IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

SECOND APPEAL No.440 of 2000

Between:

T.Kamalanabha Reddy, S/o.(late) Narasa Reddy
and two others

… APPELLANTS

AND

G.Chandrasekhar Reddy, S/o.G.Krishna Reddy
and another

... RESPONDENTS

DATE OF JUDGMENT PRONOUNCED :04.10.2021

SUBMITTED FOR APPROVAL

HONOURABLE SRI JUSTICE M. VENKATA RAMANA

1. Whether Reporters of Local Newspapers may be allowed to see the order? Yes/No

2. Whether the copy of order may be marked to Law Reporters/Journals? Yes/No

3. Whether His Lordship wish to see the fair copy of the order? Yes/No

M.VENKATA RAMANA, J

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! Counsel for appellants : Mr. M.Ravindranath Reddy

^Counsel for Respondent : Mr.S.S.Bhatt

<GIST :

>HEAD NOTE:

? Cases referred:

1. 2004(5) SCC 762
2. 1987(55) SCC
3. 2006(3) SCC 686
4. AIR 2002 RAJ 386
5. 2008(4) SCC 594
6. (2002) 3 SCC 676
7. 1983(1) SCC 35
8. AIR 1996 SC 1140
9. 2008(1) ALD 573
10. 2012(3) ALD 160
11. AIR 1951 SC 120
12. AIR 1949 PC 32
13. (1947) AC 484, 486
14. (2001) 3 SCC 179
15. AIR 1992 KAR 209
16. 1997(3) ALD 444
17. 1991(3) ALT 14
18. AIR 1970 KERALA 310
19. (1892) AC 473, dt:30-07-1892
20. AIR 1967 SC 465
21. AIR 1951 SC 16
22. AIR 1952 PUNJ 387
23. AIR 1961 MYS 62
24. AIR 1963 SC 1165
25. (1972) 2 SCC 461
26. 1999(2) MPLJ 31
27. (1973) 2 SCC 60
28. (2011) 4 SCC 567
29. (2017) 3 SCC 702
30. AIR 1961 SC 808
31. 201(2) ALT 501 (DB)
32. 1998(2) MADRAS L.W.274
33. 2008(1) ALD 24 (SC)

34. 2021 SCC On line SC 307
35. 2005(1) ALD 260
36. LAWS (APH) 2021-7-3

M.VENKATA RAMANA, J

HON'BLE SRI JUSTICE M. VENKATA RAMANA

SECOND APPEAL No.440 of 2000

JUDGMENT:

The defendant in O.S.No.24 of 1999 on the file of the Court of the then Subordinate Judge (Senior Civil Judge), Srikalahasti, presented this second appeal. He died and appellants 2 and 3 being his legal representatives are brought on record, who are pursuing this appeal.

2. The respondents were the plaintiffs in the above suit. The second respondent died during pendency of this second appeal. The first respondent being her sole legal representative is already on record.

3. The respondents laid the suit for declaration of their right and title to the plaint schedule properties and to restrain the deceased first appellant by means of permanent injunction from in any way interfering with their peaceful possession and enjoyment of these properties.

4. The plaint schedule properties are agricultural lands located in Nagulapuram village of Chittoor district and described in the plaint schedule as follows:

Sl.No.	Survey No. Extent	Hectares	Wet or Dry
1.	S.No.521/2	3.51 cents	Dry
2.	S.No.571/1 0.52 |		
3.	A.No.571/3 0.81 |	1.33 cents	Wet
4.	S.No.571/2	1.12 cents	Wet
5.	S.No.558/	0.96 cents	Wet

They shall be referred to hereinafter as 'the suit lands'.

5. Sri T.A.Kuppireddy and Smt.Sanjeevamma are the parents of the second respondent. The suit lands and other extents of about Ac.60.00 wet and dry lands at Nagulapuram belonged to Sri T.A.Kuppi Reddy. He died in May 1956 testate, directing devolution of his estate by means of a registered Will dated 22.03.1956. His entire properties were divided into

three parts shown as schedules ‘A’, ‘B’ and ‘C’ in this registered Will. ‘A’ schedule property therein was bequeathed in favour of Smt.Sanjeevamma his wife with life interest and thereafter to confer upon the second respondent. ‘B’ schedule property therein was given away to the second respondent with absolute rights. Sri Kuppi Reddy retained ‘C’ schedule properties therein for life and thereafter to devolve in favour of his wife after whose lifetime, they were directed to be conferred to this second respondent. Sri Kuppi Reddy was apparently philanthropic and who has constructed a Chowltry and Bhajan Mandir in their village, in the sites belonged to him.

6. After the death of Sri Kuppi Reddy, Smt.Sanjeevamma and the second respondent began to enjoy these properties. Smt.Sanjeevamma had sold away some of them that included an extent of Ac.8.37 cents of wet land in favour of Sri R.Chengal Reddy under Ex.A16 sale deed dated 22.03.1982 for valuable consideration.

7. Items 1 to 3 of the suit lands belonged to Smt.Sanjeevamma and whereas items 4 and 5 belonged to the second respondent. Smt.Sanjeevamma suffered from paralysis in the year 1983, had treatment in Christian Medical College Hospital, Vellore in the state of Tamilnadu. She died on 29.08.1985.

8. The deceased first appellant was a resident of Nagulapuram. He claimed relationship to the second respondent, which is disputed by the respondents. He had agricultural lands neighbouring the suit lands. Initially, the suit was instituted by the first respondent alone and later on the second respondent was added as a party (second plaintiff) to it.

9. The case of the respondents is that Smt.Sanjeevamma had executed a settlement deed on 31.05.1985 (Ex.A2) in favour of the first respondent giving away items 1 to 3 of the suit lands, which he continued to be in

possession and enjoyment. Further contention of the respondents is that the second respondent settled items 4 and 5 of the suit lands under a registered deed of settlement (Ex.A3) dated 29.05.1985 in favour of the first respondent, which he continued to be in possession and enjoyment since then. Contending that the deceased first appellant in order to knock away the suit lands taking advantage of young age of the first respondent and since his father was employed as a load surveyor in A.P.S.E.B. at Chittoor, made attempts to trespass into the suit lands including on 10.05.1989. Therefore, the respondents contended that they were constrained to lay the suit for the reliefs, sought.

10. The deceased first appellant resisting the claim of the respondents in the plaint, filed a written statement denying the case set up by them.

11. The deceased first appellant specifically contended that items 1 to 3 of the suit lands were sold by Smt.Sanjeevamma to him for Rs.32,000/-, who had received Rs.30,000/- out of it, executed an agreement for sale on 22.11.1989 and that these lands were delivered to him in possession thereunder. Similarly, he contended that the second respondent had sold items 4 and 5 of the suit lands for a consideration of Rs.20,000/- to him on 25.06.1984 under an agreement for sale and delivered possession of these lands to him. Thus, he contended that in part performance of the contract under these two agreements for sale executed by his vendors, he was put in possession of these lands, which he continued to enjoy.

12. The deceased first appellant also contended that the version of the respondents of execution of settlement deed dated 31.05.1985 by Smt.Sanjeevamma in favour of the first respondent cannot be true, since she was unwell who suffered a stroke somewhere in the year 1983, who was not able to walk or talk till she died on 29.08.1985. He further denied that settlement deed in respect of items 4 and 5 allegedly executed by the

second respondent on 29.08.1985 in favour of the first respondent. He further contended that these settlement deeds were brought out to defeat his rights under the agreements for sale executed in his favour by them. He further contended that neither Smt.Sanjeevamma nor the second respondent had any right to execute these settlement deeds, which are fraudulent transactions and that these settlement deeds are fabricated. He also denied the relationship between both the respondents while asserting that he raised crops in the suit lands and denied the alleged attempts attributed to him to dispossess the respondents.

13. Basing on the pleadings, issues were settled for trial:

1. Whether the settlement deed dated 29.05.1985 is true, valid and binding on the defendant?
2. Whether the settlement deed dated 31.05.1985 is true, valid and binding on the defendant?
3. Whether the agreement of sale dated 22.11.1981 is true and valid?
4. Whether the agreement of sale dated 25.06.1984 is true and valid?
5. Whether the plaintiff has been in possession of the suit lands as on the date of suit?
6. Whether the plaintiff is entitled for the declaration of title as prayed for?
7. Whether the plaintiff is entitled for the permanent injunction as prayed for?
8. To what relief?

14. The parties went to trial. The first respondent examined himself as P.W.1 and the second respondent as P.W.2. P.W.3 was examined on their behalf, who is an attestor to Ex.A3 settlement deed. On behalf of the respondents, Ex.A1 to Ex.A17 are relied on. On behalf of the deceased first appellant at the trial, he examined himself as D.W.1, D.W.2 and D.W.3 being attestors to Ex.B1 agreement for sale, while D.W.3 and D.W.9 are attestors to Ex.B2 agreement for sale. Further reliance is placed on the

testimony of D.W.4 to D.W.8, D.W.10 and D.W.11, Ex.B3 to Ex.B25 on his behalf at the trial. Ex.X1 and Ex.X2 were marked through D.W.7.

15. On the material and evidence, learned trial Judge dismissed the suit. In the appeal A.S.No.42 of 1996 on the file of the Court of learned III Additional District Judge, Chittoor at Tirupathi, the decree and judgment of the trial Court were reversed and the suit was decreed granting relief as prayed, in favour of the respondents and against the deceased first appellant.

16. This second appeal is preferred in the above circumstances against the decree and judgment of the appellate Court by the deceased first appellant.

17. Heard Sri M.Ravindranath Reddy, learned counsel for the appellants and Sri S.S.Bhatt, learned counsel for the respondents.

18. This second appeal was admitted for the following substantial questions of law on 20.07.2000:

> "1. Whether a suit for declaration of title and possession is maintainable when the plaintiff is not in possession of the suit schedule property?
>
> 2. Whether the Appellate Court can decree the suit for declaration of title and for injunction after having found that the defendant is in possession of the suit schedule property?
>
> 3. Whether the suit filed by the plaintiff is hit by Section 34 of the Specific Relief Act?"

19. In the course of hearing in this appeal, Sri M.Ravindranath Reddy, learned counsel for the appellants requested for formulation of additional substantial question of law, which is as follows:

> "Whether the First Appellate Court can reverse the findings of the Trial Court which are based on conflicting evidence or otherwise, arrived at by the Presiding Judge of the Trial Court based on oral evidence recorded by the same Presiding Judge who authored the Judgment and thereby or in the said process Whether the First Appellate Court has carried out its functions correctly or not?"

20. Sri M.Ravindranath Reddy, learned counsel for the appellants contended that it is open for this Court to consider any other substantial question of law basing on the material if warranted in terms of Section 100 CPC.

21. Sri S.S.Bhatt, learned counsel for the respondents vehemently opposed to consider this additional substantial question of law contending that such question did not arise in terms of Section 100 CPC and in terms of Order XLII Rule 2 CPC.

22. However, to support his contention, Sri Ravindranath Reddy, learned counsel for the appellants relied on ***THIAGARAJAN AND OTHERS v.SRI VENUGOPALASWAMY B.KOIL AND OTHERS***[1] where in para 17, it is stated as under:

> "17. Sub-section (5) of Section 100 CPC says that the appeal shall be heard on the question so formulated and the respondent shall at the hearing of the appeal be allowed to argue that the case does not involve such a question. The proviso states that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, *for reasons to be recorded,* the appeal on any other substantial question of law not formulated by it if it is satisfied that the case involves such question."

[1] 2004(5) SCC 762

23. A reference is also made in this ruling to ***Kshitish Chandra Purkait Vs. Santosh Kumar Purkait***[2] and observed in Para-18 in that context as under:

> "----- A three-Judge Bench of this Court held (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has a duty to formulate the substantial question of law and to put the opposite party on notice and give fair and proper opportunity to meet the point; (d) in absence thereof, hearing of the second appeal would be illegal."

24. Further reliance is placed on behalf of the appellants in the same context on ***Ushabhai and Others Vs. Balakrishna and others***[3], where the above ruling Thiagarajan is referred to.

25. The appellants also relied on ***OM PRAKASH v. MANOHARLAL***[4] a judgment of High Court of Rajasthan in the same context, where a learned single Judge of High Court of Rajasthan observed that even at the time of arguments, such substantial question of law can be formulated, provided the respondents are given an opportunity to meet out such question.

26. This additional substantial question is now referred to, since strenuous contentions are advanced on behalf of both the parties basing on the material and evidence, only for the purpose of considering whether the determination of the same is required. Therefore, this additional substantial question of law is being considered now along with the substantial questions referred to above, which were formulated at the time of admission of the second appeal.

27. Having regard to nature of dispute and the scope of adjudication in this second appeal, all these substantial questions raised on behalf of the appellants are now considered together. Another reason in doing so, is the

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[2] 1987(55) SCC
[3] 2006(3) SCC 686
[4] AIR 2002 RAJ 386

nature of material and evidence on record, consideration of which necessarily overlaps, in deciding all these substantial questions.

28. It is settled proposition of law that in a suit for declaration of right and title, the burden is on the plaintiff to establish his claim to the properties in dispute affirmatively and in that process, he cannot rely on weakness or latches in the case of the defendant.

29. In ***ANATHULA SUDHAKAR v. P.BUTCHI REDDY***[5]relied on for the appellants, the general principles covering a suit of this nature including a suit for mere permanent injunction are stated in para 11 as under:

> "11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.
>
> 11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simplicitor will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.
>
> 11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simplicitor, without claiming the relief of possession.
>
> 11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

[5]2008(4) SCC 594

30. Smt.Sanjeevamma and her daughter, viz. the second respondent undisputedly and admittedly had right, title and interest to items 1 to 3/4 and 5 of the suit properties respectively. The nature of defence of the deceased first appellant at the trial basing on alleged purchase of these extents from them under Ex.B1 and Ex.B2 agreements for sale feeds this position. During their lifetime, they did have every right to divest themselves from these properties either creating third party interest or by any modes of transfer of property statutorily recognized, to convey right, title and interest in relation thereto by valid and legal transactions.

31. When such is the admitted situation, when since the right, title and interest to the suit lands remained with them during their lifetime, having regard to the status of the second respondent as co-plaintiff along with the first respondent, the requirement relating to burden of proof in that context in terms of Section 101 of Indian Evidence Act stands discharged particularly in the light of the defence of the appellants in this case.

32. Nonetheless, the first respondent should establish that by means of Ex.A2 and Ex.A3 settlement deeds dated 31.05.1985 and 29.05.1985 he is entitled to vested reminder in these lands while the settlers retained their life interest therein and after their life time, he is entitled to them.

33. The significant factor in this context is that the second respondent has supported these transactions.

34. Apart from the evidence of the second respondent as P.W.2, evidence of P.W.3, who is one of the attestors to Ex.A3 settlement deed is on record. He supported the version of the respondents in relation to Ex.A3 transaction. His deposition is to the effect that the second respondent had executed it in his presence and of Sri Ranganadhan, another attestor. It was registered in the office of Sub-registrar at

Chittoor. As seen from Ex.A3, signatures of P.W.3 and Sri Ranganadhan appear as attestors to it and it was scribed by one Sri Manohar Pillai.

35. In the presence of the evidence so let in on behalf of the respondents at the trial, this transaction under Ex.A3 is established. There is no reason to reject the testimony so let in on record on behalf of the respondents.

36. Ex.A2 settlement deed was also executed at Chittoor by Smt.Sanjeevamma. The second respondent attested it. It bears the left thumb impression of Smt.Sanjeevamma as is described therein.

37. Learned trial Judge considered that there is no proof offered in respect of Ex.A2 since none of the attestors or the scribe was examined at the trial. Similarly, disbelieving Ex.A3, learned trial Judge recorded the findings that there is no proof in relation to these two settlement deeds. One of the findings of learned trial Judge in this respect is necessity for execution of these documents and their registration, at Chittoor.

38. Another factor pointed out in their defence on behalf of the appellants is the serious ill-health from which Smt.Sanjeevamma was suffering at the time of Ex.B2 transaction on account of paralysis, while also referring to the treatment she had at Vellore. A reference is also made as to conduct of the second respondent in this context, who was staying at Chittoor in the house of one Sri G.Krishna Reddy, with whom it was contended at the trial that she had illicit intimacy.

39. Execution and registration of Ex.A2 and Ex.A3 at Chittoor cannot be a reason or factor by itself to discard these transactions. Sri G.Krishna Reddy-D.W.11 is the father of the first respondent. D.W.10 Smt.Govindamma is his wife and mother of the first respondent. The contention of the respondents is that the first respondent was adopted by the second respondent and apparently Smt.Sanjeevamma also encouraged

this relationship. There is however no valid proof of this adoption. But, material on record is proving that the second respondent fostered the first respondent and that he was calling her as his aunt. Sri G.Krishna Reddy was an employee of A.P.State Electricity Board. It is the contention of the appellants that he was then working at Nagulapuram when he and his family came to be associated with the second respondent. Association of Sri Krishna Reddy and his wife as well as his children and of the second respondent is an established fact from the evidence on record in this case. However, there is strong denial from the respondents and also from Sri Krishna Reddy as D.W.11 of this alleged relationship attributed in between them. The first respondent, who was with the second respondent and her mother from the time he was 6 or 7 years old, grew up, did his engineering course from Bangalore and by the date of trial, he was an engineer working at Bangalore.

40. The suit lands are at Nagulapuram. The documents in relation to these lands or any immovable properties at Nagulapuram could have been registered at the relevant place. They were however executed and registered at Chittoor. The appellants attributed that to avoid the deceased first appellant and to keep away these transactions from his notice, they were executed and registered at Chittoor at the instance of Sri G.Krishna Reddy.

41. When there is no bar for registration of these documents at Chittoor, the contention of the appellants in this context as such cannot stand. The parties had chosen to enter into these transactions at Chittoor. P.W.3 deposed that he had lands at Nagulapuram, though a resident of Pothambattu near Chittoor. He is as an attestor to Ex.A3 settlement deed.

42. P.W.2 – the second respondent deposed in respect of Ex.A2 settlement deed. On behalf of the appellants a suggestion was given to

P.W.2 viz. the second respondent in cross-examination that the thumb impressions of Smt.Sanjeevamma were taken forcibly on Ex.A2. This suggestion indicative of the defence of the appellants puts at rest any controversy as to the thumb impressions appearing on Ex.A2 settlement deed and to hold that they are of Smt.Sanjeevamma. This circumstance infact offers support and corroboration to the testimony of P.W.2 the second respondent, who deposed in respect of Ex.A2 settlement deed executed by her mother.

43. Regarding health condition of Smt.Sanjeevamma, evidence on record is from P.W.1 and P.W.2 and medical record in the nature of Ex.A52 to Ex.A58. However, specific defence of the appellants that she was in such a serious condition unable to move and speak, is not supported by any oral or documentary proof. The deceased first appellant clearly admitted in cross-examination for the respondents in this respect. However, an admission, which seriously dents this version of the appellants, is in the testimony of D.W.2 an attestor to Ex.B1 agreement. He stated in cross-examination that Smt.Sanjeevamma was hale and healthy about three months prior to her death and when she fell sick. Thus, this statement of D.W.2 is establishing that the health condition of Smt.Sanjeevamma was not such that she was not in a position to enter into Ex.A2 transaction. Though she used to sign in Tamil, because of paralysis she was suffering from, her left thumb impressions were taken on Ex.A2.

44. In such an event, when there is evidence on record from the respondents that she had executed Ex.A2 settlement deed, on her own conscious of such fact giving away the lands covered by it in favour of the second respondent, the defence so set up by the appellants should fail.

45. Thus, from the material on record, particularly in the backdrop of the defence set up by the appellants, the irresistible inference to draw is

that the settlement deeds under Ex.A2 and Ex.A3 are proved and that the first respondent was conferred the suit lands thereunder by the second respondent and her mother Smt.Sanjeevamma, subject to limitation stated therein. Thus, right, title and interest in respect of the suit lands were transferred to the first respondent.

46. The effect of Ex.B1 and Ex.B2 sale agreements needs consideration. Further to consider in this context is the defence of the appellants in terms of Section 53-A of Transfer of Property Act, since it is their contention that under these agreements for sale Smt.Sanjeevamma and the second respondent had put the deceased first appellant in possession of the suit lands in part performance of the contract thereunder.

47. In terms of Section 53-A of Transfer of Property Act, a person in possession of the property pursuant to the contract, in its part performance, is entitled for protection. (***SHRIMANT SHAMRAO SURYAVANSHI AND ANOTHER v. PRALHAD BHAIROBA SURYAVANSHI(DEAD) BY LRs. AND OTHERS[6])***. At the same time, it should be proved that the transferee should have performed or is willing to perform his part of contract.

48. Therefore, the burden was on the deceased first respondent to establish the contracts under Ex.B1 and Ex.B2 agreements for sale at the trial and further to establish that he was ready and willing to perform his part of contract, to claim this benefit under Section 53-A of the Transfer of Property Act.

49. Ex.B1 is an unregistered agreement for sale allegedly executed by Smt.Sanjeevamma in favour of the deceased first appellant on 22.11.1981. It is the contention of the appellants that she had agreed to sell away items 1 to 3 of the suit lands for a consideration of Rs.32,000/- thereunder

[6] (2002) 3 SCC 676

and had delivered possession of these lands to the deceased first appellant upon receiving Rs.30,000/-. Thus, their contention is that Rs.2,000/- was the balance payable under this agreement for sale to the vendor.

50. The reason for sale of these lands stated in Ex.B1 is to meet her family expenses and the medical expenses. The signature attributed to Smt.Sanjeevamma is in Tamil in it. D.W.2 and D.W.3 attested it and one Sri Manoharan is its scribe as per its contents.

51. Apart from the evidence of the deceased first appellant, there is evidence of these two attestors examined at the trial as D.W.2 and D.W.3. They deposed supporting this transaction to the effect that in their presence the vendor upon receiving the sale consideration had executed Ex.B1 agreement for sale.

52. Learned trial Judge accepted their testimony and thereby held that Ex.B1 was proved. However, learned first appellate Judge reversed this finding holding that the testimony of D.W.2 and D.W.3 along with that of the deceased first appellant as D.W.1 did not prove this transaction and thus disbelieved Ex.B1.

53. D.W.2 and D.W.3 admitted their relationship and of the deceased first appellant. It is one of the circumstances considered affirmatively in favour of the respondents by the learned appellate Judge. However, this relationship cannot have any bearing according to the contentions of the appellants when both these witnesses consistently deposed proving this transaction. In one of the judgments of Hon'ble Supreme Court relied on for the appellants in ***MADHUSUDAN DAS v. SMT.NARYANIBAI (deceased) BY LRs AND OTHERS***[7] in para-18, the effect of relationship of witnesses is stated thus:

[7] 1983(1) SCC 35

"…….

> We think the proper rule to be that when a witness holds a position of relationship favouring the party producing him or of possible prejudice against the contesting party, it is incumbent on the court to exercise appropriate caution when appraising his evidence and to examine its probative value with reference to the entire mosaic of facts appearing from the record. It is not open to the court to reject the evidence without anything more on the mere ground of relationship or favour or possible prejudice."……..

54. It is for the court to exercise caution when evaluating the evidence of the witnesses who are related to the party to the suit, to consider probative value of such testimony.

55. The contents of Ex.B1 referring to necessity for Smt.Sanjeevamma to sell away items 1 to 3 of the suit lands, offer a suspicious circumstance. Even according to the defence version, Smt.Sanjeevamma fell ill in the year 1983. It is not the case of either party that she was sick and was undergoing treatment during November 1981 or by the alleged date of Ex.B1, viz. 22.11.1981. The deceased first appellant as D.W.1 admitted clearly that she was hale and healthy by then. Though the material on record including Ex.A16 sale deed indicated that Smt.Sanjeevamma was given to selling away part of her properties, the reasons so assigned in Ex.B1 compelling to sell these items to the deceased first appellant are not convincing.

56. Learned appellate Judge considered the necessity of Smt.Sanjeevamma to sell away items 1 to 3 of the suit lands under Ex.B1 and for this purpose, effect of Ex.A17 promissory note was considered. Learned appellate Judge observed that the deceased first appellant admitted this promissory note. However, as seen from the record and deposition of D.W.1, there is no such admission.

57. There are circumstances surrounding acceptability of Ex.A17 promissory note in this case. Its contents make out that on 09.09.1979, the

deceased first appellant had borrowed Rs.3,000/- from Smt.Sanjeevamma agreeing to repay the same on demand. It also bears an endorsement of payment of Rs.10/- dated 09.08.1982. When it was introduced in evidence through P.W.1, at the trial, on behalf of the deceased first appellant, there was no cross-examination of this witness or P.W.2. Nor he offered any explanation as D.W.1 at the trial. Thus, Ex.A17 promissory note remained an uncontroverted and undisputed document. When the contents of Ex.A17 are that the deceased first appellant had borrowed Rs.3,000/- agreeing to repay the same with interest at 12% per annum, from Smt.Sanjeevamma, as rightly observed by learned appellate Judge, necessity for her to sell away items 1 to 3 of the suit lands under Ex.B1 agreement is questionable in addition to the reasons already stated above. Further, it gives raise to question the capacity of the first appellant to purchase these lands from her thereunder.

58. It appears that Smt.Sanjeevamma and the second respondent were given to lending money in the village, not only as seen from Ex.A17 promissory note but also Ex.X1 and Ex.X2, P.W.7 admitted these promissory notes in cross-examination at the trial. Though he is a witness to support the version of the deceased appellant at the trial, his grouse against the second respondent stood exposed on account of these money transaction he had with her. In that process, he proved that under Ex.X1 promissory note dated 27.01.1978 he had borrowed Rs.5,000/- from her on which he had made three payments. He also admitted that under Ex.X2, his wife borrowed Rs.8,200/- on 15.05.1985 from the second respondent and made only one payment thereon. It was suggested to him on behalf of the respondents that there were disputes between him on one hand and the second respondent on the other in respect of these transactions, since they did not repay the amounts due to her. Suggestions on behalf of the respondents were denied by this witness.

59. Nonetheless, these transactions made out that neither Smt.Sanjeevamma nor the second respondent were in such circumstances to sell away the suit lands under Ex.B1 and Ex.B2. This is another factor to question the claim of the appellants in this context.

60. Further, as rightly observed by the learned appellate Judge, the deceased first appellant did not take any steps to get this alleged sale confirmed either by issuing a notice or calling upon Smt.Sanjeevamma to execute a regular sale deed. The deceased first appellant as D.W.1 admitted this fact at the trial. Similarly, he admitted that he did not pay balance sale consideration of Rs.2000/- to her. He did not choose to file a suit for specific performance against Smt.Sanjeevamma. He denied the suggestion that he got the signature of Smt.Sanjeevamma forged in Ex.B1.

61. Thus, these admissions of the deceased first appellant are the circumstances that surround the alleged transaction under Ex.B1. They reflect upon nature of this transaction and making it unbelievable. If at all the deceased first appellant had entered into this contract under Ex.B1 with Smt.Sanjeevamma, he should have taken all necessary steps to ultimately get a sale deed in his favour and omission to do so in that direction is a definite factor affecting credibility of this transaction.

62. In this backdrop when the testimony of the propounder of Ex.B1 itself is giving raise to suspicion of its nature, D.W.2, D.W.3 and the deceased first appellant, being relations, will have significant effect in evaluating their testimony.

63. D.W.2 in his cross-examination could not give the names of another attestor to Ex.B1 viz D.W.3 and of it's scribe. When these parties are inter-related, it is hard to believe that D.W.2 would not have known association of D.W.3 with this transaction as an attestor.

64. D.W.3 could not state the extent covered by Ex.B1 agreement for sale and could not state the reason why Smt.Sanjeevamma had sold the lands under Ex.B1. He further stated that he had not seen the deceased first appellant paying consideration to Smt.Sanjeevamma and further deposed that he was informed by her of the same. According to him, the sale consideration was only Rs.30,000/- and could not state the total sale consideration under Ex.B1 at Rs.32,000/-. His deposition is silent as to payment of alleged balance sale consideration of Rs.2,000/- to her.

65. Considering the inconsistencies in the testimony of D.W.1 and D.W.2 relating to execution of Ex.B1, when they are in relation to vital aspects of execution, they make their testimony a suspect and unreliable.

66. The contention of the appellants is that under Ex.A2 agreement for sale on 25.06.1984, the deceased first appellant had purchased items 4 and 5 of the suit lands from the second respondent upon paying a consideration of Rs.20,000/-. Their further contention is that the second respondent had executed Ex.B2 therefor in favour of the deceased first appellant. Possession of these items was also delivered according to their contention under Ex.B2 and that the second respondent had received entire sale consideration thereunder.

67. Apart from the testimony of the deceased first appellant as D.W.1, there is evidence of D.W.4 and D.W.9, who are its attestors, on record to support this transaction. Their testimony is that Ex.B2 agreement bears the signature of the second respondent. The contents of Ex.B2 set out the necessity for the sale, to meet the family as well as the medical expenses. D.W.4 deposed that the recitals in Ex.B2 are not to the effect that the sale of these lands by the second respondent was for the purpose of discharging the debts incurred by her and to meet the medical expenses relating to her mother. He too admitted his relationship with the defendant stating that

Kannamma, who is the wife of the deceased first appellant is his brother's daughter. He denied the suggestion that Ex.B2 was concocted with his help and that of D.W.9 in collusion by the deceased first appellant. He also denied the suggestion that Ex.B2 did not contain the signature of the second respondent and also the transaction thereunder, when suggested for the respondents.

68. D.W.9 could not give the reason why the lands under Ex.B2 were sold away. He too denied the suggestions for the reasons that the second respondent did not sign in his presence in Ex.B2 and that Ex.B2 is fabricated, in collusion with D.W.4 and D.W.1.

69. The testimony of the deceased first appellant as D.W.1, D.W.2 to D.W.4 and D.W.9 is to the effect that the deceased first appellant was in possession of the suit lands for about 20 years prior to the institution of the suit. The deceased first appellant as D.W.1 also deposed that he was tenant cultivating these lands. As rightly considered by the learned appellate Judge, the written statement did not refer to these facts.

70. In respect of Ex.B2, no steps were taken by the deceased first appellant as in the case of Ex.B1, to enforce the contract thereunder. Neither he got issued a notice to the second respondent nor filed a suit for specific performance requiring execution of a regular sale deed in his favour basing on this contract. Even though entire sale consideration was allegedly paid to the second respondent, failure to obtain a regular sale deed from her pursuant to it is a factor of significance. As admitted by the deceased first appellant himself, there is no record to show that he was in possession of the suit lands for the last 20 years prior to the institution of the suit, nor is there any material to show that he was enjoying these lands pursuant to Ex.B1 and Ex.B2 sale agreements from the dates of their execution.

71. The appellants relied on Ex.B9 and Ex.B10 extracts of adangals for faslies 1397 and 1398 corresponding to the years 1987-88 and 1988-89 respectively. The pattadar for items 1 to 3 of the suit lands as per these adangals is Smt.Sanjeevamma and whereas in respect of items 4 and 5, the second respondent is shown as the pattadar. The name of the deceased first appellant is mentioned as the person in enjoyment of these lands in these two adangals. However, as rightly observed by the learned appellate Judge, it is not stated in these adangals that he is in enjoyment on account of purchase from the pattadars under the agreements for sale. Thus, the source by which he came into possession of these lands is not seen from these two adangals.

72. It is also to be noted that at the trial, neither the adangals of the year 1981 covering items 1 to 3 nor the one covering the year 1984 in relation to items 4 and 5 of the suit lands was produced to prove and probablise that the deceased first appellant was inducted into possession of these lands under these two agreements for sale. Thus, these two adangals and entries therein did not advance the contention of the appellants that the deceased first appellant was in possession and enjoyment of the suit lands under the contracts covered by Ex.B1 and Ex.B2 in part performance thereunder.

73. Ex.B23 is a true copy of adangal for fasli 1404 relating to the year 1994-95. It is a document, post institution of the suit. Possession of these lands is reflected in these adangals similarly as in Ex.B9 and Ex.B10. This document being only a true copy and not issued by the office of the concerned Tahsildar, cannot have any bearing, nor can be looked into, since it did not have authenticity nor evidentiary value.

74. The contention of the respondents is that during lifetime of Smt.Sanjeevamma, she and the second respondent were in possession and

enjoyment of these lands and that they were cultivating them either personally or through hired labour. P.W.2 viz. the second respondent also deposed that one Sri Boya Kannayaram was assisting her in cultivation. He was not examined at the trial on behalf of the respondents, which fact was considered by the learned trial Judge.

75. Both parties relied on cist receipts in support of their respective contentions. Ex.A4 to Ex.A12 and Ex.A9 to Ex.A24 are the LR receipts in the name of Smt.Sanjeevamma relating to patta No.41 for items 1 to 3. Ex.P25 to Ex>P47 are the cist receipts relating to patta No.124 covering items 3 and 4 of the suit lands in the name of the second respondent. Ex.P48 is the cist receipt in the name of the first respondent. Ex.A12 to Ex.A17 are also the cist receipts, but cist was paid thereunder after the institution of the suit.

76. On behalf of the deceased appellant at the trial the cist receipts were produced being Ex.B3 to Ex.B7. Ex.B3 to Ex.B5 are in the name of the second respondent, which the deceased first appellant admitted as D.W.1. He paid the cist on 24.04.1989 for faslies 1396, 1398 under Ex.B6 and also for the same faslies under Ex.B7. They stand in the name of the deceased first appellant. Ex.B11 to Ex.B16, Ex.B21, Ex.B22 were issued post institution of the suit in the name of the deceased first appellant. Apparently, no mutation was carried out in respect of the patta of these lands in his favour and it stood in the names of Smt.Sanjeevamma and the second respondent, as the case may be.

77. Learned appellate Judge compared the signature in Ex.B1 attributed to Smt.Sanjeevamma and the one in Ex.A16 sale deed and recorded the finding that these signatures did not tally, even to the naked eye. Though it is open for a Court to compare signatures in terms of Section 73 of Indian Evidence Act, it is quite a hazardous course. Unless the Judge concerned is

proficient in the science of comparison of signatures and has ability, usually this exercise shall not be resorted to. Necessary caution has to be observed in this context and the Judge concerned cannot don the role of an expert. Hon'ble Supreme Court in ***O.BHARATHAN v. K.SUDHAKARAN***[8] cautioned in undertaking this exercise in para – 20 as follows, while referring to ***State (Delhi Admn.) Vs. Pali Ram (AIR 1979 SC 14)***:

> "20. ……. Though it is the province of the expert to act as judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by this Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to be ultimately rendered. To quote it has been held in State (Delhi Admn.) Vs. Pali Ram (supra):
>
> > *"The matter can be viewed from another angle also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identify of a handwriting which forms the sheet- anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other: and the prudent course is to obtain the opinion and assistance of an expert."*

78. On behalf of the appellants, reference is made to ***MD.TAJUDDIN v. MD.ABDUL RAHAMAN AND OTHERS***[9] and ***GOWRI SHANKAR v. J.L.BABU AND ANOTHER***[10] in respect of the Court undertaking this exercise of comparison of signatures under Section 73 of Evidence Act. Nonetheless,

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[8] AIR 1996 SC 1140
[9] 2008(1) ALD 573
[10] 2012(3) ALD 160

the caution required to observe as per the ruling of the Hon'ble Supreme Court referred to above shall be the watchward.

79. All these circumstances carefully considered and analysed by the learned appellate Judge in its judgment were not addressed by the learned trial Judge. Basing on the oral evidence of the attestors and that of the deceased first appellant, learned trial Judge recorded findings accepting Ex.B1 and Ex.B2 agreements for sale and held that Smt.Sanjeevamma had sold items 1 to 3 and the second respondent had sold items 4 and 5 of the suit lands to the deceased first appellant. Learned trial Judge further held that Ex.A2 and Ex.A3 settlement deeds were entered into only to get over the agreements for sale under Ex.B1 and Ex.B2 while further holding that those settlement deeds were not proved at the trial.

80. In respect of Ex.B1 and Ex.B2, learned trial Judge did not even consider the circumstances that are staring from the record, from the clear admissions of the deceased first appellant as D.W.1 and the documentary evidence adduced by both the parties, leading to the extent of rejecting the defence on the ground of highly doubtful authenticity. In such circumstances, the learned appellate Judge, when considering a regular appeal under Section 96 CPC, empowered in terms of Section 107 CPC, is entitled to reappraise the evidence on record and is at liberty to draw his own independent conclusions and inferences. The power of the first appellate Court in this context is unbridled and is not circumscribed by any limitations.

81. However, Sri M.Ravindranath Reddy, learned counsel for the appellants strenuously contended that the attempt of the learned appellate Judge is not correct and particularly when the learned trial Judge had an opportunity of observing the demeanour of the witnesses, who deposed before him. Hence, it is contended that the observations

recorded by the learned trial Judge bear due weight and consideration. Sri M.Ravindranath Reddy, learned counsel for the appellants had undertaken a strenuous exercise of bringing to the notice of the details of recording evidence at the trial by the same presiding officer, who delivered the judgment in this matter pointing out that the same presiding officer had recorded almost entire depositions of the witnesses and conducted entire trial.

82. In support of his contention, Sri M.Ravindranath Reddy, learned counsel for the appellants relied on the observations of Hon'ble Supreme Court in ***SARJU PERSHAD v. RAJA JWALESHWARI PRATAP NARAIN SINGH AND OTHERS***[11]. In para-7 of this ruling it is stated:

> "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is--and it is nothing more than a rule of practice --that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact(1). The gist of the numerous decisions on this subject was clearly summed up by Viscount Simon in Watt v. Thomas(2), and his observations were adopted and reproduced in extenso by the Judicial Committee in a very recent appeal from the Madras High Court(3). The observations are as follows:
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> "But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where

[11] AIR 1951 SC 120

credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

83. In the same context, learned counsel for the appellants also relied on ***SARA VEERASWAMI ALIAS SARA VEERRAJU v. TALLURI NARAYYA(DECEASED) AND OTHERS***[12] in which ruling, the observations in ***WATT or THOMAS v. THOMAS***[13] are relied on.

84. ***SANTOSH HAZARI v. PURUSHOTTAM TIWARI (DECEASED) BY LRs.***[14] is also relied on in the same context while also referring to the parameters under which a second appeal in terms of Section 100 CPC be considered vis-à-vis the judgment of the first appellate Court.

85. The relevant observations in this ruling in para-15 are as under:

"……

While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC

114). The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in

[12] AIR 1949 PC 32
[13] (1947) AC 484, 486
[14] (2001) 3 SCC 179

issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact.(See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh & Ors. (AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one.

86. It is also desirable to extract the following observations relating to what is substantial question of law, in para – 14 of this ruling:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the

> need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

87. ***MADHUSUDAN DAS v. SMT.NARYANIBAI (deceased) BY LRs AND OTHERS,*** (already referred supra); ***SANGAWWA v. SHANKARAPPA***[15] (a case for grant of maintenance) and ***CHOTA LAL v. BHOLARAM AGARWAL AND OTHERS***[16]**,** are also relied on by learned counsel for the appellant in this respect.

88. It is true that the findings of the trial Court in relation to and basing on the oral evidence bear significant effect in evaluating such evidence on record on reappraisal by the first appellate Court. The rulings relied on by Sri M.Ravindranath Reddy, learned counsel for the appellants are not to the effect that such observations of the trial Court cannot in any eventuality be interfered with. Pertinent to bear in this context the observations of Hon'ble Supreme Court in ***SANTOSH HAZARI,*** referred to supra.

89. Reasons stated above accepting the findings recorded by the learned appellate Judge rejecting those recorded by the trial Judge, explain the present situation. When learned trial Judge ignored crucial admissions of the party to the suit, viz. the deceased first appellant(defendant) which have profound effect on the entire defence, going to the root of the matter, learned appellate Judge was right in rejecting the findings of the trial Court, offering his own reasons. Such exercise was undertaken in the interests of justice, which a first appellate Court is ordained under Section 107 CPC. Appraisal of evidence thus considered by the learned trial Judge suffered from serious irregularity, in pretentious ignorance of the material on record.

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[15] AIR 1992 KAR 209
[16] 1997(3) ALD 444

90. Therefore, it is not correct for the appellants to contend that the approach of the learned appellate Judge is against law and the findings recorded by the trial Court should be preferred. Sitting in second appeal, this Court is entitled to, in given facts and circumstances to consider this situation. When the approach of the learned appellate Judge is just and appropriate and is in accordance with law basing on appropriate evaluation of the material on record, it should be supported.

91. In the backdrop of rejection of the defence of the appellants, basing on Ex.B1 and Ex.B2, it is manifest that it is not open for them to rely on Section 53-A of Transfer of Property Act contending that the suit lands are held by them in part performance of the contract. Nor there is proof that the deceased first appellant was always ready and willing to perform his alleged part of contract under these agreements. An agreement for sale cannot confer or create an interest or title or right to the property in terms of Section 54 of the Transfer of Property Act. On such basis, the appellants cannot contend that the alleged possession of these lands should be protected while questioning the ultimate relief granted by the appellate Court against them. Possibility of Ex.B1 and Ex.B2 as held by the learned appellate Judge being fabrications brought out at the instance of the deceased first appellant is not ruled out. Possession if any of the suit lands claimed by the deceased appellant at the trial, as rightly observed by the learned appellate Judge is that of a trespasser and an encroacher.

92. Law does not recognize possession of a trespasser. It is a wrongful act. Very intention of a trespasser to gain entry into property is tainted with criminality and to remain in that property without any manner of right or title is only in furtherance of such criminal intention. It is no possession in the eye of law. Thus, a trespasser is not entitled for consideration either in terms of equity or law. Learned appellate Judge relied on

KANAKAPPAGARI CHINNABHA REDDY[17]**,** where it was observed that a trespasser in possession of the property is not entitled for an equitable relief of injunction.

93. The respondents clearly stated in their plaint that there were attempts of the deceased appellant to highhandedly enter and trespass into the suit lands on 10.05.1989 and attempted to dispossess the first respondent. This apprehension, in proved facts and circumstances in this case became a reality. The deceased appellant could not have remained on the suit lands nor his LRs now on record as appellants can claim on such basis that they have been in possession and enjoyment of these lands.

94. ***THIRUVANCHAN SANKARAN v. KUNJIPILLAI AMMA GOURI AMMA AND OTHERS***[18] is relied on for the appellants with reference to application of Section 114 of Evidence Act. Possession follows title is the principle considered in the above ruling. Sri S.S.Bhatt, learned counsel for the respondents contended that continuity of the things must be presumed under Section 114 of Indian Evidence Act and in the given facts and circumstances of this case, possession of the suit lands to rest with the respondents should be accepted. Interim injunction granted by the trial Court in I.A.No.159 of 1989 referred to in para – 17 of the judgment of the trial Court is brought to the notice of this Court by learned counsel for the respondents, while supporting the findings of the learned appellate Judge in granting relief of permanent injunction.

95. The material on record is making out that Smt.Sanjeevamma and the second respondent were in possession and enjoyment of the suit lands to the extent they were entitled to. It passed on to the first respondent by virtue of Ex.A2 and Ex.A3. Failure of the appellants to establish of the case set up at the trial, of the deceased first appellant being in possession and enjoyment of

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[17] 1991 (3) ALT 14
[18] AIR 1970 KERALA 310

these lands, well before institution of the suit is a factor of significance in this context. The deceased first appellant without there being a basis in his written statement, apparently tried to clothe his alleged entry into the suit lands as a lawful exercise of his right claiming at one stage as a tenant in possession at the trial and in terms of Ex.B1 and Ex.B2 agreements for sale. Such attempt of the appellant is to justify his alleged entry and illegal continuance of such trespass into the suit lands. These factors were rightly considered by the learned appellate Judge while recording right findings.

96. Sri M.Ravindranath Reddy, learned counsel for the appellants on this score strenuously contended that concurrent findings recorded by both the Courts below relating to possession of the suit lands in favour of the appellants cannot be interfered with in this second appeal. It should be borne in mind that the finding recorded by the learned trial Judge was reversed in the first appeal and that the possession if any, of the deceased first appellant was held being of a trespasser. Therefore, the finding of the learned appellate Judge was not in tandem with that of the trial Court. The character and nature of alleged possession claimed by the appellants of the suit lands stood distinctly different than what was held by the learned trial Judge. Therefore, it cannot be stated that there are concurrent and consistent findings in favour of the appellants recorded by both the Courts below upholding the possession of the suit lands in favour of the appellants.

97. Sri M.Ravindranath Reddy, learned counsel further contended that the suit as laid for declaration, in the absence of proof of possession of the suit lands is not maintainable and Section 34 of Specific Relief Act itself is a bar to entertain the suit.

98. Strenuous contentions are advanced which apparently are basing on serious research into the subject by Sri M.Ravindranath Reddy, learned

counsel for the appellants. Further contentions are advanced that maintainability of the suit is a legal issue and hence the appellants are entitled to raise it for the first time in the second appeal, since it is a question purely based on law.

99. Sri S.S.Bhatt, learned counsel for the respondents seriously opposed to permit to raise this plea for the first time in the second appeal, particularly, having regard to the scope of adjudication at this stage, in terms of Section 100 CPC.

100. In effect, the question raised by Sri M.Ravindranath Reddy, learned counsel for the appellants is in respect of frame of the suit in terms of Order II CPC. Rule 1 of Order II CPC states that every suit shall as far as practicable be framed so as to afford ground for final decision upon subjects in dispute and to prevent further litigation concerning them. Frame of suit is thus explained in this Rule 1 of Order II CPC. Rule 2(1) of Order II CPC requires every suit to include whole of the claim, if the plaintiff is entitled to make in respect of the cause of action.

101. As seen from the plaint, the respondents have set out their case against the deceased appellant, stating that there is a cloud cast on their right, title and interest to the suit lands. They requested the declaratory relief and also specifically alleging attempts of the deceased first appellant to trespass into these lands, they requested consequential permanent injunction restraining him from doing so. Therefore, the plea or case set up by them is in accordance with Order II CPC in framing the suit and in that process, they invoked application of Section 34 of Specific Relief Act. In such circumstances, the deceased first appellant as the defendant should specifically raise all such pleas as are open to him in his defence, specifically pleading any new facts and raising specific denials of the allegations or facts in the plaint in terms of Order VIII Rules 2 and 5 CPC.

102. The deceased first appellant in his written statement came up with his specific case in defence pleading such facts and the denial of the allegations in the plaint. The written statement did not set out questioning frame of the suit and the nature of the relief sought by the respondents against him. Nor is there a specific plea in the written statement that the suit claim is not in accordance with and barred by Section 34 of the Specific Relief Act.

103. Therefore, it is a new plea, which is sought to be raised in this second appeal on behalf of the appellants. Any plea which is not based on pleadings cannot be raised for the first time in the second appeal. A case, which was not set up either in the trial Court or in the first appellate Court cannot be permitted to be raised for the first time in the second appeal. However, Sri M.Ravindranath Reddy, learned counsel for the appellants relied on a number of rulings including of Queens Bench judgment in ***CONNECTICUT FIRE INSURANCE COMPANY v. KAVANAGH***[19]. The statement of law therein in page-6 is as under:

> "……When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea……."

104. Further reliance is placed in the same context in ***RAGHUBANS NARAIN SINGH v. UTTAR PRADESH GOVERNMENT THROUGH COLLECTOR***

[19] 1982 AC 473

OF BIJNOR[20]**,** where the above ruling of the Privy Council was considered in approval.

105. ***YESWANT DEORAO DESHMUKH v. WALCHAND RAMCHAND KOTHARI***[21] is also relied on for the appellants, where the same ruling of the Privy Council was considered in para-16. ***KISHORI LAL v.BEG RAJ AND OTHERS***[22] is relied on for the appellants referring to application of Section 42 of the Specific Relief Act, 1877 (Section 34 of Specific Relief Act of 1963) to the effect that an objection relating to maintainability of the suit could be raised at any stage even for the first time in the second appeal. ***KASIPATHI v. E.SUBBA RAO PAWER***[23] is also relied on for the appellants for the same purpose. However, in this ruling, a plea sought to be raised for the first time in the second appeal in respect of nature of improper registration of a sale deed was not permitted.

106. ***BANARSI DAS AND ANOTHER v. KANSHI RAM AND OTHERS***[24] is also relied on by the learned counsel for the appellants in the same context, where the question of limitation being of mixed fact and law, was held being impermissible to be raised for the first time in the second appeal before the High Court.

107. Similarly, ***JAGDISH CHANDER CHATTERJEE AND OTHERS v. SHRI SRI KISHAN AND ANOTHER***[25] is also relied on by the learned counsel for the appellants, where raising a new point permitting both parties to address thereon by the High Court in the second appeal relating to contractual tenancy and its due termination by means of a notice was upheld.

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[20] AIR 1967 SC 465
[21] AIR 1951 SC 16
[22] AIR 1952 PUNJ 387
[23] AIR 1961 MYS 62
[24] AIR 1963 SC 1165
[25] (1972) 2 SCC 461

108. ***BALKRISHAN AND ANOTHER v. MOHSIN BHAI (DECEASED) THROUGH LRs AND OTHERS***[26] is also relied on by the learned counsel for the appellants, where one of the learned single Judges of Madhya Pradesh High Court, permitted a pure question of law patent on record based on admitted facts to raise, for the first time in second appeal.

109. In respect of bar in terms of Section 34 of Specific Relief Act and its application ***RAM SARAN AND ANOTHER v. SMT.GANGA DEVI***[27] is relied on. In para-4 of this ruling, it is stated thus, considering the facts:

> "We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable."

110. This ruling was followed in ***GIAN KAUR v. RAGHUBIR SINGH***[28]. In given fact situation basing on the relief sought in the plaint, in paras 10 to 13 of this ruling, it is stated:

> "10. It appears, prima facie, that apart from making a prayer for declaration there is also a consequential prayer for a decree for permanent injunction restraining the defendant from alienating the suit property or interfering in peaceful possession of plaintiff therein. There is an alternative prayer for decree for possession also.
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> 11. From the prayers made in the plaint, it is clear that the consequential relief of permanent injunction was prayed and before the Trial Court the fourth issue relating to the maintainability of the suit in the present form was raised but the same was not pressed by the defendant nor was any such question raised before the First Appellate Court.
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> 12. In that view of the matter, the finding of the High Court that the suit is merely for declaration and is not maintainable under Section 34 of the Specific Relief Act cannot be sustained. The

[26] 1999(2) MPLJ 31
[27] (1973) 2 SCC 60
[28] (2011) 4 SCC 567

> High Court's reliance on a decision of this Court in Ram Saran (supra) is also not proper. From the decision in Ram Saran (supra), it is clear that in that suit the plaintiff merely claimed a declaration that they are the owners of the property and they have not sought for possession of the said properties.
>
> 13. For the reasons aforesaid, this Court holds that the suit is not hit by Section 34 of the Specific Relief Act. The decision in Ram Saran (supra) was rendered on totally different facts and cannot be applied to the present case. We are, therefore, constrained to observe that the High Court reversed the concurrent finding of the Courts below on an erroneous appreciation of the admitted facts of the case and also the legal question relating to Section 34 of the Specific Relief Act."

111. Reliance is also placed by learned counsel for the appellants in this respect on ***EXECUTIVE OFFICER, ARULMIGU CHOKKANATHA SWAMY KOIL TRUST, VIRUDHUNAGAR v. CHANDRAN AND OTHERS***[29]. Having regard to the fact situation, in para 35 of this ruling, it is stated thus:

> "The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable."……

112. ***C.MOHAMMED YUNUS v. SYED UNISSA AND OTHERS***[30] is also relied on for the appellants. Holding that a suit for declaration with consequential relief for injunction is not a suit for declaration simplicitor and that it is a suit for declaration and further relief, it is stated that further relief claimed in a particular case consequential upon a declaration is always dependant on facts and circumstances of each case.

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[29] (2017) 3 SCC 702
[30] AIR 1961 SC 808

113. In ***SURANENI LAKSHMI v. B.VENKATA DURGA RAO AND ANOTHER***[31], a Division Bench of this Court when at Hyderabad, considered the effect of Sections 34 and 41 of Specific Relief Act. It is observed in this ruling that the declaratory relief sought under Section 34 is not exhaustive and there will be several aspects to be considered against several parties to the suit, when declaration is sought.

114. ***MUNISAMY v. MANIMUTHU ACHARI***[32] is also relied on for the appellants. However in this ruling, on facts considering that consequential relief was sought along with declaratory relief in accordance with Section 34 of Specific Relief Act, the contention that a mere declaration of title under Section 34 of this Act is barred, was rejected.

115. A suit simplicitor for declaration in terms of Proviso to Section 34 of Specific Relief Act when in given facts and circumstances, without consequential relief though required, is not maintainable. What the court does in terms of Section 34 is declaring a pre-existing legal character or right to a property in given facts and circumstances against the one denying or interested to deny title to such character or right. It is purely a discretionary relief. No new right or legal character is created in terms of Section 34 of Specific Relief Act. Proviso to Section 34 of Specific Relief Act directs that the Court shall not make such declaration when further relief is required to be sought and when the plaintiff omits to do so.

116. The suit was laid properly in perfect frame, meeting the requirements of Section 34 of Specific Relief Act. Therefore, the bar under Section 34 of Specific Relief Act did not exist. Moreover, this application of Section 34 of Specific Relief Act, is a mixed question of fact and law. It is not a pure question of law.

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[31] 2011(2) ALT 501 (DB)
[32] 1998(2) MADRAS L.W.274

117. In ***SANTOSH HAZARI*****,** the effect of new point raised for the first time before the High Court, being a substantial question of law or not, is considered in para 15, referred to above.

118. ***SANTOSH HAZARI*** is referred to in ***BOODIREDDY CHANDRAIAH AND ANOTHER v. ARIGELA LAKSHMI AND ANOTHER***[33]**,** summarizing the principles relating to Section 100 CPC. In para-12 further observations in para-13 are also relevant:

> "12. The principles relating to Section 100 CPC, relevant for this case, may be summerised 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.
>
> 13. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the

[33] 2008(1) ALD 24(SC)

> 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.

119. In ***MALLANAGUODA AND OTHERS v. NINGANAGOUDA AND OTHERS***[34] the jurisdiction to interfere with the judgment of the first appellate Court under Section 100 CPC by the High Court is stated in para-10 as under:

> "10. The First Appellate Court is the final Court on facts. It has been repeatedly held by this Court that the judgment of the First Appellate Court should not be interfered with by the High Court in exercise of its jurisdiction under Section 100 CPC, unless there is a substantial question of law."

120. Learned counsel for the appellants also relied on ***B.PUSHPAMMA v. JOINT COLLECTOR, RANGA REDDY***[35], and ***KASU RAYAPA REDDY v. STATE OF A.P.***[36]. However, these two rulings relate to effect of provisions of A.P. Rights in Land and Pattadar Passbook Act, 1971 and they are not direct on point.

121. Parameters relating to Section 100 CPC laid down in the above rulings should be borne in mind. In the light of the material on record and upon earnest consideration now, it is manifest that the substantial questions of law including new question raised in the course of hearing in the second appeal on behalf of the appellants did not arise or remain for consideration. This Court is satisfied that this case did not involve any substantial questions of law for determination. Therefore, no interference with the decree and judgment of the learned appellate Judge is required. Consequently, the second appeal has to be dismissed.

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[34] 2021 SCC On line SC 307
[35] 2005(1) ALD 260
[36] LAWS(APH) 2021-7-3

122. In the result, the second appeal is dismissed confirming the decree and judgment of the lower appellate Court. Parties shall bear their own costs in this second appeal. Interim orders if any, stand vacated. All pending petitions, stand closed.

M. VENKATA RAMANA, J

Dt: 04.10.2021
Note:
L.R.Copy to be marked.
B/o.Rns

HON'BLE SRI JUSTICE M. VENKATA RAMANA

SECOND APPEAL No.440 OF 2000

Date:04.10.2021

Rns