

**HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

***HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO**
+Second Appeal No.324 of 2009

%04.06.2018

#Between:

Smt. Nakkaraju Satyavathi

...appellant

AND

Smt. Mulagada Venkata Ramana Kumari
and others

...Respondents

!Counsel for the appellant

: Sri N. Subba Reddy

Counsel for the respondent No.1

: P. Raj Kumar,

Counsel for the respondents 3 to 5
(R.2 died)

: -Nil-

<Gist

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>Head Note

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? Cases referred:

¹ Section 13. Facts relevant when right or custom is in question reads that:—Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.

Illustration—The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

². AIR 1954 SC 379

³.. AIR 1954 SC 606

⁴.. 1902-ILR 29 Cal.190 (198) (PC)

⁵. (1998) 3 SCC 331=AIR 1998 SC 1132

⁶. AIR 1982 SC 818==1982 (3) SCR 94=1982 (1) SCC 525= 1982 (1) SCALE 79

⁷ AIR 1972 SC 1826

⁸. (2001) 7 SCC 698

⁹ . AIR 2002 SC 960= 2002(1)SCR 393=2002(3)SCC 676=2002(2)JT 24=2002(2)SCALE 118

¹⁰. AIR-2000-SC -3272

¹¹. AIR-1955-AP-112-(Paras 5 to 7)

¹².. AIR-1956-SC-593=1956-SCR-451

¹³.. AIR 2005 SC 3330=2005(7)SCC 605=2005(7)JT 530=2005(6)SCALE 625

¹⁴.. AIR-1994-SC-853

¹⁵ . AIR 1999 SC 3381

¹⁶.. AIR-1974-AP-1=ILR-1972-AP-421=1971(1)APLJ-56(SN)

¹⁷. 1993(1)SCC 531

¹⁸.. AIR 1968 SC 1165

¹⁹. (2004) 1 SCC 769

²⁰ . 2004 (1) SCC 271

²¹. 2004 (10) SCC 779

²². (2005)8 SCC 330

²³. (2009) 13 SCC 229

²⁴. 2007(2) RCR Civil 313(sc)

²⁵ 2001 (5) ALT 197

²⁶. (2004) 10 SCC 65

THE HON'BLE Dr.JUSTICE B.SI VA SANKARA RAO

SECOND APPEAL No.324 OF 2009JUDGMENT

The Second Appeal, impugning the concurrent findings of the Courts below in O.S.No.239 of 1994 and A.S.No.82 of 2004, is filed by (the 4th Appellant in A.S.No.82 of 2004 on the file of the IV Additional District Judge, Visakhapatnam) Smt. Nakka Satyavathi, W/o. DW1-Nakka Nukaraju(since died) against one Smt.Mulagada Venkata Ramana Kumari W/o. PW1-Ramayya, plaintiff in O.S.No.239 of 1994 on the file of the Principal Senior Civil Judge, Visakhapatnam, also by showing formally as respondent No.2 to the second appeal said late Nukaraju (sole defendant in O.S.No.239 of 1994 since died pending the 1st appeal he filed as sole appellant supra), besides the 2nd appeal pro forma respondents 3-5 who are no other than the two daughters and mother of said Nukaraju by names Smt. Ravipalli Lakshmidevi, Smt. Ravipalli Vijayalakshmi and Nakka Nookalamma all impleaded as LRs in the 1st appeal along with Smt. Nakka Satyavathi.

2. The suit O.S.No.239 of 1994 filed by Venkata Ramana Kumari supra against late Nukaraju supra was for the relief of recovery of possession of the plaint schedule property described as site of an area of 500sq.yds. in plot no.60, block no.39 of maitryinagar, near beach road, Visakhapatnam Municipal Corp. limits, bounded by E-40 feet road, W-plot no.65, S-30 feet road & N-Gedda, pursuant to the Ex.A3 registered sale deed No.752 dt.25.03.1992, obtained through Court pursuant to the decree and Judgment for specific performance of the trial court confirmed in the appeal (covered by the Exs.A1, 2, 4 & 5 Certified Copies of trial court in O.S.No.119 of 1982, dated 23.04.1987 confirmed in

A.S.No.95 of 1987 dated 15.07.1991), based on the Ex.A14 C.C. of non-possessory sale agreement, dated 29.08.1979 with later endorsement of delivery of possession by receiving part payment of Rs.5,000/- on 10.10.1979 said to have been executed by the 1st defendant in O.S.No.119 of 1982 by name Pentakota Seetaramanjaneyulu, one of the four sons of one Pentakota Ramabhadrarao s/o. of Sreeramulu Naidu, where from the contest of Seetaramanjaneyulu in disputing the sale agreement and the property claimed in the suit has fallen to the share of his one of three brothers by name Sitaram(impleaded as 2nd defendant). Late Nakka Nukaraju supra was not made party to the specific performance suit in O.S.No.119 of 1982. Said Nukaraju also filed separate suit for specific performance on 26.12.1991 in O.S.No.1151 of 1991 based on earlier possessory sale agreement, dated 24.11.1976, said to have been executed by the defendant in O.S.No.1151 of 1991 by name Pentakota Ramabhadrarao. Pentakota Seetaramanjaneyulu as stated supra is one of the four sons of Pentakota Ramabhadrarao. The suit in O.S.No.1151 of 1991 was also decreed *ex-parte* on 09.03.1992, based on the possessory sale agreement supra of 1976.

3. The contentions raised in the second appeal grounds, with the say of involving substantial questions of law as contemplated under Section 100 CPC are that the judgment and decree of the lower appellate court is contrary to law, weight of evidence and probabilities of the case, that the lower appellate court should have seen that the defendants are not bound by the so-called decree simplicitor for specific performance of the contract for sale with a stranger to the property in O.S.No.119 of 1982, leave apart that so called sale agreement is an ambiguous and perfunctory one without any measurement and any other information for

identification of the property to claim as the suit schedule property and that otherwise the suit for possession without seeking relief of declaration is also not maintainable. It is also contended that the lower appellate court ought to have seen that in the suit O.S.No.119 of 1982, relief for possession with relief of specific performance was not even asked and the second suit which is covered by the present *//s* for possession thereby is barred by law under Order II Rule 2 CPC and also from Section 22 of the Specific Relief Act, for if at all to seek such reliefs that were in the suit for specific performance itself and not later from accrual of cause of action already to claim possession also initially and once that was not availed, there is a bar as per Order II Rule 2 CPC; that the defendants' continuous possession over the property covered by Exs.B1 to B5 could not have been ignored by the Courts below, that merely because the suit for specific performance in O.S.No.119 of 1982 was decreed and sale deed obtained through court, there is no warranty in relation to the title over the property, much less to ignore the other *//s* appended to it and from involvement of the rights of the others covered by the principle of *caveat emptor* apart from no presumption of ownership over the property to the vendor of the property covered by the non-possessionary sale agreement to draw, that too when defendants are showing their long standing possession over the property with right by virtue of the possessory sale agreement, dated 24.11.1976 that was executed by Pentakota Ramabhadrrao which is the subject matter of suit for specific performance filed by the appellant herein in O.S.No.1151 of 1991 and that too from said possessory agreement dated 24.11.1976 is even earlier to the non-possessionary sale agreement dated 29.08.1979, in O.S.No.119 of 1982. The courts below should not have given any

credence to the decree in O.S.No.119 of 1982 for nothing to ignore the decree in O.S.No.1151 of 1991 dated 09.03.1992 granting specific performance pursuant to said possessory sale agreement, dated 24.11.1976. The courts below should have seen that plaintiff in O.S.No.119 of 1982 by name Ramana Kumari earlier made vain attempts to dispossess (non-party) Nakka Nukaraju, late husband of the appellant Satyavathi herein, from the suit schedule property in 1991-92 under the guise of execution in E.P.No.195/1987 of the decree in O.S.No.119 of 1982 against Pentakota Seetaramanjaneyulu alleging as if Nakka Nukaraju is his henchman and on the claim made by Nakka Nukaraju, finding of he is third party not bound by the decree was given by the 1st Additional Senior Civil Judge, Visakhapatnam there in E.A.Nos.589&566/1992, in E.P.No.195/1987, in O.S.No.119/1982. It is also the contention of the appellant herein that the suit claim for recovery of possession is barred by adverse possession even against the so called vendor of the specific performance suit in O.S.No.119 of 1982 of Venkata Ramana Kumari and there is also bar of *res-judicata* and the courts below committed grave error in not properly considering Exs.B1 to B5 or in giving any credence to Exs.A1 to A18 and in not properly appreciating the oral evidence of DWs.1 to 4 or in giving credence to the evidence of PW 1, and that too when plaintiff-Venkata Ramana Kumari did not enter witness box, but for her husband by name Ramayya as PW1 and thereby sought for setting aside the concurrent findings of the courts below and to allow the 2nd appeal by dismissing the suit claim for possession.

4. This court on 07.09.2009 admitted the second appeal referring to the substantial questions of law raised in the grounds of the 2nd appeal, mainly, on the grounds involving substantial questions of law,

viz., in a suit for specific performance of the contract for sale without seeking consequential relief of possession etc., from decree holder obtained sale deed through court, such person plaintiff/decreed holder entitled to file a separate suit for possession against the strangers to the agreement and suit including from any bar under Order II Rule 2 CPC and *res-judicata*; whether there is any warranty for document of sale executed by a civil court by virtue of decree for specific performance of the contract for sale; whether there is any presumption of fact or law about any person being in possession of the property in the absence of evidence to that effect, especially when the evidence discloses that the defendants in the present suit are in possession of the property as per the plaintiff's own admission; and to what result.

5. This court while admitting the second appeal granted interim stay unlimitedly of the execution of the decree of the trial court as confirmed by the lower appellate court.

6. It is after the appearance of the 1st respondent/plaintiff to the suit O.S.No.239 of 1994, the respondent No.1/plaintiff started pressing for disposal of the appeal early, time and again and there were directions for final disposal of the appeal even earlier; and earlier also it was heard in part by different Benches and however reopened.

7. Ultimately heard both sides by this court on 16.04.2018 and reserved for judgment, since no further substantial questions of law involved and to be formulated, if any, brought to the notice of the court in the course of the detailed hearing.

8. Heard both sides, as referred to supra, and perused the entire material on record.

9. For the sake of convenience, the parties are being referred by names because of multiple litigations and the appellant herein is not party to the present suit, but for her late husband as sole defendant, who died pending first appeal filed by him and the present appellant, her two children and her mother-in-law came on record as appellant Nos.2-5 in the first appeal as detailed supra.

10. The factual matrix necessary to mention including the earlier litigation relevant to the present */is* in deciding the substantial questions of law formulated supra in the second appeal in nutshell are that:

10(i). The relief sought in the present suit in O.S.No.239 of 1994 by Plaintiff-M.V.Ramana Kumari claimed against the defendant-Nakka Nukaraju is for possession of the plaint schedule property described supra after removing the structures therein and by ejectment of the defendant supra, with claim particularly in para-III(C) of the plaint that during April,1992 the plaintiff-Ramana Kumari discovered the defendant-Nakka Nukaraju trespassed into the plaint schedule property at the behest of Pentakota Seetaramanjaneyulu and others-defendants in O.S.No.119 of 1982, being their henchman. The plaint cause of action para says plaintiff obtained non-possessory agreement for sale under original of Ex.A14, dated 29.08.1979, from one Pentakota Seetaramanjaneyulu and later taken possession on 10.10.1979 and filed suit without relief of possession but for specific performance simplicitor in O.S.No.119 of 1982 on the file of the II Additional Senior Civil Judge, that was decreed and the appeal of defendants therein was dismissed and filed execution petition and obtained regd. Sale deed as per decree cause executed by court and from subsequent trespass by defendant, plaintiff as decree holder filed in O.S.No.119 of 1982, E.A.no.461 of 1992

for delivery of possession, where the defendant-Nakka Nukaraju was impleaded and asserted that he is in possession independently. The plaintiff further averments are that plaintiff-Ramana Kumari got title over suit schedule property based on the sale deed No.752 of 1992 executed by court on behalf of defendant therein by name-Pentakota Seetaramanjaneyulu, pursuant to the decree dated 23.04.1987 in O.S.No.119 of 1982 made final by dismissal of A.S.No.95 of 1987 and in E.A.No.461 of 1992 for delivery of possession, observed of the person in possession by name Nakka Nukaraju is a third party and not claiming through Pentakota Seetaramanjaneyulu-defendant in O.S.No.119 of 1982. It is averred in the present suit in O.S.No.239 of 1994 by the Plaintiff-M.V.Ramana Kumari that Nakka Nukaraju-defendant herein is claiming that he obtained exparte decree in O.S.No.1151 of 1991 against one Pentakota Ramabhadrrao, who got no right over the property and the decree is collusive and unenforceable. The written statement in O.S.No.239 of 1994 filed by Nakka Nukaraju-defendant is by disputing the suit claim for possession and denying the plaintiff averments including the alleged trespass much less at the instance of Pentakota Seetaramanjaneyulu-defendant in O.S.No.119 of 1982 and alleged cause of action, with specific claim and contention that Pentakota Ramabhadrrao, after obtained ULC clearance, executed possessory sale agreement in his favour on 24.11.1976 in respect of the suit property for Rs.15,000/-and within two years therefrom he constructed a thatched house therein allotted with D.No.7-5-7/1 and has been residing with family and they are exercising their electoral franchise therefrom and as Pentakota Ramabhadrrao was postponing till his death in 1986 to execute sale deed to his demands, he filed O.S.No.1151 of 1991 against

the LRs of said Pentakota Ramabhadrrao for specific performance and consequential injunction and the suit was decreed and he got right over the property and the plaintiff never in possession of the suit property and her attempts to enter the property were thwarted and the suit claim is false and the defendant otherwise perfected title over the property by adverse possession and the suit claim is barred by *res-judicata* and the suit wont lie and same is liable to be dismissed. During trial on the main issue as to whether plaintiff is entitled to the relief of possession prayed for, during trial plaintiff did not come to witness box but for her husband as sole witness PW1 and besides the defendant as DW1, three more witnesses were examined as DWs 2-4. Among Exs.A1 to 18, besides Exs.A1-6&14 referred supra, Ex.A7-appeal grounds in A.S.No.95 of 1987 against decree in O.S.No.119 of 1982, Exs.A7 to A9 & A15 are the plaint, written statements of D1-Seetaramanjaneyulu, D2-Sitaram(since impleaded) and issues in O.S.No.119 of 1982, Exs.A10 and 12 are notice dt.19.04.1992 and telegram notice, Ex.A11 is statement under Sec.6 of ULC Act, Ex.A13-caveat dt.14.05.1982, Ex.A16 layout plan and Exs.A17 and 18 are copies of sale agreement-cum-GPA dt.16.12.1996. Exs.B1-5 are the Decree and Judgment in O.S.No.1151 of 1991, Commissioner's report, order in E.A.No.589 of 1992 in E.A.No.566 of 1992 in E.P.No.195 of 1987 in O.S.No.119 of 1982 and identity card.

10(ii). Coming to the earlier lis background covered by the material supra, said Pentakota Seetaramanjaneyulu(1st defendant in O.S.No.119 of 1982), the so-called executant of the non-possessionary sale agreement, dated 29.08.1979 was no other than one of the four sons of said Pentakota Ramabhadrrao and other three include one Sitaram(2nd defendant in O.S.No.119 of 1982). The Ex.A8 written statement contest

of Seetaramanjaneyulu in O.S.No.119 of 1982 was while disputing said sale agreement as not true, not supported by consideration and not enforceable and alleged payment endorsement and delivery of possession are also not true, that the suit property claimed as covered by the Ex.A14 non-possessionary sale agreement dated 29.08.1979, is in fact fallen to the share of his elder brother by name Sitaram(impleaded therefrom as the 2nd defendant in O.S.No.119 of 1982) in their family partition and the written statement of 2nd defendant Sitaram was Ex.A15, where he contested that Ramabhadrarao, their father, brothers of Ramabhadrarao got the property by way of conveyance under registered Document No.1971 executed by one Sreeramulu Naidu, the original owner which was for an extent of 5000sq.yds. in plot nos.51,52,60&65 and also site intended for road abutting to the plots and it was when divided into five shares, he got the plot No.60 and also part of plot no.51 towards his share and 1st defendant is nothing to do with it. The addl. Written statement of 1st defendant in O.S.No.119 of 1982 as referred in para 5 of judgment in O.S.No.119 of 1982 speaks further that Sec.6(1)ULC declaration he filed not a condition precedent to agreement and unless ULC clearance is there by determination of no excess land, there is a prohibition for alienation and the sale agreement alleged is otherwise void thereby.

11. Coming to identity of the property, the Ex.A14 non-possessionary sale agreement dated 29.08.1979, no way contains full description of the property with boundaries undisputedly and thereby in O.S.No.119 of 1982 the contest was while disputing said sale agreement as not true and enforceable that the property claimed as covered by the Ex.A14 non-possessionary sale agreement dated 29.08.1979 is vague and without

descriptive particulars. The suit schedule property in O.S.No.119 of 1982 however speaks of 500sq.yds in plot no.60, block no.39, maitryinagar, near beach, Visakhapatnam bounded by E-road, W-plot no.65, S-road & N-Gedda. The suit schedule property in the present suit O.S.No.239 of 1994 for possession and the subject matter of the property in O.S.No.1151 of 1991 supra for specific performance, decreed on 09.03.1992, based on the possessory sale agreement earlier in point of time, dated 24.11.1976, are for one and the same property covered by possessory sale agreement dated 24.11.1976; described as 500 square yards in Plot No.60, Block No.39, Maitryinagar, Visakhapatnam near Beach Road, within Visakhapatnam Municipal Corporation limits of Visakhapatnam Sub-Registry, bounded by East-40 feet road; South-30 feet road; North-Gedda; and West-Plot No.65, with measurements East to West: 15.24 meters, North to South: 27.43 meters. Thus there can be no any dispute on its identity with reference to self same plot no.60 and extent and with reference to the self same boundaries of road on two sides and plot no 65 on one side and Gedda on the forth side. The learned II Additional Senior Civil Judge, Visakhapatnam as referred supra decreed the suit for specific performance O.S.No.119 of 1982, on 23.04.1987 for the self same property as covered by the description plaint schedule with reference to the Ex.A14 non-possessory sale agreement dated 29.08.1979 with endorsement of delivery of possession in October 1979 with specific findings that the suit sale agreement of 1979 is genuine and not a fraudulent one as contended and it is also supported by consideration and the vendor (1st defendant-Seetaramanjaneyulu) got title with possession and there was endorsement recording subsequent delivery of possession in directing to

execute sale deed and against said decree and judgment dated 23.04.1987, appeal filed in A.S.No.95 of 1987 was on contest dismissed by the learned II Additional District Judge, Visakhapatnam by confirming the trial court's decree and judgment supra.

12. As referred supra, ultimately the suit in O.S.No.119 of 1982 on contest was decreed and confirmed in appeal A.S.No.95 of 1987 and same made final between parties inter se and Ex.A3 sale deed was executed pursuant to the decree for specific performance by court on behalf of the 1st defendant-Seetaramanjaneyulu in E.P.No.195 of 1987 in O.S.No.119 of 1982 as can be seen from Exs.A1 to A5. Nakka Nukaraju defendant in O.S.No.239 of 1994 was not party to said suit proceedings in O.S.No.119 of 1982. It is thus now to be seen the findings therein how far relevant and binding in the present lis in O.S.No.239 of 1994. No doubt, there is admittedly Sec.6(1)ULC declaration filed by the 1st defendant in O.S.No.119 of 1982-Pentakota Seetaramanjaneyulu at least for the plaint schedule property covered by O.S.No.119 of 1982 referred supra for plot No.60 and he did not dispute his signatures in the sale agreement of 1979 and the endorsement of part payment with delivery of possession few months later in same year, but for saying not supported by consideration and not valid for no ULC clearance by then on his declaration given for the property and to say again inconsistently of said plot no.60 not fallen to his share but of his brother Sitaram as also contested by his said brother Sitaram with that inconsistent pleas even entitled by defendants to take, once it is with no proof much less mutation from such partition in name of 2nd defendant-Pentakota Sitaram, if not fallen to the share of 1st defendant-Pentakota Seetaramanjaneyulu, for 1st defendant-Pentakota Seetaramanjaneyulu

has admittedly shown the plot no.60 has fallen to his share in the ULC declaration and it is none of their case of no partition or in said partition fallen to their father's share. Even Nakka Nukaraju-defendant in O.S.No.239 of 1994 was not party to said suit proceedings in O.S.No.119 of 1982, the Judgement and Decree in O.S.No.119 of 1982 confirmed in appeal and same made final between parties inter se is relevant and admissible thereby in respect of the rights defined and determined therein in O.S.No.239 of 1994, as pointed out by the trial court in O.S.No.239 of 1994 and reiterated by the lower appellate court in A.S.No.82 of 2004 (the impugned judgement) of same is relevant in subsequent litigation even not inter-parties as per section 13 of the Indian Evidence Act¹. In fact, the law is fairly settled from the expressions of the Apex Court viz., in *Srinivas Krishna Rao Kango vs. Narayan Devji Kango*², speaking on behalf of a Bench of three learned Judges, Venkatarama Ayyar, J. held that a judgment not inter parties is admissible in evidence under section 13 of the Evidence Act as evidence of an assertion of a right to property in dispute. A contention that judgments other than those falling under sections 40 to 44 of the Evidence Act were not admissible in evidence was expressly rejected. Again B.K.Mukherjea, J. speaking on behalf of a Bench of four learned Judges in *Sital Das vs. Sant Ram*³ held that a previous judgment not inter parties, is admissible in evidence under section 13 of the Evidence

¹ Section 13. Facts relevant when right or custom is in question reads that:—Where the question is as to the existence of any right or custom, the following facts are relevant:—

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(b) particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.

Illustration—The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

² AIR 1954 SC 379

³ AIR 1954 SC 606

Act as a `transaction' in which a right to property was `asserted' and `recognised'. In fact in 1902, Lord Lindley held in the Privy Council in *Dinamoni vs. Brajmohini*⁴ that a previous judgment, not inter parties was admissible in evidence under Section 13 to show who the parties were, what the lands in disputer were and who was declared entitled to retain them. The same were quoted with approval later by Jagannadha Rao, J. speaking on behalf of a Bench of two learned Judges of the Apex Court in *Tirumala Tirupati Devasthanams vs. K.M. Krishnaiah*⁵.

13. Further in the case on hand as pointed out by the courts below, Ex.A13-caveat dt.14.05.1982 was filed prior to filing of O.S.No.119 of 1982, not only by the defendants 1&2-Pentakota Seetaramanjaneyulu & Sitaram; but also their father Ramabhadrarao and their other brothers including the one who attested the sale agreement by name Guru Alcott and Sriram and there is nothing to show execution and existence of any possessory sale agreement dt.24.11.1976 for the plot no.60 in favour of Nakka Nukaraju by Pentakota Ramabhadrarao and later even said Ramabhadrarao did not choose to implead as co-defendant to contest the suit in O.S.No.119 of 1982 if at all he has executed any possessory sale agreement dt.24.11.1976 for the plot no.60 in favour of Nakka Nukaraju and even his two of four sons as defendants 1&2-Pentakota Seetaramanjaneyulu & Sitaram did not say the property is undivided or fallen to the share of Ramabhadrarao (their father) or their father-Ramabhadrarao executed any possessory sale agreement dt.24.11.1976 for the plot no.60 in favour of Nakka Nukaraju. No doubt the plaintiff-Venkata Ramana Kumari, if not having knowledge to implead Nakka Nukaraju as co-defendant to contest the suit in

⁴ 1902-ILR 29 Cal.190 (198) (PC)

⁵ (1998) 3 SCC 331= AIR 1998 SC 1132

O.S.No.119 of 1982, at least after unsuccessful in Ex.B4 order in E.A.No.589 of 1992, filed third party appeal against Ex.B1&2 Decree & Judgement in O.S.No.1151 of 1991, dt.09.03.1992, once it was brought to her knowledge from the pleadings therein, though said order is no way *res-judicata* for there was no finding on enquiry by trial in passing any appealable deemed decree as per Order 21 Rule 101 CPC to say there is bar of the present suit. In fact, that application itself in E.A.No.589 of 1992 or E.A.No.461 of 1992 won't lie for not a case of suit based on non-possessory agreement and after decree for specific performance the relief of partition or possession etc., can be asked in same proceedings by execution or treating the specific performance decree defining rights as preliminary decree even as per Sections 22 and 28 of the Specific Relief Act and Sections 54 and 55 of the Transfer of Property Act (for short, 'the TP Act') and as per the settled expression of the Apex Court in *Babu Lal Vs. M/s, Hazari Lal Kishori Lal* ⁶ including with reference to *Halsbury's laws of England* and *Fry on specific Performance* and as pointed out even earlier by the Apex Court in *H. I. Trust v. Haridas Mundhra* ⁷ that "the court which passes a decree for specific performance retains control over the decree even after the decree has been passed" and the later expression of the Apex Court in *Adcon Electronics Pvt. Ltd., v. Daulat* ⁸, not considered either Section 28 of the Specific Relief Act or Section 55 of the TP Act nor the earlier judgment of the Apex Court in *Babu Lal* supra wherein the Hon'ble Apex Court elaborately considered the said provisions of law, is hit by *sub-silentio* as observed by another bench of this Court on

⁶ AIR 1982 SC 818= = 1982 (3) SCR 94= 1982 (1) SCC 525= 1982 (1) SCALE 79

⁷ AIR 1972 SC 1826

⁸ (2001) 7 SCC 698

09.03.2015 in Smt. Sarverunnisa Begum vs Syed Rafeeq-C.R.P.No.3435 of 2014 and as such the present suit is neither barred by *res-judicata* nor by non-avilment of any accrued causes of action tantamount to waiver contemplated by Order 2 Rule 2 CPC.

14. From this now coming to the relevancy of the suit in O.S.No.1151 of 1991 filed by the present second appeal appellant Nakka Satyavathi's late husband Nukaraju for specific performance of the possessory sale agreement, dated 24.11.1976 with relief of injunction that was also decreed, covered by Exs.B1 and B2 decree and judgment respectively, dated 09.03.1992 even exparte from the defendants (including the defendants 1 and 2 of O.S.No.119 of 1982) being the LRs of late Pentakota Ramabhadrarao did not choose to contest. It is pertinent to mention that said possessory sale agreement in O.S.No.1151 of 1991, dated 24.11.1976, is prior in point of time to the suit sale agreement in O.S.No.119 of 1982, originally non-possessory, dated 29.08.1979 with endorsement later of delivery of possession in October 1979. It is unknown as to if really there is a possessory sale agreement, dated 24.11.1976, without its cancellation when there is a protection available as a shield under the doctrine of *Part Performance* to the vendee or otherwise even, how possession could be endorsed as given in the subsequent endorsement or evidencing later to the Ex.A14 non-possessory sale agreement for subsequent delivery of possession, that is one of the crucial aspects to be kept in mind to decide the lis. In this regard the courts below discussed in the arrival of the concurrent findings that the so-called possessory sale agreement dated 24.11.1976 if really in existence by execution since 1976, why never seen light of the day prior to filing of the suit in O.S.No.1151 of 1991 for the relief of

specific performance, marked as Ex.B2 judgment herein. Undisputedly as pointed out supra, had Ramabhadrarao executed the possessory sale agreement dated 24.11.1976, being party to the caveat-Ex.A13 filed by him and his sons prior to filing of suit in O.S.No.119 of 1982, why did he not refer it and why did he not chosen to come on record in O.S.No.119 of 1982 to contest with such say and why he atleast not informed the so-called vendee Nakka Nukaraju so to implead and contest and why the two of four sons of him being defendants 1&2 did not refer and what they contested contra is it fell to share of Sitaram and Ex.A14 sale agreement of 1979 executed by Seetaramanjaneyulu and further Seetaramanjaneyulu has shown this property as fallen to his share in the ULC declaration and contended of without ULC clearance the sale agreement cannot be entered is not valid and enforceable and apart from all the above glaring inconsistencies, why said so-called vendee Nakka Nukaraju kept quite without even issuing of any notice pursuant to the sale agreement dt.14.11.1976 for specific performance and even the so-called executant Ramabhadrarao alive till 1986 and why even after his death he did not issue notice to LRs of Ramabhadrarao for obtaining sale deed and otherwise even to claim protection under doctrine of part performance under Section 53A TP Act, as a shield to protect his possession thereunder even suit for specific performance enforceability is barred by limitation provided in Article 54 of the Indian Limitation Act,1963-as laid down by the three Judge Bench of the Apex Court in *Shrimant Shamrao Suryavanshi And ... vs. Pralhad Bhairoba Suryavanshi (D)*⁹, what is proof of its existence and his always ready and willing to perform his part remained if any, particularly

⁹ AIR 2002 SC 960= 2002(1)SCR 393= 2002(3)SCC 676= 2002(2)JT 24= 2002(2)SCALE 118

when all the circumstances referred supra doubts the very existence of the so-called possessory sale agreement from 1976 as concluded by the courts below in support of the contention of the plaintiff of same is a collusive one, created and the exparte decree is a collusive one and not binding.

15. However from the above, the fact remains that instead of the suit for mere possession further relief of declaration of title should also have been asked was the plea taken in the written statement of the sole defendant Nakka Nukaraju as referred supra, but no issue framed by the courts below on that aspect while saying no such further relief required as it is a collusive proceeding. In this regard coming to the legal position, in *Gram Panchayat of village Noulaka Vs. Ujaghar Singh*¹⁰ it was held by the Apex Court referring to Sec.11 CPC (*Res-judicata*) and Sec.44 Evidence Act (*collusive or fraudulent decree*), that plea of decree passed in earlier proceeding was collusive or fraudulent can be raised even in a later proceedings. Filing a separate suit for declaration that decree was collusive or fraudulent is not a condition precedent for raising such plea. A contrary view would go against the provisions of Sec.44 Evidence Act which provides that any party to a suit or proceeding may show that any judgement, order or decree which is relevant u/s.40, 41 & 42 and which has been delivered by a court not competent to deliver it or was obtained by fraud or collusion It is also from the expression of this Court way back in *Gurajada Vijaya Vs. Padmanabham*¹¹ On the *distinction* between collusive and fraudulent

¹⁰ AIR-2000-SC -3272

¹¹ AIR-1955-AP-112-(Paras 5 to 7)

proceedings, in *Nagubai Ammal Vs. B.Shama Rao*¹² the Apex Court-three Judge Bench laid down that, while the former was the result of an understanding between the parties, both the claim and the contest being fictitious, and the purpose is to confound third parties; in the latter the contest was real, though the claim was untrue, and the purpose is to injure defendant by a verdict of court obtained by practicing fraud in it. In *Bhapurao Dagdu Paralkar Vs. State of Maharashtra*¹³ at para-12 it was held by the Apex Court that Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. Fraud and justice never dwell together. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void abinitio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affairs with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res-judicata*. Further in *S.P.Chengalvaraya Naidu(dead) by L.Rs. Vs. Jagannath (dead) by L.Rs*¹⁴-the Apex Court-two Judge Bench referring to Sec.2(2) CPC & Sec.44 Evidence Act held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another, it is a deception in order to gain by another's loss...it is a cheating intended to get an advantage. Withholding of a vital document or information relevant to litigation by a litigant is also fraud on Court and the guilty party is liable to be thrown out at any stage of litigation for the decree is vitiated by fraud.

¹² AIR-1956-SC-593= 1956-SCR-451

¹³ AIR 2005 SC 3330= 2005(7) SCC 605= 2005(7) JT 530= 2005(6) SCALE 625

¹⁴ AIR-1994-SC-853

16. It was also rightly observed by the lower appellate court from perusal and reading of the exparte judgement and decree in O.S.No.1151 of 1991 as not a judgement and decree in the eye of law for there are no any even reasons to decide the lis in the judgement. In fact in this regard the Apex Court way back in 1999 in *Balraj Taneja Vs. Sunil Madan*¹⁵ well laid down as per(Or.XX & Sec.2(2&9)CPC)that a judgement should be a self contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the Judgement. Whether, it is a case which is contested by the defendants by filing a written statement, or a case which proceeds exparte and is ultimately decided as an exparte case, or is a case in which the written statement is not filed and the case is decided under Or.VIII R.10 CPC. The Court has to write a Judgement which must be in conformity with the provisions of the code or at least set out reasoning by which the controversy is resolved. Even if the definition was not contained in Sec.2(9) CPC, of the contents there of were not indicated in Or.XX R.1 CPC, the Judgement would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. The whole process of reasoning has to be set out for deciding the case one way or the other. A Judge can not merely say Suit decreed or dismissed. In Judicial proceedings there cannot be any arbitrary orders. Further a full Bench of this Court in *Aziz Ahmed Vs. I.A. Patel*¹⁶ held referring to Or.XX,R.4(2) & Or.IX, R.6 CPC- on the exparte proceedings

¹⁵ AIR 1999 SC 3381

¹⁶ AIR-1974-AP-1=ILR-1972-AP-421= 1971(1)APLJ-56(SN)

also that-While pronouncing judgment, Court should apply its mind to the facts of the case and the point at issue and give a reasoned judgment after duly evaluating the evidence adduced. Judgment without reasons and not in conformity with Or.XX, R.4 & 5 is not a binding Judgment. The Apex Court in *Rameshwar Dayal Vs. Banda(dead) through his L.Rs*¹⁷ categorically held that even the order of a Small Causes Court dismissing or decreeing eviction suit exparte without rendering any findings on point in controversy for decision is no Judgment to bind anyone. As such on facts leave it is not a judgement and decree in the eye of law to bind, otherwise a collusive outcome as rightly concluded for which besides not binding, need not seek for declaratory relief of title there from for suffice to contest as collusive and not binding in asking relief of possession.

17. Coming to the other contention a separate suit covered by present one in O.S.No.239 of 1994 won't lie, that too against not parties to the suit in O.S.No.119 of 1982 concerned, the main case of the plaintiff is not that in O.S.No.119 of 1982 possession is not delivered pursuant to the sale agreement of 1979, but for in the say of this defendant in collusion with the defendants in O.S.No.119 of 1982 trespassed into the property in the month of April, 1992 and he is thereby liable to be evicted by removal of the structures raised by him therein. His relief for possession is no doubt based on title claimed based on the Ex.A3 sale deed cause executed by the court pursuant to the decree for specific performance granted on contest in O.S.No.119 of 1982. Once such is the case as discussed supra, the question of seeking

¹⁷ 1993(1)SCC 531

possession in execution proceedings in O.S.No.119 of 1982 does not arise as her claim is that in October 1979 itself with part payment endorsement to the non-possessionary agreement of August 1979, possession delivered. Whether there is truth or no-truth, that statement prevents to get relief of possession in O.S.No.119 of 1982 proceedings by execution as concluded supra and thus in the E.P.No.195 of 1987 in O.S.No.119 of 1982 there was an application to deliver possession sought and an application filed and impleaded by Nakka Nukaraju and resisted for delivery of possession with the claim that he is in possession in his own right and not claiming through defendants in O.S.No.119 of 1982, the executing court even not dismissed the application for delivery of possession not entitled for any relief is by separate suit, entertained and however held that once Nakka Nukaraju was a third party to the decree in O.S.No.119 of 1982 and E.P.No.195/1987 and contends that he obtained possessory sale agreement dated 24.11.1976 from Pentakota Ramabhadrarao in respect of the E.P and decree schedule property in O.S.No.119 of 1982 supra, for Rs.50,000/- and obtained possession and since then pursuant to the possessory sale agreement he is enjoying the property in his own right and also constructed a thatched house therein and residing with his family in a portion of the house and by leased out the other portion of the house to the tenants, and the municipality also allotted Door number as 7-5-7/1 to the house and he is demanding his vendor Ramabhadrarao, whose sons are Seetaramanjaneyulu and Sitaram etc., supra, to execute sale deed pursuant to the possessory sale agreement, but the same was postponing including to obtain Urban Land Ceiling clearance which is a condition precedent and while so, since Ramabhadrarao died in the year

1986, said Nukaraju demanded the legal heirs of Ramabhadrarao supra and ultimately he filed the suit O.S.No.1151/1991 on the file of the II Additional District Munisif, Visakhapatnam (decreed on 09.03.1992) for specific performance of the possessory contract for sale supra and he is going to execute the decree and while so, Ramayya, husband of plaintiff M.V.Ramana Kumari in O.S.No.119 of 1982 came to the property with Court Amin and tried to trespass and to dispossess him and his tenants from the house property by unheeding and not even chosen to look into the documents viz., possessory sale agreement etc., shown and even the Court Amin and said Ramayya at his resistance, though went back, instead of recording the third party obstruction, shown as if he was nominee of the Judgement Debtors that caused obstruction by misrepresentation of the facts and at the instance of said Ramayya and further instead of filing obstruction removal petition by the Decree holder, if at all under Order 21 Rule 97 CPC in O.S.No.119 of 1982 in E.P.No.195/1987, the decree holder is trying to obtain behind back re-delivery orders with police aid etc., which made him to file the petition for not bound by the decree in O.S.No.119 of 1982 to execute in E.P.No.195 of 1987 against him to dispossess. The decree holder of O.S.No.119 of 1982 by name M.V.Ramana Kumari opposed the claim petition of Nukaraju in E.A.No.566/1992, with the counter contest of said possessory sale agreement, dated 24.11.1976 is untrue and the suit O.S.No.1151 of 1991 is a collusive one and the obstructer Nukaraju informed the Amin when went to execution of the decree with Amin in O.S.No.119 of 1982 as in possession with permission of Judgement Debtor Seetaramanjaneyulu, that what the Amin reported to the Court of such person bound by the decree in claiming through Judgement Debtor

and the claim petition is thereby liable to be dismissed. The contest of Seetaramanjaneyulu, the Judgement Debtor is that under the guise of the decree passed *ex parte* in O.S.No.1151 of 1991 based on possessory sale agreement, said Nukaraju will not get any right or title over the property including the claim of the same is possessory sale agreement obtained from his father Ramabhadrrao on 24.11.1976. The implead petitioner Sitaram, brother of Seetaramanjaneyulu as respondent No.3 to the claim petition did not choose to file any counter opposing the claim petition of Nukaraju in E.A.No.566/1992. The claim for delivery against Nukaraju was thus rightly dismissed by the order dated 08.09.1992 by the learned 1st Additional Subordinate Judge, Visakhapatnam by referring to the decree and judgment in O.S.No.1151/1991, dated 09.03.1992 and the possessory sale agreement, dated 24.11.1976. Thus present suit is maintainable as concluded supra for delivery of possession sought against Nukaraju in the present suit is not a question relating to execution, discharge or satisfaction of decree in O.S.No.119 of 1982 to raise in execution and decide therein under Order 21 CPC to pass a deemed decree under Order 21 Rule 101 CPC as concluded supra.

18. No doubt in the present suit O.S.No.239 of 1994, the contest of sole defendant Nukaraju is as referred supra based on possessory sale agreement dt.14.11.1976 and otherwise perfected title by adverse possession and that the present suit if at all to file within six months as summary suit to restore possession from date of alleged dispossession and as not so filed, won't lie. Said contention is baseless from the settled law that even summary suit not filed within six months, regular suit for possession is not a bar.

18(a). The Apex Court in *Tirumala Tirupati Devasthanams* supra in this regard held relying upon the earlier judgment of the Apex Court in *Nair Service Society Ltd. vs. K.C. Alexander*¹⁸ as follows:

"In that case the respondent was the plaintiff and he was dispossessed. He sued for possession but the suit was filed more than one year after dispossession. Under the specific Relief Act, 1877 section 9 permitted a dispossessed plaintiff to sue for possession within one year and if he so sued, question of title of the defendant was immaterial. Now under section 6 of the new Specific Relief Act, 1963 the said period of one year has been reduced to six months. Question arose whether the suit by the dispossessed plaintiff, after expiry of the 1 year period, was maintainable. It was held by this court that even if the time for filing a summary suit under Section 9 the specific Relief Act, 1877 expired, the dispossessed person could still file a suit for possession on the basis of prior possession. Such a suit is described as one based on 'possessory title'. But in such a suit filed by the dispossessed plaintiff beyond the period specified in section 9 of the Specific Relief Act, 1877 (or Section 6 of the 1963 Act) defendant who dispossessed the plaintiff could defend himself by proving title and if he proved title, he could remain in possession. After an exhaustive examination of the law on this aspect, Hidayatullah, J. (as he then was) observed as follows (p 1173): "When, however, the period of 6 months has passed, questions of title can be raised by the defendant and if he does so, the plaintiff must establish a better title or fail." The difference between the right to possession in summary suit under the specific Relief Act and a regular suit based on 'possessory title' was explained further as follows (p.1173) "....the right is only restricted to possession only in a suit under Section 9 of the specific Relief Act but does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one"."

18(b). Further buy relying upon *Nair Service Society Ltd.* supra and referring to several other earlier and subsequent expressions to it, in another expression of the Apex Court (3JB) in *Rame Gowda (D) By Lrs vs M. Varadappa Naidu*,¹⁹ the principles laid down are the following:

"It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his

¹⁸ AIR 1968 SC 1165

¹⁹ (2004) 1 SCC 769

possession. The law will come to the aid of a person in peaceful and settled possession by injunction even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted”.

18(c). Thus the regular civil suit for possession is sustainable as concluded supra.

19. Coming to adverse possession, no doubt pending that suit O.S.No.1151 of 1991, an Advocate-Commissioner was appointed in I.A.No.1288 of 1991 on application of said Nukaraju-plaintiff and he has submitted report regarding possession of Nukaraju-plaintiff-claimed as the vendee of the possessory sale agreement dt.14.11.1976, subject matter of O.S.No.1151 of 1991. Report of a commissioner appointed in another proceeding also relevant if involved same subject matter to consider. The Courts below observed that property visited by the commissioner is with different door number to the suit property in O.S.No.239 of 1994. Unless there is identity of property, the question of granting relief of possession to plaintiff in O.S.No.239 of 1994 does not arise. In fact door numbers may change but the claim is for plot no.60 self same in both the matters as concluded supra to say that identity of property not in dispute and cannot even be disputed from that Door Number difference. The report of the Commissioner no doubt shows that there is an age old thatched shed where Nukaraju with family resides. It is for that property the plaintiff in present suit O.S.No.239 of 1994 seeks possession from Nukaraju. No doubt, there is no any warranty for document of sale executed by a civil court by virtue of decree for specific performance of the contract for sale and thus there is no any presumption of fact or law about any other person being in possession of

the property, in the absence of evidence to the contrary, is in unlawful possession especially when the evidence discloses that the defendant-Nukaraju and his family are in possession of the suit property as per the plaintiff's claim of possession from them with allegation of trespass in 1992 April so to prove or at least his right and title to evict the persons in possession. It no doubt as referred supra belies the version of plaintiff in O.S.No.239 of 1994 of trespass into the suit property by Nukaraju only in April,1992 i.e. two years prior to the suit, from what the Commissioner's report in 1991 itself in I.A.No.1288 of 1991 in O.S.No.1151 of 1991 shows the house in the suit property where Nukaraju resides is an aged one. However, once the possessory sale agreement of 1976 and exparte decree pursuant to it in O.S.No.1151 of 1991 is as concluded supra appears a collusive one and even not a collusive agreement, once it shows not in existence since 1976 but with ante-date even to infer its existence prior to 1991 for Nakka Nagaraju found in occupation of the house property by then by the Advocate-Commissioner. It is as discussed rightly by the Courts below evidence of D.Ws.2 to 4 are of not any much help to the case of Nukaraju-D.W.1 (defendant). No doubt the so called executant Ramabhadram if executed prior to his filing of Caveat-Ex.A.13 and before filing of suit O.S.No.119 of 1982, there should be a whisper of such agreement. Further the finding in O.S.No.119 of 1982 supra is in holding as property fell to the share of Seetaramanjaneyulu and same is relevant. In the absence of contrary evidence, even taken for arguments sake, Nukaraju has no knowledge of Ramabhadrarao has no right for it fell to share of his one of four sons supra. The doctrine of part performance protection not available to Nukaraju and the only other thing is to establish adverse

possession and otherwise bonafide improvements to the property to compensate. Thus the only thing to be seen is Nukaraju as defendant in O.S.No.239 of 1994 established any adverse possession against entitlement of possession by plaintiff in O.S.No.239 of 1994 and otherwise entitled to any compensation for the structures in the plot No.60 (covered by the plaint schedule).

20. So far as the adverse possession is concerned, it is practically a blending of limitation and prescription, though Section 27 of the Limitation Act (for short, the Act) no way speaks conferment of title to wrong doer, but extinguishment of title of true owner. Section 27 of the Act is the only exception to the general effect of the act in barring only the remedy and not the right. This section, in cases of recovery of possession, if an action is not brought within the period stipulated, destroys the very right, known as the doctrine of adverse possession. This section even not contemplated any seeking of declaration of true owner, but for the person claiming adverse possession against the true owner to claim acquiring title by prescription. Subject to further discussion to undertake with reference to Articles 64 and 65 of the Act hereunder, suit for declaration need not be asked in the present facts but for ejectment to recover possession and for that proving of title is enough leave about admitted facts need not be proved even. No doubt, if use of property/its care or attempt to regain is foregone for a period and an adverse title being established is not opposed to through the instrumentality of law or otherwise, the other person does acquire a right by prescription, even this is baffling for a reasonable man as to how does some years of illegality turn into a legality. The Supreme Court in the recent past in about three expressions observed that adverse

possession is an area where justice and law do not happily coincide and the twelve years period under Articles 64 & 65 of the Act are too short to extinguish right if proved by other side of perfected right by adverse possession, to increase the period atleast to 30 years, if not to delete this concept of adverse possession as affront to the notions of justice, equity and run counter to modern ideas of proprietary rights and international conventions. Needless to say, from the scope of adverse possession claim and keeping in mind the inherent unjust nature of this principle, courts have been consistently insisting on a very rigid satisfaction of conditions for the claim of adverse possession to be specifically pleaded and proved. As per Article 64 of the Act, 1963 for possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed, the limitation period is 12 years from date of actual dispossession; whereas, as per Article 65 of the Act, 1963 for possession of immovable property or any interest therein based on title (and not on previous possession and with no need of saying when the plaintiff was and if so, while in possession of the property has been dispossessed), the limitation period is 12 years, when the possession of the defendant becomes adverse to the plaintiff. That is the reason why and from scope of the provisions of law, in cases relating to possession based on right or title, where defendant pleads adverse possession concerned, in *Md.Mohammad Ali Vs. Jagdish Kalita*²⁰ it was held that it shifts burden on the defendant pleading adverse possession where plaintiff proved his right, as plaintiffs proof of right or title is enough to succeed for recovery of possession (without need of claiming title even merely

²⁰ 2004 (1) SCC 271

defendant denied plaintiffs title) and it is for the defendant to prove from any plea of adverse possession and in the absence of which, once plaintiff has proved his title he is entitled to the relief of possession with any further relief of declaration or other consequential reliefs like injunction etc, as the case may be. Further in same lines, the Apex Court in *Karnataka Board of Wakf vs. Government of India and Ors*²¹ among other decisions relied therein and referring to it later reiterating the scope of law particularly at paras 11 and 12 that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. Party claiming adverse possession must plead and prove that his possession is peaceful, open and continuous and it must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion of the actual owner are the most important factors that are to be accounted in cases of this nature since adverse possession plea is blended question of fact and law and the person pleading adverse possession has no equities in his favour since he trying to defeat the rights of true owner and it is for him to clearly plead and establish all facts necessary to establish his adverse possession and whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property and by placed reliance on *Karnataka Board of Wakf* supra, in *Saroop Singh Vs. Banto and*

²¹ 2004 (10) SCC 779

*others*²², it was observed further that in a suit of plaintiff for possession based on title the onus to prove acquisition by adverse possession lies on the defendant once the plaintiff proved his title and the defendant having not raised plea of adverse possession from any length of possession. The plaintiffs suit held not time barred for possession devoid of requisite animus to make it adverse to commence the prescription period for the claim of adverse possession and the animus possidendi is one of the ingredients of adverse possession and for that placed reliance on *Karnataka Board of Wakf* supra and as per *L.N.Aswathama Vs. P.Prakash*²³, at Para 17, it was observed that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi and the pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced and unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. In *Krishnamurthy S.Setlur vs O.V.Narasimha Setty*²⁴ the Apex Court held further that- the right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the person who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts

²² (2005)8 SCC 330

²³ (2009) 13 SCC 229

²⁴ 2007(2) RCR Civil 313(sc)

found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court. On the scope of Article 64 & 65 and the difference to the same from Articles 142 and 144 of the repealed Act, besides the above expressions cited by both sides those were discussed in the earlier paras, it was well laid down by this Court in *Mahendra C Mehta Vs. M/s. KCPHS Ltd. Hyderabad*²⁵, that person claiming adverse possession must know that someone else was the real owner of the property in his possession and that he is holding it adverse to him. Possession however long without the said animus does not amount to adverse possession. Article 65 is enacted in the Limitation Act, 1963 in respect of the suits based on title. Therefore, when the suit is based on title, the plaintiff need not prove that he was in possession of the land sought to be recovered within 12 years of the suit. Suits falling under Article 64 of the Act, 1963 are based purely on previous possession of the plaintiff and therefore is not covered by Art.65, because he is not claiming recovery of possession basing on his title. Therefore, if the appellants establish their title to the suit land, the burden of proof would be on respondents to establish that they have perfected their title to the suit land by adverse possession, and appellants need not establish that they were in possession of the suit land within 12 years from the date of the suit. In a suit falling under Art.65, the defendant, who wants to defeat rights of the plaintiff, has to establish his adverse possession which has the effect of extinguishing the title of the owner by operation of Sec.27 of the Act and if he fails to do so plaintiff cannot be non-suited merely because he was

²⁵ 2001 (5) ALT 197

not able to prove possession within 12 years. Articles 142 and 144 of the repealed Act had given rise to a good deal of confusion with respect to suits for possession by owners of property. Article 64 of the present Act replaces Article 142 but is restricted to suits based on promissory title so that an owner of property does not lose his right to the property unless the defendant in possession is able to prove adverse possession. Articles 64 and 65 correspond to Articles 142 and 144 of the Limitation Act of 1908. Article 142 dealt with the suit for possession of immovable property, when the plaintiff, while in possession of the property, had been dispossessed or had discontinued the possession; in such a case the period of limitation was 12 years from the date of the dispossession or discontinuance. Article 144 related to suits for possession of immovable property or any interest therein not specifically provided for in the schedule to the Act of 1908. The period of limitation was 12 years from the date when the possession of the defendant became adverse to the plaintiff. It may be seen that Article 144 was in the nature of a residuary article, which would come in for application only if there was no other specific provision in the other Articles of that Act. In other words if in a given situation Article 142 could apply then residuary Article 144 would be ruled out of the application. Articles 142 and 144 gave rise to a good deal of confusion by owners of property. The law as it stood appeared to favour a trespasser as against an owner because the decisions had held that in an ejectment action by the owner of the property it was not sufficient for him to establish his title but he had also to go further and establish that he was in possession of the property within 12 years before the date of the institution of the suit, in order to redress this anomaly. Articles 64 and 65 were suitably

altered. Article 64 deals with suits based on possession and not on title; in such a case the plaintiff, who while in possession had been dispossessed could file a suit within a period of 12 years from the date of dispossession. For the purpose of Article 64 there is no question of proving any title. Article 65 relates to suits for possession based on title. In such a case the period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Article 65 if the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for a period of 12 years, which has the effect of extinguishing the title of the owner by the operation of Section 27 of the present Act. If he fails to do so, then the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years. A person in possession of property acquires rights by prescription, if he has been in such possession adversely to the true owner. On the other hand Article 64 operates negatively and it destroys right of a person without creating right in another person. It may be that the negative and positive aspect of limitation may coincide, for instance, when a person acquires title by adverse possession, the title of the true owner is extinguished. In *Amrendra Pratap Singh vs. Tej Bahadur Prajapat*²⁶, it was held that the essential requisites to establish adverse possession are that the possession of the adverse possessor must be neither by force nor by stealth nor under the license of the owner. It is important to note that the starting point of limitation of 12 years under Article 65, Schedule I of the Limitation Act is to be counted from the point of time when the possession of the defendants becomes adverse to the plaintiff for a suit for possession of immovable

²⁶ (2004) 10 SCC 65

property or any interest therein based on title. Article 65 is an independent Article applicable to all suits for possession of immovable property based on title i.e., proprietary title as distinct from possessory title. Article 64 governs suits for possession based on possessory right and 12 years from the date of dispossession is the starting point of limitation under Article 64. Article 65 as well as Article 64 shall be read with Section 27 which bears the heading Extinguishment of right to property. It lays down: At the determination of the period hereby limited to any person for instituting the suit for possession of any property, his right to such property shall be extinguished. That means, where a cause of action exists to file a suit for possession and if the suit is not filed within the period of limitation prescribed, then, not only the period of limitation comes to an end, but the right based on title or possession, as the case may be, will be extinguished. The section assists the person in possession to acquire prescriptive title by adverse possession. When the title to property of the previous owner is extinguished, it passes on to the possessor and the possessory right gets transformed into ownership. Section 27 is an exception to the well accepted rule that limitation bars only the remedy and does not extinguish the title. It lays down a rule of substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. It means that since the person who had a right to possession has allowed his right to be extinguished by his inaction, he cannot recover the property from the person in adverse possession and as a necessary corollary thereto, the person in adverse possession is enabled to hold on to his possession as against the owner not in possession.

21. From the above, even from reading of the evidence of Dws 1-4, there is nothing including from said Commissioner's report observations of possession by living in the house age old in the absence of showing from how long in possession for nothing of any worth documents like voters enumeration and ration card or house taxes paid if any for more than twelve years to claim adverse possession and extinguishment of right of plaintiff for the defendant to non suit the plaintiff for the suit relief of recovery of possession but for entitlement of the compensation for the constructions as per Section 51 of the TP Act. Having regard to the above, but for entitlement to the improvements as to value of the construction of the structures under Section 51 of the TP Act, by the appellant and respondents 3-5, from the plaintiff as LRs of late Nakka Nagaraju, the defendants appellant and respondents 3-5 cannot resist the suit claim in appeal. The Second Appeal can be disposed of as above in answering the substantial questions of law referred supra, rather dismissal.

22. Accordingly and to the above extent, the Second Appeal is partly allowed while confirming the findings of the courts below, however with modification to the extent that the ejectment of the appellant and respondents 3-5, as LRs of late Nakka Nagaraju-sole defendant since died is subject to the payment to them by the plaintiff the value of the construction of the structures in the suit property of plot no.60 supra under Section 51 of the TP Act, from the assessment of the value to be cause done by the executing court through any licensed engineering valuer initially at the expense of the plaintiff to deduct out of amount to be deposited on arriving it, before taking possession with the structures or vacant as the plaintiff likes and by dispossessing the appellant and

respondents 3-5, as LRs of late Nakka Nagaraju-sole defendant since died. No order as to costs.

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

Dr. B. SIVA SANKARA RAO, J

Date:04.06.2018
DSR/PAB/VVR

Note: L.R.Copy to be marked.
b/o.vvr.

