

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Second Appeal No.27 of 2015
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JUDGMENT:

This is an appeal by the unsuccessful defendant under Section 100 of the Code of Civil Procedure, 1908 ('the Code' for short) assailing the decree and judgment dated 17.10.2014 of the learned VIII Additional District Judge, Chittoor passed in AS.No.140 of 2002 whereby the learned Additional District Judge while dismissing the said appeal had confirmed the decree and judgment dated 13.08.2002 of the learned II Additional Junior Civil Judge, Chittoor made in OS.No.622 of 1994.

2. I have heard the submissions of the learned counsel for the appellant/defendant ('the defendant, for brevity) and the learned counsel for the respondents/plaintiffs ('the plaintiffs', for brevity) at the stage of admission. I have perused the material record.

3. The learned counsel for the defendant would contend that though four substantial questions are formulated and mentioned in the memorandum of grounds, the substantial questions mentioned in grounds A and B are only involved in this second appeal. The said two substantial questions read as follows:

A. Whether the courts below are right in not considering the fact that even if exhibits X2 and X3 are true, the plaintiff had violated the condition of the grant of patta since she/her husband did not construct any house or other dwelling place even after one year of the grant of patta. On this ground alone, the revenue authorities can cancel the patta granted earlier and grant the same to any one. For this there is no necessity to evict the original pattedar i.e., plaintiff as observed by the 1st appellate court since she/her husband never resided in the suit land.

B. Whether the courts below are right that in spite of

establishing that the plaintiff is not houseless and is not eligible for grant of house site patta since she owns three houses in her name in the vicinity of suit land. This evidence was not all considered by courts below.

[Reproduced verbatim]

He would further contend that the following additional substantial question of law which is formulated in SAMP.No.992 of 2015 which is filed for permission to raise the said additional substantial question of law is also involved.

Whether the plaintiffs/respondents herein are entitled to the relief of mandatory injunction without seeking the relief of declaration of title over the suit schedule property in the teeth the specific defence set up by the defendant/appellant seriously disputing the right, title and interest of the plaintiffs over the suit schedule property and also pleading that the defendant is the lawful owner and possessor of the same.

[Reproduced verbatim]

4. The learned counsel for the plaintiffs would contend that the questions raised are not substantial questions of law and that neither such questions nor any other substantial question is involved in this second appeal.

5. Now it is to be examined as to whether or not any substantial questions of law are really involved in the second appeal; and, whether the appeal deserves to be admitted or is liable to be dismissed at the stage of admission.

6. Before proceeding further, it is necessary to refer to the cases of both the sides and the facts leading to the filing of the present appeal.

6.1 The case of the plaintiffs is this: - 'The suit schedule property along with the portion on the North of it, in which the plaintiffs had constructed a tiled house, originally belonged to one Dattatreya swamy. The husband of the 1st plaintiff had purchased the said properties from him. Subsequently, in the year 1977, the husband of the 1st plaintiff was granted two pattas by the then

Tahasildar for an extent of Ac.0.01 ½ cents each and the 1st plaintiff and her husband had continued in possession and enjoyment of the total extent of Ac.0.03 cents of land admeasuring 38 feet from East to West and 44 feet from North to South. The 1st plaintiff and her husband are residing in the house constructed in the Northern portion of the land which measures 38 feet from East to West and 22 feet from North to South. The remaining portion on the Southern side of the house admeasuring 38 feet from East to West and 22 feet from North to South was kept vacant. Subsequently, a thatched hut was erected and was let out to one Ammanemma. After the death of the said Ammanemma, the said hut had collapsed due to passage of time and the vacant site continued to be in possession of the 1st plaintiff and her husband. The plaintiffs had applied for a loan from Co-operative Town Bank, Chittoor in the year 1984 by mortgaging the plaint schedule property along with the residential house by depositing the house site pattas. The defendant, who is the owner of the property situate on the West of the plaint schedule property made an attempt on 26.09.1994 to knock away the suit schedule property. The plaintiffs had resisted his high handed acts with the help of elders and had brought the instant suit for perpetual injunction in respect of that vacant site left by them by the side of their house. An ad interim injunction was also granted by the Court in favour of the plaintiffs and against the defendant. When the plaintiffs are in peaceful possession and enjoyment of the suit schedule property and while the interim orders of injunction are in force, the defendant had made an attempt to lay foundation in the above said vacant site. The plaintiffs had, therefore, filed a petition to take action against the defendant for violation of the orders of the Court. However, since the defendant had made an encroachment and constructed a foundation in the encroached portion, the plaintiffs had got amended the plaint in the instant suit and sought a relief of mandatory injunction as well, for removal of constructions made in part of the suit schedule property. The amendment was permitted. Thus, the plaintiffs are entitled to the reliefs of mandatory injunction in respect of the property in which a foundation was constructed by trespassing into that portion of the property during the pendency of the suit

and also a perpetual injunction as originally sought for in the suit.'

6.2 The case of the defendant is this: 'The plaintiffs have no right, title and interest in the suit schedule property. The plaint averments about acquisition of the property by the plaintiffs are false. One Ammanemma, the wife of Dattatreya swamy was the original owner of the suit schedule property. She was granted patta by the then MRO in the year 1977. During her life time, she had resided in that property as absolute owner. Later the defendant's vendor Ganapathy had purchased the said property from the said Ammanemma by virtue of registered sale deed dated 12.03.1990. The suit land was originally assigned a door no.15-1/1-20. Later a new number 15-327 was assigned. Later the house in the property had collapsed. The defendants had purchased the suit property under a registered sale deed dated 30.11.1992 from the said Ganapathy and had cleared the land and had laid a foundation in the said suit site in the year 1993, i.e., immediately after the said purchase, for construction of a house. The defendant had also kept construction material in the suit land. The defendant had also purchased the land to the West of the suit land from Thulasi Chetty to facilitate construction of extra rooms. The suit schedule property is in possession and enjoyment of the defendant from the date of the said purchase. He is the only lawful owner of the suit schedule property. The plaintiffs have no right over the suit schedule property. The averment in the amended plaint that after interim order was granted, the defendant had flouted the interim order is false. If really the defendant had violated the said order, the plaintiffs ought to have filed and pursued an application under Order XXXIX Rule 2(a) of the Code. Though such petition was filed, the same was dismissed for default. The foundation was constructed even prior to the filing of the suit. Hence the suit may be dismissed.'

6.3 Having regard to the pleadings, the trial Court had framed the following issues.

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. Whether the plaintiff is entitled for mandatory

injunction as prayed for?

3. To what relief?

6.4 At trial, the 1st plaintiff was examined as PW1. Exhibits A1 to A5 were marked on the side of the plaintiffs. DWs1 and 2 were examined on behalf of the defendant and exhibits B1 to B7 were marked. Exhibits X1 to X3 and C1 & C2 were also marked.

6.5 On merits, the trial court had decreed the suit granting a perpetual injunction in favour of the plaintiffs and against the defendant restraining him and his agents from interfering with the plaintiffs' peaceful possession and enjoyment of the suit schedule property. The trial Court had also granted a decree for mandatory injunction against the defendant directing to remove the foundation laid in the suit schedule property and not to cause damage or hindrance to the plaintiffs hereinafter.

6.6 The appeal preferred by the defendant was dismissed. Therefore, the defendant is before this Court.

7. The learned counsel for the defendant having advanced arguments in line with the pleaded defence of the defendant had further contended as follows: - 'The Courts below erred in holding that two house pattas were granted to the husband of the 1st plaintiff even though the said aspect was not supported by the pleading. In the plaint it was only pleaded that only one patta was granted in favour of the husband of the 1st plaintiff. The judgments of the Courts below are based on assumptions. PW1 did not speak about the encroachment allegedly made by the defendant when she gave evidence subsequent to the alleged date of encroachment. Having filed a petition for violation of the orders, the same was not pursued by PW1. These facts show that the encroachment alleged is false. The defendant had never encroached any property. He had laid foundation in the property within one and a half months after the purchase of property by him. When a new patta was granted in favour of an eligible person, it pre-supposes that the earlier pattas, if any, for the same property were cancelled. There is no contrary evidence to show

that the earlier patta was not cancelled. No steps were taken to disprove the new patta. Hence patta under exhibit B4 is valid and binding. The Courts below did not approach the issue in a proper manner. The Courts below did not consider material evidence. PW1 admitted that the defendant laid foundation in the year 1993 and at that time her house was got damaged and, therefore, she had got her house repaired. The Courts below had overlooked this admission. The Courts did not consider the material evidence. When a house as directed in the terms of the patta was not constructed by the husband of the 1st plaintiff or the 1st plaintiff, it amounted to violation of conditions imposed while granting the patta. On that ground alone, the revenue authorities had cancelled the patta. When once new patta was granted, there is no need to evict or take possession from the original pattadar or the 1st plaintiff. But, the appellate court made wrong observations on this aspect though the 1st plaintiff and her husband never resided in the property. It was also established that the plaintiffs are not landless poor persons and are not eligible for grant of house site pattas. The plaintiffs urged that during the pendency of the suit this defendant had trespassed into the property and laid foundation but, had claimed only the relief of mandatory injunction without seeking the relief of recovery of possession of the property in which the foundation was laid. The relief of mandatory injunction ought not to have been granted when no relief of recovery of possession is claimed in the suit.'

7.1 The learned counsel for the defendant had relied upon the following decisions: (1) **Boodireddy Chandraiah and others v. Arigela Laxmi and another**^[1]; (2) **Anathula Sudhakar v. P. Buchi Reddy**^[2]; (3) **Sellayi and others v. Valliammal and others**^[3]; and (4) the decision rendered on 04.06.2015 by the High Court of Madras in S.A.No.389 of 2007 of the in **Ramasami Reddy and others v. Govinda Reddy and others (unreported)**.

8. On the other hand, the learned counsel for the plaintiffs would contend as follows: - 'The plaintiffs are the absolute owners of the subject property

having got the same under patta granted by the revenue authorities. The pattas were not cancelled by following the procedure established by law. The possession of the plaintiffs was never disturbed right from the date of issuance of pattas till date. When there was interference by the defendant, the plaintiffs had initially brought a suit for perpetual injunction and had obtained interim injunction orders. Violating the ad interim injunction order granted by the Court below, the defendant in a high handed manner had trespassed into a part of the property during the pendency of the suit and had constructed a foundation in the encroached portion and on that the plaintiffs had filed a petition for taking action against the defendant for violation of the Court orders and had also got amended the plaint and sought a mandatory injunction directing the defendant to remove the construction made in the suit schedule property. The said amendment was allowed. The trial Court had framed appropriate issues and answered all the issues in favour of the plaintiffs while decreeing the suit as prayed for. The first appeal preferred by the unsuccessful defendant was dismissed by adverting to all the relevant issues. The appellate Court by a well reasoned judgment confirmed the decree and judgment of the trial Court after adverting to and rejecting all the contentions of the defendant. Both the Courts have recorded concurrent findings of fact. There was neither non consideration nor misinterpretation or mis-appreciation of the evidence by the Courts below. On the other hand, the Courts below had accurately considered the facts and also appreciated the evidence on record in proper perspective. Since the construction of the foundation was made by the defendant by trespassing into the suit property during the pendency of the suit and in violation of the interim injunction order granted by the Court below, the plaintiffs are entitled to the relief of mandatory injunction. Both the Courts below had recorded concurrent findings of facts that the defendant had trespassed and constructed foundation in violation of the interim orders of injunction. All the questions raised are pure questions of fact and not even questions of law. Therefore, the substantial questions stated to have been involved in this appeal are not involved. Therefore, the appeal is liable to be dismissed at the admission stage as it does not deserve to be admitted.'

9. Keeping in view the pleadings and the contentions noted supra, I have carefully gone through the material record. Though several contentions based on facts and evidence are raised, the ambit of the questions to be considered is very limited in view of the narrow compass of the jurisdiction which this Court exercises under Section 100 of the Code. Having regard to the facts and the law, the contentions can broadly be judged under two categories viz., first set of contentions based on pleadings and evidence; and, second set of contentions on the question – ‘whether the relief of mandatory injunction for removal of constructions cannot be granted as the plaintiffs had not claimed the relief of recover of possession of the encroached portion?’

9.1 Dealing with the first set of contentions, it is noteworthy that the 1st plaintiff-PW1 deposed in line with the pleaded case and had maintained her stand in her cross examination. PW1 had explained in her evidence that originally the property was purchased from Datttareyulu by obtaining a sale document on a white paper, but, later, the Government had granted Pattas under exhibits X2 and X3 in respect of the plaint schedule land/site and in respect of the house property of the plaintiffs which is adjacent to the plaint schedule property. The plaintiffs, apart from adducing oral evidence, had exhibited exhibit A2 and A3, the house tax receipts, exhibit A1-registration extract of mortgage deed under which the entire pattas property was mortgaged to a Co-operative bank in the year 1989. It is borne out by the evidence on record that at that time, there were no disputes between the parties. PW1 had also deposed that at the time of obtaining loan under the registered deed of mortgage the original pattas were deposited with the bank. Exhibit X1-discharge register is a document showing the discharge of the mortgage debt obtained from the Co-operative bank. She had further got summoned from the Co-operative bank and got exhibited exhibit X2 and X3 pattas in respect of Ac.0.01 ½ cents of site each issued in the name of her husband way back in the year 1977. PW1 had also testified that immediately after grant of such house site pattas, a tiled house was constructed in Northern portion by leaving the plaint schedule vacant site to the South of the

said house. Exhibit A2 and A3 receipts relate to the said residential house of the plaintiffs, which is adjacent to the suit schedule site. The vital fact is the plaintiffs are in possession of the house property situated to the North of the present suit schedule vacant site. Had the plaintiffs' case been false, the plaintiffs ought not to have been in possession of the tiled house on the North of the plaint schedule property which is a part of the property covered by X2 and X3 pattas granted to the husband of the 1st plaintiff. According to her evidence, in the site which was kept vacant, a hut was constructed and that in the said hut Ammanemma had resided as a tenant till her death in the year 1991 and that later the hut had collapsed and since then that vacant site had continued in possession of the plaintiffs. Exhibit A4 is the copy of the proceedings issued by Panchayatraj department and exhibit A5 is the Award of Commissioner for Workmen's Compensation. The evidence brought on record thus sufficiently established the pleaded case of the plaintiffs in regard to the title, right and interest of the plaintiffs over the plaint schedule property and the further fact that the plaintiffs were and are exercising peaceably the right of ownership over the pattas properties. The defendant has taken a defence that though the pattas were granted to the husband of the 1st plaintiff, the same stood cancelled as the 1st plaintiff or her husband had failed to construct a house within specified time as per the conditions in the pattas. The further defence of the defendant is that Ammanemma was originally granted a patta for the suit site in the year 1977 and that she had sold the said property under exhibit B2 registered sale deed dated 22.03.1990 to one Gnopathy, the vendor of the defendant and that the defendant had purchased the said property under exhibit B1 registered sale deed dated 30.11.1992 and that exhibit B4 patta was also granted on 14.12.1994 on his application after receiving the market value of the property and that the foundation was laid even by the year 1993. In the face of exhibits X2 and X3 pattas the contention that a patta was granted to the defendant under exhibit B4 was not countenanced by the Courts below and it was also found that the defendant could not establish the right and title of Amanemma who had sold the property under exhibit B2 to the vendor of the defendant. However, the

learned counsel for the defendant would contend that the 1st plaintiff and her husband were required to construct a house in the allotted property within one year but they had failed to do so and that, therefore, the pattas in their name stood cancelled and hence, the Government had resumed the possession and granted exhibit B4-patta subsequently in favour of the defendant and that there is no need to physically take possession of the property from the plaintiffs by evicting them there from. Such a contention cannot be countenanced. It is for the Government to initiate appropriate proceedings by putting the plaintiffs to notice in case the Government intended to cancel the pattas granted in favour of the husband of the 1st plaintiff and resume possession of the property. The Government may in its discretion ignore the lapses on the part of a patta holder and may choose not to cancel the patta and resume possession having regard to the facts of a particular case. In certain cases even though the Government may initiate proceedings for cancellation, the Government by exercising its discretion may re-grant the patta to the original patta holder by condoning the lapses if the facts so warrant. Therefore, merely because there is a lapse as alleged on the part of the 1st plaintiff and her husband, and even assuming for a moment that the contention that they did not construct a house in the patta land within one year is correct, it cannot be said that the Government had cancelled the patta and resumed the possession of the land more particularly when no documentary evidence in that regard is produced and no reliable evidence is adduced by examining any competent officer of the revenue department. When the pattas under exhibits X2 and X3 are not cancelled by any valid proceeding and when the possession of the plaintiffs was not disturbed by the Government by ejecting them from the property by conducting a panchanaama as required under law before granting of exhibit B4 patta, no credence can be given to exhibit B4 patta, which was obtained in December 1994 i.e., after the institution of the suit on 30.09.1994. The patta of the defendant allegedly obtained after the institution of the suit has no probative value in the facts and circumstances of the case. Further, the defendant also could not establish the title of Ammanemma, the vendor of the Defendant's

vendor. Even the exhibit B6-property tax demand register from the year 1993-94 onwards and the exhibit B7 bill of the year 1997 are documents subsequent to the suit period. The property covered by exhibit X2 and X3 corresponds to the suit schedule property and the remaining property that is in possession of the plaintiffs is evident from the boundaries mentioned in the two pattas and the suit schedule. Therefore, it is established that at the earliest point of time the properties covered by the pattas are allotted to the husband of the 1st plaintiff and later the husband of the 1st plaintiff and the 1st plaintiff had constructed the house on the Northern portion of that property and the remaining site was left vacant by them. Therefore, the documents of the defendants under exhibits B1 to B7 which are subsequent to the pattas of the plaintiffs in respect of the very same property are of no avail. Therefore, the contentions that the Courts below did not properly appreciate the facts and the evidence and that even if exhibits X2 and X3 are true the said pattas under exhibits X2 and X3 stood cancelled as the 1st plaintiff and her husband did not construct a house even after one year after granting of the pattas and that there is no need to evict the original pattadar etcetera do not stand the test of scrutiny and the questions raised based on all these contentions are not substantial questions of law and no such questions are involved in the appeal.

9.2 The next question sought to be raised is that even before the plaintiffs instituted the suit, the defendant had laid a foundation being in possession of the suit schedule property and that, therefore, the findings of the Courts below that he had trespassed into the property and made construction of foundation during the pendency of suit and by violating injunction orders are not well founded and that even assuming for a moment that he had trespassed into the property during the pendency of the suit and had constructed the foundation, still the mere relief of bare mandatory injunction without seeking relief of recovery of possession of the encroached portion cannot be granted. The very contention sought to be raised would lay bare that this question is a question based more on appreciation of the facts and the evidence and is not a substantial question of law.

10. Firstly, while considering the issue whether the plaintiffs are entitled to a mandatory injunction as prayed for, both the Courts below had adverted to the facts and the law which are relevant and further considered the Commissioner's report, which is a part of the record, and observed that the Commissioner had noted that the foundation in the suit schedule property appears to be 5 or 6 months old as on the date of his visit on 24.09.1995, while in fact the suit was filed on 30.09.1994 i.e., about an year prior to the said visit of the Commissioner. Having regard to the evidence, the Courts below had concurrently held that the defendant had trespassed into the property and constructed the foundation by violating the orders of injunction. The trial Court having referred to the legal proposition that when once it is found that the plaintiff is in possession and enjoyment of the suit schedule property as on the date of the suit, the plaintiff is entitled to a perpetual injunction had thus held that the plaintiffs are entitled to the relief of perpetual injunction and also mandatory injunction for removal of constructions that were made by the defendant in the property during the pendency of the suit and in violation of the temporary injunction orders of the Court. In this second appeal, this Court finds no reason to interfere with the said findings of fact.

11. Now the next question is as to whether the Courts were right in granting a mandatory injunction without the plaintiffs seeking the relief of recovery of possession of the property over which the construction was made by the defendant. It is to be reiterated that this Court found that the finding of the Courts below that the trespass was made during the pendency of the suit and that the construction was made after such trespass made in violation of the injunction orders of the Court is justified in the facts and circumstances of the case.

12. The learned counsel for the defendant placing reliance on the decision in **Anathula Sudhakar** (2 supra) had contended that the plaintiffs ought to have claimed the relief of recovery of possession and that the relief of bare mandatory injunction for removal of foundation without seeking relief of recovery of possession is not maintainable. A plain reading of the decision shows that the Supreme Court had summarised the position in regard to suits

for prohibitory injunction relating to immovable property as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar (supra)*]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

Therefore, the decision is not helpful to the defendant. Further, the decision of the High Court of Madras in S.A.No.389 of 2007 between **Ramasami Reddy and others v. Govinda Reddy and others** (unreported) and the decision in **Sellayi and others v. Valliammal and others** (4 and 3 supra) were rendered by following the ratio in the above decision of the Supreme Court. Be that as it may.

13. When a party violates an injunction order of the Court and trespasses into the property, the party aggrieved need not be compelled to seek recovery of possession as driving such aggrieved party to seek recovery of possession

would amount to putting a premium on the illegal act of the party violating the orders of the Court. In such circumstances, mandatory injunction can straight away be granted by directing the party aggrieved to seek restoration of possession by filing a petition in the same proceeding before the trial Court or in the executing Court for restoration of possession. This view of this Court finds support from a decision in **Sushil Kumar Dey Biswas and another v.**

Anil Kumar Dey Biswas and another^[4] wherein the facts and ratio are as follows:

‘The respondent filed a suit for eviction against the appellants, seeking eviction of the appellants in respect of one room, one bath and privy on the first floor of the property concerned and one room and one shop room on the ground floor of that property. During the pendency of that suit, the appellants filed an application under Section 151 CPC before the trial court, seeking restoration of possession of the suit property on the ground that the respondent forcibly dispossessed the appellants from the shop room as well as from the first floor room (by chopping off the steps of the wooden staircase that led to the first floor room). The trial court dismissed the said application on the ground that the restoration application was filed nearly seven months after the alleged dispossession. Being aggrieved thereby, the appellants approached the High Court by filing a revision petition, which was also dismissed. In this admitted factual background the Supreme Court held that delay in filing the application for restoration cannot be a reason for declining the relief and directed restoration of the staircase and the possession of one room, one bath and privy on the first floor and shop room on the ground floor to the appellants within the time frame fixed by the Supreme Court and further directed that on failure to restore possession the appellants-defendants are at liberty to approach the trial Court seeking appropriate relief for ensuring compliance of the directions of the supreme Court.’

A reading of the decision shows that the Supreme Court did not direct the defendants to seek restoration of possession by filing a separate suit, but, only ordered restoration as the forceful eviction and trespass by the opposite party was during the pendency of the suit. The law is well settled that in a

suit for perpetual injunction, when the defendants trespass into the property during the pendency of the suit, restitution of possession to the plaintiffs can be ordered in an interlocutory application filed under Section 151 of the Code of Civil Procedure though not under Section 144 of the Code. Further, the law is also well settled that when an application for temporary injunction was dismissed by the trial Court and when the defendants trespass into the property before the filing of the civil miscellaneous appeal by the plaintiffs, restitution of possession can be granted to the plaintiffs even in such a case, provided the facts of the case warrant granting of such restitution of possession. The above proposition of law finds support from the decision in

Cheni Chenchiah v. Shaik Ali Saheb^[5]. The facts of the cited case are as follows: “The petitioner therein filed a suit on the file of the Court of the District Munsif for perpetual injunction. He had also filed an interlocutory application for temporary injunction, which was dismissed. The plaintiff had then filed an interlocutory application along with the miscellaneous Appeal and the appellate Court had granted an order of injunction in the said application. In the meanwhile the defendants had forcibly thrown out the belongings of the plaintiff and had evicted him from the suit premises. As per the directions of the High Court, the CMA was taken for disposal and the C.M.A. was allowed. Therefore, the plaintiff had filed an application under Section 144 read with 151 of the Code for restitution. The same was dismissed by the learned Subordinate Judge. Aggrieved of which the plaintiff had filed a CRP. A contention was raised before this Court that as the plaintiff was not dispossessed by virtue of any order or decree of the Court, restitution cannot be claimed under Section 144 of CPC and that the plaintiff should have amended the plaint in his suit instead of filing an application under Section 144 of CPC. This Court rejected these contentions and ordered restitution to the plaintiff as he was forcibly and unauthorisedly evicted by the defendants during the pendency of the proceedings.” In the above narrated factual background of the cited case it was held as under:

“... on a consideration of the decisions referred to above, it can be seen that in the absence of specific provision in the Code which deals with particular situation or unless there is any prohibition either express or implied, the Court is

entitled to exercise its inherent powers under Section 151 of Code of Civil Procedure. In this case, as I stated above, Section 144 of CPC is not applicable to the facts of the case because possession was not taken by any order of the Court. There is no other provision, which applies to the facts of the case i.e., where the possession has been taken forcibly by a party during the pendency of the proceedings i.e., when the application is dismissed by the trial Court and before filing the appeal. In these circumstances, I agree with the contention of the learned Counsel for the petitioner that in such circumstances, the Court would be justified to do justice and put back the parties in the same position in which they were, but for the order of the trial Court by invoking the inherent jurisdiction. Therefore, I agree with the contention that the Court in exercise of its jurisdiction under Section 151 can grant restitution even though Section 144 CPC may not strictly apply. That view of mine, as I have stated above, is supported by the two Division Bench decisions stated supra in *State Government v. M. Jeevraj & Co.* [AIR1973AP27] and *P. Lingesarao v. Venkata Subbarao* [1966(2) An.W.R. 144].”

A reference is also necessary to the following ratio in **Kavita Trehan v.**

Balsar Hygiene Products ^[6].

‘The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144.’

In view of the settled legal position, the contention that the plaintiffs ought to have sought a relief of recovery of possession and not a mere mandatory injunction cannot be countenanced as a factual finding was recorded by the Courts below to the effect that the defendant had trespassed into the property and laid foundation in the encroached property during the pendency of the suit and in violation of the injunction orders. Therefore, in the well considered view of this Court, the relief of mandatory injunction can be granted, directing the defendant to remove the foundation laid and restore the possession of the property to the plaintiffs without compelling the plaintiffs to file a suit for recovery of possession of that encroached portion. In case of failure of the defendant to comply with such direction the plaintiffs can be given liberty to get removed the construction and recover possession by initiating an

appropriate incidental/execution proceeding. Hence this Court finds that there is no merit in the contentions of the defendant.

14. Before parting with the case, it is necessary to state that there is no dispute with the settled proposition of law in regard to substantial question of law laid down in the decision in **Boodireddy Chandriah** (1 supra). On an analytical examination of the facts, the evidence as borne out by the material record and the law applicable, this Court finds that there is no misconstruction of documents and wrong application of principle of law in construing any documents and that the Courts below had neither ignored material evidence nor acted on no evidence and have not drawn any wrong inferences from proved facts and had not applied the law wrongly while drawing any inferences. Therefore, the decision relied upon by the learned counsel for the defendant is not helpful to the defendant.

15. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. The view of this Court is reinforced by the ratio in the decision in **Gurudev Kaur v. Kaki** (AIR 2006 SC 1975). In the case on hand, as this court finds, after careful examination of the pleadings, the evidence and the contentions, that no substantial question of law is involved, this second appeal is liable for dismissal at the stage of admission, in view of the narrow compass of Section 100 of the Code of Civil Procedure.

16. Viewed thus, this Court finds that no substantial questions of law are involved and there is no substance in the questions sought to be raised and, that therefore, the appeal deserves to be dismissed at the stage of admission.

17. In the result, the Second Appeal is dismissed accordingly. No costs. The defendant is granted two months time from the date of the receipt of a copy of this judgment to remove the constructions and deliver vacant possession of the schedule property to the plaintiffs. On failure of the defendant to do so, the plaintiffs shall be at liberty to execute the decree and obtain vacant possession of the schedule property by following the procedure established by law.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

31st July, 2015
Vjl

[\[1\]](#) 2008(1) ALD 24 (SC)

[\[2\]](#) AIR 2008 SC 2033

[\[3\]](#) 2014 Law Suit (Mad)2536

[\[4\]](#) (2015) 3 SCC 461

[\[5\]](#) AIR 1993 AP 292

[\[6\]](#) AIR 1995 SC 441