

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

+ **RFA No. 982/2016**

% **13th August, 2018**

DHANI RAM @ KALE & ANR. Appellants

Through: Mr. Shalabh Gupta, Advocate
(Mobile No. 9818681699).

versus

MOHD FAISAL & ANR. Respondents

Through: Mr. Rakesh Tikku, Sr. Advocate
with Mr. Sandeep Kumar, Mr.
Sanjeeve Kohwal and Mr.
Harish K. Mathur, Advocate
(Mobile No. 9810354910).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendants in the suit impugning the Judgment of the Trial Court dated 2.7.2016 by which the trial court has decreed the suit for recovery for possession and *mesne* profits filed by the respondents/plaintiffs.

2. The disputes pertain to the portions on the ground floor and the first floor of the property bearing no. 808, Ward No. X, Bazar Kamra Bangah, Chandni Mahal, Darya Ganj, Delhi, and as shown in red colour in site plan filed with the plaint. Respondents/plaintiffs claim to be owners of the suit property and had filed the subject suit against the appellants/defendants by pleading that actually the father of the appellants/defendants Sh. Ram Krishan was a tenant in the suit property and thereafter the appellants/defendants came into possession of the suit property. it was further pleaded that the appellants/defendants have wrongly denied any claim of tenancy of their father Sh. Ram Krishan or themselves, and accordingly for this stand of appellants/defendants, the earlier suit filed by the respondents/plaintiffs for injunction was decided as per the Judgment dated 13.12.2011, holding that there was no tenancy, but that the respondents/plaintiffs were the owners of the suit property and that the claim of appellants/defendants to be owners of the suit property by adverse possession was false and was thus rejected and appellants/defendants were enjoined from transferring possession or creating any third party rights in the suit property. Since the

appellants/defendants failed to vacate the suit property, inspite of the earlier Judgment dated 13.12.2011 passed by the Court of Ms. Swati Katiyar, Civil Judge III, Tis Hazari Courts, Delhi, holding the respondents/plaintiffs to be the owners of the suit property and that the appellants/defendants had no right to remain in possession of the suit property, hence the subject suit for possession and *mesne* profits was filed.

3. Appellants/defendants contested the suit and once again denied the ownership of the respondents/plaintiffs. Once again the respondents/plaintiffs claimed ownership of the suit property by adverse possession. The suit was therefore prayed to be dismissed.

4. In the present suit, the following issues were framed by the trial court and parties led evidence, and these aspects are recorded in paras 9-11 of the judgment and these paras read as under:-

- “9. From the pleadings of the parties following issue are framed:
1. Whether the suit is within the period of limitation?
OPP
 2. Whether the suit is barred by the Order 2 Rule 2 of CPC as pleaded in the preliminary objection no.2 of the WS?
OPD
 3. Whether the court has no pecuniary jurisdiction to entertain the present suit as pleaded in the preliminary objection no.3 of the WS? OPD

4. Whether the plaintiff is entitled for the decree of possession as prayed for in the plaint? OPP
 5. Whether the plaintiff is entitled for the decree of mesne profit as prayed for in the plaint? OPP
 6. Whether the plaintiff is entitled for the interest? IF yes, at what rate and for which period? OPP
 7. Relief.
10. Plaintiff led evidence and examined Sh. Suresh Kumar, Jr. Judicial Assistant as PW-1. He has proved the copy of the Will dated 10.10.1980 as Ex.PW1/1 and certified copy of judgment and decree dated 13.12.2011 Ex.PW1/2. PW-2 Mohd. Faisal, S/o Late Shri Rauf Ali examined himself as PW2 and he tendered his examination in chief by way of affidavit which is Ex.PW2/A. He has relied upon site plan Ex.PW2/1, Certified copy of the order dated 03.09.1960 Ex.PW2/2, certified copy of inspection form of MCD Ex.PW2/3, certified copy of order dated 17.12.1968 of Hon'ble High Court of Delhi Ex.Pw2/4, Show cause notice dated 02.11.2013 issued by MCD is Ex.PW2/5, copy of sale deed dated 30.05.2000 is Ex.PW2/6(OSR) and other sale deed dated 30.05.2000 is Ex.PW2/7 (OSR). He has also relied upon copy of Will dated 13.12.2011 already Ex.PW1/2.
11. To rebut the case of the plaintiff, defendant examined himself as DW-1 and tendered his evidence by way of affidavit as Ex.DW1/A.”
5. In my opinion this appeal can be and is liable to be dismissed on the sole ground of the application of doctrine of *res judicata* inasmuch as the issue of denial by the appellants/defendants of ownership of the respondents/plaintiffs stands concluded against the appellants/defendants by the earlier Judgment dated 13.12.2011. In this earlier judgment the claim of the appellants/defendant of being owners of the suit property by adverse possession was also held

against the appellants/defendants. The relevant paras in the earlier Judgment dated 13.12.2011 read as under:-

“Issue No.2: Whether the defendants are the owners of the suit property? OPD

Defendants’ state that their predecessor in interest Late Sh. Ram Kishan and his father were the trespassers in the suit property and over the years had acquired ownership in the suit property through adverse possession which was continuous, hostile and adverse to its true owners whosoever they may be. After death of Sh. Ram Kishan, defendants state that they became owners of the suit property being his legal representatives. Plaintiffs have denied that the defendants or Late Sh. Ram Kishan had adverse possession in the suit property.

Now, the law with regard to adverse possession is well settled.

In ***Annasaheb Bapusaheb Patil v. Baldwin Babusaheb Pati, AIR 1995 SC 895*** Hon’ble Supreme Court while dealing with a case of adverse possession opined that, *“adverse possession’ means a hostile assertion i.e a possession which is express or implied and with continuity of title of the true owner.... A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”*

In ***Rama Kanta Jain v. M.S.Jain, AIR 1999 Delhi 281***, it was held that, a party who claims title by adverse possession to a property belonging to someone else, must show the following:

- (i) He has been in occupation of the disputed property for more than 12 years without interruption;
- (ii) his possession was to the exclusion of all the persons; and
- (iii) the said possession must be open and hostile to the true owner.
- (iv) the other classical requirement of adverse possession is that it should be *nec vi nec clam nec precario* i.e for the perfection of title and possession required must be adequate in continuity, in publicity and extent.

In ***T.Anjanappa and Others Vs. Somalingappa and Another, (2006) 7 SCC 570***, it was held:

“12. The concept of adverse possession contemplates a hostile possession i.e a possession which is expressly or impliedly in denial of the title of the true owner.

Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that 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. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and in aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.”

In **Govindammal V. R. Perumal Chettiar & Ors., 2006(11) SCALE 452**, it was held:

“....In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case....”

Recently, Hon'ble Supreme Court in **State of Haryana v. Mukesh Kumar and ors., 2011 X AD (SC) 337**, held that, “35. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owners. It is for him to clearly plead and establish all facts necessary or establish adverse possession....”

Thus, the possession of a person must be adverse to that of the true owner. However, in the present case, defendants are not even aware about the true owner of the suit property.

DW1 in his examination by way of affidavit Ex.D-1 states at page 3 paragraph 3, “It is further submitted that the possession of Sh. Ram Kishan qua the suit property was continuous, uninterrupted, hostile, adverse to the true owners of the suit property **whosoever may be** as well as to the world at large.”

In his cross examination DW1 states, “I do not know who is the registered owner of the suit property in M.C.D. My father might have enquired from the M.C.D regarding the registered owner of the suit property. I myself also have not

inquired from the M.C.D. about the registered owner of the suit property.”

Thus, defendants have no knowledge about the true owner of the suit property. When the defendants have no knowledge about the true owner of the suit property, it is inexplicable as to how the defendants can claim that they are in adverse possession of the suit property. Defendants have also not shown as to in what manner they have been maintaining their adverse possession over the suit property. There is nothing on record to show that the true owner of the suit property had ever claimed the possession of the suit property through Court or otherwise and the defendants were able to resist the same. The fact that the true owner of the suit property had not approached the defendants asking them to vacate the suit property itself shows that the defendants were residing in the suit property with the acquiescence of the true owner and not through adverse intention. Merely by saying that a person was in adverse possession of a property is not enough. Adverse possession has to be established by clear and unequivocal evidence. However, the defendants have not led any evidence to establish their adverse possession over the suit property. The issue accordingly stands decided against the defendants and in favour of the plaintiff.

XXXXX

XXXXX

Issue no. 5: Whether the plaintiff is entitled for the relief of permanent injunction as prayed for in the plaint? OPP

The onus of proving this issue was upon the plaintiffs. Plaintiffs claim that they are the co-owners of the suit property. It is submitted that Late Sh. Jaffar Ali was the co-owner of the suit property and he gifted his share to his daughter Ms. Nasri Begum. Ms. Nasri Begum filed a suit for declaration before Hon'ble High Court against her father and vide judgment dated 17.12.1968, the suit was decreed in favour of Mst. Nasri Begum. Mst. Nasri Begum executed a Will dated 10.08.1980 bequeathing her share in the property in question in favour of her son Sh. Aamir Manzoor who sold his 2/7th undivided share in the suit property to plaintiff no. 2, Mrs. Razia Sultan, Mr. Nusrat Ali and Mr. Ishrat Ali vide sale deeds dated 30.05.2000.

Defendants allege that the sale deeds relied upon by the plaintiffs does not describe the extent of the suit property and thus, cannot be said to be creating any right, title or interest in the plaintiffs. It is further submitted

that Sh. Amir Manzoor himself had no right, title or interest in the suit property and thus, could not execute any sale deed as alleged.

To prove this issue, plaintiffs have placed on record, Ex.PW1/8 which is the certified copy of judgment dated 17.12.1968 passed by Hon'ble High Court of Delhi, whereby Mst. Nasri Begum was declared as owner of the 2/7th share in the suit property. Now, there is no dispute that Sh. Amir Manzoor is the son of Mst. Nasri and thus, he is one of the legal heirs of Mst. Nasri. Plaintiffs have also placed on record Will Ex.PW1/6 to establish that the suit property was bequeathed by Mst. Nasri in favour of her son. Ex. PW1/2 and Ex.PW1/3 are the certified copies of the sale deeds dated 30.05.2000 which clearly states that Sh. Amir Manzoor had sold his undivided share in the suit property to Plaintiff no.2, Mrs. Razia Sultan, Mr. Nursat and Mr. Ishrat. The fact that the suit property is undivided property stands established from Ex.PW1/7.

Further, PW1 in his cross examination states, "Nusrat Ali Nasri is grandson of brother of my grandfather. Similarly Ishrat Ali Nasri is also the grandson of brother of my Grandfather. Both are real brothers. Memoona Sultan is sister of my father. Razia Sultan is also sister of my father. I do not know whether Nusrat Ali Nasri and Ishrat Ali Nasri has executed any general power of attorney in my favour authorizing me to institute the present suit on their behalf. I am also one of the co-owner on that basis I have filed the present suit... I have not filed any document before this Hon'ble Court showing myself as one of the co-owner of the suit property. Again said I have filed the show cause notice issued by the MCD in my name..... Besides Sh. Jafar Ali, my grandfather namely Sh. Nasir Ali and Sh. Sardar Ali were the co-owner of the suit property..."

So, the fact that the ancestors of plaintiff no. 1 are the co-owners of the suit property which is undivided as on date is sufficient to give the status of co-owner to plaintiff no. 1.

Furthermore, PW2 in his examination states that as per the records brought by him i.e. Ex.PW2/1, Sardar Ali, Zafar ALi, Nishar Ali and Smt. Kulsum Begum are the owners of the suit property. In his cross examination, PW2 states that the names of persons mentioned as owners in the records is on the basis of the inspection done by the inspector stating that the persons were in occupation of the premises in question. PW2 further deposed that there was no document of ownership in the file brought by him. Thus, Ex. PW2/1 fortifies to some extent the claim of the plaintiffs that they and their ancestors were the owners of the suit property.

From the documents brought on record and evidence led, the plaintiffs have been able to establish that they are the co-owners of the suit property

and since the defendants themselves trace their rights as trespassers in the suit property, therefore, the plaintiffs are entitled to the relief of permanent injunction against the defendants to protect their property. On balance of probabilities, the issue stands decided in favour of the plaintiffs and against the defendants (emphasis in mine)

6. I may note that the decision in the suit for injunction as regards title is very much permissible once parties are aware of this aspect and after framing of issues parties lead evidence on this aspect. This is so held by the Supreme Court in the judgment in the case of *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by Lrs and Others (2008) 4 SCC 594*, and following the ratio of the Supreme Court judgment I have accordingly so held in the judgment in the case of *Naseema Begum Vs. Mohd. Javed and Ors.*, in RFA No.191/2017 decided on 27th July, 2017. The relevant paras of the judgment in the case of *Naseema Begum (supra)* read as under:-

“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. At this stage, I would like to note the vehement and passionate argument urged on behalf of the respondents/plaintiffs that actually the appellants/defendants are no longer in possession of the suit property and they have transferred possession of the suit property to third party strangers and only such third party strangers, who are speculators of properties, are contesting the present appeal. For this purpose reliance is placed by learned senior counsel for the respondents/plaintiffs upon the Right to Information query raised to

this Court to show that as regards this appeal the persons who are prosecuting the same are not the appellants/defendants but one Mr. Asim son of Mohd. Saeed and one Mr. Abdul Raheem son of Mr. Abdul Wahid.

8. It is argued that the appellants/defendants must be severely dealt with by this Court because the aforesaid third persons are not only are interlopers, but are dishonest people who are entering into litigation by wrongly taking over possession of property which is subject matter of present litigation. It is argued by respondents/plaintiffs that if such actions of the interlopers are permitted, and which is not infrequent in a city of Delhi, there will be considerable amount of speculation and gambling in litigation by dishonest persons. I completely agree and I am therefore passing the order of costs in the peculiar facts of the present case as stated below.

9. After some arguments, a pass over was sought on behalf of the appellants/defendants as to whether appellants/defendants instead of pressing the present appeal would seek time to vacate the suit premises and respondents/plaintiffs can give up their claim for *mesne* profits to the extent the same are deposited in this Court,

however, the counsel for the appellants/defendants on instructions after a pass over states that the appeal be heard and disposed of on merits.

10. This appeal is dismissed with costs of Rs.3,00,000/-, out of which Rs.1,50,000/- will be paid to the respondents/plaintiffs and balance Rs.1,50,000/- shall be deposited with the website www.bharatkeveer.gov.in within a period of four weeks from today. Costs will be jointly paid by the appellants/defendants and interlopers stated above who are stated to be in possession of the suit property namely Mr. Asim son of Mohd. Saeed and Mr. Abdul Raheem son of Abdul Wahid. I make it clear that this Court has only observed with respect to alleged possession of Mr. Asim son of Mohd. Saeed and Mr. Abdul Raheem son of Abdul Wahid as a fact, but it is made clear that such persons have no legal right, title or interest whatsoever to remain in possession of the suit property.

11. The impugned judgment and decree passed in the suit is confirmed in this appeal. The judgment and decree in the present suit will be binding against not only the appellants/defendants but also all other persons who are found to be in possession of the suit property

being Mr. Asim son of Mohd. Saeed and Mr. Abdul Raheem son of Abdul Wahid.

13. The amount of *mesne* profits deposited by the appellants/defendants in this Court be released to the respondents/plaintiffs along with accrued interest and it is further made clear that whatever amounts have been paid by the appellants/defendants to the respondents/plaintiffs under interim orders of this Court, will be taken by the respondents/plaintiffs towards appropriate satisfaction of the claim of the respondents/plaintiffs for the claim of *mesne* profits towards the *pendente lite* period of this appeal, as regards possession of the suit property.

AUGUST 13, 2018

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VALMIKI J. MEHTA, J