

**THE HON'BLE MS JUSTICE B.S.BHANUMATHI**

**Appeal Suit No.2255 of 1999**

**ORDER :**

This appeal is preferred under Section 96 of CPC against the judgment and decree dated 19.07.1999 in O.S.NO.705 of 1983 on the file of II Additional Senior Civil Judge, Vijayawada.

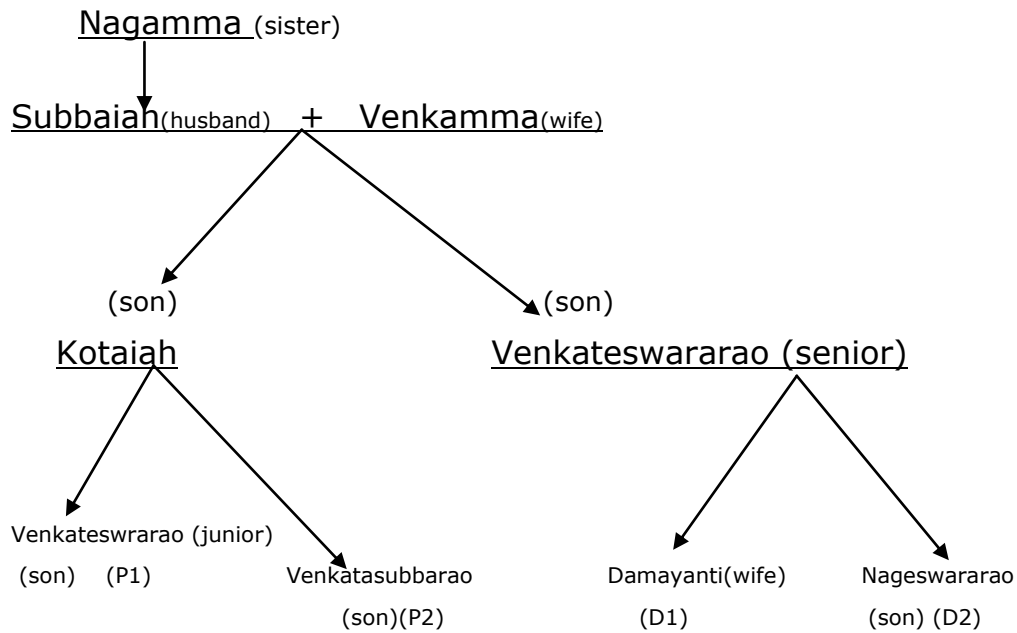
**2.** Heard Sri M.Chalapathi Rao, learned counsel Sri.Subba Rao Korrapati, learned counsel for the petitioners and Sri K.Ravindra Kumar, learned senior counsel for respondents.

**3.** The appellants are plaintiffs and the respondents are the defendants. The defendants are mother and son. The plaintiffs filed the suit for

- a) declaration of plaintiffs' title and possession of the plaint schedule properties shown in items No.1 to 3 and recovery of their possession; and
- b) for mandatory injunction directing the defendants to demolish the existing structures in item No.3 of plaint schedule properties;
- c) for mense profits for the year 1980- 1981; 1981 – 1982 and 1982- 1983 and for subsequent years till the date

of the delivery of the possession of plaint schedule properties and suit costs.

**3.** The case of plaintiffs are briefly as follows:-



Velagapudi Subbaiah and Smt Velagapudi Venkamma are the parents of Sri Velagapudi Kotaiah and Sri Velagapudi Venkateswara Rao (senior). The 1<sup>st</sup> plaintiff by name Velagapudi Venkateswara Rao (Junior) and 2<sup>nd</sup> plaintiff by name Velagapudi Venkata Subba Rao are the sons of Velagapudi Kotaiah. D1 by name Smt.Velagapudi Damayanthi is the wife and D2 by name Velagapudi Nageswara rao is the son of senior Venkateswara Rao. Sri Velagapudi Subbaiah has no ancestral properties. He had the properties given by his sister Smt Potla Nagamma who brought him up and died

issueless. Smt Potla Nagamma conveyed some properties to Sri Velagapudi Subbaiah under a sale deed dated 20.03.1912 and some properties under a gift deed dated 07.06.1925. He purchased the hayrick (part of it which is shown as item No.2), on 10.11.1943. Sri Velagapudi Subbaiah got divided the properties under the sale deed dated 20.03.1912 among his two sons and himself in or about the year 1951 and thereafter all three of them enjoyed their respective share of properties. Subsequently, Sri Velagapudi Subbaiah executed a registered will deed dated 26.08.1956 bequeathing all his properties, including the items shown in the plaint schedule properties, with life interest to his wife and thereafter with absolute interest to the plaintiffs. Sri.Velagapudi Subbaiah died on 29.01.1964. After his death, his wife took possession and enjoyed the properties till her death on 05.02.1972. As the father of plaintiffs was innocent and the plaintiffs were children by the time when Smt.Venkatamma died, the plaintiffs could not take possession of the schedule properties as per the Will. Subsequent to death of Smt Venkatamma, somehow the defendants entered into possession of the plaint schedule properties, without any manner of right and having been enjoying the properties wrongfully. The plaintiffs, having come to know about the Will dated 26.08.1956

recently, demanded the defendants to deliver the possession of the suit schedule properties, but the defendants are adamant. The plaintiffs learnt that the defendants are trying to dispose of the schedule properties contemplating the legal action by the plaintiffs, being fully aware that they do not have any right to remain in the suit schedule properties any longer. The defendants are liable to pay to the plaintiffs the mesne profits. The defendants have been cultivating item No.1 of plaint schedule and they have been getting not less than 10 bags of paddy as net income. Though the defendants are liable to pay mesne profits at the rate of the value of 10 bags of paddy per annum from 1972, the plaintiffs restricted their claim for three years just before filing of the suit. During the life time of Smt Venkatamma, there was double poled thatched house item No.3 of plaint schedule and after her death, the defendants occupied the same, removed the thatched house and constructed a building. Therefore, the plaintiffs are entitled to vacant possession of the site in item No.3, after demolishing structures existing therein. The plaintiffs got issued a registered notice on 24.12.1982 demanding the defendants to deliver possession of the (notice) schedule properties. Both the defendants received the notices and got issued a reply on 06.01.1983 with false

and untenable allegations, including that the registered will deed dated 27.06.1958 was cancelled by Sri Velagapudi Subbaiah by executing another (unregistered) Will dated 28.01.1964 giving equal rights to the plaintiffs and the 2<sup>nd</sup> defendant in his properties. Sri.Velagapudi Subbaiah never executed any Will other than the registered will deed dated 26.05.1956 and the same is the last testament. The alleged Will dated 28.01.1964 is not genuine. The contents of the reply notice that some of the properties of Sri Velagapudi Subbaiah, specially items No.1 and 2 (notice) schedule properties were voluntarily divided between the plaintiffs' father and the defendants; that they have been enjoying the same by consent; that item No.3 of plaint schedule property has been in possession and enjoyment of the defendants as of right; and that the defendants are entitled to equal share in item No.2 to 5 of the notice are all absolutely false.

**4.** The plaint schedule properties are as follows:-

Item No.1: Wet land to an extent of Ac.0.84 ½ cents out of Ac.1.69 cents covered by R.S.No.528/2 situated in Gollapudi Village bounded by :-

East : Temple land,

South & North : Remaining land belonging to plaintiff's in RS No.528/2,

West : Land of Vadlamudi Venkaiah

Item No.2: Hay rick yard to an extent of Ac.0.05 cents covered by R.S.No.546/5 situated in Gollapudi Village bounded by :-

East : Hayrick yard of Makkena Tulasamma,  
South : Land of Ammadu Punnaiah etc.,  
West : plaintiff's land in RS 547/5,  
North : Hay rick yard of Ponnam  
Venkataratnam.

Item No.3: House site in an extent of 585 square yards situated in Gollapudi Village bounded by :-

East : Bazar  
South : Wall (boundary wall of Karempudi  
Gopala Krishnaiah)  
West : D.Sambaiah etc.'s site.  
North : House of Velagapudi Kotaiah.

**5.** The defendants No.1 and 2 filed written statement opposing the suit briefly as follows:-

Except the relationship, the sale deed and gift deed in favour of Sri Velagapudi Subbaiah are denied. However, it is admitted that Sri Velagapudi Subbaiah and his two sons divided the properties, which he got under the sale deed and gift deed. The plaint schedule properties fell to the share of Venkateswara Rao (senior) in the partition which took place in

or about 1950. Ever since then, Venkateswara Rao(senior) and after his death, the defendants No.1 and 2 have been enjoying the plaint schedule properties openly, uninterruptedly and adversely to the knowledge of the plaintiffs and their predecessors in interest also. Thus, the defendants are the absolute owners of the plaint schedule properties and the plaintiffs have no manner of right, title, interest or possession whatever in the same. The defendants perfected their title in the plaint schedule properties by adverse possession. The suit is barred by time. The cause of action stated is not true and correct. The earlier Will dated 26.08.1956 is not in force since it was revoked by the Will dated 29.01.1964 (28.01.1964 sic) executed by Sri.Velagapudi Subbaiah. As per the terms of the Will dated 29.01.1964 (28.01.1964 sic), after the death of Smt.Venkatamma, the 2<sup>nd</sup> defendant alone is entitled to the properties of Sri Velagapudi Subbaiah. As such, the 2<sup>nd</sup> defendant reserves his right to proceed against the plaintiffs No.1 and 2 to recover the possession of Ac.0-32 cents in R.S.No.225/3, Ac.0.57 1/3 cents in R.S.No.229/3 and Ac.0-75 2/3 cents in R.S.No.139 and Ac.1.85 1/2 cents in R.S.No.296/4 which are in their unlawful possession. The plaintiffs are not entitled to the declaration of their title or recovery of

possession of the plaint schedule properties. The terraced building in item No.3 was constructed by him more than 6 or 7 years before filing of the suit. As the plaintiffs acquiesced in the construction of the building, they are not entitled to the discretionary relief of mandatory injunction after long delay. Further, as the plaintiffs have no right in the site in which the building was constructed, they are not entitled to the mandatory injunction. The defendants prayed to dismiss the suit stating that it was filed by the plaintiffs only to harass these defendants and they sought compensatory costs under Section 35-A CPC.

**6.** The trial Court framed the following issues :-

1. Whether in the partition the suit schedule properties fell to the share of Venkateswara Rao or fell to the share of late Subbaiah ?
2. Whether late Subbaiah executed will dated 29.01.1964 revoking the will dated 26.08.1956 ?
3. Whether plaintiffs are entitled for declaration of title ?
4. Whether plaintiffs are entitled for mandatory injunction prayed for ?
5. Whether suit is barred by limitation ?

6. Whether plaintiffs are entitled to possession of the suit property ?

7. Whether plaintiffs are entitled for mesne profits pray for?

8. To what relief ?

**7.** On behalf of the plaintiffs, the plaintiff was examined as P.W.1 and Exs.A1 to A5 are marked. Ex.A1 is 26.08.1956 Registration extract of will executed by Kilaru Subbaiah, Ex.A2 is certified copy of death register extract of Velagapudi Venkamma, Ex.A3 is certified copy of death register extract of G.Subbamma, Ex.A4 registered notice got issued by plaintiffs' advocate to the defendants and Ex.A5 is reply notice given by defendant's counsel.

**8.** On behalf of the defendants, the 2<sup>nd</sup> defendant by name Velagapudi Nageswara Rao was examined as D.W.1 and witnesses D.Ws.2 to 4 by name Vadlamudi Venkaiah, Cherukuri Ananda Rao and Velagapudi Purnachandra Rao respectively were examined. On behalf of the defendants Exs.B1 to B73 were marked. Ex.B1 is sale deed executed by defendants in favour of plaintiff, Ex.B2 sale deed executed by defendants in favour of plaintiff, Ex.A3 will in original

executed by V.Subbamma, Exs.B4 to B44 are house tax receipts and Exs.B45 to B73 are land tax receipts.

**9.** The suit is filed in respect of three items of property.

Item No.1 : an extent of 0-84 ½ cents out of Ac.1-69 cents of wet land in survey No.528/2 in Gollapudi village bounded by :

East : Temple land

South & North : Remaining land belonging to plaintiffs in R.S.No.528/2 ;

West : Land of Vadlamudi Venkaiah.

Item No.2: an extent of 0-05 cents in R.S.No.546 /5 in Gollapalli village, bounded by :

East : Hayrick yard of Nakkena Tulasamma

South : Land of A.Punnaiah etc.,

West : Plaintiffs land in R.S.No.647/5

North : Hayrick yard of Ponnam Venkataratnam.  
Venkataratnam.

Item No.3: House site in an extent of 585 square yards situated in Gollapudi Village bounded by :-

East : Bazar

South : Wall (boundary wall of Karempudi  
Gopala Krishnaiah)

West : D.Sambaiah etc.'s site.

North : House of Velagapudi Kotaiah.

**10.** The suit was decreed *ex parte* on 09.08.1991. Subsequently, by order dated 19.01.1998 in C.R.P.No.2961 of 1996, the *ex parte* decree was set aside. Meanwhile, the plaintiffs are said to have taken possession of the suit schedule properties. As such, the defendants filed I.A.No.325 of 1999 in O.S.No.705 of 1983 under Section 144 CPC for restitution of the property. While disposing of the petition, the Court observed that the contention would be considered at the time of passing of the judgment. Accordingly, on 19.07.1999 while passing the judgment and decree dismissing the suit, the trial Court ordered restitution of both items of plaintiff schedule properties from the plaintiffs. Thereafter, the plaintiffs preferred appeal in A.S.No.2255 of 1999 before this High Court against the decree and judgment in the suit. Along with the appeal, an Interlocutory Petition C.M.P.No.19992 of 1999 was filed for suspension of the operation of the impugned judgment pending disposal of the appeal. On 29.10.1999, an interim order was passed granting *status quo* till the disposal of the appeal with a condition that the appellants have to deposit Rs.7000/- on or before 10<sup>th</sup> January of every year commencing from 10<sup>th</sup> January of 2001 and shall continue to deposit the same every year and the respondent/defendant (D2) shall be entitled to withdraw the

same without furnishing any security. It was further ordered that the appellants shall continue to be in possession of the suit schedule property till disposal of the appeal and that in default of payment as ordered, that order of *status quo* shall stand vacated.

**11.** Having been aggrieved by the decree and judgment, the plaintiffs preferred this appeal.

**12.** The learned counsel for the appellants submitted that since the trial court disbelieved the will in favour of the defendants and whereas the will in favour of the plaintiffs was held to be proved, it is erroneous to dismiss the suit as the plaintiffs are entitled to decree for declaration of right and title by virtue of the Will established; consequently, they are not entitled for recovery of possession of the properties.

**13.** On the other hand, the learned senior counsel for the respondents submitted that the appellate Court rightly dismissed the suit, since the case as proposed by the plaintiffs was found to be incorrect in view of the established facts contrary to the case pleaded by the plaintiffs. He further submitted that the plaintiffs suppressed the true facts that the properties were partitioned between Sri Velagapudi Kotaiah and Sri Velagapudi Venkateswara Rao (senior) and

accordingly, the properties were enjoyed and some of them were alienated. He further submitted that even the document filed by the defendants as Exs.B1 and B2 and the plaint schedule show that the defendants are immediate neighbours to the plaint schedule properties. It is also important to note that Ex.B1 was executed in 1989, six years after the present suit was filed and is pending. He further vehemently contended that by virtue of the Will dated 26.08.1956, several properties were shown in the legal notice issued by the plaintiffs, but it was filed for only three items of those properties and that too, only half of these three properties. As such, he argued that it is a clear demonstration of the case of the defendants that the properties were partitioned and never claimed by the plaintiffs, as is now claimed in support of the Will dated 26.08.1956. He further submitted that the trial Court exhaustively dealt with the pleadings, evidence and contentions on both sides and found that the case pleaded by the plaintiffs is not proved.

**14.** The trial Court held issue No.1 in favour of the plaintiffs and against the defendants holding that the suit schedule properties did not fall to the share of Sri Venkateswara Rao (senior). Issue No.2 with regard to

the Will executed by Sri Velagapudi Subbaiah, the trial Court held in favour of the plaintiff and against the defendants observing that the Will dated 26.08.1956 marked as Ex.P1 was not cancelled by executing the Will dated 28.01.1964 marked as Ex.B3. Further, the trial Court held issue No.5 regarding limitation in favour of plaintiffs and against the defendants. The findings of the trial Court on issues No.1, 2 and 5 have not been challenged by the defendants by filing either separate appeal or a cross objections. Thus, they became final.

**15.** Issues No. 3 and 6 regarding the title and recovery of possession were held against the plaintiffs and in favour of the defendants. Consequently, issue No.7 regarding mesne profits was also held against the plaintiffs. Next, issue No.4 regarding the mandatory injunction was also held against the plaintiffs and in favour of the defendants, in light of the findings in issues No. 3 and 6. As such, the suit was dismissed with costs; however, decreed that the defendants are entitled to restitution of items No. 1 and 2 of the plaint schedule properties as indicated in the foregoing discussion.

**16.** Since the defendants did not challenge the findings of the trial court on issues No. 1, 2, and 5, it is not

necessary to delve on the contentions raised by the defendants in their defence on these aspects. Now, it is sufficient to consider mainly issues No.3 and 6 and thereafter the other issues, which depend on the findings of issues No. 3 and 6.

**17.** As can be seen from the claims made by both parties, since the beginning starting from the exchange of notices between the plaintiffs and defendants vide Ex.A4 notice issued by the plaintiffs and the reply given by the defendants vide Ex.A5, they both claimed the same properties, but under different Wills viz., under Ex.A1 by the plaintiffs and Ex.B3 by the defendants. The properties claimed by the plaintiffs are as follows :-

Items No.1, 6 and 7 :

Survey No.	Extent mentioned in Ex.A1(Will dated 26.08.1956)	Extent mentioned in Ex.A4 (Notice dated 24.12.1982 issued by the plaintiff)	Plaint schedule
528/2	Ac.1-69 cents (item No.1)	Ac.1-69 cents (item No.1)	Ac.0-84½ cents (item No.1)
546/5	Ac.0-10 cents (item No.6)	Ac.0-10 cents (item No.6)	Ac.0-05 cents (item No.2)
	Site of with 2 thatched houses in it	Site of with 2 thatched houses in it	House site to extent of 585 square yards

	585 yds. (item No.4)	585 yds. (item No.9)	with 2 thatched houses. (item No.3)
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**18.** The above table indicates that the plaintiffs claimed in the present suit only half part of the properties at Serial Nos.1 and 6 and the whole of item No.7 of the Will under Ex.A1. The case of the plaintiffs is silent as to why the remaining part is not claimed, inspite of their case that they had come know about the Will recently and they failed to state how the defendants came into possession of the plaint schedule properties, though they seek the remedy as per the will. It is also to be noted that the plaintiffs stated in their notice that the defendants are in possession of entire property covered by Ex.A1 Will after the death of their grandmother, but the suit is filed only for half of the items No.1, 6 and 7 of the notice. Nextly, it is also pertinent to note that pending the suit filed in 1983, in 1989 vide Ex.B1, the boundary of the property covered therein was shown as the 1<sup>st</sup> defendant. Even just before filing of the suit, vide Ex.B2 also the boundary of the property covered therein was described as 1<sup>st</sup> defendant. The trial Court also rightly examined the admission of P.W.1 in his chief examination with reference to the case set up in their legal notice under Ex.A4 and came to

the conclusion that the testimony of P.W.1 that after death of Smt Venkatamma, the plaintiffs took possession of all the properties covered by Ex.A1 except plaint schedule properties and that the plaint schedule properties are in possession of defendants as their paternal uncle Sri Velagapudi Venkateswara Rao (senior) earlier high handedly took possession of the same after the death of their grandmother Venkatamma was falsified by Ex.A4.

**19.** The contention of the plaintiffs about the encroachment of half of the properties covered by items No.1, 6 and 7 of the notice schedule is not as claimed by the plaintiffs and that the plaintiffs suppressed the truth. The trial Court, in detail, discussed the evidence of P.Ws.1 and 2 with reference to the documentary evidence and held that the evidence of P.W.1 was not trust worthy. It has rightly come to the conclusion that the plaintiffs are not entitled to the declaration and recovery of possession of suit schedule properties and negatived issues 3 and 6 against the plaintiffs. Therefore, this Court is also of the opinion that the plaintiffs are not entitled to the declaration of title and recovery of possession as held by the trial Court and therefore, there is no reason to interfere with the findings or decree and

judgment challenged in appeal. Even insofar as the decree granted for restitution of the possession of items No.1 and 2 of the plaint schedule properties, there is no merit and thus, the judgment and decree even in that respect also do not require any interference in appeal.

**20.** Accordingly, the appeal is dismissed and the judgment and decree dated 19.07.1999 in O.S.NO.705 of 1983 on the file of II Additional Senior Civil Judge, Vijayawada confirmed. However, without any costs in appeal.

Pending miscellaneous applications, if any, shall stand closed.

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**JUSTICE B.S.BHANUMATHI**

Date : 14-09-2023  
SAB