

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

AS No.436 of 1999 & XOBJJS in AS No.436 of 1999 &
AS No.414 of 2006

COMMON JUDGMENT ::

AS No.436 of 1999 & XOBJJS and AS No.414 of 2006 arise out of the common judgment and decree, dated 18-12-1998 passed in OS No.6 of 1983 and OS No.20 of 1992, respectively on the file of I Addl. Senior Civil Judge, Warangal.

2. Appellants in AS No.436 of 1999 are defendants in suit OS No.6 of 1983 and respondents in the appeal are plaintiffs in the said suit. Suit OS No.6 of 1983 was filed for recovery of possession of an extent of 150 sq. yards shown as Part-I of the suit property by evicting the defendants-appellants therefrom and restoring the same to the plaintiffs; for grant of mandatory injunction directing the defendants to dismantle and remove the structures, fill up the well and restore Part-I of the suit property to status-quo ante; for

perpetual injunction against the defendants in respect of 250 sq. yards shown as Part-II of the suit property situated at Charbowli area of Warangal town, for short “the suit property”. For convenience sake, parties hereinafter will be referred to as they are arrayed in suit OS No.6 of 1983.

3. Facts as emerged from the pleadings of the parties in suit OS No.6 of 1983 are as follows:-

4. Suit property was purchased by Mohd. Ismail under a registered document vide document no.4216 of 1975, dated 05-11-1975 from Pratapuram Rangachary and Pratapuram Venkatachary. Mohd. Ismail mortgaged the suit property under an unregistered mortgage deed dated 26-12-1975, Ex.A-6 (usufructuary mortgage) for a period of five years in favour of the husbands of plaintiffs 1 and 2 and obtained a loan of Rs.20,000/- from them subject to condition, if he fails to discharge the debt, the mortgage would convert into sale. It so happened that Mohd. Ismail could not discharge

the debt, but he was in need of further amounts, therefore on or about 12-03-1978, he offered to sell the suit property to the mortgagees (husbands of plaintiffs 1 and 2) on payment of further sum of Rs.5,000/-. When the mortgagees were ready to pay the said sum and get a regular sale deed registered, Mohd. Ismail was murdered in May, 1978. Thereafter, mortgagees and plaintiffs 1 and 2 with the help of elders K. Veera Bhadraiah and Teli Papa Lal approached Chand Bee, the wife of the deceased Mohd. Ismail to execute registered sale deed in their favour as she and her children are his legal heirs. That in pursuance of discussions between them, it was agreed that Chand Bee should sell 2/3rd of the suit property to plaintiffs 1 and 2 and she would be free to sell the remaining 1/3rd of suit property to discharge the debts surrounding her. The 1/3rd share of Chand Bee was agreed to be purchased by 3rd plaintiff, who is none other than her son-in-law. In

pursuance of the said agreement, the wife (Chand Bee) and children of Mohd. Ismail executed agreement of sale dated 05-10-1982, Ex.A-1 to sell the suit property to the plaintiffs.

Accordingly, Chand Bee and her children executed registered sale deed vide sale deed no.4672 of 1982, dated 07-10-1982, in favour of plaintiffs 1 to 3, plaintiffs 1 and 2 being the nominees of mortgagees under Ex.A-6, dated 26-12-1975 and 3rd plaintiff being the nominee assignee of the vendors i.e. (Chand Bee and her children). Thus, plaintiffs 1 to 3 continued to be in possession of the suit property and prior to the sale deed under Ex.A-2, the husbands of plaintiffs 1 and 2 were in possession as tenants under the mortgage deed dated 26-12-1975, Ex.A-6.

5. While the matter stood thus, the 1st defendant (S.Komraiah) who has his house property on the south side of the suit property, encroached into 150 sq. yards of land, which is part of the suit property under Part-I and

constructed bath room and wash room taking undue advantage of absence of the plaintiffs from the suit property owing to their employment. That both defendants 1 and 2 also planned to occupy the suit property under Part-II. Though a panchayat was convened to resolve the dispute between the plaintiffs and the defendants, the defendants did not turn up and, therefore, laid the suit claim.

6. The defendants-appellants herein contested the suit by filing written statements. In the written statement filed by the 2nd defendant (B.Rajaiah) it was pleaded that Mohd. Ismail never mortgaged the suit property in favour of the husbands of the plaintiffs nor did he agree to sell the suit property. Mohd. Ismail agreed to sell the entire suit property for a sum of Rs.6,000/- to one P.Ramakotaiah (DW-2) and executed an agreement of sale dated 21-08-1976 under Ex.B2 and received a sum of Rs.4,700/- and passed on a receipt on the same day i.e. 21-08-1976 under Ex.B-3 and

put P. Ramakotaiah (DW-2) in possession of the suit property pending finalization of permission from the Urban Land Ceiling Authority. Later, P. Ramakotaiah DW-2 agreed to sell an extent of 240 sq. yards to 2nd defendant (B. Rajaiah), and his intention to sell the said extent of 240 sq. yards was also informed by P. Ramakotaiah to Mohd. Ismail, who accepted to execute registered sale deed in favour of 2nd defendant (B. Rajaiah). In that connection, Mohd. Ismail also applied for permission from Urban Land Ceiling Authority, Warangal, seeking permission to alienate 240 sq. yards of land and gave a statement to that effect before the competent authority. But, before any permission could be granted by the Urban Land Ceiling Authority, Mohd. Ismail insisted 2nd defendant (B. Rajaiah) to buy stamps and prepare the sale deed. Accordingly, 2nd defendant, purchased stamps on 20-05-1978 and got the sale deed typed on the stamp papers. Mohd. Ismail signed the

document and presented it before the registering authority, which is Ex.B-8, registration thereof was refused for want of permission from Urban Land Ceiling Authority, but in the meantime, Mohd. Ismail was murdered. That Mohd. Ismail received entire sale consideration from P. Ramakotaiah (DW-2) and nothing was to be paid. 2nd defendant applied to Municipality to enter his name in respect of 240 sq. yards of suit property which is property under Part-II and permit him to make constructions thereon. By order dated 28-12-1982, the Warangal Municipality accorded permission to 2nd defendant (B. Rajaiah) to construct house as per the approved plan. 2nd defendant is in possession of 240 sq. yards of land, which is covered under Part-II, in his own right, as owner of the suit land.

7. 1st defendant (S.Komraiah) also claimed property rights to the suit property under Part-I (150 sq. yards) through P. Ramakotaiah. In the written statement it was

stated by him that while he was constructing house by the side of suit property, he fell short of house site and therefore approached P. Ramakotaiah, who was known to him, to provide some land, upon which P. Ramakotaiah and Mohd. Ismail delivered 150 sq. yards of land covered under Part-I, on 21-08-1976, the day on which Ex.B-2 was executed by Mohd. Ismail in favour of P. Ramakotaiah. Thereafter, 1st defendant (S.Komraiah) obtained an unregistered sale deed dated 20-12-1977 under Ex.B-1, (which was subsequently impounded by paying stamp duty and penalty) from Mohd. Ismail in the fond hope that he could get regular sale deed executed subsequently. 1st defendant (S.Komraiah) also obtained permission from the Warangal Municipality and completed construction of house in the year 1979 and the plaintiffs were also aware of the same and attended the house warming ceremony of 1st defendant's house. The construction made by him is not an encroachment and he is

in lawful possession and enjoyment over the suit property covered under Part-I.

8. Basing on the pleadings of the parties, the trial Court framed the following issues for trial (OS No.6 of 1983):-

1. Whether the plaintiffs are a joint owners of plaintiff Part-I and Part-II schedule extents?
2. Whether the plaintiffs are in exclusive possession of Part-II of schedule property?
3. Whether the sale of the suit schedule land by widow and children of late Mohd. Ismail on 7-10-1982 under registered document to the plaintiff is invalid and whether the house bearing No.14/990/3 was in existence as on 7-10-1982 in the suit land ?
4. Whether the alleged sale agreement dated 21-08-1976 between late Mohd. Ismail and Pendam Ramakotaiah is true genuine and valid ?
5. Whether late Mohd. Ismail executed the alleged sale deed in favour of D-2 purporting the said 246 square yards in the suit land and delivered possession and also his title deed dated 05-11-1975 and whether the alleged purchase by the 2nd defendant is valid?
6. Whether late Mohd. Ismail and one Ramakotiah jointly delivered 150 square yards (Part-I schedule land) to the first defendant on or about 21-08-1976 ?
7. Whether the unstamped, unregistered sale deed dated 20-12- 1977 (Ex.B1) is true, genuine and valid and whether D-1 can validly claim any rights in 150 square yards (Part-I of the suit land) or protection of his alleged possession thereof ?
8. Whether the plaintiffs are entitled to eviction of defendants from Part-I of the suit land and put in

possession thereof ?

9. Whether the plaintiffs are entitled to mandatory injunction as prayed for ?
10. Whether the plaintiffs are entitled to perpetual injunction concerning Part-II of the suit land as prayed for ?
11. To what relief ?

9. Suit OS No.20 of 1992 is filed for specific performance of un-registered sale deed dated 20-05-1978, Ex.B-8 executed by Mohd. Ismail in respect of Part-II of the suit property in favour of 2nd defendant (B.Rajaiah) in suit OS No.6 of 1983, plaintiff in suit OS No. No.20 of 1992, claiming that Mohd. Ismail delivered possession of Part-II of the suit property as also original title deed dated 05-11-1975, Ex.B7 to him. Plaintiff in suit OS No.20 of 1992 (2nd defendant (B.Rajaiah) in suit OS No.6 of 1983) in effect sought a direction to defendants 1 to 7 therein i.e. wife, Chand Bee and children of Mohd. Ismail to present the sale deed executed by Mohd. Ismail for registration or to execute a fresh sale deed conveying 246 sq. yards which is referred to

as Part-II of the suit property in OS no.6 of 1983. Plaintiff in suit OS No.20 of 1992 made averments akin to the pleas taken by him as 2nd defendant in the written statement filed in suit OS No.6 of 1983. The case of the plaintiff (OS no.20 of 1992) is that the unregistered mortgage deed dated 26-12-1975, Ex.A-6 (usufructuary mortgage) allegedly executed by Mohd. Ismail in favour of the husbands of plaintiffs 1 and 2 in suit OS No.6 of 1983, defendants 8 and 9 in suit OS No.20 of 1992, and the subsequent sale allegedly made in favour of plaintiffs 1 to 3, is bogus and intended to obviate his rights over the suit land. Plaintiffs in suit OS No.6 of 1983, defendants 8 to 10 in suit OS No.20 of 1992 made averments akin to the plaint averments made in suit OS No.6 of 1983 and hence need not be repeated.

10. Defendants 1 to 7, wife and children of Mohd. Ismail in OS no.20 of 1992 filed written statement wherein they stated that Mohd. Ismail never agreed to sell the suit land to

P. Ramakotaiah for a sum of Rs.6,000/- nor did he execute agreement or passed on receipt and, therefore, P. Ramakotaiah is not competent to sell the suit land in OS No.20 of 1992 to the plaintiff therein (B. Rajaiah, 2nd defendant in suit OS No.6 of 1983). Mohd. Ismail in fact mortgaged 400 sq. yards of land (suit property in OS No.6 of 1983 consisting of Part-I (150 sq. yards) and Part-II (250 sq. yards), which includes the property claimed in suit OS No.20 of 1992 (Part-II 250 sq. yards) in favour of husband of defendants 8 and 9 on 26-12-1975 under Ex.A-6 and unable to redeem the mortgage, Mohd. Ismail later agreed to sell the suit land to them. Mohd. Ismail could not have entered into any sale transaction with P. Ramakotaiah. The alleged proceedings before the Urban Land Ceiling Authority are fake and bogus. Mohd. Ismail never informed them i.e. (wife and children) about the sale transaction he had entered into with P. Ramakotaiah, whereas he informed them of the

transaction entered into with the husbands of defendants 8 and 9 (plaintiffs 1 and 2 in suit OS No.6 of 1983). In effect, defendants 1 to 7, who are wife and children of Mohd. Ismail totally supported the case of the plaintiffs in suit OS No.6 of 1983. It is also stated that there is no cause of action for the plaintiff-B. Rajaiah (2nd defendant in OS no.6 of 1983 to file the suit for specific performance and the suit is also barred by limitation.

11. Basing on the pleadings of the parties, the trial Court framed the following issues for trial (OS No.20 of 1992):-

1. Whether the sale agreement alleged to have been made on 21-08-1976 between late Md. Ismail and P. Ramakotaiah is true, genuine and valid ?
2. Whether P. Ramakotaiah was in possession of the suit land in part performance of the alleged sale agreement ?
3. Whether the suit sale agreement between P. Ramakotaiah and late Md. Ismail on the one hand and the plaintiffs on the other, on an unspecified date is true, genuine, competent and valid ?
4. Whether late Md. Ismail executed on 20-05-1978 the sale deed in favour of plaintiff and also inducted him into possession of the suit land in the last week of May, 1978, as alleged ?

5. Whether either Md. Ismail or P. Ramakotaiah had possession of the suit land and were capable of inducting the plaintiff into possession thereof ?
6. Whether the sale by D1 to D7 of the plot of 400 sq. yards of land under a registered sale deed in favour of D-8 to D-10 is collusive, sham, nominal and fraudulent as alleged by the plaintiff ?
7. Whether the suit is within limitation as claimed by the plaintiff ?
8. Whether the suit for specific performance is not maintainable as contended by the defendants ?
9. Whether the suit is liable to be stayed under Section 10 of CPC in view of the pendency of suit OS No.6 of 1983 on the file of Subordinate Judge, Warangal ?
10. To what relief ?

12. It is to be seen that the plaintiffs in suit OS No.6 of 1983 based their claim to the suit property *i.e.* Part-I (150 sq. yards) and Part-II (250 sq. yards) on the basis of a registered sale deed dated 07-10-1982 (Ex.A-2) executed by the wife and children of Mohd. Ismail. The defendants are claiming the same suit property based on two separate sale deeds dated 20-12-1977, Ex.B-1 and Ex.B-8 dated 20-05-1978. The trial Court upon considering the evidence adduced answered issues 1 to 3 in favour of the plaintiffs

and held that Ex.A-1, agreement of sale dated 05-10-1982, A-2 registered sale deed dated 07-10-1982 both the deeds executed by Chand Bee and her children in favour of the plaintiffs; Ex.A-6, mortgage deed dated 26-12-1975, are genuine and Ex.A-6, mortgage deed dated 26-12-1975 is much prior to Ex.B-1, dated 20-12-1977 un-registered sale deed said to have been executed by Mohd. Ismail in favour of D-1 (S.Komariah). It was held by the trial Court that a charge was created under Ex.A-6 in favour of the husbands of the plaintiffs. Thus, by the date of Ex.B-1 dated 20-12-1977, Mohd. Ismail executed Ex.A-6 mortgage deed dated 26-12-1975 and effected transfer of his rights, and therefore it would not be open for him to derogate from his grant and deal with the property free from the rights created under the earlier transaction, Ex.A-6. The trial Court disbelieved Ex.B-2, agreement of sale dated 21-08-1976 executed by Mohd. Ismail in favour of P. Ramakotaiah, Ex.B-3 receipt

passed on by Mohd. Ismail to P. Ramakotaiah, and Ex.B-8, sale deed dated 20-05-1978 executed by Mohd. Ismail in favour of (B. Rajaiah), the 2nd defendant and held that they were brought into existence using the signatures of Mohd. Ismail on blank papers and that they are not genuine. Ex.B-5, permission granted by Urban Land Ceiling Authority and Ex.B-6 certified copy of statement of Mohd. Ismail deposed before the Spl. Dy. Tahsildar, ULC, Warangal, were also disbelieved holding that the suit property consists of a dilapidated house and that it is not a vacant site and, therefore, it is outside the purview of the Urban Land (Ceiling & Regulation) Act, 1976. The trial Court also found that 1st defendant (S.Komraiah) in OS No.6 of 1983 is a bona-fide purchaser of suit property under Part-I and as such his possession over that part of the land is to be protected consequent upon Ex.B-1, sale deed dated 20-12-1977 executed by Mohd. Ismail and such a protection is

available to him under Section 53-A of the Transfer of Property Act 1882, (for short, 'the Act'). By the impugned common judgment, the trial Court decreed suit OS No.6 of 1983 in part in respect of Part-II of the suit property and dismissed the suit in respect of Part-I, likewise the suit OS No.20 of 1992 was dismissed in toto.

13. Aggrieved by the relief granted to the extent of Part-II of the suit property, the defendants (S.Komaraiah) and (B.Rajaiah) in suit OS No.6 of 1983 filed appeal being AS No.436 of 1999. The plaintiffs filed cross appeal being XOBJS No.21599 of 2005 in AS No.436 of 1999 in so far it denied the relief in respect of Part-I of the suit property. The plaintiff (2nd defendant-B. Rajaiah in suit OS No.6 of 1983) in OS No.20 of 1992 filed appeal being AS No.414 of 2006 aggrieved by the dismissal of the suit filed by him for specific performance of contract.

14. Heard Sri PV Narayana Rao, learned counsel for the appellants and Sri MRK Chakravarthy, learned counsel for respondents and appellants in cross appeal, in both the appeals respectively.

15. Contentions of Sri PV Narayana Rao, learned counsel for the appellants in AS No.436 of 1999 and AS No.414 of 2006 are:-

1. That the trial Court erred in decreeing suit in respect of Part-II of suit property though the plaintiffs 1 and 2 did not enter into the witness box to prove their title and possession over the suit property and the recitals in Ex.A-2, registered sale deed, dated 07-10-1982 executed by Chand Bee and her children, did not speak of delivery of possession of suit property to the plaintiffs; and the trial Court failed to examine this aspect of the matter.
2. That the trial Court failed to notice that no consideration was paid on execution of agreement of sale under Ex.A-1 or on execution of the registered sale deed under Ex.A-2 by the plaintiffs and, therefore, Exs.A-1 and A-2 are void documents.

3. That the 2nd appellant-2nd defendant (B. Rajaiah) obtained permission from Municipal authorities in the year 1982 under Exs.B-9 and B-10 for construction of house in the suit land which substantiates that the 2nd appellant is in possession of land (Part-II) purchased by him under Ex.B-8, dated 20-05-1978 unregistered sale deed executed by Mohd. Ismail.
4. That the 1st appellant-1st defendant (S.Komraiah) cleared the loan amount in Punjab National Bank obtained by Mohd. Ismail on the security of the suit property and got the original sale deed, dated 05-11-1975 under Ex.B-7 inasmuch as it is admitted by PW-1 in his evidence, Ex.B-1 sale deed in favour of 1st defendant (S.Komraiah) and Ex.B-8 sale deed in favour of 2nd defendant (B.Rajaiah) executed by Mohd. Ismail are valid and binding.
5. That the trial Court failed to notice that under Ex.B-6, dated 20-05-1978, Mohd. Ismail gave a statement before the competent authority, ULC, that he purchased house site of 245 sq. yards (Part-II) under a registered sale deed and sold the same to 2nd defendant (B. Rajaiah) and such statement recorded by the competent authority under the Urban Land Ceiling Act, probalizes the execution of Ex.B-8 sale deed in favour of 2nd defendant.

6. That the trial Court failed to notice that the sale deed under Ex.A-2, dated 07-10-1982 executed by Chand Bee on her behalf and also on behalf of minor children of Mohd. Ismail, in favour of the plaintiffs is *void ab-initio* inasmuch as she cannot transfer the interest of her minor children.

7. That the trial Court failed to notice that appellant no.2 (B.Rajaiah)-2nd defendant is also entitled to protect his possession under Section 53-A of the Act, under Ex.B-8, dated 20-05-1978.

16. Contentions of Sri MRK Chakravarthy, learned counsel for the respondents in AS No.436 of 1999 and AS No.414 of 2006 and appellants in cross appeal in AS No.436 of 1999 are:-

1. That the appellants in the appeals have not specifically denied Ex.A-2 sale deed, dated 07-10-1982 and did not challenge the same. The appellants are disputing Ex.A-2 only on the ground that legal heirs of Mohd. Ismail have no authority to execute the document under Ex.A-2 and it was executed without obtaining permission from the Urban Land (Ceiling & Regulation) Act, 1976. That a bald plea in a written statement that the alleged sale deed under Ex.A-2 is collusive, sham a

nominal does not amount to specific denial and in the absence of specific denial it amounts to admission by the appellants as regards Ex.A-2.

2. That the trial Court though disbelieved Ex.B-2 agreement of sale executed by Mohd. Ismail in favour of P. Ramakotiah, dated 21-08-1976, Ex.B-8, dated 20-05-1978 sale deed executed by Mohd. Ismail in favour of 2nd appellant (B. Rajaiah), and held there were brought into existence using the signatures of Mohd. Ismail on blank papers, however erroneously held that possession of suit property under Part-I might have been delivered to the 1st appellant (S.Komraiah) by Mohd. Ismail under Ex.B-1, dated 20-12-1977, without notice of Ex.A-6, dated 26-12-1975, mortgage deed executed by Mohd. Ismail, and that the possession of 1st appellant (S.Komraiah) can be protected under Section 53-A of the Act. That Section 53-A of the Act does not confer any title to the 1st appellant (S.Komraiah, D-1) and it can be used only in defence and not to invalidate the title of the plaintiffs-respondents.

3. That Section 53-A of the Act will not apply when there are prior encumbrances in the light of Section 48 of the Act and the said provision is absolute in its terms and does not contain any protection or reservation in

favour of a subsequent transferee though he has no knowledge of the prior mortgage.

4. That the appellants are claiming the entire suit property under two un-registered sale deeds (Exs.B-1 and B-8) which are compulsorily registerable documents under Section 17 of the Registration Act, 1908, and therefore no right is created under the said documents to the appellants in view of the specific bar contained under Section 49 of the Act and the documents can be received in evidence only for collateral purposes.
5. That Ex.B-8, dated 20-05-1978 executed by Mohd. Ismail in favour of 2nd appellant (B.Rajaiah) being unregistered and an stamped, cannot be used in evidence and the plaintiffs as required, under Section 35 and 36 of the Stamp Act, 1899, raise objection at the time of marking those documents, and they were marked subject to objection.
6. That the provisions of Urban Land Ceiling Act are not applicable to the facts of the present case as the suit property is at measuring only 400 sq. yards and for Warangal municipality the ceiling limit during the relevant point of time was 2000 sq. mtrs., and the suit property is far less than the prescribed ceiling limit.

17. On perusal of the respective pleadings of the parties as also the reasoning adopted by trial Court and on hearing the learned counsel for the parties, the following points arise for consideration in the appeals and cross appeal.

1. Whether Exs.A-1 and A-2 agreement of sale and sale deed respectively executed by the wife and children of Mohd. Ismail in favour of the plaintiffs in suit OS No.6 of 1983 are valid and binding;
2. Whether appellants in AS No.436 of 1999, defendants 1 and 2 (S.Komaraiah & B. Rajaiah) in suit OS No.6 of 1983, are entitled for protection of their possession over the suit property (Part-I and Part-II) in terms of Section 53-A of the Act basing on Ex.B-1 & Ex.B-8 respectively and the same are valid and binding;
3. Whether appellant in AS No.414 of 2006, plaintiff in suit OS No.20 of 1992, (defendant no.2 (B.Rajaiah) in suit OS No.6 of 1983) is entitled for decree for specific performance basing on Ex.B-8, sale deed dated 20-05-1978 stated to have been executed by Mohd. Ismail in his favour; &
4. Whether the judgment and decree of the trial Court is liable to be set aside, varied or modified in the facts and circumstances of the case.

POINTS: 1 TO 3 ::

18. The admitted facts are Mohd. Ismail was the owner of suit property having purchased the same under registered sale deed vide document no.4216 of 1975, dated 05-11-1975 from Pratapuram Rangachary and Pratapuram Venkatachary, under Ex.B-7 and the defendants 1 to 7 (in suit OS No.20 of 1992) are his legal heirs. Execution of the agreement of sale dated 05-10-1982, under Ex.A-1 and the registered sale deed vide sale deed no.4672 of 1982, dated 7-10-1982, under Ex.A-2 in favour of plaintiff 1 to 3 in suit OS No.6 of 1983 is also not disputed by defendants 1 to 7, who are wife and children of Mohd. Ismail, and in fact they supported the case of the plaintiffs in suit OS No.6 of 1983, and opposed the claim of the plaintiff in suit OS No.20 of 1992 which was filed for specific performance by defendant no.2-B. Rajaiah in OS No.6 of 1983.

19. To substantiate their respective cases, plaintiffs 1 and 2 in suit OS No.6 of 1983 examined their husbands as PWs.1 and 2, 3rd plaintiff as PW3, the brother-in-law of Mohd. Ismail and elder brother of Chand Bee, as PW4 and elders to the panchayat as PWs.5 and 6 and marked Exs.A-1 to A-6. Likewise, 1st defendant (S.Komraiah) examined himself as DW-1, P. Ramakotaiah as DW-2, 2nd defendant (B.Rajaiah) as DW-5 and four other witnesses as DWs.3, 4, 6, and 7 and Exs.B-1 to B-10 were marked.

20. It has come in the evidence of PWs1 and 2, who are husbands of plaintiffs 1 and 2 in suit OS No.6 of 1983 that they and Mohd. Ismail were friends and out of friendship, he asked for a loan and accordingly they paid a sum of Rs.20,000/- on 26-12-1975 to him and got the mortgage deed executed in respect of the suit property in their favour. Mohd. Ismail was unable to repay the loan and further asked for an amount of Rs.5,000/-, and agreed to sell the suit

property to them. As stated above, Mohd. Ismail was murdered in the month of May, 1978 and he could not execute the sale deed in favour of PWs.1 and 2 as agreed to by him. It has further come in the evidence of PWs.1 and 2 that they have paid amounts to the wife of Mohd Ismail, being the balance sale consideration, as decided in the panchayat held with the intervention of elders and Ex.A-3 is the resolution of the elders in which Chand Bee signed having received the amounts as decided in the panchayat, on the understanding that further amounts will be paid by PWs.1 and 2 towards the balance sale consideration in relation to the sale of suit property. Thereafter, wife and children of Mohd. Ismail executed agreement of sale dated 05-10-1982, Ex.A-1, sale deed under Ex.A-2, dated 07-10-1982 in favour of the plaintiffs 1 and 2 who are spouses of PWs.1 and 2. 1/3rd of the suit property was purchased by 3rd plaintiff, the son-in-law of Chand Bee and Mohd. Ismail as part of the elders settlement and to meet the

surmounting debts of Chand Bee and her children. It is to be seen that the plaintiffs 1 and 2 have also agreed, as part of understanding, to part with 1/3rd share of the suit property in favour of Chand Bee and her children, with an option to sell the same to whomsoever she likes, which was purchased by the 3rd plaintiff, her son-in-law. Ex.A-2, dated 07-10-1982, sale deed was preceded by an agreement of sale Ex.A-1 wherein she (Chand Bee) and her children specifically stated that they have received an amount of Rs.35,000/- in cash, the previous month, as they required the amounts urgently to meet their necessities from the plaintiffs towards total sale consideration. It is to be seen that on the death of Mohd. Ismail, (mortgagor) the legal heirs of Mohd. Ismail have a right of redemption under Section 91 of the Act to repudiate the usufructuary mortgage executed under Ex.A-6, dated 26-12-1975, and that is what was concluded in the elders panchayat (amicable repudiation of the mortgage deed by the LRs of

mortgagor and the mortgagees-husbands of plaintiffs *i.e.* PWs.1 and 2) under Ex.A-3, dated 25-09-1982 which is signed by Chand Bee, wife of Mohd. Ismail and others. It is also admitted by Chand Bee and her children that they received the balance sale consideration of Rs.10,000/- from the plaintiffs. Admittedly Mohd. Ismail created charge over the suit property by executing Ex.A-6, mortgage deed, which is dated 26-12-1975 and prior in time of all other documents allegedly executed by him. As per this deed, as has been admitted by Chand Bee and her children, the husbands of the plaintiffs were delivered possession of the suit property. The other documents executed by Mohd. Ismail under Ex.B-2, dated 21-08-1976, agreement of sale, in favour of P.Ramakotaiah (DW-2), the unregistered sale deed under Ex.B-1, dated 20-12- 1977 in favour of 1st defendant (S.Komariah) in respect of Part-I of the suit property, the unregistered sale deed under Ex.B-8, dated 20-05-1978 in

favour of 2nd defendant (B.Rajaiah) in respect of Part-II of the suit property are all subsequent to Ex.A-6, mortgage deed said to have been executed by Mohd. Ismail.

21. Section 48 of the Transfer of Property Act, 1882, speaks of priority of rights created by transfer, which reads as under:-

“48. Priority of rights created by transfer:---Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.”

22. From a reading of the above proposition of law, it is understood that Section 48 of the Act, is absolute in its terms and does not contain any protection or reservation in favour of a subsequent transfer though he has no knowledge of the prior transfer. Therefore the rights of the plaintiffs 1 and 2 which devolved through their husbands under Ex.A-6, dated 26-12-1975 usufructuary mortgage deed, will not get affected by Exs.B-1 and 8. The doctrine ***“qui prior est tempore potior***

est jure” i.e. who is earlier in time is stronger in law applies to the facts of the case. The contention of learned counsel for the appellants that the plaintiffs did not enter into witness box to prove their title and possession over the suit property cannot be countenanced as PWs1 and 2 are none other than the husbands of plaintiffs 1 and 2 and in fact they were the mortgagees under Ex.A-6 and per the averments therein possession was delivered. Ex.A-6 is also an unregistered document and, therefore, not admissible in evidence as proof of transaction, however, it is admissible in evidence to show the nature and character of possession. The other contention of the learned counsel is that Chand Bee could not have executed Ex.A-2 sale deed, dated 07-10-1982 without obtaining permission from the competent authority, Urban Land Ceiling. As observed by the trial Court and not disputed by the appellants counsel, the suit property is admittedly admeasuring 400 square yards and in respect of

Warangal Municipality, the ceiling limit at the relevant point of time was 2000 sq. mtrs., and the suit property is within the ceiling limit. Section 5(1) of the Land Ceiling Act prohibits only transfer of vacant land if it is in excess of ceiling limit and admittedly the suit property is only 400 sq. yards and, therefore, the provisions of the Land Ceiling Act are not applicable to the suit property which is within the ceiling limit. Even otherwise, if the provisions of the Land Ceiling Act are applicable, Ex.B-7 sale deed, dated 5-11-1985 under which Mohd. Ismail purchased the suit property and Ex.A-6, mortgage deed, dated 26-12-1975 refers to existence of titled house in the suit property. Ex.B-8 sale deed also refers to existence of a house and assigned house no.14/990/3 and in the circumstances it must be held that the appellants-defendants (OS no.6 of 1983) admit the existence of house in the suit property as on 20-5-1978, the day on which Ex.B-8 sale deed was executed in favour of 2nd defendant-B.Rajaiah in

respect of Part-II. Ex.A-3, dated 25-09-1982, the resolution of the elders in the panchayat also refers to existence of house and it is not a vacant land to attract the provisions of the Land Ceiling Act and, therefore, obtaining permission from the competent authority, ULC, does not arise and, therefore, to seek to nullify Ex.A-2 sale deed, dated 07-10-1982 executed by the legal heirs of Mohd. Ismail on that ground is impermissible and cannot be countenanced. Ex.A-6, unregistered mortgage deed dated 26-12-1975, is pressed into service not for recovery of the mortgage debt, but is relied on only for a limited purpose of establishing possession of PWs.1 and 2, husbands of the plaintiffs 1 and 2 over suit property.

23. The other ground raised by learned counsel for the appellants that Chand Bee, being *de facto* guardian, could not have transferred the interest in the suit property of minor children under Ex.A-2, and as she has no authority to alienate the property of minors. The law on this issue is

crystallized. It is true and as also contended by learned counsel for the appellants under Mohammedan law, Father is guardian of minor and in his absence a person appointed as such by the Court can be a guardian. Any other person acting as guardian would be de-facto guardian even Mother of the minor. A guardian of a Muslim minor (in this case, mother) cannot transfer the interest of the minor in the property, during the minority of the minor and even if transferred, the minor after attaining majority also cannot ratify the transaction of such transfer. Even construing that Chand Bee the mother of minor children has no authority to sell the suit property to the extent of their corresponding share being de-facto guardian, suit could be filed by the minor within the period of limitation of 12 years under Article 65 of the Limitation Act, (3 years, under Section 8 of the Limitation Act, if the sale of property by a guardian, Father or Court appointed guardian) from the date of a minor attaining

majority. (*see HUKMI vs. GIAN KUMAR¹, & DARSHAN SINGH vs. GURUDEV SINGH²*). In this case the minor children of Chand Bee are the affected parties, they are not seeking to repudiate either Ex.A-1, agreement of sale, dated 05-10-1982 or Ex.A-2, sale deed, dated 07-10-1982 executed in favour of plaintiffs by their mother Chand Bee and in fact they are supporting the case of the plaintiffs. Therefore, in view of the foregoing discussion, it is to be held that Ex.A-2 sale deed, dated 07-10-1982 is validly executed and it is binding on the defendants. This point (1) is answered accordingly in favour of the plaintiffs and against the defendants in suit OS No.6 of 1983.

24. It is to be seen that defendants 1 and 2 (S. Komariah and B.Rajaiah) are claiming the suit property (delineated as Part-I and Part-II), Part-I (150 sq. yards) by S.Komariah-D1 and Part-II (250 sq. yards) by B.Rajaiah-D2 under two sale deeds, 1st

¹ (1971) 3 SCC 782

² AIR 1995 SC 75

defendant (S.Komariah) under Ex.B-1, dated 20-12- 1977 and 2nd defendant under Ex.B-8 dated 20-05-1978. It has come in the evidence of 1st defendant, examined as DW-1 that he purchased an extent of 150 sq. yards, which is Part-I of the suit property from Mohd. Ismail. It has further come in his evidence that possession in respect of Part-I of the suit property was jointly delivered to him by P. Ramakotaiah (DW-2) and Mohd Ismail on 21-8-1976 itself *i.e.* the day on which agreement of sale was executed by Mohd. Ismail in favour of P. Ramakotaiah. Thereafter, 1st defendant obtained Ex.B-1 sale deed from Mohd. Ismail. The alleged date of handing over possession jointly by P. Ramakotaiah (DW-2) and Mohd. Ismail is one year prior to Ex.B-1, sale deed in favour of 1st defendant. In effect, the 1st defendant is claiming the suit property *i.e.* Part-I in his own right. It is also a matter of record that 1st defendant got impounded the sale deed, Ex.B-1 dated 20-12-1977 by paying stamp duty and penalty. In this case

the 1st defendant got Ex.B-1 impounded by paying stamp duty and penalty. But merely because stamp duty and penalty have been paid, it would not automatically make the document (Ex.B-1) admissible in evidence, if the document is required to be registered. **(see GOLLA DHARMANNA vs. SAKARI POSHETTY @ WADOOR POSHETTY)³.**

25. DW-5 (2nd defendant-B.Rajaiah) stated that he had attested the sale deed Ex.B-1 as attester no.2 executed in favour of 1st defendant by Mohd. Ismail. It is further stated that 1st defendant made constructions in Part-I of the suit property and the husband of the 1st plaintiff supervised the constructions made therein. Another attester DW-4 in his evidence also stated to the same effect that Mohd. Ismail executed Ex.B-1 in favour of 1st defendant. It is a matter of record that 1st defendant after obtaining permission from the ULC authority constructed house on his plot including the

³ 2013 (5) ALD 490

land covered under Ex.B-1 (Part-I). It is to be seen that in chief examination of PW-1 it has come that when he visited the suit property, 1st defendant encroached the suit property and pulled the titled roof room. PW-1 in his chief examination stated that the signature on sale deed Ex.B-1, dated 20-12-1977, appears to be that of Mohd. Ismail. PW-2 also speaks of possession of 1st defendant-(S.Komariah) over Part-I of the suit property, but adds that it is an encroachment. In the evidence of PWs.1 and 2 it has categorically come that they used to come to the suit property now and then and look after the property. A perusal of the evidence of both these witnesses goes to show that 1st defendant-S.Komariah is in possession of the suit property to the extent of 150 square yards, which is Part-I of the suit property, though PWs.1 and 2 brand him as an encroacher. Under Ex.B-1, un-registered sale deed, which was subsequently impounded and paid stamp duty by 1st defendant, it can be relied for the purpose of

possession of the suit property under Part-I. According to the case of the 1st defendant, under Ex.B-1, sale deed dated 20-12-1977 and in pursuance thereof possession has been taken by him. PWs.1 and 2 husbands of plaintiffs, however, brand him as an encroacher. The evidence of PWs.1 and 2 is to the effect that they have been visiting the suit property now and then and insisted to handover the suit property, but the 1st defendant postponing the issue one pretext or the other.

26. Trial Court recorded a finding that such possession over Part-I of the suit property by 1st defendant (S.Komariah) can be protected under Section 53-A of the Act by virtue of Ex.B-1, sale deed, dated 20-12-1977. If one examine the scope of Section 53-A of the Act, it has been enacted to put restriction on the right of the owner of the property who has entered into agreement to sell the property and has delivered possession of that property to the prospective purchaser.

When once possession of the property is delivered, the

prospective purchaser has a right to continue in possession of the property which he had agreed to purchase. The Supreme Court in ***SHRIMANT SHAMROA SURYAVANSHI vs. PRALHAD BHAIROBA SURYAVANSHI (dead) by LRs***⁴ while dealing with scope of Section 53-A of the Act and for its application, detailed the following conditions:-

- (i) there must be a contract for transfer for consideration of any immoveable property;
- (ii) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (iii) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (iv) the transferee must in part performance of the contract take possession of the property, of any part thereof;
- (v) the transferee must have done some act in furtherance of the contract; and
- (vi) the transferee must have performed or be willing to perform his part of the contract

27. In this case, the 1st defendant-S.Komariah is claiming the Part-I of suit property in his own right as owner of the property under Ex.B-1, unregistered sale deed, dated 20-12-

⁴ (2002) 3 SCC 676

1977 (impounded subsequently by paying stamp duty and penalty) having paid full consideration to Mohd. Ismail. The nature of documents i.e. execution of agreement of sale which transfer only interest in the immovable property and execution of sale deed, where the immovable property is transferred absolutely, in pursuance of the agreement of sale, are two different documents altogether and the rights created by virtue of these two documents operate in their own hemisphere. In other words, doctrine of part performance cannot be made to apply in case where the person (1st defendant-S.Komariah) is claiming to be in possession of the suit property, (Part-I), is not a proposed transferee, but as a owner of the property already transferred in his favour by Mohd Ismail under Ex.B-1, sale deed dated 20-12-1977. When once he is claiming the property in his own right as owner of the suit property (Part-I), the 1st defendant's possession over the suit property cannot be protected under Section 53-A of

the Act. I am fortified in my view in the light of the ratio laid down in **DEEPAK vs. JAINABAI**⁵. At paras 8 and 9 it was observed as follows:-

“The doctrine of part performance would not apply to the facts of this case as Section 53-A of the Transfer of Property Act merely disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession of the property in pursuance of the agreement. Section 53-A of the Transfer of Property Act has nothing to do with the ownership of the transferor who remains full owner of the suit property till it is legally conveyed by executing a registered sale deed in favour of the transferee. The defendants had claimed to be the owners of the suit property in pursuance of the registered sale deed which was executed in the year 1983. Hence, Section 53-A of the Transfer of Property Act did not come into play as under Section 53-A of the Transfer of Property Act, a proposed transferee is entitled to protect his possession against the true owner or any person claiming through him. It cannot apply in the case where the person who is put in possession of the suit property is not the proposed transferee, but is, in face, a person who claims that the property is already transferred in his favour.....”

⁵ (2007 (5) Mh. LJ)

28. It is to be seen that the 1st defendant had not specifically pleaded that he is entitled to protect his possession by taking the aid of Section 53-A of the Act. All through his plea is that he is the owners of the suit property (Part-I) in his own right under Ex.B-1. In the absence of any pleadings in the written statement that he is also entitled for protection under Section 53-A of the Act, Section 53-A cannot be made applicable to the case of the defendants 1 and 2 as they are not the proposed transferees, but claim title in themselves. It settled proposition of law that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A Court cannot make out a case not pleaded and should confine its decision to the question raised in the pleadings, nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action stated in the plaint. **(see BACHHAJ NAHAR vs. NILIMA**

**MANDAL⁶, & RAM SARUP GUPTA vs. BISHUN NARAIN
INTER COLLEGE⁷.**

29. The trial Court proceeded on the footing that 1st defendant has been in permissive possession of the suit property (Part-I) being a bona-fide purchaser and his possession can be protected under Section 53-A of the Act, such a reasoning is unsustainable law. To claim protection under Section 53-A of the Act, the requirements as detailed in **SHRIMANT SHAMROA SURYAVANSHI (4 supra)** have to complied. Admittedly, the 1st defendant claimed the suit property as absolute owner and at the cost of repetition, nowhere in the written statement it is pleaded that he is entitled for protection of his possession over the suit property under Section 53-A of the Act. The decisions in **J. SURYA NARAYANA vs. R.SATHAMMA⁸, P. RAMESH vs. SHAIK**

⁶ (2008) 17 SCC 491

⁷ (1987) 2 SCC 555

⁸ (1994 (1) ALT 93)

BEGUM BEE⁹, B. LAXMIPATHI vs. MUNICIPAL COUNCIL,

KAMAREDDY¹⁰ relied on by learned counsel for the appellants to contend that to take protection under Section 53-A of the Act, 1st defendant need not plead and prove readiness and willingness when the entire sale consideration is paid are not applicable to the facts of the present case as in those cases the parties have set up a plea of protection under Section 53-A of the Act and did not claim any title to the property, but this case is distinguishable as in this case the 1st defendant is claiming title to the suit property (Part-I) based on Ex.B-1 sale deed in his own right. Ex.B-1, sale deed dated 20-12-1977 under which 1st defendant is claiming ownership has all the trapping of a sale deed. Hence, invoking the doctrine of part performance under Section 53-A of the Act to protect his possession does not arise when once he is claiming ownership to Part-I of the suit property. Therefore, the plaintiffs in suit

⁹ (2015 (3) ALT 167)

¹⁰ (2002 (5) ALT 76 (DB))

OS no.6 of 1983 are entitled for the relief in respect of Part-I of the suit property.

30. So far as the 2nd defendant-B.Rajaiah is concerned, the 2nd defendant is claiming suit property in respect of Part-II under Ex.B-8. It has come in his evidence, examined as DW-5 that 1st defendant is his brother-in-law and his sister is his wife and that he has been in actual possession of Part-II of the suit property having purchased the same under Ex.B-8 and the plaintiffs are not in possession of the suit property. It has come in his evidence that Mohd. Ismail executed Ex.B-8, sale deed and presented it before the registering authority, but the same could not be registered as they refused to register the same and advised them to obtain permission from the competent authority under the Urban Land Ceiling Act. DW-1-S.Komariah in his evidence stated that Mohd. Ismail handed over the original sale deed, dated 05-11-1975, Ex.B-7 to 2nd defendant-B.Rajaiah. It has come in his evidence that plaintiffs

are not in possession of the property and that he secured permission to sell the suit property from the competent authority, ULC, under Ex.B-5, but by the time he was about to present the sale deed for registration, in the meanwhile, Mohd. Ismail was murdered. The other evidence of DWs.1 and 2 is on the same lines of DW-5. It is to be noted that in the sale deed, Ex.B-8, dated 20-05-1978, sought to be presented before the registering authority, the suit property (Part-II) was shown as vacant land and though DW-5 (2nd defendant-B.Rajaiah) claims to be in possession. There is no material evidence to prove the possession of 2nd defendant over Part-II of the suit property. Under Ex.B-8, un-registered sale deed, the 2nd defendant-B.Rajaiah also claims to be in possession in his own right, and treating as such, he filed the present suit for specific performance to direct the wife and children of Mohd. Ismail to execute sale deed or to grant relief for specific performance of the contract treating Ex.B-8 as an agreement

of sale. The 2nd defendant is also claiming the suit property under Part-II in his own right under Ex.B-8 sale deed. To seek for protection under Section 53-A of the Act, as observed above the plaintiff-2nd defendant is required to do certain acts in furtherance of the contract. A perusal of the evidence, there is nothing that has been done in furtherance of the contract and, therefore, the protection under Section 53-A of the Act is also not available to the 2nd defendant.

31. Even otherwise a perusal of Ex.B-8 most of the typed contents were erased in the document and made corrections and interpolations. These discrepancies are succinctly noted by the trial Court in its judgment at para 37. Relevant portion of para 37 reads as under:-

“.....To the naked eye, it appears that some sale deed was typed contents thereof were erased and thereafter sale deed Ex.B-8 was typed. The year and month of the document was erased and May, 1978 is typed in the first line of Ex.B-8. The name of the earlier Vendee is also erased. Some irrelevant matter namely Andhra Pradesh was typed in 4th line of Ex.B-8 just before the name of the Vendee which is not at all warranted. Some matter is erased and the name of D2 as

Vendee is typed. The name of DW2 Ramakotaiah is typed as holding agreement of sale after erasing some name. In the second page, first four lines were erased and the recitals as to the delivery of possession were typed. The second page is also torn at its middle during the process of erasing obviously with a rubber. The 3rd page of Ex.B-8 refers to the boundaries of the property sold. Page 4 is the last page. Pages 3 and 4 are typed with a different typewriter than the one which was used for typing first two pages.....”

32. It is to be seen that no explanation whatsoever was given to explain these discrepancies and therefore the execution of Ex.B-8 by Mohd. Ismail is doubtful and the fact that Mohd. Ismail made a statement before the competent authority, ULC, seeking permission to sell Part-II of the property in favour of 2nd defendant and the permission granted by the competent authority, ULC, under Ex.B-5, dated 26-07-1978 and the certified copy of the statement of Mohd. Ismail before the competent authority, ULC, Warangal, under Ex.B-6 cannot improve the case of the 2nd defendant to show that he is the owner of the suit property under Part-II and he has been put in possession by Mohd. Ismail. As noted above, the suit

property consists of 400 square yards and it is outside the purview of Urban Land Ceiling and, therefore, the permission obtained under Ex.B-5 is of no consequence, as also the statement of Mohd. Ismail under Ex.B-6. Further, issuance of notice in writing as contemplated in Form Nos.47 and 48 of the Code of Civil Procedure and Section 16 (c) of the Specific Relief Act prior to the filing of the suit is a norm and in the absence of issuance of any such notice, the suit is barred. Admittedly, no notice is issued to the wife and children of Mohd. Ismail, who are defendants in suit OS No.20 of 1992 as contemplated under Sections in Form Nos.47 and 48 of the Code of Civil Procedure and Sections 16 (c) of the Specific Relief Act. **(see NANDAGIRI GODAVARI vs. KANUGANTI**

SUDERSHAN¹¹, & BADDAM PRATHAP REDDY vs.

CHENNADI JALAPATHI REDDY¹². In the circumstances

Points 2 and 3 are accordingly answered against defendants.

¹¹ 2011 (6) ALD 613

¹² 2008 (5) ALD 200)

Point no.4, the judgment and decree in suit OS No.6 of 1983 is modified in so far it dismissed the relief in respect of (Part-I) of the suit property. Judgment and decree in suit OS No.20 of 1992 is confirmed.

33. In the result the appeals AS No.436 of 1999 filed by the defendants in OS No.6 of 1983, AS No.414 of 2006 filed by plaintiff in OS No.20 of 1992 (2nd defendant-B.Rajaiah in OS No.6 of 1983) are dismissed. In view of the reasoning given and for the reasons stated hereinabove, XOBJIS No.21599 of 2005 in AS No.436 of 1999 filed by the plaintiffs (OS No.6 of 1983) are allowed and the suit OS No.6 of 1983 is decreed.

Plaintiffs in suit OS No.6 of 1983 established their title to the suit property (Part-I) and (Part-II) and entitled for recovery of possession thereof. There shall be no order as to costs.

A.RAJASHEKER REDDY, J

Dated: 17-07-2018
NRG

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

AS No.436 of 1999 & XOBJJS in AS No.436 of 1999 &
AS No.414 of 2006

COMMON JUDGMENT ::



17th July, 2018

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