule property items 1 and 2.

5. The court below missed to consider the exbts A-1 to A-35, X-1 to X4 and the advocate commissioners 2(two) reports marked and on the record of the court in dismissing the suit to the prejudice of the plaintiffs/appellants herein.

6. The court below ought to have allowed the suits r/w. the Exbts.A1,A2 original parikaths of the family division of shares made on consent of the sharers therein and the Exbts.X-1 to X-4 filed by the Tahsildar/M.R.O. who categorically stated in his evidence duly filing in support of his evidence the F.M.B., Survey and sub-division certified copies of Revenue records of Mangalagiri Revenue Taluk which discloses that the Survey extent in S.Nos.676/1,2A and 2B is of only Ac.05-35 and the extent in S.NO.is of only Ac.03-48 Cents which tallies with the Ex.A1 and A-2 totally. As such are the recorded facts, this appeal is filed challenging the impugned judgment and decree passed on 18-07-2011.

Limitation: The impugned Common judgment was passed on 18-07-2011 and copy in C.A.NO.NIL dated 26-8-2011 was delivered on 09-09-2011 and the appeal is preferred (Sic. preferred) on 26-09-2011 and hence within the period of 90 days.”

21. In Transfer A.S. No.612 of 2012, the following grounds have been agitated:

GROUND OF APPEAL

Under O-47 Rule-2 C.P.C.

1. In O.S.NO.188 of 2008 under 'A' Schedule three items in Survey No.676/2A are filed as below.

Item NO. Ac.0-4½ cents

Item No. Ac.0-6. “ and

Item No. Ac.0-42 “ Total Ac.0-52½ cents

but No Whiper (*Sic.* Whisper) on item No.2 schedule in the judgment though Court fee is paid. The trial court ought to have adjudicated this item also framing proper issues.

2. The issue framed on the point of limitation and answered is contrary to the the facts of the case which was adjudicated or admission and numbering this case as O.S. No.510 of 2006 by the Hon'ble Principla (*Sic.* Principal) Senior Judge, Guntur from which court this case was transferred and renumbered as O.S.No.188 of 2008 on installation of the Present trial court at Mangalagiri, newly (*Sic.* Newly) in 2008, and this court ought to have seen the provisio (*Sic.* Proviso) made under ART.65 r/w its Explanation(b) of the Limitation Act, 1963 before concluding the adverse possession in favour of the respondent No.2 herein.

3. The court below ought to have seen that Art.63 and 64 of the Limitation Act is applicable to this suit

being the reason that the deceased plaintiff rightly filed the suit in time when the fact of dispossession came to her notice only on 10-04-2006 and filed the suit at Guntur, and for acquisition of adverse possession (*Sic.* possession) title however long necessarily (*Sic.* necessarily) does not mean that it is adverse to the true owner and such possession (*Sic.* possession) is in denial (*Sic.* denial) of true owner title

Law citation

2010 (13)

SCALE (DB)

4. As in page-2 para4 the Court below itself rendered observation that it became difficult to it to its understanding of the pleadings of the plaintiffs denotes, that Judgement was rendered without proper judicious scrutiny (*Sic.* Scrutiny) of the pleadings made by the plaintiffs, though Ex.A1,A2,X1 to X4 and A-3 to A-35 marked exbts are very clear and the items in the suit schedule intitio are transparent.
5. The court below ought to have closely seen that the conveyence (*Sic.* Conveyance) made by the Dw.1 to D.W.2 as gift does nto vest any right to convey Item No.1 extent of A.Schedule of O.S.NO.188 of 2008 in Exbt,.A-7 as the gift deed Exb5.A-6 of D-1 does not confer such right to him.
6. The trial court ought to have seen that Exbt,.A-1 A-2 and X1 to X4 reads that the 5 (five shares) divided during 1942 is specific with all equal shares as below:-

S.NO:676(OLD) Each of the 4 shares are only with the extent of Ac.01-06=Ac.4-24 cents and 1 share or Original (Sic. Original) land lord with his un-partitioned Well site = Ac.1-11 cents = 5-35 cents

Balance of actual land left is Ac.0-26 cents out of Ac.0..... even after 5 divisions = Ac.05-35=5-61-5-35 = Ac.0.26 cents. The balance 26 cents is the schedule 'A' item in the Partition OS.NO.94 of 2009 in between the paltiniffs and the D-2. But dismissed and appealed against and separate appeal is filed.

6. The court below ought to have seen that the D-2 Contrary to the Ex.A-1 and A2 r/w.X1 to X3 claimed possession by false titles the following extents:-

In S.NO.676(OLD) later sub-divided as S.NO.676/1 = Ac.02-12 cents only insted (Sic. instead) the D-2 claimed division cents = AC.02-25 So excess claimed is Ac.02-25-Ac.02-12 = AC.0-13 cents which mean that he encroached into the excess 0-26 cents. Yet the balance of 0-13 cents partition is dismissed to the plaintiffs, and not answered its status in the impugned judgment of common delivered.

7. The court below ought to have seen that when the well site of about Ac.0-06 cents was not the subject matter of division during 1942 as per ExA-1 and when once the appellate courts in Exbt A-3 and A-5 denied to grant title rights over the said well extent in favour of the D-2, how it was allowed in the common judgement as DW is owner to 04½ cents from the lands of the plaintiffs in S.NO.676/2A that too without any relinquishment

(Sic. Relinquishment) deed which is tot be registered as per law for the reason of its cost is more than about 10,000/- though Law dictated that land cost more than 100/- rupees registration is compulsory.

8. The court below ought to have seen that the extent in Ex.A-7differees (Sic. differs) with the Adangls (Sic. Adangals) exbt.A-25 to A-32 and similarly Ex.A-33 with A-19 and A-35. The Depositions of the deceased plaintiff and the Depositions of the D-2 before the Advocate-comissioners (Sic. Commissioners) appointed by the court below at the cost of the plaintiffs are not taken into consideration and no Whisper on this in the impugned common judgement.

The lower court ought to have allowed the suit in question together with mesne profits claimed and costs.

The appellants therefore prays that this Hon'ble Court may be pleased to allow this appeal and set aside the decree in O.S.NO.188 of 2008 by common judgement passed on 18-07-2001 (Sic. 18-07-2011) with costs on the file of the Hon'ble Senior Civil Judge, Mangalagiri, Guntur district.

Pending disposal of the appeal, it is prayed that this Hon'ble Court may be pleased to stay all further proceedings arising out of the impugned common judgement and decree passed in OS.NO.188 of 2008 and pass such other order or orders as deems fit and proper.

Dated this the 15th day of September,2011 at
Hyderabad

IV. **LIMITATION**: Certified copies of the common judgement and decree afore mentioned were delivered on 09-09-2011 and hence filed the appeal without delay.”

22. The grounds have been extracted in both the appeals from the Memorandum of Grounds of Appeal Suits for the reason, it would be appropriate to refer to the grounds in the words of the appellants, when contextually required to advert to.

23. Though, the learned counsel on either side raised various contentions and referred to and relied on the rulings of the Hon’ble Supreme Court, it is opined that the said contentions need no elaboration in view of the opinion that is expressed in the following discussion.

24. At the outset, it is to be stated that the Court below has proceeded on the premise that the property described in the plaint schedule in O.S. No.188 of 2008 and the property described in the plaint schedule in O.S. No.94 of 2009 are one and the same. The manner in which issue Nos.1 and 2 in O.S. No.94 of 2009 was addressed would give such an impression. The findings recorded by the Court below on issue Nos.1 and 2 in O.S. No.94 of 2009 are contained in paragraph Nos.27 and 28 of the common judgment which read thus:

“ISSUE Nos.1 & 2 in O.S.94/2009:

27. At this juncture, it is significant to note that the result of O.S.94/2009 depends on the result of the suit in O.S.188/2008. The reliefs sought in the suit in O.S.188/2008 and the reliefs sought in suit in O.S.94/2009 filed by the 1st plaintiff are inconsistent to each other. In the suit in O.S.188/2008, it is the plea of 1st plaintiff that she is the absolute owner of the suit schedule properties and therefore, it has sought for declaration of title, whereas, the plea of same plaintiff in O.S.94/2009 is that she is entitled to half share in the suit schedule properties. In that view, the plaintiffs are non-suited.

28. Further more, it has been established that the 2nd defendant became the absolute owner of the suit schedule property by virtue of original of Ex.A7, vide findings in issues 1 to 3 in the suit in O.S.188/2008, the plaintiffs are not entitled to partition of the suit schedule properties into two equal shares and to allot one such share to the 1st plaintiff and remaining half share to the 2nd defendant.”

25. In fact, the frame of issue Nos.1 and 2, when seen, they are to the effect ‘whether the plaint schedule property is existing?’ and ‘whether the plaintiff is entitled for partition of plaint schedule property into two equal shares and allotment of one such share to the plaintiff and put the plaintiff in possession of the same?.’

26. To resolve the same, when the present appeals were heard once again, the learned counsel for the appellants and the learned

counsel for the respondent would submit that the subject matters in both the suits are not identical and they are distinct. The learned counsel for the respondent would submit that in fact, second item in O.S. No.94 of 2009 is non-existent and only Ac.0-06 cents covered by a 'well' was kept as joint. The learned counsel for the appellants would, in fact, attack the said findings on the ground that the Court below completely misconstrued in appreciating the pleadings and the evidence and arrived at a wrong conclusion by recording incorrect findings on issue Nos.1 and 2 in O.S. No.94 of 2009.

27. When issue No.1 in O.S. No.94 of 2009 is to the effect 'whether the plaint schedule property is existing?', the Court is obligated with the duty to initially refer to description of property in O.S. No.188 of 2008 and O.S. No.94 of 2009 with reference to description including boundaries and, if necessary, ought to have taken external aid by taking out a commission as the relief claimed in both the suits are not just for a perpetual injunction simplicitor, but, for declaration of title and for recovery of possession of the suit schedule properties and a consequential relief of cancellation of registered gift deed and for partitioning of properties and for allotment of half share in the other suit. Therefore, on this short ground itself, both the matters are required to be remitted to the Court below.

28. There is yet another ground where it has to be invariably held that the Court below even in answering issues in O.S. No.188 of 2008, did not comprehensively deal with the controversy between the parties. It is, no doubt, true, the Court below referred to the answers given by PWs.1 to 3 in recording findings on issues in O.S. No.188 of 2008 and arrived at the conclusion that the plaintiffs are not entitled to the relief as prayed for, but, the fact remains that the answers of the witnesses on behalf of the plaintiffs referred to by the Court below would relate to an extent of Ac.0-42 cents of land, but, when the plaint schedule is seen, the total extent claimed by the plaintiffs is Ac.0-65½ cents. The 'A - Schedule' consists of three items, referring to Ac.0-42 cents, Ac.0-4½ cents and Ac.0-06 cents totalling to Ac.0-52½ cents; and 'B - Schedule' consists of Ac.0-13 cents in Survey No.677. Thus, the Court below, somehow, overlooked the remaining extent, at least, as to whether it is available or whether the plaintiffs are entitled to the relief of declaration or otherwise. Thus, inherent defects are to be found in the findings recorded by the Court below settled for trial in both the cases. In such an event, it is difficult for this Court to resort to re-appraisal of evidence on record without there being clarity in regard to whether the subject matter in the first suit is distinct or identical with the subject matter in the second suit. Therefore, it is a case where matters required to be remitted to the Court below for disposal in accordance with law by even appointing a Court Commissioner to locate as to availability or

otherwise of the extents mentioned in the plaint schedule in O.S. No.94 of 2009. Hence, the submissions made by the learned counsel for the appellants and the learned counsel for the respondent and the authorities referred to by the learned counsel for the appellants are not adverted to.

29. Therefore, both the Appeal Suits are allowed setting aside the common judgment and decree under challenge passed in both the suits by the Court below and remanded to the Court below restoring them to their file and directing the Court below to afford an opportunity to both sides to lead further evidence, if any, both oral and documentary including the necessity to appoint an Advocate-Commissioner as opined in the above and to dispose of the suits as expeditiously as possible, but not later than 31.12.2018. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in both the Appeal Suits stand closed.

A. SHANKAR NARAYANA, J

June 4, 2018.

PV