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**(2013) 03 AP CK 0043**

**In the Andhra Pradesh High Court**

**Case No : Second Appeal No. 188 of 1999**

Nesam Subbarao @ Subbayya

APPELLANT

Vs

State and Another

RESPONDENT

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**Date of Decision :** 25-03-2013

**Acts Referred:**

Evidence Act, 1872 — Section 65

**Citation :** (2013) 03 AP CK 0043

**Hon'ble Judges :** Samudrala Govindarajulu, J

**Bench :** Single Bench

**Advocate :** G. Rama Gopal, for the Appellant; V.L.N.G.K. Murthy, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Samudrala Govindarajulu, J.—Unsuccessful defendants in both the courts below are the appellants herein. The plaintiff/first respondent filed the suit for declaration of title to the plaint schedule property, for possession of the same after evicting the defendants there from and for damages for unauthorized use and occupation of the same. According to the plaintiff, the plaint schedule property is part of Balayya Sastry layout. Plaint schedule consists of site of 180 square yards with R.C.C. roof building therein in S.No.2 of Balayya Sastry layout, Visakhapatnam within the specified boundaries. Late Balayya Sastry is father of the plaintiff. He along with his wife and the plaintiff were assigned by Board of Revenue, Andhra Pradesh, Hyderabad by proceedings dated 01.06.1961 an extent of Ac.65.55 cents, vide Ex.A1, out of which the plaintiff was assigned Ac.22.88 cents. According to the plaintiff, the suit property is part of the said property. It is the plaintiff's case that on 24.09.1986, she came to know about the encroachment of the suit property when she went to the property where thatched house was in existence in an extent of 20 X 20 feet. It is alleged that after issue of Ex.A2 legal notice dated 10.11.1986, the defendant constructed a shed with brick and cement in approximately 140 square yards. The second

defendant is father of the first defendant. It is their contention that the second defendant occupied the suit site about 17 years ago, filled up gedda with sand and soil and constructed a house. The defendants contend that the suit property is not in Balayya Sastry's lay out or in the land covered by Ex.A1 proceedings and that the plaintiff with a view to grab gedda property of the Government, filed the suit with false averments. After trial, the trial Court decreed the suit with costs; and on appeal by the defendants, the lower appellate Court confirmed the said decree; and it resulted in the defendants approaching this Court with this second appeal. At the time of admission of this second appeal, the then learned Judge of this Court found that substantial questions of law are stated in Para 10 of the memorandum of grounds of second appeal. They are as follows:

- (a) Whether the findings of the Courts below are perverse?
- (b) Whether the findings of the Courts below are based on misreading and non-reading of evidence?
- (c) Whether the Courts below have failed in appreciating the evidence available on record?
- (d) Whether the Courts below have wrongly placed the burden of proof on the appellants/defendants?

2. On reading of judgments of both the Courts below, I find that findings therein are not at all perverse. The appellants' counsel failed to demonstrate that any findings or reasons given by lower appellate Court are perverse. So, I find question of law No.10(a) against the appellants.

3. Grounds (b) to (d) go together. Appreciation of evidence is in the realm of fact finding. It cannot be a question of law as such, unless the appreciation is vitiated by misreading or non-reading of evidence or the burden is wrongly placed on any person other than the person to whom it should be placed. No material is placed before this Court by the appellants' counsel to show that there was any misreading or non-reading of evidence by the lower appellate Court. Nothing was also pointed out on placing burden of proof wrongly by the lower appellate Court on the defendants-appellants.

4. It is contended by the appellants' counsel that Ex.A1 was wrongly admitted by the lower appellate Court as it is a photostat copy and there were no circumstances pleaded much less proved by the plaintiff u/s 65 of the Indian Evidence Act(in short "the Act") laying foundational facts for receipt of secondary evidence on record. The appellants' counsel placed reliance on U. Sree Vs. U. Srinivas, , H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam, and Smt. J. Yashoda Vs. Smt. K. Shobha Rani, of the Supreme Court on this aspect. On the other hand, it is contended by the respondent's counsel that since the defendants or their counsel did not take any objection at the time of marking of Ex.A1 during trial of the suit in the trial Court, such objection cannot be permitted to be raised by the appellants in this second appeal. The respondent's counsel placed

reliance on a full bench decision of this Court and another decision of the Supreme Court on this aspect. Full bench of this Court in *The Land Acquisition Officer, Vijayawade Thermal Station Vs. Nutalapati Venkata Rao*, after discussion of march of law from the privy council until that date, finally concluded:

Therefore, the marking of secondary evidence, if not objected to at the trial cannot be objected to later, and the "contents" can also be looked into.

5. In *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another*, of the Supreme Court, the Supreme Court had occasion to deal with the subject. The Supreme Court after noting the difference between admissibility of a document and mode of proof of a document, laid down as follows:

Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the later case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to

raising the objection in a superior court.

6. The appellants' counsel tried to contend that non-laying foundation for receipt of secondary evidence u/s 65 of the Act leads to inadmissibility of such document. From the above discussion of difference between admissibility and mode of proof of a document elaborated by the Supreme Court, this Court is of the opinion that marking of a secondary evidence relates to mode of proof of a document and not relating to admissibility of that document. In the case on hand, admissibility of original of Ex.A1 proceedings of Board of Revenue, is permissible in law. The only objection for the appellants' counsel is that marking of photostat copy thereof by the trial Court is impermissible in law. Marking of photostat copy of a document without laying foundational facts for receiving secondary evidence u/s 65 of "the Act" is within the purview of mode of proof only and it does not relate to admissibility as such of the document. Admittedly, in this case, Ex.A1 is marked by the trial Court in the evidence of P.W.1 and there was no objection made by the defendants or their counsel for marking photostat copy of the document as Ex.A1. Therefore, the appellants are not entitled to raise that ground in this second appeal.

7. It is contended by the appellants' counsel placing reliance on Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, of the Supreme Court that the plaintiff did not examine herself in this case, but her power of attorney holder vide Ex.A4 power of attorney deed, was examined as P.W.1 on her behalf. This Court is of the opinion that even without there being Ex.A4 power of attorney deed in favour of P.W.1, he is a valid witness for the plaintiff. P.W.1 is no other than brother of the plaintiff. Under Ex.A1, the plaintiff was assigned Ac.22.88 cents whereas her father S. Balayya Sastry was assigned Ac.23.23 cents and her mother S.Meenakshamma was assigned Ac.19.44 cents, totaling Ac.65.55 cents. According to the plaintiff, her father S. Balayya Sastry formed a layout of the total extent and got it approved. The plaintiff contends that the suit site is part of Balayya Sastry layout, but no plot number was assigned to the suit site. It cannot be said that the plaintiff who is a woman was the person who took part in forming Balayya Sastry layout. It was Balayya Sastry during his lifetime, who formed the said layout in his name and got it approved. P.W.1 being son of two assignees and brother of another assignee under Ex.A1, is most competent person to speak to facts of the case. Therefore, evidence of P.W.1 cannot be brushed aside, in the particular circumstances of this case.

8. It is next contended by the appellants' counsel that the lower appellate Court erred in relying upon infirmities in the defendants' case and failed to note that the plaintiff has to fall or stand on merits of her own case. While considering merits of the plaintiff's case, the Court need not shut its eyes to the demerits in the defendants' case though the Court may not pass a decree in favour of the plaintiff solely on demerits of the defendants' case. In the case on hand, the plaintiff took steps before the trial Court for appointment of an advocate-commissioner to localize the suit property. The advocate-commissioner inspected

the suit property in the presence of both the parties together with all the documents including lay out plan of Balayya Sastry layout and with the assistance of officials of Visakhapatnam Urban Development Authority (VUDA) and filed his report along with plan. In the report, the advocate-commissioner came to the conclusion that the suit property is part of Balayya Sastry layout. This is a piece of positive evidence in favour of the plaintiff to show that the suit property is part of Balayya Sastry layout and is not outside Balayya Sastry's layout and is not in gedda belonging to the Government adjacent to Balayya Sastry layout. Therefore, it cannot be said that without there being any material on record, the Courts below granted decree in favour of the plaintiff on only demerits of the defendants" case.

9. Therefore, in the light of discussion of contentions of the appellants" counsel with reference to material on record and findings of the Courts below, this Court is of the opinion on substantial questions of law Nos.10(b) to (d) that decisions of the Courts below are not vitiated by non-appreciation of evidence on record, much less by any misreading or non-reading of evidence on record or by placing burden of proof wrongly on the defendants. I find that the Courts below did not err either on facts or on law and came to correct conclusion in favour of the plaintiff. I find that the substantial questions of law raised and framed are untenable. In the result, the second appeal is dismissed with costs.