

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

SECOND APPEAL Nos.405 and 426 OF 2005

COMMON JUDGMENT:

1 The unsuccessful first defendant preferred S.A.No.405 of 2005 challenging the decree and judgment dated 08.12.2004 passed in A.S.No.12 of 2003 on the file of the VII Additional District Judge (Fast Track Court), Nizamabad at Bodhan, confirming the decree and judgment dated 12.02.1997 passed in O.S.No.30 of 1992 on the file of the District Munsif, Yellareddy declaring that the plaintiffs are owners of suit schedule property and for recovery of possession. The unsuccessful first defendant preferred S.A.No.426 of 2005 challenging the decree and judgment dated 08.12.2004 passed in A.S.No.13 of 2003 (filed by the plaintiffs) on the file of the VII Additional District Judge (Fast Track Court), Nizamabad at Bodhan, granting mesne profits to the plaintiffs. For the sake of convenience, the parties will hereinafter be referred to as they are arrayed in the suit.

2 The case of the plaintiffs is that Balakistaiah and Venkaiah are sons of Pappu Kondaiah. Plaintiff Nos.1 and 2 are the sons of late Balakistaiah through his first wife. Defendant Nos.3 to 5 are the sons of late Balakistaiah through his second wife. The first defendant is the daughter and second defendant is the son of late Venkaiah. Balakistaiah acquired the suit schedule property along with some other property 40 years back and enjoyed the same as joint family property. Balakistaiah and Venkaiah have partitioned an extent of Acs.2.33 guntas and allotted Ac.0.37 guntas i.e., the suit schedule property to plaintiff Nos.1 and 2; an extent of Ac.0.38 guntas to defendant Nos.3 to 5; and Ac.0.38 guntas to late Venkaiah, who is paternal uncle of plaintiffs. Defendant Nos.1 and

2 succeeded to the extent of Ac.0.38 guntas fell to the share of their father, late Venkaiah. The plaintiffs have been in possession and enjoyment of suit schedule property since 1976 – 77. The first plaintiff being a Teacher used to reside at Banswada and second plaintiff, who is a retired Teacher, never cultivated suit schedule property. On 11.09.1991, the defendant Nos.1 to 3 started digging a bore well in the suit schedule property as if the same belongs to them. The plaintiffs have applied for certified copies of Pahani Patriks for the year 1977 – 78 onwards; wherein the name of first plaintiff is mentioned as owner of suit schedule property and the name of the first defendant is shown in possessory column. The fifth defendant worked in Revenue department in various capacities and taking advantage of his official position, he manipulated the revenue records showing the name of first defendant in 'possessory column'. The first defendant is a handicapped woman since more than 40 years and the suit schedule property is not under cultivation. The defendants without any right whatsoever have taken possession of the suit schedule property in the year 1991. Hence, the suit was filed for declaration of title and recovery of possession.

3 The defendant Nos.1 to 5 filed the written statement admitting relationship between the parties, inter alia contending that late Balakistaiah and late Venkaiah acquired the suit schedule property jointly. In the family partition, late Venkaiah and late Balakistaiah got half share each including suit schedule property. The sons of late Balakistaiah have further partitioned the property fell to their father; in the said partition defendant Nos.3 to 5 got $\frac{1}{4}^{\text{th}}$ share and plaintiff Nos.1 and 2 got $\frac{1}{4}^{\text{th}}$ share. Defendant Nos.1 and 2 equally succeeded to the property fell to the share of their father, late Venkaiah. The second plaintiff has been looking

after the cultivation affairs as the first plaintiff never resided in Yellareddy. On 24.01.1971 the plaintiffs have relinquished their rights in the suit schedule property in favour of defendant Nos.1 to 5 in exchange of the land in survey Nos.102 and 103 of Devenapally village, which is exclusively belonged to defendant Nos.1 to 5. Defendant Nos.1 to 5 have been in exclusive possession and enjoyment of the suit schedule property whereas the plaintiffs have been in possession and enjoyment of the land in survey Nos.102 and 103 of Devanapally village. The husband of first defendant has been cultivating the land on behalf of the defendants. The fifth defendant has been maintaining cordial relations with both the plaintiffs. The plaintiffs were inimical with each other till filing of the proceedings before the Mandal Revenue Officer, Yellareddy (MRO). The suit is barred by limitation. Hence the suit is liable to be dismissed.

4 After filing of written statement, the plaintiffs filed rejoinder denying the execution of exchange agreement relinquishing their rights over the suit schedule property in favour of the defendant Nos.1 to 5.

5 Basing on the above pleadings, the trial court framed the following issues and additional issues:

1. Whether the properties of Bala Kistaiah and Pappu Venkaiah is divided into three shares between plaintiffs, defendants No.1 and 2 and 3 to 5 as contended by the plaintiffs?
2. Whether the suit schedule lands are owned and possessed by the plaintiffs till 1976 – 77 and later on they were disposed on 11.9.1991 by sinking the bore well?
3. Whether the plaintiffs are entitled for declaration of title over the suit property and in consequences for recovery of possession from the defendant No.1?

Additional issues:

1. Whether the plaintiffs were in actual and physical possession over the suit lands?
2. Whether the defendants dispossessed the plaintiffs from the suit land forcibly and illegally on 11.9.1991?
3. Whether the plaintiffs filed this suit within 12 years from the date of their dispossession from the suit land by the defendants?
4. Whether the plaintiffs have got cause of action to file this suit?
5. Whether the defendants came into possession of the suit lands by virtue of Ex.B.1 in the year 1971?
6. To what relief?

6 During the course of trial, on behalf of plaintiffs, P.Ws.1 to 4 were examined and Ex.A.1 to A.24 were marked. On behalf of the defendants, D.Ws.1 to 7 were examined and Exs.B.1 to B.15 were marked.

7 Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiffs are entitled for the relief of declaration and recovery of possession, and accordingly decreed the suit, while rejecting the relief of mesne profits. Feeling aggrieved by the decree and judgment of the trial court, first defendant filed A.S.No.12 of 2003 and the same was dismissed. The plaintiffs preferred A.S.No.13 of 2003 challenging the decree and judgment of the trial court, so far as rejecting the relief of mesne profits is concerned. The first appellate court allowed A.S.No.13 of 2003 granting mesne profits to the plaintiffs. Assailing the decrees and common judgment of the first appellate Court, the unsuccessful first defendant preferred these second appeals. The subject matter involved in both the appeals is one and the same; hence I am inclined to dispose of

these second appeals by common judgment.

8 At the time of the arguments, learned counsel for the appellant raised the following substantial questions of law.

- 1) “Whether Ex.B.1 is admissible in evidence for collateral purpose in view of proviso to Section 49 of the Indian Registration Act?
- 2) Whether the suit can be decreed in spite of first defendant proved her possession of the suit schedule property by filing ROR passbook and orders of RDO and Tahsildar?
- 3) Whether the first defendant acquired the title to the suit schedule property by adverse possession?
- 4) Whether the plaintiffs are entitled for mesne profits?”

9 Heard Sri J.Ramachandra Rao, learned counsel for the appellant/first defendant and Sri Balraj Bodhankar, learned counsel for respondent Nos.1 and 3 to 6/plaintiffs.

Question No.1:

10 Late Balakistaiah and late Venkaiah are sons of late Pappu Kondaiah. The plaintiffs 1 and 2 are sons of Balakistaiah through his first wife, and defendant Nos.3 to 5 are the sons of Balakistaiah through his second wife. Defendant Nos.1 and 2 are daughter and son of late Venkaiah. Pappu Kondaiah did not acquire landed property during his life time. Late Balakistaiah and late Venkaiah have partitioned an extent of Acs.2.33 guntas in survey Nos.426, 427 and 430 of Yellareddy village. The plaintiff Nos.1 and 2 got Ac.0.37 guntas; defendant Nos.1 and 2 got Ac.0.38 guntas and defendant Nos.3 to 5 got Ac.0.37 guntas.

11 It is the case of defendants, late Balakistaiah and late Venkaiah acquired the property jointly and in the family partition they got equal shares. The plaintiff Nos.1 and 2 got 1/4th share

and defendant Nos.3 to 5 got the remaining 1/4th share in the property fell to the share of their father. Defendant Nos.1 and 2 succeeded to the share of late Venkaiah. Both the parties have not filed any document to prove that the property in question was acquired by late Balakistaiah and late Venkaiah jointly. However, the same is not of much significance in view of the scope of the present suit. As per the contention of defendants, the first plaintiff never resided in Yellareddy and it is the second plaintiff, who looked after the suit schedule property till 1971. The defendants are claiming that they got suit schedule property under Ex.B.1 agreement (Kararnama – exchange deed) dated 24.8.1971. P.W.1 denied the execution of Ex.B1 agreement. Even as per the version of the defendants, the plaintiffs are having right over the suit schedule property. The specific stand of the defendants is that the plaintiffs have exchanged the suit schedule property by taking the land covered by survey Nos.102 and 103 of Devanapally village. To prove the execution of Ex.B.1 in their favour, the defendants mainly relied on the oral testimony of D.W.3, who is the second plaintiff. In the cross-examination, D.W.3 in unequivocal terms admitted that the first plaintiff was not authorised him to execute Ex.B1 agreement. There is no proper explanation in the testimony of D.W.3, how he executed Ex.B.1 in favour of the defendants without the consent of the first plaintiff. Even otherwise, the second plaintiff alone is not entitled to execute Ex.B.1. Ex.B.1 is silent with regard to exchange of the properties between the plaintiffs and defendants. The relevant portion of Ex.B.1 reads as under:

“Khararnama dated 24.8.1971 Monday executed by Pappu Anjaiah, son of Bala Kistaiah. I have no share in Sadaka Pai Kitta Khushki Bhagam. There will be only three shares, their names are as follows:

Smt.Susheela – 1/3; Sri Pentaiah – 1/3; and Pandari,

Vishwanatham and Narayana – 1/3.

This is the Khararnama executed by me with my free will.”

12 A perusal of Ex.B.1 gives an impression that the second plaintiff has relinquished his right over the suit schedule property in favour of the defendants. Except the oral testimony of D.Ws.1 to 5, there is no other convincing evidence to establish that the land in survey Nos.102 and 103 of Devenapally village exclusively belonged to the defendants. The defendants have not filed any document to establish that the plaintiffs have been in possession and enjoyment of land situated in survey Nos.102 and 103 with effect from 24.8.1971. There is no mention in Ex.B.1 that the possession of the suit schedule property was delivered to the defendants. The suit was filed in the year 1992. Ex.B.1 has not seen the light of the day till 20.12.1993, on which date it was produced before the court. Non-filing of Ex.B.1 before the court at the earliest point of time casts a cloud on its genuineness.

13 Section 118 of Transfer of Property Act postulates the procedure to be followed in case of exchange of immovable property. Section 54 of the Transfer of Property Act postulates that sale of immovable property worth Rs.100/- or more shall be by way of a registered instrument. A fascicular reading of Sections 54 and 118 of the Transfer of Property Act clearly manifests exchange of immovable property worth more than Rs.100/- is only by way of a registered document. As per Section 17(1)(b) of the Registration Act, exchange of immovable property worth Rs.100/- or upward shall be by way of registered instrument. According to Section 35 of Indian Stamp Act a compulsorily registerable document, if not registered, is inadmissible in evidence.

14 However, under the proviso to Section 49 of the Registration

Act, an unregistered document can be admitted in evidence for a collateral purpose. In this case, the defendants contend that they acquired title over the suit schedule property under Ex.B.1 exchange deed; since Ex.B1 is an unregistered document, it cannot be admitted in evidence to prove the main purpose of 'exchange'. Therefore, the proviso to Section 49 of the Registration Act is not applicable to the facts of the case on hand. Viewed from any angle, the stand of the defendants that they got the suit schedule property in exchange is untenable.

Question Nos.2 and 3:

15 Since question Nos.2 and 3 are inter-linked, I answer these two questions simultaneously, in order to avoid recapitulation of facts and evidence.

16 The contention of the plaintiffs is that fifth defendant, taking advantage of his official position in the Revenue department, manipulated the revenue records. As contended by the defendants, they have been in possession and enjoyment of the suit schedule property. Exs.A.1 to A.17 are pahanies for the years from 1976 – 77 to 1990 – 91. In all these documents, the names of the first plaintiff and the defendants are shown in possessory and ownership columns. In some documents, the name of the first defendant alone is shown in possessory column. If really the plaintiffs have executed Ex.B1 in favour of defendant Nos.1 to 5, how the name of the plaintiffs is shown in possessory and ownership columns is not properly explained by the defendants. In these documents, the source of the tile of the defendant Nos.1 to 5 is not mentioned. How the defendants came into possession of the suit schedule property is not mentioned in these documents. The discrepancy in these documents, to certain extent, substantiates

the stand of the plaintiffs that the fifth defendant manipulated Exs.A1 to A17 taking advantage of his official position. If really Ex.B1 was in possession of the defendants, what prevented them to file the same either before the Mandal Revenue Officer, Yellareddy (MRO) or the Revenue Divisional Officer, Kamareddy (RDO) to substantiate their stand? In all these documents, the suit schedule lands are described as PADAVA, which means fallow. Therefore, the contention of the defendants that they have been cultivating the suit schedule property from the year 1976 onwards is falsified.

17 The first plaintiff submitted a report to the MRO, Yellareddy on 19.01.1992 stating that the defendants have manipulated the pahanies. The MRO passed orders on 07.04.1992 (Ex.A.18) ordering rectification of the records by showing the name of the first plaintiff in possessory and ownership columns in place of first defendant's name. The defendants have preferred appeal before the RDO. A perusal of the Ex.B.3 reveals that by interim order dated 31.07.1992 the RDO directed the parties to raise their claims before the recording authority concerned. However, the Deputy Tahsildar, Yellareddy passed orders on 21.09.1992 (Ex.B.4) rejecting the claim of the first plaintiff. A perusal of Ex.A.20 reveals that the RDO has kept the appeal in abeyance in view of the pendency of O.S.No.30 of 1992 on the file of District Munsif, Yellareddy between the parties. A perusal of the record clearly reveals that the plaintiffs are disputing the genuineness of the revenue records. Admittedly the concerned revenue people have not taken any steps for rectification of entries the revenue records, in view of the pendency of the suit for declaration.

18 The court can place reliance on record of rights unless and

until contrary is proved. In the instant case, defendant Nos.3 to 5 have obtained pattadar passbooks i.e., Exs.B.5, B.6, B.11, B.12 and B.13, basing on the manipulated pahanies. Therefore, much weight cannot be attached to these revenue documents.

19 It is the duty of the person, who asserts the title over certain property basing on adverse possession, to establish that he has been in continuous possession of the same without any interruption to the knowledge of one and all particularly the owner of the property, for a period of 12 years immediately preceding to the filing of the suit. The present suit is filed in the year 1992.

The case of the defendants is that they have been in possession and enjoyment of the suit schedule property since 24.08.1971. If mathematical calculation is applied, the claim of the defendants appears to be correct. Absolutely there is no material on record to establish that the defendants have been in physical possession of the suit schedule property for a period of 12 years preceding to the filing of the suit. The documents on which the defendants are placing reliance, to establish their title by way of adverse possession, are not legally admissible.

20 The defendants are claiming the title over the suit schedule property on one hand by placing reliance on Ex.B.1 and on the other hand by way of adverse possession. There is no doubt that the defendants are entitled to take inconsistent pleas. It is a settled principle of law that a party to the suit is not entitled to take mutually self-destructive pleas. The defendants, who have placed much reliance on Ex.B.1 to establish their title over the suit schedule property, are legally precluded from taking the plea of adverse possession. Therefore, the defendants are not entitled to take the plea of adverse possession.

21 It is not in dispute that the plaintiffs have succeeded to the suit schedule property from their father and the same is substantiated by the recitals of Exs.B.14 and B.15 Khasra Pahanies for the year 1954 – 55. The defendants themselves are admitting the title of the plaintiffs over the suit schedule property. The defendants having admitted the title of the plaintiffs, failed to establish that they got the suit schedule property under Ex.B.1 exchange deed. The material placed before the court clinchingly establishes that the plaintiffs are the owners of the suit schedule property. Being the owners of the suit schedule property, the plaintiffs are entitled to recover the same from the defendants.

Question No.4:

22 The trial court rejected the relief of mesne profits on the ground that the plaintiffs failed to establish the quantum of mesne profits. The trial court proceeded on a wrong premise that the plaintiffs ought to have proved the quantum of mesne profits in the suit itself. The quantum of mesne profits will be decided by the court on a separate application filed by the plaintiff as contemplated under Order XX Rule 12(1) CPC. The first appellate court rightly considered the scope of Order XX Rule 12(1) CPC and granted the relief of mesne profits by setting aside the decree and judgment of the trial court to that extent. The trial court ought to have granted the mesne profits, having arrived at a conclusion that the plaintiffs are entitled for the relief of declaration and recovery of possession. The first appellate court has not committed any irregularity or illegality while granting the relief of mesne profits to the plaintiffs. I am fully agreeing with the findings of the first appellate court so far as granting of mesne profits to the plaintiffs are concerned.

23 The courts below concurrently held that the plaintiffs are entitled for the relief of declaration and recovery of possession. The courts below have minutely scrutinized the oral and documentary evidence and arrived at a conclusion that the plaintiffs are the owners of the suit schedule property. The courts below have assigned cogent and valid reasons to its findings. Viewed from factual or legal aspects, the findings recorded by the courts below cannot be branded as perverse. I am fully agreeing with the findings recorded by the courts below that the plaintiffs are entitled for the reliefs of declaration, recovery of possession of the suit schedule property and mesne profits. There is no question of law much less substantial question of law in these second appeals. Hence, these two second appeals are liable to be dismissed.

24 Accordingly, second appeal No.426 of 2005 is dismissed, confirming the decree and judgment dated 08.12.2004 passed in A.S.No.13 of 2003 on the file of the VII Additional District Judge (Fast Track Court), Nizamabad at Bodhan. The second appeal No.405 of 2005 is dismissed, confirming the decree and judgment dated 08.12.2004 in A.S.No.12 of 2003 on the file of the VII Additional District Judge (Fast Track Court), Nizamabad at Bodhan; consequently the suit in O.S.No.30 of 1992 on the file of District Munsif, Yellareddy is decreed. The parties are directed to bear their own costs in these two appeals. As a sequel, miscellaneous petitions if any pending shall stand closed.

T.SUNIL CHOWDARY, J

Date: 22.04.2014

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