

(2009) 10 AP CK 0051

In the Andhra Pradesh High Court

Case No : A.S. No. 1412 of 1997 and Cross-Objections (SR) No. 963 of 1998

Briigopal Lumani and Another

APPELLANT

Vs

Mothey Anja Ratna Rajkumar (Died) and Others

RESPONDENT

Date of Decision : 23-10-2009

Acts Referred:

Andhra Pradesh Court Fees and Suits Valuation Act, 1956 — Section 11, 11(1), 11(2), 11(3)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 149
Constitution of India, 1950 — Article 14, 16
Evidence Act, 1872 — Section 115
Limitation Act, 1963 — Article 64, 65, 3
Penal Code, 1860 (IPC) — Section 341, 447
Transfer of Property Act, 1882 — Section 10, 51, 53A, 54

Citation : (2010) 3 ALT 785

Hon'ble Judges : G. Bhavani Prasad, J

Bench : Single Bench

Advocate : N.V. Suryanarayana Murthy, for A. Savitha, in Appeal, for the Appellant; A. Ramalingeswara Rao in Cross Objections, N.V. Suryanarayana Murthy, for A. Savitha in Cross Objections and A. Ramalingeswara Rao in Appeal, for the Respondent

Final Decision : Dismissed

Judgement

G. Bhavani Prasad, J.—An appeal against the judgment and decree in O.S. No. 133 of 1988 on the file of Principal Subordinate Judge's Court, Eluru, dated 04-09-1997 by the unsuccessful defendants therein.

2. The parties are referred to herein as they are arrayed in the suit.

3. The suit was filed by the deceased 1st plaintiff with plaintiffs 2 to 7 coming on record as his legal representatives on his death during the pendency of the sit, for recovery of possession of the plaint schedule suit of 4040 square yards in Eluru town along with removal of structures raised by the defendants, Rs. 72,000/- towards past mesne profits, future profits and costs.

4. The 1st defendant was stated to be having a site to the West of the suit site owned by the 1st plaintiff, separated by a joint path way. The 1st defendant's site of 6733 square yards was purchased under a registered sale deed dated 29-06-1974 and defendants 1 and 4 represented by the 3rd defendant offered to purchase the suit site, but the 1st plaintiff expressed his inability due to prohibition against alienation of vacant urban lands, but promised to consider in case the move was through the land acquisition authorities. The 3rd defendant again approached the 1st plaintiff for permission to close his site on the North by raising a compound wall and to repair the existing compound wall on the East of the 1st plaintiff's site and to dig a bore well in North-eastern portion of the 1st plaintiff's site at their cost and risk to protect the mill properties and to meet their water needs, promising to remove the same at their cost, if their proposal for purchase was not ultimately accepted. The 1st plaintiff was again approached by defendants 1, 3 and 4 to raise a wall enclosing the site proposed to be acquired by them from the 1st plaintiff and the 1st plaintiff permitted such construction only up to foundation level. Defendants 1, 3 and 4 did not conduct any further negotiations and abandoned their proposal. Still they constructed a compound wall to a height of 10 feet for 76 yards length in February, 1976 and they also closed the two openings made in the Eastern wall by the 1st plaintiff for access to his site and prevented the 1st plaintiff and his people from entering the site. Then, the 1st plaintiff complained to the police and also filed C.C. No. 125 of 1978 under Sections 447 and 341 of the Indian Penal Code against defendants 1 and 3 and the 3rd defendant's father. The permission was, thus, revoked and defendants 1, 3 and 4 made some unauthorized constructions in the site later. The 1st plaintiff gave registered notices on 07-08-1979 and 27-08-1979, for which a reply was given on 14-09-1979. The defendants are in unlawful possession on encroachment since 24-02-1976 and the 1st plaintiff gave registered notices on 15-03-1987 and 15-12-1987. Hence, the suit.

5. The suit was resisted by the defendants contending that the 1st defendant prescribed its title to the suit site by adverse possession over the statutory period by 30-12-1987, the date of the suit. The 1st defendant approached the 1st plaintiff to purchase the suit site to make it contiguous to the land purchased on 29-06-1974 for the expansion of their mills and the 1st plaintiff readily agreed, as the site was not fetching any income. The 1st defendant offered to pay Rs. 40/- per square yard minus the expenses for reclamation of the land and removal of encroachments, for which the 1st plaintiff agreed. The 1st plaintiff was asked to obtain exemption under the Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act, (Act 12 of 1972). But the 1st plaintiff was postponing for assessment of tax implications and also asked the 1st defendant to explore acquisition through the State Government under the Land Acquisition Act. The 1st plaintiff agreed to the request of the 1st defendant in March, 1975 to merge the suit site to be bound by a compound wall and to dig a bore well in the suit site and carry out other constructions or additions and delivered possession in March, 1975. The defendants constructed the Northern wall,

repaired and reconstructed the Eastern wall, dug a bore well in the North-eastern corner and constructed Southern compound wall by 24-02-1976. When the 1st plaintiff made holes in the Southern wall unauthorizedly, the 1st defendant closed them and the dispute was stated to be of civil nature in the judgment in C.C. No. 125 of 1978. The 1st plaintiff was silent except for the notices and as per the concluded contract, the 1st defendant invested huge sums of money for constructing the compound walls, digging two deep bore wells, paying compensation to unauthorized occupants and construction of factory building with machinery worth millions and large water storage tanks. The 1st defendant could not have abandoned the contract after such expenses to the knowledge of the 1st plaintiff. The claim for mesne profits is untenable and the defendants promptly replied to the notice, dated 07-08-1979. Only payment of balance of consideration remained under the concluded contract before execution and registration of sale deed and the defendants gave a reply to the notice on 15-12-1987 after the suit. The suit is barred by time due to absence of possession of the 1st plaintiff beyond 12 years prior to the suit. But still the 1st defendant is ready and willing to pay Rs. 40/- per square yard as agreed on moral grounds. Defendants 2 and 3 are not necessary and proper parties to the suit. Plaintiffs 2 to 7 are not entitled to claim any reliefs, as the legal representatives of the deceased 1st plaintiff and hence, the defendants sought for dismissal of the vexatious and frivolous suit with costs.

6. On such pleadings, the trial Court settled the following issues for trial and determination of the suit.

1. Whether the 1st defendant perfected its title to the schedule property by adverse possession?
2. Whether the agreement of sale in respect of the schedule property pleaded by defendants is true?
3. Whether the plaintiff delivered possession of the suit site in pursuance of the agreement of sale pleaded by defendants?
4. Whether the plaintiff is entitled to the relief of possession of the said site?
5. Whether the plaintiff is entitled to profits? If so, at what rate?
6. Whether the suit is bad for misjoinder of parties?
7. To what relief is the plaintiff entitled?

7. P.W.1 and D.W.1 were examined and Exs.A-1 to A-27 and B-1 and B-2 were marked during trial.

8. The trial Court rendered the impugned judgment firstly observing that the original ownership of the deceased 1st plaintiff and plaintiffs 2 to 7 being his legal heirs are not in dispute and the defendants have to prove perfection of title of the 1st defendant over the suit property by adverse possession. The trial Court referred to Ex.A-16 reply notice as an acknowledgement of the title of the

deceased 1st plaintiff by the defendants, who did not set up any adverse title in the reply notice. The written statement also was noted as acknowledging such title and the theory of adverse possession was considered to be excluded in respect of possession of a party under an agreement of sale. The trial Court also noted the suit to be based on title and not possession and concluded that the defendants did not prove perfection of title by adverse possession. While noting that P.W.1, the 2nd plaintiff, is having no personal knowledge about the transaction, the trial Court referred to D.W.1 admitting that no consideration was paid to the 1st plaintiff and the trial Court discredited the alleged oral agreement of sale due to no sale consideration being fixed and no payment being made to the 1st plaintiff. While concluding that even such an oral agreement could have been only null and void in view of the prohibition against alienation of vacant urban lands by the statute, the trial Court considered plaintiffs 2 to 7 to be entitled to possession and also mesne profits, which have to be determined in a separate enquiry. Rejecting the contentions about any non-joinder or misjoinder of parties or any entitlement of the defendants to the value of any improvements, the trial Court decreed the suit for possession within three months and past and future mesne profits to be ascertained separately.

9. The defendants challenged the said judgment and decree contending that the 1st defendant's possession continuously since March, 1975 for 12 years 9 months prior to the suit perfected its title by adverse possession and the 1st plaintiff as P.W.1 in C.C. No. 125 of 1978 admitted about his agreeing to sell the land to the 1st defendant, the construction of the Northern wall and bore well and repairs to the Eastern wall in 1975 as stated in Ex.B-1. The defendants gave replies to the notices with facts and if the sale is hit by Act 12 of 1972, the possession of the 1st defendant since March, 1975 will start adverse possession. The overt acts of construction by and enjoyment of the defendants without any protest from the 1st plaintiff estop the plaintiffs from seeking eviction. The defendants are entitled to the protection of Section 51 of the Transfer of Property Act and irreparable injury will be caused to about 4800 employees and workers of the factory, if the suit is decreed. The defendants could not claim specific performance only due to A.P. Act 12 of 1972 and the plaintiffs were not justified in demanding Rs. 1,000/- per square yard. Principles of natural justice, equity and good conscience and the economic conditions of the workers should have resulted in dismissal of the suit.

10. Plaintiffs 2 to 7 filed cross-objections contending that the trial Court should have granted costs of the suit to the plaintiff, while decreeing the same.

11. During the pendency of the appeal, defendants filed A.S.M.P. No. 1586 of 2006 to amend the written statement by incorporating additional pleas about the deceased 1st plaintiff being permitted to value the suit at Rs. 150/- per square yard without notice to them by the order, dated 07-07-1988 in the purported exercise of the power under Order VII Rule 11(b) read with Section 149 of the Code of Civil Procedure, by which time the suit was admittedly barred and liable

for rejection. The defendants, therefore, sought to contend that it is the statutory duty of the 1st plaintiff to ascertain the market value of the property as on the date of the presentation of the plaint and when the land was agreed to be purchased at Rs. 40/- per square yard in March, 1975, it could not have been valued at Rs. 15/- per square yard on 30-12-1987. The suit was, hence, patently undervalued mala fide and the plaint having been taken on file only on 03-08-1988, the suit was barred by time. The defendants further sought to contend that they are ready to pay Rs. 40/-per square yard with simple interest at 6 per cent per annum from 01-03-1975 to 31-08-2006 for 21½ years without any deduction i.e. Rs. 3,70,064/- and they are ready to deposit the same into Court. The said A.S.M.P. No. 1586 of 2006 was ordered on 19-10-2006 observing that the pleas based on admitted facts on record without requirement of any proof by any evidence ought to be permitted to be raised, as it is also the duty of the Court u/s 3 of the Limitation Act, 1963 to consider the question of bar of limitation even without any pleading. Observing that the merits are left to be decided in the main appeal itself, the petition was allowed on payment of costs.

12. The defendants also filed A.S.M.P. No. 1587 of 2008 for leave to raise additional grounds of appeal on similar lines as in A.S.M.P. No. 1586 of 2006. It was claimed that the order, dated 07-07-1988 was unavailable in the records received from the trial Court and the right to challenge the same is, hence, reserved. This petition was also allowed on payment of costs.

13. Sri N.V. Suryanarayana Murthy, learned senior Counsel for the defendants and Sri A. Ramalingeswara Rao, learned Counsel for the plaintiffs are heard at length and Sri Suryanarayana Murthy also furnished a detailed synopsis of his arguments in writing.

14. With the above background, the following points arise for consideration and determination herein.

1. Whether the suit cannot be deemed to have been presented on 30-12-1987?
2. Whether the 1st defendant perfected his title by adverse possession and the suit is consequently barred by time?
3. Whether the defendants are entitled to fall back upon Sections 53A and 51 of the Transfer of Property Act on the strength of an oral agreement of sale?
4. Whether the plaintiffs are entitled to the suit reliefs including costs?
5. To what relief?

Point No. 1:

15. Section 149 of the CPC gives the power to the Court in its discretion to allow the person who has to pay Court fee, to pay the deficit in such Court fee payable and upon such payment, the document shall have the same force and effect as if such fee had been paid in the first instance. Order VII Rule 11, Clauses (b) and (c) of the CPC referred to contingencies of undervaluation of the relief or

understamping of properly valued relief respectively and the Proviso to the rule states that the time fixed by the Court under Clauses (b) and (c) shall not be extended but for reasons to be recorded by the Court about the plaintiff being prevented by an exceptional cause and the refusal to extend time causing grave injustice to him. Noncompliance would lead to rejection of plaint under Order VII Rule 11. Section 149 and Order VII Rule 11 by their plain and unambiguous language would indicate that any undervaluation or understamping of the plaint can be corrected within the time fixed or extended by the Court in its judicial discretion and on making up the required Court fee payable, the document will have the same force and effect as if such fee had been paid in the first instance.

16. In the present case, the plaint was filed into Court on 30-12-1987 and was being returned and represented within the time fixed by the Court from time to time till the plaint was taken on file on 03-08-1988. The objections appeared to be relating to valuation and Court fee and a copy of the order, dated 07-07-1988 filed by the defendants shows that the trial Court considering the valuation made by the plaintiff in two other suits concerning sites near the suit site, directed the deceased 1st plaintiff to value the suit at Rs. 150/- per square yard, as the Court fee put by him is very low and returned the plaint for payment of deficit Court fee within 15 days.

17. Relying on *Nadikatla Narayana Swamy and Others Vs. State of A.P. and Another*, stating that for assessment of value of any property, generally the basic value register is taken as a guide, the defendants seek to contend that the 1st plaintiff could not have relied on certification by the Income Tax Officer, as he did earlier. But firstly the decision does not appear to lay down any ratio decidendi about the basic value register being the safe measure for assessment of value of any property and secondly, reference to the basic value register as a guide is not as though it is the exclusive guide in respect of assessment of value of any property to the exclusion of all other things in the world. The sale isthihar issued by the Income Tax Department was equally from a public office and could not have been totally ignored.

18. It is also true that the claim of the defendants is about their offer to purchase the suit site at Rs. 40/- per square yard even in February/March, 1975, due to which the value of the same could not have been Rs. 15/- per square yard by 30-12-1987 after more than 12 years. The market value of the property as on the date of the presentation of the plaint, of course, has to be ascertained by the deceased 1st plaintiff and the order, dated 07-07-1988 referring to the valuation of two other nearby sites of the plaintiffs at Rs. 1,500/- and Rs. 250/- per square yard, ex facie, indicated to the trial Court that the valuation adopted by the 1st plaintiff at Rs. 15/- per square yard is very low. It is also true that in *Meenakshisundaram Chettiar Vs. Venkatachalam Chettiar*, , the Apex Court following ILR (1969) AP 1042 (FB) concluded that there must be a genuine effort on the part of the plaintiff to estimate his relief and that the estimate should not be a deliberate under-estimation. It is also true that the Apex Court laid down

that Order VII Rule 11(b) of the CPC casts a duty on the Court to reject the plaint when the relief claimed is undervalued. But the Apex Court also observed that Order VII Rule 11 of the CPC requires the Court to return the plaint, if the relief claimed is undervalued. So, any inadequate or unreasonable or deliberate underestimation by a plaintiff in valuing the relief will be met by the Court returning the plaint to correct the valuation within a time to be fixed by it. It is only on the failure of the plaintiff to do so, that rejection follows.

19. The defendants were also critical of the trial Court still entertaining and returning the plaint after the representation on 25-02-1988, which was more than 12 years from 24-02-1976 when the 1st plaintiff alleged the alleged trespass to have taken place, but as the language of Section 149 of the CPC makes it clear that payment of required Court fee ultimately as ordained by the Court will take the payment of such Court fee on the document to the first instance, the plaint probably could not have been rejected mid way on any ground of limitation. The power of the Court to grant time for hearing and the jurisdiction of the Court to pass the order on 07-07-1988 do not appear to be non-existent as contended and any notice to the defendants before the order on 07-07-1988 cannot be considered required by law in the light of *Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others*, laying down that the question of payment of Court fees is a matter primarily between the Government and the person concerned and where the High Court on the materials put before it allowed an amendment u/s 149 of the Code of Civil Procedure, the Apex Court held that any recognized principles of law were not violated and any gross injustice has not been done. The plea therein also was that by allowing the amendment, valuable rights of the opposite party to plead the bar of limitation were taken away. No provision or principle of law requiring notice to the defendants for hearing them before passing an order concerning the Court fee before a plaint was taken on file, is brought to notice.

20. In fact, Section 11 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 enables by Sub-section 1(a) the Court to decide the proper fee payable on a plaint to be registered before ordering such registration, while Sub-clause (b) thereof makes such decision subject to review from time to time as occasion requires. Any defendant is given the right to question proper valuation or sufficiency of Court fee through his pleading by Sub-section (2), which provides for hearing such an issue as a preliminary issue. The question of valuation and Court fee was also made triable in appeal by Sub-section (3). The mandatory statutory provision itself, thus, lays down the manner in which the questions of valuation and Court fee raised are determined.

21. The objection of the defendants about the Court making number of returns and granting number of hearings is also untenable in the light of *Collector, Land Acquisition v. Dina Nath* : AIR 1977 J and K 11, wherein with reference to the precedents from various High Courts, a Division Bench held that Section 149 of the CPC gives discretion to the appellate Court to give an opportunity to the

appellant to pay the deficit Court fee within a specified time, which discretion is generally exercised judiciously in favour of the appellant in good faith. Incidentally, it was also laid down that payment of Court fee is a matter that primarily concerns the Government and the appellant and the opposite party cannot plead the bar of limitation. While there is nothing on record to attribute any mala fides or bad faith or dishonesty to 1st plaintiff, the exercise of judicial discretion by the trial Court does not appear to be exercising a jurisdiction not vested in it or improperly exercising a jurisdiction vested in it. The defendants also seek to question the order, dated 07-07-1988 on merits elaborately, but the said order is not directly in question in this appeal and cross-objections and the defendants have reserved their right to challenge the reasons given in the said order in their additional grounds of appeal included as per order in A.S.M.P. No. 1587of2006.

22. The trial Court did not substitute any procedure prescribed by the statute to apply the principle laid down in *Shri Mandir Sita Ramji Vs. Lt. Governor of Delhi and Others*, wherein it was laid down that when a procedure is prescribed by the legislature, it is not for the Court to substitute a different one according to its notion of justice.

23. There is no doubt that the power u/s 149 of the CPC has to be exercised judiciously and objectively as laid down in *Sivishi Associates and Others Vs. Jagadeeshwari Agencies*, in which on the facts and circumstances of the case, an inference was drawn that the trial Court did not exercise its power u/s 149 of the CPC judiciously for meeting the ends of justice. Though the power is not an absolute power, the requirement of any notice to the defendant having been held to be unnecessary by the Apex Court, the present case does not present, on facts, any unreasonable or unjudicious exercise of the power by the trial Court.

24. While Order VII Rule 11 of the CPC does not place any restriction or limitation on the exercise of the Court's power under the same and such a power can be exercised at any stage of the case, as held in *Samar Singh Vs. Kedar Nath alias K.N. Singh and Others*, taking recourse to Order VII Rule 11 of the CPC to reject the plaint in the present case does not arise, firstly because the order, dated 07-07-1988 directing valuation and payment of Court fee at a particular rate within the time allowed by the trial Court has been complied with and has become final and secondly, because the said order is and cannot be the subject matter of challenge in the present appeal and thirdly, because the facts and circumstances do not, in any manner, suggest the exercise of jurisdiction u/s 149 and Order VII Rule 11 of the CPC to be unreasonable or irregular or illegal. Therefore, the suit must be deemed to have been presented on 30-12-1987.

Point No 2:

25. The 2nd plaintiff as P.W.1 referred to the purchase of the adjacent site by the 1st defendant under the original of Ex.A-1, the request of the 1st plaintiff to defendants 1 and 2 to take recourse to the land acquisition proceedings in

respect of the suit site and permission to the 3rd defendant to dig the bore well in the suit site as well as the permission to raise a wall up to basement level. While claiming that they never permitted any permanent constructions, which were unauthorisedly raised since February, 1976, and referring to the consequential police report in Ex.A-2 and private complaint in Ex.A-3, P.W.1 claimed the permission given by the 1st plaintiff to have been revoked. He also spoke about Exs.A-4, A-13 and A-17 notices given to the defendants, but he admitted that there was no document for permission by the 1st plaintiff and that they did not give any rejoinder notice to Ex.A-16 reply notice. P.W.1 was admittedly not present during the negotiations between the 1st plaintiff and the defendants and his claim about the defendants being not put in possession and their trespassing into the suit property may not be in tune with the permission accorded by the 1st plaintiff, which was claimed to have been later revoked. He claimed to have objected even when the Southern wall was being constructed and he was unaware of the various claims made by the defendants about what they did in the suit site or in respect thereof. P.W.1 was unaware whether the 1st plaintiff deposed in the criminal case about his consent for construction of the walls and sale of the property to the defendants. Though it was suggested to P.W.1 that their wealth tax returns did not show the suit property, the defendants did not take any steps to summon such returns and P.W.1 was unable to explain the gap of time between Ex.A-16 and the suit. He also admitted not filing the tax receipts into Court. Thus, the evidence of P.W.1 about what happened between the 1st plaintiff and the defendants does not appear to be very much based on any personal knowledge and naturally so and no other witness could have been examined by the plaintiffs for the purpose, as no third party was present when the sale talks took place between D.W.1 and the 1st plaintiff even according to D.W.1 and as the activities by the defendants in the suit site with the permission of the Is" plaintiff commenced thereafter.

26. The 3rd defendant is the lone witness for the defendants and the approach by the defendants to the 1st plaintiff was in January, 1975, according to D.W.1 while an oral contract was claimed to have been concluded between them in February, 1975 for sale at Rs. 40/- per square yard minus expenses of reclamation and eviction of hut dwellers. D.W.1 claimed that the 1st plaintiff put them in possession obviously under the alleged oral agreement of sale and the defendants were claimed to have followed it up with the construction and repairs of the walls, digging a bore well, constructing an underground water storage tank, etc., for which the 1st plaintiff never raised any objection. A part of the 1st plaintiff's godown projecting into the suit site was claimed to have been removed while constructing Southern compound wall and another bore well and extended factory premises with jute mill machinery at an expense of Rs. 3.00 crores were claimed to have been undertaken in 1977-78 and D.W.1 claimed that the 1st plaintiff wanted to have the tax issues examined before making any request for land acquisition. D.W.1 himself stated that they refused to pay the entire consideration as requested by the 1st plaintiff and his chief-examination did not

refer to the payment of any rent to the 1st plaintiff in spite of possessing and enjoying the suit site owned by the 1st plaintiff since February, 1975.

27. D.W.1 admitted during the cross-examination that the 1st plaintiff advised them to get the land acquired under the Land Acquisition Act and he also admitted that there is no documentary proof to show the alleged purchase of the suit site at Rs. 40/- per square yard and that no consideration was paid to the 1st plaintiff. He also admitted that even after prohibition against alienation of vacant urban sites was removed since 05-11-1977, he did not give any legal notice to the 1st plaintiff to receive sale consideration and execute a sale deed and that they did not file any suit for specific performance of the alleged oral agreement of sale.

28. Ex.A-2, the earliest version in writing by the 1st plaintiff in his complaint to the police on 25-02-1976, alleges construction of a wall in the site of the 1st plaintiff by Jute mill workers without his consent on 24-02-1976. In the complaint in CC. No. 341 of 1977, dated 21-02-1977, it was elaborated about the offer to purchase the suit site, which the 1st plaintiff promised to consider if undertaken under the Land Acquisition Act in view of the prohibition of alienation of vacant urban sites. Ex.A-3 also referred to the approach by the defendants and permission by the 1st plaintiff in respect of the compound walls and bore wells and the grievance of the 1st plaintiff was only about the compound wall being fully raised without permission, causing him to make two openings in the Eastern compound wall to provide access to his own site.

29. Ex.A-4 notice, dated 07-08-1979 is a reiteration by the 1st plaintiff of the same claims and the acquittal in the criminal case was due to the dispute being civil in nature. The 1st plaintiff, therefore, demanded the defendants to remove the constructions and deliver vacant possession apart from claiming damages. This was again followed by Ex.A-13, dated 27-08-1979 with identical allegations and Ex.A-16 is the first response from the defendants in writing, in which the 1st plaintiff was stated to have offered to sell the suit site, which was agreed to by the defendants at Rs. 40/- per square yard excluding the expenses of reclamation. The Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act was stated to have stood in the way and the 1st plaintiff himself was stated to have put the defendants in possession followed by digging of bore wells and raising of compound walls, reclamation of the land, etc. Even the alleged demolition of part of the godown of the 1st plaintiff was stated to be with his consent. It was, thus, specifically pleaded by the defendants in the said reply notice that their possession was under a concluded oral agreement of sale and the constructions and improvements were made with the oral permission of the 1st plaintiff creating an equitable title to the defendants, who are ready to pay the agreed balance of consideration. Thus, they were demanding enforcement of the alleged concluded oral agreement of sale and not claiming the possession or constructions or improvements to be adverse to the rights and interests of the 1st plaintiff.

30. After the said reply notice, dated 14-09-1979, the 1st plaintiff gave another notice only on 15-12-1987 in Ex.A-17 reiterating the same allegations and specifying that there was never any payment of any consideration to the 1st plaintiff, never any concluded contract and the possession of the defendants since 24-02-1976 was unlawful. The 1st plaintiff, therefore, demanded possession and damages.

31. Exs.A-4, A-13, A-16 and A-17, thus, do not suggest the defendants to be claiming at any time prior to the suit to be in such possession as would be adverse to the rights and interests of 1st plaintiff in the suit site, while the original absolute title and possession of the 1st plaintiff are admitted. They claimed to have entered into the suit site and to have undertaken the improvements and constructions therein with the permission of the 1st plaintiff and while the dispute under Exs.A-2 and A-3 was only in respect of unauthorized construction of a wall and denial of access to the suit site, even Exs.A-4 and A-14 did not allege the possession of the defendants to be adverse. It is only Ex.A-16, dated 14-09-1979 that can be said to have contained a claim by the defendants for the first time about their possession being in their own right under a concluded contract of sale conferring equitable title on them. While even then the claim is only under the 1st plaintiff and not independent of him, it was only in the written statement in the suit that for the first time the prescription of title by adverse possession was clearly and unambiguously pleaded.

32. The deposition of 1st plaintiff as P.W.1 in C.C. No. 125 of 1978 marked as Ex.B.1, of course, referred to his agreeing to sell his land to the Jute mill, from which he was not getting any income, but he stated even then that the question of any Rate would not arise, though the area to be sold was demarcated. He also admitted that he agreed for the construction of and repairs to Northern and Eastern walls, digging of a bore and laying foundations to other two walls. He also referred to his godowns being under the lease of East India Commercial Company abutting AB wall and main road. There is nothing fundamentally inconsistent between the version of the 1st plaintiff in the other documents and the suit or the deposition in CC. No. 125 of 1978, except that, he positively stated about his agreeing to sell the land to the defendants, while in his three notices, he claimed to have expressed his inability in view of the statutory prohibition, except, if steps were taken under the Land Acquisition Act, which also indicated his willingness to part with the land in a manner permitted by law.

33. While it is true that clerk of the plaintiffs referred to by the 1st plaintiff was not examined, it is also not known whether such clerk was available for examination. Notwithstanding the variations about the description of the events in Exs.A-2 to A-4, A-13 and A-16, the 1st plaintiff was consistent about the conflict surfacing for the first time on 24-02-1976 and 25-02-1976 and even the version of the defendants about the events since January/February, 1975 traces the commencement of the disputes only since then. The earlier entry into possession, acts of improvement and construction in the suit site, even according

to the defendants, were with the knowledge and consent of the 1st plaintiff. If the approximate date of the possession or enjoyment of the defendants becoming a subject of controversy is 24-02-1976, the present suit instituted on 30-12-1987 is well within time. The title of the deceased 1st plaintiff being admitted and the entry into possession being claimed by the defendants to be with his consent and knowledge, the burden of proving since when the possession of the defendants became adverse to the deceased 1st plaintiff, is on the defendants and not on the plaintiffs, as is sought to be contended. Assuming that the 1st plaintiff did not establish when he gave permission or withdrew permission, it should also be noted that the question of burden of proof loses much of its relevance once the evidence of both the parties is before the Court, such burden assuming relevance only when the evidence of both parties is evenly balanced. When the version of both sides does not even remotely suggest any adversity in possession prior to 24-02-1976 and when the first communication in writing by the defendants setting up any rights or interests in themselves was only on 14-09-1979 in Ex.A-16, the attempt to take adverse possession back to January/February, 1975, is futile.

34. Such a conclusion is in tune with the principle laid down in *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another*, in which it was laid down that in a suit for ejectment, the plaintiff has to succeed or fail on the title he establishes and if he cannot succeed on the strength of his title, his suit must fail notwithstanding that the defendant in possession has no title to the property. In the present case, the original title of the 1st plaintiff being admitted, the plaintiffs suffer no prejudice by the principle and the Apex Court pointed out that once in a suit for possession based on title, the plaintiff has been able to create a degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title. The question of the plaintiffs depending on any weakness in the defendants' version does not arise, as not only the original title of the 1st plaintiff but also the manner of entry into enjoyment of the suit site by the defendants, is also not in dispute, the origin of any conflicting claims to the nature of possession being stated more or less similarly by both sides to be around 24-02-1976. When the defendants did not claim the entry into possession since January/February, 1975 to be on their own, treating such possession as permissive by the trial Court cannot be criticized, which is well within the principle laid down in *Achal Reddi v. Ramakrishna Reddiar* AIR 1990 SC 553, wherein it was laid down that in the case of an agreement of sale, the party, who obtains possession, acknowledges title of the vendor, which excludes the theory of adverse possession. The Apex Court was clear that in the case of an executory contract, the possession of the transferee until the date of registration of the conveyance is permissive or derivative and in law is deemed to be on behalf of the owner himself. The principle of estoppel also was intended to apply and the defendants herein only

claimed such possession under a concluded oral agreement of sale.

35. Any remote claims even to adverse possession being capable of perceived only since 24-02-1976, whether Article 64 or Article 65 of the Limitation Act, 1963 applies to the suit, the suit of the plaintiffs is within time. This is not because of the defendants' failure to acquire title by adverse possession but because, of the permissive and derivative nature of the possession of the defendants at least till 24-02-1976 taking the case outside the principle laid down in *Pedda Maddileti v. Mandli Sanjeevu* 1964 (1) An.W.R. 330. Hence, it has to be concluded that it is not proved that the 1st defendant perfected his title by adverse possession and hence, the suit cannot be considered to be barred by limitation.

Point No. 3:

36. *C. Ramaiah Vs. Mohammadunnisa Begum*, holding that an agreement of sale in respect of vacant land covered by the Andhra Pradesh Vacant Lands in Urban Areas (Prohibition of Alienation) Act becomes impossible of performance and is frustrated and is incapable of specific performance, was relied on by the trial Court for refusing to act upon any oral agreement of sale and the Division Bench held that in respect of such an illegal contract, even Section 53A of the Transfer of Property Act cannot be invoked. It is true that subsequently the said decision was overruled by *K. Venkateswarlu and others Vs. Pedda Venkaiah (died) Per LRs.*, holding that an agreement of sale, which does not create any title in the immovable property, is not prohibited by the Act and the relevant date, as regards the applicability of the Act, would be the date of execution of the conveyance and not the date of agreement for sale. However, the same may not make any difference to the ultimate result, as the defendants are not seeking specific performance or enforcement of their rights under the alleged oral agreement of sale in this suit by making any counter claim nor did they file any separate suit so far claiming such reliefs. The repeal of A.P. Act 12 of 1972 makes no difference for that reason apart from the absence of proof of such oral agreement of sale, the burden of proving which is squarely on the defendants. Admittedly, even according to D.W.1 no third person was present at the time of conclusion of such oral agreement of sale and the deceased 1st plaintiff did not even remotely admit any agreement of sale between him and the defendants, conclusive or inconclusive. The defendants admittedly did not pay a pie towards the sale consideration under such an agreement and did not take any steps to enforce such an agreement even after the repeal of A.P. Act 12 of 1972 on 05-11-1977 within three years from the alleged oral agreement of sale, which could have been only after January or February, 1975.

37. *Bai Dosabai Vs. Mathurdas Govinddas and Others*, , which directed to mould the relief as to accord the changed statutory situation, is, hence, of no avail to the defendants and the principle laid down in *Nutan Kumar and Others Vs. IInd Additional District Judge and Others*, , *Nanakram Vs. Kundalrai*, and *Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others*, about the validity

of such contracts between the parties to the contracts is also of no help to the defendants when on the basis of broad human probabilities the evidence on record cannot lead to any conclusion of the preponderance of probabilities indicating the existence of an oral agreement of sale. There is no doubt that an oral agreement of sale is enforceable as held by the Apex Court in *Kollipara Sriramulu Vs. T. Aswathanarayana and Others*, and even mere omission to settle the mode of payment does not affect the completeness of the contract, but that was because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed, which vital aspects were not spoken to or pleaded by D.W.1 herein. Even otherwise, admittedly, the defendants did not sue for specific performance and are attempting to now rely on the rights allegedly protected u/s 53A of the Transfer of Property Act.

38. The learned senior Counsel for the defendants, who referred to *Mool Chand Bakhru and Another Vs. Rohan and Others*, , attempted to get over the principle laid down therein that a proposed vendee cannot protect his possession in immovable property on the basis of an oral agreement of sale, the terms of which, have not been reduced into writing. The Apex Court held that a written agreement was sine qua non for the applicability of the legal doctrine of part performance enshrined in Section 53A of the Transfer of Property Act.

39. The learned senior counsel sought to contend that when Section 54 or Section 10 of the Transfer of Property Act do not require an agreement to be in writing to be specifically enforceable and in the light of the decision in *K. Sriramulu v. Aswatha Narayana* (17 supra), no discrimination could have been shown between a transferee under a written agreement and a transferee under an oral agreement, which will be violative of Article 14 of the Constitution of India and the purpose and object of Section 53A of the Transfer of Property Act. The learned senior Counsel also referred to the omission of the words "relating to the requirement of registration and the absence of registration" in Section 53A by the amendment Act 43 of 2001 and desired the binding precedent from the Apex Court to be ignored. The learned senior Counsel also attempted to draw support from *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, dealing with judgments per incuriam, but the Apex Court was clear that a prior decision of the Apex Court on identical facts and law binds the Court on the same points of law in a later case and unless it is shown that some part of the decision was based on a reasoning, which was demonstrably wrong, the principle of per incuriam cannot be applied. Similarly, in *M/s. A-One Granites Vs. State of U.P. and Others*, , the applicability of a statutory rule was not referred or considered by Supreme Court in an earlier decision and hence, it was held that a precedent sub silentio is not binding, as a particular point of law was not consciously determined. *Mool Chand Bakhru v. Rohan* (18 supra) is neither a case of applicability of rule of sub silentio nor a case of failure to notice any statutory provision or binding precedent. The decision by a two-Judge Bench does not, in any manner, run counter to *K. Sriramulu v. Aswatha Narayana* (17 supra) by a three-Judge Bench, as the two decisions operate in different settings as the

enforceability of an oral agreement of sale and the rights of a person in possession in part performance of an oral agreement of sale are different and distinct.

40. The classification between transferees under written agreements and oral agreements cannot be considered unreasonable or unjust or not based on intelligible differentia to attract any contravention of Articles 14 and 16 of the Constitution of India. Drawing analogy to direct recruits and promotees in Telecommunication Research Centre considered in Telecommunication Research center Scientific Officers" (Class I) Association and Others Vs. Union of India (UOI) and Others, or diploma and non-diploma holders considered in Punjab State Electricity Board, Patiala v. Ravinder Kumar AIR 1987 SC 367 : 1986 Lab. I.C. 2076, will be attempting to draw a parallel where there is none. Girdhari Lal and Sons Vs. Balbir Nath Mathur and Others, about the primary and foremost task of a Court in interpreting a statute being to promote and advance the object and purpose of the enactment even departing from the plain meaning of the plain words, cannot have any persuasive effect when the Apex Court had laid down the law in Mool Chand Bakhru v. Rohan (18 supra). Section 53A of the Transfer of Property Act cannot be supplemented by supplying any nonexistent words and terms to bring within its ambit oral agreements of sale also under the circumstances and the plaintiffs cannot be debarred from enforcing their rights, if they are otherwise entitled to, by taking shelter u/s 53A of the Transfer of Property Act on the ground of any hardship or difficulty for the defendants, even though even expiry of period of limitation in filing a suit for specific performance of an agreement of sale will not extinguish the defence u/s 53A of the Transfer of Property Act, if it is otherwise available, as held in Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, . If civil rights do exist in favour of the plaintiffs, the consequences of enforcement of such legal rights cannot matter like they matter in exercise of any jurisdiction in equity. The defendants, who never attempted to have the alleged oral agreement of sale in their favour recognized or enforced through any judicial proceeding and who have since 1975 up to date, admittedly not paid a paisa to the admitted original owner in spite of enjoying the property, cannot be heard to complain of any injustice or any inequity to them or the persons claiming under them.

41. The doctrine of eclipse recognized in Dularey Lodh Vs. Third Additional District Judge, Kanpur and Others, also has no relevance, as the enforceability of the oral agreement of sale after the repeal of the Act 12 of 1972 does not confer any respectability to such an oral agreement of sale u/s 53A of the Transfer of Property Act.

42. The silence of the 1st plaintiff almost for 12 years since the first police complaint against the defendants, also cannot extinguish his rights in the property.

43. The defendants are then relying on Section 51 of the Transfer of Property Act

and stated that though the general rule, no doubt, is that the relief should be founded on pleadings, where the substantial matters relating to title of both parties to the suit are touched, though not directly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings, would be purely formal or technical and cannot succeed in every case, vide *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, . They further contended that all the pleas now raised are available to the defendants and *Brahmvarth Sanathan Dharam Mahamandal, Kanpur and Others Vs. Prem Kumar and Others*, was cited for the proposition that when the transferee made valuable constructions, it will be inequitable to ask the transferee to pay the present market value of the land.

44. *Maddanappa v. Chandramma* AIR 1065 SC 1812 was also relied on to contend that improvements made in the property belonging to another knowing that he has no title to the property, cannot entitle the person making improvements to demand payment for the improvements, but estoppel by representation operates against the plaintiffs in this regard.

45. *Syed Mohammad Yahya Quadri (died) per L.Rs. Vs. The District Collector and Another*, was relied on to contend that the rule of equity codified u/s 51 of the Transfer of Property Act is exhaustive or absolute and the person improving the property can be compensated on eviction by being paid the value of the improvements or by buying out the better title at a valuation of the property irrespective of the improvements, for which the option is that of the evictor.

46. *S. Palanivelu v. K. Veradammal* AIR 1977 Madras 342 is cited for the proposition that acquiescence by the owner in the construction by the trespasser should lead to compensating the owner and not evicting the trespasser.

47. In answer, the learned Counsel for the plaintiffs relied on *Smt. Gitarani Paul Vs. Dibyendra Kundu alias Dibyendra Kumar Kundu*, to contend that when title is proved, it was not necessary to ascertain the date of dispossession. He also relied on *Maddanappa v. Chandramma* (28 supra) to show that when a person concerned knows the true position relating to the title in the property in his possession, he cannot plead that he was induced to hold an erroneous belief by reason of conduct of its real owner. It was made clear that there is nothing like equitable estoppel beyond Section 115 of Evidence Act and no man, who spends money on improving the property knowing fully well that he has no title to it, can be permitted to deprive the original owner of his right to possession of the property, except upon the payment for the improvements, which were not effected with the consent of that person. The Apex Court held that the doctrine of acquiescence is of no help to such a man, for he, who knows about true state of affairs, cannot say that any mistaken belief was caused in his mind by reason of what the owner said or did.

48. The learned Counsel further referred to *T. Anjanappa and Others Vs.*

Somalingappa and Another, for the proposition that the defendants, who base their title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. Lastly, he reiterated that the defendants cannot claim any benefit of improvements made by them in the property on the principle laid down in Arjun Lal Gupta and Others Vs. Mriganka Mohan Sur and Others, , wherein the Apex Court pointed out that when there was no evidence to show that the plaintiff had in any way encouraged the defendants to incur any expense or had made any representations to induce them to change their position to their disadvantage, but asserted his rights within a reasonable time after learning of the trespass, the defendants cannot contend to be bona fide in raising any structures. When the plaintiff sent a notice objecting to the trespass as soon as he learnt of valuable constructions being made, the defendants cannot succeed on the principle of estoppel or acquiescence and on the factual background discussed in detail earlier, the defendants in the present case cannot claim to be standing on a better footing.

49. While the defendants will, of course, be entitled to remove all the improvements made by them in the property and leave the property in its original state while delivering possession, any offer by them to nominally deposit Rs. 3.70 lakhs or any claims of estoppel from recovery of possession u/s 51 of the Transfer of Property Act cannot be upheld. In view of the law laid down by the Apex Court disentitling a person from taking advantage of his own wrong in making improvements in the property in his possession in spite of knowing the situation about the title to the property, the defendants cannot claim any equities on the ground of improvements.

50. Thus, it has to be concluded firstly that the oral agreement of sale is not proved and secondly irrespective of the truth or otherwise of such an agreement of sale, the enforcement of which is not subject matter of the present suit, the defendants cannot claim any relief under Sections 53A and 51 of the Transfer of Property Act.

Point 4:

51. The plaintiffs are entitled to the reliefs granted by the trial Court, which did not award the costs of the suit to them against the defendants. The 1st plaintiff was not also very diligent and prompt in enforcing his rights over the suit property and allowed the defendants to incur much expense in making improvements over the property. Costs are in the judicial discretion of the Court and there are no strong reasons for interfering with such judicial discretion exercised by the trial Court in this regard by directing the parties to bear their own costs in the present case.

Point 5:

52. The judgment and decree under appeal have to be confirmed, but in the light of the difficulty expressed by the defendants throughout concerning the running

of their factory and employment of their workers, a further reasonable time has to be granted to them to deliver vacant possession and the parties should be directed to bear their own costs herein also.

53. In the result, the appeal and the cross-objections are dismissed without costs and the judgment and decree in the Original Suit No. 133 of 1988 on the file of the Principal Subordinate Judge's Court, Eluru, dated 04-09-1997 are confirmed. But the defendants therein are granted further time of six months from today to deliver vacant possession of the plaint schedule property to plaintiffs 2 to 7.