THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

<u>Second Appeal No.120 of 2015</u>

<u>JUDGMENT</u>:

This second appeal by the unsuccessful 1st defendant under Section 100 of the Code of Civil Procedure, 1908 ('the Code' for short) is directed against the decree and judgment dated 12.12.2014 of the learned XIII Additional District Judge at Gajuwaka of Visakhapatnam whereby the learned Additional District Judge while dismissing the said appeal had confirmed the decree and judgment dated 08.08.2011 of the learned Senior Civil Judge, Gajuwaka of Visakhapatnam passed in OS.No.163 of 2004 filed by the plaintiffs/respondents 1 to 5 herein for recovery of Ac.1.20 cents covered by revenue survey no.52/10 and 11 patta No.135 situate at Mindi village of Gajuwaka Mandal more fully described in the schedule annexed to the plaint and for consequential perpetual injunction restraining the defendants 1 to 3 including the appellant herein and their men, agents etcetera from meddling with the plaint schedule property in any manner or alienating the same or making constructions or developments over it and for damages and costs.

2. I have heard the submissions of the learned counsel for the appellant/1st defendant ('the 1st defendant', for brevity) and the learned senior counsel for the respondents 1 to 5/plaintiffs ('the plaintiffs', for brevity) at the stage of admission. I have perused the material record.

3. The learned counsel for the 1st defendant would contend that the following substantial questions of law are involved in the second appeal. Per contra, the learned senior counsel for the plaintiffs would contend that no such questions of law are involved in this appeal.

a. Whether the lower appellate court committed an error of law in decreeing the suit, without giving any finding on the issue whether the suit is barred by limitation under Articles 64/65 of Indian Limitation Act, 1963?

b. Whether the plaintiffs are entitled for decree of possession in the absence of proof of title over the suit schedule property; and possession and the alleged dispossession with reference to their pleading, particularly when it is held that Exs.A1 and A2 have no evidentiary value?

c. Whether the lower appellate court committed an error in decreeing the suit on the weakness of the 1st defendant's case, if any, under section 6 of Specific Relief Act, 1963?

[Reproduced verbatim]

4. Before proceeding to arrive at a decision as to whether any substantial questions of law are involved in this appeal for admission of the same, it is necessary to state the facts, in brief, which lead to the filing of this second appeal.

4.1 The 1st plaintiff and the plaintiffs 2 to 5, who are the sons of the 1st plaintiff, brought the suit against the defendants 1 to 3 for the aforementioned reliefs. The case of the plaintiffs, in brief, is as follows: 'The father-in-law of the 1st plaintiff had purchased Ac.1.20 cents by virtue of a registered sale deed dated 27.12.1954 under exhibit A1 and had continued in possession of that property. Later he had gifted that property to the wife of the 1st plaintiff by name Appalanarasamma by virtue of a registered gift settlement deed dated 17.08.1960 under exhibit A2. Since the said date, the wife of the 1st plaintiff, who is also the mother of the plaintiffs 2 to 5, had continued in peaceful possession and enjoyment of the property. During the life time of the wife of the 1st plaintiff, the husband of the 1st defendant had tried to encroach into the said property. Therefore, she had filed OS.No.1192 of 1982 on the file of the learned I Additional District Munsif Magistrate, Visakhapatnam for a perpetual injunction and the said suit was decreed. When the Public Health Department people had attempted to dig trenches across the plaint schedule property, she had then filed O.S.No.175 of 1985 on the file of the learned IV Additional District Munsif against the District Collector and Deputy Executive Engineer, Public Health Department, Visakhapatnam for perpetual injunction and the said suit was also decreed. On the death of the wife of the 1st plaintiff, the property had devolved upon her husband and sons, who are the plaintiffs herein. Taking advantage of the death of Appalanarasamma, the husband of the 1st defendant had grabbed a portion of the plaint schedule property alleging that the 3rd defendant has leased out the said property to him. In spite of the requests by the plaintiffs he did not vacate the property. The plaintiffs made representations to the officials of the 3rd defendant on 28.05.2003, but they did not initiate any action. Therefore, the plaintiffs had approached the District Legal Services Authority by filing a pre litigation case in PLC.203 of 2003 against the husband of the 1st defendant, the 3rd defendant and others. The 3rd defendant had stated vide letter dated 19.02.2004 (under exhibit A7) that the property was not acquired. During the pendency of the said PLC, the husband of the 1st defendant had vacated the plaint schedule property and handed over the same to the plaintiffs. Subsequently, the 1st defendant who is an influential woman being a retired Joint Director of Child & Women Welfare Department had approached a higher official of her religion in the Police Department and had falsely alleged that the plaintiffs had encroached upon the plaint schedule property, with a view to grab the property; she had approached the police officer on the pretext that the property was assigned to her late husband. The said police official without trying to know the truth of the allegations of the representation dated 14.09.2004 lodged by the 1st defendant, commanded the 2nd defendant to drive the plaintiffs out of the plaint schedule property and restore the same to the 1st defendant. The 1st defendant had dispossessed the plaintiffs from the plaint schedule property with the support of the 2nd defendant, who was the then Sub-Inspector of Police, Gajuwaka. Forgetting that he is a law enforcing official, the 2nd defendant had taken the law into his hands. On the 2nd defendant illegally detaining the plaintiffs in the police station on the night of 17.09.2004, the 1st defendant and her henchmen had demolished the structures raised by the plaintiffs and caused damage to a tune of Rs.1,20,000/-. As a prelude to this incident, the 1st defendant with the help of the 2nd defendant managed to publish news items in local vernacular newspapers alleging that the 1st defendant is in possession of the property and that the plaintiffs are trying to encroach into the property and that the husband of the 1st defendant used to run a unit by name Mani Casting and structures in the plaint schedule property from 1980 onwards; but, the contents of the said publications are not true. The 1st defendant with the help of the defendants 2 and 3 started fabricating documents and the 2nd defendant, who was obviously under the influence of his superior, has become responsible for the demolition of the structures and the damage caused to the property including household articles of the plaintiffs. On the demand of the 2nd defendant, the plaintiffs appeared before him and explained the facts to him. Stating that the complainant is not attending to the police station, he had sent away the plaintiffs. Ultimately, the 2nd defendant and his higher officials have gone through the record and had stated that there is a difference in survey number and the property is not identifiable and had advised the henchmen of the 1st defendant, who had also appeared before them to approach a civil court and sent away the plaintiffs. Thus, the higher officials of the 2nd defendant did not take any action on the complaint of the plaintiffs. Since the 2nd defendant had supported the illegal acts of the 1st defendant, the plaintiffs are constrained to file the suit for recovery of possession and perpetual injunction.

4.2 Since the 1st defendant is the appellant, the defence in her written statement, which is relevant and necessary for consideration, is as follows: - 'This defendant is not aware of the property covered by the gift settlement deed alleged by the plaintiffs. The property in S.Nos.52/10 and 11 was acquired by the Government for industrial development; and, the land in S.No.52/11 was handed over to M/s. Mani Castings represented by Md.Moulana, the husband of the 1st defendant by virtue of an agreement dated 30.03.1977. And, possession of the said property was handed over on 15.03.1980 to the husband of the 1st defendant; and, since then and till his death, he had continued in possession and enjoyment of the said property. The 3rd defendant had allotted the land to the husband of the 1st defendant on rate sale basis by executing the agreement of sale dated 15.03.1980. Since the death of the husband of the 1st defendant, the 1st defendant has been in peaceful possession and enjoyment of the schedule property. The plaintiffs were never in possession and enjoyment of the schedule property. The schedule property was allotted by the 3rd defendant to the husband of the 1st defendant. On 28.05.2003 the 1st plaintiff made a representation to the 3rd defendant categorically admitting that he cannot identify the property and that though the decree was obtained in OS.No.175 of 1985 the same could not be executed. Even according to the plaint averments, the cause of action arose in the year 1980. Therefore, the suit is barred by law of limitation. The plaintiffs were dispossessed lawfully by the 3rd defendant in the year 1996. The plaintiffs also admitted that their names are not recorded in Government and revenue records and stated that they are in possession since 1990. Therefore, it is clear that the plaintiffs have no right and title to the property. The plaintiffs are not in possession and enjoyment of the property for over a statutory period. The plaintiffs are not entitled to any relief.'

4.3 Basing on the pleadings of the parties, the trial Court had framed the following issues.

> 1. Whether the suit schedule property is covered under Registered Sale Deed dated 27.12.1954 in favour of 1st plaintiff's father-in-law?
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> 2. Whether the said property was given to the 1st plaintiff's wife under Registered Gift Settlement deed dated 17.08.1960 along with possession?
>
> 3. Whether 1st plaintiff's wife continued to be in possession of suit property till the date of her demise on 03.05.1994 and thereafter the plaintiff's?
>
> 4. Whether the 3rd defendant acquired the properties covered under survey no.52/10 and 11 and allotted land under survey no.52/11 to D1's husband under agreement dated 15.03.1977?
>
> 5. Whether D1's husband was given possession of land under survey no.52/11 by virtue of agreement of sale dated 15.3.1980? whether D1 continued to be in possession of the land subsequent to demise of her husband?

6. Whether the suit schedule land and the land covered under agreement of sale in favour of D1's husband dated 15.03.1980 are different?

7. Whether the plaintiff's are entitled for recovery of possession as prayed for?

8. Whether the plaintiff's are entitled for permanent injunction as prayed for?

9. Whether the plaintiff's are entitled to the damages as prayed for?

10. Whether the suit is barred by limitation?

11. To what relief?

4.4 At trial, the 2nd plaintiff was examined as PW1 and exhibits A1 to A14 were marked on the side of the plaintiffs. The 1st defendant was examined as DW1; and, an official of the 3rd defendant was examined as DW2; and, exhibits B1 to B17 were marked on the side of the defendants.

4.5 On merits, the trial Court had partly decreed the suit of the plaintiffs and directed the 1st defendant to handover vacant possession of the property to the plaintiffs within two months from the date of the decree of the trial Court and restrained the defendants 1 and 3 by way of a perpetual injunction from meddling with the plaint schedule property in any manner but, dismissed the suit against the 2nd defendant and had further refused to grant a decree for damages. As already noted, the first appeal preferred by the 1st defendant was dismissed by the Court below. Therefore, the 1st defendant is before this Court.

5. The learned counsel for the 1st defendant would contend as follows: - 'The trial court has given undue importance to exhibits A1 and A2 on the ground that they are more than 30 years old documents even though the said documents have no evidentiary value. The trial Court ought not to have drawn any presumption merely because they are 30 years old documents. When the 1st defendant is admittedly in possession of the property, the Court below ought to have answered all the issues in favour of the appellant/1st defendant. The Courts below ought to have seen that the plaintiffs who are admittedly out of possession are not in a position to identify their property as is evident from exhibit A5. The trial Court ought to have seen that it is admitted in exhibit A5, which is a representation submitted by the 1st plaintiff to the Special Deputy Collector-Land Acquisition and APIIC limited, that the plaintiffs were dispossessed from the suit schedule property in the year 1990. The Courts below ought to have seen that though it is categorically admitted that the plaintiffs were dispossessed in the year 1990; but, they could not establish their plea that the property was handed over to them by the husband of the 1st defendant during the pendency of the PLC; and that, therefore, the Courts below ought to have held that the suit brought in the year 2004 for recovery of possession is barred by law of limitation. The Court below ought not to have dismissed the application filed by the 1st defendant for receiving additional evidence. The Court below was in error in dismissing the appeal only on the strength of certain statements of DW1 who is of 75 years of age. The court below framed a strange point for consideration as to 'whether the appeal lies though the appellant/1st defendant admitted in her cross examination that she is not interested in the suit schedule property' and had erroneously answered the said issue against the 1st defendant/appellant herein. Though an issue on bar of limitation was framed and determined by the trial Court, the Court below did not at all advert to the said issue and had not recorded any finding as to whether or not the suit is barred by limitation. The Court below ought to have seen that the plaintiffs are not entitled to a decree for possession in the absence of proof of title and the plea of handing over possession of the property by the husband of the 1st defendant during the pendency of the pre litigation case.' He would further contend that in the facts and circumstances, the aforementioned questions of law are involved in the second appeal and that the second appeal deserves to be admitted.

6. On the other hand, the learned senior counsel for the plaintiffs while supporting the decrees and judgments of the courts below had submitted as follows: - 'The trial Court had recorded a finding of fact on proper appreciation of facts and evidence that the suit is not barred by law of limitation. The trial Court having framed as many as 11 issues has answered all the relevant issues in favour of plaintiffs and had granted a decree for recovery of possession and directed the 1st defendant to handover possession of the suit schedule property to the plaintiffs and had further granted the relief of perpetual injunction against defendants 1 and 3. It is not the case of the defendants that they have perfected title to the property by adverse possession. There is no plea in regard to adverse possession much less satisfying the necessary requirements for claiming adverse possession. Therefore, when there is no plea of adverse possession and the suit is filed for recovery of possession, the question of bar of limitation does not arise as possession however long when it is not adverse to the true owner does not bar the remedy. The Court below has rightly considered the disinterestedness of the 1st defendant/appellant in this lis and had rightly framed the point to the effect as to 'whether the appeal lies though the 1st defendant admits in her cross examination that she has no interest in the suit schedule property' and had answered that point in favour of the plaintiffs and against the 1st defendant having properly adverted to the relevant portion of her deposition. DW1 had categorically admitted that she is not interested in the litigation and that she is no way related or connected to the plaintiffs in respect of the suit schedule property and that she does not know the pendency of the suit also in the Court of law till date (till the date of her deposition). Her deposition shows that she is not interested in the lis but, somehow the appeal was instituted without her knowledge and by somebody who is behind. Her admissions are enough to hold that there is no substantial question of law involved in this second appeal. The first appellate Court confirmed the well reasoned findings of the trial Court by recording findings supported by sufficient reasons. There are no questions of law involved in this second appeal and hence, the second appeal does not deserve admission and is liable to be dismissed.'

7. Now it is to be examined as to whether the questions being sought to be raised as involved are substantial questions of law and, if so, whether such questions are involved. If this Court comes to the conclusion that no such questions are involved, this appeal deserves to be dismissed at the stage of admission. Therefore, it is necessary to examine and determine as to whether any substantial questions of law are involved. I have carefully gone through the pleadings and the evidence brought on record. I have noted the submissions.

8. As rightly contended in a suit for recovery of possession, the initial onus of proof and the legal burden, which never shifts, are on the plaintiffs and the plaintiffs are not entitled to succeed on the weakness of the defence. Keeping in view this legal aspect, this Court shall not proceed to examine the matter. Both the Courts below had recorded concurrent findings of fact on the issue concerning the relief in regard to the plaintiffs' entitlement to recovery of possession of the suit schedule property from the 1st defendant and the consequential relief of perpetual injunction against defendants 1 and 3. The trial Court had categorically held that the suit is not barred by law of limitation. The grievance of the 1st defendant in the grounds is that the Court of first appeal did not frame a point on the issue of bar of limitation and determine the said issue. The fact of the matter is that the 1st defendant did not take a defence in her written statement that she had perfected title by adverse possession. Therefore, in the suit for recovery of possession, in the absence of such a plea in regard to adverse possession satisfying necessary ingredients and requirements, the plaintiffs would be entitled to the relief of recovery of possession once their title is held established, as the law is well settled that possession however long and which is not adverse does not bar the remedy of the plaintiffs to recover possession. The issue of bar of limitation is a blended question of fact and law and it is not even a pure question of law. In this regard, it is necessary to refer to a decision in **Maria Margarida Sequeria Fernandes and others v. Erasmo Jack de Sequeria**[1] wherein the Supreme Court has held on the relevant aspect as follows: -

> **69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with**

documents to support his claim and details of subsequent conduct which establish his possession.

70. It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

(a) who is or are the owner or owners of the property;

(b) title of the property;

(c) who is in possession of the title documents

(d) identity of the claimant or claimants to possession;

(e) the date of entry into possession;

(f) how he came into possession -whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;

(h) If taken on rent, license fee or lease -then insist on rent deed, license deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.;

(j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

In this action of the plaintiffs for recovery of possession of immovable property, both the Courts had held that the plaintiffs established their title and/are entitled to recover possession of property. When once the legal title to the property of the plaintiffs is held established and when concurrent findings of fact are recorded by the Courts below that the plaintiffs are entitled to the relief of recovery of possession, the 1st defendant, who is the occupant of the property having no legal title and whose right to remain in possession is sub-ordinate to the legal title of the plaintiffs, cannot resist the claim for recovery of possession unless a right to remain in possession is pleaded and established. There is neither pleading nor proof in regard to the 1st defendant's right to continue in possession. Be that as it may. The learned counsel for the 1st defendant having forcefully contended that the Court of first appeal did not deal with the issue of bar of limitation had contended that the 1st defendant is in long possession of the property. Even this plea of long possession was not accepted by the Courts below and the Courts below had recorded a finding that in an appropriate proceeding the possession of the plaintiffs was recognised by a competent Court in the year 2003-04 and that, therefore, the 1st defendant cannot contend that she was in possession prior to the illegal occupation in September 2004. Thus it is clear that the Courts below had held that the plaintiffs who had established their title are entitled to the relief of recovery of possession. In **Indira v. Arumugam**[2], the Apex Court held as follows:

> **"In a suit based on title for possession where title was established on the basis of relevant documents, plaintiffs cannot be non-suited unless defendant proves adverse possession for prescriptive period and the provisions of Article 142 of the Limitation Act, 1908 wherein plaintiff had to prove not only title but also possession within 12 years of the date of the suit had undergone a metamorphic sea change in view of Article 65 of the present Limitation Act, 1963."**

In **Md. Mohammad Ali v. Jagadish Kalita**[3], the Apex Court pointed out:

> **By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.**

This position has again been reiterated in **Saroop Singh v. Banto**[4] holding as under:

> **So under the 1908 Act, the plaintiff not only had to prove his title but also had to prove his possession within twelve years**

preceding the date of institution of the suit in order to recover possession of immovable property. But under the 1963 Act, there has been a change in law and in a suit attracting Article 64 and 65 of the said Act, the plaintiff has only to prove his title and it is for the defendant to prove acquisition of title by adverse possession.

In the decision in **Chatti Konati Rao v. Palle Venkata Subba Rao**[5] it is held that mere possession however long does not necessarily mean that it is adverse to the true owner and that adverse possession really means the hostile possession which is expressly or impliedly in denial of the title of the true owner and that in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner and that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owners title must be peaceful, open and continuous. Thus, there is no dispute with the legal proposition that when a suit is filed for recovery of possession based on title, the plaintiff has only to prove his/her title and that it is for the defendant to prove acquisition of title by adverse possession. The plaintiff need not prove her possession within twelve years preceding the suit to recover possession, though in the case on hand, such possession is established by the plaintiffs. As already noticed, the 1st defendant in this case did not raise the plea of adverse possession. In the absence of a plea of adverse possession, the issue as to suit being barred by law of limitation does not arise for a decision. When once the plaintiffs established their right to recover possession and the 1st defendant had failed to establish any semblance of right to remain in possession, the 1st defendant cannot resist the lawful right of the plaintiffs to seek recovery of possession. Therefore, the contention that the plea of bar of limitation was not considered by the Court of first appeal is of no avail.

9. Be that as it may. It is important to refer to the deposition of the 1st defendant which lays bare her non concern with the property and her disinterestedness in the lis. The 1st defendant in her cross examination had categorically admitted as follows:

> **I do not remember who gave instructions to draft written statement filed on my behalf. I do not remember whether I have engaged any counsel at the time of filing of my written statement. I do not remember in which year I had engaged Mr.K.Krishna Mohan as my counsel. I do not know who is proceeding on my behalf to proceed with the matter. ……. I do not know the suit filed by the plaintiff against my husband for declaration and injunction and the results thereon. ……… I do not know at present what industry is being run and who is running the same in the said site. I do not know at present the name of the person who is the owner of the said site and what is going on in the said site. At present I am in no way connected to the suit schedule property. I do not know till so far what are the proceedings going on in respect of the suit schedule property. I do not know whether the plaintiff filed any application for mesne profits claiming a sum of Rs.5,00,000/- per year. Even I do not know the counter averments mentioned on my behalf. ………… I do not know who is running the Court proceeding in my name in the suit, though I am in no way connected to the suit schedule property. I have no responsibility or liability though the court pronounced judgment. I have no way related or connected to the plaintiffs in respect of the suit schedule property. I do not know the pendency of the suit also in the court of law till date.'**

In the well considered view of this Court, the Court below, which has adverted to the said version of DW1 in her cross examination, is justified in holding that the appeal by the 1st defendant, in view of her deposition, does not lie and that the appeal is liable to be dismissed in limine. The trial Court formulated a specific issue as to whether the plaintiffs are entitled to recover possession of the suit schedule property and had answered the said issue in favour of the plaintiffs. The Court of first appeal had also framed a point as to whether the plaintiffs are entitled to recover possession of the plaint schedule property and the relief of consequential perpetual injunction and answered that point in favour of the plaintiffs while recording findings well supported by reasons. Therefore, and for the reasons assigned by the Courts below while recording concurrent findings of fact, the contention that the suit was decreed based on the weakness of the defendant cannot be countenanced.

10. Having carefully gone through the pleadings and analytically examined the evidence in juxtaposition with the pleadings, this Court finds that there is neither misreading nor non consideration of evidence much less material evidence and that there is also neither misinterpretation of the documentary evidence by the Courts below. On the other hand, the Courts below had accurately considered the facts and had also appreciated the evidence in proper perspective while holding that the plaintiffs are entitled to the decree for recovery of possession of the schedule property from the 1st defendant and a perpetual injunction against the defendants 1 and 3.

11. Viewed thus, this Court finds that the three substantial questions of law, which are sought to be raised, stating that they are involved in the appeal, are in fact not involved in the appeal to admit the appeal.

12. In the result, the Second Appeal is dismissed at the stage of admission. No costs.

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

M. SEETHARAMA MURTI, J

23rd July, 2015
Vjl

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[1] AIR 2012 SC 1727
[2] AIR 1999 SC 1549
[3] (2004) 1 SCC 271
[4] AIR 2005 SC 4407
[5] (2010) 14 SCC 316