

THE HON'BLE DR JUSTICE SHAMEEM AKTHER
CIVIL MISCELLANEOUS APPEAL Nos. 489 of 2018,
765 of 2018 & 810 of 2018

COMMON JUDGMENT:

1. Since all the appeals emanate from the same order, they are being disposed of by this Common Judgment.

2. These appeals are directed against the order and decretal order dated 08.11.2017 in I.A. No.708 of 2016 in O.S. No.167 of 2016 on the file of the VI Additional District Judge, Kakinada, whereby petition filed by respondent no.1 under Order XXXIX Rules 1 and 2 CPC was allowed granting temporary injunction restraining the appellants from interfering with peaceful possession and enjoyment of the petition schedule properties.

3. Respondent no.1 herein is the petitioner; the appellant in C.M.A. No.489 of 2018 is respondent no.1; the appellants in C.M.A. No.765 of 2018 are respondent nos.2 to 5, 7, 8 and 11 and the appellant in C.M.A. No.810 of 2018 is respondent no.10, in the interlocutory application before the court below. For better appreciation of facts, the parties are hereinafter referred to, as per their array in the impugned order.

4. The petitioner filed the Original suit No.167 of 2016 before the Court below seeking permanent injunction

restraining the respondents from interfering with his peaceful possession and enjoyment of the plaint schedule properties. He filed Interlocutory Application No.708 of 2016 in the said suit seeking temporary injunction pending disposal of the suit. The averments, in brief, in the affidavit filed in support of the petition may be stated as follows:

One Kakara Bapiraju, late Kakara Krishna Murthy and respondent no.1 are brothers. They are sons of late Ramamurthy, who also had 6 married daughters Boddu Iyyanamma, Endru Seethayamma, Endru Savithri, Ennam Satyavathi, Palacharla Venkayamma and Balusu Surya Prabha. Respondent no.1 is petitioner's junior paternal uncle. Respondent no.2 is the husband, and respondents 3 to 5 are sons, of Yennam Satyavathi. Respondents 6 to 9 are sons of Yendru Seethayamma. Respondent no.9 is son of Yendru Savithri. R.10 is son of Palacharla Venkayamma and respondent no.11 is grandson of Boddu Ayyanamma.

Out of three brothers of late Krishna Murthy, petitioner's father alone was blessed with male issues. Female child of petitioner's junior paternal uncle late Kakara Krishna Murthy and his wife Varalakshmi demised and so they brought the petitioner as their foster son right from his childhood and provided education, and instrumental in setting his practice as an Advocate. Late Kakara Krishna Murthy executed a will dated 22.10.2012

in a sound and disposing state of mind bequeathing lands held by him in K.Nayakampalli and Kotapadu villages in favour of the petitioner with life interest and his son Kakara Ravindra Kanna with absolute rights, along with other properties. Wife of late Krishna Murthy predeceased him and so he succeeded item no.6 of schedule property which was standing in her name. Late Krishna Murthy died on 03.02.2015 and thereafter the will dated 22.10.2012 was acted upon. At the time of shifting his dead body, keys of wooden almirah and steel wardrobe were removed from his person and handed over to respondent no.9 for safe custody. Petitioner performed his last rites. Thereafter, it transpired that respondents 2, 4, 10 and 11 won over respondent no.9 and all of them conspired together and committed theft of title deeds, pass books, tax receipts, valuable securities, etc. from the wardrobe. Father of petitioner lodged a report which was registered as crime no.57 of 2015 of Bandepalli police station.

Respondent no.1, who came to attend obsequies of late Krishna Murthy, stayed in the house of latter, which was bequeathed to petitioner under the will, and thereafter also, he continued to stay in the house with the permission of petitioner on the pretext of construction of his new house.

Respondents developed eye sore against the petitioner and started advancing false claims over the petition schedule properties, and one of the sisters of late Krishna Murthy Palacharla Venkayamma filed a collusive suit in O.S. No.111 of 2015 on the file of the IV Additional District Judge, Kakinada against the father of petitioner, respondent no.1 and other sisters of late Krishna Murthy, stating falsely that late Krishna Murthy died intestate and all of them succeeded estate, including the petition schedule properties, of late Krishna Murthy. Respondent no.1 filed A.T.C. No.15 of 2016 on the file of the Special Officer-cum-Tenancy Tribunal, Kakinada against the petitioner, his father, his brother and his sister's husband, falsely setting up tenancy claim and seeking a declaration of the alleged tenancy rights in item no.6 of schedule property, and filed I.A. No.909 of 2016 therein for ad-interim injunction. After full scale enquiry, the I.A. was dismissed by the Special Officer.

On 31.7.2016, 28.8.2016 and 29.8.2016, all respondents jointly made an attempt to trespass into the petition schedule properties, but with great difficulty, licensed cultivators of petitioner could resist their illegal attempts. For last 4 days prior to the suit, respondents started openly proclaiming that they would wrest possession of suit schedule properties. It is learnt that

with a common object to dislodge petitioner from possession of plaint schedule properties, respondents were gathering anti social elements to achieve their wrongful object. Since petitioner resides in Hyderabad and his father became old, there is no scope for them to watch movements of respondents day in and day out. Hence, the suit for perpetual injunction and the present application therein for temporary injunction.

5. The averments in the counter filed by respondent no.1 are as follows.

Without any right whatsoever over the plaint schedule property, the petitioner filed the suit and the present petition. After death of his wife Varalakshmi, late Krishna Murthy requested him and his wife to live along with him, and accordingly, he shifted his residence and was living together with late Krishna Murthy. Petitioner is not foster son of late Krishna Murthy, who died intestate. He never executed any will, much less will deeds dated 10.6.1993 and 22.10.2012, which are forged and fabricated. After his death, all his properties devolved on his brothers and his sisters. Petitioner was never in possession of the schedule property. The inconsistency of the averments in the present suit and the written statement of the father of the petitioner, clearly show the falsity in the case set up by the

petitioner. Plaintiff has no *prima facie* case or balance of convenience in his favour. There is no cause action and the alleged cause of action is invented. Hence, it is prayed to dismiss the suit.

6. Respondent no.4 filed separate written statement, which was adopted by respondents 2, 3, 5, 7, 8 and 11, contending as follows.

Late Krishna Murthy himself was looking after affairs and management of his properties till his demise. After suffering a set back in his health, he executed a Will dated 02.02.2015 bequeathing his properties to his brother and sisters in a sound and disposing state of mind. After his death on 03.02.2015, beneficiaries of the will came into joint possession and enjoyment of the properties. Father of the petitioner, with dishonest intention, gave a false report to police against the respondents. Late Krishna Murthy never executed alleged possessory agreements dated 16.3.1985 and 10.2.1988 in favour of the petitioner and his wife, and the same are forged one. The alleged wills dated 10.6.1993 and 22.10.2012 are forged. Petitioner was never in possession of the properties of late Krishna Murthy. Plaintiff has no *prima facie* case or balance of convenience in his favour. There is no cause

action and the alleged cause of action is invented. The suit is not maintainable and is liable to be dismissed.

7. Respondent no.10 filed counter denying the averments in the petition and contending *inter alia* that late Krishna Murthy never executed any will and he died intestate. During his life time, he used to reside with respondent no.1, who is none other than his brother. Petitioner and other respondents in O.S. No.111 of 2015 on the file of the IV Additional District Judge, Kakinada colluded, and are propounding number of wills as if executed by late Krishna Murthy and are claiming his properties. As late Krishna Murthy died intestate, his property has to be divided as per the succession Act. Petitioner was never in possession of the schedule property. Petitioner cannot claim exclusive right or possession basing on forged and fabricated will. Plaintiff has no *prima facie* case or balance of convenience in his favour. There is no cause action and the alleged cause of action is invented. The suit is not maintainable and is liable to be dismissed.

8. During enquiry, no oral evidence was adduced on behalf of the parties, but Exs.P1 to P21 were marked on behalf of the petitioner; Exs.R1 to R9 were marked on behalf of respondent no.10 and Exs.R10 to R15 were marked on behalf of respondents 2 to 5 and 7.

9. The court below, upon appreciation of the material on record, allowed the petition granting temporary injunction restraining the respondents, their men and agents from interfering with peaceful possession and enjoyment of the petition schedule properties by the petitioner. Challenging the same, the aforesaid appeals have been preferred.

10. Heard Sri T.V.Jaggi Reddy, learned counsel for appellant in C.M.A. No.489 of 2018; Sri S.Subba Reddy, learned counsel for appellants in C.M.A. No.765 of 2018; Sri E.V.V.S. Ravi Kumar, learned counsel for the appellant in C.M.A. No.810 of 2018 and Sri D.Prakash Reddy, learned counsel for respondent no.1 in all the appeals. Perused the record.

11. Learned counsel for appellant in C.M.A.No. 489 of 2018 would contend that the impugned order granting interim injunction is contrary to law and the facts of the case; that the petitioner has not made out a *prima facie* case; that there is no balance of convenience in his favour; that Exs. P1 to P3 would not make out a *prima facie* case or title or possession in favour of petitioner over the petition schedule property; that the unregistered will deed ought not to have been proved in terms of Section 63 of the Indian Succession Act or under Section 68 of the Indian Evidence Act, 1872; that it cannot be relied on, for grant of

temporary injunction; that the court below ought to have seen that no injunction can be granted against co-owners; that the findings recorded by the court below in paragraph nos. 21 and 26 are contrary to each other; that the respondent no.1 did not admit exclusive possession of respondent petitioner or his father, in any proceedings; that a person claiming equitable and discretionary relief of temporary injunction has to approach the court with clean hands; that there cannot be any cloud on the title and possession; that there is no single document to show possession of the petitioner over the petition schedule property; that the burden is on the petitioner to prove possession for grant of the relief of temporary injunction; that the documents filed on behalf of the appellant *prima facie* establish that late Krishna Murthy continued in possession of the petition schedule property till his death; that the court below, without there being *prima facie* case and balance of convenience, granted the relief of temporary injunction pending disposal of the suit erroneously, and ultimately prayed to set aside the same.

12. Learned counsel for appellants in C.M.A.No. 765 of 2018 would contend that the impugned order is contrary to law and facts of the case; that the petitioner has not made out any *prima facie* case or balance of convenience for grant

of temporary injunction; that the court below erroneously placed reliance on Exs. P1 to P3; that they do not establish *prima facie* title or possession of the petitioner over the petition schedule property; that the court below ought to have seen that Ex.P1- unregistered will deed, is required to be proved in terms of Section 63 of the Indian Succession Act or under Section 68 of the Indian Evidence Act, 1872; that it cannot be relied on, for grant of temporary injunction; that no injunction can be granted against the co-owners; that the petitioner was never in exclusive possession over the petition schedule property; that Smt.Palacharla Venkayamma, who is one of the sisters of the late Krishna Murthy, filed O.S.No. 111 of 2015 on the file of the IV Additional District Judge, Kakinada for partition and sought for ad-interim injunction against the respondents therein restraining them from alienating the petition schedule property; that the petitioner did not approach the court with clean hands, in order to grant the equitable and discretionary relief of temporary injunction.

It is further contended that admissions made by a person in one proceedings do not bind the other person and the person so admitted is always entitled to explain the said admission; further there is no admission of possession of petitioner by any of the parties; that the burden of proof lies on the petitioner to prove *prima facie* case; that he

cannot rely on the weakness of the other party for grant of injunction; that the court below ought to have considered the documents filed on behalf of the appellants and other respondents, which, *prima facie*, establish that late Krishna Murthy continued to be in possession of the petition schedule properties till his death, and ultimately prayed to set aside the impugned order.

13. Learned counsel for appellant in C.M.A.No. 810 of 2018 put forth the same contentions raised by the appellants in other appeals. It is further contended that the deceased Krishna Murthy did not execute any will during his life time and ultimately prayed to set aside the impugned order.

14. On the other hand, the learned senior counsel appearing for respondent No.1 in all the appeals would contend that late Krishna Murthy executed Ex.P1- unregistered will deed on 22.10.2012, and also Exs. P2 and P3- possessory agreements of sale, and died on 03.02.2015; that the petitioner is in possession and enjoyment of the petition schedule properties, which were bequeathed in his favour with life interest, and in favour of his son Kakara Ravindra kanna with absolute rights, along with other properties; that wife of late Krishna Murthy pre-deceased him and so petitioner succeeded item No. 6 of petition

schedule properties which was standing in her name; that after death of late Krishna Murthy on 03.02.2015, Ex.P1-will dated 22.10.2012 was acted upon; that prior to the death of late Krishna Murthy, the petitioner was managing the petition schedule properties on behalf of the former, and after his demise, the petitioner continued possession over the same; that one of the sisters of late Krishna Murthy filed a collusive suit i.e., O.S.No. 111 of 2015 on the file of the IV Additional District Judge, Kakinada against father of petitioner, the respondent no.1 and others stating that late Krishna Murthy died intestate and the properties left by him, including the petition schedule properties, devolved on them; that the appellant in C.M.A.No. 489 of 2018 filed A.T.C. No.15 of 2016 on the file of the Special Officer-cum-Tenancy Tribunal, Kakinada against the petitioner, his father and others, falsely setting up tenancy claim and seeking a declaration of the alleged tenancy rights in item no.6 of schedule property, and filed I.A. No.909 of 2016 therein for ad-interim injunction, and after enquiry, the I.A. was dismissed by the Special Officer; that when the appellants made an attempt to dislodge the petitioner with the help of anti-social elements, the present petition was filed and the same was rightly allowed by the court below.

He further contended that there are specific admissions made in other civil suits by some of the appellants, in respect of the petition schedule properties; that the lower court had elaborately dealt with the documents filed by both the parties and held that the petitioner is in possession of the petition schedule property, and there is balance of convenience and irreparable loss in his favour and rightly granted temporary injunction; there are no circumstances to take a different view, and ultimately prayed to dismiss the appeals.

15. In view of the rival contentions put forth by both the parties, the points that arise for consideration are –

- i) Whether the respondent no.1/petitioner has made out a *prima facie* case;
- ii) Whether there is balance of convenience in favour of the respondent no.1/petitioner, and in the event of not granting interim injunction as prayed for, whether he would be put to irreparable loss ?
- iii) to what relief ?

POINTS:

16. Injunction is an equitable remedy. Grant or refusal of a temporary injunction is covered by three principles viz.,
 1) if the petitioner has made out a *prima facie* case 2) if the balance of convenience is in his favour i.e., it would be

greater inconvenience to the plaintiff if the injunction is not granted than the inconvenience which the respondent(s) or person claiming through him would be put to if the temporary injunction is granted and 3) if the petitioner suffers irreparable injury.

17. With regard to *prima facie* case, it is a case to be made out by proper and sufficient material. The court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, there is a probability that the petitioner is entitled to relief. Coming to the balance of convenience, the Court must compare the amount of mischief done or threatened to the petitioner and must weigh the same against inflicted by the injunction upon the respondent (s) and see that the comparative mischief or inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. Coming to the irreparable injury, the injury must be material and substantial one and not adequately reparable in damages. It cannot be measured by any known pecuniary standard. One of the basic principles on which injunction should be issued is that petitioner must show that an injunction is necessary to protect him from irreparable injury and that mere inconvenience is not enough.

18. Petitioner filed O.S.No. 167 of 2016 before the court below seeking the permanent injunction restraining the respondents from interfering with his peaceful possession and enjoyment over the suit schedule property and made I.A.No.708 of 2016 therein seeking temporary injunction pending disposal of the suit. It is his case and contention that late Kakara Krishna Murthy is his junior paternal uncle and he was his foster son; that the said Krishna Murthy and his wife Vara Lakshmi have no male issues, and the only female child born to them demised; that he provided education to the petitioner, who was managing his properties during his life time; that late Krishna Murthy executed Ex.P1- will deed dated 22.10.2012, bequeathing the properties held by him in K.Nayakampalli and Kotapadu villages in favour of the petitioner with life interest and his son Kakara Ravindra Kanna with absolute rights, along with other properties; that wife of late Krishna Murthy predeceased him and so he succeeded item no.6 of schedule property which was standing in her name; late Krishna Murthy died on 03.02.2015 and thereafter the will dated 22.10.2012 (Ex.P1) was acted upon.

The respondents are brothers and sisters of late Krishna Murthy. Their case and contention is that the said Krishna Murthy died intestate and that the petitioner is not his foster son and that Ex.P1 will deed is fabricated and

that the said late Krishna Murthy executed Ex.R10- will deed on 02.02.2015 bequeathing his properties in favour of his brothers and sisters and hence they, being co-owners, succeed over the petition schedule properties, and that the petitioner cannot claim exclusive right basing on forged and fabricated will.

19. In an application for grant of temporary injunction, possession as on the date of filing of the suit is the paramount consideration. In the case on hand, as regards his *prima facie* title over the subject property, the petitioner relied on Ex.P1- will dated 22.10.2012 contending that it is executed by the original owner late Krishna Murthy creating life interest in his favour and absolute rights in favour of his son Kakara Ravindra Kanna. The said document is seriously disputed by the respondents stating that it is forged and fabricated. However, at this interlocutory stage, it is not appropriate and open to the court to give finding on the main issue which arises for determination in the suit. The same view is taken by the Hon'ble Apex Court in *Babulal and others v. Vijay Solvex Ltd.*¹. Therefore, validity or otherwise of Ex.P1 cannot be decided at this stage. It is a matter to be decided after full fledged trial.

¹ (2014) 16 Supreme Court Cases 680

20. Under Ex.P1, petitioner is claiming possession over the schedule property and the said document demonstrates possession of the petitioner over the schedule property. O.S.No. 111 of 2015 on the file of the IV Additional District Judge, Kakinada has been filed by mother of respondent No.10 and one of the sisters of late Krishna Murthy against their two brothers including father of petitioner, and remaining five sisters of late Krishna Murthy, for partition stating that said Krishna Murthy died intestate. In the said suit, father of the petitioner (defendant No.1 therein) filed written statement stating that late Krishna Murthy executed Ex.P1- will deed bequeathing the schedule properties. The other brother of late Krishna Murthy (defendant No.2 therein) filed written statement in the said suit with the same contentions. Three sisters of late Krishna Murthy, who are defendants 3, 4 and 6 therein, filed written statement in the suit denying the plea set up by the father of the petitioner and setting up will deed dated 02.02.2015 (Ex.R10) executed by late Krishna Murthy bequeathing the petition schedule properties in favour of his second brother and six sisters. It is also clear from the record that defendants 3, 4 and 6 in the said suit had also filed I.A.No. 1414 of 2016 in the said suit for appointment of receiver to take possession of the suit schedule property from the father of the petitioner, stating

that father of the petitioner is in possession of the land and committed acts of waste. The respondents did not deny the admissions made by the said persons that the petitioner is in possession of the schedule properties. Considering all these aspects, the trial court rightly held that the persons who are said to be in joint possession of the schedule properties according to the respondents, admitted the possession of the petitioner over the schedule properties. The recitals in the documents marked as Exs. P5, P12, P13, P17 and P18 clearly establish that the respondents are not in possession of the petition schedule properties and petitioner is in exclusive possession thereof.

21. According to respondents, brothers and sisters of late Krishna Murthy i.e. the plaintiff and the defendants in O.S.NO. 111 of 2016 on the file of the IV Additional District Judge Kakinada, are joint owners and are in joint possession of properties of late Krishna Murthy as he died intestate. Whereas defendants 3, 4 and 6 in the said suit filed a petition in I.A.No.1414 of 2016 in the said suit under Order XL Rule 1 C.P.C. (marked as Ex.P17) seeking appointment of the receiver to take possession of the item numbers 1 to 8 of the said suit schedule properties which include the petition schedule properties, stating that father of the petitioner took possession of the said properties after

filing of the said suit and he is enjoying the proceeds derived by leasing it out and also cutting various trees situated in the said premises and also sold away the same to third parties and trying to change the bunds and excavate sand in the said lands and trying to sell the same to third parties, and as such there is an imminent danger to item Nos. 1 to 7 of the said suit schedule properties. Further, respondent No.1 also admitted possession the petitioner over the petition schedule properties in his written statement filed in the said suit (marked as Ex.P19) and counter in I.A.NO. 767 of 2015 in the above suit (marked as Ex.P14), stating that after death of late Krishna Murthy the petitioner thrashed the paddy heaps in lands of Krishna Murthy and the petitioner and his father are in a position to alienate and induct third parties in possession of the schedule properties.

22. It is the case of respondents that Ex.P1 is not genuine one as it does not contain reference of Exs. P2 and P3-possessory agreements, and that the petitioner cannot rely on the admission of defendants 3, 4 and 6 in O.S.No.111 of 2015, and that he has to stand on his own case and prove possession over the schedule properties. Had the brothers and sisters of late Krishna Murthy been in joint possession of the schedule properties as contended by the

respondents, the question of father of petitioner and his sons being in a position to alienate and induct third parties into possession of the said properties would not arise. It is settled proposition of law that admitted facts need not be proved. At this stage, since there is no conclusive determination of rights of the parties to the litigation, *prima facie*, the recitals in Ex.P1-will deed coupled with the admissions made by the parties under Exs. P1, P5, P12, P13, P17, P18 and P19, it can safely be concluded that the petitioner is able to establish *prima facie* possession over the petition schedule properties as on the date of filing of the suit.

23. As far as the contention that injunction cannot be granted against co-owners is concerned, it is the specific case of the petitioner that he is in exclusive possession and enjoyment of the petition schedule properties, whereas it is the specific case of the respondents that the petitioner has no right over the said properties. When there are rival claims in respect of the same property, the question of co-ownership does not arise. Furthermore, as can be seen from the record, plea of the respondents is two fold. On one hand, they claim the property on the strength of Ex.R10- will dated 02.02.2015 allegedly executed by late Krishna Murthy and on the other hand, they claim that the

said Krishna Murthy died intestate and so they are the co-owners of the schedule property. On one hand, they state that they inherited the property by virtue of Ex.R10- will and on the other they state that as late Krishna Murthy died intestate, they are the co-owners. In view of the above discussion the contention of the respondents that the injunction cannot be granted against co-owners is not tenable.

24. As regards the balance of convenience is concerned, since the petitioner is able to establish his *prima facie* possession over the schedule property, it would be greater inconvenience to him if the injunction is not granted than the inconvenience which the respondents or person claiming through them would be put to if the temporary injunction is granted. Therefore, the comparative mischief or inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. Hence, the possession of the petitioner can be protected by way of grant of temporary injunction pending disposal of the suit. Further, the petitioner made out a case that an injunction is necessary to protect him from irreparable injury and loss.

25. Therefore, from the foregoing discussion, it is clear that there is *prima facie* case and balance of convenience

are in favour of the petitioner, and that he would suffer irreparable loss if injunction is not granted. The court below considered all aspects in right perspective and gave findings. They are based on proper appreciation of material on record. There is nothing to take a difference view. The appeals are devoid of merit and liable to be dismissed.

26. In the result, the appeals are dismissed. No costs.

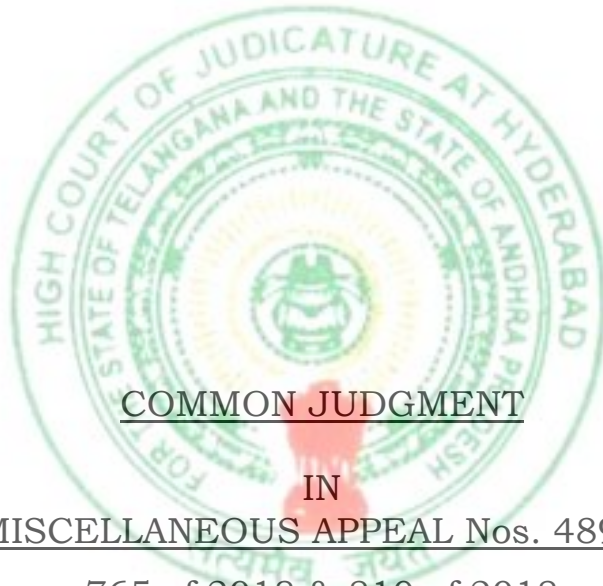
Miscellaneous petitions pending, if any, in the appeals shall stand closed.

06.11.2018
DRK



(Dr.SA, J.)

THE HON'BLE DR JUSTICE SHAMEEM AKTHER



COMMON JUDGMENT

IN

CIVIL MISCELLANEOUS APPEAL Nos. 489 of 2018,

765 of 2018 & 810 of 2018

06.11.2018