
(2005) 03 AP CK 0081

In the Andhra Pradesh High Court

Case No : CCCA No. 74 of 2002 and CCCAMP No's. 6, 7, 14, 15 and 114 of 2005

Syed Fahim Arif and Another

APPELLANT

Vs

Rahmatunnisa Begum and Another

RESPONDENT

Date of Decision : 22-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 — Section 3
Evidence Act, 1872 — Section 57, 57(6), 65, 82, 85
Limitation Act, 1908 — Article 142
Limitation Act, 1963 — Article 65
Registration Act, 1908 — Section 33

Citation : (2005) 3 ALD 545

Hon'ble Judges : P.S. Narayana, J;G. Bikshapathy, J

Bench : Division Bench

Advocate : N. Srinivas Iyengar, in CCCA No. 74 of 2002 and G. Anjappa, for the Appellant; M.R. Harsha, for Respondent Nos. 1 and 2, B. Adinarayana Rao, for Respondent Nos. 7, 10 and 11 in CMP Nos.14 and 15 of 2005 and S. Malla Rao, in CMP Nos. 14 and 15 of 2005, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Introduction: Challenge is made by the unsuccessful appellants/plaintiffs who were non-suited by the learned VII Senior Civil Judge, City Civil Court, Hyderabad, in O.S. No. 318/96 dated 28-1-2002. The suit was instituted by the appellants/plaintiffs for declaration that they are the lawful owners of premises bearing No. 8-2-624/A/1/2 and 8-2-624/A/1/3, between Road Nos.10 and 11 of Banjara Hills, Hyderabad, formerly known as Plot No. 83 in S. No. 1 17, Shaikpet Village, within Hyderabad West, for a perpetual injunction restraining the respondents/defendants, their men, agents and servants from making any construction, for a mandatory injunction to demolish and remove the constructions already made and also for such other suitable reliefs. The learned Judge recorded the evidence of the 1st plaintiff as PW-1 and also the evidence of DW-1, the 1st defendant, had been recorded on

Commission. Exs.A-1 to A-14 and Exs.B-1 to B-15 were marked on behalf of the respective parties and the learned Judge after recording the findings found Issues 1, 2, 3, and 4 against appellants/plaintiffs and came to the conclusion that they failed to prove their right and possession over the suit property and thereby they are not entitled for declaration of right, perpetual injunction and mandatory injunction and consequently dismissed the suit with costs. Aggrieved by the same, the appellants/plaintiffs preferred the present C.C.C.A.

2. Incidentally it may be referred to here that pending this Appeal certain interlocutory applications i.e., C.C.C.A.M.P. Nos.6/2005, 7/2005, 14/2005, 15/2005 and 114/2005 were moved praying for passing of certain interim orders against non-parties to the litigation, to implead such parties in the application complaining violation of interim orders and also praying for permission to examine the mother of the appellants/plaintiffs. Certain interim orders had been granted for a limited period which are being extended from time to time.

3. Submission of Sri Anjappa, the learned Counsel representing the appellants/plaintiffs:

Sri Anjappa, the learned Counsel representing the appellants/plaintiffs had taken this Court through the respective pleadings of the parties, the oral and documentary evidence available on record, the findings recorded by the learned Judge and had also commented how the said findings are not in accordance with law. The Counsel also pointed out the non-consideration of the documentary evidence in proper perspective and the consideration of inadmissible evidence and also total omission of consideration of certain documents which have material bearing on the result of the suit. The learned Counsel pointed out that the learned Judge had given undue importance to corrections made in the documents and also the rectification of plot number. The learned Counsel also would maintain that in a suit of this nature, the evidence of the appellants/plaintiffs and the evidence of the respondents/defendants may have to be weighed in a balanced manner and the learned Trial Judge had concentrated in appreciating the evidence of the appellants/plaintiffs alone totally disregarding the evidence of DW-1 since the evidence of DW-1 would definitely go to show that she has no right or marketable title to the suit property and even if such property is available to her it may be under a different survey number and definitely not the plaint schedule property. The Counsel also pointed out that Exs.A-1 to A-3 clearly refer S. No. 1 17 and Plot No. 83 admeasuring 3633 sq.yards which was purchased by the mother of the appellants/ plaintiffs on 27 Farvardi 1355 Fasli dated 27-2-1945 and the same was produced from lawful custody and the learned Counsel also pointed out to the vendors title on 26 Amardad 1354 Fasli. The Counsel also would maintain that the mistake relating to plot number was only a mistake of fact which had been duly corrected. The learned Counsel commented that the findings recorded in relation to Exs.A-5, A-6 and A-6(a) definitely cannot be sustained especially in the light of Sections 82 and 85 of the Indian Evidence Act 1872. The Counsel also made elaborate

submissions relating to oral gift which is recognized by the Muslim Law and in the light of the peculiar position the Counsel would comment that the non-examination of mother definitely is not fatal to the case of the appellants/plaintiffs. Even otherwise the Counsel would maintain that at present an application i.e., C.C.C.A.M.P. No. 1 14/2005 had been moved before this Court praying for permission to examine the mother and in the interest of justice the said application may have to be allowed. The learned Counsel explained when once a mistake regarding plot number was made, the same mistake continued in all the subsequent documents, the original being in Urdu and the mistake which occurred had been carried forward in other documents and this was just a continuation of the said mistake. The learned Counsel also commented that Exs.A-7 and A-9, the crucial documents had been referred to in a casual manner by the learned Judge. The learned Counsel pointed out that the abduction of secondary evidence and marking of such documents on respondents/defendants side though specific objection had been taken before the then Commissioner definitely is not in accordance with law. The learned Counsel also had pointed out to Ex.A-6 plan and made submissions that the learned Judge recorded certain findings reaching the same on unsustainable grounds. The learned Counsel also had taken this Court through Ex.A-7, dated 23-10-1978 with a reverse endorsement on payment of betterment charges of Rs. 44,000/- duly paid to the M.C.H. The learned Counsel also had pointed out to O.S. No. 804/97 in relation thereto. The learned Counsel also would submit that Ex.A-9, the supplementary G.P.A. was admitted without objection and marked and acted upon and hence the same cannot be questioned at a later point of time. While further commenting about Exs.A-8 and A-9 and the findings recorded by the learned Judge, comment had been made that the Stamp Act is only an enabling provision to avoid stamp duty when a document is already stamped and hence there is no question of further valuation under the Stamp Act and the Counsel would point out that proper stamp duty had been paid and the document had been marked without objection and this aspect had not been properly considered. The learned Counsel also pointed out to O.S. No. 6023/ 94 filed by the respondents/defendants against M.C.H. which ended in dismissal. The learned Counsel also pointed out the circumstances under which the memo of gift was prepared and the persons concerned with the same are no more. The learned Counsel also pointed out to the sale deed in favour of Ramachandra Reddy. The learned Counsel also pointed out that when once the title is established by the appellants/plaintiffs the burden to prove adverse possession or perfection of title would lie on the respondents/defendants and even otherwise there is no plea of adverse possession and this aspect had not been taken note of while appreciating the aspect of burden of proof. The total non-consideration of Ex.A-14 had been commented upon. The report of the Commissioner and the objections filed thereto also had been pointed out. The Counsel no doubt commented that in the light of the fact that oral gift is well recognized under Muslim Law non-examination of the mother would not alter the situation in anyway but even otherwise for the reasons explained in C.C.C.A.M.P. No. 114/2005 she may be permitted to be examined.

The learned Counsel would comment that in the light of Sections 82 and 85 of the Indian Evidence Act, 1872 definitely the procedure followed in England in relation to Ex.A-5 cannot be found fault by an Indian Court. The learned Counsel also had explained certain anomalies in the documents referring to Jubilee Hills and Banjara Hills in this regard. The learned Counsel also pointed out to the ancient nature of these documents and laid stress on the tax payment receipts as well. The learned Counsel also placed reliance on certain decisions.

4. Submissions made by Sri Harsha, Counsel representing the respondents/defendants:

Sri Harsha, the learned Counsel representing the respondents/defendants had taken this Court through the evidence of PW-1 and DW-1 and also the documentary evidence available on record and would contend that in a suit of this nature where declaration of title had been prayed for, the burden is on the appellants/plaintiffs to prove title and in the light of the non-discharge of such burden cast on the appellants/plaintiffs by law, the appellants/ plaintiffs are to be non-suited and hence the learned Trial Judge had arrived at the correct conclusion. The learned Counsel also pointed out that Ex.A-10 does not refer to Ex.A-5 and even in Ex.A-3, the extent of the plot also had not been mentioned and Ex.A-4 is not an official plan. The learned Counsel pointed out to the correction of Ex.A-6. The learned Counsel also laid stress on the identity of the property whether in Jubilee Hills or in Banjara Hills and had stressed on the aspect of Plot No. 37 referred to in the documents and correction in relation thereto and Plot No. 83. The Counsel laid stress on the point that Ex.A-5 was not proved and none concerned with the same had been examined and though the mother was in India and was able to attend the Court she was not examined for reasons best known to the appellants/plaintiffs. The learned Counsel had taken this Court through the findings recorded by the learned Judge and would comment that in view of the failure on the part of the appellants/ plaintiffs to establish the title by proving Ex.A-5 at least by examining the mother or at least to prove the other records relating to M.C.H. the appellants/plaintiffs are property non-suited. The Counsel explained certain aspects and circumstances how Ex.A-6 was tagged on to Ex.A-5 just to have regularization of the present dispute. The Counsel pointed out to several aspects, circumstances and also had taken this Court through the evidence of DW-1 and would explain that DW-1 had established the right over this property and already certain documents had been executed and non-parties to the litigation are in possession of the respective properties and hence the present litigation is only a speculative one. The Counsel also explained the documentary evidence adduced on behalf of the respondents/defendants and also placed reliance on certain decisions in this regard.

5. Pleadings of the parties: The appellants/plaintiffs pleaded in the plaint as hereunder:

Syedunnisa Begum W/o. Syed Arifullah Quadri, now residing at 160, Manor Court Road, England was a true and lawful owner of Plot No. 83 in Sy.No.. 1 17,

Shaikpet Village, situated between Road 10 and 11, Banjara Hills, having purchased the said open piece of land from Badrunnisa Begum w/o. Abdur Rub R/o Asif Nagar on 27th Farvardi 1355 Fasli, admeasuring 3633 sq. yards. The said Badrunnisa Begum became full owner of this land by virtue of a document of division on 16 Amardad, 1354 Fasli registered vide No. 961 of 1934 duly registered by City Registrar, Hyderabad on 26 Amardad 1354 Fasli. It is therefore submitted that Badrunnisa Begum who was true and lawful owner of open piece of land bearing Plot No. 83 in Sy.No.. 1 17 between Road Nos.10 and 11 conveyed the same to the appellants/plaintiffs' mother Syedunnisa Begum with full possession taken by her as full proprietrix of the property. It was further pleaded that the appellants/plaintiffs' mother Syedunnisa Begum gifted the said property on 27-2-1963 to three of her sons viz., the two appellants/plaintiffs herein and their elder brother Syed Saleem Arif by a oral gift in the presence of three respectable witnesses and gave possession of the property to three donees, her sons and allotted Plot No. 1, admeasuring 922 sq. yards to Syed Saleem Arif and Plot No. 2, admeasuring 922 sq.yards in favour of 1st plaintiff and Plot No. 3, admeasuring 922 sq.yards to the 2nd plaintiff and it was found in actual measurement that this corresponded to 940 sq.yards (2) 945 sq.yards, (3) 1156 sq. yards which was taken possession of by the respective donees. As a token of oral gift a Memo of gift was prepared on 10-9-1976 incorporating, admitting and accepting the deed of gift already made and therefore the appellants/ plaintiffs and their elder brother Syed Saleem Arif became the true and lawful owners and possessor thereof. It was further pleaded that Syed Saleem Arif, the elder brother of the appellants/plaintiffs, sold Plot No. 1 admeasuring 922 sq. yards which by then was allotted Municipal No. 8-2-624/A/1/1 situated at Road No. 111, Banjara Hills, Hyderabad in favour of M. Ramchandra Reddy and gave possession thereof to him leaving a passage in the Northern side to approach Plot 2 and 3 which were also allotted Municipal Nos. 8-2-624/A/1/2 and 8-2-624/A/3. Finding that their brother's vendee Dr. Ramchandra Reddy was interfering and extending and illegally encroaching upon the Northern side of the passage the appellants/plaintiffs had filed a suit against Ramchandra Reddy in O.S. No. 804/94 on the file of Xth Assistant Judge, City Civil Court, Hyderabad and obtained an ad-interim injunction in LA. No. 1483/94 dated 22-8-1994 and finally the suit was also decreed on 22-8-1994 allowing the suit maintaining the Northern passage in tact. It was also further pleaded that the appellants/plaintiffs brother's vendee also obtained and constructed a bungalow in the plot sold to him leaving clearly an approach road to reach Plot Nos. 2 and 3 belonging to the appellants/plaintiffs herein. However, the respondents/defendants took some illegal, wrongful and adverse steps during the absence of appellants/plaintiffs from India and constructed a small room for their watchman in Plot No. 2 belonging to the 1st plaintiff which was absolutely illegal and unauthorized. The katcha construction made of stones was illegal, unauthorized and without due municipal sanction and accord and are trying to establish some connection to the suit land by illegal manner and wrongful step taken by them. The 1st defendant had filed a suit on the file of IV Assistant

Judge, City Civil Court, Hyderabad in O.S. No. 6023/94 against Municipal Corporation of Hyderabad asking for perpetual injunction restraining the Corporation from interfering with the construction and also obtained ad-interim injunction against the Corporation. It was pleaded that the said case is pending before the IV Assistant Judge and was posted to 12-3-1996. It was also further pleaded that the respondents/ defendants created documents to suit their own ends and alleged that they are the owners of Premises No. 8-2-624/A/B/3/1, Banjara Hills, Road No. 11. As a matter of fact, if the respondents/defendants have any rights to legally establish their title, it is in Plot No. 25 in Sy.No.. 109, near Road No. 7, Banjara Hills. The respondents/defendants have manipulated things for their own benefits in an illegal manner. The title that the respondents/defendants allege is based on documents which clearly and categorically point out to an entirely different location and of different area and dimensions and is situated elsewhere and has nothing to do with the suit land.

The respondents/defendants filed a written statement denying the allegations. It was pleaded in the written statement that the allegations in the plaint are absolutely false, baseless, mischievous and misconceived. The allegations in the cause title and descriptions are formal and do not call for any specific reply. However the appellants/plaintiffs are put to strict proof thereof. The suit is not properly valued and the Court fee paid is incorrect. No reasons or grounds had been mentioned as to how the appellants/plaintiffs are entitled for declaration and possession. Merely on the basis of an alleged partition deed, no title can pass to the appellants/plaintiffs. Assuming without admitting that Badrunnisa Begum became entitled for some land, it is not explained how Syedunnisa Begum, the mother of the appellants/plaintiffs, became entitled to the suit property or any portion thereof. It was averred that the allegations in the plaint are quite vague, misconceived and devoid of merits. The alleged memorandum of gift purported to have been executed on 10-9-1976 incorporating an earlier alleged oral gift nearly 13 years earlier i.e., 27-2-1963, appears to be frivolous, false and the same is denied. The allegation that Syed Saleem Arif sold Plot No. 1 to Ramchandra Reddy is neither known nor concerned. The documents referred to by appellants/plaintiffs do not give correct and true identity, location and boundaries of the suit plot. The appellants/plaintiffs are not sure about their own property. It was further averred that the respondents/ defendants are the absolute owners of H.No. 8-2-624/4 and 8-2-624/A/B/3/1 situate in between Road Nos.10 and 11 having obtained the same under an oral gift from their mother Hafeezunnisa Begum on 2-6-1972 which was later confirmed in writing on 19-6-1973 and since then the defendant's mother was in actual physical possession and enjoyment of the said property and was also paying all the taxes. Hafeezunnisa Begum in turn obtained the property under gift from M.A. Raoof on 28th Azar 1350 Fasli and the same was confirmed on 1st Isfandar 1350 Fasli. M.A. Raoof in turn purchased land from Syed Yousufuddin through registered sale deed 252 of 1342 Fasli and on 23rd Isfandar 1346 Fasli, Syed Yousufuddin purchased 145 acres known as Kareemabad from Sri Aqad Jung, Smt. Sakeena

Begum and Smt. Mesooma Begum under Document No. 358 of 1342 Fasli dated 6th Khurdad of 1342 Fasli. Thereafter Syed Yousufuddin made plots and roads and sold it to various persons. It was also further pleaded that the respondents/defendants sold Plot No. 6-2-642/ A/B/3/1 admeasuring 326.6 sq. yards to one Smt. All Ahmed through registered sale deed dated 13-10-1994. Thereafter another Plot Nos. 8-2-624/4 and 8-2-624/A/B/1 admeasuring 239 sq. yards was sold to Gulam Mohammed Javeed by document dated 17-1-1995. Thereafter on 17-1-1996 another portion was sold by the respondents/ defendants forming part of 8-2-624/4 and 8-2-624/A.B/3/1 admeasuring 388 sq. yards and again on 12-6-1995 the respondents/ defendants sold another portion from 8-2-624/A/B/3/1 admeasuring 162.5 sq. yards to G. Shaheen and Zohra Shaheen and another portion admeasuring 823 sq. yards to Syed M.H. Quadri and another from 8-2-624/A/B/3/1. The second sale deed was also executed by one of the purchasers. Thus the respondents/defendants had sold various plots to various persons and they are the absolute owners and possessors and they are the absolute owners and are entitled to deal with the property as they deem fit and proper. The appellants/plaintiffs are unable to locate their own plots, if any. The appellants/plaintiffs made a complaint to M.C.H. and the M.C.H. issued notice dated 30-12-1994 u/s 461 referring to the complaint. Thereafter there were public notices exchanged in the local newspapers. The appellants/plaintiffs claimed property on Plot No. 83, Sy.No.. 117 with Municipal No. 8-2-624/A/1/1, A/1/2, A/1/3 as belonging to them but in the publication dated 27-11-1994 the appellants/plaintiffs have referred to layout purported to be issued by the Municipality. It appears to have been Plot No. 37 in Sy.No.. 117. The respondents/defendants issued a legal notice dated 29-7-1995 to the Municipality objecting for the sanction of the layout and bringing up the real facts. The allegations in Paras 1 to 4 of the plaint had been denied as far from truth. The filing of the suit O.S. No. 804/94 on the file of X Assistant Judge is neither known nor the respondents/ defendants are concerned with the same. It was stated that the allegations in Para-5 of the plaint do not concern to any of the properties. Similarly, the allegations in Para-6 of the plaint had been denied and it was specifically stated that the respondents/ defendants never took any illegal or adverse steps as mentioned in Para-6. It was further specifically pleaded that the respondents/ defendants never constructed any permanent or temporary structures. Further, the allegations in Para-7 of the plaint are absolutely misconceived and devoid of merits. The filing of the suit O.S. No. 6023/94 against M.C.H. is neither concerned to the respondents/defendants nor is of any relevance. The respondents/defendants had not created any documents in regard to Property No. 8-2-624/A/B/3/1, Road No. 11, Banjara Hills. The allegations that the respondents/defendants have so-called rights in Plot No. 25 in Sy.No. 109, near Road No. 7, Banjara Hills, is absolutely misconceived and denied. There is no manipulation as wrongly contended by the appellants/ plaintiffs. In fact, it is the appellants/plaintiffs who are trying to manipulate the documents and are unable to locate their own properties if any. The allegations in Para-8 of the plaint also had been denied. It was further pleaded that the appellants/plaintiffs

are not the true and lawful owners of the Premises No. 8-2-624/A/1/2, admeasuring 945 sq. yards and 8-2-624/A/1/3 admeasuring 1556 sq. yards, totally admeasuring 2101 sq. yards situate between Road Nos.10 and 11. The respondents/defendants are absolute owners and possessors of the said properties and are in actual possession and enjoyment. In fact, the appellants/ plaintiffs claimed property on Plot No. 83, in S.No. 117 but in the publication dated 27-11-1994, the appellants/ plaintiffs had referred to layout purported to be issued by Municipality which appears to be in Sy.No. 117, Plot No. 37. It was also further pleaded that there is no cause of action and it never arose on 1-1-1996 or on any other date. It was also further pleaded that without prejudice to the rights and contentions of the respondents/defendants, the respondents/ defendants had perfected their right, title and interest by virtue of being in actual physical possession and enjoyment without paying any periodical monies whatsoever to the knowledge of one and all including the appellants/ plaintiffs and their predecessors-in-title. The suit is hopelessly barred by limitation even assuming that the appellants/ plaintiffs have any cause of action.

6. Issues settled by the trial Court:

On the strength of the respective pleadings of the parties, the following Issues were framed by the Trial Court which are as specified hereunder:

1. Whether the plaintiff is entitled for declaration as owners of the suit schedule premises?
2. Whether the plaintiff is entitled for permanent injunction against the defendant?
3. Whether the respondents/defendants have any right over the suit schedule property?
4. Whether the plaintiff is entitled for mandatory injunction to demolish and remove any construction in the plaint schedule property?
5. To what relief?
7. Oral and documentary evidence adduced by the parties:

The 1st plaintiff was examined as PW-1 and the 1st defendant was examined as DW-1 through Court Commissioner. Exs.A-1 to A-14 and Exs.B-1 to B-15 were marked on behalf of the respective parties. Ex.A-1 is the original registered sale deed in Urdu dated 27 Farvardi 1351 Fasli (1945) under which the mother of the plaintiff was shown to have purchased land from Badrunnisa Begum, Ex.A-2 is the plan attached to the said sale deed, Ex.A-3 is the certified copy of the partition deed of the year 1345 Fasli in the name of Badrunnisa Begum, Ex.A-4 is the plan appended to Ex.A-3, Ex.A-5 is the memorandum of gift dated 10-9-1976 executed in England by the mother of the appellants/ plaintiffs in favour of the appellants/ plaintiffs and their brother Syed Saleem Arif, acknowledging oral gift. Ex.A-5(a) is validation of Ex.A-5 at Hyderabad by the Assistant Inspector General

of Stamps, dated 18-2-1977, Ex.A-5(b) is the attestation done in England on Ex.A-5 by a Solicitor. Ex.A-6 is the plan showing the demarcation of the land gifted to the appellants/plaintiffs and their brother under Ex.A-5. Ex.A-6(a) is the correction in Ex.A-6 made by the mother of the appellants/ plaintiffs dated 10-9-1976 correcting the plot number. Ex.A-7 is the copy of the layout issued by M.C.H. Ex.A-8 is the General Power of Attorney executed by Syed Azeem Arif, 2nd plaintiff, in favour of the 1st plaintiff. Ex.A-9 is the supplementary G.P.A. executed by the 2nd plaintiff in favour of the 1st plaintiff at England dated 2-10-2000. Ex.A-10 is the certified copy of the registered sale deed dated 13-7-1977 executed by the brother of the plaintiff Saleem Arif in favour of Dr. Ramachandra Reddy with regard to H.No. 8-2-24/A/1/1. Ex.A-11 is the plan attached to Ex.A-10. Ex.A-12 is the tax receipt relating to H.No. 8-2-624/A/1/3 in the name of the 2nd plaintiff. Ex.A-13 is the tax receipt dated 27-1-1977 relating to H.No. 8-2-624/A/1/2, Ex.A-14 is the extract of assessment register of property tax for H.No. 8-2-624/A/1/3 from the year 1979 to 2000 showing that the tax is exempted. Likewise, Ex.B-1 is the paper publication dated 29-12-1994. Ex.B-2 is another publication in Eenadu dated 29.12.1994, Exs.B-3 and B-4 are tax receipts for H.No. 624/4, dated 7-9-1997 and H.No. 624/ A/B/3/1, dated 19-7-1991 respectively, Ex.B-5 is a tax demand notice dated 12-12-1974 in respect of H.No. 8-2-624/4 addressed to 2nd defendant. Ex.B-6 is the similar notice dated 21-12-1983 of H.No. 8-2-624/A/B/3/1 addressed to Defendant No. 1. Ex.B-7 is a demand for non-agricultural land tax dated 2-6-1995 addressed to both the defendant and Syed M.H. Quadri and All Ahmed showing the property bearing No. 8-2-624/A/ B/3/1. Ex.B-8 is the cash memo issued by Deccan Chronicle dated 29-12-1994. Ex.B-9 is the cash memo issued by Eenadu dated 28-12-1994. Ex.B-10 is another cash memo issued by Eenadu dated 20-12-1994. Ex.B-11 is the copy of the sale deed executed by respondents/ Defendants 1 and 2 in favour of one Gulam Mohd. Javed dated 17-1-1995 and Ex.B-11 (a) is the plan attached to it. Ex.B-12 is another copy of the sale deed dated 17-1-1995 executed by the respondents/defendants in favour of Smt. Shaheen Sultana and Ex.B-12(a) is the plan attached to it. Ex.B-13 is another copy of the sale deed dated 12-6-1995 executed by the respondents/defendants in favour of Gazala Shaheen and Ex.B-13(a) is the plan attached to it. Ex.B-14 is a copy of the sale deed dated 23-8-1995 executed by Syed Nadeemullah Hussaini Quadri in favour of Sri V. Krishna Reddy. Ex.B-15 is a copy of the plaint in O.S. No. 804/90 on the file of X Assistant Judge, City Civil Court, Hyderabad filed by the appellants/plaintiffs against Dr. Ramachandra Reddy.

8. Findings recorded by the Trial Court:

Issues 1 to 3 were discussed together commencing from Paras 14 to 47 and Issue No. 1 was answered against the appellants/ plaintiffs that the appellants/ plaintiffs failed to prove their right and possession over the plaint schedule property and hence not entitled for declaration as owners thereof and it was further held that the respondents/ defendants also could not prove title over the plaint schedule property though they had proved that they have been in

possession of the plaint schedule property at least from 1974. The other Issues, Issues Nos. 2, 4, and 5 also had been answered at Paras 48, 49, and 50 against the appellants/plaintiffs. Certain of the reasons which weighed with the Trial Court to negative the reliefs prayed for by the appellants/plaintiffs are as hereunder:

The mother of the appellants/plaintiffs though alive had not been examined and hence Ex.A-5 was not true. There was no proof to show that property was assessed and mutated in any official records in favour of the appellants/plaintiffs. It was not established that Ex.A-5 said to have been validated in India can be said to be an authenticated document since there is no proof relating to any official marks. In Ex.A-10 sale deed which was executed in favour of one Ramachandra Reddy on 13-7-1977, there is no reference relating to Ex.A-5. A finding had been recorded that Ex.A-6 is an old one prepared in Urdu language when compared to Ex.A-5 in English and Ex.A-6 contains the seal of Nizam Government and a similar seal also is there on Ex.A-1 which is of the year 1945 and Ex.A-6 was just tagged on to Ex.A-5 with a view to regularize the property in dispute. Certain other findings had been recorded relating to the suspicious nature of the documents. Ex.A-4 plan appended to Ex.A-3 partition deed is not official plan. There is some confusion in the documents produced relating to Plot No. 37 or Plot No. 83. Since the appellants/plaintiffs and respondents/defendants failed to prove their title to the property in view of the fact that burden of proof is on the appellants/ plaintiffs, the appellants/plaintiffs were nonsuited recording a finding that there is some evidence adduced on behalf of the respondents/ defendants to show that they have been in possession of the plaint schedule property.

9. Points for consideration which arise in the present appeal:

1. Whether the findings of the Trial Court relating to Hiba and proof thereof are sustainable?
2. Whether the appellants/plaintiffs can be non-suited on the ground that the respondents/defendants are in possession of the property without a plea of adverse possession and proof relating thereto?
3. Whether Exs.B-11 to B-14, certified copies of the sale deeds are admissible in evidence especially in the light of the objection raised by the appellants/ plaintiffs in this regard.

10. Point No. 1: The case of the appellants/plaintiffs is that appellants/plaintiffs 1 and 2 and one Syed Saleem Arif are brothers and sons of Syedunnisa Begum and the plaint schedule property is in between Road Nos. 10 and 11 of Banjara Hills, formerly known as Plot No. 83, S.No. 1 17 of Shaikpet Village. It is the specific case of the appellants/plaintiffs that their mother Syedunnisa Begum purchased open land under Ex.A-1 sale deed dated 27 Farwardi 1355 Fasli of an extent of 3633 sq.yards in Plot No. 83, S.No. 1 17. Shaikpet Village in between Road Nos. 10 and 11 of Banjara Hills from Badrunnisa Begum. The said Badrunnisa Begum

got right over the said property by virtue of a registered partition deed dated 16th Amardad 1345 Fasli, Ex.A-3, bearing No. 961 of 1934. It is also the case of the appellants/plaintiffs that their mother orally gifted the suit land to her three sons i.e., appellants/plaintiffs 1 and 2 and Saleem Arif and each acquired 922 sq. yards which she had confirmed in Memorandum of acknowledgment of gift under Ex.A-5 on 10-9-1976 at London in view of the fact that she had migrated to the said place along with her husband. The said deed had been validated in Registrar's Office under Ex.A-5(a) by an endorsement. Ex.A-6 is the plan attached to Ex.A-5 showing demarcation of the plots. It is also their case that their brother Syed Saleem Arif sold away his plot to one Dr. Ramachandra Reddy by virtue of an agreement of sale Ex.A-10, dated 13-7-1977 and M.C.H. had given No. 8-2-624/A/1/1 to the said plot, MCH No. 8-2-624/A/1/2 to the plot of 1st plaintiff and 8-2-624/1/1/3 to the plot of 2nd plaintiff. The respondents/defendants however claimed right and title to the suit property through their mother Hafeesunnisa Begum which it is said that she got the same by virtue of gift from her uncle M.A. Rawoof on 28 Azur 1358 Fasli, which he confirmed later under a Memorandum dated 1st Isfandar 1350 Fasli. The said Rawoof purchased the land from one Syed Yousufuddin under registered sale deeds dated 1342 Fasli and 23 Isfandar 1346 Fasli and the said Yousufuddin in turn had purchased an extent of 145 acres of land known as Kareemabad from Aqud Jung, Smt. Sakeena Begum and Smt. Masooma Begum under Document No. 358 of 1342 Fasli. The same was divided into plots and had been sold to various persons and Rawoof was one of such purchasers. It was stated that their mother gifted over the property on 2-6-1972 to them orally which was later confirmed in writing on 19-8-1973 under a written document. The respondents/defendants have been exercising their rights by selling several portions of the property under registered sale deeds to various persons under the originals of Exs.B-11 to B-14. Exs.B-3 and B-4 are tax receipts. Ex.B-5 is the tax demand notice. Ex.B-7 is the notice demanding payment of non-agricultural land tax. Thus, both the appellants/plaintiffs and the respondents/defendants are claiming title to the plaint schedule property by virtue of the respective claims put forth as referred to supra.

11. At the first instance, it may be appropriate to have a look at certain of the findings recorded by the Court of first instance in relation to Ex.A-5, at Paras 24, 25 and 26, which read as hereunder:

"Admittedly Ex.A-5 was executed in London on 10-9-1976 and it was validated in India on 18-2-1977 before the Assistant General of Stamps as if required under law. The date of this document and the date of its validation rules out that this document having been brought into existence for the purpose of litigation as this suit is of the year 1996. Thus there is proof that this document is in the hands of the appellants/plaintiffs from February, 1977. But no proof is produced by them nor this document bears any official mark to show that, on the basis of it the right of the appellants/plaintiffs was mutated to the property referred in it in any official records which should have been a normal conduct. This document reads,

what impelled the donor to execute it. "That the said factum of as to transaction of oral gift is reduced to writing as purchasers of the donee are demanding the tide deed". Thus it appears, essentially this document was obtained by appellants/plaintiffs, for the purpose of alienating the property and to create confidence in their offer to sell.

According to appellants/plaintiffs, the plot got by their elder brother Saleem Arif was sold by him to Dr. Ramachandra Reddy on 13-7-1977, whose certified copy is marked as Ex.A-10. It is seen from Ex.A-10 there is no reference to Ex.A-5 document, particularly there is no mentioning of the plot number which is in controversy. According to the appellants/plaintiffs Ex.A-5 is stated to have been executed before the Commissioner of Oath at London. It is seen from Ex.A-5 there is no seal or attestation of such an official in it. There is signature of a person said to be Mr. Patt (as it reads). Besides it, it is written Commissioner Oath. His signature is found among one of the witnesses but not as an attestor. The case of the appellants/ plaintiffs is, that the Commissioner of Oath has signed in Ex.A-5, where their mother, the donor, declared about the oral HIBA and passing the title endorsing such a declaration was made in his presence on Oath. Thus, it has to be inferred, in his presence the declaration was made and he attested the signature of the donor and the truth of the declaration in his presence. I do not think an official of the Government in London would just scribbled his signature along with the other witnesses as a witness when a declaration of tide of an immovable property has been made on Oath holding an office of the designation Commissioner of Oath of the Government there. There is no gainsaying in stating that an official acts in a developed country like U.K. would be on a definite pattern and form, which are all absent in the case of Ex.A-5. By no means the signing of a person by name called Md. Pratt, where he signed as a first witness can be said to be an official in whose presence the document stated to have been executed. Where an instrument is required to be attested under law the meaning shall be that a witness/ attestor shall be present at its execution and shall testify on it that it has been executed by particular person. To attest an instrument is not merely to subscribe ones name to it as having been present at its execution, but includes essentially, the presence of the persons the fact of execution, and that person shall be capable of giving evidence as to what took place. I had referred to the above factors to note the essentiality of the endorsement by the said Commissioner of Oath and his seal as he is described by the appellants/plaintiffs as Commissioner of Oath of the Government at London. In view of the serious controversy involved as to the plot number mentioned in Ex.A-5 document and the subsequent plea that it was a typographical mistake, and the correct plot number is different, and that later before the same official a correction as to the Plot No. was made in the plan attached to that document, which aspect is a bone of contention between the parties is marked as Ex.A-6 said to be attached to Ex.A-5. A glance at this document goes to show, that it could not have been executed at London and could not have been prepared there and shown to the official there. This plan on

the face of it is a quite old one prepared in Urdu language when compared with the document Ex.A-5. Ex.A-5 is in English and was executed at London, and said to have been executed in the presence of an officer at London called Commissioner for Oath. In that case normally Ex.A-6 plan said to have been appended to it, must also be in English. But strangely enough it is in Urdu. It is not the case of the plaintiff the said English Officer also knows Urdu. It is also seen that this plan Ex.A-6 contains a seal of the erstwhile Nizam Government. Such a similar seal is seen in Ex.A-1 document of 1945. I do not think any Officer of the Government of London would have just signed on this plan as a witness, which is in Urdu which document could not have been prepared in London. To top it all, in fact, there is no signature of that officer on this plan. This shows pairing of this plan to Ex.A-5 to somehow legitimize that document and to show the property in dispute is the one that was shown conveyed under Ex.A-5."

12. It is no doubt true that the mother of the appellants/plaintiffs who could have been examined was not examined and it is stated that none others concerned with the oral gift are available to be examined. Here itself it may be referred to that explaining certain reasons in the present Appeal, C.C.C.A.M.P.No. 114/2005 was filed praying for permission to examine the mother of the appellants/plaintiffs and no doubt the said application is being opposed. It is not in controversy that Ex.A-1 is of more than 30 years old coming from proper custody and hence the presumption u/s 90 of the Indian Evidence Act, 1872 would be available in relation thereto. Section 90 of the Indian Evidence Act, 1872 reads as hereunder:

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports" to be executed and attested."

Ex.A-5 was executed at London on 10-9-1976 and the same was validated in India on 18-2-1977. Several circumstances said to be suspicious relating to Exs.A-5 and A-6 had been discussed by the Trial Court and ultimately a finding had been recorded that the same cannot be relied upon for want of proof. Sections 82 and 85 of the Indian Evidence Act, 1872 may be relevant in the present context and the said provisions read as hereunder:

Section 82: When any document is produced before any Court, purporting to be document which, by the law in force for the time being in England or Ireland would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or

official character which he claims and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Section 85: The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Counsel or Vice-Counsel, or Representative of the Central Government; was so executed and authenticated.

It is not in serious controversy that a Muslim can make an oral gift and no doubt the specific stand taken by the appellants/ plaintiffs is that the same was reduced to writing subsequent thereto under Ex.A-5. It is no doubt true the oral gift may have to be proved in accordance with the settled principles under the Mohammedan Law. Much comment had been made on the aspect of non-examination of the mother of the appellants/plaintiffs. It is pertinent to note that the mother of the appellants/ plaintiffs is not making any adverse claim as against the appellants/plaintiffs and at present there is no adverse interest as between the mother and the sons. It is also pertinent to note that it is the specific case of the appellants/plaintiffs that their brother executed Ex.A10 in favour of one Ramachandra Reddy in relation to the plot which had been allotted to him which is one of the plots which had been orally gifted by their mother. Non-reference of Ex.A-5 in Ex.A-10 had been much commented upon. It is no doubt true that in a suit of this nature, the appellants/plaintiffs may have to succeed on the strength of their own title and proof thereof and may not take advantage of the weakness of the defence. But, at the same time, it may be equally essential to have a look at the evidence of DW-1 and especially in the light of the finding recorded by the Trial Court that the respondents/defendants also failed to prove their title to the suit property how to evaluate and appreciate the evidence and balance the same while recording findings in evaluating the respective claims of title of the respective parties would assume some importance. In *The Performing Right Society, Limited Vs. The Indian Morning Post Restaurant*, , it was held that u/s 85 of the Indian Evidence Act 1872 the Court shall presume that a Power of Attorney executed before and authenticated by a Notary Public was so executed and authenticated and the provision is mandatory and it is open to the Court to presume that all the necessary requirement for the proper execution of the Power of Attorney had been duly fulfilled and moreover there are different legal modes of execution of a Power of Attorney and the provision of Section 85 is not exhaustive. In *Abdul Jabbar and Others Vs. 2nd Additional District Judge, Orai and Others*, , it was held that Section 85 of the Indian Evidence Act 1872 applies not only to Notaries Public as defined under the Notaries Act, but also to Notaries Public functioning in other countries and the documents authenticated before the Notaries Public functioning in other countries like Pakistan must be presumed to have been duly authenticated within the meaning of Section 85 of the Indian Evidence Act, 1872. Reliance also was placed on *Jugraj Singh and Another Vs. Jaswant Singh and Others*, , *National and Grindlays Bank Ltd. Vs. World Science News and Others*,

and In Re: K.K. Ray (Private) Ltd., , in this regard. In the decision referred in National and Grindlays Bank Ltd. v. World Science News (supra), following the ratio laid down in the decision of the Apex Court referred in Jugraj Singh v. Jaswant Singh (supra), it was held:

"The document in the present case is a Power of Attorney and again on the face of it shows to have been executed before, and authenticated by, a Notary Public. In view of Section 85 of the Evidence Act, the Court has to presume that it was so executed and authenticated. Once the original document is produced purporting to be a Power of Attorney so executed and attested as stated in Section 85 of the Evidence Act, the Court has to presume that it was so executed and authenticated. The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the Power of Attorney have been duly fulfilled. There is no doubt that the section is not exhaustive and there are different legal modes of executing a Power of Attorney, but once the Power of Attorney on its face shows to have been executed before, and authenticated by, a Notary Public, the Court has to so presume that it was so executed and authenticated. The authentication by a notary public of a document, purporting to be a Power of Attorney and to have been executed before him is to be treated as the equivalent of an affidavit of identity. The object of the section is to avoid the necessity of such affidavit of identity. u/s 57 Sub-section (6) of the Evidence Act, the Courts have to take judicial notice of the seals of Notaries Public and when the seal is there, of which judicial notice is taken, there is no reason why judicial notice should not be taken of the signatures as well. What is argued by Shri Rameshwar Dial, learned Counsel for respondents/Defendants 1 to 3, is that the Notary Public in Section 85 or Section 57 of the Evidence Act merely means Notaries appointed under the Notaries Act, 1952. The argument is that where a document purports to be a Power of Attorney, before the Court can presume it to be so executed and authenticated as is contemplated by Section 85, it should have been authenticated by Indian Consul or Vice-Consul or the representative of the Central Government and not by a notary public of a foreign country. For one thing Notaries Act, 1952 was not there when Evidence Act which was the first Act of 1872 was enacted. Secondly, the purpose of Section 57 and 85 is to cut down recording of evidence. For such matters, like the due execution of a Power of Attorney in the present day of international commerce, there is no reason to limit the words "Notary Public" in Section 85 or Section 57 to Notaries appointed in India. The fact that notaries public of foreign countries have been recognized as proper authorities for due execution and authentication for purpose of Section 85 of the Evidence Act is illustrated by the Supreme Court in case Jugraj Singh and Another Vs. Jaswant Singh and Others, . In this case the Supreme Court held that a Power of Attorney executed and authenticated before a notary public of California satisfied the test of Section 85 of the Evidence Act and Section 33 of the Indian Registration Act. If the interpretation of notary public is limited to notaries public appointed in this country only, it will become impossible to carry

on commerce with foreign countries. Surely, Section 57 of the Indian Evidence Act enjoins upon the Courts to take judicial notice of seals of Notary Public. Such judicial notice cannot be limit to Notaries appointed in India only. This seems clear if the entire sub-section is read. Once, this conclusion is reached, there is no reason to limit the meaning of the expression "Notaries Public" in Section 85 of the Indian Evidence Act to Notaries appointed in India only".

Likewise in the decision referred in *In Re. K.K. Roy (Private) Ltd.* (supra), it was observed:

"The Notary is now internationally known today in the modern world of commerce, industry and dealings between different nations and countries. Reciprocity between different countries is its essential basis. Without this reciprocity and mutual respect the whole system and rationale of notarial acts will break down, to the great detriment of commercial transactions throughout the world and their due administration by Courts of law in different countries and will jeopardize international commerce, law merchant and administration of justice. It is precisely to provide facilities of receiving affidavits, documents, protests of bills of exchange and other commercial papers that this institution of Notary Public grew up to fulfil a very practical need. Unnecessary or illogical impediments should not be put on his way. No doubt that does not mean that law of the Courts should not ensure reasonable authenticity and dependability of notarial acts. When I find that this notarial act of Elizabeth Levy has been certified by the Country Clerk and by the Clerk of the Supreme Court of New York, the Court of Record under its seal, when I find that this Notary public is authorized to administer Oath by the laws of the State of New York, USA and further that there is the certificate of the Consulate General of India, an office recognized expressly by Section 3 of the Indian Diplomatic and Consular Officers (Oath and Fess) Act 1948 to administer Oath and take affidavit, then the dependability and authenticity of such notarial act are in my judgment sufficiently ensured and cannot be doubted.

On this important and practical problem of reciprocity, the Court requested Mr. RK Deb as *amicus curiae* to appear as a Senior Notary Public of this city to inform the Court about the Indian practise and experience in dealing with notarial acts and reciprocity between Indian and U.S.A. Mr. Deb has informed the Court that Indian notarial act is recognized and reciprocated in the U.S.A. and similarly the notarial acts of the USA have been accepted and recognized in India in diverse matters and documents, specifically when many industrial, commercial and business transactions are today entered between India and the USA. Mr. Rashmohan Chatterjee of the instructing Solicitors. Messrs. Orr, Pignam and Company of Mr. Shankar Ghosh also supported the same practice and experience on the point of reciprocity between India and the USA regarding notarial acts. Mr. Deb has told me that he himself in his professional capacity as a Notary Public in India has notarially noticed documents of USA and his notarial acts have been recognized in the USA. Similarly India has recognized notarial acts done by

American Notaries. I am therefore satisfied that there is reciprocity with mutual recognition of notarial acts between India and the USA.

On these authorities and for these reasons I have no doubt in my mind this petition signed by Michael Michaelson, President and Principal Officer of the petitioner Co. Franklin Square Agency Inc., and verified by two affidavits sworn before Elizabeth Levy, a Notary Public of USA should be duly admitted and received on the records of this Court".

In the decision referred in Jugraj Singh v. Jaswant Singh (supra), the Apex Court at Paras 6 and 7 held:

"It is plain that presentation for registration could be, either by the Principal or by a duly constituted attorney. It is equally plain that a proper Power of Attorney duly authenticated as required by law had to be made before power could be conferred on another either to execute the document or to present it for registration. That indeed is the law.

The short question in this case is whether Mr. Chawla possessed such a Power of Attorney for executing the document and for presentation of it for registration. Now, if we were to take into account the first Power of Attorney which was executed in his favour on May 30, 1963, we would be forced to say that it did not comply with the requirement of the law and was ineffective to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. That Power of Attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second Power of Attorney however does show that it was executed before a proper Notary Public who complied with the laws of California and authenticated the document as required by that law. We are satisfied that the Power of Attorney is also duly authenticated in accordance with our laws. The only complaint is that the Notary Public did not say in his endorsement that Mr. Chawla had been identified to his satisfaction. But that flows from the fact that he endorsed on the document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and we are satisfied that he must have satisfy himself in the discharge of his duties that the person who was executing it was the proper person. This makes the second Power of Attorney valid and effective both u/s 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act."

No doubt submissions at length were made relating to the presumption available in favour of the validity of such documents in the context of Section 82 of the Indian Evidence Act, 1872 as well. However, the learned Counsel representing the respondents/ defendants placed strong reliance on certain decisions to substantiate his stand that the weakness of the respondents/defendants cannot

be of any consequence in a suit for declaration of title and the appellants/ plaintiffs are bound to fail when they are unable to prove their title to the property irrespective of the defence of the respondents/ defendants. In AIR 1946 59 (Privy Council) , it was held:

"Where a plaintiff sues in ejectment, he can succeed on the strength of his own title. There is no obligation upon the defendant to plead possible defects in the plaintiff's title which might manifest themselves when the title is disclosed. It is sufficient that in the written statement the defendant denies the plaintiff's title, and under this plea he can avail himself of any defect which such title discloses."

In *M.M.B. Catholicos v. M.P. Athanasius* AIR 1954 SC 526 , it was held that the plaintiff in ejectment suit must succeed on the strength of his own title and this can be done by adducing sufficient evidence to discharge the onus that is on him irrespective of whether the defendant has proved his onus or not and a mere destruction of the respondents/defendants title in the absence of establishment of his own title carries the plaintiff nowhere. In *Brahma Nand Puri Vs. Neki Puri* , it was held 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, the suit must fail notwithstanding that the defendant in possession has no title to the property. Strong reliance also was placed on *S.M.M. Kunhi Koya Thangal v. B.J.P. Dharas Committee and Ors.* 2004 SAR 832, where the Apex Court held that the cardinal principle in a suit for declaration of title and recovery of possession on the strength of title is that the plaintiff can succeed only on establishing his title to the suit property and the plaintiff cannot succeed on the weakness of the case put forward by the defendant.

13. There cannot be any doubt or quarrel about this proposition and evidently recording certain findings relating to certain of the suspicious circumstances surrounding Exs.A-5 and A-6 and principally on the ground of non-examination of the mother of the appellants/plaintiffs or any other person concerned with Ex.A-5, the appellants/ plaintiffs had been non-suited on the ground that the very oral gift said to have been made by their mother in their favour and the resultant document Ex.A-5 had not been proved and hence the appellants/ plaintiffs were unable to establish their case. No doubt incidentally certain mistakes which had crept in and the number of the plot also had been referred to and was made a ground to non-suit the appellants/plaintiffs. There appears to be some controversy relating to the identity of the property as well and it is no doubt true that none of the persons from the M.C.H. had been examined and none others concerned with any of the documents except PW-1 had been examined on behalf of the appellants/ plaintiffs. Reliance was placed on the report of the Commissioner and in fact the work memo had been filed and objections also had been raised to the report of the Commissioner though the report of the Commissioner forms part and parcel of the record. In the light of the facts and circumstances the Commissioner also should have been examined in this regard but for reasons best known even the Commissioner was not

examined.

14. The evidence of DW-1 was recorded on Commission. At this juncture itself it may be relevant to have a look at the findings recorded at Para-44 by the Trial Court which are as hereunder:

"Of course the respondents/defendants have not filed their tide deeds and their like documents. A plea is taken that these documents were lost by Defendant No. 1 while she was travelling in an Autorickshaw and that publications were made in the newspapers as seen from Exs.B-1 and B-2 dated 28-12-1994, that those documents were lost. But the respondents/defendants could not clinchingly prove that those documents were lost. In the absence of those documents it is not possible to give a finding that they hold title to the disputed property. But what has been proved is the respondents/defendants were always in possession of the suit property, at least from the year 1974 as recorded and is evident from the Municipal demand notice and subsequent payment of taxes by them and their exercising right over it by selling most of the property. The right in Plot No. 83 in favour of respondents/defendants cannot be held as their tide deeds were not produced, and on the other hand, in one of the sale deeds Exhibits B-14 the Plot No. is given by them is 25(a) but not 83, which is an anomaly which should have been explained by respondents/defendants, but they did not. Thus, what can be held with regard to the claim of the defendant is, though they could not prove that they have acquired tide over the suit property but they have been in possession of the suit property at least from the year 1974 is well established."

No doubt the oral evidence of PW-1 and DW-1 apart from the documentary evidence is available on record. Though in the former portion of the Judgment Ex. A-14 had been referred to there is no discussion in relation thereto. Ex.A-14 is the extract of Assessment Register of property tax for H.No. 8-2-624/A/1/3 for the years 1979 to 2000. Plaintiff No. 1 who was examined as PW-1 deposed in detail about all the aspects and also explained the identity of the property and apart from it further explained the mistake which had crept in and how the same had been rectified relating to plot number. This witness deposed in detail how his mother purchased open piece of land and how oral gift was-made and subsequent thereto execution of Ex.A-5 at London validated in India and also typographical error which had occurred showing Plot No. 37 instead of Plot No. 83 and how in Ex.A-6 plan on the reverse, the said mistake was corrected and signed by his mother and again signed by the Solicitor showing the correct number. This witness also deposed about the sale by his brother made in favour of Dr. Ramachandra Reddy and also payment of taxes for property to the Municipal Corporation. Though the mother is not claiming any adverse interest as such when she is available the appellants/plaintiffs should have taken steps to examine her, if not possible in Open Court at least by taking other appropriate steps in this regard. No doubt certain submissions were made that this would not alter the situation in anyway, but however it is pertinent to note that when the appellants/plaintiffs are making a claim under oral gift which had been

subsequently reduced to writing under Ex.A-5, some proof in relation thereto may be essential and though such persons in relation to the oral gift may not be available any other mode of proof which may be available for the parties to be adduced for the purpose of establishing the same. Only on the ground of non-discharging of burden of proof and the failure on the part of the appellants/plaintiffs to clearly establish the title by proof of documents, the appellants/plaintiffs had been non-suited.

15. Several of the discrepancies in the documents had been pointed out. As against the evidence of PW-1, there is evidence of DW-1 and no doubt this witness was examined on Commission and on appreciation of the evidence of DW-1 and Ex.B-2 to Ex.B-15, the Trial Court recorded a categorical finding that the respondents/ defendants also had not established their title to the suit property. It is pertinent to note that none concerned with any of the documents, at least the persons who are said to have purchased the properties under the respective sale deeds had been examined. Evidently, no further evidence was thought of by the respondents/defendants in view of the fact that the plaintiffs had not chosen to examine any other witnesses to substantiate their title as such. Virtually this is a matter of balancing the claims of both the appellants/plaintiffs and the respondents/defendants as against each other in the light of the oral and documentary evidence available on record. The oral evidence of PW-1 and DW-1 need not be dealt with in detail since these witnesses depose about their respective pleadings and also the documents Exs.A-1 to A-14 and Exs.B-1 to B-15.

16. Point No. 2: It is pertinent to note that the respondents/defendants had not taken any specific plea of ? adverse possession as such and the principal stand taken by them is that they are the owners of the plaint schedule property. In *Kalal Thimmanna and Others Vs. Krishna Reddy and Another*, , it was held that the limitation of 12 years in a suit for possession is from the date when the possession of the defendants becomes adverse to the plaintiff and hence it is for the defendants to prove adverse possession and the defendants having taken up a plea of title and failed to prove it, cannot be permitted to plead adverse possession and on facts it was held that adverse possession was not established by the defendants and hence the suit for possession to be decreed. In *Ejas Ali Qidwai and Ors. v. Special Manager, Court of Wards, Balrampur Estate and Ors.*, AIR 1935 PC 53, it was held that a person who bases his title of adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In *Rangulal Ram Vs. Makhan Lal and Others*, , it was held that the payment of house tax is not such a conclusive act as would constitute an assertion of hostile intention so as to amount to adverse possession in law and if the plaintiff knew that the defendant was asserting his own title and yet omitted to enforce the remedies open to him, there would be discontinuance but without a voluntary abandonment of possession, there can be no such discontinuance and merely remaining quiescent cannot amount to discontinuance. In *Indira Vs.*

Arumugam and Another, , it was held that in a suit based on title for possession where title was established on the basis of relevant documents, plaintiffs cannot be non-suited unless defendant proves adverse possession for prescriptive period and the provisions of Article 142 of the Limitation Act, 1908 wherein plaintiff had to prove not only title but also possession within 12 years of the date of the suit had undergone a metamorphic sea change in view of Article 65 of the present Limitation Act, 1963. While dealing with possession referable to lawful title in Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc., , it was held:

"Adverse possession means a hostile assertion i.e., a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, burden is on the respondents/defendants to prove affirmatively. A person whose bases his tide on adverse possession must show by clear and unequivocal evidence i.e., possession was hostile to the real owner and amounted to a denial of his tide to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. Where possession could be referred to a lawful tide, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful tide will not be permitted to show that his possession was hostile to another's tide. One who holds possession on behalf of another, does not by mere denial of that other's tide make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful tide, cannot divest another of that title by pretending that he had not tide at all."

Submissions at length were made by both the Counsel relating to this aspect. On a careful scrutiny of the respective pleadings of the parties and also the issues settled and the evidence of DW-1 in particular it appears that the respondents/defendants are not particular of claiming any possessory title by virtue of the plea of adverse possession, but on the contrary a clear stand had been taken asserting their own title by virtue of the documents. In such a case, while appreciating the rival claims of the parties, documentary evidence on behalf of both the parties may have to be carefully scrutinized since the rival claims appear to be virtually balancing the claims. However as already observed supra, neither of the parties had chosen to adduce sufficient evidence in relation to the other aspects i.e., the payment of tax, proof of identity of the property and the other relevant aspects which are germane in relation to a suit praying for relief of title and other incidental reliefs. Ex.A-7 is a copy of the layout issued by M.C.H. Ex.A-10 is a certified copy of the registered sale deed executed by the brother of the appellants/plaintiffs Syed Saleem Arif In favour of one Ramachandra Reddy. Ex.A-11 is the plan. Exs.A-12 and A-13 are the tax receipts and Ex.A-14 is the extract of Assessment Register of property tax of the relevant house for the years 1979 to 2000. Likewise, on behalf of the respondents/defendants as well Exs.B-3, B-4 Tax receipts, Exs.B-5 B-6-Tax demand notices, Ex.B-7 -Demand of

for non-agricultural land tax, had been marked. The proof of these documents in relation to the subject-matter in controversy and the identity of the property and linking of these documents to the subject-matter of the litigation are certain of the relevant factors which had not been seriously adverted to by either of the parties fighting the litigation and hence merely by recording a finding that the respondents/defendants have been in possession for sometime automatically the appellants/plaintiffs cannot be non-suited, provided no doubt, the appellants/plaintiffs are able to establish their title to the plaint schedule property.

17. Point No. 3: Ex.B-11 is a copy of the sale deed dated 7-1-1995, Ex.B-11 (a) is the plan attached to it. Ex.B-12 is yet another copy of the sale deed dated 17-1-1995. Ex.B-13 is yet another copy of the sale deed dated 12-6-1995, Ex.B-13(a) is the plan attached to it. Ex.B-14 is the copy of the sale deed dated 30-8-1995. The original documents had not been produced and no steps had been taken to summon the originals. None concerned of these documents at least had been examined. Equally so in relation to Ex.A-10 which is a certified copy of the registered sale deed executed by the brother of the appellants/plaintiffs in favour of one Ramachandra Reddy. The main grievance ventilated by the Counsel representing the appellants/ plaintiffs is that these sale deeds relied upon by the respondents/defendants being secondary evidence cannot be said to have been proved unless the procedure in this regard had been followed. Reliance was placed on K. Krishna Appala Naidu Vs. B. Sohanlal and Others, , wherein it was held that u/s 65 of the Indian Evidence Act 1872 for production of secondary evidence notice is required to be issued to person in whose possession the document is, to produce the document and merely because the person in possession of the required document is himself a party to the suit, it cannot be a ground for not giving notice to produce the document in question. In A.P. State Civil Supplies Corporation Ltd. Vs. Simhadripuram Co-operative Marketing Society and Others, , it was held that if the very document is inadmissible in evidence, the acquiescence of the other party at the time of marking the document would not be a bar to raising the objection in the Appellate Court and on the other hand if the objection is with regard to mode of proof, it cannot be permitted to be raised at the time of appellate stage.

18. As can be seen from the evidence of DW-1 the same had been recorded on Commission and she had not deposed anything why the secondary evidence is being adduced without taking any steps for summoning the original documents or at least examine the parties concerned with those documents and hence this Court is the considered opinion that these documents had not been proved in accordance with the provisions of Indian Evidence Act, 1872 since these documents are in the nature of secondary evidence.

19. Interlocutory Applications: Certain applications were moved viz., C.C.C.A.M.P. Nos. 6, 7, 14, 15 and 114 of 2005. Submissions at length were made in relation to these applications and the interim orders made therein. It was also brought to the notice of this Court that certain of the parties are purchasers even prior to

the institution of the suit but despite the knowledge, the appellants/plaintiffs had not chosen to implead such parties and certain of the parties had purchased these properties subsequent thereto. It is also brought to the notice of this Court that yet another suit was filed in relation to the self-same property and an Appeal also is pending in relation thereto. The other details need not be adverted to, but however the fact remains that all the parties who are interested in the litigation, the subject-matter of the suit, are not brought before this Court. An attempt is made to implead such parties, non-parties to the suit, only in the application complaining violation of the interim order which is definitely impermissible. It is no doubt true that in certain circumstances when violation or breach of interim orders had been complained, may be only under clear specific circumstances non-parties to the litigation also may be proceeded against. But however in the light of the fact that these are all non-parties to the litigation, in the facts and circumstances, the interim orders made by this Court in this regard cannot be sustained and accordingly the applications i.e., C.C.C.A.M.P. Nos.6, 7, 14 and 15 of 2005 are hereby dismissed.

20. Reliance was placed on Syed Khajahasanuddin, Warangal v. Mohd. Riyajuddin and Anr. 2004 (1) A.W.R. 238 : 2004 (5) ALD 359 , wherein it was held a document which is germane for the effective adjudication of the matter may have to be considered by the Court even if there had been violation on the part of the parties to adduce the same as a requirement of the Court and a reference in this regard can be made to provisions of Order 41 Rule 27 CPC whereunder Court can receive additional evidence as requirement of the Court and it becomes an obligation of the Court for rendering justice at times to send for the document when the matter is coming up for trial. In Mandala Madhava Rao Vs. Mandala Yadagiri and others, , while dealing with the scope of Order 41 Rule 27 CPC it was held that additional evidence in appeal can be permitted to be adduced when the Court requires it to pronounce the judgment satisfactorily. In the present case as referred to supra, non-examination of the mother was made a serious ground of attack and the present application is moved praying for such relief at the appellate stage. No doubt some comment had been made by the learned Counsel representing the respondents/ defendants that the reasons in the present application definitely cannot be sustained in the light of the findings recorded by the Trial Court in this regard. It is needless to say that the application C.C.C.A.M.P. No. 1 14/2005 is filed before this Court praying for liberty to examine the mother. When sufficient opportunity had been given before the Court of first instance the said opportunity had not been utilized in this regard. On a careful scrutiny of the affidavit filed in support of the application, none of the ingredients to satisfy the provisions of Order 41 Rule 27 C.P.C. had been furnished and hence this application cannot be entertained. In the light of the same, C.C.C.A.M.P. No. 114/2005 is also hereby accordingly dismissed.

21. Conclusion: On appreciation of the overall facts and circumstances taking into consideration the findings which had been recorded by the Court of first instance in a suit of this nature, the plaintiffs failed to establish their title,

irrespective of the fact that the defendants had established their title or not. It is also pertinent to note that as per the findings of the Court of first instance opportunity had been given to examine the mother of the appellants/ plaintiffs and also sufficient opportunity had been given to the parties to adduce evidence. When the parties had not availed the opportunity, to fill up the gaps, normally, an order of remand would be impermissible. Inasmuch as the appellants/plaintiffs miserably failed in discharging the burden cast on them as per law, it is needless to say that the Appeal is bound to fail and accordingly the same is hereby dismissed. In view of the facts and circumstances of the case, the parties are directed to bear their own costs.