

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.1171 OF 1996

AND

TRANSFER APPEAL SUIT No.726 OF 2005

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COMMON JUDGMENT:

Both these Appeals are filed against the common judgment dated 11.12.1995, passed in Original Suit No.68 of 1984 and O.S. No.163 of 1991 by the Subordinate Judge, Eluru, West Godavari district (for short, the 'trial Court').

2. The defendant in O.S. No.68 of 1984 filed A.S. No.1171 of 1996 before this Court and the plaintiffs in O.S. No.163 of 1991 filed A.S. No.130 of 1996 before the District Judge's Court, Eluru, which was withdrawn and transferred to this Court *vide* order of this Court in Tr.C.M.P. No.265 of 2003, dated 05.08.2003, to try along with A.S. No.1171 of 1996.

3. The plaintiff in O.S. No.68 of 1984 filed the suit for possession of the plaint schedule property by evicting the defendant and grant Rs.1,414/- towards past damages for use and occupation with subsequent interest and also for future damages; whereas, the plaintiffs in Original Suit No.163 of 1991 filed the suit filed for declaration and for a direction to execute registered sale deed for 171.78 Sq. yards forming part of the northern portion of plaint schedule property and grant permanent injunction restraining the defendants from interfering with their possession and enjoyment of schedule property, was dismissed by the trial Court, while decreeing Original Suit No.68 of 1984 for recovery of possession, granted past damages for use and occupation.

4. As these two appeals arose out of common judgment and decrees, I find it expedient to decide both these appeals by way of

common judgment, as the parties to the suit and subject matter of the schedule property is one and the same.

5. For convenience of reference, the ranks given to the parties in O.S. No.68 of 1984, by the trial Court, will be adopted throughout this common judgment.

6. The plaintiff, Vangala Mastan Rao (3rd defendant in O.S. No.163 of 1991), filed the suit in O.S. No. 68/1984 alleging that the suit schedule property and other property which is subject matter of O.S. No.163 of 1991, originally belongs to Eluru Municipality and, illegally occupied by Palla Apparao, Palla Ammaji wife of Palla Apparao, Puvvula Appalanarayanamma and others. They constructed thatched houses in the respective land in their occupation and made a representation to the concerned for granting pattas in their favour for the land in their occupation. The land in their occupation was originally part of burial ground of Narasimharaopet, Eluru.

Considering the representations of the illegal occupants, the Government passed a Government Order permitting the Municipal Commissioner, Eluru to execute sale deeds for the land in their occupation on collection of market rate. Accordingly, the Government permitted the municipality to execute registered sale deed in favour of those illegal occupants and execute a registered sale deed in favour of Puvvula Appalanarayanamma, alienating the schedule property in O.S. No.68 of 1984, since then, she has been in possession and enjoyment of the same.

While the matter stood thus, the plaintiff purchased the schedule property for valuable consideration of Rs.42,000/-, initially, under an agreement of sale dated 04.09.1982 and, later, obtained registered sale deed dated 31.05.1983. Thus, Puvvula Appalanarayanamma conveyed title to the plaintiff for an extent of 171.78 square yards,

which is more fully described in the schedule annexed to the plaint. By the date of purchase, part of the property was in possession of Vemulapalli Raghavamma, as a tenant on payment of rent of Rs.60/- *per mensem* and the said Puvvula Appalanarayanamma attorned the tenancy in favour of plaintiff and said Raghavamma agreed to pay rent to the plaintiff from the date of purchase. Thus, she obtained constructive delivery of possession.

The house was kept under lock and occupation of the plaintiff for his use, but he did not shift to the schedule property as he intends to affect suitable repairs to it and with a view to shift his family on an auspicious day.

During life time of Palla Apparao, he paid property tax to the Municipality and, later, Puvvula Appalanarayanamma also paid property tax, and the plaintiff, from the date of his purchase, is paying property tax to the municipality for the house situated in the schedule property. Thus, the plaintiff became absolute owner of the property and was in possession and enjoyment of the same.

While the matter stood thus, taking advantage of his absence at the schedule property, the defendant with the aid of her sons trespassed into the same on 17.06.1983 by breaking open the lock and occupied the same without his consent or knowledge and the defendant is the widow of younger brother of the plaintiff's vendor. The defendant has been residing in the southern portion of the plaint schedule property and she also obtained a registered sale deed from Eluru Municipality on 30.10.1982 for an extent of 175 Sq. yards and that an old thatched house was in existence by the date of purchase by the plaintiff, which consists of two rooms and a veranda and, whereas, the schedule property belonging to the plaintiff and it consists of four rooms and a veranda which is southern part of the property divided by a common brick wall, but both the portions are having a common roof.

On coming to know about the trespass, the plaintiff questioned the defendant about their highhanded acts, but the defendant abused the plaintiff in vulgar language and intimidated him with a threat of dire consequence with the aid of her sons. Thereupon, the plaintiff gave report to the police, in II Town Police Station, Eluru; who, on the same day directed the defendant to vacate the house, but the defendant refused to vacate. Thereupon, the police directed the plaintiff to pursue his grievance in civil Court. Thus, the defendant is in illegal occupation of the plaint schedule house, without any lawful right, and, thereby, the plaintiff being the lawful owner of the property is entitled to recover possession of the property including past damages of Rs.1,414/- and future damages, for use and occupation, hence, the suit.

7. The defendant filed written statement denying material allegations of the plaint *inter alia* contending that the vendor of the plaintiff Puvvula Appalarayanamma was never in possession and enjoyment of the schedule property and the defendant is the widow of late Palla Apparao, the brother of Puvvula Appalarayanamma, the alleged vendor of the suit property to the plaintiff *i.e.*, Puvvula Appalarayanamma and the said Palla Apparao occupied an extent of 350 Sq. yards of site including the suit site in 1959 and had been living therein with his family in a dwelling house constructed by him in the said site and in 1962 he constructed a permanent structure and assigned door No.25.10.11 for the residence of his family and since 1959 the said Apparao and his family including the defendant have been living in the house, including the suit schedule property in their own right and the defendant and their family members have been in exclusive possession and enjoyment of the entire site of 350 Sq. yards and the house constructed therein. The said Palla Apparao died on 30.01.1974 leaving the defendant and her family members to succeed entire house including the schedule property; since then, they were in continuous and exclusive possession and enjoyment of the property of

350 Sq. yards in which the schedule property is a part.

It is further contended that Puvvula Appalanarayanamma, sister of the defendant's husband, has no claim to any part of the site of 350 Sq. yards or of the house therein and she did not construct any part of the house, never resided in that house or ever in possession of the property or house.

As per G.O.Rt. No.899 (M.A.), dated 14.08.1981, the person in occupation of the area including the suit site was once a burial ground in Narasimharaopet, Eluru became entitled to the patta for the area in their occupation on payment of the site value fixed by the Government. As per said Government Order, the Commissioner, Eluru Municipality, issued a notice dated 29.02.1981 to the defendant to remit a sum of Rs.3,517/- to the Municipality towards sale price for an extent of 175.85 Sq yards out of the total area in her occupation and, accordingly, the defendant remitted the said amount to the Municipal Commissioner, Eluru. The Municipal Commissioner did not call upon the defendant for deposit of amount for the remaining site of 171.78 Sq. yards and on coming to know about the same, the defendant approached the Municipal Commissioner, Eluru demanded him to receive consideration for an extent of 171.78 Sq. yards on the ground that Puvvula Appalanarayanamma was never in possession and enjoyment of the property, but sale deed was executed in her favour for an extent of 171.75 Sq. yards, the Municipal Commissioner rejected the defendant's claim, thereupon, the defendant got issued a notice dated 05.10.1982 to the Municipality calling upon to cancel the sale deed executed in favour of Puvvula Appalanarayanamma and execute a sale deed for the entire site in her favour and her family offered to take a sale deed for an extent of 175.85 Sq. yards, for which sale consideration was collected from the defendant, without prejudice to file a suit against the Municipality and Puvvula Appala Narayanamma for obtaining a sale deed for the balance of land and as such the

defendant obtained sale deed from the Municipality only for 175.85 Sq. yards of site without prejudice to her claim for the remaining site and the plaintiff and his wife are close associates of Puvvula Appalanarayanamma and they were aware about the dispute regarding the suit schedule property, but with an ulterior motive they instigated Puvvula Appalanarayanamma, laid unlawful claim and obtained sale deed from the Municipality, therefore, the title conveyed to the plaintiff by the Municipality is not legal and, thereby, not entitled to recover possession of the schedule property from the defendant and prayed for dismissal of the suit.

8. Basing on the above pleadings, the trial court framed the following issues:

1. Whether the plaintiff is entitled for recovery of possession of plaint schedule property after evicting the defendant therefrom?
2. Whether the plaintiff is entitled for damages? If so, to what amount?
3. To what relief?

9. The defendant in O.S. No.68 of 1984 filed O.S.63 of 1986 on the file of the Court of I Additional District Munsif, Eluru along with four others, wherein the defendant herein is arrayed as 5th plaintiff and the said suit was transferred to the Court of Subordinate Judge, Eluru and renumbered as O.S. No.163 of 1991 as per the orders in Tr.O.P. No.495 of 1990, dated 27.08.1991 passed by the Principal District Judge, Eluru. The Commissioner, Eluru Municipality, was arrayed as 1st defendant, plaintiff in O.S. No.68 of 1984 was arrayed as 3rd defendant, his vendor Puvvula Appalanarayanamma was arrayed as 2nd defendant, the tenant Vemulapalli Raghavamma was arrayed as 4th defendant and arrayed the District Collector, West Godavari, Eluru as 5th defendant in the suit respectively. The 5th plaintiff (defendant),

as already stated, is the widow of late Palla Apparao, plaintiffs 1 to 4 are the children of 5th plaintiff through Apparao, constituted as members of the joint family. They filed suit for declaration while seeking a direction against the Municipal Commissioner to execute a registered sale deed conveying the suit schedule property in their favour alleging that in the year 1959 late Palla Apparao occupied 350 Sq. yards of site situated at Narasimharaopet burial ground which belonged to Eluru Municipality, constructed a house and lived therein with his family members and in 1962 he developed the dwelling house, raised permanent construction therein, Municipality assigned door No.25-10-11; Apparao and the plaintiff have been living in the said house constructed in an extent of 350 Sq. yards, in their own right and have been in exclusive possession and enjoyment of the entire property of 350 Sq. yards and house constructed therein. The said Apparao died on 30.01.1974 and after his death, the plaintiffs succeeded entire property in an extent of 350 Sq. yards and continuing in possession and enjoyment of the same in their own right and also contended that they acquired absolute title by adverse possession.

10. The 2nd defendant is the sister of Apparao. She has no right or claim over the property as she never resided in the said property or any part thereof. As per G.O.Rt. No.899 (M.A.), dated 14.08.1981, persons in occupation of the area which was once a burial ground of Narasimharaopet, Eluru Town, the plaintiffs became entitled to patta for the area in their occupation on payment of value fixed by the Government and as per the Government Order, the plaintiffs alone became entitled to grant patta and conveyance for the entire 350 Sq. yards of the plaint schedule property which has been in their occupation since 1959 and in pursuance of the said Government Order, the 1st defendant-Municipality issued a notice dated 29.12.1981 to 5th plaintiff, defendant in O.S. No.68 of 1984, to remit to the 1st defendant a sum of Rs.3,517/- towards market value for an extent of

175.85 Sq. yards out of 350 Sq. yards at the rate of Rs.20/- per square yard. Accordingly, 5th plaintiff remitted the amount as demanded by the 1st defendant. The 1st defendant should have called upon the plaintiff to pay market value for entire 350 Sq. yards. However, the plaintiffs came to know that the 1st defendant demanded and collected market value for the remaining extent of 171.78 Sq. yards from the 2nd defendant, as if she was in occupation of the same and entitled to a patta, on coming to know about the same, the 5th plaintiff sent a protest petition to the 1st defendant questioning its unlawful action; in spite of protest, the 1st defendant executed sale deed in favour of the 5th plaintiff herein and sole defendant in O.S. No.68 of 1984 conveying an extent of 171.76 Sq. yards out of 350 Sq. yards. Immediately, she got issued a legal notice dated 05.10.1982 to the defendants 1 and 2, demanding to cancel the registered sale deed executed in favour of 2nd defendant and execute registered sale deed in favour of the plaintiffs for the remaining extent of 171.76 Sq. yards, but no purpose was served, moreover, subject to their rights and without prejudice to the contention of the 5th defendant, she paid market value for an extent of 175.85 Sq. yards and obtained a registered sale deed. Thus, the plaintiffs are in possession and enjoyment of entire 350 Sq. yards of site though a registered conveyance was executed in favour of the 2nd defendant by the 1st defendant for an extent of 171.78 square yards. The vendor of the plaintiff was never in possession and enjoyment of the property and, thereby, question of execution of sale deed conveying any lawful title in favour of the plaintiff in O.S. No.68 of 1984 doesn't arise. The act of the 1st defendant is illegal and unlawful. The plaintiffs are entitled to registered sale deed for the entire extent. Hence, the plaintiffs sought for a declaration that the plaintiffs are entitled to obtain a sale deed for the site of 171.75 Sq. yards in the schedule to the plaintiff and for consequential relief of mandatory

injunction directing the 1st defendant to execute registered sale deed in favour of the plaintiff along with defendants 2 and 3 for an extent of 171.78 Sq. yards which is already conveyed to the 2nd defendant by executing registered sale deed.

11. The 1st defendant filed written statement contending that in pursuance of G.O.Rt. No.899 (M.A.), dated 14.08.1981 persons in occupation of the area which was once a burial ground in Narasimharaopet, Eluru town became entitled to pattas for the area in the occupation on payment of market value fixed by the Government and the Government Order also applied to the plaint schedule site and in pursuance of G.O.Rt. No.899 (M.A.), dated 14.08.1981, notice was issued to the 5th plaintiff to remit to 1st defendant municipality a sum of Rs.3,517/- for an extent of 175.85 Sq. yards at the rate of Rs.20/- per Sq. yard, accordingly, she remitted the amount. The 1st defendant also issued notice and collected market value for an extent of 171 Sq. yards from the 2nd defendant and the plaintiff has no right to question the right of the 1st defendant-Municipality to execute registered sale deed in favour of the 2nd defendant conveying 171.78 square yards, that too the plaintiff is in unlawful possession of the property even according to his own case and thereby not entitled to claim any relief against the plaintiffs.

It is further contended that the 1st defendant is not a necessary party to the suit and there is no cause of action against the 1st defendant and, finally, prayed for dismissal of the suit.

12. The 2nd defendant filed written statement denying material allegations of the plaint *inter alia* contending that late Apparao was her brother and both of them have been in occupation of an extent of 175 square yards each separately in their own right. As per G.O.Rt. No.899

(M.A.), dated 14.08.1981, the plaintiffs and the 2nd defendant became entitled to obtain a registered sale deed from Eluru Municipality and the plaintiffs made an attempt to get sale deed for the entire extent of 350 Sq. yards and the officers of the Municipality personally inspected the building and executed the sale deed in her favour after receiving consideration and the plaintiffs have no right to question the said sale deed. The plaintiffs have been in possession of 175 Sq. yards by obtaining a registered sale deed from the 1st defendant in the name of 5th plaintiff, but taking advantage of situation, the plaintiffs began harassing the 2nd defendant not to sell the schedule property to 3rd parties. Thus, the plaintiffs have no right or interest in the schedule property and prayed for dismissal of the suit.

13. The 3rd defendant filed written statement denying material allegations of the plaint *inter alia* contending that he purchased 171.78 Sq. yards with an old tiled house portion from Puvvula Appalarayanamma for consideration of Rs.42,000/- on 31.05.1983. In pursuance of the agreement of sale dated 04.09.1982 and the person who is carrying on business in wooden bunk by name Vemulapalli Raghavamma (4th defendant) was paying rent of Rs.60/- *per mensem* and the said tenancy was attorned to the 3rd defendant by 2nd defendant Puvvula Appalarayanamma, since he alone was in possession and enjoyment of the property. However, taking advantage of her absence, the property was highhandedly occupied by the plaintiffs herein and the defendant and her sons in O.S. No.68 of 1984 and she almost reiterated the contentions raised in O.S. No.68 of 1984 while contending that the plaintiffs have no right to seek any relief and prayed for dismissal of the suit.

14. 4th defendant filed a separate written statement contending that Puvvula Appalarayanamma (D-2) was the absolute owner of the

property and she had been in possession and enjoyment without any interruption from anybody at any time and used to pay tax to the municipality. She is a lessee of part of property for running a sundry shop business on a monthly rent of Rs.25/- initially and the 4th defendant was inducted into possession of part of the property in the year 1978, since then, she has been paying monthly rent regularly to the 2nd defendant and the rent was enhanced from time to time and the rent prevailing then was Rs.60/- per month. She has been in possession and enjoyment of baddi bunk (shop) in part of the schedule property belonging to the 2nd defendant and carrying on her business paying monthly rent regularly to the 3rd defendant, who purchased the property in view of the attornment. While the matter stood thus, the plaintiffs herein highhandedly encroached into schedule property taking advantage of absence of 3rd defendant. Thereby, their possession is unlawful and they trespassed, not entitled to claim any relief against the defendants.

15. 5th defendant remained *exparte*.

16. Basing on the above pleadings the trial court framed the following issues:

1. Whether the plaintiffs are in possession and enjoyment of the schedule property?
2. Whether the plaintiffs are entitled to the relief of declaration prayed for?
3. Whether the plaintiffs are entitled to the permanent injunction?
4. To what relief?

17. During course of trial, O.S. No.163 of 1991 was clubbed with O.S. No.68 of 1984, as the property in dispute and parties in both the suits are one and the same, recorded evidence in O.S. No.68 of 1984.

18. During course of trial on behalf of plaintiff, PWs.1 to 5 were examined and Exs.A-1 to A-36 were marked. On behalf of defendant, DWs.1 to 4 were examined and marked Exs.B-1 to B-37.

19. Upon hearing argument of both the counsel, considering oral and documentary evidence on record, the trial Court decreed the suit O.S. No.68 of 1984 while dismissing the suit O.S. No.163 of 1991.

20. Aggrieved by the decrees and common judgment in both the suits dated 11.12.1995, the defendant in O.S. No.68 of 1984 and unsuccessful plaintiffs in O.S. No.163 of 1991 preferred these two appeals on various grounds. The grounds of appeal in both the appeals are almost identical. Therefore, to avoid unnecessary repetition, the following are the important contentions culled out from both the appeals:

- 1) The finding of the trial court that Puvvula Appalanarayanamma, vendor of the plaintiff in O.S. No. 68 of 1994 was never in possession of the property, at any time, but the trial court believed the contention of the plaintiff and committed an error in granting decree in his favour and dismissing the suit O.S. No.163 of 1991;
- 2) The trial court failed to consider documentary evidence placed by the appellants (plaintiffs in O.S. No.163 of 1991) to prove their possession since 1959 over entire property of an extent of 350 Sq. yards, but the trial court on erroneous appreciation of oral and documentary evidence dismissed their case while decreeing the suit O.S. No.68 of 1984;
- 3) Voluminous documentary evidence produced before the trial court coupled with oral evidence clinchingly established the possession of the plaintiffs and their predecessors in title in total extent of 350 Sq. yards, but

the trial court on erroneous appreciation of fact and law dismissed the suit O.S. No.163 of 1991 and granted decree in favour of the plaintiff in O.S. No.68 of 1984 erroneously;

4) The trial court also failed to take into consideration of the oral admissions of PW.1 in his cross-examination about the occupation of the property by the plaintiffs in O.S. No.163 of 1991 and failed to consider the assessment of the entire property by the Municipality and collection of property tax from the plaintiffs in O.S. No.163 of 1991;

5) The trial court did not take into consideration the nature of the possession of the property by Puvvula Appalanarayanamma and her vendee, conduct of the parties in dealing with the property, relationship between the parties, consideration and motive for obtaining title deeds. Thus, the trial court failed to appreciate the evidence on record in proper perspective and committed an error in dismissing the suit O.S. No.163 of 1991 and decreed the suit O.S. No.68 of 1984 erroneously and prayed to allow both the appeals reappraising the documentary and oral evidence afresh to come to an independent conclusion, notwithstanding the finding recorded by the trial court.

21. During course of argument, Sri T.S. Anand, learned counsel for the appellants (plaintiffs in O.S. No.163 of 1991 and defendant in O.S. No.68 of 1984) would contend that single assessment number was assigned to the entire house situated in 350 Sq. yards and number of tax receipts and demand notices were produced to establish that the schedule property was assessed in the name of plaintiffs in O.S. No.163 of 1991. On the other hand, the 2nd defendant did not produce

any iota of evidence to prove that the property was assessed in her name by separate assessment number. When the 2nd defendant was not in possession of the property, she is not entitled to obtain a sale deed in terms of G.O.Rt. No.889 (M.A.), dated 14.08.1991, but she managed everything with the 1st defendant in O.S. No.163 of 1981 and obtained a registered sale deed for an extent of 171.78 Sq. yards. Thus, there is collusion between defendants *inter se* and obtained sale deed for 171.78 Sq. yards by 2nd defendant from the 1st defendant, though she was out of possession. Therefore, the plaintiffs in O.S. No.163 of 1991, being in possession of the property alone, are entitled to obtain registered sale deed for the total extent of 350 Sq. yards, but the 1st defendant in O.S. No.163 of 1991 conveyed only 171.78 Sq. yards and the action of the 1st defendant is illegal and highhanded and, apart from that, the plaintiffs in O.S. No.163 of 1991 alone are in possession and enjoyment of the property even till today as admitted by defendants 2, 3 and 4; in such case, the plaintiff in O.S. No.68 of 1984 and 3rd defendant in O.S. No.163 of 1991 is not entitled to recover possession of the property and whereas the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984 alone are entitled to the relief as they are in lawful possession and enjoyment of the property since long time, but the trial court without considering oral and documentary evidence decreed the suit O.S. No.68 of 1984 while dismissing the suit in O.S. No.163 of 1991, erroneously, and prayed to *set-aside* both the decrees and common judgment while passing a decree in favour of the plaintiffs in O.S. No.163 of 1991 declaring the action of the 1st defendant is illegal and highhanded, while directing the defendants 1 and 2 to execute registered sale deed in favour of the plaintiffs for the suit schedule property of an extent of 171.78 Sq. yards and to grant permanent injunction.

22. *Per contra*, Sri P.V. Vidya Sagar, learned counsel for the

plaintiff in O.S. No.68 of 1984 and the 3rd defendant in O.S. No.163 of 1991, would contend that the declaratory relief is hopelessly barred by time, but the trial court failed to take into consideration of the same and did not decide the specific contention regarding the bar of limitation. Though, no specific plea was raised by the plaintiff in O.S. No. 68 of 1984 still it is obligatory on the part of the court to look into limitation in view of the power conferred under Section 3 of the Limitation Act, 1963. If the point of limitation is looked into by this court, the plaintiffs in O.S. No.163 of 1991 are disentitled to claim declaratory relief, consequentially not entitled for other relief of mandatory injunction.

It is further contended that as the plaintiffs in O.S. No.163 of 1991 are in unlawful possession of the property even by the date of passing Government Order, they are not entitled to claim declaratory relief which is purely discretionary in nature. On this ground alone, the plaintiffs in O.S.163 of 1991 are disentitled to claim declaratory relief under Section 34 of the Specific Relief Act, 1963.

Finally, he would contend that the 1st defendant in O.S. No.163 of 1991 already conveyed title to an extent of 171.78 Sq. yards executing registered sale deed in their favour and apart from that there is voluminous documentary evidence to establish that the 2nd defendant in O.S. No.163 of 1991 was paying property tax to the Municipal Corporation since long time and those documents establish that she was in possession and enjoyment of the property by the date of issuance of Government Order. Thereby, she is entitled to obtain registered sale deed conveying the property in her possession *i.e.*, 171.78 Sq. yards, as such, the 1st defendant executed a registered sale deed in favour of 2nd defendant conveying an extent of 171.78 Sq. yards. Therefore, there is no illegality or irregularity in the common judgment and decree passed by the trial court in both the suits and prayed to dismiss the appeals confirming the common judgment and

decrees of the trial court.

23. Considering rival contentions, perusing material available on record including oral and documentary evidence and common judgment, the points that arise for consideration are:

1. Whether the claim of the defendant in O.S. No.68 of 1984 and the plaintiffs in O.S. No.163 of 1991 for declaration is within time?
2. Whether the plaintiffs in O.S.No.163 of 1991 and the defendant in O.S. No.68 of 1984 are entitled to a declaration that the action of the 1st defendant that the plaintiffs are entitled to obtain registered sale deed for an extent of 171.78 Sq. yards which is part of northern portion of the schedule property?
3. Whether the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984 are entitled to consequential direction against the 1st defendant to execute registered sale deed in favour of the plaintiffs and to join the defendants 2 and 3 in execution of sale deed conveying title in an extent of 171.78 Sq. yards?
4. Whether the plaintiff in O.S. No.68 of 1984 and 3rd defendant in O.S. No.163 of 1991 is the absolute owner of the property in an extent of 171.78 Sq. yards? If so, is he entitled to recover possession of the schedule property from the defendant in O.S. No.68 of 1984 and 5th plaintiff in O.S. No.163 of 1991?
5. Whether the plaintiff in O.S. No.68 of 1984 and 3rd defendant in O.S. No.163 of 1991 is entitled to past damages of Rs.14,091/- and future damages as estimated by the Commissioner from the defendant?

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24. **POINT No.1:** One of the major contentions of learned counsel

for plaintiff in O.S. No.68 of 1984 is that the claim of the plaintiffs in O.S. No.163 of 1991 is hopelessly barred by limitation. The plaintiffs in O.S. No.163 of 1991 claimed primary relief of declaration to declare that they are entitled to obtain registered sale deed for 171.78 Sq. yards site from the 1st defendant-municipality. Admittedly, Eluru Municipality, the 1st defendant in O.S. No.163 of 1991 was the owner of the schedule property. However, on the representations submitted by illegal occupants therein, the government passed G.O.Rt. No.889, (M.A.), dated 14.08.1981 permitting the 1st defendant to convey title to the respective area in their illegal occupation collecting market value of the property. It is specifically pleaded in the plaint by the plaintiffs in O.S. No.163 of 1991 and so also in the written statement in O.S. No.68 of 1984 that the 5th plaintiff in O.S. No.163 of 1991 and defendant in O.S. No.68 of 1984 received a notice from the 1st defendant in O.S. No.163 of 1991 calling upon her to remit Rs.3,517/- towards market value for an extent of 175.85 Sq. yards, which is in her occupation. Immediately, the defendant remitted the amount in time as per the notice. However, she sent a letter raising a protest against the notice issued to the 2nd defendant in O.S. No.163 of 1991 calling upon her to remit market value for 171.78 Sq. yards which is allegedly in her occupation by issuing a registered notice dated 05.10.1982 calling upon the 1st defendant to cancel the sale deed executed in favour of the 2nd defendant, but the plaint in O.S. No.163 of 1991 was presented on 29.07.1985 before the Munsif Magistrate Court, Eluru and, later, it was transferred to the Subordinate Judge's Court, Eluru. According to Article 58 of the Limitation Act, the limitation for filing a suit to claim any other declaration is three years from the date when a cloud is created on the rights of the plaintiffs. At this stage, I find that it is appropriate to advert to the oral evidence of DW.1 *i.e.*, 5th plaintiff in O.S. No.163 of 1991. In her evidence, while admitting about receipt of notice from 1st defendant for remittance of market value for an extent of

175 Sq. yards, contended that she got issued a notice in the year 1981 to the 1st defendant calling upon to cancel the sale deed executed in favour of Puvvula Appalanarayanamma. In the cross-examination at the end of page 7, she admitted as follows:

“It is true Municipality issued a notice to me under Ex.B-35 asking me to pay Rs.3,570/- for 175 Sq. yards of site. Immediately after receipt of Ex.B-35 I went to Municipal Office and questioned them about the extent mentioned in Ex.B-35. I went to municipal office immediately on the next day. The Municipal office informed me that only 175 Sq. yards will be allotted to me and the remaining 175 Sq. yards will be allotted to PW.2. Municipality also informed me that they are not going to allot 350 Sq. yards to me under any circumstances. I have no disputes with Municipality. There were no differences or disputes at the time of measurements. Municipal Authority have not demanded any bribe from me for issuing Patta for 350 Sq. yards. Immediately on next day, I sent a petition to Municipality informing that I have been paying tax for the entire 350 Sq. yards and requested them to give patta for entire extent. Municipality informed me that they are not going to allot entire extent to me alone. They asked me to pay amount for 175 Sq. yards and if I am not willing they are not going to allot even that 175 Sq. yards.”

25. From the oral admission extracted above, it is evident that she received EX.B-34 notice dated 29.12.1981 and on receipt of the same on the next day, she questioned about the extent mentioned in the notice. But the concerned municipal officials informed that 350 Sq. yards will not be allotted to her. Thus, a cloud is created on the next day of receipt of Ex.B-34 notice in the year 1981 itself. Therefore, the limitation starts from the date when cloud is created on the right of the plaintiffs who claimed declaratory relief; when a cloud is created on 29.12.1981, when Ex.B-34 was issued, the limitation starts from 29.12.1981. Even otherwise, on the next day when the 5th plaintiff in O.S. No.163 of 1991 approached the 1st defendant-municipality and demanded to execute registered sale deed for entire 350 Sq. yards and denied her entitlement by the 1st defendant. Even then the

limitation starts from 30.12.1981 in view of the oral admission made by DW.1 in his evidence. However, the suit was filed before the Munsif Magistrate Court, Eluru on 29.07.1985.

26. Whereas, the learned counsel for the plaintiffs in O.S. No.163 of 1991 contended that the limitation starts from the date of issuance of notice under Ex.B-33 dated 05.10.1982, not from the date of denial to convey title by the 1st defendant and that too no specific plea of limitation was set up as defence in the written statement filed by defendants in O.S. No.163 of 1991 and, in such circumstances, it cannot be held that the declaratory relief claimed by the plaintiffs is barred by limitation. However, Sri P.V. Vidyasagar, learned counsel for the 3rd defendant in O.S. No.163 of 1991, specifically contended that the limitation starts from the date when a cloud is created on the right of the plaintiffs in view of Article 58 of the Limitation Act and the cloud is created on the next day when DW.1 approached the Municipal Authorities on receipt of Ex.B-34 i.e., on 30.12.1981, but the suit was filed after lapse of 3 years. He has drawn the attention of this court as to what amounts to creation of cloud was not explained anywhere. However, Sri P.V. Vidyasagar, learned counsel, placed reliance on a judgment of Orissa High Court in ***Bishunath Saran Singh Vs. Sitla Bakhsh Singh***^[1]. The Division Bench of Orissa High Court referring the observations made in ***Whitney VS. Port Huron*** held as follows:

“Our jurisdiction to grant a declaratory relief rests on the provisions of Section 42 of the Specific Relief Act (I of 1877). That the plaintiff has a right to the property in suit is not disputed and having regard to the facts already stated we are of opinion that the defendant is a person interested to deny the title of the plaintiff to his right in the property in suit. To quote an American authority noticed in Doctor Banerji's Specific Relief Act, second edition, page 492 'A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud the density of the cloud can make no difference in the right to have it removed. Anything of the kind that has a tendency, even in a

slight degree, to cast doubt upon the owner's title and to stand in the way of a full and free exercise of his ownership, is in my judgment cloud upon his title, which he may remove. We think it should be mentioned that in spite of the fact that the defendant has not in his pleadings in this suit claimed any under-proprietary right in the lands in suit he stubbornly resisted the relief which the plaintiff asked in the first part of the declaration and succeeded in that resistance in the court below.”

27. Relying on the principle laid down by the Oudh Court, it is contended that the right to obtain registered sale deed for the remaining extent 171.78 Sq. yards was denied by issuing Ex.B-34 notice and also denied by the 1st defendant on the next day when 5th plaintiff in O.S. No.163 of 1991 approached the municipality-1st defendant in view of her own admission in the evidence and also the pleadings in the plaint in O.S. No.163 of 1991. Thus, a cloud on the right of the plaintiffs in O.S. No.163 of 1991 has created only on the date of Ex.B-34 notice was issued so also on the next day when 1st defendant denied the right of the plaintiffs to get conveyance for the entire extent of 350 Sq. yards in the year 1981. Thus, the act of the 1st defendant created a cloud on the right of the plaintiffs in O.S. No.163 of 1991 in the year 1981 itself as per the judicial admissions in the pleading so also in the evidentiary admissions, which I referred in earlier paragraphs. Therefore, the limitation to claim declaratory relief commenced when a cloud is created on the right of the plaintiffs in O.S. No.163 of 1991 by issuing Ex.B-34 or at least by denying the right of the plaintiffs to obtain registered sale deed for the entire extent on the next day of Ex.B-34. The present suit is filed after lapse of more than 3 years from the date of creation of cloud against the right of the plaintiffs.

28. The main endeavour of learned counsel for plaintiffs in O.S. No.163 of 1991 is that when no specific defence of bar of limitation was set up by the defendant in O.S. No.163 of 1991, this court need

not decide the issue of limitation for the first time by the appellate court. This argument would not stand to any legal scrutiny for the reason that Section 3 of the Limitation Act conferred power on the court to examine the question of limitation though plea of limitation was not set up as defence. Therefore, in view of the power conferred on the courts under Section 3 of the Limitation Act, either trial court or the first appellate court can look into the question of limitation and if the claim of plaintiffs is barred by the limitation, the court can safely dismiss the suit.

29. In view of my foregoing discussion, the right of the plaintiffs in O.S. No.163 of 1991 was denied by issuing Ex.B-34 notice or at least on the next day when the 1st defendant denied right of the plaintiffs to obtain registered sale deed as per the oral evidence of DW.1. Three years period of limitation under Article 58 was expired by 28.12.1984 or on the next day according to the admission of DW.1. The present suit is filed after lapse of almost seven months approximately and, consequently, the primary relief of declaration that the plaintiffs are entitled to obtain sale deed for the remaining extent of 171.78 Sq. yards is hopelessly barred by limitation.

30. The trial court did not look into the aspect of the limitation and no issue was framed since the plaintiffs did not affirm the fact or law and denied by the other with reference to the limitation, but made a stray observation that the suit is barred by limitation at page Nos.28 and 29 of the original judgment. In those circumstances, the trial court cannot be found fault for failure to record any finding about the limitation, however, when such question is raised before this appellate court for the first time, this court can decide the question of limitation and record its finding. Therefore, the contention of learned counsel for the plaintiffs in O.S. No.163 of 1991 is unsustainable and it is without merits. Hence, while rejecting the contention of the plaintiffs in O.S. No.163 of 1991, I hold that the primary relief of declaration that the

plaintiffs in O.S. No.163 of 1991 are entitled to obtain registered sale deed from the 1st defendant for the entire extent of 350 Sq. yards (after excluding the sale deed executed by the 1st defendant in favour of 5th plaintiff) in O.S. No.163 of 1991 is hopelessly barred by limitation and, accordingly, the point is held in favour of the defendants in O.S. No.163 of 1991 and the plaintiff in O.S. No.68 of 1984.

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31. **POINT Nos.2 & 3:** These points are interconnected to one another and finding on one issue have its own impact on the finding on other point, therefore, it is expedient to decide both these points by common discussion.

32. Indisputably an extent of 350 Sq. yards which is a part of T.S. No.464, Narasimharaopet, Eluru originally belonging to Eluru Municipality- 1st defendant in O.S. No.163 of 1991 and conveyed by sale deed in favour of 5th plaintiff in O.S. No.163 of 1991 for an extent of 175.78 Sq. yards and 171.78 Sq. yards was conveyed to 2nd defendant in the same suit who in turn sold the same to 3rd defendant, who is the plaintiff in O.S. No.68 of 1984, separately, on collection of market rate at the rate of Rs.20/- per Sq. yard. Thus, the illegal occupation of part of the property in T.S. No.464 of Narasimharaopet of Eluru was legalized by the 1st defendant in pursuance of the G.O.Rt. No.889, (M.A.), dated 14.08.1981.

33. The only dispute between the parties is that Puvvula Appalarayanamma-2nd defendant in O.S. No.163 of 1991, vendor of the plaintiff in O.S. No.68 of 1984, obtained a document for an extent of 171.78 Sq. yards from the 1st defendant-municipality under Ex.A-9 and she was examined as PW.2 before the trial court by undue influence. The plaintiff in O.S. No.68 of 1984 was examined as PW.1 and according to him, he purchased the land under Ex.A-2 which was in occupation of the family members of Puvvula Appalarayanamma,

but the legal heirs of deceased Apparao filed suit for declaration that they are entitled to purchase 171.78 Sq. yards and sought a direction against the 1st defendant for execution of registered sale deed for the said extent.

34. The real dispute between the parties is possession of 171.78 Sq. yards by the date of execution of Ex.A-9 in favour of Puvvula Appalanarayanamma. According to the plaintiffs in O.S. No.163 of 1991, Palla Apparao was in possession of entire extent of 350 Sq. yards of site during his life time, thereafter, the plaintiffs are continuing in possession and enjoyment of the same, constructed a house. Whereas, the contention of Puvvula Appalanarayanamma is that she is in possession and enjoyment of 171.78 Sq. yards though Appalanarayanamma and Apparao were residing under the same roof, the house was separated by a common brick wall. There is no direct evidence on record except the *ipsi-dixit* of PWs.1 and 2 and DWs.2 and 3 to establish their possession.

35. To substantiate the contention of the plaintiff in O.S. No.68 of 1984 and defendants 2 and 3 in O.S. No.163 of 1991, more particularly, to establish the possession over the entire extent, they placed reliance on several documents. Exs.A-1 and A-2 are only the agreement of sale and sale deed executed by Puvvula Appalanarayanamma in favour of Vangala Mastanrao, plaintiff in O.S. No.68 of 1984. Ex.A-9 is the sale deed executed by Eluru Municipality in favour of Puvvula Appalanarayanamma conveying title in an extent of 171.78 Sq. yards having found that she is in possession and enjoyment of the said extent as on the date of making recommendation before passing Government Order referred above. At the same time, 5th plaintiff in O.S. No.163 of 1991 obtained a registered sale deed for an extent of 178.78 Sq. yards on payment of market rate at Rs.20/- per Sq. yard. Thus, both the parties became owners of different extents

originally owned by the 1st defendant in O.S. No.163 of 1991.

36. The specific contention of the plaintiffs in O.S. No.163 of 1991 is that they were in possession of entire extent of 350 Sq. yards though DWs.1, 2 and 3 supported their contention that they were in possession and enjoyment of the entire property but failed to establish their possession and enjoyment of the property by the date of making recommendation and execution of sale deed in their favour.

37. They mostly relied on Exs.B-1 to B-32 demand notices issued by Eluru Municipality, miscellaneous receipts issued by Eluru Municipality, special notices and tax receipts, total 32 in number, which pertains to assessment No.27161 of Eluru Municipality evidencing levy, demand and collection of Rs.28/- towards half yearly tax for the construction existing in the land, but the receipts, special notices *etc.*, do not disclose the actual extent in possession of any of the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984. Therefore, all the documents referred above *i.e.*, as Exs.B-1 to B-32 are not sufficient to conclude that the deceased Palla Apparao and, after his death, the plaintiffs in O.S. No.163 of 1991 were in legal possession and enjoyment of the property of an extent of 350 Sq. yards originally belonged to the 1st defendant-municipality in O.S. No.163 of 1991.

38. The defendants 2 and 3 in O.S. No.163 of 1991 and the plaintiff in O.S. No.68 of 1984 placed reliance on Exs.A-6 to A-36 to prove that Puvvula Appalanarayanamma was in possession and enjoyment of the property and produced Ex.A-9 to establish her title and, in turn, she conveyed title to the plaintiff in O.S. No.68 of 1984 by executing Exs.A-1 and A-2 agreement of sale, regular sale deed in pursuance of the said agreement. Exs.A-6 to A-8, and Exs.A-10 to A-35 established that the Eluru Municipality levied tax and collected tax from the said Puvvula Appalanarayanamma for different assessments. All these

documents do not disclose the actual extent in possession of Puvvula Appalanarayanamma, vendor of the plaintiff in O.S. No.68 of 1984. On the other hand, Exs.A-9, A-1 and A-2 established that the 1st defendant- municipality in O.S. No.163 of 1991 conveyed title in an extent of 171.75 Sq. yards in favour of Puvvula Appalanarayanamma and, in turn, she executed an agreement of sale in favour of the 3rd defendant, who is plaintiff in O.S. No.68 of 1984, under Ex.A-1 and, later, executed a regular registered sale deed marked as Ex.A-2. Execution of Exs.A-9, A-1 and A-2 are not in dispute, but possession of the property as on the date of issuance of G.O.Rt. No.899, (M.A.), dated 14.08.1981 alone is in controversy.

39. DW.4 is the crucial witness to decide the real controversy between the parties and he is Building Inspector working in Eluru Municipality by then. According to his evidence, the suit schedule property is a burial ground, originally situated at Narasimharaopet, but, the Municipality granted pattas in favour of eligible occupants vide G.O.Rt. No.899, dated 14.08.1981. DW.1 Ammaji, 5th plaintiff in O.S. No.163 of 1991, PW.2, Appalanarayanamma, vendor of the plaintiff in O.S. No.68 of 1984 were given pattas for the land in their occupation of an extent of 175.78 and 171 Sq. yards, respectively, collecting an amount of Rs.3,517/- from DW.1 at the rate of Rs.20/- per Sq. yard and similar value was collected for an extent of 171 sq. yards also. In the cross-examination, DW.4 admitted that occupation of individuals was recoded by the surveyor and sent to the Government for approval. The list was sent to the Mandal Revenue Officer after survey and he would forward the same to the Collector and after due inspection by the Collector, the certificates of the eligibility of the individuals and recommendations for grant of pattas were sent to the Government; list of occupants and extent of occupation is mentioned in the concerned records. After issuance of notice, the 1st defendant-municipality in O.S. No.163 of 1991 executed registered sale deed collecting necessary

amount towards market value. Thus, it is clear from the material available on record that the record is available with the revenue authorities, but not with the municipality and the entire record was sent to the Mandal Revenue Officer and, in turn, he submitted the same to the Collector and, in turn, the Collector sent the same to the Government for making necessary recommendations, but the Government of Andhra Pradesh is not a party to the suit, and, no steps were taken to summon the report of the Surveyor, Mandal Revenue Officer and the Collector to find out the actual extent in occupation of individuals. In the cross-examination by the counsel for the defendant in O.S. No.68 of 1984, DW.4 admitted that he does not know actual extent in occupation of each individual, but admitted about issuance of Exs.B-2 and B-3 in the name of Apparao; Ex.B-2 is the demand notice issued for collection of license fee under Sections 192, 193 and 359 of A.P. Municipalities Act, 1965 demanding Rs.146/- within 3 days. It is only a demand for collection of license fee for illegal occupation of the land belonging to the Government, constructing a hut in the site. It is specifically mentioned that said Apparao occupied 294 Sq. meters of site in T.S.No.464. Similarly, in Ex.B-3 notice, the 1st defendant-Municipality in O.S. No.163 of 1991 demanded license fee within three days with a threatened action to remove the occupation. The extent in occupation of the plaintiff is that by Apparao 19.20 x 15.70 meters *i.e.*, total extent comes to 301.44 Sq. meters. Taking advantage of the notices under Exs.B-2 and B-3 and evidentiary admission of DW.4, it is contended that late Palla Apparao, father of the plaintiffs 1 to 4 and husband of 5th plaintiff in O.S. No.163 of 1991 and sole defendant in O.S. No.68 of 1984, was in possession and enjoyment of 350 Sq. yards. Even according to the contents of Government Order referred *supra*, the Municipality was permitted to convey title to the property which is in illegal occupation of different occupants without prescribing any limit in the extent to be conveyed. Therefore, taking advantage of these two notices, it was contended before the trial court that the

plaintiffs in O.S. No.163 of 1991 are entitled to claim declaration and entitled to obtain registered sale deed from the 1st defendant-municipality. It is not their case that the plaintiffs in O.S. No.163 of 1991 perfected their title to the schedule property and sought declaration, but, they questioned the act of the 1st defendant-Municipality. However, the evidence of DW.4 established that a survey was conducted to find out the actual illegal occupation of the burial ground site by each individual. The said reports are available with the Government and that mere issuance of notices under Exs.B-2 and B-3 in the year 1965 and 1974 is not sufficient to establish the possession of entire 350 Sq. yards by Palla Apparao as on the date of conducting survey. Merely because Apparao was in possession in the year 1965 and 1974 in view of Exs.B-2 and B-3, it is difficult to believe that he is in possession as on the date of conducting survey and at the time of passing Government Order and execution of sale deeds in favour of the occupants.

40. Except Exs.B-2 and B-3, no other document established that the said Palla Apparao was in possession and enjoyment of the property of an extent of 350 Sq. yards. The basis for execution of registered sale deeds is the survey report submitted by the Surveyor of the Municipality to the Mandal Revenue Officer and, in turn, to the Collector by the Mandal Revenue Officer and to the Government by the Collector. If Puvvula Appalarayanamma was in actual possession of the property, as on the date of survey, she is entitled to obtain registered sale deed for the extent of land in her occupation, therefore, the 1st defendant-municipality in O.S. No.163 of 1991 executed registered sale deed in favour of Puvvula Appalarayanamma conveyed title in an extent of 171.78 Sq. yards.

41. The main endeavour of the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984 is that, the defendant in O.S.

No.68 of 1984 since Apparao was in possession and enjoyment of entire extent of 350 Sq. yards and, later, they are continuing in possession and enjoyment of the entire extent, the Municipality is not supposed to execute registered sale deed in favour of Puvvula Appalanaryanamma. Except producing Exs.B-2 and B-3, no other document is produced to establish as on the date of conducting survey, said Palla Apparao or the plaintiffs in O.S. No.163 of 1991 are in possession and enjoyment of the property, but on the other hand, the evidence established that the said Puvvula Appalanarayanamma alone is in possession and enjoyment, as on the date of passing Government Order and by the date of execution of sale deed conveying title to an extent of 171.78 Sq. yards.

42. When the plaintiffs in O.S. No.163 of 1991 claimed declaratory relief, the burden is upon them to establish that they are in possession and enjoyment of the property and entitled to obtain registered sale deed. Thus, the initial onus of proof is on the plaintiffs to establish the right to obtain a sale deed for entire extent of 350 Sq. yards as on the date of filing suit and not entitled to take advantage of the weakness in the defence set up by the defendants in O.S. No.163 of 1991, in view of the principles laid down by the Apex Court.

43. In a recent judgment of the Apex Court in ***Union of India and Others Vs. Vasavi Co-operative Housing Society Limited and others***^[2], it was held as follows:

“In a suit for declaration of title, the burden is always on the plaintiff to make out and establish her case for granting such declaration and the weakness, if any, in the case set up by the defendants would not be a ground to grant relief of declaration. The legal position is therefore clear that the plaintiff in a suit for declaration of title and possession and possession would succeed only on the strength of its own case and that could be done by adducing sufficient evidence to discharge onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title

set up by the defendants is found against them, in the absence of establishment of plaintiff's own title, the plaintiff must be non-suited."

44. In ***Baba Kartar Singh Bedi Vs. Dayal Das and Others***^[3], the Privy Council held as follows:

"When a suit for possession against the person in possession by a person who is out of possession as on the date of filing the suit after so many years prior to filing of the suit, he can succeed only on the strength of his own title but not on the weakness of his opponents."

45. In ***P.H. Dayanand Vs. S. Venugopal Naidu and others***^[4], the Apex Court in Para No.11 held as follows:

"When the suit is filed for declaration and possession on the basis of title, the defendant set up his rival title, the burden is on the plaintiff to establish the title. In appreciating the case of title set up by the plaintiff, the trial court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by him, does not entitle the plaintiff to a decree."

46. By applying the principles laid down in the above judgments, it is incumbent upon the plaintiffs in O.S. No.163 of 1991 to establish their right for entire extent, independently, and not entitled to take advantage of weakness in the defence set up by the defendants in the said suit.

47. The basis for their claim is that Palla Apparao was in possession during his life time, later the plaintiffs are continuing in possession and enjoyment of the property of an extent of 350 Sq. yards, but they did not produce even a scrap of paper to establish their actual possession as on the date of survey, as on the date of Government Order and by the date of execution of sale deeds in favour of respective illegal occupants of the burial ground. Thus, the plaintiffs in O.S. No.163 of 1991 miserably failed to establish their possession

as on the relevant dates referred *supra*, consequently, they are not entitled to a declaratory relief.

48. The relief of declaration under Section 34 of the Specific Relief Act is purely discretionary and equitable in nature and when such equitable relief is claimed by the plaintiffs in O.S. No.163 of 1991, they must approach the court with clean hands so as to enable the court to exercise its discretion to grant a decree in their favour. Admittedly, the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984 are in illegal possession and occupation of burial ground, which was vested with the 1st defendant-municipality but taking advantage of their poverty or other eligibility criteria, the Government executed sale deed by collecting the then market value prevailing in that area. Therefore, the plaintiffs were in illegal possession even according to their own admissions and a person who is in illegal possession cannot claim an equitable relief of declaration. The learned counsel for the defendants in O.S. No.163 of 1991 while contending that when the plaintiffs in the said suit did not approach the court with clean hands, the court cannot exercise its discretion and placed reliance on a judgment of Calcutta High Court in ***Smt. Nilima Bose Vs. Santosh***

Kumar Ghose^[5], wherein at Para No.15, it was held as follows:

“Any person entitled to any legal character or to any right as to any property may institute a suit against any person denying or interested to deny his title to such character or right, where the court may in its discretion make a declaration that he is so entitled. The object and the scope of the said section is to perpetuate and strengthen testimony regarding title and to protect the same from adverse attack, that is, to prevent future litigation by removing existing cause of controversy not only to secure the plaintiff possession of the property wrongfully taken away from him or her but also to see that he or she is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon the title of the plaintiff by denial of his legal character or right or by execution of any document which, if left outstanding would militate against such legal character or right and if some steps are not taken at once to

have the doubts and difficulties removed, it may, at a later time, create difficulties for the plaintiff, to prove his legal character or right as the evidence that is available now may not be forthcoming hereinafter.”

49. In view of the principle laid down in the above judgment, and the law laid down by different Courts referred in earlier paragraphs, it is for the plaintiffs to approach the court with clean hands to claim equitable and discretionary relief under Section 34 of the Specific Relief Act so as to establish their legal right to obtain sale deed for 171.78 Sq. yards belonging to the 1st defendant and conveyed to the 2nd defendant, who in turn conveyed to 3rd defendant in O.S. No.163 of 1991. If the entire evidence is taken into consideration, the plaintiffs are only illegal occupiers of burial ground which is meant for public purpose, but obviously for different reasons, the Government passed a Government Order permitting the municipality to execute registered sale deeds in favour of illegal occupants to legalize their occupation, thereby, deprived the public from using the burial ground. However, the legality of the Government Order issued by the Government is not an issue before this court or before the trial court. Therefore, I need not go into the legality of Government Order issued by the Government. However, it is evident from the facts on hand that the plaintiffs in O.S. No.163 of 1991 did not approach the court with clean hands claiming equitable and discretionary relief under Section 34 of the Specific Relief Act, thereby, they are disentitled to claim declaratory relief under Section 34 of the Specific Relief Act. The trial court rightly declined to exercise its discretion in favour of the plaintiffs as they are in illegal and unlawful possession, even if their case is accepted, thereby disentitled to claim declaratory relief, the finding of the trial court does not suffer from any legal infirmity warranting interference of this court. Hence, the finding of the trial court is hereby confirmed holding that the plaintiffs in O.S. No.163 of 1991 are disentitled to claim equitable and discretionary relief of declaration under Section 34 of the Specific

Relief Act. Even otherwise, the claim of declaration is barred by limitation in view of my finding on point No.1.

50. In view of my foregoing discussion, the plaintiffs in O.S. No.163 of 1991 and the defendant in O.S. No.68 of 1984 are not entitled to declaratory relief, thereby, they are not entitled to claim a consequential direction by way of mandatory injunction under Section 39 of the Specific Relief Act, directing the 1st defendant to execute a sale deed for an extent of 171.78 Sq. yards and a direction against defendants 2 and 3 to join in execution of registered sale deed doesn't arise. Even according to Section 39 of the Specific Relief Act, the relief of mandatory injunction is harshest remedy and such relief cannot be granted merely because it is asked for unless the plaintiffs established substantial loss or injury which cannot be compensated by granting damages. But, here the plaintiffs did not establish the substantial damages being caused to them in case mandatory injunction is denied. On the other hand, they are in illegal or unlawful possession even according to their own admissions, even assuming that the plea of the plaintiffs in O.S. No.163 of 1991 is true. In such case, the trial court cannot exercise its discretion to grant relief of mandatory injunction under Section 39 of the Specific Relief Act. As I find that the plaintiffs are disentitled to claim declaratory relief, they are disentitled to claim mandatory injunction, since, it is a consequential relief claimed by the plaintiffs against the defendant in O.S. No.163 of 1991. Accordingly, I hold that the plaintiffs in O.S. No.163 of 1991 are disentitled to claim a direction by way of mandatory injunction directing the 1st defendant to execute registered sale deed and further direction to defendants 2 and 3 to join execution of sale deed. Accordingly, both the points are answered.

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51. **POINT No.4:** The plaintiff in O.S. No.68 of 1984 claimed recovery of possession on the ground that the defendant therein with

the help of her sons illegally occupied the suit schedule property taking advantage of his absence, which fact was testified by PW.1 in his evidence and the same is supported by PW.2, but the contention of the defendant in said suit and the plaintiffs in O.S. No.163 of 1991 is that they never parted with possession of the property of an extent of 171.78 Sq. yards and said Puvvula Appalanarayanamma or the 3rd defendant in O.S. No.163 of 1991 was never in possession and enjoyment of the same, but, this contention was not substantiated by any evidence on the other hand, undisputedly, registered sale deed was executed in favour of Puvvula Appalanarayanamma by Eluru Municipality collecting market value at the rate of Rs.20/- per Sq. yard prevailing by then. Thus, conveyed title to 171.78 Sq. yards in favour of Puvvula Appalanarayanna, thereby, became absolute owner of the property. The Eluru Municipality was admitted owner of the land in dispute and conveyed title to Puvvula Appalanarayanamma for an extent of 171.78 Sq. yards. In such case, the plaintiffs in O.S. No.163 of 1991 are not entitled to occupy the house constructed in 171.78 Sq. yards conveyed to Puvvula Appalanarayanamma by Eluru Municipality and even if they are in possession and enjoyment of the property before execution of a registered sale deed by Eluru Municipality in favour of Puvvula Appalanarayanamma she became owner of entire extent of 171.78 Sq. yards and construction therein if any existing and thereby, the possession of the defendant in O.S. No.68 of 1984 and plaintiffs in O.S. No.163 of 1991 is illegal and they are bound to deliver vacant possession to the lawful owner of the property *i.e.*, the plaintiff in O.S. No.68 of 1984 who purchased the property under agreement of sale, Ex.A-1, and in turn obtained registered sale deed marked as Ex.A-2. Since the date of execution of Ex.A-2, the plaintiff in O.S. No.68 of 1984 became absolute owner and entitled to enjoy the property. The defendant in O.S. No.68 of 1984 alone is in possession and enjoyment of the property having occupied illegally in the absence the plaintiff in O.S. No.68 of 1984. When once

the possession of the defendant in O.S. No.68 of 1984 is illegal, the lawful owner *i.e.*, the plaintiff (PW.1) is entitled to recover possession under Section 5 of the Specific Relief Act. It is settled law that when the suit is filed for recovery of possession of property under the provisions of Specific Relief Act, it is for the plaintiffs who approached the court to establish their independent title notwithstanding the weakness in the defence set up by the defendant in view of the principles laid down in decisions referred in point Nos.2 and 3 *supra*, it is for the plaintiff in O.S. No.68 of 1984 to establish his independent title. In fact the title of the plaintiff in O.S. No.68 of 1984 is not in dispute since the defendant herself questioned the execution of sale deed in favour of Puvvula Appalanarayanamma by Eluru Municipality submitting her protest so also by issuing registered notice. Hence, no further proof is required to establish title of the plaintiff in O.S. No.68 of 1984 as long as he is the lawful owner of the property; he is entitled to recover possession of the property under Section 5 of the Specific Relief Act. The plaintiff established his title to the property producing Exs.A-9, A-1 and A-2 and that the defendant in O.S. No.68 of 1984 illegally occupied the property taking advantage of his absence, thereby, the defendant is liable to vacate the premises as her possession is unlawful. The trial court, on elaborate consideration of each and every document and considering oral evidence minutely, concluded that the plaintiff in O.S. No.68 of 1984 established his title so also unlawful possession of defendant therein, decreed the suit in favour of the plaintiff. Therefore, I find no legal infirmity warranting interference of this court with the finding of the trial court. Hence, the finding of trial court is hereby confirmed holding that the plaintiff in O.S. No.68 of 1984 is entitled to recovery possession of the property from the defendant therein and 5th plaintiff in O.S. No.163 of 1991.

In view of my foregoing discussion in the above paragraphs, I find that the plaintiffs in O.S. No.163 of 1991 are disentitled to claim

declaratory relief and mandatory injunction and whereas the plaintiff in O.S. No.68 of 1984 is entitled to recover possession of the suit schedule property therein. Accordingly, the point is decided.

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52. **POINT No.5:** The plaintiff in O.S. No.68 of 1984 claimed past and future damages for use and occupation in Para No.9 of the plaint. According to the plaintiff, the defendant-5th plaintiff in O.S. No.163 of 1991 illegally occupied the schedule property taking advantage of his absence, thereby, her possession is illegal. In such case, the plaintiff in O.S. No.68 of 1984 is entitled to claim *mesne* profits both past and future as defined under Section 2(xii) of the Civil Procedure Code and not entitled to claim damages for use and occupation. Normally, granting of damages for use and occupation would arise only in a case when the person is inducted lawfully and his possession becomes unauthorized subsequently, but here, the defendant was not inducted into possession of the property by the plaintiff or his predecessors in title, but illegally occupied the property, thereby, her possession is wrongful. In such case, the plaintiff is entitled to claim only *mesne* profits not damages for use and occupation. There is lot of difference between *mesne* profits and damages. When the plaintiff claimed past and future damages for use and occupation, and the trial court granted the same without drawing distinction between *mesne* profits and damages for use and occupation. The finding of the trial court is erroneous for the reason the defendant in O.S. No.68 of 1984 was not inducted lawfully and continuing unauthorizedly subsequent to termination of lawful induction, but occupied the land unlawfully, thereby, her possession became wrongful. It is settled law that when the plaintiff did not claim *mesne* profits, this court cannot travel beyond the pleadings and grant relief which is not claimed. Hence, the finding of the trial court granting damages at the rate of Rs.100/- per month from 17.06.1983 till date of delivery of possession towards use and occupation is hereby *set-aside* holding this point in favour of the

defendant and against the plaintiff in O.S. No.68 of 1984.

In view of my foregoing findings on point Nos.1 to 5, the Transfer Appeal Suit No.726 of 2005 is dismissed *in-toto* while allowing the Appeal Suit No.1171 of 1996, in part, *setting-aside* the damages awarded by the trial court for use and occupation, while confirming the decree for recovery of possession of the property in O.S. No.68 of 1984.

In consequence, miscellaneous petitions, if any, pending in these appeals, shall stand closed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 06-02-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CMSO:11.02.2015

APPEAL SUIT No.1171 OF 1996
AND
TRANSFER APPEAL SUIT No.726 OF 2005
Date.06-02-2015

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- [\[1\]](#) AIR 1924 Oudh 69
[\[2\]](#) 2014 (2) SCC 269
[\[3\]](#) AIR 1939 PC 201
[\[4\]](#) 2009 (1) Cvl.C.C. 0493 (SC)
[\[5\]](#) AIR 1997 Calcutta 202