

(2003) 04 AP CK 0083
In the Andhra Pradesh High Court
Case No : SA No. 437 of 1994

Pappu Venkata Laxmi and Another

APPELLANT

Vs

Kolli Pydithalli and Others

RESPONDENT

Date of Decision : 22-04-2003

Acts Referred:

Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act,
1948 — Section 15, 15(1)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, 11

Citation : (2003) 6 ALD 430 : (2003) 5 ALT 720

Hon'ble Judges : P.S. Naryana, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; M. Bhaskaralakshmi, for Respondent
Nos. 1 to 11, for the Respondent

Final Decision : Allowed

Judgement

P.S. Naryana, J.—The legal representatives of the plaintiffs aggrieved by the judgment and decree made in AS No. 8/89 on the file of the Additional District Judge, Vizianagaram reversing the judgment and decree made in OS No. 189/76 on the file of Principal District Munsif, Bobbili, had preferred the present Second Appeal. The points which were framed for consideration in the Appeal A.S. No. 8/89 on the file of Additional District Judge, Vizianagaram are as follows:

(1) Whether the judgment in S.A.No. 170/ 58 on the file of High Court of Andhra Pradesh operates as res judicata?

(2) Whether the plaintiff/1st respondent in this appeal is entitled for recovery of possession of plaint schedule property?

(3) To what relief?

2. The parties are referred to as plaintiff and defendants as shown in the Original Suit for the purpose of convenience.

3. The plaintiff herein instituted OS No. 189/76 on the file of Principal District Munsif, Bobbili for the relief of possession of plaint schedule property after ejecting defendants therefrom and for recovery of mesne profits from the date of suit till the date of possession and for costs of the suit. On the respective pleadings of the parties, after settlement of issues and after recording the evidence of P.W.1 and P.W.2 and D.W.1 and D.W.2 and marking Exs.A-1 to A-46 and Exs.B-1 to B-29, the learned Principal District Munsif, Bobbili, had decreed the suit with costs as prayed for on 4-11-1988 and aggrieved by the same, the defendants preferred A.S. No. 8/89 on the file of Additional District Judge, Vizianagaram and inasmuch as the 1st respondent/ plaintiff died pending Appeal, the legal representatives were brought on record in IA No. 138/90 by the order dated 6-12-1990 and thus at present the said legal representatives are prosecuting the litigation. The learned Additional District Judge, Vizianagaram, after framing the points for consideration referred to supra, had arrived at a conclusion that the plaintiff failed to prove the title in the light of T.O.Ps. 4/72, 8/72 and 62/72 on the file of Estates Abolition Tribunal, Srikakulam and also on the ground that Ex.A-127, the patta u/s 15(1) of Estates Abolition Act is not binding on the defendants and the judgment of the High Court of Andhra Pradesh in S.A. No. 170/58 operates as res judicata, and after recording such findings, had reversed the judgment and decree of the Court of first instance and allowed the Appeal with costs by the judgment dated 15-7-1994 and aggrieved by the same, the legal representatives of the deceased plaintiff had preferred the present Second Appeal.

4. Both the Counsel had addressed elaborate arguments taking this Court through both the oral and documentary evidence available on record and putting forth their respective contentions with all emphasis.

5. Sri Subba Reddy, the learned Counsel representing the appellants had raised a principal question that the appellate Court had reversed the judgment and decree of the Trial Court without discussing the voluminous oral and documentary evidence available on record mainly on the ground that the judgment in S.A. No. 170/58 operates as res judicata and this approach of the appellate Court is totally erroneous. The learned Counsel also with all emphasis had submitted that the patta granted u/s 15(1) of the Estates Abolition Act, Ex.A-27, is definitely binding on the parties and the findings recorded in relation thereto at paragraph 15 of the judgment of the appellate Court are not sustainable. The learned Counsel also had pointed out that the decision in S.A. No. 170/58 on the file of High Court of Andhra Pradesh is one arising out of a claim proceeding under Order 21 Rule 5.8 of the Code of Civil Procedure, hereinafter in short referred to as "Code", as it stood prior to the amendment of 1976 and a decision in such a proceeding will not operate as res judicata. The learned Counsel also submitted that apart from Ex.27, there is voluminous documentary evidence available on record and the learned Counsel had taken me in detail through Exs.A-1 and A-2 - the certified copies of land registers, Exs.A-3 to A-9 -Adangal extracts, Ex.A-10 - certified copy of the sale deed, Ex.A-11 -

copy of the order in S.R. No. 4/49 made by Inam Settlement Officer, Exs.A-12 and A-13 -Orders in M.C. No. 28/50 u/s 144 Cr.P.C., Exs.A-14 to A-17 - the plaint, written statement, judgment and decree in O.S. No. 323/52, Exs.A-18 and A-19 - copy of C.C. No. 31/65 on the file of Additional Munsif Magistrate, Parvathipuram and the judgment therein, Ex.A-21 - certified copy of deposition of D.W.1 in O.S. No. 165/66 on the file of District Munsif Court, Bobbili, Exs.A-24 to A-39 - proceedings before Civil Courts and also the Settlement Officer, Exs.A-30 to A-39 - cist receipts and adangal extracts, and the other certified copies like Exs.A-45 and A-46. The learned Counsel also submitted that the judgment and decree made in S.A. No. 170/58 is of consequence in the light of Ex.A-27. The learned Counsel also had drawn my attention to certain of the admissions made by D.W.1 to the effect that the names of the 1st defendant, Suredu and Gurayya were not included in the rent reduction statement in 1947 and 1950 or in Ex.B-14. The learned Counsel also made an attempt to contend that the subject-matter of the prior litigation and the subject-matter of the present litigation are not one and the same and they are different. The learned Counsel also had placed strong reliance on Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others, , Kandadai Narasimhachariar v. Raghava Padayachi AIR 1945 Mad. 33 (FB) Angathevan v. Natarajan Chettiar AIR 1948 Mad. 118.

6. Per contra Smt. Bhaskara Lakshmi, Counsel representing the respondents had thoroughly taken me through the findings recorded by the Court of first instance and also through the findings recorded by the appellate Court and had pointed out that though a claim proceeding under the unamended Code prior to 1976 and a decision thereon may not operate as *res judicata*, definitely when a suit is instituted questioning such an order under Order 21 Rule 63 of the Code, the findings recorded on the issues will definitely operate as *res judicata*. The learned Counsel had placed strong reliance on Sawai Singhai Nirmal Chand Vs. Union of India, . The learned Counsel further had pointed out that elaborate procedure to be followed in relation to an enquiry u/s 15 of the Estates Abolition Act had not been followed at all and hence Ex.A-27 cannot be said to be binding on the defendants. The learned Counsel in a meticulous fashion had taken me through all factual details and had pointed out that several admissions were made by the both father of plaintiff and the plaintiff in this suit in the prior proceedings admitting the rights of the defendants and on the strength of these admissions alone, the defendants are bound to succeed. The learned Counsel had taken me through all Ex.B series documents in general and Exs.B-11, B-12, B-16, B-19, B-20, B-21, B-22 and B-24 particular in this regard. The learned Counsel also had drawn my attention to Bharat Singh and Another Vs. Bhagirathi, , Nagubai Ammal and Others Vs. B. Shama Rao and Others, , Union of India (UOI) Vs. Moksh Builders and Financiers Ltd. and Others, , Bishwanath Prasad and Others Vs. Dwarka Prasad and Others, .

7. Heard both the Counsel and also perused the oral and documentary evidence adduced by both the parties and also the findings recorded by the Court of first

instance and also the appellate Court.

8. As already referred to supra, the plaintiff instituted the suit O.S. No. 189/76 on the file of Principal District Munsif, Bobbili praying for the relief of recovery of possession and mesne profits and the averments made in the plaint are as follows.

9. One late Suryanarayana, father of the plaintiff purchased large extents of land under a registered sale deed dated 29-5-1918 which are situated in Burjavalasa Village, which was never an estate under the Estates Land Act or under the Estates Abolition Act. The considerable extent of land adjoining East of Tulasipannu Cheruvu upto the public garden on East consists of small extents of both wet, dry and uncultivated portions. To the East of the rasta, there is a plot known as Bangarammamadi. Adjoining the rasta on the South Eastern corner there is Gadimadi Subbammamadi. Excluding the Subbammamadi and Bangarammamadi the rest of the block of land is known as Tulasiponu Istuva. It was pleaded that the above lands are opposite to the residential area of the father of the plaintiff who had personal cultivation in the village. The lands East of Tulasiponu Istuva and further East of rasta were under the control of the plaintiff's father. The Kudivaram rights in the village was declared to had been vested in the Inamdar since a long time. The plaintiffs father also reclaimed some extent of land of Tulasiponu Istuva also and after the death of his mother, his (plaintiffs) father Suryanarayana gave the lands referred to above to his washerman servant Mangatuttu Sureedu for cultivation except Bangarammamadi and Subbammamadi, and the said Sureedu co-opted his brother-in-law, the 1st defendant, for assistance in cultivation. It was further pleaded that subsequently the plaintiff's father gave Subbammamadi and Bangarammamadi to Sureedu for temporary cultivation, but Sureedu gave Bangarammamadi to one Yeldurti Gurayya for cultivation. The said Sureedu and the 1st defendant divided among themselves the leased lands except Subbammamadi and Bangarammamadi and Sureedu got 18 wet plots adjoining the tank bund while the 1st defendant got five small plots (Boddelu) and big plot Baddemadi and they had equally divided the dry land also. It was further pleaded that the 1st defendant got the Eastern portion and the said Sureedu got the Western portion. Subbammamadi was cultivated by Sureedu and Bangarammamadi was under the cultivation of Yeldurti Gurayya. The 1st defendant never cultivated Bangarammamadi either as a lessee or co-cultivator of Sureedu. The lands were given for cultivation only on temporary basis on account of the mental agony of the plaintiffs father. All the cultivators yielded up their lands to plaintiffs father earlier in the year 1947 and since then personal cultivation of all the lands resumed as usual. It was further pleaded that the 2nd defendant was a close follower of the plaintiffs father and in the year 1950 for some reason he fell out with him and resolved to take vengeance of plaintiffs father and was waiting for an opportunity. In the year 1950, at the time of enquiry by the Settlement Officer, Visakhapatnam under Estates Abolition Act, the plaintiffs father and other inamdars adduced both oral as well as documentary evidence to establish the existence of Kudivaram rights

and also the existence of personal cultivation and the Officers upheld the claim of the inamdars and there were no appeals against the said orders. It was further pleaded that the 2nd defendant, during the enquiry, got filed a petition in M.O. No. 28/50 through the 1st defendant u/s 144 Cr.P.C. which was dismissed by the Tahsildar after enquiry. The 2nd defendant to wreak vengeance against the plaintiffs father brought into existence a pronote for a small sum, filed a suit O.S. No. 376/50 on the file of the District Munsif Court, Vizianagaram and got attached six wet plots given by Sureedu to the 1st defendant in the partition before judgment. The father of the plaintiff filed a claim petition in I.A. No. 723/50 which was allowed and the attachment was raised and thereupon the 2nd defendant filed a claim suit in O.S. No. 323/52 on the file of the same Court, but the said suit was dismissed and the Appeal filed by the 1st defendant in A.S. No. 520/56 on the file of the Additional District Judge, Vizianagaram was allowed holding that it is quite probable that the 1st defendant got in partition with Sureedu the attached lands to his share in the leasehold lands on which the father of the plaintiff filed S.A. No. 170/58 which was dismissed by the High Court and since December, 1964 there was absolutely no further action by the defendants. It was further pleaded that the 1st defendant, at the instance of the 2nd defendant filed a complaint in the Judicial I Class Magistrate's Court, Parvathipuram in C.C. No. 31 765 stating that the plaintiff and several others cut away the crops on the lands and the police also did not come to the aid of the 1st defendant which had ended in discharge. In the year 1965, the defendants taking advantage of the observations contained in the judgment of the appellate Court in A.S. No. 520/56, trespassed upon five plots and Baddemadi and the Eastern portion of the dry plot asserting that the 1st defendant had tenancy rights in the lands. The plaintiff was then in possession of the lands, but could not counteract the large body of men supporting the defendants. However, the other lands are in continuous possession and enjoyment of the plaintiff. It was also pleaded that in the year 1966, defendants 1 and 2 proclaimed that they would get the sons of Sureedu to occupy 18 plots of land and other portions as the High Court confirmed their rights also. To purchase peace and to avoid any controversy the plaintiff approached the son of Sureedu who offered to affirm the possession of the plaintiff and to convey whatever legal rights they may still have legally or reputedly in the lands and hence the plaintiff obtained a registered sale deed dated 29-3-1966 from the sons of Sureedu for a valuable consideration of Rs. 2,000/- to protect their rights of the plaintiff and thereafter the plaintiff filed a suit O.S. No. 165/66 on the file of the District Munsif, Bobbili to restrain the defendants 2 to 4 and others from interfering with the 18 plots and the dry portion and the suit was tried and ultimately decreed. The 1st defendant got himself impleaded on his own application as party to the suit on which the defendants preferred an appeal in A.S. No. 21/72 in Subordinate Judge's Court, Parvatipuram wherein the Subordinate Judge, Parvathipuram upheld the claim of the plaintiff. Subsequently, the 1st defendant filed a suit in O.S. No. 15/75 which was dismissed by the Munsif Magistrate, Rajam. It was further pleaded that the plaintiffs father was ordered to be granted a ryotwari patta in respect of the

lands of Tulasiponu Istuva and Bangarammamadi and Subbammamadi. The 18 plots which were said to be the share of Sureedu were surveyed as R.S. No. 64/2 measuring Ac.2-13 cents, while the six wet plots claimed by the 1st defendant as his shares were surveyed as S.No. 65/2 which is an extent of Ac.1-93 cents. The Assistant Settlement Officer, Srikakulam conducted inquiries in respect of the lands including S.Nos. 64/2 and 68/2 u/s 15 of the Estates Abolition Act after observing all formalities and due publication in the village. The plaint schedule lands as well as the lands in O.S. No. 165/65 were held to be the private lands belonging to the plaintiffs father and a ryotwari patta was ordered to be granted. The orders of the Settlement Officer is dated 30-8-1961 which was filed in O.S. No. 165/66 and marked as Ex.A-2. The plaint schedule lands are Ac.1-95 cents of wet in R.S. No. 65/2 and 67 cents of dry in the Eastern portion of S.No. 68/5 which the 1st defendant claimed as his tenancy lands having been got from the father of the plaintiff under a joint tenancy with Mangatuttu Sureedu and in his exclusive possession as tenant in portion with the said Sureedu. It was further pleaded that defendants 1 to 4 occupied the lands as stated above in the year 1965 and the lands were always known ryoti land private lands of plaintiffs father and the 1st defendant does not get any occupancy rights in the said lands and hence the 1st defendant is liable to give up the lands. The order of the Settlement Officer is final and binding on the defendants 1 to 4. The defendants 1 to 4 in all the previous proceedings asserted positively that the plaint schedule lands were got in partition as their share of tenancy lands while Sureedu got the rest of the lands of his share. The defendants are now estopped from questioning the rights of the plaintiff in the schedule lands or the sale deed dated 29-3-1966 as the plaintiff following the observations of the High Court had to purchase the rights of Sureedu for valuable consideration to protect his rights. The defendants are barred by principles of res judicata to deny the rights of the plaintiff in the plaint schedule lands or other lands in view of the findings given in O.S. No. 15/75, A.S. No. 21/72 and other proceedings. The 1st defendant offered to settle the disputes and give up possession, but immediately the defendants 2 to 4 intervened and threatened the 1st defendant that such conciliation cannot take place without any benefit for them as they stood by the 1st defendant in all the proceedings and hence the plaintiff gave a registered notice on 26-2-1976 calling upon the defendants to deliver possession of the lands together with the mesne profits. The defendants 1 and 2 received the said notice on 28-2-1976, but had not given any reply and they failed to deliver the lands to the plaintiff.

10. The 1st defendant filed written statement and the other defendants had adopted the same. It was pleaded in the written statement that Burjavalasa Agraharam in Bobbili Taluq is a whole Imam Village and is an estate within the meaning of Section 3(2)(d) of the Madras Estates Land Act. The cultivating tenants of the landholders acquired occupancy rights in their respective holdings. The plaintiffs undivided father late Pappu Suryanarayana was one of the landholders of the village and among the lands he owned Tulasiponu Istuva - wet, dry and waste is a part and it is a big block of land. Subbammamadi, alias,

Godimadi, Bangarammamadi, etc., are names of Khandams in Tulasiponu Istuva. The 1st defendant and Mangatutti Sureedu had been inducted as joint tenants. Sureedu is the brother-in-law of the 1st defendant residing with him as Sureedu had no properties of his own and was sickly. It was pleaded that Pappu Suryanarayana obtained Kudapa on 28-12-1939 from the 1st defendant and the said Sureedu. The rent (annual rent) was fixed at Rs. 100/- and subsequently it was enhanced to Rs. 150/-. It was further pleaded that among the two tenants there was a temporary arrangement according to which Sureedu would cultivate Subbammamadi, Bangarammamadi and few Boddelu and the remaining lands under Tulasiponu Istuva would be under the cultivation of the 1st defendant. Subsequently, Bangarammamadi was left to the 1st defendant by Sureedu and the Boddelu mentioned above under the cultivation of Sureedu include one small dry plot. Sureedu died in 1947 and as the sons of Sureedu left cultivation, the 1st defendant had been cultivating the entire Tulasiponu Istuva and Bangarammamadi is under the cultivation of Gurayya. Thus, the 1st defendant had occupancy rights in the entire Tulasiponu Istuva except Bangarammamadi and Gurayya acquired occupancy rights in Bangarammamadi. The 2nd defendant's wife Narayanamma purchased the said Bangarammamadi from the sons of late Gurayya under a registered sale deed and the 1st defendant is cultivating tenant for half of the said Bangarammamadi and his tenancy is protected under the Andhra Tenancy Act. The 1st defendant is the absolute owner of the suit properties as well as the other lands of Tulasiponu Istuva and in respect of Bangarammamadi the extent of his rights had been already stated above. The 2nd defendant got attached item No. 1 of the plaint schedule in O.S. No. 376/50 on the file of District Munsif's Court, Vizianagaram. As the plaintiffs father made an unrighteous claim to item No. 1 of the plaint schedule, the 2nd defendant filed a claim suit O.S.No. 323/52 on the file-of the same Court and he filed an appeal A.S. No. 520/56 on the file of the Additional District Judge's Court, Visakhapatnam and the present plaintiff's father Suryanarayana was a party defendant in those proceedings and it was held by the appellate Court that the plaintiffs father had absolutely no cultivation in any portion of Tulasiponu Istuva and that the entire Tulasiponu Istuva was leased out by him and that the 1st defendant acquired occupancy rights and as such the attachment made in O.S. No. 376 of 1950 is valid and that Pappu Suryanarayana had no title to those lands on which the plaintiffs father preferred S.A.No. 170/58 on the file of High Court and the High Court held that late Pappu Suryanarayana leased out the entire Tulasiponu Istuva without any exclusion. It was further pleaded that late Suryanarayana had no title in any portion of Tulasiponu Istuva and that he had no personal cultivation in any portion of Tulasiponu Istuva at any time and accordingly the said Second Appeal was dismissed. It was further pleaded that the village Headman is a pawn in the hands of late Pappu Suryanarayana and both these Brahmins could deceive the Settlement Officer in inducing the Settlement Officer to believe that Tulasiponu Istuva is the private land of late Suryanarayana. The 1st defendant is not aware of those proceedings at all and any order passed u/s 15(1) is not valid and binding on the tenant. It was further

pleaded that the provisions of Madras Act XXVI of 1948 do not affect the occupancy holding of a tenant. Further, the Kudivaram right of a tenant in abolition villages is not affected by any of the provisions of the Madras Estates Abolition Act and therefore the enquiry u/s 15(1) alleged to have been made by the Settlement Officer in favour of the plaintiffs father is vitiated by fraud and the 1st defendant being not a party to the proceedings is not bound by the said order and his occupancy rights in the suit lands as well as in the other lands of Tulasiponu Istuva cannot be extinguished or cannot be deemed to have been extinguished. It was admitted that Tulasiponu Istuva was included in the sale deed dated 29-5-1918, but it was denied that the lands covered by the said sale deed are the private lands of Suryanarayana. It was also pleaded that Burjavalasa was declared to be an inam estate and as such Melivaram interest of late Pappu Suryanarayana vested in the State Government and the plaintiff had also made a claim for compensation in the Abolition Tribunal, Srikakulam in respect of the lands purchased by his father late Pappu Suryanarayana. The Settlement Officer declared that Burjavalasa is a 1936 Inam Estate and as such the same was taken over by the Government in the year 1959. Neither late Suryanarayana nor any of the Inamdars preferred any Appeal against the action taken by the Government. The allegations with regard to the situation of the lands, cultivation by the plaintiffs father of the suit lands and other lands are not true. It was also pleaded that the Kudivaram right in the village had vested in the Inamdars since long time is false. It was further pleaded that it is also not true that Tulasiponu Istuva was leased out only to M. Sureedu exclusively and the 1st defendant had only assisted Sureedu in cultivation. The other allegations made in the plaint are not true and it is not true that there was a permanent partition between Sureedu and the 1st defendant, but it was only a temporary arrangement. It is also false to state that Sureedu got 18 plots adjoining the tank bound and that the 1st defendant got 5 small Boddalu and Buddimadi i.e., item No. 1 of the plaint schedule. It was further pleaded that it is also not true that wet plots cultivated by the 1st defendant are in continuous row adjoining the wet portions of Surredu. After the death of Sureedu in 1947, since 1950 the 1st defendant had been alone the entire cultivator of the entire Tulasiponu Istuva and it is false to allege that the 1st defendant and Sureedu left the cultivation of Tulasiponu Istuva wet, dry and waste lands in the year 1947 and they delivered the entire Istuva to the father of the plaintiff and that his father was cultivating the entire Istuva since 1947. It is also false to state that late Suryanarayana or the plaintiff were never in possession of the lands either prior to 1947 or subsequent to 1947. It is also false to state that in the year 1965 the 1st defendant trespassed into the suit lands and that the plaintiff has title to the suit lands. It is also not true that the 1st defendant was instigated by defendants 2 to 4 to trespass into the suit lands in the year 1965. The 1st defendant is not a trespasser, but he is the owner of the suit lands and he is the Kudivaramdar of the suit lands. The sale deed dated 29-3-1966 is a fabricated document and the survey numbers and the extents mentioned in the plaint are not true and correct. The plaintiff is not entitled for the relief prayed for in suit.

11. On the strength of the respective pleadings, certain issues had been settled and subsequent thereto additional written statements were filed and additional issues also were settled. The Court of first instance in fact had appreciated the oral and documentary evidence available on record in detail and a specific finding was recorded that the prior judgment in S.A. No. 170/58 on the file of High Court of Andhra Pradesh - Ex.B-12, will not operate as res judicata mainly on the ground that the issues are different and the subject-matter also is different. The appellate Court without appreciating the voluminous documentary evidence and also the oral evidence available on record had reversed the well considered judgment of the Court of first instance mainly on the ground that the judgment in S.A. No. 170/58 operates as res judicata and the plaintiff failed to establish title despite the fact that Ex.A-27 was marked in view of the T.O.Ps. 4/72, 8/ 72 and 62/72 and the order under Ex.A-27 was not granted in accordance with the procedure and hence the defendants are not bound by the same.

12. I had given my anxious consideration to the findings recorded by the appellate Court at paragraphs 11 to 17 and it is really unfortunate that the appellate Court, except touching these aspects, had not adverted to the voluminous documentary evidence available on record and it is needless to say that the non-consideration of the material available on record by the appellate Court itself is a substantial question of law. In the present Appeal, the following substantial questions of law arise for consideration:

(1) Whether the appellate Judge had arrived at the correct conclusion in reversing the judgment of the Court of first instance on the ground that the judgment in S.A. No. 170/58 operates as res judicata?

(2) Whether the findings recorded by the appellate Court in relation to Ex.A-27 are sustainable?

(3) Whether the total non-consideration of the other documentary evidence by the appellate Court vitiates the judgment of the appellate Court?

13. Question No. 1: The factual aspects and the respective stands taken by the parties are clearly evident from the respective pleadings and the same need not be repeated again. The evidence of P.W.1-plaintiff and P.W.2 on the side of the plaintiff is available apart from the documentary evidence and likewise the evidence of D.W.1 and D.W.2 is available on the side of the defendants apart from the documentary evidence. It is pertinent to note that the appellate Court, except referring to certain documents like Exs.A-27, B-12, B-20, B-21 and B-22 had not referred to the other documentary evidence available on record, the prior judgments and decrees, the prior E.P. proceedings, the certified copies of the revenue records, the sale deeds, the orders of the Settlement Officers and also the cist receipts and other proceedings. Be that as it may, both the Counsel made elaborate submissions on the first aspect i.e., whether the judgment and decree in S.A. No. 170/58 - Ex.B-12, operate as res judicata in the present suit or not. Exs.B-10, B-11 and B-12 are relevant for this purpose.

14. O.S. No. 323/52 on the file of District Munsif Court, Vizianagaram was filed by Pydithalli, the 2nd defendant in this suit against Pappu Suryanarayana, the father of the present plaintiff and against Yeldurti Buchaiah, the 1st defendant in the present suit for setting aside the summary order passed on 10-1-1951 in I.A. No. 723/ 51 in O.S. No. 376/50 and the issues which were settled in the said suit were:

(1) Whether the 2nd defendant is a tenant for the plaint schedule lands under the 1st defendant?

(2) Whether the claim order in I.A. No. 723/50 in O.S. No. 376/50 is liable to be set aside?

(3) To what relief?

15. It is pertinent to note that the 2nd defendant in the present suit filed O.S. No. 376/50 against the 1st defendant on the strength of a promissory note for Rs. 400/- executed by him which was decreed and the 2nd defendant in the present suit attached the standing crops in the lands in which the plaintiffs father filed a claim petition under Order 21 Rule 58 of the Code and the same was allowed and hence the 2nd defendant in the present suit filed O.S. No. 323/52 against plaintiffs father and the 1st defendant in the suit which was dismissed and the Appeal was preferred as against the said judgment by the 2nd defendant which was allowed and aggrieved by the same, a Second Appeal was preferred and the same was dismissed. Exs.B-11 and B-12 are the certified copies of judgments in A.S. No. 520/56 on the file of Additional District Judge, Visakhapatnam and S.A. No. 170/58 on the file of High Court of Andhra Pradesh, Hyderabad. It is pertinent to note that the father of the plaintiff filed a claim petition under Order 21 Rule 58 of the Code prior to the amending Act in 1976 and ultimately this is the proceedings which had been taken upto the level of Second Appeal no doubt wherein the father of the plaintiff was unsuccessful. The nature of the claim proceeding under Order 21 Rule 58 of the Code prior to 1976 was undoubtedly summary in nature and merely because a suit is instituted under Order 21 Rule 63 of the Code, in my considered opinion, such suit will not enlarge the scope or ambit of a claim proceeding as such and the suit also is only in the nature of a summary proceeding only since the limited relief which will be prayed for in the suit is for setting aside the order made in claim proceeding and hence in this view of the matter, I do not think that merely because the suit is instituted the findings recorded in the suit will operate as res judicata though the findings recorded in the claim proceeding may not operate as res judicata. A serious attempt was made by the Counsel representing the respondents in the Appeal to draw a distinction between the cases where the orders on claim proceeding attained finality and where the orders subsequently had been questioned by way of suits and subsequently carried by way of Appeal or a Second Appeal. In my considered opinion, this will not alter the situation in any way since the proceeding though had been questioned subsequently by way of a suit will not in any way change the character or nature of the summary

proceeding, the original proceeding which is questioned by way of a suit. In the decision referred *Manguru v. Taraknathji* (supra), the Apex Court held:

"A claim proceeding under Order 21 Rule 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceedings does not operate as *res judicata*. It is because of Rule 63 that the order becomes conclusive. The effect of Rule 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or any person claiming through him cannot reargue in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further."

The ratio laid down by the Full Bench of the Madras High Court in the decision referred, *Kandadi Narasimhachariar v. Raghava Padayachi* (supra) had been approved by the Apex Court in the decision referred in *Manguru v. Taraknathji* (supra). An attempt was made by the learned Counsel for the respondents to distinguish this decision on the ground that it is only a case where a claim proceeding had been dealt with and not after the institution of the suit under Order 21 Rule 63 of the Code. Strong reliance was placed on the decision referred, *Sawai Singhai v. Union of India*, (supra) in this regard, wherein the apex Court while dealing with the question of law whether a suit filed in pursuance of Order 21 Rule 63 of the Code attracts the provisions of Section 80 of the Code, answered the same in the affirmative. In the said decision, at page 1071, it was observed:

"In this connection, we ought to bear in mind that the scope of the enquiry under Order 21 Rule 58 is very limited and is confined to question of possession as therein indicated while suit brought under Order 21 Rule 63 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the investigation under Order 21 Rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under Order 21 Rule 63. Therefore, it would be impossible to hold that such a suit is outside the purview of Section 80 of the Code."

As far as the applicability of the principle of *res judicata* is concerned, the specific question was decided in the decision referred in *Kandadi Narasimhachariar v. Raghava Padayachi* (supra) and the said Full Bench decision of the Madras High Court was in fact followed and approved by the Apex Court in the decision referred in *Manguru v. Taraknathji* (supra). It is no doubt true that the decision referred, *Manguru v. Taraknathji* (supra) was delivered by a three-Judge Bench whereas the decision referred, *Sawai Singhai v. Union of India*, (supra) was delivered by a five-Judge Bench. However, the five-Judge Bench while dealing with the question of applicability of Section 80 of the Code to a suit filed under Order 21 Rule 63 had made certain observations relating to the nature of the suit under Order 21 Rule 63 of the Code. As already observed by me supra, a claim

proceeding under Order 21 Rule 58 of the Code prior to 1976 amendment was definitely a summary proceeding and a suit contemplated under Order 21 Rule 63 of the Code. At any rate, inasmuch as it is a question of applicability of the Principle of *res judicata*, the suit filed under Order 21 Rule 63 of the Code, in my considered opinion, cannot enlarge the scope and ambit of the nature of the proceeding, a summary proceeding, inasmuch as such a suit will be only questioning an order passed in such a claim proceeding and though incidentally certain other questions may be decided, the limited scope of the suit cannot be in any way enlarged, especially in the light of the provisions of the Code as they stood prior to 1976 amendment i.e., Order 21 Rule 58 read with Order 21 Rule 63 of the Code, in the light of the binding decisions referred to *supra*, since such question had been decided directly in the decision referred in *Manguru v. Taraknathji* (*supra*), I have no hesitation in arriving at the conclusion that the appellate Court had totally erred in arriving at the conclusion that the judgment in S.A. No. 170/58 - Ex.B-12, operates as *res judicata* and accordingly the said finding recorded by the appellate Court is hereby set aside.

16. Question No. 2: The next question which had been elaborately argued by both the Counsel is in relation to Ex.A-27. Ex.A-27 is a certified copy of the order in S.R. No. 15(1)(9/61, Bobbili, dated 30-8-1961 by the Assistant Settlement Officer, Srikakulam. The Assistant Settlement Officer had taken up suo motu enquiry and objections had been called for and as can be seen from Ex.A-27. I do not see any reason to doubt its genuineness. No doubt, an attempt was made to assail the validity of Ex.A-27 on the ground that the disposal of S.A. No. 170/58 was not brought to the notice of the concerned officer when S.A. No. 170/58 was disposed of by the High Court of Andhra Pradesh on 28-2-1961 and the order Ex.A-27 was made on 30-8-1961. On the material available on record it is clear that the existence of Ex.A-27 is within the knowledge of the defendants, but at no point of time the defendants made any attempt to question the same.

17. The Counsel for the defendants made elaborate submissions about the procedure to be followed in an enquiry u/s 15(1) of the Estates Abolition Act and had pointed out that such procedure had not been followed. I had given my anxious consideration to the order made by the Assistant Settlement Officer, Srikakulam - Ex.A-27, and I do not see any suspicion and it is needless to say that at this distant point of time, the validity of the said document cannot be assailed on such a ground, especially in the light of the fact that the same had not been questioned at all by the defendants though it was within their knowledge from sufficiently a long time. Hence, the reasons recorded by the appellate Court in view of T.O.Ps.4/72, 8/72 and 62/72 on the file of the Estates Abolition Tribunal, Srikakulam cannot be sustained in view of the fact that Ex.A-27 was made by the competent authority after following the due procedure and there is a presumption in favour of application of all the procedural formalities in such a case and hence at any stretch of imagination it cannot be said that Ex.A-27 is not valid or at any rate the same is not binding on the defendants. In the facts and circumstances of the case, I am of the considered

opinion that Ex.A-27 is a valid and binding document between the parties.

18. Question No. 3: As already observed by me supra, the appellate Court had mainly proceeded on the ground that the prior Judgment Ex.B-12 operates as res judicata and the said question cannot be reagitated again. It is pertinent to note that the suit is instituted on the strength of a cause of action of independent trespass and on the strength of the pleadings of the respective parties also and especially in the light of the binding decisions referred to supra, the said finding that Ex.B-12 operates as res judicata cannot be sustained. I may be relevant to have a look at the views expressed by me while dealing with Claim Order in execution proceedings and res judicata in my Law of Res judicata, 2000 Edn., at page 323:

"Order 21 Rule 58 C.P.C. deals with the adjudication of claims or objections to the attachment of property. Now by virtue of the Amending Act of 1976, Order 21 Rule 58 (4) provides for an appeal under Order 21 Rule 63 C.P.C was omitted by the amendment. However the effect of the rule is discussed. A claim proceeding under Order 21 Rule 58 C.P.C. is not a suit or a proceeding analogous to a suit and an order in the claim proceeding does not operate as res judicata. It is because of Rule 63 that the order becomes conclusive. The effect of Rule 63 is that unless a suit is brought as provided by the rule, the party against whom the order is made cannot reagitate the same i.e., whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose but the bar of Rule 63 extends no further. A decision in the claim proceedings has no application beyond the execution of the decree which has given rise to those proceedings and does not operate as res judicata in proceedings in execution of another decree. The Execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale when one has failed and it is immaterial whether the grounds are same or different. When the Single Judge of High Court passed an order under Order 21 Rule 58 C.P.C., the aggrieved party cannot file a Letters Patent Appeal but has to institute a suit under Rule 63 C.P.C. There is nothing in Rule 63 to indicate that the reject of the claim or objection under Rule 58 should be only after investigation and on merits and hence an order dismissing the claim petition under Rule 58 for default would attract Rule 63, and will be conclusive subject to the result of the suit. When the auction purchaser was not impleaded in a suit under Rule 63 of Order 21 C.P.C. the declaration obtained in the claim case does not have the effect of setting aside the sale or taking away the title of the auction purchaser acquired under the sale certificate. The scope of enquiry contemplated by Order 21 Rule 58 C.P.C. before amendment in 1976 was a summary one and in view of Section 97(1) of the Amendment Act of 1976 regarding the attachment subsisting before the enforcement of the amended provisions, the old provisions of Order 21 Rule 58 C.P.C. would continue to apply and where a claim petition is preferred before the sale but the order is rendered after the sale the order of the Court is not one falling under Order 21 Rule 58 C.P.C. which is required to be set aside by instituting a suit."

It is really unfortunate that except concentrating on Ex.B-12 and Ex.A-27, though several other judicial proceedings are there and the revenue records are available, none of the documents had been considered by the appellate Court, evidently for the reason that by recording such findings relating to the documents referred to supra only the judgment and decree of the Court of first instance can be reversed. In fact, both the Counsel had pointed out several admissions made by both the parties in the prior proceedings. In the decision referred, *Bharat Singh v. Bhagirathi* (supra). Apex Court held:

"Admissions must be clear if they are to be used against the person making them. They are substantive evidence by themselves in view of Sections 17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness u/s 145 of the Evidence Act is quite different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and only serves the purpose of throwing doubt on the veracity of the witness. Weight to be attached to an admission made by a party is a matter different from its use as admissible evidence."

In the decision referred, *Nagu Bai v. B. Shama Rao* supra, while dealing with approbate and reprobate it was held by the Apex Court that the maxim that a person cannot "approbate" and "reprobate" is only one application of the doctrine of election and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. In the decision referred, *Biswanath Prasad v. Dwaraka Prasad* (supra), it was held:

"There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case, an admission by a party is substantive evidence if it fulfills the requirements of Section 21; in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*; in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by Section 145."

In the decision referred in *Union of India v. Moksh Builders and Financiers* (supra), it was held by the Apex Court that an admission by a party is substantive evidence of the fact admitted and admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those

admissions. These elaborate submissions made by both the Counsel at the second appellate stage when none of these aspects had been considered by the first appellate Court at all, in my considered opinion, cannot be entertained and decided in a Second Appeal for the first time in the absence of any consideration by the first appellate Court which is virtually the final Court relating to the factual aspects. Hence, I am not inclined to touch upon the elaborate submissions made by both the Counsel relating to the rest of the documentary evidence and also the oral evidence and several of the admissions made by the parties in the prior proceedings. In the peculiar facts and circumstances of the case, this Court is left with no other option except to remand the matter for the purpose indicated in Question No. 3 only and for this limited purpose. I am inclined to make an order of remand.

19. In the facts and circumstances discussed in detail *supra*, the judgment and decree of the appellate Court are hereby set aside and the matter is remanded to the appellate Court for the purpose of deciding the aspects-referred to while dealing with Question No. 3 *supra*. The Second Appeal is allowed to the extent indicated above. No costs.