

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.Nos.1671 & 1672 of 2002

Arulmigu Velukkai Sri Azhagiya
Singaperumal Devasthanam
Rep. By its Trustees

1.A.Venkatarayalu
2.P.Ethirajulu
3.G.Sanjeevi
4.C.Poovan

.... Appellants/Plaintiffs
(in both appeals)

Vs

1.G.K.Kannan (Deceased)
2.G.K.Gopal Chettiar (Deceased)

.... Respondents 1 & 2/Defendants

3.Gajalakshmi
4.Perundevi
5.Suseela
6.Pushpa
7.Gunasundari
8.Devagi
9.Pangajam
10.Danapal
11.Kamalammal
12.Saraswathi
13.Jayaprakash
14.Barathi Ammal
15.Indira

.... Respondents (in both appeals)

(Respondents 3 to 11 are brought on record as LR's of the deceased R2 Vide Order of Court dated 18.09.2018 made in CMP.No.677 to 679/2011 in S.A.No.1671/2002 and in C.M.P. No. 680 to 682/2011 in S.A. 1672/2002)

(Respondents 12 to 15 are brought on record as LR's of the deceased R1 Vide Order of Court dated 24.10.2018 made in CMP.No.14661 to 14663/2003 in S.A.No.1671/2002 and in C.M.P. No. 14499 to 14501/2003 in S.A. 1672/2002)

Prayer in S.A.No.1671/2002 :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 15.12.2000 made in A.S.No.35 of 1991 on the

file of Sub Court, Kancheepuram, confirming a portion of the judgment and decree dated 05.4.1991 made in O.S.No.773 of 1985 on the file of the District Munsif Court, Kancheepuram.

Prayer in S.A.No.1672/2002 :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 15.12.2000 made in A.S.No.50 of 1991 on the file of Sub Court, Kancheepuram, reversing the judgment and decree dated 05.4.1991 made in O.S.No.773 of 1985 on the file of the District Munsif Court, Kancheepuram.

For Appellants : Mr.B.Jeganath
(in both appeals) for Mr.A.Jenasenan

For Respondents : Mr.Niranjan Rajagopalan
(in both appeals) for M/s.G.R.Associates [R3 to R10]
R1 & R2 [Died]
R11 to R15 [Not ready in notice]

COMMON JUDGMENT

1.1 The plaintiff is a temple and it has instituted the suit through its trustees for evicting its tenant, who is arrayed in the suit as 1st defendant, from the suit property, along with a prayer for recovery of arrears of rent. In the suit, the 1st defendant had pleaded that his brother was the title holder of the suit property. Hence, he came to be impleaded as the 2nd defendant. The prayer in the suit however, was not amended to include any relief of declaration of plaintiffs' title.

1.2. Both the defendants have filed separate written statements. As stated earlier, the 1st defendant in his written statement inter alia alleged that the plaintiffs does not have any title to the suit property. The second defendant adopted the written statement of his brother, the first defendant and added that he had purchased the property from one Ramachandran, Vide Sale Deed dated 14.08.1985.

2.1 The suit went to trial, and before the trial Court, the plaintiff has produced the certified copy of a Trust Deed dated 24.09.1907, executed by one Andalammal, who was admittedly the owner of the suit property, and this came to be marked as Ex.A5. The rent note 04.12.1957 executed as between the plaintiff and the 1st defendant was marked as Ex.A6. It was subsequently renewed Vide Ext.A-7 dated 17-09-1963. The document on the basis of which the 2nd defendant claims title came to be marked as Ex.A15 = Ex.B1, dated 27-09-1984.

2.2 Turning to the oral evidence, the trustee of the temple was examined as PW1. The first defendant did not adduce any

oral evidence, whereas the 2nd defendant examined himself as DW1. He also examined his vendor Ramachandran as DW2.

2.3 On appreciating the evidence before it, the trial Court decreed the suit as against the 1st defendant, but dismissed the suit as against the 2nd defendant since there was no prayer for declaration of plaintiff's title. The trial court was of the view that in the face of the second defendant setting up an independent title to the suit property in himself, the plaintiff ought to have amended the prayer.

3.1 Aggrieved by the decree of the trial Court, both the plaintiffs and the 1st defendant had respectively preferred separate first appeals in A.S.35 of 1991, and A.S.50 of 1991, to the extent that the said decree went against them. Both the appeals came to be heard jointly and were disposed of by a common judgment.

3.2 The first Appellate Court held that Ex.A5, which is a certified copy of the Trust Deed based on which the plaintiff claims title to the suit property, was not proved, since Sec. 90 of the Evidence Act, (which enables the Court to presume that the handwriting and the signature in any ancient document are the handwriting and signatures of the persons by who they were purported to have been written or signed), would not apply to a certified copy of the document. Hence, it dismissed the plaintiff's appeal in A.S.35/1991 and as a consequential measure, it dismissed A.S.50 of 1991 as well. This has now led the plaintiff to prefer these two second appeals.

4. The appeals are admitted on the following substantial questions of law:

'Whether the judgment and decree of the courts below is right in holding that the plaintiff ought to have filed a suit for declaration instead of filing the present possessory suit on the ground that the 2nd defendant is denying the title of the plaintiff.'

5. Arguments that both the sides advanced largely revolve around Ext.A-5, a certified copy of a registered trust deed. The document shows that a certain Andalammal had endowed the suit property along with another property for certain religious purposes connected with the plaintiff temple. Anadalammal had also nominated few named trustees, and had provided that she would be in management of the properties till her demise, and that after her demise the endowed properties would be managed by a person, who the trustees nominated by her would appoint. And, the trust deed nowhere provided how to fill up the vacancies

created by the demise of her nominated trustees. This introduction to Ext.A-5 would enable a better appreciation of the arguments of the parties to be detailed.

6. The learned counsel for the appellants argued:

- a) The first appellate Court was in egregious error, when it overlooked that Ext.A-5 Trust deed, dated in 1907, had been acted upon and that the plaintiff has produced Exts. A-6 and A-7, both of which are rent notes between the plaintiff and the first defendant, dated respectively in 1957 and 1963. It has also produced Exts.A-8 to Ext.A-14 which are dated between September, 1963 and November, 1980, all of which are documents that relate to the leasehold right of the first defendant. And, they are not disputed since the first defendant opted to shy away from the witness box. This left two consequences: First, it defeated first defendant's pleading of creating a superior title holder in the second defendant and left that fact as not proved; and second, the cause of action for the suit founded on tenacy to the first defendant, and the plaintiff's right to seek recovery of possession of the suit property stood proved.
- b) The proof of the tenacy to the first defendant, on which the cause of action for the suit was founded upon, constitutes an act in assertion by the plaintiff of the legal character of the suit property as an endowed property, and this ought to have weighed with the first appellate Court. Instead, it attempted to invoke Sec.90 to prove the genuineness of Ext.A-5, which, given the setting of the suit, is not required. The mere fact that the second defendant has disputed Ex.A-5, a registered Trust deed dated in 1907, does not imply that execution of the sale deed must be necessarily proved in terms of the Evidence Act.
- c) Under Ext.A5 Andalammal endowed two items of properties for specific religious charity connected with the plaintiff temple. The trust deed recites that author of the trust had purchased them under Ext.A3 sale deed (=Ext.B2), dated 09.09.1892, and Ext.A4 sale deed (=Ext.B3), dated 27.05.1893. When once the properties are endowed, its character cannot be altered. Reliance was placed on the authority of the Hon'ble Supreme Court in The Idol of Sri Renganathaswamy, Rep. By its Executive Officer, Vs. P.K.Thoppulan Chettiar, Ramanuja Koodam Anandhana Trust, Rep. by its Managing Trustee & Others, (Civil Appeal No.9492 of 2019 dated 19.02.2020).
- d) In the context of title to the property, the second defendant claims that he has purchased the property from

D.W.2 Ramachandran, who in his testimony would depose that he had purchased the suit property from a certain Ranganayaki in 1974. This Renganayaki is stated to be a descendant of the Anadammal, the author of Ext.A-5. Neither this sale deed dated in 1974 was produced, nor was D.W.2's vendor examined. The second defendant did not produce any evidence of any kind either, to demonstrate, that between 1907 (the year in which Ext.A-5 was executed) and Ext.A-15 sale in favour of the second defendant, the descendants of the family of the author of Ext.A-5 had enjoyed the suit property in assertion of their title over the same.

- e) In the face of the overwhelming evidence that the plaintiff has produced, Ext.A-15 = Ext.B-1 Sale Deed appears weak and suspect, and hence, there is no need for the plaintiffs to amend the plaint seeking declaration of title. Reliance was placed on the dictum in Anathula Sudhakar Vs.P.Buchi Reddy [(2008) 4 SCC 594].

7. In response, the learned counsel for the contesting second respondent/second defendant would submit:

- That Ext.A5 document has not been proved in the manner that law requires, and even if its admissibility is accepted on its face value, a close reading of the document would indicate that the Trustees of the plaintiff could not maintain the suit, since Ext.A-5 contemplates that after the demise of the Andalammal, the trust should be managed by a person nominated by the Trustees of the plaintiff temple, and only such trustee thus nominated would be entitled to maintain the suit.
- The suit is laid chiefly against the first defendant for arrears of rent and for recovery of property, and both the trial Court and the first Appellate Court have not framed any issue on the point of disputed title to decide the issue. And, even if an issue had been framed, still title cannot be decided, as there is no prayer for declaration of plaintiff's title. This is a distinguishing feature which may not invite the application of the law declared in Anathula Sudhakar case.

8.1 The battle lines are drawn with absolute clarity. And, part of the battle has ended even before it commenced, since the respondent's counsel did make a statement that title to the property may not be decided in this case. Still, this court opted to deal with it for reasons to be stated in the subsequent paragraphs.

8.2 There are two issues: The issue on the tenancy of the first defendant is one, and the issue concerns the dispute (on plaintiff's title or more specifically the legal character of the suit property) which the second defendant raises is the other. As to the first, a specific relief is sought, and as to the second no relief is sought to declare the character of the suit property as an endowed property of the plaintiff temple. And, in defending the suit for recovery of possession on the termination of lease, in his written statement, the first defendant-tenant has named his brother, (the second defendant), as the superior title holder.

9. If the issue on tenancy, to which the first defendant is hinged to, is separated from the issue on title, then the first defendant is seen presenting a decree for his own eviction from the suit property on a platter to the plaintiff with his decision not to contest the suit during trial. With Sec.116 of the Evidence Act staring at him, he possibly could not deny the title of his lessor, unless he proves the existence of a superior title holder. Now, there are two issues: (a) Is the second defendant a superior title holder? (b) And, should the plaintiff have sought a declaration as to the character of the suit property since the second defendant asserts a title in himself?

10. Before delving on this issue, it is necessary to address two other aspects which this Court considers as incidental to the substantial question involved in this case: (a) The finding of the first appellate Court as to the need for proving Ext.A-5 trust deed, executed in 1907, the fact that it is a registered document, notwithstanding. And, this proof was in December, 2000, (when the first appeals are disposed), exactly 93 years after Ext.A-5 came into existence. The need for proof of Ext.A-5 will have its impact on the decision regarding the need to seek a declaratory relief by the plaintiff. (b) The other issue is about the alleged incompetency of the trustees of the plaintiff temple to maintain the suit.

Ext.A-5 and need for formal proof:

11.1 Turning to the aspect on the need for proving Ext.A-5, which has guided the first appellate Court to its decision, as stated a few times earlier, Ext.A-5 is a registered document of the year 1907. Sec.90 of the Evidence Act provides that the handwriting and signatures in an ancient document, aged thirty years and more, shall be presumed to belong to those by whom they were purported to have been made, and this presumption is rebuttable. And it stops there, and does not stretch to make any presumption regarding the genuineness of the contents of the document. In other words proof of the genuineness of an execution of document cannot be equated to proof of its contents,

and Sec. 90 of the Evidence Act does not concern itself with the latter.

11.2 In the instant case, the first appellate Court was looking for the due proof of execution of Ext.A-5, exactly 93 years since the execution of Ext.A-5 in 1907. And, the first appellate Court cannot be faulted for not invoking Sec.90 of the Evidence Act since Ext.A-5 was not the original but only a certified copy. But, is the fact that the execution of Ext.A-5 was not formally proved, render all that are proved to have been done on its basis nugatory and non-existent?

11.3 It requires to be stated with some emphasis that Ext.A-5 is a private document, and not any official document from the archives. Therefore, preserving a near century old private document, and proving or rebutting its due execution by a mode other than by leaning on the presumption under Sec.90 of the Evidence Act might be a difficult proposition. And, law does not require a litigant to perform that which is incapable of being performed.

11.4 Was then the first appellate Court without any materials to decide if Ext.A-5 was worthy enough a document for it to rely on? In the opinion of this Court, it did have, but it missed it when it opted for some law and limited logic, and left the life's experience on the sidelines while appreciating the evidence. It had ample opportunity to ascertain if the endowment created under Ext.A-5 had taken effect, and how parties, more particularly the plaintiff, had conducted itself in relation to Ext.A5, the absence of its formal proof notwithstanding. During the 93 years of its working (as at the time when the first appellate court decided the cause before it) Ext.A-5 did not face any obstruction from the family of its author. On the other hand, there are evidences in Ext.A-6 dated in 1957 to Ext.A-14, dated 5-11-1980 that pertain chiefly to the tenancy of the first defendant which the trustees of the plaintiff temple had created. They remain on record unscathed, thanks to the strategy of the first defendant not to participate in the trial, which would preponderate the probability that the suit property has been under the management of the trustees of the plaintiff temple. Here is a state of affairs which is shown to have been in existence for a considerable period from 1957 (Vide Ext.A-6), and hence its continuity backwards till the date of Ext.A-5 has to be necessarily presumed. Illustration (d) of Sec.114 of the Evidence Act enables this presumption.

11.5 If the Court were to insist on the formal proof of a 93 year old document, and attach significance to its search for the proof of the genuineness of the due execution of Ext.A-5, then how to account for the proof of the conduct of the trustees of

the plaintiff temple in relation to the working of Ext.A-5. If the formal proof of due execution of Ext.A-5 alone is considered as a validating fact to approve all that has been done till 1980 (as evidenced by Ext.A-14), then the proof that establishes actual and unobstructed working of Ext.A-5 gets wiped away without any logical explanation, leaving the reasonable man of law baffled over this outcome. That course would defy Sec.8 of the Evidence Act (which provides for the relevancy of conduct in relation to a fact in issue), and along with it both logic and life's experience, all in one stroke. Alternatively, in Indian law, creation of a trust for charitable purpose need not be in writing. Therefore, even if the execution of Ext.A-5 is not considered to have been formally proved, yet it is possible to hold that there has been a religious endowment of the suit property in favour of the plaintiff temple, whose origin was lost in antiquity. See: The Idol of Sri Renganathaswamy, Rep. By its Executive Officer, Vs. P.K.Thoppulan Chettiar, Ramanuja Koodam Anandhana Trust, Rep. by its Managing Trustee & Others., (Civil Appeal No.9492 of 2019 dated 19.02.2020). Either way, the evidence on record leads to the only dominant conclusion: That there is an endowment of the suit property in favour of the plaintiff temple, and it is real and subsisting.

12. In civil cases, the duty of the Courts of facts (which the trial and the first appellate courts are) to decide on facts is both arduous and strenuous, and easily be hazardous if requisite care is abandoned. They have the initial responsibility of selecting the right (evidentiary) materials for consideration and subject them to a mental distillation to filter any personal preferences and prejudices. Every material thus collected must then be sequentially arranged, to which the thumb-rule in rule of preponderance of probability must be applied to guide the Court to its conclusion. Here the first appellate Court has short circuited the process of appreciation of evidence by leaning heavily in looking for a formal proof of Ext.A-5 and obstructed its course with its self-created doubt. It is necessary for the Courts of facts to remember that if a certain state of affairs or a status quo, not illegal or opposed to public policy, is proved to be in existence for a very long period, then disturbing that status quo requires a stronger proof.

Is the suit maintainable by the trustees of the temple:

13. The argument here was that the suit was laid only by the trustees of the temple. and after the demise of Andalammal, in terms of Ext.A-5, the endowment has to be managed by the one who her nominated trustees have appointed, and that person will be competent to maintain the suit. This point was neither seen as argued before the Courts below, nor was any substantial question of law raised on it, and is now probing for an opportunity to

test the waters at the second appellate stage. This Court does neither appreciate, nor intend to permit a rear guard action such as this in the final hour. Even on merit it has to fail, because as indicated in paragraph 6 above, Ext.A-5 does not provide for filling up the vacancies created by the nominated trustees of Andalammal in order that they could nominate a trustee for managing the affairs of the endowment. It is obvious from evidence that sometime prior to 1957 (See Ext.A-6) the trustees of the plaintiff temple have began managing the suit properties without any challenge.

Not seeking declaratory relief Vs Non-suiting the plaintiff

14. And, to the final leg of this judgement. Should the plaintiff be non-suited for its failure to seek a declaratory relief? Given the scope of the litigation as determined by the relief sought, since the first defendant has opted out of the contest in the suit, it has to be held that he has not proved that the second defendant is the superior title holder, since in terms of Sec.116 read with Sec101 of the Evidence Act, the burden to prove the existence of a superior title holder (to the suit property) is on him. Therefore, from the plaintiffs' stand point, the contest should conclude here. That however, was not to be, as the trial Court laboured to include an issue on title (quite unnecessarily), merely because the second defendant was before it. This in essence is a case of misjoinder of issues with no cause of action against the second defendant, since no prayer was sought against him. After all the phrase 'cause of action', or more appropriately 'cause for an action' is understood as the bundle of facts which the plaintiff has to prove for enabling him to obtain the relief sought, and where no relief is sought against the second defendant, it is axiomatic that there can be no cause of action against the second defendant.

15. However, as outlined in an earlier paragraph, this Court considered it necessary to delve on the point if denial of plaintiff's title by the defendant should necessarily non-suit the plaintiff for not seeking a declaratory relief. The reason is, very frequently arguments are heard (not just in the trial Court, but in at the second appellate stage) that in cases where the plaintiff has not sought a declaratory relief, a mere denial of title by the defendant in the written statement itself should be considered as sufficient to non-suit the plaintiff. This may be explained.

16.1 Sec.34 of the Specific Relief Act provides that the Court has the discretion to declare the entitlement of a person to "a legal character, or to any right as to any property", and further provides that any person may institute a suit for declaration against any other person who denies or interested in

denying the title or the legal character of the former. A century ago, in *Gandla Pedda Naganna And Two Othres Vs Sivanappa And Two Others* [(1915) ILR 38 Mad 1162], a Division Bench of our High Court has explained the significance of seeking a declaratory relief in the following terms: "The object of the section is really to perpetuate and strengthen the testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the legislature is not only to secure to a wronged party possession of the property taken away from him, but also to see that he is allowed to enjoy that property peacefully. In other words, if a cloud is cast upon his title or legal character he is entitled to seek the aid of the Court to dispel that cloud."

16.2 Let it be underscored here that granting a declaratory relief is a relief in equity, and hence discretionary. It therefore follows, that merely because the plaintiff files a suit for declaration (because he is affluent enough to pay the court fees) it does not imply that the court should necessarily grant it, such as for instance where the Court finds that there is no threat to plaintiff's title. See *Muddasani Venkata Narasaiah, through Lrs Vs Muddasani Saroja* [(2016)12 SCC 288], *Harendra Lal Roy Chowdhury vs Nawab Salimullah Bahadur And Others* [7 Ind Cases 21, Para 3] for some observation on the point.

16.3 Now, where the plaintiff has a cause of action, and to state it in terms of Sec.34, faces an actual or an imminent a denial of his right, and necessarily to dispel the threat, he can institute a suit for declaration of his right. And, where he has not sought a declaratory relief, but faces a denial of his right in the written statement, he can seek an amendment of the prayer in the plaint to include the relief of declaration. These are well known and straight forward circumstances. The gray area where there is some wobbling is where the plaintiff faces a denial of his title in the written statement, but chooses to face the trial without a declaratory relief. Should in every such circumstance the plaintiff be non-suited?

17.1 Where the title of the plaintiff is made to appear weak or defective (and hence suspect) at the instance of the defendant, they fall under the phrase 'cloud on title'. In a lis in personem between two individuals, what should constitute this cloud on title, how to identify whether the alleged existence of the cloud on plaintiff's title is real or imaginary, and who ought to hold it thus? To state it differently, is it not necessary to ascertain before non-suiting a plaintiff (for not seeking a declaratory relief), whether the denial of his title by the defendant is substantial, or if it is a mere colourable and pretentious defence. If it falls under the second category, there can be no justifiable reason to non-suit the plaintiff merely because the defendant has contended so.

17.2 Let these aspects be considered in their deeper layers. The phrase 'Cloud on title' is not a formula, nor is it a catch-phrase of forensic coinage of American jurisprudential vintage. The West's Encyclopedia of American Law, 2nd Edition Copyright 2008), explains 'Cloud on title' as: "An apparent claim or encumbrance such as a lien, that, if it impairs the right of the to transfer his or her property free and clear of the of any other party. The existence of a cloud on title casts doubt upon the ability of an owner of real property to convey marketable title his or her land, thereby lessening its value. The owner must present evidence to dispel the cloud on title if he or s wants to transfer ownership free of legal uncertainty. On method to remove a cloud on is the commencement of action to quiet title." The Black's Law Dictionary, also shares the same view.

17.3 An action for quiet title is known in our jurisprudence as a suit for declaration of title to a legal character, or right over the property. However, in the Indian context, the content of the phrase 'cloud on title', as explained above may only mean that which may affect the warranty of title of the buyer of an immovable property within the meaning of Sec.55 of the Transfer of Property Act. But the sweep of Sec.34 of the Specific Relief Act, indicates that it has greater operational width as it enables a person to have his entitlement to a legal character or his right over the property declared, and hence this statutory idea has to be imported into the phrase 'cloud on title' to understand it in our jurisprudence.

18. As to the possible circumstances where the plaintiff may have to seek a declaratory relief in a suit relating to an immovable property, the Hon'ble Supreme Court in Anathulas Sudhakar's case [(2008) 4 SCC 594], has laid down certain indicators:

"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 the 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 the 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 v. Alagammal*, [(2005) 6 SCC 202]. 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 straightforward, 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 the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

19. The issue here is, to emphasis, not when a declaratory relief may be sought, but is about non-suiting the plaintiff for not seeking a declaratory relief merely because the defendant has denied the plaintiff's right. And, it does not apply to situations where, the plaintiff amends his plaint to include a declaratory relief, but only to situations where he opts to face the trial without any such amendment. This Court is witnessing the latter scenario. Hence, the issue here is a mild variant of what the Hon'ble Supreme Court has laid down in Anathula Sudhakar case, and the focus will be more on how the Courts of facts may approach the issue.

20.1 A denial of the plaintiff's title in the written statement is merely a pleading of the defendant. It is part of his strategy, and is fundamentally self-serving. Can therefore, a denial of plaintiff's title without anything more, be adequate enough to conclude that the title of the plaintiff has come under a cloud? For instance, in the present case, Andalammal had purchased two items of properties (of which one is the suit property), sometime in 1892 and 1893, and endowed them for religious charity under Ext.A-5 in 1907, and the plaintiff has produced documents up to couple of years next before the institution of the present suit for proving the character of the suit property. So far as the plaintiff-temple is concerned, the initial burden cast on it to prove its case has been discharged. The law on shifting of burden of proof informs that the burden shifts to the defendant only after the plaintiff has discharged his burden, which in other words would mean that when the evidence produced by the plaintiff is found to be capable of producing a certain prima facie conclusion in support of the latter's case. Now, can the prima facie conclusion on the plaintiff's title based on his evidence, be stated to have been adequately defended by a mere denial of plaintiff's title in the written statement, or its inadequate proof?

20.2 If a mere denial in the pleading of the defendant is considered adequate, it instantly dispenses him of his burden to prove his plea of denial of plaintiff's title, which then will automatically elevate the defendant's pleading on a disputed fact (and not law) to the status of its proof. This would give an unfair procedural advantage to the defendant. Viewing it from another angle, if only a denial of plaintiff's title in the written statement without anything more, can be a ground to non-suit the plaintiff for not seeking a declaratory relief, then

that could have been made the ground to dismiss the suit on a preliminary issue, but Order XIV Rule 2 CPC, does not provide for this course. It cannot be ignored that, notwithstanding the nature of action, and irrespective of whether the relief sought is one under the common law, or a discretionary relief in equity, the procedure which the Courts adopt for trial of the case and the law on burden of proof that govern the trial remain the same for both.

20.3 It can now be deduced that, to constitute a cloud on plaintiff's title, there must be evidence for the Court to conclude prima facie that the plaintiff's assertion of title to a legal character, or to a right over a property has come under the cloud. Let it not be forgotten, that life's experience in this country, which both the Courts and the legal practitioners would vouchsafe, that not every litigant makes a bonafide denial of plaintiff's title. While, a bonafide denial of plaintiff title with some evidence may merit consideration, to non-suit the plaintiff with a colourable denial of former's title will be unconscionable, if only it is acknowledged that fairness is integral to our adversarial jurisprudence.

21. Hence, it is necessary for the Court to weigh:

- The quality of the pleadings to ascertain if the defendant alleges if a third party to the suit has the title, or, if he traces his title to the same source from which plaintiff also derives title, or if the defendant relies on an independent source of title to some other source;
- If the evidence produced by the defendant to prove his plea of denial of the plaintiff's title covers the same period for which the plaintiff has produced the evidence, or whether such evidence as produced by both the plaintiff and the defendant are separated by a clear time-line;
- If any adverse inference is required to be drawn against any of the parties for not producing the evidence which is in their capacity to produce, and evaluate the relative quality of the evidence made available before it. (What is indicated here is not exhaustive since every case has its own character. When the rule of probability determines the nature of the decision to be made, it can never be exhaustive too.). This precisely is the exercise what the Court engages in it is required to enter a finding on a disputed title incidentally in a suit for bare injunction.

22. Ideally, the Court may engage in a certain process to achieve a certain degree of balance between a bonafide denial of title and a colourable denial of title:

- Firstly, it may independently evaluate the plaintiff's title

based on the evidence he produces, and then evaluate the resistance to it in terms of the defendant's case. Then it may try viewing the conclusion arrived on the plaintiff's case through the conclusion arrived in defendant's case (something like holding a glass in between the eye and the object).

- If the vision to the plaintiff's title is not obstructed or blurred, then there is no cloud on plaintiff's title, and if it is not, then there is one (though in actual working, the mind works faster and enables an understanding instantaneously).
- And if after this process, the Court holds that the suit is maintainable without a relief of declaration, then subject to the rule of res judicata, the defendant may institute a suit to establish his title.

23. The above course, in the estimate of this Court, will infuse a certain degree of processual fairness to the whole discourse relating to 'cloud on title', and non-suiting the plaintiff for not seeking a declaratory relief. If it were to be understood differently, then a person with a settled title and possession for a long period can face a threat to such title at anytime of the defendant's choice, who may emerge from nowhere, with mere denial of the plaintiff's title on his lip. And the defendant will be under no burden to prove his case, since the defendant in our legal system can recline on the comfort of the procedural law, and wait for the plaintiff to prove his title. And, in the process, he may count every shades of weakness in the plaintiff's case, the advantage of which the plaintiff does not have, since the law on burden of proof does not permit the plaintiff to rely on the weakness of the defendant's case.

24. If fairness has to reign supreme in our processual jurisprudence, it is necessary to eliminate a seeming opportunity available to the defendant to steal an unfair procedural advantage over the plaintiff. It then becomes indispensable for Courts of facts to realise their responsibility, assert their role as fair arbiters within the bounds of available procedure, and ascertain if the denial of the plaintiff's title by the defendant is bonafide, or hollow and colourable.

25. To demonstrate how it works, let the facts of the present case specific to the second defendant be tested on the plane of what has been hitherto discussed. It immediately indicates a time line separating the evidence on record : while the plaintiff has produced all the evidence at its command for well over eighty years, the only evidence that the second defendant relies on is Ext.A-15 = Ext.B-1 sale deed, dated 27-09-

1984, which is subsequent to Ext.A-14, the latest document that the plaintiff has produced. It is already seen that the evidence on record preponderates a probable inference that the plaintiff has proved the legal character of the suit property. And, if the same has to now come under any cloud of denial, then the defendant has to provide such evidentiary material of reliable quality that appeals to the conscience of the Court as prima facie upsetting the title of the plaintiff. The solitary piece of evidence that the second defendant has produced, in the opinion of this Court, is not only incapable of creating any cloud on the legal character of the suit property, but it is not even sufficient to form a smoke screen to prima facie doubt the plaintiff's title.

26. This Court has tried multiple approaches to test if the plaintiff should have sought any declaratory relief, but each of them only produce the same result: That given the nature and character of the suit, there is no need for the plaintiff to seek any declaratory relief. Hence, the suit is maintainable without a declaratory relief. The substantial question raised has to be necessarily answered in favour of the plaintiff/appellant.

27. In conclusion, this Court allows both the appeals and set aside the decrees passed in A.S.No.35/1991 and A.S.No.50/1991 and directs delivery of vacant possession of the suit property to the plaintiff within a period of three months from the date of the decree of this Court. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ds

To:

1.The Subordinate Judge
Kancheepuram.

2.The District Munsif
Kancheepuram.

Copy to

1.The Assistant Registrar(A.S)
High Court,
Madras 104.

2.The Section Officer
Judicial Department
High Court, Madras 104.

(to comply with the direction to the registry Direction to the Registry for placing the Judgment before the Hon'ble The Chief Justice for considering its circulation to all the Courts in the District Judiciary)

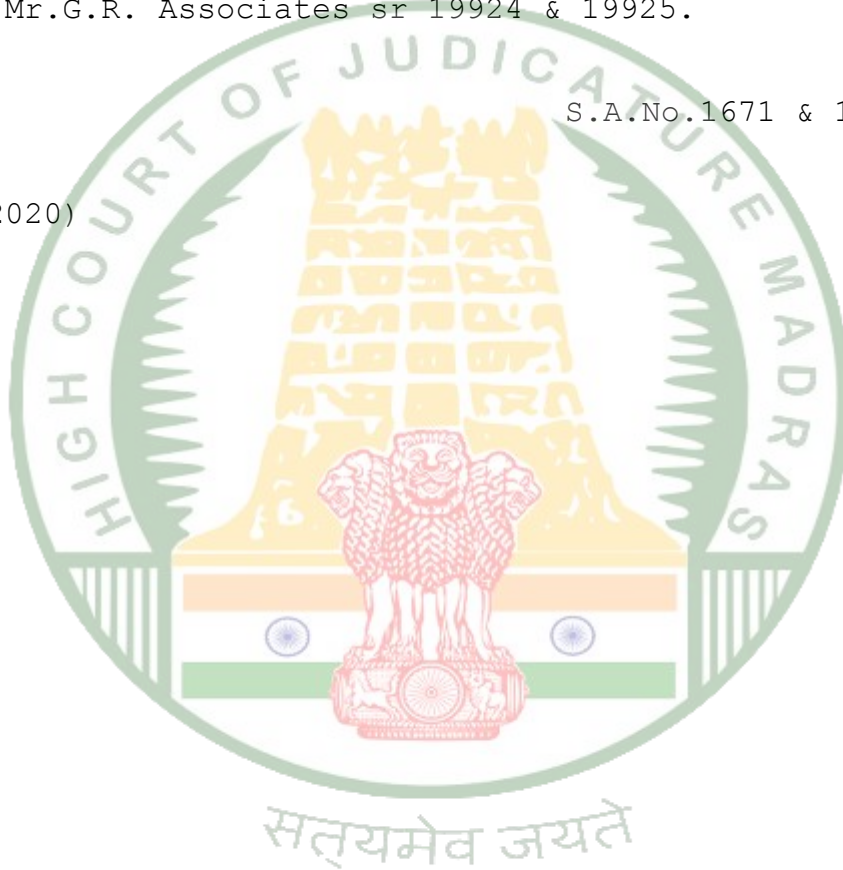
3.The Section Officer
VR Section, High Court, Madras

+2 Ccs to Mr.A.Jenasenan, Advocate sr 19555

+2 Ccs to Mr.G.R. Associates sr 19924 & 19925.

S.A.No.1671 & 1672 of 2002

VGII(CO)
SP(30/11/2020)



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