

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.1509 of 1997

JUDGMENT:

This Appeal Suit, under Section 96 of the Code of Civil Procedure, 1908, by the unsuccessful defendant (since died) is directed against the decree and judgment, dated 29.10.1997, of the learned II Additional Subordinate Judge, Vijayawada, passed in O.S.No.810 of 1983.

2. I have heard the submissions of *Sri C.Subba Rao*, learned counsel appearing for the 2nd appellant, and of *Sri V.Venkata Mayur*, learned counsel appearing for the respondents 2 to 6/plaintiffs. I have perused the material record.

3. At the outset, it is to be noted that during the pendency of the appeal before this Court, the sole appellant/defendant died and therefore, his son is brought on record as the 2nd appellant, vide order dated 20.11.2003, passed in CMP no.26634 of 2003. Thus, the 2nd appellant is prosecuting the appeal suit. The sole plaintiff, who originally brought the suit, died during the pendency of the suit and his legal representatives were brought on record as plaintiffs 2 to 7. The parties in this Appeal Suit shall hereinafter be referred to as the 1st plaintiff and the defendant as arrayed in the suit for convenience and clarity. The impleaded parties shall be referred to as 2nd appellant and respondents 2 to 7.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

5. The averments in the plaint, in brief, are as follows:-

The 1st plaintiff and the sole defendant and another Narasimha Chary are brothers. They had not possessed any joint or joint family property. The defendant who was employed as a Clerk in the Forest Department worked at

several places and retired in or about 1972. The property described in the schedule annexed to the plaint and the adjacent Northern site are the absolute self acquired properties of the 1st plaintiff having been purchased by him with his own funds under the registered sale deed, dated 19.04.1968, executed in favour of the 1st plaintiff alone by V.J.Annapurnamma and others. Since the date of the said purchase, the 1st plaintiff alone has been in absolute possession and enjoyment of the same. The defendant has no rights whatsoever in the plaint schedule property. By the time, the defendant came to Vijayawada after his retirement, the 1st plaintiff was seriously ill. The defendant posing himself as a well-wisher, requested the 1st plaintiff to permit him to reside in the suit site of an extent of about 298 square yards so that he will be able to look after the 1st plaintiff and his children, who were in distress at that time. Believing his words, in the first instance, the 1st plaintiff had put up a thatched shed in the suit site at his own expenses; and, later, he converted it into a zinc sheet shed at his own expenses and permitted the defendant to reside therein on the distinct understanding that the defendant would vacate and re-deliver possession of the said property viz., plaint schedule property to the 1st plaintiff whenever demanded. The defendant is, therefore, a mere licensee of the 1st plaintiff and is liable to vacate the said property at the desire of the 1st plaintiff. Owing to certain un-brotherly acts of the defendant, the 1st plaintiff had been put to severe loss and troubles all of which were got over by him by God's grace. The 1st plaintiff does not wish that the defendant should continue in the plaint schedule site any longer. Hence, on 14.09.1983, the 1st plaintiff got issued a registered notice, through his advocate to the defendant, demanding to deliver possession of the suit property to him. The defendant got issued a reply notice, dated 23.09.1983. Each one of the assertions made therein by defendant are deliberate concoctions invented for the purpose of sticking on to the suit property over which the defendant had no right at all. The suit is, therefore, filed based

upon title of the 1st plaintiff as per Article 65 of the Indian Limitation Act, 1963, for recovery of possession of the suit site & the shed thereon from the defendant and for profits.

6. The averments in the written statement, in brief, are as follows: -

The suit is not maintainable. The averment that the suit schedule property and the adjacent Northern site are the self-acquired properties of the 1st plaintiff is false. It is also false to say that the 1st plaintiff alone is in absolute possession and enjoyment and that the defendant has no right. The 1st plaintiff and the defendant are undivided brothers till 31st December, 1972, whereas another brother had separated from the 1st plaintiff and the defendant in the year 1955 itself. The plaint schedule property and the other property were purchased with the savings of both the brothers. As such, it is the property of the erstwhile joint family consisting of the 1st plaintiff and the defendant. In fact, the vendor, namely, V.J. Annapurnamma sent her son, V.V.V.S.R.Prasad, alias Shivaji, with an intention to sell the property to this defendant. This defendant had settled the bargain and paid an advance of Rs.2,500/- towards sale price at Eluru. Subsequently, the same was informed to the 1st plaintiff and he has also accepted to complete the sale transaction. Thereupon, the balance of Rs.1,010/- was paid in the presence of Registrar and the sale transaction was completed. The sale deed was got executed in the name of the 1st plaintiff as the defendant was a Government employee, working at Eluru, and is liable for transfers and as the defendant's family is also at Vijayawada along with family of 1st plaintiff. Since then, the plaint schedule property and the other property is being treated as the joint family property and the same is in possession and enjoyment of the joint family. The 1st plaintiff and the defendant were living with their family members as joint family in a rented house in Jenda Chettu Veedhi near Shivalayam street, Vijayawada. Under the mediation of Kuchbhotla Venkata Rajagopala Sastry,

Mandapaka Veerabhadrachary and Pulletikurti Siva Rama Brahmam, the 1st plaintiff and the defendant divided their joint family properties, which included the plaint schedule property. The said partition was reduced into writing in the form of a memorandum drafted by Adavi Venkata Subba Rao. In the said partition, the plaint schedule property was allotted to the share of the defendant. Since then, the defendant is in exclusive possession and enjoyment as owner thereof without any concern with the 1st plaintiff or any others. Therefore, he has constructed a thatched shed thereon. Later, with his own funds, the defendant converted it into a shed with brick walls and asbestos cement roof. The same is being assessed to Municipal tax in the name of the defendant and he is enjoying the same in his own right and it is his absolute property. The allegation that the defendant has requested the 1st plaintiff to permit him to reside in the suit site is an absolute falsehood. It is alleged that the defendant served the 1st plaintiff during his sickness from July to September, 1972 whereas the defendant retired in the year 1971 itself. The property being joint family property and as the defendant is a joint family member, there is no need for the defendant to make any request to the 1st plaintiff. It is absolutely false to state that the 1st plaintiff at his own expenses put up a thatched shed in the first instance and later converted it into a zinc sheet shed and permitted the defendant to reside therein on the distinct understanding that the defendant would vacate and redeliver possession of the same to the 1st plaintiff whenever demanded. The further allegation that this defendant is a mere licensee and that he is liable to vacate the property at the desire of the 1st plaintiff is false. The defendant has not committed any unbrotherly acts. The 1st plaintiff wanted the defendant to depose falsely in a suit in O.S.no.897 of 1979 on the file of District Munsif Court, Vijayawada. The defendant had refused to do so. Hence, the 1st plaintiff bore grudge and got foisted this suit. The defendant sent a reply with true facts. The contrary allegations made by the 1st plaintiff are not true and correct. The 1st plaintiff

has no title to the suit property. The suit is misconceived. The reply notice issued by the defendant may be read as part and parcel of the written statement. The suit is the result of vengeance for not deposing falsely. This defendant, therefore, prays to dismiss the suit with costs.

7. Taking into consideration the above pleadings, the trial Court settled the following issues for trial:

1. Whether the suit schedule property was jointly purchased by 1st plaintiff and defendant in the name of 1st plaintiff?
2. Whether there was partition of joint family property and if so whether the suit property was allotted to defendant?
3. Whether defendant is the absolute owner of suit property?
4. Whether the 1st plaintiff has nothing to do with suit property?
5. Whether the 1st plaintiff is entitled for possession of suit property?
6. Whether defendant is in permissive possession of suit property as licensee?
7. Whether the 1st plaintiff is entitled for mesne profits?
8. To what relief?

[Reproduced Verbatim]

8. At trial, the plaintiffs 4 and 3 were examined as PWs 1 & 2 and their supporting witness was examined as PW3. Exhibits A1 to A9 were marked on the side of the plaintiffs. The sole defendant was examined as DW1 and his supporting witnesses were examined as DWs2 to 6. Exhibits B1 to B36 were marked on the side of the defendant.

9. On merits and by the judgment impugned in this first Appeal, the trial Court decreed the suit. Therefore, the sole defendant (since died) preferred this instant Appeal Suit. As noted, the 2nd appellant, who is his son, is prosecuting this appeal suit.

10. Learned counsel for the appellant/defendant while reiterating the pleaded case of the defendant contended as follows:

The judgment under appeal is bad in law and is contrary to the weight of evidence. The Court below erred in decreeing the suit with costs as the 1st

plaintiff was the benami holder of the suit schedule property. The Court below failed to see that the suit schedule property was purchased from the earnings of the appellant and that the 1st plaintiff was not having any source of income to purchase the property. The Court below failed to see that the 1st plaintiff out of vengeance filed the suit as the defendant did not depose falsely in O.S.no.897 of 1979 on the file of the Court of the learned District Munsif Vijayawada. The Court below failed to see that the defendant having deposed as DW1 further examined DW3, who is none else than the son of the vendor and that his evidence corroborated the evidence of DW1. The Court below failed to see that the original sale deed, exhibit B1, was produced by the defendant before the Court below; whereas exhibit A1, sale agreement was filed by the 1st plaintiff. DW3 in his evidence clearly stated that *"DW1 paid an advance of Rs.2500/- at Euru but the sale agreement is taken in the name of his brother, the first plaintiff."* He further stated that *"I received the sale advance of Rs.2500/- before execution of exhibit A1."* This only goes to show that the sale consideration for the suit schedule property was paid by the defendant. DW3, the son of the vendor was also a signatory to the sale deed. The Court below failed to see that the 1st plaintiff did not get into witness box due to his sudden demise and the evidence of his son-PW1, his widow-PW2 and his son-in-law-PW3 is of no avail as the transaction that took place with respect to the suit schedule property was to the knowledge of the 1st plaintiff, the defendant and their vendors alone. Therefore, no credence or weightage could be given to the evidence of PWs 1 to 3. The Court below failed to see that the suit schedule property was purchased, on 19.04.1968, when the defendant was in the service and whereas the notice (exhibit A7) was got issued by the 1st plaintiff for the first time, on 14.09.1983, and that the defendant issued a suitable reply (exhibit A8), on 23.09.1983. The belated issuance of the notice itself goes to suggest that the 1st plaintiff with an ulterior motive and for extraneous reasons instituted the suit against the defendant with an intention

to derive undue advantage. The Court below had erroneously given undue advantage to a mortgage under exhibit A3 executed by the 1st plaintiff. In fact, such mortgage only indicates the bankruptcy of the 1st plaintiff and his inability to eke out his livelihood and that such person could not have purchased or developed the suit schedule property out of his own earnings. The Court below failed to see that the defendant placed ample evidence before the Court below as to the purchase of suit schedule property and its possession and enjoyment by the defendant as is evident from exhibits B1 to B32. The Court below failed to see that the 1st plaintiff in whose name the suit schedule property was purchased was an ostensible owner and that through his evidence, the defendant showed to the Court below that he was the real owner. Besides, the evidence of the defendant as DW1, the evidence of the vendor's son (DW3) and the evidence of other witnesses DWs 2, 4 to 6 goes to show that the defendant proved his title to the suit schedule property to the hilt. The Court below failed to appreciate the fact that both the 1st plaintiff and the defendant are the coparceners of a joint family till the partition was affected, on 31.12.1972, under exhibit B25, and that in the said partition, the suit schedule property fell to the share of the defendant. The Court below failed to see that the suit schedule property after partition, on 31.12.1972, has been in the exclusive possession and enjoyment of the defendant to the knowledge of every one including the plaintiffs. The Court below failed to see that certain guidelines were laid down by the Supreme Court in respect of the *benami* transactions such as i) the relationship between the parties; (ii) the motive for the *benami* transaction; (iii) the custody of title deed; (iv) the possession of the property in question; and, (v) the source of the consideration for acquisition of the property. All these aspects were proved by the defendant; but, unfortunately, the Court below failed to appreciate the same.

11. Learned counsel for the respondents 2 to 7 supported the decree and judgment of the trial Court. He submitted as follows: - 'The trial Court correctly appreciated the facts and properly considered the evidence. The trial Court noted that the recitals in the sale deed (exhibit B1) clearly show that the 1st plaintiff is the owner of the property and that the defendant has nothing to do with the sale transaction under the said sale deed and also the ownership of the plaint schedule property and that, therefore, the defendant's possession is permissive in nature. The trial Court noted that if really the sale transaction was first negotiated by the defendant and that he paid a part of the consideration and that the sale deed was taken in the name of the 1st plaintiff as the defendant was in service and his job is transferable, the defendant ought to have figured as a witness in the sale deed. The defendant failed to examine either the scribe or the attestors in support of his defence. Since the sale deed is in the name of the 1st plaintiff, the onus of proof, which is heavy, is upon the defendant. Till the disputes arose, there was no necessity for the 1st plaintiff to put an end to the permissive possession and seek recovery of the property. The trial Court noted that the defence that there was joint family and that the family of the defendant and the 1st plaintiff along with his family lived together as a joint family is not established. The trial Court having recorded valid reasons held that the defence that the property was jointly purchased by the 1st plaintiff and the defendant, but the sale deed was obtained in the name of the 1st plaintiff in the circumstances stated by the defendant is not established. It further held that the 1st plaintiff is entitled to recover possession of the property from the defendant and accordingly decreed the suit. The well considered judgment of the trial Court does not warrant interference. Therefore, the appeal is liable to be dismissed.

12. The points that arise for determination in this appeal suit are as under:

1. Whether the plaintiffs are entitled to a decree for recovery of possession of the plaint schedule property from the defendant?
2. Whether the plaint schedule property and the adjacent property both covered by exhibit B1, dated 19.04.1968, were jointly purchased by the 1st plaintiff and the defendant; but, the sale deed was obtained in the name of the 1st plaintiff in the circumstances stated by the defendant? And, if so, whether the property under exhibit B1 was joint family property and that out of it the plaint schedule property fell to the share of the defendant in the partition before the elders and the remaining extent on the North fell to the share of the 1st plaintiff as contended by the defendant?
3. Whether the decree and judgment of the trial Court are unsustainable under facts and in law and are liable to be set aside as being contended by the appellant?
4. To what relief?

13. POINT Nos.1 & 2:-

13.1 The 1st plaintiff, defendant and one Narasimha Chary, DW2, are brothers and are sons of Raja Rao. The 1st plaintiff contends that the brothers had no joint or joint family property and that he purchased the plaint schedule property and the property adjacent to it under a sale deed, dated 19.04.1968, from V.J. Annapurnamma and others and that, therefore, he is the absolute and exclusive owner in possession and enjoyment of the said property since the said date and that the defendant has no right whatsoever in the said property. According to the further case of the 1st plaintiff, by the time the defendant came over to Vijayawada after his retirement, the 1st plaintiff was seriously ill and that the defendant by posing himself as a well-wisher, requested the 1st plaintiff to permit him to reside in the site of an extent of 298 Square Yards on the premise that he will be able to look after the 1st plaintiff and his children,

who are in distress at that time and that believing the said version of the defendant, the 1st plaintiff initially raised a thatched shed in the said extent of site and later converted it into an asbestos sheet shed at his own expenses and permitted the defendant to live in that shed in the said site and that later owing to certain un-brotherly acts of the defendant, the 1st plaintiff suffered severe loss and was put to troubles, which were got over, and that, therefore, the 1st plaintiff requested the defendant to re-deliver the plaint schedule property, but, the defendant refused to do so and that, therefore, after exchange of notices, the suit is instituted for recovery of possession of the said property and profits.

13.2 Per contra, the case of the defendant is that after the separation of the other brother in 1955, the 1st plaintiff and the defendant continued as undivided brothers and members of joint family till they divided in the year 1972; that he first negotiated for purchase of the entire property covered by exhibit B1; that in fact the vendor, Annapurnamma, had sent her son, VSR Prasad-DW3, to the defendant; that the defendant settled the bargain and paid an advance of Rs.2,500/- towards sale price at Eluru itself and informed about the same to the 1st plaintiff; that the 1st plaintiff has accepted for the same; that thereupon, the balance of Rs.1,010.50 ps., was paid in the presence of the Registrar and the sale deed was obtained in the name of the 1st plaintiff as the defendant was a Government employee liable for transfers and as the families of both the brothers are living at Vijayawada; that since then the entire property is being treated and enjoyed as a joint family property; that in the presence of the elders (whose names are stated in the defence), the entire property was partitioned; that the same was reduced into writing in the form of a memorandum; that in the said partition, the plaint schedule property was allotted to the share of the defendant; that since then he is in exclusive possession and enjoyment of the plaint schedule property as owner thereof

without any concern with the 1st plaintiff and others; that he has constructed a thatched shed and later converted it into a shed with brick walls and asbestos cement roofing with his own funds; that the same is being assessed to municipal tax in his name; that he is enjoying the property as an absolute owner; that he did not commit any un-brotherly acts; that as he failed to depose falsely as wanted by the 1st plaintiff in OS.No.897 of 1979 on the file of District Munsiff's Court, Vijayawada, the 1st plaintiff bore grudge and filed the suit without any right, title and interest in the plaint schedule property.

13.3 Since the 1st plaintiff died before the commencement of the trial, the wife and children of the 1st plaintiff are impleaded as plaintiffs 2 to 7. The 4th plaintiff, the 2nd plaintiff and one of the sons-in-law of the 1st plaintiff, were examined as PWs1 to 3. PW1 is aged 41 years by the year 1991, the date of his examination. His evidence shows that because of his bad character, his father, the 1st plaintiff, gave a paper publication stating that his character is bad. His evidence also shows that one Siva Ramabrahmam, who is related, filed a suit, OS.No.897 of 1979 on the file of the Court of the learned District Munsif, Vijayawada, against him and his father on the basis of a pronote and that the said pronote was the result of his wavered life and that in that suit, the Northern side property, which is in the possession of the 1st plaintiff and which is adjacent to the plaint schedule property, was attached and that in the said attachment proceedings, while describing the schedule of the attached property, the Southern boundary of that property was shown as the property belonging to the defendant. He is not a party to exhibit B1 sale deed, a copy of which is also marked as exhibit A6. He is also not a party to the mortgage bond, exhibit A3, dated 27.10.1967, under which the 1st plaintiff mortgaged the property and also the prior agreement of sale, dated 18.11.1967. The photocopy of the said agreement is exhibit A2. The same was marked as the last sheet of exhibit A1 was partly in a torn condition. This agreement was

marked to show that in the prior agreement of sale also, there is no recital that the defendant made any payment towards sale consideration and that it discloses payment of Rs.2,500/- as an advance and that the balance is payable at the time of registration. He marked exhibit A6, as already noted, the registration extract of the sale deed related to the entire property of which the plaint schedule property is a part by *inter alia* stating that they lost some of their documents in the cyclone. He finally stated that the suit schedule property is the exclusive property of his father. His evidence further shows that his father resided in a house in Jenda chettu street till the end of 1980 whereas he left that house by 1967 itself. Therefore, his evidence is not of much help to the plaintiffs as he is not concerned with either the transaction under the agreement, exhibit A1, or the sale transaction under exhibit B1 or the mortgage transaction under exhibit A3. PW2, an illiterate lady, stated that she was 50 years of age by the said year 1991. She reiterated the pleaded case in her examination in chief. Her evidence shows that she is the second wife of the 1st plaintiff and that the suit site was not available to her family by the date of her marriage. She stated that she cannot say as to when she has seen the suit site for the first time. She stated that her step son, Raj Kumar, along with his wife and children, is residing in the site adjacent to the plaint schedule site and that they are residing at Machilipatnam. She pleaded ignorance as to whether the plaint schedule house was assessed to municipal tax. She admitted that the defendant raised the house in the disputed site while they were living in Jenda chettu street and further stated that she and her son served her husband during his illness. She stated that she cannot say whether the defendant had joined in the disputed site in the year 1972. But she had stated that they have joined in the other site, that is, the site adjacent to the plaint schedule property, in the year 1979. She also stated that she cannot say after how many years after the defendant joined in the disputed property, they have joined in the other property. PW3, the son-in-law of the

1st plaintiff, stated that his marriage with the daughter of the 1st plaintiff was performed in 1964 and that he is a goldsmith and that in the year 1968 his father-in-law wanted Rs.1,500/- from him for registration expenses for the site purchased by him and that he paid the same to him. However, his evidence does not find support either from the pleading or the evidence of PWs1 & 2. Be that as it may.

13.4 The original sale deed, exhibit B1, related to the entire property of which the plaint schedule is a part, admittedly stands in the name of the 1st plaintiff. Therefore, the onus is upon the defendant to prove his case. The defendant deposed in line with his pleaded defence and maintained his stand in the cross examination. He produced the original sale deed and marked it as exhibit B1 and stated that since the property is a joint property the original sale deed is with him. The plaintiffs could not explain the possession of the original sale deed with the defendant. The theory that the original is lost in a cyclone along with other documents as put forward by PW1 is proved to be false, as the defendant produced the original sale deed, exhibit B1. This aspect of the matter lends support to the defence of the defendant. The evidence of PW2, the wife of the 1st plaintiff, also shows that by the time the defendant joined in the suit site, they were not living in the adjacent site and that she and her son served her husband during his illness. PW2 also admitted that the defendant raised the house in the disputed site while they were living in Jenda chettu street. Therefore, the theory that posing himself as a well wisher, the defendant requested the 1st plaintiff to permit him to live in the suit site on the premise that he would be helpful to the 1st plaintiff who was seriously ill and was in distress, appears to be false. PW1 admittedly fell in bad ways. Therefore, his father, the 1st plaintiff gave a paper publication in that regard is admitted by him. His evidence shows that because of his wavered behaviour, as admitted by him, a suit on the foot of a promissory note was

brought by a third party against him and his father, the 1st plaintiff, for recovery of money and that in that suit the property of the 1st plaintiff, which is adjacent to the plaint schedule property was got attached and that in the attachment schedule, while describing that property of the 1st plaintiff, the Southern boundary of that property was mentioned as the property of the defendant. The schedule of immovable property in the said suit, OS No.897 of 1979 evidencing the said fact is marked as exhibit B19. Exhibit B20 is the certified copy of the report of the Amin in the said suit. In that schedule of attachment, the extent of property in the possession of the 1st plaintiff is shown as 204 Square yards and its Southern boundary is shown as the property of the defendant is thus established. These are all strong circumstances, which lend support to the case of the defendant. Apart from the admission of PW2 that the defendant constructed the shed, it is undisputed that the plaint schedule site with the shed is being assessed in the name of the defendant and he is paying municipal taxes. The said facts are also evident from the documents exhibited in 'B' series. In-fact, a special notice, dated 28.09.1976, under exhibit B2 was issued by the municipal authorities, Vijayawada, to DW1 in respect of the plaint schedule property. The tax receipts, exhibits B3 to B18 show that the defendant was paying taxes from 1976 onwards. It is not the case of the plaintiffs that they ever paid municipal tax on the suit schedule property. They did not exhibit any tax receipts. If really the thatched shed initially and the asbestos sheet shed later were constructed by the 1st plaintiff and the defendant was in permissive possession, the plaint schedule property ought to have been entered in the municipal record in the name of the 1st plaintiff. However, the property stands in the name of the defendant in the municipal records and that the defendant alone paid taxes on the plaint schedule property is borne out by evidence. Further, the defendant and his son mortgaged the plaint schedule property under exhibit B21, a registered mortgage deed, dated 06.08.1981, in favour of P. Ramanjua Rao and later

discharged the said mortgage debt as is evident from the endorsement, dated 04.08.1984, on the said deed. Therefore, the defendant was exercising rights incidental to ownership over the plaint schedule property is a fact borne out by the overwhelming documentary evidence. All the facts & circumstances discussed supra cumulatively lend support to the defence and fully corroborate the version of the defendant.

13.5 The above facts & circumstances apart, there is also other evidence and other circumstances. The defendant examined the other brother as DW2. He deposed that he separated from his two brothers in the year 1955 and left for Rajahmundry and that thereafter the 1st plaintiff and the defendant lived jointly as members of joint family and that their father lived upto 1970 and that the defendant raised the hut and thereafter extended it into a shed and that when the 1st plaintiff was sick the defendant was on a pilgrimage and that he was called by a telegram and that he served the 1st plaintiff. He stated that the defendant divided from the 1st plaintiff immediately on securing his job, is not true. In his cross-examination, he admitted that he has no documents in support of his statements in evidence. Be that as it may. The divided brother supported the case of the defendant. He has no motive or reason to speak against his other brother, the 1st plaintiff. Further, the defendant examined one of the vendors as DW3. He was a Works Inspector in PWD, Hyderabad. He deposed that the plaint schedule property and its adjacent property belonged to their family and that they wanted to sell the same and that he approached DW1 in the beginning at Eluru and that the bargain was settled and that DW1 paid Rs.2,500/- at Eluru, but, the sale agreement and the sale deed were taken in the name of his brother, the 1st plaintiff, and that he received Rs.2,500/- as advance even before execution of exhibit A1 agreement. He admitted that exhibit A1 sale agreement bears the signature of his mother and that the recitals therein show that the advance was received from the 1st plaintiff but

not from the defendant. He also admitted that as per exhibit B1 sale deed recitals, the remaining consideration was also received from the 1st plaintiff. Defendant also examined DWs 4 & 5. DW4 was examined to prove the partition of the property covered by exhibit B1, sale deed, and the allotment of the plaint schedule property to the share of the defendant in the said partition. DW4 is related to both parties. The father of the 1st plaintiff and the defendant is his maternal uncle. He testified that the 1st plaintiff and the defendant lived together as joint family members in the house, which is at Jenda Chettu veedhi till 1975 and that he, his father-in-law and one of the friends, K. Venkata Raja Gopala Sastri also known as panthulu garu acted as elders at the time of partition of the joint family properties between the 1st plaintiff and the defendant and that only vacant site was divided and that the defendant got the Southern side portion of the entire property and the 1st plaintiff got the Northern side property and that after partition, a partition list was drafted on the same day in the evening and that he attested it as third attesor and that the said list is exhibit B25 and it bears his signature. He deposed that both the parties signed on the partition list but admitted that his signature appears after/under the signature of the scribe. However, he explained that since he has gone outside at the time of the parties signing the document, he had later put his signature after the scribe had signed, and that the other attestors witnessed his signing exhibit B25 and that by that time he returned and signed the document, the scribe and other attestors were present and that they asked him to sign as third attesor. He also asserted that the plaint schedule property is the exclusive property of the defendant, but, the document was obtained in the name of the 1st plaintiff. He denied the suggestion that the 1st plaintiff has not signed exhibit B25 and it is a fabricated document. DW5 is presently a practising advocate in the High Court, Hyderabad. He worked as Munsif Magistrate and as Deputy Secretary to Government, Law Department. He deposed that by the year 1972 he was

working as Munsif Magistrate, Parvathipuram, and that the 1st plaintiff and the defendant are the sons of his maternal uncle and that his cousin sisters were given in marriage to the 1st plaintiff and the defendant and that his father performed the two marriages and that he is having cordial relationships with both of them. He further testified that he came to Vijayawada in 1972, May, to visit Kanakadurga temple and Tirupati and that at that time he visited the house at Jenda Chettu veedhi where the 1st plaintiff and the defendant were living and that to his knowledge 1st plaintiff and defendant lived together as joint family members till 1972. In his cross examination, he stated that after the death of Dhanalakshmi, who is his cousin sister, the 1st plaintiff contacted a second marriage and that the 1st plaintiff was blessed with three children through Dhanalakshmi but he does not know the number of children and names of the children of the 1st plaintiff through his second wife. He denied the suggestions put to him in line with the case of the plaintiffs.

13.6 To sum up, when the sale deed is admittedly in the name of the 1st plaintiff, naturally the recitals in the sale deed do not support the defence of the defendant that the property is jointly purchased, however, in the name of the 1st plaintiff. As noted, the oral evidence of PWs1 to 3 does not support the theory of the 1st plaintiff that the defendant was in permissive possession as a licensee. Nonetheless, the respondents herein/ plaintiffs 2 to 7 placed strong reliance on exhibit A1-agreement of sale, which preceded exhibit B1, sale deed, and contend that the said agreement of sale belies the theory introduced in the defence. Be it noted that the defendant examined DW3, the son of Annapurnamma, who is also one of the vendors, to substantiate his defence that he negotiated the sale transaction and paid the advance but the agreement and sale deed were obtained in the name of the 1st plaintiff as at that time the defendant is employed and he is liable for transfers on account of his employment. Therefore, and in the light of the evidence of DW3, the

examination of a scribe or an attester of exhibit B1 by the defendant is unnecessary. The defendant is in possession of the plaint schedule property and the same was and is being assessed in his name from the inception and that the sale deed of the entire property is in his possession coupled with the fact that the theory of permissive possession is not established are sufficient to hold that the defence is more probable. Further, the evidence of DW3, which corroborates the version of the defendant, is one of the circumstances in favour of the defendant. The defendant by examining DW4 proved the partition and also the partition list under exhibit B25. He examined DW5 to show that the brothers lived jointly till 1972. These two witnesses, who are related to both the 1st plaintiff and the defendant, have no reason or motive to depose against the 1st plaintiff or in favour of the defendant. Further, the Northern side property of the 1st plaintiff was attached in a civil suit filed by a third party against the 1st plaintiff and his son. While describing that property of the 1st plaintiff in the attachment schedule filed in the said suit, the Southern boundary of that property was described as the property of the defendant. These are further strong circumstances which lend support to the defence of the defendant. As noted, PW2, the wife of the 1st plaintiff admitted that the defendant constructed the shed. The property is standing in the name of the defendant in the municipal records and he was and is alone paying municipal taxes on the property. He produced relevant records from 1976 onwards like special notice and tax demand & payment receipts. The plaintiffs/ respondents 2 to 7 herein have not paid any property tax. Therefore, they did not exhibit any documents in that regard. Though the plaintiffs/ respondents 2 to 7 herein also rely upon a mortgage bond whereunder the 1st plaintiff mortgaged the entire property in the year 1967, yet, this circumstance does not weigh in favour of the plaintiffs for the reason that after the partition that was pleaded by the defendant, the defendant and his son mortgaged the plaint schedule property under exhibit B21 mortgage deed, dated 06.08.1981,

and discharged the said mortgage debt subsequently by an endorsement, which is made on the said document. One more crucial and vital fact is the possession of exhibit B1, original sale deed, by the defendant. If really he was not concerned with the ownership of the property and he is only a licensee, one would expect the 1st plaintiff to have possession of exhibit B1 sale deed. The plaintiffs, having stated that the original sale deed is lost in a cyclone and marked a certified copy of it as exhibit A6, could not explain the possession of exhibit B1 sale deed by the defendant. This fact of possession of exhibit B1 by the defendant supports the defence that since he was one of the joint purchasers of the entire property covered by the said document, he was having possession of the same. Another important aspect is that though the defendant is staying in the plaint schedule property and the property is standing in his name and he is paying municipal taxes since 1976, the 1st plaintiff kept quiet. However, the suit is filed in the year 1983. According to the defendant, as the defendant failed to give false evidence in the suit in O.S.no.897 of 1979 as wanted by the 1st plaintiff, the 1st plaintiff instituted the suit out of vengeance. The timing of the instant suit clearly demonstrates that the suit is not *bona fide* and lends further support to the defence of the defendant. Thus, this is a case where the proverbial saying that 'men may lie but circumstances do not' applies.

13.7 Thus, on a wholesome consideration of both the oral and documentary evidence and on the application of the test of preponderance of probabilities, this Court finds that the evidence brought on record sufficiently establishes the defence of the defendant and, therefore, it follows that the plaintiffs are not entitled to recover the plaint schedule property from the defendant. The points are accordingly answered.

14. POINT No.3: -

I have gone through the judgment of the trial Court. The trial Court without properly advertent to the oral and documentary evidence and without considering the same in proper perspective merely went by the recitals in the exhibit A1-agreement and exhibit B1 sale deed and erroneously ignored the vital evidence and circumstances that were adverted to supra by this Court. A reading of the impugned judgment shows that by improper evaluation of the evidence, the trial Court arrived at erroneous conclusions and that the same are based on extraneous considerations like non examination of scribe and attesor of exhibit B1 sale deed and the mortgage of the property by the 1st plaintiff in the year 1967 under exhibit A3. The trial Court ignored the evidence of one of the vendors and the subsequent mortgage transaction, where under, the plaint schedule property was mortgaged by the defendant and his son. On carefully going through the judgment of the trial Court, this Court finds that the appreciation of evidence by the trial Court is perverse and that the findings of the trial Court based on such erroneous & perverse appreciation of evidence & extraneous and irrelevant considerations brook interference. For the said reasons and for the reasoned findings recorded under point nos.1 & 2, this Court holds that the appeal suit deserves to be allowed and that the decree & judgment of the trial Court, which are unsustainable under facts and in law are liable to be set aside and that as a sequel to the said findings, the suit of the plaintiffs is to be dismissed.

15. POINT No.4:

In the result, the appeal suit is allowed, however, without costs. And, the decree and judgment, dated 29.10.1997, in OS No.810 of 1983 on the file of the Court of the learned II Additional Senior Civil Judge, Vijayawada, are hereby set aside and the said suit is dismissed without costs.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

02.05.2018
Vjl

