

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

+ **RFA No. 786/2017**

% **19th December, 2018**

VIKAS WADHWA Appellant

Through: Mr. Rajesh Banati and Mr.
Ankit Banati, Advocates
(Mobile No. 9810294894).

versus

PARDEEP KUMAR & ORS Respondents

Through: Mr. Brahmanand Gupta,
Advocate for R-4 to 7 (Mobile
No. 9899194195).
Mr. Ajay Kumar, Advocate for
R-8 (Mobile No. 9891454997).

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

To be referred to the Reporter or not? **YES**

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 plaintiff in the suit impugning the Judgment of the trial court dated 04.05.2017 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of possession of the suit property bearing no. D-213, JJ Colony, Shakur Pur, Delhi (*hereinafter* 'suit property').

2(i). The facts of the case are that the appellant/plaintiff pleaded that he had purchased the suit property from the owner/seller- Smt. Vaikunthi Devi by usual Documentation dated 26.04.2001 which included the Agreement To Sell, Power Of Attorney, Receipt, Possession Letter, etc. The Power Of Attorney and the Will were registered before the Sub-Registrar.

2(ii). It was pleaded that the original owner/allottee was Sh. Lachoo Ram who sold the suit property to Smt. Vainkunthi Devi on 19.10.1987 and thereafter the appellant/plaintiff purchased the suit property. On purchase of the suit property, Smt. Vainkunthi Devi asked the appellant/plaintiff to create a tenancy in her favour and therefore a tenancy was created by the execution of a Rent Deed in favour of the husband of Smt. Vainkunthi Devi, namely, Sh. Prabhu Dayal with respect to the third floor and one shop on the ground floor of the suit property.

2(iii). The appellant/plaintiff pleads that in July, 2005 when he went to the suit property, he found that some persons were in illegal possession, and who were dispossessed by the police after a police complaint was filed by the appellant/plaintiff. Once again, when the

appellant/plaintiff visited the suit property in 2006, three persons, namely, Sh. Shanker Lal, Sh. Pardeep Kumar and Sh. Yogendir Tyagi threatened the appellant/plaintiff, and therefore, the subject suit was filed as respondent nos. 4 to 8/defendant nos. 4 to 8 were found to be in possession of the suit property.

3. It is noted that respondent nos. 1 to 3/defendant nos. 1 to 3 were proceeded against *ex parte* in the trial court as they failed to appear after service by publication. They were proceeded *ex parte* vide the trial court order dated 03.02.2014.

4(i). The suit was contested by respondent nos. 4 to 7/defendant nos. 4 to 7 who filed a joint written statement. It was pleaded that respondent no. 5/defendant no. 5 had got executed in his favor a Power of Attorney on 19.07.2005 for the entire property and the sale consideration was paid to Smt. Vainkunthi Devi and that he had received possession from Smt. Vainkunthi Devi. It was also pleaded that Smt. Vainkunthi Devi had sold one shop on the ground floor to respondent no. 7/defendant no. 7 in the year 2008 and another shop to respondent no. 6/defendant no. 6 on 30.03.2010 and

possession was handed over to respondent nos. 6 and 7/defendant nos. 6 and 7.

4(ii). Respondent no. 8/Defendant no. 8 separately filed his written statement and took up the same preliminary objections as the other respondent nos. 4 to 7/defendant nos. 4 to 7. He also pleaded that he was a *bona fide* purchaser of one shop bearing no. 2 on the ground floor. Respondent no.8/Defendant no. 8 claimed his title through Smt. Anita, Smt. Omwati and ultimately Sh. Pardeep who is said to have purchased from Smt. Vainkunthi Devi on 19.10.1987.

5. After the pleadings were complete, the trial court framed the following issues:-

- “1. Whether the plaintiff is entitled to decree of possession of property no. 213, JJ Colony, Shakur Pur Delhi-34 against the defendants? OPP.
2. Whether the plaintiff is entitled to a decree of permanent injunction against the defendants? OPP.
3. Whether the plaintiff is entitled to a decree of damages with interest, pendente lite and future, if so, at what rate and for what period? OPP.
4. Relief.”

6. It is noted that whereas the appellant/plaintiff led evidence, no evidence has been led on behalf of the

respondents/defendants. This is recorded in para 9 of the impugned, and this para reads as under:-

“9. At the time of trial, the plaintiff has examined himself as PW-1, Ct. Ankur of Complaint Branch, Ashok Vihar as PW-2, HC Jai Prakash of P.S Subhash Place as PW-3, Sh. Ravinder Kumar, LDC from office of SubRegistrar as PW-4 (his testimony could not be completed) and Sh. Rama Shankar, UDC, DUSIB North Zone B Shakur Pur as PW-5. On the other hand, no evidence has been led on behalf of defendants.”

(Underlining Added)

7. The trial court has dismissed the suit by placing reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. v. State of Haryana and Anr., (2012) 1 SCC 656*** that documents such as agreement to sell, power of attorney, cannot create rights in an immovable property. The trial court has also held that appellant/plaintiff failed to prove that any rent was paid by Smt. Vainkunthi Devi or that Smt. Vainkunthi Devi was a tenant. Further, the trial court held that the rent agreement which was proved as Ex. PW1/2 was in favour of one Sh. Prabhu Dayal and therefore Smt. Vainkunthi Devi could not be a tenant, although it is noted above that Sh. Prabhu Dayal is admittedly the husband of Smt. Vainkunthi Devi. The trial court has also held that since there was a dispute with regard to the title, the appellant/plaintiff ought to have sought the

relief of declaration of his title in view of the judgment of the Supreme Court in the case of *Anathula Sudhakar v. P. Buchi Reddy (Dead) by Lrs and Others*, (2008) 4 SCC 594. Accordingly, the trial court dismissed the suit.

8. In my opinion, the trial court has clearly erred in dismissing the suit. Once the appellant/plaintiff led evidence and proved his rights in the suit property in terms of the Documentation dated 26.04.2001. This documentation in the entire chain was proved and exhibited before the trial court as Ex. PW1/1 (colly) and Ex. PW1/2 (colly). These documents include the entire set of original documents of allotment to the original allottee Sh. Lachoo Ram and thereafter further transfer to Smt. Vainkunthi Devi and then transfer by Smt. Vainkunthi Devi to the present appellant/plaintiff. The rent agreement in favor of Sh. Prabhu Dayal, the husband of Smt. Vainkunthi Devi, was proved as Ex. PW1/3. I may note that since the documentation in favour of the appellant/plaintiff are prior to 24.09.2001 whereafter an amendment to Section 53A of the Transfer of Property Act, 1882 was made whereby an agreement to sell could only be looked into if it was stamped and registered, therefore in this

case, the bar applicable from 24.09.2001 will not apply to the Documents dated 26.04.2001 which have been executed in favour of the appellant/plaintiff. Even the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra)*** does not bar the case of the appellant/plaintiff, and in fact this judgment supports the case of the appellant/plaintiff and the trial court has erred in observing that the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra)*** prevents it looking into the Documentation dated 26.04.2001 executed in favour of the appellant/plaintiff. I have considered these aspects of the applicability of the ratio of the judgment of ***Suraj Lamps & Industries Pvt. Ltd. (supra)*** in the case of ***Ramesh Chand v. Suresh Chand and Anr., 188 (2012) DLT 538***, and the relevant paras 1 to 3 of this judgment read as under-

“1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of ***Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC)***, and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of ***Asha M. Jain Vs. Canara Bank 94 (2001) DLT 841***. Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of ***Asha M. Jain (supra)***, and which judgment was over ruled the Supreme Court in the case of ***Suraj Lamps & Industries Pvt. Ltd. (supra)***, the matter was therefore remanded back to this Court.

2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*, it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

“12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law**. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In *State of Rajasthan v. Basant Nehata* MANU/SC/0547/2005 : 2005 (12) SCC 77 this Court held:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. **Except in cases where power of attorney is coupled with interest**, it is revocable.

The done in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.”
(emphasis supplied)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing

with the doctrine of *part performance* (para 12), an irrevocable right of a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.”

9. In my opinion, therefore, once the appellant/plaintiff has proved his rights in the suit property in terms of the Documentation dated 26.04.2001, and there is no evidence led on behalf of the respondents/defendants, there was no reason why the appellant/plaintiff should not succeed. Therefore, the trial court has erred in dismissing the suit by applying the ratio of the judgment in the case of *Suraj Lamps & Industries Pvt. Ltd. (supra)*.

10. The trial court, in my opinion, also has erred in holding that the appellant/plaintiff failed to prove any tenancy in favour Smt. Vainkunthi Devi, inasmuch as, not only the rent agreement in favor of Sh. Prabhu Dayal, husband of Smt. Vainkunthi Devi, was proved as Ex. PW1/3, and even assuming that no tenancy is proved, but once

appellant/plaintiff proved to be the owner of the suit property in terms of the Documentation dated 26.04.2001, the suit had to be decreed.

11. The trial court has also erred in placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Anathula Sudhakar (supra)* because this judgment only applies if the parties are not aware that there is an issue which is required to be decided of title to a property. Once title of a property is very much in issue, the relief of declaration is always implicit, and it is not necessary to separately pray for a specific relief of declaration. I have considered this aspect of applicability of the ratio of the judgment in *Anathula Sudhakar (supra)* in the judgment in the case of *Naseema Begum v. Mohd. Javed and Ors* in *RFA No.191/2017* decided on 27.07.2017 and 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.”

12. Therefore, the trial court has erred in dismissing the suit by applying the ratio in the case of *Anathula Sudhakar (supra)* whereas this judgment states that an issue of title is decided once parties are aware of this issue in the suit and the parties have accordingly led evidence.

13. The Ld. counsel for the respondents/defendants sought to argue that appellant/plaintiff has failed to prove the site plan of the suit property, and therefore the suit had to be dismissed, however, this argument is misconceived because Order VII Rule 3 CPC provides that a property is also capable of identification by municipal numbers, and which it is in the present case. This argument of the respondents/defendants is therefore rejected.

14. The Ld. counsel for the appellant/plaintiff does not press for the relief of *mesne* profits.

15. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 04.05.2017 is set aside. The suit of the appellant/plaintiff is decreed for

possession against the respondents/defendants with respect to property bearing no. D-213, JJ Colony, Shakurpur, Delhi. Parties are left to bear their own costs. Decree sheet be prepared.

DECEMBER 19, 2018

VALMIKI J. MEHTA, J

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