

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Second Appeal No.455 of 2018

JUDGMENT:

The unsuccessful defendants 11 & 14 filed this Second Appeal under Section 100 of the Code of Civil Procedure, 1908, assailing the decree and judgment, dated 01.02.2018, of the learned II Additional District Judge, Prakasam District at Ongole, passed in A.S.No.137 of 2009. By the said impugned decree and judgment, the learned Additional District Judge confirmed the decree and judgment, dated 23.11.2007, of the learned Senior Civil Judge, Kandukur, passed in O.S.No.30 of 1997.

2. I have heard the submissions of *Sri V.V.Lakshmi Narayana*, learned counsel appearing for the appellants/ defendants 11 & 14 (hereinafter referred to as 'the defendants 11 & 14', for brevity) at the stage of admission. I have perused the material record including the copy of the written arguments said to have been submitted before the Court below.

3. The matter is coming up for consideration on the following limited questions:— 'Whether the substantial questions of law as raised in the grounds of appeal or any other substantial questions of law are involved in this second appeal? And, if so, whether the second appeal deserves to be admitted?

4. The parties in this second appeal shall hereinafter be referred to as the plaintiffs and the defendants as arrayed in the original suit for convenience and clarity. At the outset, it is to be noted that neither a copy of the plaint nor the copies of the written statements and additional written statements of the contesting defendants were filed along with the material papers. However, during the course of hearing at the stage of admission, a copy of the written statement filed by the 1st defendant and the copy of the memo filed by the defendants 2 to 6 adopting the said written statement are placed on record.

5. To begin with, it is necessary to note the pleadings/ cases of the parties and the events that led the defendants 11 & 14 to prefer this second appeal.

6. The case of the plaintiffs, in brief, as could be culled out from the material record, is this: 'The 1st plaintiff, the father of the plaintiffs 2 & 3, the father of the 4th plaintiff, the father of the plaintiffs 5 to 7 and Narra Sessaiah, the senior paternal uncle of the 8th plaintiff, together purchased from Syed Hussain Saheb the Western portion of the plaint schedule property of 160 akanams for a consideration of Rs.700/-, under a registered sale deed, dated 14.11.1947. The said persons also jointly purchased from Sheik Mohiddin, the Western 164 akanams of plaint schedule property for a consideration of Rs.700/-, under a registered sale deed dated 16.11.1947. Since the dates of the said purchases, the said vendees were in possession and enjoyment of the entire extent of plaint schedule property, viz., 324 akanams. Pabbisetty Venkateswarlu, the father of the 4th plaintiff, died in the year 1961. Therefore, the 4th plaintiff succeeded to his share in the plaint schedule property. Anumalasetty Murthy, the father of plaintiffs 5 to 7 died in the year 1963. Therefore, plaintiffs 5 to 7 succeeded to his share in the plaint schedule property. Murarisetty Venkateswarlu, the father of the plaintiffs 2 & 3 died in the year 1988. Therefore, plaintiffs 2 & 3 succeeded to his share in the plaint schedule property. Narra Sessaiah, the uncle of the 8th plaintiff, died in the year 1972 leaving behind him his son, Narra Yelamanda. Narra Yelamanda died leaving behind him, the 8th plaintiff. Therefore, 8th plaintiff, who is the widow of the said Narra Yelamanda succeeded to his share in the property. The said property was purchased with a view to construct a cinema theatre. However, as some of the original purchasers died, no construction was made; and, Japan and Babul trees had grown in the entire property. The plaintiffs used to cut the trees that were growing and used to sell those cut trees and portions of trees once in three or four years and the sharers/joint owners used to

appropriate the income. In the municipal elections, the defendants became a rival group/ party to the plaintiffs and as such, disputes had cropped up. And, the defendants started denying the title of the plaintiffs. Hence, the suit is filed for the relief of declaration of right & title of the plaintiffs over the vacant site of an extent of 324 ankanams in Ward no.9 of Kandukur Town, more fully described in the schedule annexed to the plaint, and for the consequential relief of recovery of vacant possession of the plaint schedule property from the defendants.'

7. The defendants 1 & 7 filed written statements. Defendants 2 to 6 adopted the written statement filed by the 1st defendant. Defendants 8 to 11 adopted the written statement filed by the 7th defendant. Defendants 14 to 16, who were impleaded on the death of the 7th defendant, filed additional written statement. The 10th defendant also filed additional written statement. The same was adopted by the defendants 1 to 6, 8, 9, 11, 14, 15 and 16. On impleadment of the 12th and 13th defendants, the 12th defendant filed a written statement; and, the 13th defendant adopted the said written statement of the 12th defendant.

8. The defence of the defendants 1 to 11, 14, 15 & 16, is this: 'The plaint schedule property is the ancestral property of 'Gulla' family and that of defendants 7 to 11. After the death of the 7th defendant, the defendants, 14, 15 & 16 also came into possession and enjoyment of the said property. The plaintiffs were never in possession and enjoyment of the plaint schedule property. The original extent of the property is 486 ankanams and it belonged to Gulla Yanadi Naidu, Gulla Subba Naidu and Gulla Venkatappa Naidu. On the death of Yanadi Naidu, his share devolved upon Gulla Jonnappa Naidu. The said Jonnappa Naidu sold away his 1/3rd share in the said total extent of 486 ankanams to Kotha Papisetty. In turn, the said Papisetty sold the same to Amudalapalli Papaiah and two others under a registered sale deed, dated

01.10.1913. The remaining extent of 325 gadies continued in possession and enjoyment of the other two brothers, Gulla Subba Naidu and Gulla Venkatappa Naidu. Thus, the remaining 324 ½ ankanams continued in actual possession and enjoyment of Gulla Subba Naidu and Gulla Venkatappa Naidu. As such, the plaint schedule property is the ancestral property of the two brothers, Gulla Subba Naidu and Gulla Venkatappa Naidu; and, they continued in joint possession and enjoyment of the said property, which was vacant. Subba Naidu died leaving behind him his wife, Rangamma, and married daughter, Madala Punnamma, as his only legal heirs. The said Rangamma executed a Will, dated 05.05.1940, in a sound and disposing state of mind and bequeathed her properties including half of the plaint schedule property to her said daughter Punnamma and her grand son Madala Kondaiah, the 7th defendant herein. The Will is valid and it was duly executed and attested. As per the terms of the said Will, Punnamma has to enjoy the said property during her life time without powers of alienation. And, after her death, the property shall devolve upon her grandson, the 7th defendant, with absolute rights. Rangamma died in the year 1947. Madala Punnamma died intestate in or about the year 1956. Thus, the 7th defendant became absolute owner of a half share in the plaint schedule property. The remaining half share of Venkatappa Naidu devolved upon his sons, Venkata Subba Naidu, Venkata Swamy and Venkat Rayudu. Venkatappa Naidu died long ago. The other two sons, Venkata Subba Naidu and Venkata Swamy sold their 2/3rd share in the half share in the plaint schedule property to their brother, Venkata Rayudu, for a consideration of Rs.1,100/- under an agreement of sale, dated 09.06.1950. He obtained delivery of possession of the property under the agreement of sale. Venkata Rayudu died in or about the year 1975 leaving behind his four sons, Narasimham, Balaiah, Kondaiah, viz., defendants 8, 9 and 10 and Venkata Subbaiah. Venkata Subbaiah died. The 11th defendant is his only son. Thus, defendants 8, 9 & 10 and the 11th defendant are the joint owners of their shares in the plaint schedule property.

Defendants 1 to 6 have no right or interest in the plaint schedule property. Defendants 7 to 11 alone are the absolute owners of the plaint schedule property. Defendants 1 to 6 are not necessary parties to the suit.'

9. The case of the defendants 12 & 13, in brief, is this:

The plaint schedule property originally belonged to Gulla Yanadi Naidu, Gulla Venkatappa Naidu and Gulla Subba Naidu. Jonnappa Naidu is the son of Yanadi Naidu. Gulla Venkata Subbaiah is the son of Venkatappa Naidu. Biggaiah is the son of Subba Naidu. After the death of Yanadi Naidu, Venkatappa Naidu & Subba Naidu and the said sons, viz., Jonnappa Naidu & Venkata Subbaiah sold an extent of 484 gadies. Gulla Kondaiah and Amudalapalli Papaiah sold the property to one Kotha Papisetty under a registered sale deed, dated 21.11.1908, for a consideration of Rs.180/-. In the said sale deed, Rangamma wife of Subba Naidu signed as a witness on behalf of minor son of Subba Naidu, that is, Biggaiah. Thus, Kotha Papisetty, validly purchased from the rightful owners, the plaint schedule property, which is part of 484 gadies. There were no other sharers by the time of purchase by Kotha Papisetty. He, in his turn, sold 160 ankanams, under a regular registered sale deed, dated 25.09.1913, to Amudalapalli Papaiah, Amudalapalli Lingaiah and Amudalapalli Rama Lingam. Papisetty's brother, Addenna also executed the said sale deed. He had no issues. Kotha Papisetty had two children, viz., Kamakshamma and Venkata Subbaiah. Venkata Subbaiah went in adoption to Addenna, who is the brother of Kotha Papisetty. Kotha Papisetty gifted 15 gadies of house site to his son, Venkata Subbaiah, who was given in adoption to his brother, Addenna. On 01.04.1920, Kotha Papisetty representing himself and his minor son, Venkata Subbaiah, sold an extent of 15 gadies to Syed Bade Saheb, son of Adam Saheb. Later, the said Venkata Subbaiah, the adopted son of Addenna, died. Kotha Papisetty executed a registered Will, dated 21.07.1941, in favour of his daughter Kamakshamma, wife of Yadala Venkatachalam. It is his last Will. On his death, the entire property including

the plaint schedule site devolved upon Yadala Kamakshamma. Ever since his death, she continued in possession and enjoyment of the plaint schedule property also. Later, she sold away 82 gadies under registered sale deed, dated 07.09.1943, to Mohinddin Saheb, S/o Peshmam Khasim Saheb. Subsequently, she died. She had two sons, by names, Yadala Peda Masthan Setty and Yadala China Masthan Setty. Peda Masthan Setty had a wife by name Kanakamma. The said Kanakamma who is elder daughter-in-law of said Yadala Kamakshamma looked after the welfare of Kamakshamma. As such, the said Kamakshamma executed a Will for the remaining extent in favour of her daughter-in-law Kanakamma. The said Will is her last Will and testament. After selling away the extent of 82 gadies, Kamakshamma possessed an extent of 227 gadies. To the said extent, Kamakshamma executed a Will as stated above in favour of her elder daughter-in-law, Kanakamma. Later, Kanakamma and her husband Peda Masthan Setty died leaving behind the 12th and 13th defendants. Thus, the 12th and 13th defendants are the absolute owners of the house site, which is of an extent of 227 gadies, and which is a part of the suit schedule property. Therefore, the remaining extent after leaving 227 gadies of house site belongs to others. So, neither the plaintiffs nor the defendants 1 to 11 got right, title, possession over the total extent of the suit schedule property at present. Soon after the demise of the 12th defendant's mother and father, the 12th and 13th defendants were and are in continuous possession and enjoyment of an extent of 227 gadies which is a part of suit schedule property.

10. Taking into consideration the above pleadings, the trial Court framed the following issues and additional issues for trial:

1. Whether the plaintiffs are entitled for declaration of title as prayed for?
2. Whether the plaintiffs are entitled for permanent injunction as prayed for?
3. Whether the suit schedule property is under the possession of the defendants?

4. Whether the sale deed, dated 14.11.47 and another sale deed, dated 16.11.47 executed in favour of 1st plaintiff and others are binding on the defendants?
5. To what relief?

Additional Issues:

1. Whether the 12th and 13th defendants are entitled an extent of 227 gadies of house site over the suit schedule property or not?
2. Whether the vendors of the plaintiffs has got absolute rights over the entire suit schedule property or not?
3. Whether the defendants 1 to 11 has got any absolute right, title, possession and enjoyment over the suit schedule property or not?
4. To what relief?

During the course of trial, 1st plaintiff (since died), 4th plaintiff, Gokaraju Malakondaiah and the 2nd plaintiff were examined as PWs 1 to 4. In exhibit 'A' series, the following documents were marked: Exhibit A1 is the registered sale deed executed by Syed Hassan Saheb in favour of Pabbisetty Venkateswarlu, Anumalasetty Murthy, Bonala Chenchaiyah, Murarisetty Venkateswarlu, Narra Sesaiah; Exhibit A2 is the certified copy of settlement deed, dated 02.08.1942, executed by Syed Bade Saheb in favour of Hasan Saheb and others; Exhibit A3 is the sale deed, dated 16.11.1947, executed by Syed Mohiddin Saheb in favour of Pabbisetty Venkateswarlu and others; Exhibit A4 is the copy of registered sale deed, dated 07.09.1943, executed by Yadala Kamakshamma in favour of Syed Mohiddin Saheb; Exhibit A5 is the copy of registered sale deed, dated 31.05.1946, executed by Khasim Jan in favour of Syed Mohiddin Saheb; Exhibits A6 & A7 are served copies of caveat petitions; Exhibit A8 is the certified copy of partition deed, dated 14.12.1937, executed between Syed Bade Saheb, Kotha Papisetty and Meera Saheb; Exhibit A9 is the certified copy of sale deed, dated 21.11.1908, executed by Gulla Jonnappa Naidu and Venkata Subbaiah in favour of Kotha Papisetty; Exhibit A10 is the certified copy of sale deed, dated 02.09.1913, executed by Kotha Somisetty in favour of

Amudalapalli Papaiah and others; and, exhibit A11 is the certified copy of sale deed, dated 01.04.1920, executed by Papisetty in favour of Bade Saheb. Defendants 1 & 3 and their supporting witnesses were examined as DWs 1 to 6. No documents were marked on their side, that is, in exhibit 'B' series. The Commissioner's reports, plan etcetera and photographs were marked in 'C' series as exhibits C1 to C19.

11. On merits, the trial Court decreed the suit of the plaintiffs. The Court below confirmed the decree & judgment of the trial Court while dismissing the first appeal suit preferred by defendants 11, 14 and others. However, the defendants 11 & 14 alone preferred this second appeal.

12. Learned counsel for the appellants/defendants 11 & 14 contended as follows: 'The trial Court delivered the judgment on the basis of insufficient evidence. DW4, whose evidence is eschewed from consideration for his non-appearance for facing cross-examination, was at the relevant time a practicing Advocate in the High Court. Without giving an opportunity for producing the said witness, the judgment was rendered by the trial Court. DWs 1 to 6 are not contesting defendants. The aspect that DW4 failed to appear for his cross examination is not a material aspect and will not affect the defence of these defendants. The evidence of the 14th defendant is crucial to decide the issues involved in the suit. However, his evidence, which was partly recorded was eschewed from consideration. Will executed by Rangamma in favour of the 7th defendant was earlier marked as exhibit A1 in O.S.no.61 of 1996 on the file of Senior Civil Court, Kandukur. The trial Court ought to have called for the said Will and ought to have perused it, though DW4 did not appear before the trial Court for facing cross examination and completion of his deposition in the suit. Defendants 8 to 11 as per their written statement are claiming 1/3rd share which would be half of the plaint schedule property and the same was purchased under an agreement of sale, dated 09.06.1950, by the father of the

said defendants from his two brothers who are co-sharers. The said agreement of sale was also exhibited as exhibit A2 in the aforestated suit O.S.no.61 of 1996. Exhibits A1 & A3 are only the sale deeds on the basis of which the plaintiffs made their claim. The other documents are merely link documents. Exhibit A8 is a deed of partition of the year 1937. It is a crucial link document. There was no reference in this document as to mode of acquisition. Presumption under Section 90 of the Evidence Act applies to execution of the document only but not to the genuineness or otherwise of the contents of the documents, which are 30 year old. The learned Judges of the trial Court and the Court below did not properly appreciate the defence of these defendants 11 & 14/ appellants herein. The approach of the learned Judges of the Courts below resulted in miscarriage of justice.'

13. Basing on the said contentions, he further contended that the following substantial questions of law are involved:

a) Whether the Courts below are justified in arriving at the final conclusions after having noted that the documents marked as exhibits A2, A4, A5, A8, A9, A10, A11 are link documents to exhibits A1 and A3 and that for proving the said exhibits A1 & A3 no oral evidence was adduced? Whether the Courts below were wrong in not discussing the evidence related to the above documents, which are only link documents related to the plaint schedule property?

b) Whether the trial Court is justified in decreeing the suit? And, whether the Court below is justified in dismissing the first appeal suit? Whether the Courts below are justified in doing so without deciding the aspects with regard to ownership of the Plaint Schedule property and the contents of Exhibit A8, which is a certified copy of the partition deed, dated 14.12.1937? Whether the Courts below are justified in not noticing the fact that there is no reference in the said partition deed to any corresponding sale deed or to any other mode of acquisition of the plaint schedule property from its true owners?

c) Whether the Courts below had arrived at correct conclusion regarding the applicability of the rebuttal presumption envisaged under Section 90 of the Indian Evidence Act? Whether the Court below was right in holding that the right, title and possession are established, when the contents are self contradictory and when exhibits A8 and A9 do not show mode of acquisition of the property? Whether the Court below is justified in not noticing the great suspicion as regards the ownership of the property by the persons referred to in Exhibit A8?

d) Whether the Courts below are justified in arriving at the conclusions even in the absence of an additional issue with regard to the validity and binding nature of exhibit A8? Whether the Courts below are justified in holding that the plaintiffs succeeded in proving their right, title and possession over the plaint schedule property as on the date of the filing of the suit?

e) Whether the Courts below are justified in holding that the plaintiffs are entitled to a decree without evaluating the oral and documentary evidence available on record, particularly the evidence in respect of A8 and A9, the contents of which are self contradictory? Whether the findings of the Courts below on issues nos.1 and 4 and the additional issue no.2 are erroneous and are unsustainable?

14. Now, the following points need examination: 'Whether or not the above said questions being sought to be raised as substantial questions are in-fact substantial questions of law? Whether any substantial questions of law are involved? And, if so, whether the Second Appeal deserves to be admitted?

15. The Courts below having analyzed the oral and documentary evidence, took specific note of exhibits A1 & A3, registered sale deeds, both of the year 1947, and the link documents in exhibit 'A' series. The Courts below also took note of the version of the plaintiffs that the original idea of constructing a cinema theatre did not fructify due to the deaths of some of the purchasers and that the trees that were growing over the vacant site were used to be cut

and sold once in two or three or four years and that the income being realized from such sales was being enjoyed by the sharers/joint owners of the plaint schedule property. It is noticeable from the pleadings and evidence that the two sets of defendants claimed title independently in respect of a part or the whole of the plaint schedule property. The following facts and aspects are borne out by record: "The defendants 12 & 13 claimed independent title to an extent of 227 gadies of site. The other defendants claimed that defendants 7 to 11 are the absolute owners of the entire plaint schedule property. However, the defendants commonly contended that the property originally belonged to 'Gulla' people, that is, Gulla Yanadi Naidu, Gulla Subba Naidu and Gulla Venkatappa Naidu. The specific claim of defendants 12 & 13 in respect of 227 gadies is through the branch of Gulla Yanadi Naidu, who according to them, is a 1/3rd shareholder. Whereas, the specific claim of the other defendants is that the total extent was originally 486 akanams and that out of it, the 2/3rd share of Gulla Subba Naidu and Gulla Venkatappa Naidu in an extent of 324 akanams devolved upon defendants 7 to 11 and that 227 gadies being claimed by the defendants 12 & 13 is not part of the plaint schedule property. The defendants also alleged that the vendors of the plaintiffs under exhibits A1 & A3 sale deeds, had no title and that neither the plaintiffs nor were their vendors in possession of the plaint schedule property." Be that as it may. Exhibit A9 is a certified copy of the sale deed, dated 21.11.1908; the same reflects that the property belonged to Gulla Jonnappa Naidu and Venkata Subbaiah and that they sold the same to Kotha Papisetty; Exhibit A10, the certified copy of sale deed, dated 02.09.1913 reflects that K.Papisetty sold the property to Amudalapalli Papaiah and others. Nonetheless, as per exhibit A11, the certified copy of registered sale deed, dated 01.04.1950, the said Papisetty sold the property to Bade Saheb. Exhibit A8, the certified copy of the registered partition deed, dated 14.12.1937, on a plain perusal shows that the property was partitioned between Bade Saheb, Kotha Papisetty and Meera

Saheb. As noted, exhibit A1 is the registered sale deed in favour of 1st plaintiff and the father of the plaintiffs 2 & 3; and that exhibit A3 is the copy of the sale deed in favour of the father of the 4th plaintiff, the father of plaintiffs 5 to 7 and Narra Sessaiah, the senior paternal uncle of the 8th defendant. The antecedent title deeds, exhibits A4 & A5, dated 07.09.1943, and 31.05.1946 for 82 ankanams each, are also exhibited through PW1. The cross-examination done by defendants 7 to 11 admittedly discloses that the executions of exhibits A1 & A3 sale deeds were not questioned by them as according to them, the vendors thereunder have no title to the properties covered by the said documents. Exhibit A2, dated 02.08.1942, obtained by Shaik Rasool Saheb and others relates to 162 gadies out of plaint schedule property. Under exhibit A5, dated 31.05.1946, Imam Mohiddin Saheb purchased 82 gadies from Pathan Khasim Saheb. Kamakshamma became entitled to 82 gadies as per the Will of Papisetty. She sold 82 gadies to Shaik Syed Mohiddin Saheb under exhibit A4, sale deed dated 07.09.1943. Pathan Ismail Khan sold 82 gadies to Syed Mohiddin. Thus, it is evident from the evidence that Syed Mohiddin became entitled to 164 gadies and Shaik Hassan Saheb entitled to 160 gadies. It is pertinent to note that though the defendants 12 & 13 raised a defence and had set up a claim of title, they did not adduce any evidence on their side to substantiate their defence and further failed to cross examine PWs 2 & 3 and also the other defence witnesses, who were examined on behalf of the other set of defendants. Thus, there is no rebuttal evidence adduced by the said defendants. The defendants 7 to 11, who claimed title in their own right, did not file any documents in support of their claims of title. Even the Will or the sale deed referred to in their pleadings is not exhibited. Mere oral assertions are not sufficient to establish title; and, in the absence of documents related to title, any amount of oral evidence is not sufficient to advance the defences of the two sets of defendants. Therefore, the evidence on the side of the plaintiffs remained unrebutted.

16. Turning to the evidence adduced by the contesting defendants, it is necessary to note the following vital aspects, which are borne out by record: 'DW1 stated in his evidence that he has nothing to do with the subject property. DW2 pleaded ignorance as to how the defendants 7 to 11 acquired rights in the plaint schedule property. DWs 1 & 2 did not exhibit any documents. DW3, the 10th defendant, stated that they have no registered documents in support of their claim. DW4's evidence, that is, the partly recorded evidence of the 14th defendant was eschewed, as he failed to turn up to face the cross-examination. DW5 admitted that her husband did not acquire the subject property and that she has no documents to show that her husband acquired the subject property. DW6, Amudalapalli Malakondaiah, stated in his evidence that he does not know whether the plaintiffs purchased the property from Mohammedans and whether Gulla family had no connection with the property since the year 1908.' Thus, on an overall examination of the evidence brought on record it is evident that the evidence including the evidence adduced by the contesting defendants is by no means sufficient to advance their claims of title in respect of any part of the plaint schedule property. The Courts below also took the aid of the presumption under Section 90 of the Indian Evidence Act, 1872, as the plaintiffs' documents are 30 year old and the persons associated with the said documents are either dead or not available for being examined on the side of the plaintiffs. The learned Judges of the Courts below gave valid reasons in support of their findings. The learned Judge of the Court below took note of precedents in support of his conclusions with regard to the applicability of presumption under Section 90 of the Indian Evidence Act and the said learned Judge after adverting to the facts & law held that the presumption applicable to thirty year old documents and the evidence brought on record establishes the genuineness of all the thirty year old documents. Thus, considering the overwhelming oral and documentary evidence on the side of the plaintiffs and the fact that there is absence of rebuttal evidence on the

side of the defendants 12 & 13, and documentary evidence on the side of all the contesting defendants, and also considering the failure on the part of the defendants 12 & 13 to cross-examine PWs 2 & 3, the Courts below rightly and concurrently concluded that there is sufficient evidence in support of the plaintiffs' claims and that on the application of test of preponderance of probabilities the suit can be decreed in favour of the plaintiffs. Accordingly, the trial Court decreed the suit and the lower appellate Court dismissed the first appeal preferred by the defendants 11, 14 and others. No sincere attempt was made to even adduce additional evidence before the first appellate Court by following the procedure established by law. The law is well settled that the Courts will not come to the rescue of those who are indolent. In the presence of overwhelming oral and documentary evidence that too, un rebutted evidence, particularly un rebutted documentary evidence on the side of the plaintiffs, this Court finds that the Courts below are justified in decreeing the suit of the plaintiffs. Adverting to the aspect of recovery of possession, be it noted that on this aspect also, both the Courts below concurrently held that the defendants are trespassers and that the defendants are liable to vacate and deliver vacant peaceful possession of the plaint schedule property. Such concurrent findings of fact, in the light of the discussion supra, do not warrant interference. Once, title of the plaintiffs is held established, the plaintiffs who are not required to prove that they are in possession within 12 years preceding the date of the filing of the suit in view of the present law of limitation obtaining, the plaintiffs would be entitled to a consequential decree for recovery of possession unless the defendants plead and establish title by adverse possession. No such plea is taken and established in the case on hand. Though a decision of a Division Bench of this Court in *Nakka Srinivas and another v. Nakka Yadagiri and others*¹ is relied upon by the appellants in support of the contention that the presumption of

¹ 2017 (2) ALD 144 (DB)

genuineness of the contents of the document is not available and that the presumption of execution is only applicable to a 30 year old document, in the case on hand, in absence of evidence much less of reliable character on the side of the contesting defendants, there is no reason to discard the overwhelming unrebutted documentary evidence coupled with the oral evidence.

17. It is apt to note that in *R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and Ors.*², the Supreme Court while dealing with the distinction between 'Burden of Proof' & 'Onus of Proof' and the standard of proof required in a suit for declaration of title, held as follows:

'In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in *A. Raghavamma and Anr. v. Chenchamma and Anr.*, [1964] 2 SCR 933, there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which, never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiffs title.'

Thus, from the facts and the legal position obtaining, this Court finds that the concurrent findings of the Courts below do not warrant interference in the absence of involvement of substantial questions of law in this second appeal.

18. On the above analysis and on a careful reading of the questions of law formulated in the grounds of second appeal, it is obvious that the questions being sought to be raised are not even pure questions of law leave alone substantial questions of law and that the said questions raised are either only mixed questions of fact & law or pure questions of fact and not substantial

² AIR 2003 SUPREME COURT 4548

questions of law. Therefore, this Court finds that no substantial questions of law are involved in this second appeal. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. The view of this Court is reinforced by the ratios in the decisions in *Gurudev Kaur v. Kaki*³ and *Dagadabai (dead) by LRs. v. Abbas Alias Gulab Rusrtum Pinjari*⁴. In the case on hand, after careful examination of the pleadings, evidence and the contentions, as this Court finds that no substantial questions of law are involved, this second appeal is liable for dismissal at the stage of admission, in view of the narrow compass of Section 100 of the Code of Civil Procedure.

19. Viewed thus, this Court finds that no question of law much less a substantial question of law is involved requiring interference with the judgment impugned. Accordingly, this Court holds that there is no substance in the questions sought to be raised and that the second appeal deserves to be dismissed at the stage of admission.

20. In the result, the Second Appeal is dismissed. There shall be no order as to costs. However, the defendants are granted a time of two months from the date of receipt of a copy of this judgment for vacating and delivering vacant possession of the suit schedule property to the plaintiffs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

30.07.2018
RAR

³ AIR 2006 SC 1975

⁴ (2017) 13 SCC 705