

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No. 191/2017**

% **27<sup>th</sup> July, 2017**

NASEEMA BEGUM ..... Appellant  
Through: Mr. Brahm S. Nagar, Advocate.

versus

MOHD JAVED & ORS. .... Respondents

**CORAM:**  
**HON'BLE MR. JUSTICE VALMIKI J. MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

**C.M. Appl. No. 26262/2017 (for exemption)**

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

**RSA No. 191/2017**

1. By this Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) the defendant in the suit impugns the concurrent judgments of the courts below; of the trial court dated 26.10.2012 and the first appellate court dated 27.2.2017;

whereby the suit of the respondents/plaintiffs for injunction has been partly decreed and the appellant/defendant has been restrained from selling, alienating or creating third party interest in the first floor of the suit property. Rights were claimed by the respondents/plaintiffs in both first and second floors. The number of the suit property as per the plaint is the property 7503-7506, Kasabpura, Sadar Bazar, Delhi. The disputed portion is shown in red colour in the site plan. Respondents/plaintiffs claimed ownership of the suit property in terms of a registered Gift Deed dated 11.6.1973 executed by the erstwhile owner Mohd. Yasin in favour of the predecessor-in-interest of the respondents/plaintiffs Mohd. Ismail. Mohd. Ismail was the father of the respondents/plaintiffs. The gift deed was proved before the trial court as Ex.PW1/2. In terms of the gift deed the respondents/plaintiffs claim to have become the owner of the disputed portion comprising of the first floor and the second floor of the suit property and therefore claimed injunction against the appellant/defendant from selling, alienating, etc. the suit property and which was in possession of the appellant/defendant.

2. The appellant/defendant contested the suit and denied the execution of the gift deed by Mohd. Yasin in favour of Mohd. Ismail. Appellant/defendant pleaded that it was the appellant/defendant who was the sole owner of the entire property No. 7503-7506 Kasabpura, Sadar Bazar, Delhi. Appellant/defendant claimed to have become owner of the suit property on account of a bequest by an oral gift deed of half portion (west side portion) of the complete property in her favour. Appellant/defendant also claimed that late Mohd. Yasin bequeathed the other half portion (east side portion) of the subject property to the appellant/defendant by virtue of a duly registered Will dated 15.9.1976.

3. Before the trial court the respondents/plaintiffs proved the Gift Deed dated 11.6.1973 and which was exhibited as Ex.PW1/2 in terms of the statement of the attesting witness to the gift deed, Mohd. Shafi who deposed as PW-2. Appellant/defendant though had relied upon the Will said to have been executed by Mohd. Yasin, however, the trial court held that the said Will dated 15.9.1976 relied upon by the appellant/defendant is held not to be proved because the appellant/defendant did not summon any attesting witness to the Will.

At least one attesting witness is required to prove the Will in view of Section 68 of the Indian Evidence Act, 1872. Trial court, however, instead of decreeing the suit with respect to the entire red colour portion in the site plan which comprised of the first floor and the second floor of the suit property, decreed the suit for injunction only with respect to the first floor portion inasmuch as the gift deed Ex.PW1/2 as per the finding of the trial court pertained only to the first floor portion and not the second floor portion. Suit was dismissed so far as the relief of injunction was claimed with respect to the second floor portion shown in the site plan filed with the plaint.

4. I do not find any illegality whatsoever in the concurrent judgments of the courts below, and no substantial question of law arises, inasmuch as, the respondents/plaintiffs proved the registered gift deed executed by Mohd. Yasin in favour of their predecessor/father Mohd. Ismail and the appellant/defendant failed to prove the Will allegedly executed in her favour dated 15.9.1976 by late Mohd. Yasin. No substantial question of law arises and, in fact, the judgments of the courts below are completely as per the facts found on the basis of evidence led by the parties.

5(i). Learned counsel for the appellant/defendant argued that the suit for injunction was not maintainable and relied upon the judgment passed by this Court in the case of ***Lakhmi Chand and Ors. Vs. Karan Singh and Anr.***, in RSA No. 346/2015 decided on 5.10.2016. It is argued that the judgment in ***Lakhmi Chand (supra)*** relies upon the judgment of the Supreme Court in the case of ***Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others (2008) 4 SCC 594*** and therefore it must be held that simplicitor suit for injunction without filing a suit for declaration of title by the respondents/plaintiffs is not maintainable.

(ii) I cannot agree with the argument urged on behalf of the appellant/defendant, inasmuch as, in the case of ***Lakhmi Chand (supra)*** the plaintiff claimed injunction from being dispossessed from the suit property, and there were serious questions of title which were in issue and parties went to trial on this issue, as also whether the plaintiff was or was not in possession. This Court in the case of ***Lakhmi Chand (supra)*** gave a finding that the defendant in the suit was found in possession and not the plaintiff and therefore held that injunction could not be granted to the plaintiff in the suit. This Court

in the case of *Lakhmi Chand (supra)* while relying upon the judgment in the case of *Anathula Sudhakar (supra)* has held that once the plaintiff is not in possession there did not arise issue of grant of injunction to such a plaintiff from being dispossessed.

(iii) This Court also held in *Lakhmi Chand's* case (*supra*) by placing reliance upon the ratio of the judgment of the Supreme Court in the case of *Anathula Sudhakar (supra)* that where the parties proceeded on the basis of title being in issue and accordingly the case is contested by leading evidence by the respective parties then the issue of title is very much in issue and can be decided by the civil court. The relevant observations of the judgment in the case of *Lakhmi Chand (supra)* are contained in paras 5 to 9 and which paras read as under:-

5. The relevant issue which is called upon for decision as per the arguments urged on behalf of the parties before this Court is the issue no.5. Issue no.5 is the issue with respect to entitlement of the appellants/plaintiffs for injunction with respect to the suit property and which head of injunction would have within its hold two ingredients, one as to whether the appellants/plaintiffs are the owners of the suit property and second as to whether the appellants/plaintiffs are in possession of the suit property as on the date of the suit. It is these two ingredients and aspects which are called for decision in the present Regular Second Appeal.

6. Before turning to these two aspects to be decided, the law with respect to grant of injunction, pleading possession and ownership of an immovable property, is required to be noted and which is exhaustively stated in the judgment of the Supreme Court in the case of *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others (2008) 4 SCC*

594, and the relevant paras of which judgment are paras 13 to 21, and the same read as under:-

“13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction

is dismissed, where the suit raised only the issue of possession and not any issue of title.

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.

16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

17. There is some confusion as to in what circumstances the question of title will be directly and substantially in issue, and in what circumstances the question of title will be collaterally and incidentally in issue, in a suit for injunction simpliciter. In *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari* Madras High Court considered an appeal arising from a suit for possession and injunction. The defendant contended that the plaintiff had filed an earlier suit for injunction which was dismissed, and therefore the plaintiff was precluded from agitating the issue of title in the subsequent suit, being barred by the principle of res judicata. It was held that the earlier suit was only for an injunction (to protect the standing crop on the land) and the averments in the plaint did not give rise to any question necessitating denial of plaintiff's title by the defendant; and as the earlier suit was concerned only with a possessory right and not title, the subsequent suit

was not barred. There are several decisions taking a similar view that in a suit for injunction, the question of title does not arise or would arise only incidentally or collaterally, and therefore a subsequent suit for declaration of title would not be barred.

18. On the other hand, in *Sulochana Amma v. Narayanan Nair* this Court observed that a finding as to title given in an earlier injunction suit, can operate as res judicata in a subsequent suit for declaration of title. This was on the premises **that in some suits for injunction where a finding on possession solely depended upon a finding on the issue of title, it could be said that the issue of title directly and substantially arose for consideration**; and when the same issue regarding title is put in issue, in a subsequent title suit between the parties, the decision in the earlier suit for injunction may operate as res judicata. This Court observed: (SCC p.20, para 9)

“9. Shri Sukumaran further contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata.”

This was reiterated in *Annaimuthu Thevar v. Alagammal*.

19. This Court in *Sajjadanashin Sayed Md. B.E. Edr. v. Musa Dadabhai Ummer* (at SCC pp.362-63, para 24) noticed the apparent conflict in the views expressed in *Vanagiri* and *Sulochana Amma* and clarified that the two decisions did not express different views, but dealt with two different situations, as explained in *Corpus Juris Secundum* (Vol.50, para 735, p.229):

“Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title.”

20. In *Vanagiri*, the finding on possession did not rest on a finding on title and there was no issue regarding title. The case related to an agricultural land and raising of crops and it was obviously possible to establish by evidence who was actually using and cultivating the land and it was not necessary to examine the title to find out who had deemed possession. If a finding on title was not necessary for deciding the question of possession and grant of injunction, or where there was no issue regarding title, any decision on title given incidentally and collaterally will not, operate as res judicata. On the other hand, the

observation in *Sulochana Amma* that the finding on an issue relating to title in an earlier suit for injunction may operate as res judicata, was with reference to a situation where the question of title was directly and substantially in issue in a suit for injunction, that is, where a finding as to title was necessary for grant of an injunction and a specific issue in regard to title had been raised. It is needless to point out that a second suit would be barred, only when the facts relating to title are pleaded, when a issue is raised in regard to title, and parties lead evidence on the issue of title and the court, instead of relegating the parties to an action for declaration of title, decides upon the issue of title and that decision attains finality. This happens only in rare cases. Be that as it may. We are concerned in this case, not with a question relating to res judicata, but a question whether a finding regarding title could be recorded in a suit for injunction simpliciter, in the absence of pleadings and issue relating to title.

21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

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

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

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

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide

upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.” (emphasis is mine)

7. A reading of the aforesaid paragraphs of the judgments of the Supreme Court in *Anathula Sudhakar's* case (*supra*) shows that a person who is in possession can protect his possession against the world at large except the true owner. As against the true owner the equitable remedy of injunction is not to be granted in favour of a plaintiff who is not in lawful possession. In a suit where a plaintiff only claims injunction, but where title of a plaintiff is seriously disputed and which requires examination of complex questions of law and facts, then a simplicitor suit for injunction will not lie and it would be necessary for the plaintiff to seek a declaratory relief with respect to the ownership of the suit land before seeking injunction with respect thereto. The Supreme Court has also however held that if a suit is simplicitor for injunction but the parties proceed on the basis of title itself being in issue and accordingly the case is contested by leading evidence by the respective parties, then in such a case the simplicitor suit for injunction can be said to include the aspect of title which has to be decided. Thus, in any suit for injunction filed with respect to an immovable property where title of the suit property is disputed, courts have to examine the aspect of title which is directly in issue and it is only if the plaintiff is found to have title to the suit property, only then the plaintiff will be entitled to injunction, of course provided that the plaintiff is also found to be in actual physical possession of the suit property at the time of filing of the suit.

8. So far as the aspect of title is concerned in the present case, counsel for the appellants/plaintiffs has conceded that the appellants/plaintiffs have not proved their title to the suit property, and therefore, the appellants/plaintiffs are seeking relief only on the basis of their settled and lawful possession of the suit property. I may note that even if the title was in issue as the issue no.5 covers it and parties have led evidence on the issue of title, it is seen that appellants/plaintiffs have led no documentary evidence whatsoever to show their ownership/title of the suit land. Obviously, oral testimony cannot confer ownership/title of the suit land on the appellants/plaintiffs and appellants/plaintiffs had necessarily to prove, ordinarily by unimpeachable documentary evidence, that the suit property fell to the share of their grandfather Sh. Chhajan on there being an oral partition and from which Sh. Chhajan the appellants/plaintiffs have inherited the suit property being his grandsons. The only document which

was filed by the appellants/plaintiffs was a revenue record of the year 1977-78, and which document was never proved because this document was only a photocopy and not a certified copy of the revenue record of 1977-78. This document has not been exhibited but is only marked as Mark A even in the affidavit by way of evidence filed on behalf of the appellants/plaintiffs of their witness PW-1/Sh. Raghbar Singh/plaintiff no.2. Even for the sake of arguments, if we take the revenue record of 1977-78 as proved and exhibited document, it is seen that even in this document, the title of the suit land is admittedly shown to be of Smt. Fatto mother of the respondent no.1/defendant no.1 and there is no ownership shown of the suit property of the appellants/plaintiffs or their predecessors-in-interest/ancestors. Therefore, it is clear that appellants/plaintiffs have miserably failed to prove their title to the suit land. Once appellants/plaintiffs failed to prove their title to the suit land, no relief of injunction can be granted holding that the appellants/plaintiffs are the owners of the suit land, and in fact, in view of the paras of the judgment in *Anathula Sudhakar's* case (*supra*) quoted above, injunction cannot be granted in favour of a person/plaintiff to protect his possession if such person is in wrongful possession, and therefore, injunction cannot be granted to a person in unlawful possession and against a rightful owner, and this is because injunction is a discretionary relief and cannot be granted to an illegal occupant. Therefore, once appellants/plaintiffs have miserably failed to prove their title to the suit land, firstly they are not entitled to any injunctive relief by declaring that the appellants/plaintiffs are the owners of the suit property and secondly the appellants/plaintiffs cannot also be granted injunction against the respondent no.1/defendant no.1 who not only is the owner of the suit property as discussed below, but also that respondent no.1/defendant no.1 is found to be in possession of the suit land and not the appellants/plaintiffs.

9. So far as the aspect of injunction being granted to the appellants/plaintiffs against the respondent no.1/defendant no.1 from dispossessing the appellants/plaintiffs from the suit property is concerned, it is seen that as per para 15 of the judgment in *Anathula Sudhakar's* case (*supra*), appellants/plaintiffs will have to be in lawful possession of the suit property on the date of the suit before being entitled to grant of injunction against dispossession. Let us therefore examine as to whether the appellants/plaintiffs have proved their possession of the suit property on the date of filing of the suit or in any case in and around the date of filing of the suit.”

6. Therefore, in my opinion, the argument of the appellant/defendant is misconceived that the suit for injunction as

claimed is not maintainable because parties in this case proceeded on the basis that title was in issue and thus the respondents/plaintiffs had proved the gift deed Ex. PW1/2.

7. Learned counsel for the appellant/defendant then argued that the relief granted to the respondents/plaintiffs should be confined only to the first floor of the entire property, and with respect to which there is no doubt because this is so specifically held and observed by the trial court in paras 13 and 14 of its judgment, and the judgment of the trial court has been simply upheld by the first appellate court in terms of its judgment dated 27.2.2017 dismissing the first appeal filed by the appellant/defendant.

8. There is no merit in this second appeal. No substantial question of law arises. Dismissed.

**JULY 27, 2017**

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**VALMIKI J. MEHTA, J**