

HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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S.A Nos. 1140 and 1305 of 2003

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COMMON JUDGMENT:

The second appeal in SA.No.1140 of 2003 under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the unsuccessful defendants 2 and 4 is directed against the decree and judgment dated 11.09.2003 in AS.No.204 of 2001 on the file of the Court of the learned II Additional District Judge, Visakhapatnam.

1.1 By the impugned decree and judgment, the Court below had dismissed the first appeal of the defendants 2 and 4 and also the cross objections of the plaintiffs.

1.2 Therefore, feeling aggrieved of the dismissal of their cross objections and for not awarding future mesne profits, the plaintiffs had brought the other second appeal SA.No.1305 of 2003.

1.3 The learned Additional District Judge while dismissing the said first appeal of the defendants 2 and 4 and the cross objections of the plaintiffs had confirmed the decree and judgment dated 27.08.2001 of the learned Senior Civil Judge, Yelamachili of Visakhapatnam District passed in OS.No.32 of 1997 (Old OS.No.287/91 on the file of the Court of the learned Principal District Munsif Court, Yelamachili) filed for declaration of plaintiffs' right, title and interest over Ac.5.89 cents of Zeroithi land of Z. Chinthuva village, Rambilli mandal in four items viz., Ac.1.95 cents in S.No.103/3A; Ac.1.95 cents in S.No.103/3B; Ac.1.35 cents in S.No.103/3C and Ac.0.64 cents in S.No.103/4 situate contiguously and for recovery of possession of the said property

more fully described in the schedule annexed to the plaint.

2. At the time of admission of the second appeal of the plaintiffs, the following substantial questions of law were formulated:

1) **Whether the courts below were justified in not awarding future mesne profits even though not prayed decreeing the suit holding that the plaintiffs are having right, title and interest over the suit schedule lands?**

2) **Whether the courts below were correct in not awarding future mesne profits as not being prayed contrary to the judgments of AIR 1965 SC 1812, AIR 1952 SC 358 and AIR 1974 Gujarat 95?**

[Reproduced verbatim]

3. At the time of admission of the second appeal of the defendants 2 and 4, the following substantial questions of law were formulated.

1) **Whether, under the facts and circumstances, certain findings in an earlier suit after reaching its finality can be reversed in subsequent suit when the parties disputed property and the documents relied upon are one and the same, irrespective of the relief sought for?**

2) **Whether it is justified that when certain exhibits, which are disbelieved in the earlier proceedings could be believed in subsequent proceedings?**

[Reproduced verbatim]

4. At the time of hearing of these two appeals, the following additional substantial questions of law are formulated in the second appeal of the defendants 2 and 4.

1) **Whether the suit of the plaintiff is barred by law of limitation in view of the provision of Section 58 of the Indian Limitation Act?**

2) **Whether the Courts below are justified in**

ignoring the findings in the earlier suit on the ground that a document which is filed in the present litigation was not filed in the earlier suit despite the fact that the findings in the earlier suit, which have become final are binding on the parties insofar as the disputed property?

5. I have heard the learned senior counsel appearing for the defendants 2 and 4/the appellants in SA.No.1140 of 2003 and the learned senior counsel appearing for the plaintiffs/the appellants in SA.No.1305 of 2003. The 4th defendant had died during the pendency of these appeals and the 3rd appellant is brought on record in SA.No.1140 of 2003 being his legal representative.

6. The parties in these appeals shall hereinafter be referred to as 'the plaintiffs' and 'the defendants' as arraigned in the suit, for convenience and clarity.

7. The introductory facts, in brief, are as follows:

7.1 The plaintiffs had brought the suit against the defendants 1 and 2 for declaration of their right, title and interest over the plaint schedule property and for recovery of possession of the same after evicting the defendants therefrom. During the pendency of the suit, the 1st defendant had died and his legal representatives were brought on record as defendants 3 and 4. The 1st defendant during his life time had filed a written statement and resisted the suit. The 2nd defendant had filed a written statement stating that he is not a necessary party to the suit. The 3rd defendant, who is one of the legal representatives of the 1st defendant, had remained ex parte. Though the suit was originally instituted in the Court of the Principal District Munsif, Yelamanchili on 08.08.1997, the said learned Munsif having passed an order holding that the said Court

has no pecuniary jurisdiction to try the suit had accordingly returned the plaint for presentation to the proper Court. Thereafter, the plaint was presented in the Court of the Senior Civil Judge, Yelamanchili and the suit was renumbered as OS.No.32 of 1997. After the death of the 1st defendant, the 2nd defendant had filed a further written statement denying the plaint averments and had claimed that after the death of the 1st defendant, the subject property devolved upon him and the 4th defendant by virtue of a registered Will dated 28.03.1990 executed by the deceased 1st defendant and that the 3rd defendant is not a necessary party and that in terms of the said Will, the suit property had devolved upon the defendants 2 and 4.

7.2 At trial, the 1st plaintiff and his supporting witness were examined as PWs1 and 2 and exhibits A1 to A42 were marked on the side of the plaintiffs. The 2nd defendant and his supporting witnesses were examined as DWs1 to 3 and exhibits B1 to B20 were marked on the side of the defendants.

7.3 On merits, the trial Court had decreed the suit of the plaintiffs declaring the right, title and interest of the plaintiffs over the plaint schedule property and that they are entitled to recover possession of the same from the defendants. However, the trial Court did not grant future mesne profits to the plaintiffs. The unsuccessful defendants had preferred the first appeal in AS.No.204 of 2001. In that first appeal, the plaintiffs had filed cross objections feeling aggrieved of the denial of grant of future mesne profits to them by the trial Court. As already noted, by the impugned decree and judgment, the Court below had dismissed the first appeal of the defendants 2 and 4 and also the cross

objections of the plaintiffs. Therefore, the plaintiffs had preferred SA.No.1305 of 2003 and the defendants 2 and 4 had preferred SA.No.1140 of 2003. In the facts and circumstances, both these appeals are being disposed of by this common judgment.

8. To begin with, it is necessary to refer to the pleadings.

8.1 The averments in the plaint, in brief, are as follows:

The plaint schedule properties are the self acquired properties of the 1st plaintiff and also the family properties of the plaintiffs. They are in possession and enjoyment of the same for more than 50 years and they are paying regularly land revenue to the Government. The revenue authorities had recognized the title and possession of the plaintiffs and had issued ryot patta passbooks in their favour. Though the plaintiffs had divided the plaint schedule properties amongst them, they are cultivating the entire plaint schedule land jointly and sharing the produce. The plaintiffs had raised Casurina Tope in the plaint schedule land nearly about 19 years prior to the suit and had realized the produce about 12 years prior to the suit. They had again raised Casurina tope in the schedule land about 11 years prior to the suit. The 1st defendant is the son-in-law of the 1st plaintiff. As the plaintiffs had not allotted any share in the family properties to the daughter of the 1st plaintiff by name Appalanarasamma, who is the wife of the 1st defendant, both the defendants 1 and 2 had started harassing her to bring Rs.50,000/- from the 1st plaintiff, who is her father. As she was unable to bring any dowry amount from the 1st plaintiff as desired by the said defendants, they had started threatening the plaintiffs and began to declare in the village that they would occupy the plaint schedule land and cut away the

Casurina tope and appropriate the same towards the dowry amount. In the said circumstances, the plaintiffs had filed OS.No.330 of 1986 against the defendants 1 and 2 herein on the file of the Court of the learned Principal District Munsif, Yelamanchili for a perpetual injunction in respect of the plaint schedule property. That suit was decreed with costs on 28.04.1988 by granting a perpetual injunction against the said defendants. Against that judgment, the defendants 1 and 2 had preferred a first appeal in AS.No.26 of 1988 on the file of the Senior Civil Judge Court, Anakapalli. The said appeal was allowed and the decree and judgment granted by the trial Court in OS.No.330 of 1986 were set aside and consequently the said suit of the plaintiffs was dismissed. In that judgment, the learned Senior Civil Judge had observed that the plaintiffs are not entitled to seek perpetual injunction but, they are at liberty to file a suit for declaration of their title and recovery of possession of the plaint schedule property. Aggrieved of the said judgment in the first appeal, the plaintiffs had filed a second appeal in SA.No.409 of 1989 on the file of this Court. That second appeal was dismissed. The LPA preferred before the Supreme Court was also dismissed. That earlier suit is only a suit for perpetual injunction based on mere possession over the plaint schedule property. Further, there was an observation in the judgment of the learned Senior Civil Judge in AS.No.26 of 1988 that the plaintiffs are at liberty to file a suit for declaration of title. Hence, the plaintiffs had filed the present suit for declaration of title and recovery of possession of the plaint schedule property. Since the earlier suit is only for mere injunction and as the title of the plaintiffs and possession of the defendants over the plaint schedule lands are not finally adjudicated and as those aspects are not at all gone into by either

of the appellate Courts, the findings given in OS.No.330 of 1986 or AS.No.26 of 1988 do not operate as *res judicata*. After the disposal of the suit by virtue of the judgment in AS.No.26 of 1988 by the learned Senior Civil Judge, Anakapalli and while the stay orders granted in CMP.No.16450 of 1990 pending disposal of the SA.No.409 of 1989 on the file of this Court are in force, the defendants had forcefully trespassed into the plaint schedule land on 06.12.1990 and had cut and appropriated the standing Casurina Tope, which was raised by the plaintiffs in the schedule land. Thus, the defendants had caused loss and damage to the extent of Rs.1,50,000/- to the plaintiffs. The plaintiffs, therefore, had got issued a lawyer's notice dated 17.12.1990 to the defendants condemning their illegal acts and also claiming damages. The defendants had sent a reply dated 22.12.1990 with false and untrue allegations. The entire plaint schedule land belonged to Vizianagaram Estate. The old survey numbers of the schedule lands are 5/1 and 5/4. The new survey numbers assigned to the schedule lands are 103/3 and 103/4. While the lands were originally in the possession and enjoyment of one Vemparala Suryanarayana, a resident of Anakapalli, the 1st plaintiff was the tenant under him for 55 years. The 1st plaintiff used to raise dry crops for some time and also Casurina Topes for sometime therein and enjoyed the same with his sons (plaintiffs 2 to 4). While so, the 1st plaintiff had purchased from Vemparala Laxminarayana, S/o Suryanarayana an extent of Ac.0.74 $\frac{3}{4}$ cents out of Ac.5.25 cents in S.No.5/1 of Zeroyati Chinthuva village and also another extent of Ac.0.73 $\frac{1}{2}$ cents out of Ac.5.89 cents in S.No.219/2A, and 219/2C of Lalamkoduru village through a registered sale deed dated 03.04.1952. As by that time the entire land of Ac.5.89 cents in Lalamkoduru village was in possession

and enjoyment of Lalam Ramaswamy and his brothers, the 1st plaintiff could not get possession of the said Ac.0.73 ½ cents of land. In the same manner another Ac.0.74 ¾ cents of land in S.No.5/1 of Zeroyati chinthuva village which was in possession of the 1st plaintiff as a tenant was purchased by Lalam Rama Murthy and his brother Demullu @ Appanna from another share holder. But, they too could not get possession of the same from the 1st plaintiff. Subsequently, a compromise was affected and consequently Lalam Ramaswamy had executed a registered sale deed dated 05.04.1957 in favour of the 1st plaintiff for Ac.0.74 ¾ cents in S.No.5/1 which was in-fact in possession of the 1st plaintiff as a tenant. So also, the 1st plaintiff had executed a registered sale deed in favour of Lalam Ramasamy for Ac.0.73 ½ cents which was in fact in possession of Lalam Ramaswamy but, in fact purchased by the 1st plaintiff. Thus, the 1st plaintiff had got purchased Ac.1.49 ½ cents (0.74 ¾ cents + 0.74 ¾ cents) out of Ac.5.25 cents in S.No.5/1 (old) by virtue of registered sale deeds dated 03.04.1952 and 06.04.1957. Thus, the 1st plaintiff had acquired title to the 1/4th extent of the present plaint schedule property through the above registered sale deeds. For the remaining extent of land out of Ac.5.89 cents in S.No.5/1 and 5/4, the Government gave full rights to the 1st plaintiff after the abolition of the Inams on the commencement of the Inams Estates Abolition Act during the year 1958 to 1960 as by then the 1st plaintiff has been in possession and enjoyment of the same since more than 55 years under the Inamdar-Vemparala Suryanarayana. Thus, the 1st plaintiff has been enjoying the entire plaint schedule land of Ac.5.89 cents with full rights along with his

sons. Though the plaintiffs had partitioned the plaint schedule properties along with other lands and are paying the land revenue to their respective lands, they are cultivating the schedule land jointly. During sub divisions the survey numbers 5/1 and 5/4 are registered with new survey numbers 103/3-A, 103/B, 103/3C and 103/4 and accordingly patta pass books are issued to the plaintiffs. The sale deeds, patta pass books and land revenue receipts are filed in OS.No.330 of 1986. The 1st plaintiff filed for himself and also as guardian of the 4th plaintiff Land Ceiling Declarations before the land ceiling authorities. The plaintiffs 2 and 3 also had filed in their individual capacities their declarations before the said authorities. In the said declarations, they had shown the plaint schedule land of Ac.5.89 cents. Basing on those declarations, the Land Reforms Tribunal also passed orders dated 21.06.1983. In that order, it is clearly mentioned that plaint schedule land of Ac.5.89 cents was left over to the plaintiffs as their holdings. But, a mistake had crept in the order showing the plaint schedule land in the order as having been situate in M. Chinthuva instead of showing those lands as situate in Zeroyatii Chinthuva village. However, the plaintiffs had clearly shown in their declarations that the plaint schedule lands are in S.No.103/3 in an extent of Ac.5.25 cents and S.No.103/4 in an extent of Ac.0.64 cents and they are situate in Zeroyati Chinthuva village. The plaintiffs are taking steps before the land ceiling authorities for rectification of the mistake in the said orders. Thus, the land ceiling authorities had also recognized the right, title, interest and possession of the plaintiffs over the plaint schedule lands. The Photostat copy of the verification document under the Land Ceiling Act in respect of the 2nd plaintiff issued by the Mandal Revenue Officer, Narsipatnam is also filed into Court. In that also, the

plaint schedule lands in S.No.103/3 and 103/4 of a total extent of Ac.5.89 cents are shown as situate in Zeroyati Chinthuva village. The Inam patta dated 11.07.1970 issued to the 1st plaintiff is filed along with the plaint. The notices issued under the Land Ceiling Act are filed in OSNo.330 of 1986 and were marked as exhibits A17 to A19; the copies of 10 (1) adangals were also filed in the said suit. The plaintiffs are in continuous possession and enjoyment of the plaint schedule lands for over the statutory period and had thus perfected right and title over the plaint schedule property by adverse possession. Even if the defendants have got any right and title over the plaint schedule lands, that title is extinguished by adverse possession. The defendants have no manner of right, title and interest or possession over the plaint schedule lands and the defendants are continuing in the plaint schedule lands since 06.12.1990 only and that too as mere trespassers. Hence, the suit is filed.

8.2 The 1st defendant had filed a detailed written statement denying each and every allegation in the plaint and had *inter alia* contended in the written statement as follows:

The 1st defendant's marriage with the daughter of the 1st plaintiff took place in the year 1961. Within a year of the marriage, the 1st defendant had put up separate residence with his wife separating from his brother in the year 1962 due to the pressures of the 1st plaintiff; and, this defendant alone had provided everything to his wife to the best of his ability. In the division of the properties with his father, the plaint schedule property which has been in possession and enjoyment of the family of the defendants for the last 30 years by then fell to the share of this defendant and this defendant has been in possession and

enjoyment of the property in his own right and is enjoying the same by raising Casurina Topes and dry crops as per his convenience. In or about the year 1986 this defendant fell ill, seriously. At that time, this defendant had executed a Gift Settlement Deed dated 02.09.1986 in respect of his properties including the suit schedule property in favour of his nephew by making provisions for his wife. At that time, the 1st plaintiff had started canvassing that the 1st defendant became a Cancer patient and will not survive; and wanted this defendant to transfer all his properties in his name or in the name of his daughter. This defendant did not agree for the said proposal. Having come to know about the execution of the gift settlement deed by this defendant, the 1st plaintiff had developed ill will; and, in a bid to take revenge made the wife of this defendant to stay away from him. While this defendant is at Hyderabad for his treatment, his wife under the evil advise of her father had taken away all the papers/documents and also movable properties from the house and had fled away to her parents' house. Since then, the 1st plaintiff had started making false claim by filing frivolous suits. Ultimately, the litigation in OS.No.330 of 1986 ended in favour of the defendants observing that by the date of the suit, the 1st plaintiff is not in possession of any part of the plaint schedule property and, therefore, the question of trespass during the pendency of that litigation does not arise. This defendant has been in possession and enjoyment of the properties since the year 1962 and had perfected title to the said property by all means. Prior to this defendant, the defendants' family consisting of his father and brother (2nd defendant) has been in possession and enjoyment of the property. The claim of the plaintiffs in this suit is

barred by law of limitation. There is no cause of action. As a mark of revenge, the plaintiffs have been harassing this defendant. This defendant's wife had deserted him. He had filed a divorce petition in OP.No.59 of 1990 on the file of the Senior Civil Judge Court, Anakapalli. The averment in regard to dowry demand is a fictitious averment made by the 1st plaintiff. The suit is frivolous and fictitious. The stand of the plaintiffs in the former suit-OS.No.330 of 1986 and AS.26 of 1988 is inconsistent with the present stand regarding acquisition of title. The suit is liable to be dismissed with compensatory costs.

8.3 The 2nd defendant had filed a written statement adopting the written statement of the 1st defendant and supporting the case of the 1st defendant stating that he and the 1st defendant are divided brothers since 1962 and that since then the plaint schedule properties are in possession and enjoyment of the 1st defendant and that the 1st defendant alone has got possession and enjoyment of the plaint schedule properties since 1962 and that prior to that the properties were in exclusive possession and enjoyment of the 2nd defendant and his family for over 30 years and that the 2nd defendant is not a necessary party.

8.4 Further, after the death of the 1st defendant, the 2nd defendant had filed an additional written statement stating that the 1st defendant had executed a Will dated 28.03.1990 and that as per the bequests in the said Will, the property of the 1st defendant had devolved upon him (the 2nd defendant) and the 4th defendant-Rajeswaramma and that during his life time the deceased 1st defendant had sold away some of his properties to meet his

medical and other expenses and that the 3rd defendant has no interest what-so-ever in any of the properties of the deceased 1st defendant including the suit schedule property and that as per the bequests under the said Will of the 1st defendant, his properties had devolved upon the defendants 2 and 4 and that therefore, they are only entitled to the plaint schedule properties.

9. Now the substantial questions/additional substantial questions in the defendants' second appeal are first taken up. A reading of the substantial questions would show that the substantial questions raised deal with two principal issues; and, they are - (1) the plaintiffs' suit for declaration of title and recovery of possession is barred by law of limitation; and, (2) The consideration of the documents of the plaintiffs and placing reliance on the said documents by the Courts below is erroneous as the plaintiffs herein have pressed into service the very same and similar documents in the earlier suit and that as a competent civil court, which had an occasion to deal with the said documents in the former suit, did not accept the case of the plaintiffs while disbelieving the said documents. On this aspect, the further contention of the defendants 2 and 4 is that merely because some additional document/s is/are filed, the same is not sufficient to advance the case of the plaintiffs any further and that basing on the documents, which were earlier disbelieved by a competent Civil Court in the earlier proceeding, the Courts below ought not to have granted the reliefs to the plaintiffs. It is also pertinent to note that keeping in view the scope and ambit of the additional substantial question of law number 2, the defendants 2 and 4 also would contend that the instant suit of the plaintiffs is barred by the principle enunciated in the doctrine of *res judicata* in view of the

dismissal of the earlier suit filed by the plaintiffs for perpetual injunction in respect of the very same property.

10.1 This Court shall first deal with the question of Limitation. The learned senior counsel for the defendants 2 and 4 would contend that the limitation for filing a declaratory suit is three years under Article 58 of the Indian Limitation Act, 1963 ('the Limitation Act', for short) and that in the earlier suit for perpetual injunction filed by the plaintiffs, the 1st defendant having filed a written statement on 16.02.1987 had denied the title of the plaintiffs stating that the plaintiffs have no title to and possession over the plaint schedule land and that the standing Casurina Tope has been in possession and enjoyment of the 1st defendant since more than 19 years and that therefore, the suit instituted in the year 1991 is barred by law of limitation since the limitation provided under law is three years for the present suit for declaration of title and recovery of possession. He would further submit that the present suit ought to have been filed within a period of three years from the date of the written statement in the said suit and that the present suit-OS.287 of 1991, which was filed in the year 1991, is barred by law of limitation.

10.2 On the other hand, the learned senior counsel for the plaintiffs had contended that in terms of Articles 64 and 65 of the Limitation Act the period of limitation is 12 years from the date when the possession of the defendants becomes adverse to the plaintiffs and that the burden would be on the defendants 2 and 4 to prove that they have acquired title by adverse possession and that in the absence of such proof of adverse possession, the defendants 2 and 4 cannot be heard to say that the suit instituted by the plaintiffs for declaration of title and recovery of possession

is barred by law of Limitation. He would further contend that the issue of limitation is not a pure question of law and it is a blend of fact and law and is not a substantial question of law and that, therefore, the defendants are not entitled to raise the said issue of limitation in this second appeal.

10.3 In view of the contentions of the learned senior counsel for the parties, it is necessary to first refer to the three articles on which reliance was placed.

Article 58:

Description of Suit	Period of Limitation	Time from which period begins to run
To obtain any other declaration	Three years	When the right to sue first accrues

Article 64:

Description of Suit	Period of Limitation	Time from which period begins to run
For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed	Twelve years	The date of dispossession

Article 65:

Description of Suit	Period of Limitation	Time from which period begins to run
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For possession of immoveable property or any interest therein based on title. Explanation:-- For the purposes of this article— (a) Where the suit is by a remainder-man, a reversioner (other than a landlord) or a devisee the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee as the case may be, falls into possession; (b) Where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) Where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale the purchase shall be deemed to be a representative of the judgment debtor who was out of possession.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff
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The first division of the Schedule of the Limitation Act deals with suits. Part III of the said division deals with suits relating to declaration. Article 58 is contained in this part. Part V deals with suits relating to immovable properties. Articles 64 and 65 are contained in this part. Thus, Part V specifically deals with suits relating to immovable property.

10.4 If Article 58 is the appropriate Article applicable to the facts of the present case as contended by the learned senior counsel for the defendants 2 and 4, then the period of limitation would be 3 years; and, if that is so, it must be held that the plaintiffs' suit is barred by limitation, according to his submissions; and that on the other hand, if it is to be held that the said Article has no application to the facts of the present case, then it follows that the suit is maintainable and not barred by law of limitation. The trial Court had framed a specific issue on bar of limitation and had answered the said issue in favour of the plaintiffs and against the defendants. On this issue the specific case of the plaintiffs is that they were in possession and enjoyment of the suit schedule property till 06.12.1990 but, the 1st defendant taking advantage of the decree and judgment passed in AS.26 of 1988 had forcefully taken possession of the plaint schedule property and, as such, the suit that was brought in the year 1991 is well within time even assuming for a moment that the period of limitation is three years. However, the main contention of the plaintiffs is that the period of limitation allowed under law is 12 years for the present suit, which is filed for declaration of title and recovery of possession, and that the time of twelve years would begin to run from the time when the possession of the defendants becomes adverse to the plaintiffs.

However, as per the defence of the deceased 1st defendant, he was and is in possession of the plaint schedule property since a long time i.e., since the date of partition in the year 1962 between him and his family members and that the plaint averment that he had trespassed into the plaint schedule property on 06.12.1990 is false. In support of the said defence, strong reliance was placed on the finding that was recorded in AS.No.26 of 1988 to the effect that the plaintiffs herein in that suit for injunction were required to

prove their possession over the suit property as on the date of the said suit-OS.No.330 of 1986 and that the plaintiffs had miserably failed to show that they were in possession and enjoyment of the suit property by the date of the said suit. Placing reliance on the said finding, it is urged that the contention of the plaintiffs that they were dispossessed on 06.12.1990 i.e., within three years prior to the institution of the instant suit is contrary to the findings in the former proceedings and therefore, such a contention of the plaintiffs cannot be countenanced. Be it noted that except placing reliance on this observation/finding, no revenue records are produced by the contesting defendants 2 and 4 to prove their actual possession and enjoyment of the suit property prior to the filing of the instant suit by the plaintiffs herein. The learned senior counsel for the plaintiffs would contend that a finding that the plaintiffs miserably failed to prove their possession and enjoyment over the suit property as on the date of the former suit does not mean that they were not in possession even prior to that suit. Admittedly, the suit property is a Zeroyati land. However, no documents like cultivation accounts are exhibited on the side of the defendants to prove that the 1st defendant was in long possession specifically from 1962 onwards. On the other hand, exhibits A4 to A7, the ryot pass books; exhibits A11 to A14, the land revenue receipts; exhibits A22 to A28, the copies of the village accounts i.e., the certified copies of no.2 adangals for faslies 1388, 1404, 1394 and 1393; exhibit A15, the verification report issued by the Tahasildar, Land Ceilings, Yelamanchili; exhibits A16 and A17, the declarations given by the 2nd plaintiff and the 1st plaintiff under the Land Ceilings Act; exhibit A18, the verification report issued by the Tahasildar, Yelamanchili; exhibits A19 and A20, similar verification reports issued by the Tahasildar,

Chodavaram; and, exhibit A21, the proceedings of the Land Ceilings Tribunal and Sub-Collector, Narsipatnam issued to the 1st plaintiff sufficiently establish the possession of the plaintiffs over the suit land within 12 years prior to the filing of the instant suit. Therefore, the trial Court had held that the suit is not barred by law of limitation. The first appellate Court having placed reliance on the decision in **Indira v. Arumugam & another** [AIR 1999 SC 1549] had noted the change in the law of limitation brought about by the amendment and had further held that under Article 65 of the Limitation Act, the limitation for a suit for recovery of possession of immovable property or any interest thereon based on title is 12 years from the time when the possession of the defendants becomes adverse to the plaintiffs. In view of the above settled position of law, the Court below had held that if the defendants want to defeat the rights of the plaintiffs they have to establish their adverse possession for a period of 12 years and that on their failure to do so, the plaintiffs cannot be non suited merely because they were not able to prove possession within 12 years preceding the institution of the suit. The Court below had *inter alia* held that the defendants could not establish either the plea of adverse possession or that they had perfected title to the suit schedule property by adverse possession against the true owners. In the well considered view of this Court, the concurrent findings of fact supported by valid and cogent reasons recorded by the Courts below are justified and do not call for any interference. Be that as it may.

10.5 The learned senior counsel for the defendants 2 and 4 had placed strong reliance on the following decisions:

Tumu Srihari v. Thumu Padmamma and others^[1]. The

facts of the reported case are as follows: 'The plaintiff had filed a suit for declaration of title and consequential perpetual injunction. The contention of the defendants is that the suit is barred by limitation. The defendants 3 to 5 had earlier filed a suit-OS.213/1992 denying the sale deed dated 12.01.1970 and sought partition.' In the above stated set of facts, this Court held that the cause of action for filing the suit arose immediately on filing of the suit-OS.213 of 1992, and within 3 years there from, under Article 58 of the Limitation Act, the suit for declaration ought to have been filed; but, the suit is filed in the year 2005 i.e., after a period of 13 years, and hence the suit is hopelessly barred by law of limitation.

Khatri Hotels Private Limited and another v. Union of India and another^[2]. The facts of this cited case, in brief, are as follows: 'The suit land was owned by one Smt. Kasturi and Rattan Lal. They had sold it to Parma Nand, Tej Nath, Tej Prakash, Gokal Chand and Ram Dhan by a registered sale deed dated 07.10.1959. The legal heirs of Parma Nand and other vendees sold the same to the second appellant and his brothers by a sale deed dated 10.10.1963. The suit was filed in the year 2000 alleging that the cause of action accrued to the appellants for the first time in 1998 when they came to know about the entries in the revenue records in favour of Delhi Development Authority. The respondents alternatively contended that the cause of action accrued to the appellants in December 1990 when the written statement was filed on behalf of the DDA with a categorical assertion that with the urbanization of the rural areas of Village Kishangarh the suit land automatically vested in the Central Government which transferred it to DDA *vide* Notification dated 20.08.1974 and that, therefore, the suit was barred by law of

limitation.’ In the above stated factual background and contentions, the Supreme Court held as follows:

‘The appellants have not explained stark contradictions in the averments contained in three suits on the issue of cause of action and in the absence of cogent explanation, it must be held that the statement contained in para 19 of suit no.313 of 2000 was per se false and, as a matter of fact, the cause of action had first accrued to the appellants on 10.08.1990 when their so called right over the suit land was unequivocally threatened by the respondents. Therefore, the suit filed by the appellants on 14.02.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act and was barred by time.’

In this cited case the title divested and vested in Central Government and thereafter, the Government have transferred the property to DDA in 1974.

Placing reliance on these decisions, it is contended that since the present suit is for declaration and not for bare recovery of possession based on title, Article 65 has no application and that Article 58 is alone applicable and that, therefore, the period of limitation is (3) three years.

10.6 On the other hand, the learned senior counsel for the plaintiffs had placed reliance on the following decisions.

C. Natarajan v. Ashim Bai and another ^[3]. The facts of the cited case show that the appellant therein had filed a suit against the respondents claiming (a) declaration of title; (b) consequential injunction; (c) alternatively recovery of vacant possession of the suit property, if for any reason the Court comes to the conclusion that the plaintiff is out of possession and (d) for costs; The cause of action for the suit arose in the year 1994, but, the suit was filed in the year 2001; While so, the respondent had filed an application under Order VII Rule 11(d) of the Code for rejection of the plaint on the premise that the suit was barred by limitation. In the above stated factual background the Supreme Court at paragraph nos.13 and 15 held as follows:

13. If the plaintiff is to be granted a relief of recovery of

possession, the suit could be filed within a period of 12 years. It is one thing to say that whether such a relief can be granted or not after the evidences are led by the parties but it is another thing to say that the plaint is to be rejected on the ground that the same is barred by any law. In the suit has been filed for possession, as a consequence of declaration of the plaintiffs title, Article 58 will have no application.

15. The law of limitation relating to the suit for possession has undergone a drastic change. In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession.

On facts, the ratio in the above decision squarely applies to the instant case, in the considered view of this Court.

Mechineni Chokka Rao and others v. Sattu Sattamma ^[4].

The facts are as follows: ‘The respondent had filed a suit for perpetual injunction against the revision petitioners. At the stage when the suit was adjourned for judgment, the respondent had filed an application to amend the plaint to seek the relief of declaration of title. That application was resisted. The trial Court had allowed the application. In the revision before this Court, the core contention of the revision petitioners is that the proposed amendment is barred by law of limitation and that the said contention is conspicuously not considered by the trial Court.’ Having regard to the rival contentions, this Court considered the scope and ambit of Articles 58 and 65 of the Limitation Act and held as follows:

‘10. While part-III of first division deals with suits relating to declarations; Part-V thereof deals with suits relating to immovable property. In Part-III there are three Articles, namely, 56, 57 and 58. While [Article 56](#) prescribes three years period of limitation to institute a suit for declaration that the instrument issued or registered is a forged one; [Article 57](#) prescribes an equal period for declaring the alleged adoption

as invalid and [Article 58](#), however, prescribes albeit an equal period in respect of any other declaration. It is obvious that [Article 58](#) is in the nature of residuary provision among the declaratory suits. Indubitably the relief of declaration can be sought for in respect of an immovable property or movable property, or in respect of an instrument, or in respect of a decree, or in respect of an adoption. Thus, various types of declaratory reliefs can be sought for pertaining to those categories. Therefore, the relief of declaration alone appears to be not the criterion for prescribing the period of limitation but the subject-matter of the suit in respect of which the declaration is sought for, appears to be germane for consideration.

11. One shall not be oblivious of the fact that part-V of first division specifically deals with category of suits relating to immovable property. Coming in the domain of part-V, Articles 64 and 65 specifically deal with the period of limitation to institute a suit for possession of immovable property based on previous possession and to institute a suit for possession of immovable property or any interest therein based on title. Having regard to the categorisation sought to be made in the Schedule, although Part-III of the first division thereof apparently deals with suits relating to declarations, that part does not deal with suits relating to immovable property inasmuch as Part-V thereof exclusively deals with the suits pertaining to immovable property, prima facie it appears, therefore, that notwithstanding the fact that the suit is filed for the relief of declaration but the suit is in respect of an immovable property, [Article 58](#) of the Act has no application, instead Articles 61 to 67, which specifically deal with the suits relating to immovable property, seem to be applicable.’

Having so held, this Court had referred to the recommendation made by the Law Commission in the 89th Report for amendment of Article 58 by adding the words “without seeking further relief” after the word “declaration” in the first column of Article 58 so as to avoid any confusion and had noted that so far no amendment has been brought in by the Parliament as recommended. This Court had finally held as follows:

‘The preponderance of authority which holds the view that in respect of declaratory suits pertaining to immovable property,

the period of limitation is governed by Articles 64 and 65 but not [Article 58](#) of the Act is in conformity with the [Scheme of the Act](#), as discussed hereinabove.'

10.7 As rightly pointed by the learned senior counsel for the plaintiffs, in the instant suit there are two main reliefs viz., one for declaration of title and the other for recovery of possession. For a suit for declaration of title the limitation is three years under Article 58 and the time from which the period of limitation begins to run is the time when the right to sue first accrues. For a suit for recovery of possession of immovable property or any interest thereon based on title, the limitation is 12 years under Article 65 and the time from which the period of limitation begins to run is the time when the possession of the defendants becomes adverse to the plaintiffs. In the instant suit, since declaration of title as well as recovery of possession based on title are sought, the periods of limitation, which govern the two reliefs are three years and twelve years respectively and, therefore, the limitation of twelve years is the period of limitation available to the plaintiffs under Article 65 as the question of instituting a suit for declaration and recovery of possession would hardly arise until there was an actual disturbance of possession of the plaintiffs. The 12 years period of limitation for the relief of recovery of possession is to be reckoned from the time the possession of the defendants becomes adverse to the plaintiffs. However, the period of limitation for the relief of declaration of title is three years from the date of accrual of the cause of action. The instant suit is filed seeking the relief of declaration of title as well as the relief of recovery of possession. Hence, the relief of declaration of title is unaffected by the mere fact that the period of limitation is three years for a suit seeking the relief of a bare declaration.

Having regard to these factual and legal aspects, it is necessary now to refer to the decision in **Radha Gobinda Roy and others v. Sri Sri Nilkantha Narayan Singh and others**^[5]. The facts of the reported case are as follows: - 'The plaintiff had brought a suit for

recovery of arrears of way-leave rent against one set of defendants on the basis of agreement entered into with them and had also prayed for a declaration of his right to receive the rent as against the other set of defendants, who were adversely claiming a right under the sale deed from the plaintiff. He had actually realized the rent for many years from the first set of defendants. Thus, there are two parts in the plaint, which are intimately connected with each other and the declaration asked for in one part of the plaint is the basis of the claim in the other part. A contention that the suit was barred under the proviso to Section 42 of the Specific Relief Act, 1877 was raised.' In this backdrop of facts, while considering the plea on the bar of limitation, the High Court of Patna had held that the suit is not purely a declaratory suit and it is a suit for recovery of rent and as a preliminary to the decree for rent it was necessary for the Court to come to a finding as to title and it is not suggested that the recovery of the rent claimed was barred by time, the prayer for the determination of the title was equally unaffected. From a reading of the ratio in the decision, it is obvious that when there are two parts of the plaint which are intimately connected with each other and a declaration is asked for in one part of the plaint and it is the basis of the claim in the other part, which is for recovery of possession, then the period of limitation for recovery of possession being larger and being 12 years, the relief of declaration of title for which the period of limitation is less being 3 years is unaffected even though the suit which is comprehensive is instituted beyond three years. In the present context, to put it more precisely, when two prayers seeking two reliefs made in the plaint are intimately connected, the period of limitation which is larger and which is governing one of the two reliefs becomes the determinative factor and the prayer in regard to the relief for which the period of limitation is less remains unaffected.

C. Mohammad Yunus v. Syed Unnissa and others ^[6] the Supreme Court has drawn a distinction between the suits for declaration simpliciter and the suits for declaration with further relief.

In this decision, the plaintiffs claiming as heirs of one 'F' had sued to obtain a declaration of their rights in certain institution, which was in the management of trustees, with an injunction restraining the defendants (other claimants) from interfering with their rights. While dealing with the question of limitation, the Supreme Court had held as follows:

'A suit for declaration with a consequential relief for injunction, is not a suit for declaration simpliciter: it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case. In Kunj Behari Prasadji v. Keshavlal Hiralal it was held that S.42 of the Specific Relief Act does not empower the court to dismiss a suit for a declaration and injunction and that an injunction is a further relief within the meaning of S.42 of the Specific Relief Act. In that case, the plaintiff had claimed that a certain Will was null and void and that being a close relative of the last holder of a gadi, he was entitled to be the Acharya in the place of that last holder and for an injunction restraining the defendants from offering any obstruction to his occupation of the gadi. It was held that such a suit was maintainable.'

From the ratio in the cited decision it is evident that a suit for declaration of title seeking further relief of recovery of possession or a consequential relief of perpetual injunction is not a suit for declaration simpliciter and it is a suit for declaration with further relief.

In **Lal Bal Mukand (dead) by LRs v. Lajwanti and others**^[7] the interpretation of the provision of Section 12(2) of the Limitation Act fell for consideration. The material part of Section 12(2) runs thus: "In computing the period of limitation for an appeal the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree or order appealed from shall be excluded." The Allahabad High Court has taken one view which was first propounded in the decision in *Bechi v. Ahsan Ullah Khan*. However, a contrary view was taken by the High Court of Bombay, Calcutta, Nagpur and Assam. The contrary view proceeded on a

liberal approach of interpretation of language of Section 12(2). In the background the Supreme Court held as follows:

‘We do not wish to encumber this judgment with a detailed discussion of all the citations and the reasoning advanced therein in support of one or the other view. It will be sufficient to say that upon the language of Section 12(2) both the constructions are possible, but the one adopted by the majority of the Courts, appears to be more consistent with justice and good sense. The Limitation Act deprives or restricts the right of an aggrieved person to have recourse to legal remedy, and where its language is ambiguous, that construction should be preferred which preserves such remedy to the one which bars or defeats it. A Court ought to avoid an interpretation upon a statute of Limitation by implication or inference as may have a penalizing effect unless it is driven to do so by the irresistible force of the language employed by the legislature.’

The ratio supports the proposition that while interpreting the provisions of the Indian Limitation Act, when two constructions are possible, the construction which preserves the remedy should be preferred to the one which bars or defeats it.

10.8 It is to be next noted that in part III of the first division of the Schedule of the Limitation Act, which relates to suits for declaration, there are three Articles viz., 56, 57 and 58. Articles 56 & 57 relate respectively to – (i) declaration that an instrument issued or registered is forged; and, (ii) a declaration that an alleged adoption is invalid; or never, in fact, took place. Whereas Article 58 in that part, which deals with suits to obtain any other declaration, is a general provision. Part V of the said division deals specifically with the suits relating to immovable properties. The law is well settled that a special provision should be given effect to the extent of its scope leaving the general provision to control cases where the special provision does not apply. The view of this Court gets reinforced by the ratio in the decision in **South India Corporation (P) Ltd., v. Secretary, Board of Revenue, Trivandrum and another**^[8] wherein the two questions that were raised before the Supreme Court are – (1) whether Article 372 of the

Constitution is subject to Article 277 thereof? And, (2) whether Article 372 is subject to Article 278 thereof? While considering the said questions, the Supreme Court held as follows:

‘Article 372 is a general provision; and Article 277 is a special provision. It is settled law that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply. The earlier discussion makes this abundantly clear that the Constitution gives a separate treatment to the subject of finance, and Art.,277 saves to the existing taxes etc. levied by States, if the conditions mentioned therein are complied with.’

10.9 Having regard to the reasons and the precedential guidance, this Court holds that the period of limitation for institution of a suit for declaration of title seeking the further relief of recovery of possession based on title is governed by Article 65 and that, therefore, the period of limitation is twelve years from the time when the possession of the defendants becomes adverse to the plaintiffs. Viewed thus, this Court finds that the contention of the learned senior counsel for the defendants 2 and 4 that the suit is barred by limitation cannot be countenanced being devoid of merit. The said contention is accordingly rejected.

11. The next question raised is concerned with the issue of ‘*res judicata*’. In-fact a reading of the substantial questions would show that no substantial question directly on the issue of *res judicata* is raised though in the additional substantial question no.2, it is also urged as under: – ‘*whether under the facts and circumstances certain findings in an earlier suit after reaching its finality can be reversed in a subsequent suit when the parties, the disputed property and the documents relied upon are one and the same irrespective of the relief sought for*’.

11.1 Dealing with this issue of *res judicata*, it is an admitted fact that OS.No.338 of 1986 was earlier filed by the plaintiffs herein for a perpetual injunction simpliciter. The said suit was decreed by the trial

Court. However, the first appeal suit in AS.No.26 of 1988 was allowed. The second appeal preferred to this Court and the LPA preferred before the Supreme Court were dismissed. Subsequently, the present suit is filed for declaration of plaintiffs' title to the very same property and for recovery of possession. Therefore, the learned senior counsel for the defendants 2 and 4 would contend that though the suit for perpetual injunction was decreed by the trial Court, the first appeal suit was allowed and that the decree and judgment of the trial Court were set aside and that the judgment of the first appellate court were confirmed by the High Court and also by the Supreme Court and that the findings recorded in the judgments in the suit for perpetual injunction operate as *res judicata* and that the plaintiffs herein are estopped by record from claiming the reliefs in the present suit. However, the learned senior counsel for the plaintiffs would contend that though the suit was decreed by the trial court, the first appeal suit was allowed and the judgment and decree of the trial court were set aside on the ground that the plaintiffs were not found to be in possession as on the date of the filing of the suit and that the question of title to the suit property was not decided in the said suit and, therefore, the findings, if any, in the said suit do not operate as *res judicata*. Indubitably, while dismissing the first appeal suit-AS.26/1988 the learned Senior Civil Judge, Anakapalli had observed that the plaintiffs are not entitled for perpetual injunction but, are at liberty to file a suit for declaration of title and possession of the plaint schedule property. The learned senior counsel for the plaintiffs also would point out that the observation of the learned Senior Civil Judge would itself indicate that the question of title was neither directly nor incidentally gone into as it was not necessary for consideration and that the question of title was left open by giving liberty to the plaintiffs to institute a suit for declaration of title and recovery of possession. He would further contend that had the Court decided the issue of title either directly or incidentally, such a liberty to institute a fresh suit

would not have been given to the plaintiffs, by the Court of the learned Senior Civil Judge. He would also contend as under: 'Even if there is an incidental finding on title in the earlier suit for injunction, the same will not be binding in a later suit or proceeding where title is directly in question unless it is established that it was necessary in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding of title. In a suit where *res judicata* was raised as a defence, it is necessary for the Court deciding the subsequent suit to investigate the facts in order to determine whether the requirements of Section 11 of the Code have been fulfilled or not. Therefore, the party who is relying upon the plea of *res judicata* has to file the copies of the pleadings of the earlier suit and also the copies of the issues and the judgments in the former suit so that the Court can see whether the required elements are present on record or not. As the defendants 2 and 4 had not placed the relevant material before this Court, the question of invoking the doctrine of *res judicata* does not arise. Moreover, the issue of *res judicata* is not a pure question of law much less a substantial question of law and it is a blend of fact and law. Both the Courts below have recorded concurrent findings of fact on the said issue holding that the plaintiffs' suit for declaration of title and recovery of possession is not barred by the principle enunciated in the doctrine of *res judicata*. Hence, the contention of the learned senior counsel for the defendants 2 and 4 is devoid of merit and is liable to be rejected.'

11.2 Before proceeding further, it is necessary to refer to the decisions relied upon by the learned senior counsel for the defendants 2 and 4.

Tumu Srihari (1 supra). In this decision this Court referred to the decision of the Apex Court in ***Sunderbai v. Devaji Shankar Deshpande (AIR 1954 SC 82)*** wherein the Supreme Court held as follows:

‘11..... where it was held that where the right claimed in both suits is the same the subsequent suit would be barred as ‘res judicata’ though the right in the subsequent suit is sought to be established on a ground different from that in the former suit. It would be only in those cases where the rights claimed in the two suits were different that the subsequent suit would not be barred as ‘res judicata’ even though the property was identical.’

The learned senior counsel placing reliance on the observations in the judgment of the Supreme Court in **Ramchandra Dagdu Sonavane (dead) by LRs and others v. Vithu Hira Mahar (dead) by LRs and others**^[9] had contended that to substantiate the plea of *res judicata* the pleadings and issues in the former suit need not be filed and that in the case on hand, in the judgment of the first appellate Court in the former appeal suit a reference extenso has been made to the pleadings of the parties and that, therefore, there is no requirement to file the pleadings. In the cited case, the Supreme Court held as follows:

‘The principle of *res judicata* comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of the law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided.(See *Workmen v. Cochin Port Trust* [(1978) 3 SCC 119].”

In this cited case on facts of that case it was further held in paragraphs 46 & 47 as follows:

‘46. So far as the finding drawn in the suit for injunction in O.S. No.104 of 1953, regarding adoption would also operate as a *res-judicata* in view of the judgment of this Court in *Sulochana Amma Vs. Narayanan Nair* [(1994) 2 SCC 14]. It is observed:

The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a *res-judicata*. A plea decided even in a suit for injunction touching title between the same parties, would operate as *res-judicata*.

“9..... It is a settled law that in a Suit for injunction when

title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties when the same is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit, the decree in injunction suit equally operates as a *res-judicata*.”

47. The same view is reiterated in *Gram Panchayat Vs. Ujagar Singh* [AIR 2000 SC 3272]. This Court has stated that even in an earlier suit for injunction, if there is an incidental finding on title, the same will not be binding in the later suit or proceedings where title is directly in question, unless it is established that it was "necessary" in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the findings of title. Even the mere framing of an issue may not be sufficient as pointed out in that case.’

It appears from the facts of this reported decision that the pleadings in the former suit were not marked, however, in the copy of the judgment that was exhibited, the trial Judge in extenso had referred to the pleadings of the parties in the earlier suit and, therefore, the Court found no necessity for marking of the copies of the pleadings in the former suit. Thus, this decision is also relied upon in support of the proposition that a finding drawn and the plea decided in a suit for injunction touching the title between the same parties would operate as *res judicata*.

Commissioner of Endowments and others v. Vittal Rao and others ^[10]. This decision was relied upon in support of the proposition that even though an issue is not formally framed but, such an issue is material and essential for the decision of the case in the earlier proceeding and when a finding was recorded though an issue was not framed, the said finding would operate as *res judicata* in a subsequent proceeding. The ratio in the decision is that failure to frame a formal issue would not invalidate the findings of the binding judgment between the parties.

In **Vithal Yeshwant Jathar v. Shikandarkhan Makhtumkhan Sardesai** ^[11] the Supreme Court observed as follows:

‘It is well settled that if the final decision in any matter at issue between the parties is based by a court on its decisions on more

than one point – each of which by itself would be sufficient for the ultimate decision – the decision on each of these points operates as res judicata between the parties.’

11.3 Per contra, the learned senior counsel for the plaintiffs relied upon the following decisions.

In **Sajjadanashin Sayed Md.B.E. Edr.(D) by LRs v. Musa Dadabhai Ummer and others** ^[12] while dealing with the words “directly and substantially in issue” in the provision of law the Supreme Court had held as follows:

‘12. It will be noticed that the words used in Section 11 CPC are “directly and substantially in issue”. If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceeding. Judicial decisions have however held that if a matter was only ‘collaterally or incidentally’ in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a latter proceeding where the matter is directly and substantially in issue.

14. A collateral or incidental issue is one that is ancillary to a direct and substantive issue; the former is an auxiliary issue and the latter the principal issue. The expression ‘collaterally or incidentally’ in issue implies that there is another matter which is ‘directly and substantially’ in issue (Mulla, CPC 15th Ed., p.104).’

In this cited case, the Supreme Court referred to the following extract from 15th Edition, Page 104 Mulla wherein the learned author said as follows:

18. In India, Mulla has referred to similar tests (Mulla, 15th Ed.p.104). The learned author says: A matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter ‘directly and substantially’ in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was ‘directly and substantially’ in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls? One test is that if the issue was ‘necessary’ to be decided for adjudicating on the principal issue and was decided, it would have to be treated as ‘directly and substantially’ in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. (Mulla, p.104) One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwar Singh Vs. Sarwan Singh: AIR 1965 SC

Mohd.S.Labbai Vs. Mohd. Hanifa: AIR 1965 SC 1569). We are of the view that the above summary in Mulla is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p.105). "It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the Court considers the adjudication of the issue material and essential for its decision".

In **Gram Panchayat of Village Naulakha v. Ujagar Singh and**

Others ^[13] the Supreme on the aspect of *res judicata* had held as follows:

10. We may also add one other important reason which frequently arises under section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed. Musa Dadabhai Ummer, [2000] 3 SCC 350, where this Court, on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceedings where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case.

11.4 I have carefully gone through the decisions. There is no dispute with the propositions of law relied upon by the learned senior counsel for both the sides. From the decisions cited by both the sides, the following points emerge: **(I)** The plea of *res judicata* can be given effect if four conditions, which are required, are proved. They are - (i) litigating parties must be the same; (ii) the subject matter of the suit also must be identical; (iii) the matter must be finally decided between the parties; (iv) the suit must be decided by a court of competent jurisdiction. **(II)** Framing of an issue or not framing of a formal issue is immaterial. But, the material test to be applied is whether the Court

considered in the former suit the adjudication of the issue material and essential for its decision. (III) Which of the matters are directly in issue and which are collaterally or incidentally in issue, must be determined on the facts of each case. (IV) Even though an issue is not formally framed, but, it is material and essential in the earlier proceeding, a finding on that issue would operate as *res judicata* in the subsequent proceeding. In other words, to determine whether an issue was directly and substantially in issue, normally one has to examine the plaint, the written statement, the issues and the judgment and then find out if the matter was directly and substantially in issue and it is not to be assumed that matters in respect of which issues have been framed are directly and substantially in issue nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. One of the tests is if the issue is necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as directly and substantially in issue; and, if it is clear that the judgment was in fact based upon the decision on such issue, then it would operate as *res judicata* in a later case.”

11.5 Now keeping in view the legal position, it is to be examined as to whether the present suit of the plaintiffs is barred by the principle enunciated in the doctrine of *res judicata*. The trial Court had decreed the former suit. A reading of the judgment of the 1st appellate Court in the earlier first appeal suit would show that the said court, which is the last court of fact, had recorded a finding that the plaintiffs failed to establish that they were in possession of the plaint schedule property as on the date of the former suit. Further, in this instant case, as rightly pointed out by the learned senior counsel for the plaintiffs, the pleadings in the former suit are not filed. Further, ultimately the appeal suit was allowed only on the ground that the plaintiffs were not found to be in possession of the suit property, as on the date of that suit. The said Court had further observed that the plaintiffs are at liberty to file a

(fresh) suit for declaration of title and recovery of possession. Therefore, the contention that the present suit is barred by *res judicata* is devoid of merit. Be that as it may. On facts, both the Courts below, after referring to the decisions cited before the said Courts, had concurrently held that the present suit for declaration of title and recovery of possession is not barred by *res judicata*. The law is well settled that when the finding on the issue of *res judicata* arrived at by the Courts below is possible and plausible, this Court is precluded from substituting its view even if another view is possible. Even otherwise, any other view is not possible in this case, in the well considered view of this Court. Further, *res judicata* being a question of fact and law and not a pure question of law, let alone, substantial question of law, the said question cannot be permitted to be raised in this second appeal, more particularly, when there was no perversity either in the appreciation of facts and the evidence or in the application of the law to the material facts or the findings recorded by the Courts below. Hence the contention that the present suit of the plaintiffs is barred by *res judicata* is devoid of merit and is accordingly rejected.

12.1 This takes this Court to the next set of contentions of the learned senior counsel for the defendants 2 and 4, which are as follows: 'The plaintiffs had relied upon in the former suit, the very same documents on which they are now relying upon in the present suit. The same property is involved in both the suits. In the earlier suit, the Courts have extensively dealt with the very same documents, which were also pressed into service in that former suit. Therefore, a competent civil Court had an occasion to earlier deal with all the documents. And, hence on that ground also the principle of *res judicata* applies.' In support of the said contentions, the learned senior counsel for the defendants 2 and 4 had placed reliance on the decision in **Mahaboob Bi Saheb and others v. Shaik Abdul Razack Saheb (died) per LRs and others**^[14] wherein this court dealing with a similar line of

contentions had held as follows:

‘A series of documents submitted by the plaintiffs herein are the very same documents filed in the earlier suit, related to the entire property. It is not the case that the documents produced in the present suit, in the lower Court, only related to the earlier suit and that property is not the property involved in the present suit. The lower Court has extensively dealt with the issues at page No.10 of its judgment and has held that the documents produced before the trial Court in the earlier suit are by the plaintiffs herein and have been pressed into service by them in the earlier suit and the Court had the occasion to deal with all these documents. Thus the lower Court held that the principles of res judicata applies.’

12.2 The learned senior counsel for the plaintiffs, in reply, would contend as follows: - ‘No doubt, it is true that some of the documents exhibited in this suit were also exhibited in the former suit filed for perpetual injunction simpliciter based on possession. Naturally when the relief of injunction claimed in the former suit and the relief of declaration of title and recovery of possession claimed in the present suit relate to the very same property, the plaintiffs are obliged to file in both the suits their title documents as well as the other documents, which are necessary to establish their case. In fact, the documents were accepted by the trial Court while decreeing the former suit for perpetual injunction. However, the documents were considered by the first appellate Court only on a limited aspect and to find out as to whether the plaintiffs in the former suit were in possession or not as on the date of the institution of that former suit. But, in this suit for declaration of title and recovery of possession, a detailed consideration of the documents as was necessary was done by the Courts below to arrive at a finding in regard to title.’

12.3 In the present case, the plaintiffs were required to prove their right, title and interest and also entitlement to recover possession of the plaint schedule property. Therefore, apart from the documents filed in the former suit, the plaintiffs had further filed some more documents in the present suit through PWs1 and 2. In the former suit ryotwari patta under exhibit A3 was not filed besides several other documents.

In-fact it was contended before the Courts below that the documents that were not filed in the earlier litigation were also filed in the present suit and exhibited. But, that contention was rejected by assigning valid and cogent reasons and by observing that the documents are not filed in the former suit is no ground to disbelieve the said documents.

Having regard to the said reasons and accepting the explanation of the plaintiffs that the plaintiffs did not file the said documents in the earlier suit as the said suit was a simple suit for injunction, it must be held that this contention of the defendants 2 and 4 does not merit consideration.

13. Before parting, it is to be noted that the learned senior counsel for the defendants 2 and 4 had contended that insofar as a part of the plaint schedule property admittedly the claim is based on mere entries in revenue records and that the law is well settled that entries in revenue records do not confer title and therefore, the courts below ought not to have decreed the suit of the plaintiffs based on entries in revenue records. He would further contend that the burden is on the plaintiffs to establish their case irrespective of the defendants proved their case or not and that in the absence of establishment of the plaintiffs' title, the weakness of the case set up by the defendants cannot be a ground to grant the relief. In support of the contentions, he placed reliance on a decision in **Union of India v. Vasavi Co-**

operative Housing Society Limited and others^[15]. The ratio in the decision is as follows:

'It is trite law that, in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.'

The learned senior counsel for the plaintiffs would submit as follows: 'The plaintiffs' case is not based on mere entries in revenue records. The plaintiffs had filed title deeds in respect of Ac.1.49 ½ cents of land out of Ac.5.25 cents. Apart from filing the said title deeds,

the plaintiffs had *inter alia* claimed that the Government gave full rights to the 1st plaintiff after the abolition of the Inams on the commencement of the Inams Estates Abolition Act during the year 1958 to 1960 as by then the 1st plaintiff has been in possession and enjoyment of the same since more than 55 years under the Inamdar-Vemparala Suryanarayana. Thus, the basis for the claim is the bestowing or conferment of full rights on the 1st plaintiff by the Government on the commencement of the above said enactment and also based on long adverse possession and prescriptive title by long continuous possession for more than 55 years under the inamdar.' Nonetheless, the concurrent finding recorded by the courts below that the plaintiffs had established title, being a finding on a question of fact and as no substantial question of law was raised, formulated and involved for consideration on this aspect, the defendants 2 and 4 are precluded from raising this plea before this Court in view of the narrow compass of Section 100 of the Code.

14. Keeping in view the facts of the present case and the scope of Section 100 of the Code, it is necessary to refer to the decision of the Supreme Court in **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others**^[16] wherein it was held as follows: 'The second appeal cannot be decided on merely equitable grounds.' 'It is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court. 'In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex

Court, or was based upon in inadmissible evidence or arrived at without evidence.’ The law is well settled that concurrent findings of fact based on evidence, which was accepted by the trial Court as well as the first appellate court, cannot be disturbed more particularly when the first appellate court has given satisfactory reasons for accepting the same evidence which was accepted by the trial Court. In the case on hand, the appellants/defendants 2 and 4 had not raised a substantial question of law on this aspect and also could not show that the conclusions drawn by the Courts below, which are concurrent, were erroneous on any ground.

15. Having regard to the reasoned findings on the substantial questions of law raised in S.A.No.1140 of 2003 of the defendants 2 and 4, this Court finds that there is no substance in the substantial questions of law and that the said second appeal is devoid of merit and is liable for dismissal.

16. Now the substantial questions of law raised by the plaintiffs in their second appeal are taken up. The said questions relate to the plaintiffs’ entitlement to the mesne profits, which are not granted by both the Courts below. Be it noted that the Court below had dismissed the cross objections of the plaintiffs filed in that regard.

16.1 No serious resistance is made to the claim of the plaintiffs in this regard. The learned senior counsel for the plaintiffs had contended that the suit filed for recovery of possession was decreed by the Courts below and that award of mesne profits follow the event and hence, the Courts below ought to have granted future mesne profits to the plaintiffs instead of refusing to grant the same. He had placed reliance upon the decision of the Supreme Court in **R.S.Maddannappa (deceased) by LRs v. Chandramma and another**^[17]. The facts of the case disclose that the plaintiff brought a suit against her sister for possession of half share of the suit property. The High Court had

awarded mesne profits to the successful first defendant even though she was not transposed as a plaintiff. It was contended before the Supreme Court that mesne profits cannot be awarded to the successful party to a suit for possession unless a claim was made in respect of them. In this backdrop of facts and contentions, the Supreme Court held as follows:

'The learned counsel is right in so far as mesne profits prior to the suit are concerned but in so far as mesne profits subsequent to the date of the institution of the suit, that is future mesne profits are concerned, the position is governed by Order XX, rule 2, C.P.C. which is as follows :

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree –

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until :-

(i) the delivery of possession to the decree holder,

(ii) the relinquishment of possession by the judgment debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under Clause (b) or Clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry."

The Supreme Court having referred to the earlier decisions had upheld the decree of the High Court and had dismissed the appeal. From the settled legal position, it is clear that in a suit for recovery of possession, the claim for future mesne profits can be granted. Therefore, the Courts below are not justified in refusing to grant the relief of future mesne profits to the plaintiffs. Viewed thus, this Court finds that there is acceptable merit in the questions raised in this second appeal of the plaintiffs and that accordingly this second appeal of the plaintiffs deserves to be allowed.

17. In the result, S.A.No.1140 of 2003 is dismissed. S.A.No.1305 of 2003 of the plaintiffs is allowed granting a decree additionally for future mesne profits from the date of institution of the suit until the delivery of possession of the plaint schedule property to the plaintiffs; the

plaintiffs, however, are directed to move an application under Order XX Rule 12 of the Code before the trial Court requesting to direct an enquiry as to the mesne profits from the date of the institution of the suit until the delivery of possession and pass a decree in respect of future mesne profits in accordance with the result of such enquiry. The appellants in SA.No.1140 of 2003 are granted four months time from the date of receipt of a copy of this judgment to vacate and handover vacant peaceful possession of the plaint schedule property to the plaintiffs. Failing compliance, the plaintiffs are at liberty to obtain possession of the property by following the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in these appeals, shall stand closed.

M. SEETHARAMA

MURTI, J

7th December, 2015

Note: L.R copy to be marked.

(B/o)

Vjl

[\[1\]](#) AIR 2011 AP 88

[\[2\]](#) (2011) 9 SCC 126

[\[3\]](#) AIR 2008 SC 363

[\[4\]](#) 2006(1) ALD 116

[\[5\]](#) AIR 1951 PATNA 556 (CN.157)

[\[6\]](#) AIR 1961 SC 808

[\[7\]](#) AIR 1975 SC 1089

[\[8\]](#) AIR 1964 SC 207

[\[9\]](#) (2009) 10 SCC 273

[\[10\]](#) (2005) 4 SCC 120

[\[11\]](#) AIR 1963 SC 385

[\[12\]](#) AIR 2000 SC 1238

[\[13\]](#) AIR 2000 SC 3272(1)

[\[14\]](#) 1998(2) ALT 277

[\[15\]](#) (2014) 2 SCC 269

[\[16\]](#) AIR 1999 SC 2213

[\[17\]](#) AIR 1965 SC 1812