THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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A.S.No.718 of 2006

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JUDGEMNT:

(Per the Hon'ble Sri Justice K.C.Bhanu)

This appeal is directed against the judgment and decree dated 31.10.2006 in Original Suit No.174 of 2004 on the file of the IV Additional District Judge (Fast Track Court), Ranga Reddy District, whereunder and whereby the suit filed by the plaintiff for declaration and perpetual injunction, was decreed with costs.

2. The appellant herein is the defendant, and the respondents herein are the plaintiffs, in the Original Suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the suit.

3. Plaintiffs filed the aforesaid suit stating as follows.

Plaintiffs and their father G.Balaiah purchased an extent of Ac.17.07 guntas of land in survey nos.6 and 7 of Kokapet village, Rajendranagar Mandal, Ranga Reddy District under registered sale deed bearing document No.5890/1989, dated 16.05.1989 from 1) Smt. Rukmini Bai, w/o. late Narayan Rao Kamegaonkar; 2) Shobha, d/o. late Narayan Rao Kamegaonkar and 3) Nanda, d/o. late Narayan Rao Kamegaonkar. Plaintiffs' vendors succeeded the suit schedule property through late Narayan Rao Kamegaonkar, who got the same by virtue of a compromise decree in Original Suit No.18 of 1966 on the file of the I Additional Judge, City Civil Court, Hyderabad and since then he had been in possession and enjoyment of the same. After his death, vendors of the plaintiff succeeded the property. Therefore, they became absolute owners and possessors thereof. On 02.05.1974, the plaintiffs' father and the defendant jointly entered into an agreement with Srinivas Rao Kamegaonkar, s/o. late Narayan Rao Kamegaonkar without knowing the true facts and also without consent of vendors of the plaintiffs, who are the original owners, and came into possession by payment of part sale consideration. Thereafter, the plaintiffs' father and the defendant came to know about the fact that the vendors of the plaintiffs are owners and therefore could not pay the balance sale consideration amount. Thereafter, the said Srinivas Rao Kamegaonkar disappeared and his whereabouts were not known till date of filing of the suit. Therefore, the agreement of sale dated 02.05.1974 became *in fructuous.* Plaintiffs' vendor continued in possession since 1974 till registration of the regular sale deed without any interruption. The defendant got mutated his name in the revenue records based on the agreement of sale. After registration of sale deed, the plaintiffs approached the Mandal Revenue Officer, Rajendranagar and requested to mutate their names in the revenue records. But, the Mandal Revenue Officer did not issue mutation proceedings. Mean while, the defendant also approached the Mandal Revenue Officer by suppressing the fact of purchase made by the plaintiffs, and made an application under the RoR Act for issuance of pattadar passbook. After enquiry, the Mandal Revenue Officer rejected the application of the defendant. Thereafter, the plaintiffs filed an application before the Mandal Revenue Officer to mutate their names in the revenue records, but no proceedings are initiated. The defendant has no title to the schedule land and when he tried to interfere with the suit land, they lodged a complaint to the Mandal Revenue Officer, the Revenue Divisional Officer and the District Collector, and also a complaint with the Rajendranagar police. The defendant, being stranger to the suit schedule land, is not entitled to claim the suit schedule property. Hence, the suit.

4. The defendant filed written statement denying the averments made in the plaint and stating as follows:

The vendors of the plaintiffs have no right to execute the sale deed and it is a sham document. The sale deed itself shows that Srinivas Rao Kamegaonkar entered into agreement in respect of the schedule land with the defendant and the father of the plaintiffs. The sale deed is valued with deficit stamp duty and hence defective and cannot be acted upon. As per the decree, late Narayan Rao Kamegaonkar became the owner and after his death his son Srinivas Rao Kamegoankar inherited the property. He entered into the agreement with the defendant and late G.Balaiah, but could not execute the sale deed. Late G.Balaiah did not pay his share of the purchase price and therefore the defendant paid the entire purchase money and got possession of the land in the year 1974. The order of the Mandal Revenue Officer and the pahanis show his possession. Late G.Balaiah developed evil design and got false sale deed executed in favour of him and the plaintiffs from the wife and daughters of late late Narayan Rao Kamegaonkar. The defendant admitted entering into agreement of sale with Srinivasa Rao Kamegaonkar, but denied payment made by late G.Balaiah under it.

The Mandal Revenue Officer allowed his application to an extent of ½ share and the other half share in favour of the said G.Balaiah. The defendant has been in continuous, open and actual possession of the land since 1974 for a period of more then 30 years as rightful owner and perfected his title. Hence, he prays to dismiss the suit.

5. Basing on the above pleadings, the trial Court framed the following issues for trial.

> 1) Whether the plaintiffs are entitled for declaration that they are the only absolute owners and possessors of the suit schedule land admeasuring Ac.17.07 guntas in Sy. Nos. 6 & 7 of Kokapet Village of Rajendranagar Mandal ?
>
> 2) If so, whether the plaintiffs are entitled for grant of permanent injunction, as prayed for ?
>
> 3) Whether the defendant perfected his title to the plaint schedule property by way of adverse possession ?
>
> 4) To what relief ?

6. During trial, P.Ws. 1 to 4 were examined and Exs.A1 to A23 were

got marked, on behalf of the plaintiffs, and D.Ws. 1 to 3 were examined and Exs.B1 to B28 were got marked, on behalf of the defendant.

7. The trial Court, after considering both the oral and documentary evidence, came to the conclusion that under Ex.A1-sale deed, plaintiffs are owners and possessors of the suit land and that the defendant failed to place the agreement of sale under which he purchased the suit land, and that when he claims the right under agreement of sale, he cannot plead adverse possession and that the mere fact that he was in possession for a period of 12 years is not sufficient to prove adverse possession, and accordingly decreed the suit.

8. Now, the points that arise for consideration in this appeal are –

> 1) Whether the plaintiffs are entitled for declaration that they are absolute owners and possessors of the suit schedule land ?
>
> 2) Whether the plaintiffs are entitled for grant of permanent injunction?
>
> 3) Whether the defendants perfected their title to the suit schedule property by way of adverse possession ?
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> 4) Whether the suit is barred by limitation ?
>
> 5) Whether the right of the defendant is protected under Section 53 A of the Transfer of Property Act, 1882 ?
>
> 6) Whether the suit is maintainable without seeking the relief of recovery of possession ?
>
> 7) To what relief ?

9. Learned counsel for the appellant/defendant contended that the defendant and the father of the plaintiffs purchased the suit schedule property under an agreement of sale in the year 1974 from Srinivas Rao Kamegaonkar, and since then the defendant has been in possession and enjoyment of the property; that Exs.B2, B4, B5, B6 to B28 would clearly go to show that the defendant is in exclusive possession and enjoyment of the property and his name was

mutated in the revenue records; that the agreement of sale was regularized by the Mandal Revenue Officer, Rajendranagar to the extent of ½ share in favour of the defendant; that having come to the Court, it is for the plaintiffs to establish that they have got right, title and interest in respect of the suit land; that the vendors of the plaintiffs have no title to execute a sale deed in favour of the plaintiffs; that the suit is barred by limitation as Article 58 of the Limitation Act, 1963 would be applicable to the facts of the case and the suit is not filed within 3 years from the date the right to sue first accrues; that the possession of the defendant is protected under Section 53A of the Transfer of Property Act, 1882; that the suit is not maintainable in view of Section 34 of the Specific Relief Act, 1963 as the relief of recovery of possession is not sought, and hence, he prays to set aside the impugned judgment and allow the appeal.

10. On the other hand, learned counsel for the respondents contended that the vendors of the plaintiffs are the legal heirs of the original owner late Narayan Rao Kamegaonkar, who got the same by virtue of a compromise decree in Original Suit No.18 of 1966 on the file of the I Additional Judge, City Civil Court, Hyderabad; that though the vendors of the plaintiffs were also having a share, without knowing the same, the agreement of sale was entered into between the said Srinivas Rao Kamegaonkar and the plaintiff's father and the defendant; that the whereabouts of said Srinivas Rao Kamegaonkar were not known from 1979 onwards and therefore the vendors of the plaintiffs, who were the only legal heirs of the original owner, have got right, title and interest over the schedule property and they executed the sale deed in favour of the plaintiffs; that Article 65 of the Limitation Act, 1963 would be applicable as the suit is based upon interest in the property and therefore it is within time; that Section 53A of the Transfer of Property Act, 1882 has no application because the defendant was never ready and willing to pay the balance sale consideration and has not obtained registered sale deed executed by said Srinivas Rao Kamegaonkar; that the defendant, who claims to be agreement holder, cannot claim adverse possession; that there is

no evidence to show that the defendant was in continuous possession and enjoyment of the suit schedule property; that the name of the defendant in the revenue records has been deleted by the Mandal Revenue Officer after conducting enquiry and that order has become final and therefore no reliance can be placed upon any one of the revenue records filed by the defendant; that the trial court, after considering the evidence on record, rightly decreed the suit and that order needs no interference by this Court.

POINT No.1: Whether the plaintiffs are entitled for declaration that they are absolute owners and possessors of the suit schedule land ?

11. The suit is filed for declaration that the plaintiffs are the only absolute owners and possessors of the suit schedule property and for consequential relief of permanent injunction. The plaintiffs and their father purchased the schedule land under Ex.A1-registered sale deed dated 16.05.1989 from pattadars Smt. Rukmini Bai, Smt. Shobha and Smt. Nanda. The evidence of P.W.1 would go to show that plaintiffs' vendors succeeded the suit schedule property through Narayan Rao Kamegaonkar, s/o. late Srinivas Rao Kamegaonkar, who died due to natural death, leaving behind the plaintiffs' vendors as the only successor, and that the said Narayan Rao Kamegaonkar succeeded the suit land through a compromise decree in Original Suit No.18 of 1966 on the file of the I Additional Judge, City Civil Court, Hyderabad, and being successors and legal heirs of late Narayan Rao Kamegaonkar, the plaintiffs' vendors alienated the suit land in their favour. He also stated that his father paid sale consideration of Rs.50,000/- under Ex.A1. It is suggested to him that as already possession was delivered under Ex.A22-agreement of sale, the mother and sisters of said Srinivas Rao Kamegaonkar have no right to execute the sale deed, but the same is denied. The fact that the vendors of the plaintiffs derived the title from the original owner, has not been specifically denied or disputed. The only defence taken by the defendant in the suit is that because he is in possession of the property, plaintiffs' vendors have no right to sell the

property. Except suggesting that Ex.A1 is invalid document, nothing has been elicited to doubt the evidence of P.W.1. Nothing has been elicited in the cross-examination so as to discredit the testimony of P.W.1 with regard to execution of Ex.A1.

12. To prove Ex.A1, P.W.2 is also examined. According to him, he accompanied G.Balaiah, father of plaintiffs, to the Registrar Office on the date of execution of the sale deed and that on the date of the registration, the said Balaiah paid Rs.28,000/- in his presence. His presence at the time of registration has not been specifically denied or disputed. His evidence proves the due execution of Ex.A1.

13. P.W.3, who is one of the executants of Ex.A1, was examined to speak about the execution of Ex.A1. Her evidence is clear that her father got the suit schedule land by virtue of a compromise decree and he died leaving behind herself, her mother, sister and brother as the only legal heirs and successors of the property; that as her brother is no more, herself, her mother and sister remained as the only legal heirs and they offered the sell the land to the plaintiffs in the year 1989. She categorically stated that by virtue of the Ex.A1-sale deed, they transferred all their legal rights and interest in respect of the schedule property in favour of said G.Balaiah (father of plaintiffs) and his children. She identified her signature and also her mother's signature on the sale deed Ex.A1. She stated in cross-examination that whereabouts of her brother Srinivas Rao were not known and that whether he was alive or not is not known, and that he left the house in the year 1979. She also stated that prior to execution of Ex.A1, the said Balaiah was in possession and enjoyment of the suit land and on the date of execution of the sale deed, possession was delivered to him. Nothing has been elicited in cross-examination to discredit her evidence. So, from the oral evidence of P.Ws. 1 to 3, it is established beyond doubt that Ex.A1 is proved and the vendors of the plaintiffs have right, title and interest to sell the schedule property.

14. It is not in dispute before this Court that late Narayan Rao Kamegaonkar got the schedule land as per compromise decree in

Original Suit No.18 of 1966 on the file of the I Additional Judge, City Civil Court, Hyderabad, marked as Ex.A2. The said late Narayan Rao Kamegaonkar has wife by name Rukmini Bai; son Srinivas Rao Kamegoankar and daughters Shobha and Nanda. Whereabouts of the son Srinivas Rao Kamegaonkar were not known. It is an admitted fact. Therefore, after his whereabouts are not known for more than 7 years, the wife and the two daughters of Narayan Rao Kamegaonkar executed a registered sale deed in favour of the plaintiffs and their father. Except saying that Ex.A1 is a sham and nominal document, no other evidence is adduced by the defendant as to how it is a sham and nominal document. Under Section 108 of the Indian Evidence Act, 1872, presumption of death of a person can be made only if it is proved at the time when the presumption is sought to be raised that the person concerned was not heard of for seven years by those who would naturally have heard of him if he had been alive. Admittedly, whereabouts of Srinivas Rao were not known from the year 1979. Execution of Ex.A1-sale deed was in the year 1989. Since the whereabouts of son of said Srinivas Rao Kamegaonkar were not known, the vendors of the plaintiffs, who are his only legal heirs, executed the registered sale deed. So, by virtue of Ex.A1, it is clear that the plaintiffs and their father purchased the suit schedule property from the legal heirs of the original owner. Once a document is registered under the Registration Act, 1908, it can be said that it is validly executed unless contrary is proved. The vendors of Ex.A1 are not disputing or denying about the execution.

15. Learned counsel for the appellant placed reliance on a decision in *Union of India & others v. Vasavi Co-operative Housing Society Limited & others*, wherein it is held thus: (para 19).

> "The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non –suited."

He also relied on a decision in *Bajranglal Shivchandrai Ruia v. Shashikant N.Ruia & others*, wherein it is held thus: (para 71)

> "In our view, this reasoning of the Division Bench is erroneous. Although the period of limitation prescribed in the Limitation Act, 1963, precludes a plaintiff bringing a suit which is barred by limitation, as far as any defence is concerned, there is no such limitation. In reply to the plaintiffs suit that she had derived title to the suit property by virtue of the auction sale and the certificate of sale issued by the BMC, it was perfectly open to the defendants, including Bajrangalal, to contend to the contrary. The burden of proving the facts alleged in the plaint was squarely upon the plaintiff. After recording evidence on both sides, if the evidence showed that the auction sale held by the BMC was contrary to the provisions of the BMC Act and the Regulations made thereunder, the defendants were entitled to urge upon the learned single Judge to come to the conclusion recorded by the learned single Judge."

From the above decisions, it is clear that the burden of proof lies on the plaintiffs to establish the title when they are seeking declaration. Burden of proof will not shift to the defendant.

16. Learned counsel for the appellant/defendant contends that recitals in Ex.A1 would go to show that the shares of the vendors only were sold under it. But, on a reading of the recitals in Ex.A1, in its entirety, it is clear that the vendors were the absolute owners and possessors of Ac.17.07 guntas of land. So, the recital that the vendors of the plaintiffs sold their share, must be understood as relating to the entire extent of land because the schedule of the property shows that the entire extent has been sold. Therefore, it cannot be taken as a ground to doubt the sale deed. If the son of the original owner is alive, then only the vendors of the plaintiffs can sell to the extent of their shares. As whereabouts of the son of the original owner were not known, the entire property of said Narayan Rao Kamegaonkar devolves upon his wife and two daughters, who are admittedly his legal heirs. Therefore, under Ex.A1, entire plaint schedule has been purchased by the plaintiffs and their father. It confers title on the plaintiffs and their father. The finding of the trial Court on this issue cannot be said to be perverse or contrary to the

evidence on record. Accordingly, this point is answered against the appellant.

<u>POINT No.4:</u> Whether the suit is barred by limitation ?

17. The suit was filed on 10.11.2004. As seen from the plaint, cause of action for the suit arose on 16.05.1999 when the plaintiffs and their father purchased the schedule land and also on 15.02.1992, 16.09.1995 and 22.04.2003 when the plaintiffs approached the Mandal Revenue Officer for issuance of mutation proceedings and pattadar pass book, and that cause of action also arose when the defendant's application was rejected by the Mandal Revenue Officer, Rajendranagar for mutation, and on 05.11.2004, when the plaintiffs lodged a complaint before the Revenue authorities against the defendants. In the written statement, except stating that the suit is hopelessly barred by limitation, how it is barred by limitation has not been specifically stated. Learned counsel for the appellant contended that since it is a suit for declaration, it has to be filed within 3 years from the date the right to sue first accrues. Whereas the contention of the learned counsel for the respondents is that Article 65 of the Limitation Act, 1963 would come into play as the plaintiffs are seeking declaration with regard to interest based on title and the period of limitation is 12 years and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiffs.

18. On this aspect, learned counsel for the appellant relied on a decision in *Khatri Hotels Private Limited & anr. V. Union of India & anr.*, wherein it is held thus: (para 27)

> "While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word `first' has been used between the words `sue' and `accrued'. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is

> beyond the period of limitation counted from the day when the right to sue first accrued."

There is no dispute about the commencement of limitation under Article 58 of the Limitation Act, 1963. Limitation for filing a suit for declaration under Article 58 of the Act, 1963 is 3 years and the period of limitation will begin to run from the date when the right to sue first accrues. Therefore, there is no dispute about the ratio laid down in the above decision.

19. On the other hand, learned counsel for the respondents placed reliance on a decision in *Parepalli Pallalayya v. Kasagani Ramulu & others*, wherein it is held thus: (para 14)

> "A look at Article 65 of the Limitation Act shows that the first limb of this Article entitles the plaintiff to file a suit for possession of immoveable property within 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. The suit for possession would be decreed only when the Court records a finding in favour of the plaintiff that he is the owner of the property. In other words, when possession is sought, a decree for declaration of title can be claimed and granted if the suit is filed within 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Then, how can it be said that when the plaintiff is in possession of his property, he shall be denied the right to claim a declaration of his title in case he does not file a suit for declaration of title within three years when the right is denied? It is also pertinent to note that a suit for claiming any interest in the immoveable property based on title can also be filed within 12 years when it is denied by the defendant. Article 65 of the Limitation Act is not confined only to suits for possession based on title. When the plaintiff is entitled for a suit for protecting his interest of whatever nature in the immoveable property based on title, the case would be covered under Article 65 of the Limitation Act and not under Article 58 of the Act, for the simple reason that Article 58 deals with suits relating to declarations, except when the declaration of title is sought in respect of immoveable property, as there is a specific provision, that is to say Part V of the First Division of the Schedule. I am, thus, in complete agreement with the view expressed by learned Brother P. Ramakrishnam Raju, J., (as he then was)."

He also relied on a decision in *Surabhi Baburao v. Vullingala*

Suryanarayana & others, wherein it is held thus: (paras 10 & 11).

> "The declaration sought for by way of the proposed amendment is in respect of the immovable property. THE lower Court erroneously thought that the proper Article that would govern the case is Article 58 which prescribes a period of three years to obtain the declaration when the right to sue accrues and not Article 65 of the Limitation Act which prescribes a period of 12 years for recovery of possession of immoveable property or any interest therein, based on title when possession of the defendant becomes adverse to the plaintiff. It is true, the parties have exchanged notices and the respondents issued a reply dated 7-3-1984 asserting their title that they have purchased the property under three registered sale deeds and prior to that they were in possession of the property as tenants. In the written statement also, which was filed in the year 1986, they have reiterated the same stand. However, amendment petition was filed in the year 1990. Therefore, the lower Court relying upon Article 58 of the Limitation Act, held that the period of three years has elapsed from the date of notice as well as from the date of filing of the written statement and as such, the proposed amendment, is barred by limitation.
>
> PART V of the Limitation Act contains Articles, including Article 65, applicable for suits relating to immoveable property; whereas, PART III which contains Article 58 deals with suits relating to declaration. When there is a specific chapter viz., PART V relating to suits for immoveable property, Article 65 which is relevant Article which provides for limitation, has to be applied and not Article 58 which provides limitation for other declarations."

Part-V of the Limitation Act, 1963 contains the Articles including Article 65, applicable to suits for declaration relating to immovable property, whereas Article 58 is in Part-III which deals with suits simplicitor for declaration other than the suits relating to immovable properties. Therefore, Article 65 of the Limitation Act, 1963 is only applicable in the present facts of the case because this is a suit for declaration of title or interest relating to immovable property. Article 65 of the Act consists of 2 parts. First part is for possession of immovable property and second part is any interest therein based on title. Therefore, the contention that Article 58 of the Act is applicable to the present facts and circumstances of the case is wholly devoid of merit and untenable. Under Article 65 of the Act which deals with declaration of any interest based on title, the suit has to be filed within a period of 12 years and the period of limitation begins to run when the possession of the defendant becomes adverse to the plaintiff.

20. The plaintiffs made Ex.A7 representation to the Mandal Revenue Officer to effect mutation of their names in the revenue records, as per the registered sale deed. As the Mandal Revenue Officer did not effect any mutation, on 04.11.2004 when the defendant, along with some labourers, tried to trespass into the land forcibly by engaging proclaims and buldozers, plaintiffs lodged a complaint and also brought to the notice of the Mandal Revenue Officer and the Revenue Divisional Officer. Earlier, the Mandal Revenue Officer issued Ex.A21-proceedings dated 02.09.1995 on the basis of the representation filed by the defendant. As seen from Ex.A21, it is clear that the defendant filed an application under Section 22 (2) of the RoR Act with a request to regularize the un-registered sale agreement. The Mandal Revenue Officer passed the order, which reads thus:

> "The petitioner Sri Sonti Jagadeeshwarappa, S/o. Chenna Basappa, R/o. Kokapet Village, produced sale agreement dt.7.2.74 which is not maintainable. He has failed to produce any other evidence in support of his claim.
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> There is objection and counter claim received from Sri G.Srinivas, G.Sridhar and G.Gopal Krishna, S/os. Balaiah, R/o. Kokapet for Ac.17.07 through registered sale deed No.5890 of 89, dt.16.5.1989, there is Civil dispute over title and the land. In the light of the above both the parties are advised to redress their claim through competent Civil Court.
>
> Accordingly, the claim on form-10 is hereby rejected."

Cause of action for the suit arose when the defendant tried to interfere with the possession of the land and when he claims possession, and the suit is filed within 12 years thereafter.

21. Even D.W.1 did not specifically state as to how the suit is barred by limitation because, in the facts and circumstances of the case, limitation aspect is a question of fact and law. He has not denied the causes of action as pleaded in the plaint, and on the other hand, the

evidence of P.W.1 is very clear that the plaintiffs came to know that the defendant filed an application for mutation of his name in the year 1990 and inspite of giving an application by the plaintiffs on 22.04.2003(Ex.A6), the Mandal Revenue Officer did not issue any proceedings. Therefore, from the oral and documentary evidence, it is established beyond doubt that the suit is well within the time. Accordingly, this point is answered against the appellant.

<u>POINT No.5:</u> Whether the right of the defendant is protected under Section 53 A of the Transfer of Property Act, 1882 ?

22. Specific case of the defendant is that in pursuance of the agreement of sale executed in the year 1974, he paid entire sale consideration and he is in actual physical possession of the property since then and that father of the plaintiffs did not pay any amount in pursuance of the agreement and he paid the full amount. The evidence of D.W.1 would go to show that that in the first instance, the sale agreement was entered into in between the defendant and G.Balaiah on 07.02.1974 for a total consideration of Rs.22,000/- and an advance of Rs.12,500/- was paid. According to him, another agreement of sale dated 07.05.1974 was executed by Srinivas Rao Kamegaonkar by receiving an amount of Rs.6,500/- from him alone and physical possession was delivered to him. But, that agreement of sale dated 07.05.1974 has not been filed. The plaintiffs filed agreement of sale dated 22.05.1974 marked as Ex.A22, which would go to show that the agreement of sale was executed by Srinivas Rao Kamegaonkar in favour of Balaiah (plaintiffs' father) and S.Jagadeeswarappa(defendant). The total sale price of the property agreed at Rs.25,000/- and total sum of Rs.19,000/- was paid and the balance amount has not been paid thereafter. As seen from this document, it is clear that purchasers have to pay Rs.3,000/- to the seller before 10.07.1974 failing which the earnest money stood forfeited; that after paying the aforesaid amount of Rs.3,000/-, the remaining amount of Rs.3,000/- had to be paid by the purchasers within one month from the date when the Government permits the seller to transfer and register the property in favour of the purchasers.

As the amount has not been paid, the agreement is said to be ineffective. Whereas case of the defendant is that he purchased the land under another agreement of sale, which has not been filed and therefore his contention cannot be accepted. Therefore, from the evidence of D.W.1, it is clear that his entire claim is based upon agreement of sale dated 07.05.1974. But, that agreement of sale was not exhibited.

23. The pre-conditions for applicability of Section 53A of the Transfer of Property Act, 1882 are as follows: (a) the transferor has contracted for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;
(b) the transferee has, in part performance of the contract, taken possession of the property or any part thereof; or the transferee being already in possession, continues in possession in part performance of the contract; (c) the transferee has done some act in furtherance of the contract; (d) the transferee has performed and is willing to perform his part of contract. Therefore, one of the pre-conditions for getting the benefit of Section 53 A of the Transfer of Property Act, 1882 is readiness and willingness of the transferee to perform his part of contract. There is no pleading that the defendant was ready and willing to perform his part of the contract but the transferor was delaying or postponing execution of regular sale deed.

24. Learned counsel for the respondents relied on a decision in *Brijgopal Lumani & another v. Mothey Anja Ratna Rajkumar (died) per LRs & others*, wherein it is held thus: (para 38)

> “The learned Senior Counsel for the defendants, who referred to Moo! Chand Bakhru v. Rohan, 2002 (2) ALD 84 (SC) = AIR 2002 SC 812, attempted to get over the principle laid down therein that a proposed vendee cannot protect his possession in immovable property on the basis of an oral agreement of sale, the terms of which, have not been reduced into I writing. THE Apex Court held that a written agreement was sine qua non for the . applicability of the legal doctrine of part performance enshrined in Section 53A of

the Transfer of Property Act."

Since the defendant failed to produce the written agreement of sale, Section 53A of the Transfer of Property Act, 1882 has no application.

25. Learned counsel for the respondents also relied on the following decisions.

(a) in *A.Lewis & anr. v. M.T. Ramamurthy & Ors.,* wherein it is held thus: (para6)

> "As rightly pointed out by the High Court, the existence of right to claim protection under Section 53-A of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform his part of the contract and convey his willingness. On the other hand, the factual finding is that there was no intimation by defendant Nos. 3 and 4 to perform their part of contract to claim protection of Section 53-A of the Transfer of Property Act. Likewise, as rightly concluded by the courts below, there is no material to show that the plaintiff had notice of agreement of sale Ex.D-1 in favour of defendant Nos. 3 and 4. The conclusion of the High Court that defendant Nos. 3 and 4 or even defendant No.1 who claims through them are not entitled to protection of Section 53-A of the Transfer of Property Act is acceptable and the argument contrary to the said conclusion is liable to be rejected."

(b) In *Mohan Lal(deceased) through LRs. Mira Abdul Gaffar & another*, wherein it is held thus: (para 5)

> "The question then is whether he is entitled to retain possession under Section 53-A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already

> received from the transferor so long as he is willing to perform his part of contract. Agreement does not create title on interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise."

(c) In *Shrimant Shamrao Suryavasanshi & another v. Pralhad Bhairoba Suryavanshi (dead) by LRs.*, wherein it is held thus: (paras 16 & 17)

> "But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under S. 53-A of the Act. The necessary conditions are-
>
> "1) there must be a contract to transfer for consideration any immovable property;
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> 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
>
> 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
>
> 5) the transferee must have done some act in furtherance of the contract; and
>
> 6) the transferee must have performed or be willing to perform his part of the contract.
>
> We are, therefore, of the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under S. 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract has barred by limitation."

From the above decisions, it is clear that to claim protection under Section 53A of the Transfer of Property Act, 1882, the transferee has to comply with certain conditions. None of the conditions has been complied with by the defendant. Therefore, the protection under Section 53A of the Act is not available to the defendant. Accordingly, this point is answered against the appellant.

<u>POINT No.6:</u> Whether the suit is maintainable without seeking the relief of recovery of possession ?

26. Learned counsel for the appellant contended that under Section 34 of the Specific Relief Act, 1963, the relief of mere declaration of immovable property is not sufficient. This section is *in verbatim* the same as Section 42 of the repealed Act (Act 1 of 1877). The essential ingredients thereof are -(a) the plaintiff must be a person entitled to entire legal character or to any right as to any property; (b) the defendant must be a person denying or interested to deny the plaintiff's title to such character or right; (c) declaration issued for must be declaration that the plaintiff is entitled to legal character or to any right to property; (d) where the plaintiff is able to seek further relief than mere declaration of title, he must seek such relief.

27. On this aspect, learned counsel for the appellant relied on a decision in *Ram Saran & another v. Smt. Ganga Devi*, wherein it is held thus: (para 4)

> "We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding Courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable. In these circumstances, it is not necessary to go into the other contention that the suit is barred by limitation."

It is a case where the defendants therein were in possession of the property and without claiming recovery of possession, suit for mere declaration is not maintainable as the plaintiffs therein did not claim possession over the suit schedule property.

28. Learned counsel for the appellant also relied on a decision in *Vinay Krishna v. Keshav Chandra & another*, wherein it is held thus: (para 13)

> "From the reading of the plaint it is clear that the specific case of the plaintiff Jamuna Kunwar was that she was in exclusive possession of property bearing No. 52 as well. She thought that it was not necessary to seek the additional relief of possession. However, in view of the written statement of both the first and the second defendant raising the plea of bar under Section 42, the plaintiff ought to have amended and prayed for the relief of

> possession also. In as much as the plaintiff did not choose to do so she took a risk. It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration."

It is also a case where the plaintiff therein did not claim possession, but suit is filed for declaration only. The plaintiff therein was not in exclusive possession of the property. So, in the absence of claiming the relief of recovery of possession, mere declaration is not sufficient.

29. Learned counsel for the appellant relied on a decision in *Union of India v. Ibrahim Uddin & another*, wherein it is held thus: (paras 55 & 57).

> "The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.
>
> xxx
>
> In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief."

From the above decision, it is clear that a suit for mere declaration without seeking consequential relief is not maintainable.

30. But, in this case, plaintiffs also sought for consequential relief of perpetual injunction against the defendant and his men. Therefore, it is not a suit for simplicitor for declaring right, title and interest of the plaintiff in respect of the suit schedule property. Therefore, the above decisions have no application to the present facts of the case. Accordingly, the point is answered against the defendant.

<u>POINT No.3:</u> Whether the defendants perfected their title to the suit schedule property by way of adverse possession ?

31. There cannot be any doubt that in order to claim acquisition of title by adverse possession, the same must be hostile at its inception and the possession, in order to be adverse, must be continuous, hostile and open to the knowledge of the true owner. The expression 'adverse possession' is hostile possession i.e. possession which is expressly or impliedly in denial of the title of the true owner. Article 65 of the Schedule to the Limitation Act, 1963 prescribes that for possession of immovable property or any interest thereof based on title, limitation of 12 years begins to run from the date the defendant's interest becomes adverse to the plaintiff. A person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed.

32. There cannot be any dispute that whenever any person takes the plea of adverse possession, the burden is on him to establish the same. The evidence of D.W.1 would go to show that from the date of agreement of sale dated 07.05.1974, he was in possession and enjoyment of the schedule property and this can be seen from the proceedings under Ex.B14. Basing on the application of the defendant to incorporate his name against survey nos. 6 and 7 of Kokapet in respect of Ac.17.07 guntas, the name of the defendant was incorporated in respect of Ac.4.20 guntas in survey no.6 and Ac.4.03 ½ guntas in survey no.7. He also filed Ex.B2, land revenue receipts for the years 1977-78 to 1995-96 and Exs.B4 to B7 and B16 to B28-which are pahanis. Ex.B1 is xerox copy of letter which is not admissible. Further more, it is not proved. Ex.B3 is attested copy of First Information Report. It is not a substantive evidence. Exs.B4 and B5 relate to plot Nos.6 and 7, but not survey numbers. They are not shown that they relate to suit schedule property. Even otherwise, they do not confer any title. Exs.B6 and B7 are not relevant as they do not contain any survey numbers. Exs.B8 and B9 are not proved. Even otherwise, they do not confer any right to the defendant. Exs.B10 to B13-notices issued by the revenue authorities. They are not relevant for the purpose of deciding the points. Ex.B14 cannot be looked into

as Mandal Revenue Officer has no authority to declare that the defendant is half-share holder of Ac.4.20 guntas in Survey No.6 and Ac.4.03 ½ guntas in Survey No.7. The defendant has not filed any title deed. His title is based upon possession which is in pursuance of the agreement of sale. There cannot be any dispute that agreement of sale does not confer any title. On this aspect, learned counsel for the respondents relied on a decision in *Konkana Ravinder Goud & others v. Bhavanarishi Co-operative House Building Society, Hyderabad & others*, wherein it is held thus: (paras 63 & 64)

> "Thus on the basis of the two documents, the only right which the Society got was a right to seek specific performance of agreements to sell and not any right, title or interest in the land. Assuming a suit was also filed and decree of specific performance was obtained, such a decree for specific performance of contract will not have the effect of conveying right, title and interest in favour of the Society till a deed of sale is duly executed and registered. In Babu Lal v. M/s Hazari Lal Kishori Lal, AIR 1982 SC 818, the Supreme Court held that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder. The right and the title passes to the decree-holder only on the execution of the deed of sale either by the judgment-debtor himself or by the Court in case the judgment-debtor fails to execute the sale deed.
>
> EVEN in those cases where pursuant to agreement of sale the transferee takes possession of the land in part performance of the agreement of sale as is the case of petitioner society, such an act also does not confer any title in the land in favour of the transferee."

Similarly, he placed reliance on a decision in *N.R. Srinivas v. Madduri Mallareddy and Ors.,* wherein it is held thus: (para 31)

> "From the above judgments, the evidentiary value of the entries made in the revenue records, can be summarized as that firstly they are only in the nature of fiscal enquiry instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid; secondly presumption on the basis of entries in the revenue records as rebuttable and not conclusive; thirdly the entries in the revenue records are not conclusive proof of title; fourthly the revenue courts have limited jurisdiction and they have no jurisdiction to

> decide the title conclusively and it is always desirable to have the question of title decided by competent civil courts rather than by revenue courts."

From the above decisions, it is clear that entries in the revenue records do not confer any title. The entries are only for the purpose of payment of land revenue and they can be used for no other purpose.

33. The evidence of D.W.1 would clearly go to show that he became absolute owner of the suit land by prescription having been in possession and enjoyment of the property since 1974 and has been cultivating the same by raising paddy and other crops. According to him, he dug a borewell and erected an electric motor and also obtained crop loan over the suit land from the Primary Agricultural Society. In cross-examination, he admitted that no written notice was issued by him to the vendor and no steps were taken by filing a suit for obtaining a registered sale deed. He also admitted that in Ex.B5, house number was mentioned as 6 & 7. Therefore, it does not relate to the schedule property. He specifically admitted that the plaintiffs approached the Revenue Divisional Officer and filed an application for rectification entry in the revenue records against the deletion of their father's name and their claim was allowed under Ex.A23. Against the order of the Revenue Divisional Officer under Ex.A23, the defendant did not prefer any appeal. A perusal of Ex.A23, it is clear that wrong entries were made in the revenue records for the year 1990-91 to 2004-05 in the name of the defendant with regard to possession column and he directed the Mandal Revenue Officer to rectify the entries made in the revenue records to incorporate names of the plaintiffs in the possession column. That order has become final because the defendant failed to produce a copy of the appeal or about the pendency of the appeal before the Collector. Therefore, the entries in the revenue records in the name of the defendant have been deleted. Hence, no reliance can be placed upon the documents Exs.B2, B16 to B28.

34. Learned counsel for the appellant placed reliance on a decision in *Shakir Hussain v. Administrator, Nagar Palika, Mandsaur*, wherein

it is held thus:

> Even if adverse inference is drawn against the municipality for not producing the documents in its possession, the plaintiff cannot succeed unless the plaintiff establishes the plaintiff's title to the suit property and also possession in respect of the same."

Similarly, he placed reliance on a decision in *Khato Lal Dass & another v. Md. Jahiruddin Babar & others*, wherein it is held thus: (para 9)

> "The general rule that possession by one tenant-in-common cannot, in the absence of special circumstances, be treated as adverse to another tenant-in-common should not be applied to a case where the circumstances are such as to indicate that the possession of each must have been adverse to the other."

Those decisions have no application to the present facts and circumstances of the case.

35. On the other hand, learned counsel for the respondents relied on the following decisions.

(a) in M.Gopal & another v. K.Jangareddy (died) by LRs. & another, wherein it is held thus: (para 31)

> "From the above two judgments of the Apex Court it is thus obvious that a person who obtained the possession of the property under executory terms of contract of sale, cannot ask for declaration of his title even on the ground that he remained in possession of the property for more than 12 years period and contending that his possession is adverse to the real owner. The Apex Court said in the above two judgments that possession of such person cannot be adverse and he cannot set up the plea of adverse possession. Therefore, in my view the trial court has fallen into error in declaring the title of the plaintiff holding that he perfected his title to the schedule mentioned property by adverse possession against the defendants 1 and 2 who are the real owners and defendants 3 and 4 who are the subsequent purchasers."

(b) in Roop Singh (dead) through LRs. V. Ram Singh (Dead) through LRs., wherein it is held thus: (para 7)

> "It is to be reiterated that under Section 100 of the CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure

> questions of fact while exercising its jurisdiction under Section 100, CPC. That apart, at the time of disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, fact findings Courts after appreciating evidence held that defendant entered into the possession of the premises as a batai, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by two Courts below were based on proper appreciation of evidence and material on record and there was no perversity, illegality or irregularity in those findings. If the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. (Re : Thakur Kishan Singh (Dead) v. Arvind Kumar, (1994) 6 SCC 591 : (1994 AIR SCW 4082 : AIR 1995 SC 73)). Hence, the High Court ought not to have interfered with the findings of fact recorded by both the Courts below."

(c) in Achal Reddi v. Ramakrishna Reddiar & others, wherein it is held thus:

> "The well-settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well-recognised policy of law that possession is never considered adverse if it is referable to a lawful title."

(d) in *Anathula Sudhakar v. P.Buchi Reddy (dead) by LRs. & others,* wherein it is held thus: (para 15)

> "In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a

> land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.”

As seen from Exs.A14 to A20, name of father of the plaintiffs and the defendant were shown as the persons in possession of the property. The evidence of P.W.1 would go to show that plaintiffs’ father alone was in possession of the property and that when the defendant tried to interfere with the possession, he lodged a complaint with police and gave representation to the revenue officials. D.W.1 has not stated that to the knowledge of the true owners prior to 1989, he was in possession and enjoyment of the property and thereafter the plaintiffs and their father knew about his possession. In the absence of any knowledge to the real owners, the alleged possession of the defendant, however long, cannot be adverse to the plaintiffs. Further, it is the specific case of the defendant that he is in possession of the property by virtue of an agreement of sale. The plea of adverse possession is not available to the defendant when he claims to have inducted into possession in pursuance of an agreement of sale. Therefore, the plea of adverse possession is not available to the defendant. Further, the defendant failed to establish that he was in continuous and uninterrupted possession of the property to the knowledge of the true owner. Accordingly, the point is answered against the appellant.

<u>POINT No.2:</u> Whether the plaintiffs are entitled for grant of permanent injunction?

36. The evidence of P.Ws.1 to 3, coupled with the recitals in Exs.A4, A5 and A6, would clearly go to show that the defendant tried to interfere with the possession of the plaintiffs without there being any right, title or interest over the suit schedule land. When the plea of adverse possession is not established, then the plaintiffs are entitled to consequential relief of perpetual injunction. Further, on the complaint lodged by the defendant, Ex.B3-First Information Report was registered, which would go to show that the plaintiffs occupied the plaint schedule property and therefore police registered a case.

That means the plaintiffs were in possession and enjoyment of the property by the date of Ex.B3. Since the mutation was effected in the revenue records in the name of the plaintiffs as possessors of the plaint schedule property, they are deemed to have been in possession of the property from 2000-2001 and therefore they are entitled to perpetual injunction. Accordingly, this point is answered against the appellant.

POINT No.7: To what relief ?

37. In the result, the appeal fails and is, accordingly, dismissed with costs. Miscellaneous Petitions pending, if any, in the appeal shall stand closed.

K.C.BHANU, J

M.SEETHARAMA MURTI, J

25.02.2015

DRK

THE HON'BLE SRI JUSTICE K.C. BHANU

AND

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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A.S.No.718 of 2006

(Per the Hon'ble Sri Justice K.C.Bhanu)

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