

HON'BLE SRI JUSTICE A.SANTHOSH REDDY

SECOND APPEAL Nos.411 and 412 of 2016

COMMON JUDGMENT:

These two second appeals under Section 100 of the Code of Civil Procedure, 1908 (C.P.C) are filed against the common judgment and decrees rendered in A.S. Nos. 240 of 2012 and 241 of 2012 on the file of the II Additional District and Sessions Judge, Ranga Reddy District at L.B.Nagar, Hyderabad, dated 31.12.2015 through which, the common judgment, rendered by the Court of IV Additional Senior Civil Judge, Ranga Reddy District in O.S.Nos. 565 of 2005 and 330 of 2009 and the corresponding decrees, dated 10.04.2012, were confirmed.

2. As both the appeals arose out of the common judgment and in between the same parties, they are being heard together and disposed of by this common judgment.

3. The appellants are the plaintiffs in O.S.No.565 of 2005 and defendants in O.S.No.330 of 2009. The respondents are the

plaintiffs in O.S.No.330 of 2009, and the defendants in O.S. No. 565 of 2005.

4. Heard the submissions of Sri D.V.Seetharama Murthy, learned Senior Counsel for the appellants and Sri D.Prakash Reddy, learned Senior counsel for the respondents. Perused the record.

5. During the pendency of these appeals, appellant No.5 died and his Legal representatives were brought on record as appellant Nos.6 to 9.

6. The introductory facts, in brief, are as follows:

The plaintiffs filed O.S.No.565 of 2005 seeking declaration of their title and for delivery of vacant possession of the plaint schedule property admeasuring Ac.1-00 guntas of land in Sy.No.339 of Turkamjal Village of Ranga Reddy District (hereinafter referred to as 'suit schedule property'). It is their case that they are the owners and the possessors of agricultural land admeasuring Ac.8-19 guntas in sy.No.339 of Turkamjal Village and they have purchased the said land from one S.Ram Reddy and

eight others under registered sale deed dated 21.07.1992 vide document No.292 of 1992. Though, the defendants are no way concerned with regard to the above lands, they are claiming the title and possession over an extent of Ac.1-00 guntas of land out of Ac.8-19 guntas of land on the basis of sale deed said to have been executed by one Smt.B.Bujjamma in their favour in the year 1985 and also through their counter in Case No.A2/2756/2002 on the file of the Revenue Divisional Officer, Hyderabad East Division. Thereby, they filed O.S.No.1556 of 2003 on the file of Principal Junior Civil Judge's Court, Ranga Reddy District.

7. Originally, one Samala Narayana @ Linga Reddy was protected tenant of land admeasuring Ac.45-39 guntas of land in Sy.Nos.332, 334 to 337, 339 and 340 of Turkamjal Village. After Andhra Pradesh (Telangana area) Tenancy and Agricultural Lands Act, 1950 (for short "the Tenancy Act) came into force, the grand son of original protected tenant by name Samala Bakkaiah obtained ownership certificate under Section 38 E of the Tenancy Act from the Revenue Divisional Officer (R.D.O.) claiming to be sole tenant of the entire land. The mother of the plaintiffs by name Bujjamma

acting upon the said certificate purchased an extent of Ac.16.38 guntas in Sy.No.339 under a registered sale deed, dated 28.06.1975 from said Samala Bakkaiah. Aggrieved by the order of R.D.O. against the issuance of 38-E certificate in favour of Samala Bakkaiah, one Samala Narayana preferred appeal before the Joint Collector claiming half share in the above Ac.16-38 guntas for himself and his two brothers namely; Mr.Anji Reddy and Sai Reddy. The Joint Collector allowed the appeal on 20.01.1970 and set aside the 38-E certificate issued in favour of Samala Bakkaiah in respect of the half extent of the property and the case was remanded to the R.D.O. to decide afresh.

8. During the pendency of said the enquiry, the father of the plaintiffs by name Balvanth Reddy claimed that he was also tenant of the above said land and his wife Bujjamma purchased the said land from Samala Bakkaiah and accordingly, an elaborate enquiry was conducted and the orders were passed by the R.D.O. on 16.09.1983 and granted 38-E certificate in favour of Samala Bakkaiah. Aggrieved thereby, the co-sharers, who were denied the ownership certificate, preferred appeals before the Joint

Collector, Ranga Reddy District. But, the Joint Collector confirmed the orders of the R.D.O. dated 16.09.1983. Aggrieved by the said order, the co-sharers of Samala Bakkaiah preferred revisions in Civil Revision petition Nos.2023 and 2024 of 1989 before this Court. In the said revisions, one Balavanth Reddy and his wife Bujjamma were shown as the respondents. This Court allowed the said revision petitions vide order, dated 16.04.1992, by setting aside the orders of the Joint Collector and the R.D.O. and negatived the claim of Balavanth Reddy and Bujjamma in respect of the entire extent of land. Therefore, the sale deeds executed by Samala Bakkaiah in favour of Smt.Bujjamma became null and void.

9. It is alleged by the plaintiffs that they purchased Ac.8-09 guntas in Sy.No.339 under a registered sale deed from the original owners and protected tenants, who were recognized as the legal owners in CRP Nos.2023 and 2024 of 1989 and they were put in possession of the property and they were enjoying the same. They also made an application to the Mandal Revenue Officer (M.R.O.) for mutation and they were issued passbook and title deeds only to

an extent of Ac.7-19 guntas. Their enquiries revealed that the defendants had already obtained passbooks and title deeds by illegally mutating their names for an extent of Ac.1-00 guntas in Sy.No.339. The plaintiffs questioned the issuance of the pass book in favour of defendants before the M.R.O. on 04.06.2002. Later, the matter was referred to the R.D.O. and after an elaborate enquiry, the R.D.O. allowed the application on 29.03.2009 cancelling the passbook and title deeds issued in favour of the defendants vide Case No.A2/2756/02. Against the orders of the R.D.O., the defendants preferred revision before the Joint Collector in Revision Case No.D5/6981/03. On 27.04.2004, the Joint Collector has set aside the order of the R.D.O.by leaving it open to the parties to approach the Civil Court for redressal of their grievance. Aggrieved by the same, the plaintiffs filed WP.No.9951 of 2004 before this Court. This Court disposed of the same vide order, dated 08.10.2004. In the meanwhile, the defendants approached the civil Court in O.S.No.1556 of 2003 for perpetual Injunction on 26.09.2003. Wherein, they also filed an application seeking temporary injunction, but the same was dismissed. Later,

an appeal was preferred against it. The appeal was allowed on 17.02.2005. It is alleged that without having any right, the defendants are claiming the suit schedule property and thereby, dispossessed them by virtue of the orders in CMA. Therefore, they were constrained to file the suit for declaration of title and for delivery of the property.

10. The defendants filed a written statement. They denied the possession of the plaintiffs over the entire suit claim. They contend that they are the absolute owners and pattadars of the schedule property admeasuring Ac.1-00 guntas of land in Sy.No.339, as they have purchased the same from the mother of the plaintiffs by name Smt.Bujjamma under registered sale deed, dated 14.09.1985, for valid consideration. From the date of purchase, they have been in possession and enjoyment of the same.

11. The mother of the plaintiffs by name Smt.Bujjamma purchased the said land from Samala Bakkaiah, who is the recorded protected tenant of the land. Subsequently, the ownership certificate was also granted in favour of Samala Bakkaiah. The defendants on verifying the ownership certificate of

Smt.Bujjamma, purchased the suit schedule property from its original owner and it is a valid, as they purchased it from rightful owner. They are in possession of the suit schedule property from 04.03.1985 onwards and they have perfected their title by way of adverse possession to the said Bujjamma as well as the plaintiffs.

12. The defendants further pleaded that since 04.03.1985, they are in possession and enjoyment of Ac.1-00 guntas and the revenue records also would disclose their continuous possession over the schedule property. The plaintiffs kept quiet for thirteen (13) years and filed the present suit.

13. The defendants further pleaded that disputes arose only from the year 2002 and the plaintiffs failed to prove their title and possession. There is no cause of action to file the suit and the suit is barred by limitation.

14. On the strength of the pleadings, the trial Court framed the following issues:

- i) Whether the plaintiffs are entitled for the declaration that the plaintiffs are lawful owners of the suit property?

ii) Whether the plaintiff is entitled for recovery of possession of suit schedule property from the defendants?

iii) To what relief?

15. Originally the suit in O.S.No.1556 of 2003 filed by the defendants in O.S.No.565 of 2005 before the Principal Junior Civil Judge's Court was transferred and the same was numbered as O.S.No.330 of 2009.

16. The averments of the plaint in O.S.No.330 of 2009, in brief, are as under:

The plaintiffs contend that they are the brothers and sons of late Mr.Gurram Yadi Reddy respectively and all the defendants are the sons of one Smt.B.Bujjamma. They have purchased the land admeasuring Ac.1-00 guntas, which is part and parcel of sy.No.339 of Turka Yamzal Village for valid sale consideration under registered sale deed, dated 04.03.1985, from Smt.B.Bujjamma. They were inducted into possession of the schedule property by their vendor.

17. The plaintiffs were issued pattadar passbook in their favour at Ac.0-08 guntas each in their undivided khata in respect of the

schedule property. The defendants illegally claimed that the sale of schedule land by their mother Smt.B.Bujjamma and that they purchased the land from the vendors of their mother. They are bound by valid alienation of the schedule property by their mother.

18. The plaintiffs further contend that the defendants tried to interfere with their possession and tried to trespass into the suit schedule property on 24.09.2003 by taking aid and support from the antisocial elements. Hence, the suit was filed.

19. The defendants filed written statement denying the allegations made by the plaintiffs. It is further stated that with a malafide intention to grab the suit schedule property, the plaintiffs filed the suit. Though, they have no right and title obtained pattadar passbooks of the schedule land and the suit schedule property is part of their land admeasuring Ac.08-19 guntas in Sy.No.339 which was purchased by them under registered sale deed, dated 21.07.1992, from its lawful owners and possessors.

20. The defendants further reiterated the averments made by them in O.S.No.565 of 2005.

21. The defendants further contend that the plaintiffs were never in possession of the suit schedule property and the names of the defendants were shown as pattadars and possessors in pahanies for the year 2003-2004. As such, the plaintiffs have no *prima facie*, title or possession over the schedule property.

22. On the strength of the pleadings, the trial Court framed the following issues:

- i) Whether the plaintiff is the owner of the suit property?
- ii) Whether the plaintiff is entitled for perpetual Injunction as prayed for?
- iii) To what relief?

23. On a joint memo filed by the parties for clubbing the suits, common evidence was recorded in O.S.No.565 of 2005.

24. During the trial, On behalf of the plaintiffs, Pws.1 and 2 were examined and Exs.A.1 to A-34 were marked. On behalf of the defendants, DW.1 was examined and Exs.B.1 to B.30 were marked.

25. On a consideration of the evidence available on record, the trial Court held that the plaintiffs have no right over the suit schedule property and thereby, answered issue No.1 in O.S.No.565 of 2005 against the plaintiffs therein and issue No.1 in O.S.No.330 of 2009 in favour of the plaintiffs therein.

26. Similarly, the trial Court with regard to issue No.2 held that since the plaintiffs filed the present suit in the year 2005, the defendants are in possession of the suit schedule property from 1985 and even if the title of the defendants is invalid against others, their possession is adverse to the plaintiffs and they perfected their rights in that manner and answered issue No.2 in O.S.No.565 of 2005 against the plaintiffs and issue No.2 in O.S.No.330 of 2009 in favour of the plaintiffs therein.

27. Accordingly, the suit in O.S.No.565 of 2005 was dismissed, while the suit in O.S.No.330 of 2009 was decreed. Aggrieved by the same, the defendants in O.S.No.330 of 2009 filed A.S.No.240 of 2012 and the plaintiffs in O.S.No.565 of 2005 filed A.S.No.241 of 2012.

28. The first appellate Court, after perusing the material on record, has framed the following points for consideration:

1. Whether the plaintiffs are entitled to seek declaration and recovery of possession of the property, as prayed for?
2. Whether the defendants who are the plaintiffs in O.S.No.330 of 2009 are entitled to seek perpetual injunction as prayed for?

29. On consideration and re-appreciation of the evidence on record, the first appellate Court by the impugned common judgment, dismissed both the appeals confirming the judgment of the trial Court. Aggrieved by the same, the present second appeals are filed.

30. A learned Judge of this Court admitted these second appeals on finding that the following substantial questions of law arise for consideration:

- (1) Whether the Courts below were correct in returning a finding on adverse possession without framing an issue?
- (2) Whether the Courts below were correct in the interpretation and appreciation of documentary evidence?
- (3) Whether Section 43 of the Transfer of Property Act, 1882 would have application?

31. Sri D.V.Seetharama Murthy, learned Senior Counsel appearing for the appellants submits that both the Courts below have committed error in not considering the fact that the title of Bujjamma was based on 38-E certificate, dated, 28.06.1975, issued in favour of the legal heirs of Samala Bakkaiah and consequent to cancellation of the 38-E certificate by the Joint Collector, by order, dated 20.01.1979, she could not have conveyed the valid title of the schedule property under Ex.B.1 sale deed, dated 04.03.1985, to the respondents. He further submits that both the Courts below committed error by giving categorical finding to the effect that the respondents perfected their title by way of adverse possession. Both the Courts below failed to consider the factum of cancellation of Section 38-E certificate issued in favour of Samala Bakkaiah and issuance of fresh 38-E certificate in the name of Samala Bakkaiah and half share in favour of his co-sharers. He further submits that the respondents herein purchased the suit schedule property from Bujjamma, who purchased the same from Samala Bakkaiah before issuance of fresh 38-E certificate. Therefore, the sale deed executed by

Smt.Bujjamma in favour of the respondents becomes void and the respondents do not derive any title over the suit schedule property.

32. Learned Senior Counsel further submits that the Courts below committed error, without framing an issue on adverse possession, held that the respondents perfected their rights by way of adverse possession over the suit schedule property and granted the relief of permanent Injunction in favour of the respondents. He further submits that the respondents, who came into possession under the colour of title of Smt.Bujjamma, whose title held to be not valid, cannot plead adverse possession against the appellants. There is no such pleading or evidence. As such, the finding of the Courts below to the effect that the respondents acquired title by way of adverse possession is perverse.

33. Learned Senior Counsel further submits that the findings of both the Courts below were based on misreading of material documentary evidence and mis-interpretation of the evidence. The Courts below erroneously came to the conclusion that the respondents had perfected their title by way of adverse possession

and decreed the suit. The said finding of the Courts below needs to be interfered with by this Court.

34. Sri D.Prakash Reddy, learned Senior Counsel appearing for the respondents, while supporting the concurrent findings of the Courts below, submits that the scope of interference by this Court in Second Appeal, particularly after amendment of Section 100 of C.P.C., is very limited and is confined only to cases, where a substantial question of law arises. He further submits that on re-appreciation of the entire evidence, the first appellate Court has rightly held that the suit schedule property was sold by Smt. Bujjamma, in favour of the respondents and she has got the suit schedule property and half share of the land in Sy.No.339 from the successors of Samala Bakkaiah. Therefore, she acquired the right and title over the schedule property.

35. Learned Senior Counsel further submits that though the trial Court had not specifically framed the issue relating to the adverse possession, but the respondents in their written statement pleaded that they have been in continuous possession over the suit schedule

property from 1985 onwards and that they have perfected their title by way of adverse possession. Both the Courts below on appreciation of the evidence, oral and documentary, categorically gave finding that since the date of purchase, the respondents are in possession of the suit schedule property and their possession is adverse to the appellants and they perfected their right and title over the same by way of adverse possession.

36. Both the learned senior counsel relied upon the precedents in support of their contentions.

37. Out of the three substantial questions of law identified by this Court, while admitting the second appeals, substantial question No.2 one relates to the procedural aspect, and substantial question Nos.1 and 3 touches upon the substantive aspect.

38. The first question to be considered is; whether this Court can interfere with the concurrent findings recorded by the Courts below in the present appeals. I deem it appropriate to deal with the important cases regarding the principles to be kept in mind, while deciding the present appeals.

The Apex Court in **State of Rajasthan v. Shiv Dayal**¹,

at para Nos.14 and 16 held as under:

14. True it is as has been laid down by this Court in several decisions that “concurrent finding of fact” is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”). However, this rule of law is subject to certain well-known exceptions mentioned infra.

16. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (See observation made by learned Judge, Vivian Bose, J., as his Lordship then was a Judge of the Nagpur High Court in *Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar* [*Rajeshwar Vishwanath Mamidwar v. Dashrath Narayan Chilwelkar*, 1942 SCC OnLine MP 26 : AIR 1943 Nag 117] para 43.)

In **Sebastiao Luis Fernandes (Dead) through LRs v. K.V.P.Shastri (Dead) through Lrs.**², the learned counsel for the defendants therein relied on the judgment of Hero Vinoth v. Sheshammal [(2006) 5 SCC 545)]. In the said judgment, the principles relating to Section 100 of C.P.C were summarized in para No.24, which are extracted as under:

¹ (2019) 8 Supreme Court Cases 637

² (2013) 15 Supreme Court Cases 161

The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where

(i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

39. It is the contention of the appellants that the original 38-E certificate, dated 28.06.1975, issued in favour of Samala Bakkaiah was cancelled and consequently, all the sale deeds executed by him, basing on the cancelled 38-E certificate, cannot convey any valid title to the purchasers. The respondents did not acquire any title under Ex.B.1 and without disclaiming their title under Ex.B.1 set-up adverse claim against the title of the appellants, who are the true owners.

40. In order to examine the said contention, at the outset, it is necessary to touch upon the material aspects of the evidence, both oral and documentary.

41. Originally, Samala Bakkaiah was the protected tenant of an extent of the land admeasuring Ac.45-39 guntas in Sy.Nos.332, 334 to 337, 339 and 340 of Turkayemjal Village. One Samala Narayana and others claiming to be the co-sharers questioned the 38-E certificate granted in favour of Samala Bakkaiah in appeal in proceedings No.B4/6974-76 before the Joint Collector claiming half share in the above land. The Joint Collector by order, dated 20.01.1979, allowed the said appeal by setting aside

the 38-E certificate, dated 28.06.1975, issued in favour of Samala Bakkaiah and remanded the matter to the R.D.O. for fresh enquiry. The R.D.O. by order, dated 16.09.1983, once again granted 38-E certificate in favour of Samala Bakkaiah, upon which, the co-sharers preferred an appeal before the Joint Collector, who confirmed the orders of the R.D.O. on 16.09.1983. Thereafter, the co-sharers preferred revisions in Civil Revision Petition Nos.2023 and 2024 of 1989 before this Court. This Court by order, dated 16.04.1992, allowed the revisions setting aside the orders of the Joint Collector and the R.D.O. holding that the petitioners therein along with Samala Bakkaiah were cultivating the said land as tenants and they were entitled to half share each and directed the R.D.O. to issue 38-E certificate to them to an extent of half share.

42. It is also relevant to note that, in the said revisions, this Court also held that “the evidence further shows that half of the disputed lands were purchased by R-4 and R-5 (Balwanth Reddy and Bujjamma) from Bakkaiah under registered sale deed. It must be noticed that the Collector has given a positive finding that R-4 and

R-5 were not protected tenants. It is settled proposition of law that if the land is offered for sale, it must be first given to the protected tenant. Any sale without consulting the protected tenant is void and not binding on the protected tenant. Therefore, the alleged sales made in favour of R-4 and R-5 will not take away the rights conferred on the protected tenants.”

43. Admittedly, the respondents purchased the suit schedule property from Smt.Bujjamma under Ex.B.1 and the said Bujjamma purchased the lands from Samala Bakkaiah under Ex.A.34 sale deed, dated 12.09.1977, on the basis of 38-E certificate granted to him. The 38-E certificate issued in favour of Samala Bakkaiah was set aside by virtue of the orders of this Court in CRP.Nos.2023 and 2024 of 1989. Consequently, the sale deed under Ex.A.34 executed by Samala Bakkaiah in favour of Smt.Bujjamma and the sale deed under Ex.B.1 executed by Smt.Bujjamma in favour of the respondents become null and void. As such, the respondents do not derive any valid title under Ex.B.1 document.

44. As per the orders of this Court in CRP.No.2023 and 2024 of 1989, dated 16.04.1992, fresh 38-E certificate was issued to the

Samala Bakkaiah in respect of his half share and to other co-sharers in respect of their half share. It is evident that the appellants have purchased the land admeasuring Ac.8-19 guntas including the suit schedule property from the legal heirs and the successors of Samala Bakkaiah under Ex.A.1 and Ex.A.22, sale deed, dated 21.07.1992. Ex.A.1 is the certified copy of sale deed, dated 21.07.1992 and Ex.A.22 is the original sale deed dated 21.07.1992. A perusal of Ex.A.1 and Ex.A.22 discloses that the mother of the appellants was not a party to the sale deed and the title of the appellants under Ex.A.22 sale deed was an independent and not derived from their mother Bujjamma. Both the Courts held that the claim of the appellants is based on the rights of Samala Bakkaiah and the claim of the respondents is also based on the rights of Samala Bakkaiah, as they purchased the suit schedule property from the vendee of Bakkaiah only. However, the sale deed executed by Samala Bakkaiah in favour of Smt.Bujjamma has become null and void, in view of cancellation of the 38-E certificate. Therefore, the respondents did not derive any valid title under Ex.B.1, which was executed by

Smt.Bujjamma. The Courts below have not considered the fact that Smt.Bujjamma, the vendor of the respondents has lost title over the property due to cancellation of 38-E certificate in favour of her vendor Samala Bakkaiah. The evidence on record would disclose that the Courts below have not properly appreciated, who has got the better title in respect of the suit schedule property. Apart from that, the Courts below by ignoring the evidence that the appellants have got valid and better title under Ex.A.22 in respect of the subject property, only basing on the entries in the revenue records and on improper appreciation of the evidence held that the appellants have no right and title over the suit schedule property. Hence, the findings of the Courts below are not correct and based on improper appreciation of the evidence, both oral and documentary.

45. The Courts below gave findings in favour of the respondents that their possession is adverse to the appellants and they perfected their title by adverse possession without any pleading and without framing an issue of adverse possession. It is settled principle of law to claim the title on the basis of adverse possession, there must be

proper pleadings, an issue framed in that regard and both parties must be given opportunity to lead evidence. In the instant case, the respondents, undisputedly, did not disclaim their title under Ex.B.1 and set-up adverse claim against the title of the appellants, who are the true owners for maintaining the claim of adverse possession.

46. Learned counsel for the appellants submits that no issue was framed relating to the adverse possession and without framing an issue, both the Courts below have held that the respondents perfected their title by adverse possession. He has placed reliance on the following precedents.

i) In **Vishwanatha Achari v. Kanakasabapathy**³

(2 supra), the Apex Court at para No.8 held as under:

8. A question was also formulated i.e. whether the lower appellate court is justified in dealing with issues other than those framed by the trial court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter the plaintiff's evidence. It has been clearly stated that there was no issue framed regarding the adverse possession. The lower appellate court was not justified in deciding issues which were not framed. The High Court seems to have taken a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when the specific stand of the appellant was that there was no issue framed relating to adverse possession and, therefore, the first

³ (2005) 6 Supreme Court Cases 56

appellate court should not have recorded any finding in that regard. The trial court had not specifically framed any issue relating to adverse possession. Under Section 107 CPC, the appellate court has power to frame issue other than those framed by the trial court. But here again the requirement is to refer them for trial. Consequentially, the defendant would have got opportunity to adduce evidence in that regard.

ii) In **Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai**

Harijan⁴ the Apex Court at para 23 and 30 held as under:

23. This Court had an occasion to examine the concept of adverse possession in *T. Anjanappa v. Somalingappa* [(2006) 7 SCC 570] . The Court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The Court further observed that : (SCC p. 577, para 20)

“20. ... The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.”

30. Reverting to the facts of this case, admittedly, the appellants at no stage had set up the case of adverse possession, there was no pleading to that effect, no issues were framed, but even then the trial court decreed the suit on the ground of adverse possession. The trial court judgment being erroneous and unsustainable was set aside by the first appellate court. Both the first appellate court and the High Court have categorically held that the appellant has miserably failed to establish title to the suit land, therefore, he is not entitled to the

⁴ (2009) 16 Supreme Court Cases 517

ownership. We endorse the findings of the first appellate court upheld by the High Court.

47. The Apex Court in **Karanataka Board of Wakf v. Government of India**⁵ at para No.11 held as under:

“ Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.”

The Apex Court further observed as under:

“ Plea of adverse possession is not a pure question of law, but a blended one of fact and law. Therefore, a person who claims adverse possession should show in the pleadings that the material issues like; on what date he came into possession of the property; what was the nature of possession; how long his possession has continued; and whether the factum of possession was known to the other party and his possession is open and undisturbed. It is for him to clear plead and establish all facts necessary to establish adverse possession. It is also settled law that the pleas on title and adverse possession is mutually inconsistent and the latter does not begin to operate until the former is renounced.”

48. Keeping in view, the principles on law of adverse possession laid down by the Apex Court, coming to the present case, the respondents claimed their title under Ex.B.1 sale deed. However, in the written statement filed by them, they have pleaded about the

⁵ (2004) 10 Supreme Court Cases 779

adverse possession as 'thus from 04-03-1985 the defendants are in possession and enjoyment of the said purchased land without any hindrance or any claim whatsoever for all these more than statutory period, thus, even otherwise also these defendants have perfected their title by way of adverse possession to the said Smt.Bujjamma and as well as to the Plaintiffs with their knowledge. Thus at this stage, knowingly they cannot claim any right over the land in question.'

Admittedly, the trial Court has not framed any issue relating to adverse possession. However at para No.34 of the judgment, the trial Court held that the respondents perfected their title by adverse possession. The appellate Court also upheld the said finding without there being any issue in that regard.

49. Undisputedly, the respondents came into possession over the suit schedule property under Ex.B.1 sale deed executed by Smt.Bujjamma, who acquired the title on the basis of 38-E certificate dated 28.06.1975 which came to be set aside by the Joint Collector by order, dated 20.01.1979, and the same was confirmed by this Court in CRP Nos.2023 and 2024 of 1989 by order,

dated 16.04.1983. Further, this Court specifically held that the sale deed executed in favour of Smt.Bujjamma would not be binding on the protected tenants and thereby, the respondents who came into possession under the title of Smt.Bujjamma, whose title was held to be not valid, consequently, the claim of adverse possession set-up against the appellants herein is also not proper and correct for the reason that the appellants title to the suit schedule property is independent to the title of Smt.Bujjamma.

50. Admittedly, there is no specific pleading that after disclaiming their title from Bujjamma, they have set-up hostile claim against the appellants title. It is evident that after issuance of the fresh 38-E certificate in favour of the legal representatives of Bakkaiah, the appellants purchased Ac.08-19 guntas under Ex.A.22 sale deed in the year 1992 including the suit schedule property. The appellants filed suit in the year 2005. It appears that both the Courts below by misreading the evidence held that the respondents have been in possession of the suit schedule property from 1985. The evidence on record discloses that except the pleadings in the written statement as stated above, there are no requisite and

adequate pleadings claiming the adverse possession in respect of the suit schedule property. There must be a pleading claiming adverse possession clearly assailing the hostile title in denial of title of true owner. The evidence available on record would disclose that after the appellants purchased the suit schedule property, on the question of entries in the revenue records, several proceedings were taken place before the revenue authorities and they were finally landed and settled in this Court in WP.No.9951 of 2004 filed by the appellants against the entries in the revenue records. This Court observed that they should wait till the disposal of these civil suits. However, ignoring the disputes about the entries in the revenue records and about the possession of the property, the Courts below gave finding to the effect that the respondents have perfected their title and right over the suit schedule property by way of adverse possession. Since the disputes between the appellants and the respondents have been continuing from the date of purchase of the suit schedule property i.e. from the year 1992, it cannot be said that the possession of respondents is in denial of the title of the appellants was peaceful and continuous.

51. Learned Senior counsel for the respondents vehemently contended that though the trial Court failed to frame an issue on adverse possession, basing on the evidence, it has rightly held that the title of the respondents is perfected by adverse possession. Learned counsel placed reliance on the judgment of this Court in **Mohd.Kareemuddin Khan (died) v. Syed Azam**⁶, wherein this Court at para Nos.7 and 9 held as under:

“.....It is for such reason that we intend to discuss the question of adverse possession first before going into other questions. Before such question is tackled, it is necessary first to consider the objection raised by Mr. Reddy as to the absence of issue in that regard and of specific determination on the point by the Courts below. It is true that though the respondents raised the plea in the written statement of having perfected title by adverse possession, no specific issue was struck in that regard. Though ordinarily we would have been persuaded, because of such fact, to frame such an issue and remand it to the trial Court for finding on the same, yet we find that despite the absence of the issue, both the parties have freely gone into evidence in the matter being alive up to the position and the trial Court having addressed itself to the question of possession and to have held the defendant having been in possession of the land since his purchase and the plaintiffs to have lost their title to the defendant since the date of purchase through the sale deeds. The position of law is well settled that where parties adduce evidence in respect of a matter for which an issue has not been struck and both sides are well aware of the dispute which relates to the issue, the defect of non-framing of the issue is cured and there will be no inherent lack of jurisdiction in the Court to go into that question and decide that aspect of the matter.”

⁶ 1997 (2) ALT 625 (D.B.)

9. The law has been so since more than half a century, in *Sheo Nath v. Tulsipat ram* (3) AIR 1925 OUDH 385, considering the effect of a sale through unregistered sale deed which was invalid, the Court held that the sale having taken place as a matter of fact, it certainly gave a starting point for the adverse possession in the character of the purchaser. Similar view was expressed in *Mahipal v. Sarjoo* (4) AIR 1926 OUDH 141, that if the possession is acquired by a person under an invalid title and continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years the title becomes an unassailable one.....”

52. On a consideration of the above decision, in the instant case, the appellants are claiming title on the basis of Ex.A.22 and executed by the legal representatives of Bakkaiah after conclusion of ownership disputes with co-sharers by this Court. The title of the respondents is based on Ex.B.1 executed by Smt.Bujjamma and pursuant to the orders of this Court and due to the cancellation of 38-E certificate, she could not have conveyed title under Ex.B.1 to the respondents over the suit schedule property. A party pleading the adverse possession must be to the effect of possession having open and hostile to the real owner. Therefore, the principles laid down in the above decision are not applicable to the facts and circumstances of the present case.

53. Learned Senior counsel for the respondents further submits that though no issue has been framed regarding adverse possession, but when the parties have gone to the trial with the knowledge about the adverse possession pleaded by the respondents, the finding on adverse possession cannot be discarded. Learned counsel placed has reliance on the judgment of **Nagubai Ammal v. B.Shama Rao**⁷, wherein the Apex Court at para No.12 held as under:

12. “The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto....”

54. Admittedly, no issue was framed regarding the adverse possession. However, there is finding of the Courts below on adverse possession without there being any issue. A perusal of the pleadings and evidence on record disclose that the parties went on trial with the knowledge that the adverse possession is an issue. Infact, it is settled principle of law the plea on title and adverse

⁷ AIR 1956 Supreme Court 593

possession are mutually inconsistent and later does not begin to operate until the former is renounced. Admittedly, the respondents have not disclaimed their title through Bujjamma and did not set up a hostile claim against the appellants on the plea of adverse possession. There are no such requisite pleadings or evidence to that effect. Hence, the above decision is also not rightly applicable to the facts of the present case.

55. In the present case, admittedly, the trial Court has not framed the issue on the adverse possession. The respondents purchased the suit schedule property from Bujjamma and she is not a party to the suit. The appellants are not the real owners prior to 1992 and since the date of purchase, the disputes are continuing between the parties about the title and possession of the suit schedule property. Hence, the finding of the trial Court and the appellate Court that the respondents acquired title by way of adverse possession is perverse. Therefore, the finding of the both the Courts below without framing an issue that the respondents have perfected their right and title by way of adverse possession is erroneous and unsustainable.

56. Coming to the substantial question of law about the application of Section 43 of the Transfer of Property Act, 1882 (for short “the Act”) to the present suit, it is necessary to refer to the decision of Apex Court in **the Jumma Masjid, Mercara v. Kodimaniandra Deviah**⁸, wherein the scope and applicability of Section 43 of the Act was summarised by the Apex Court, which is extracted as under:

Section 43 of the Transfer of Property Act runs as follows:-

"Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

Considering the scope of the section on its terms, it clearly applies whenever a person transfers property to which he has no title on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consideration. When these conditions are satisfied, the section enacts that if the transferor subsequently acquires the property, the transferee becomes entitled to it, if the transfer has not meantime been thrown up or cancelled and is subsisting."

⁸ 1962 AIR 847

57. Section 43 of the Act applies, if a person transfers property to which he has no title on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consideration.

58. In the present case, the respondents purchased the suit schedule property from Smt.Bujjamma, who had purchased the property from Samala Bakkaiah vide Ex.A.34 sale deed, on the basis of 38-E certificate granted to Samala Bakkaiah, which was subsequently cancelled. Therefore, the sale deed executed by Samala Bakkaiah under Ex.A.34 in favour of Smt.Bujjamma and also the sale deed under Ex.B.1 in favour of the respondents has become void. Since the respondents-predecessors-in-title have no valid title over the suit schedule property, they do not derive any valid title. The respondents are not entitled to claim the title in respect of the suit schedule property under Ex.B.1. The appellants have purchased the land to an extent of Ac.08-19 guntas under Ex.A.22 from the legal representatives of Samala Bakkaiah including the suit schedule property. Therefore, the provisions

under Section 43 of the Act would have no application to the facts and circumstances of the present case.

59. As per the settled principle of law in **State of Rajasthan's** case (1 supra) where the concurrent findings are recorded dehors the pleadings or based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law or the decision is one which no Judge acting judicially could reasonably have reached and if any one or more of these grounds are made out in an appropriate case on the basis of the pleadings and evidence, such grounds would constitute the substantial question of law and in such case, the concurrent findings can be interfered with in the second appeal. More precisely to conclude the findings on the substantial questions of law in the present case, this Court finds that the Courts below have mis-read the entire evidence on record and erroneously came to the conclusion that the respondents perfected their title by way of adverse possession without any proper pleadings and without issue being framed. The evidence available on record clearly establishes the title of the appellants over the suit schedule

property. Therefore, the findings of the Courts below that the possession of the respondents is adverse to the appellants and they perfected their rights on the ground of adverse possession are also based on improper appreciation of the evidence. As such, the said findings are perverse and are liable to be set aside.

60. For the foregoing reasons, S.A.Nos.411 and 412 of 2016 are allowed and the judgment and decrees passed by the lower appellate Court in A.S.Nos.240 and 241 of 2012, dated 31.12.2015 are hereby set aside. The respondents are granted three months time from the date of receipt of a copy of this judgment to vacate and handover the vacant peaceful possession of the plaint schedule property to the appellants. Failing compliance, the appellants-plaintiffs are at liberty to obtain possession of the property by following the procedure established by law. There shall be no order as to costs. Miscellaneous applications, if any, pending shall stand closed.

A.SANTHOSH REDDY, J

26.12.2022
Nvl