

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 296 OF 2011  
WITH  
CIVIL APPLICATION NO. 2334 OF 2014**

**SANTOSH  
SUBHASH  
KULKARNI**

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Lalitkumar Jagdishkumar Grover & ors. ...Appellants

**Versus**

New Bandra Hill Co-operative Housing  
Society Ltd. ...Respondent

**WITH**

**FIRST APPEAL NO. 1407 OF 2011**

New Bandra Hill Co-operative Housing  
Society Ltd. ...Appellant

**Versus**

Lalitkumar Jagdishkumar Grover & ors. ...Respondents

Mr. Girish Godbole, a/w Mr. Aseem Naphade, Ms. Rujuta  
Patil, for the Appellant in FA/296/2011 and for the  
Respondent in FA/1407/2011.

Mr. Rajesh Shah, a/w Mr. Darshan Mehta, i/b M/s. Dhruve  
Liladhar & Co., for the Respondent in FA/296/2011 and  
for the Appellant in FA/1407/2011.

**CORAM: N. J. JAMADAR, J.**

**RESERVED ON: 22<sup>nd</sup> DECEMBER, 2021**

**PRONOUNCED ON: 22<sup>nd</sup> APRIL, 2022**

**JUDGMENT:-**

1. These appeals are directed against the judgment and  
decree dated 28<sup>th</sup> April, 2010 in SC Suit No.7239/1998, passed  
by the learned Judge, City Civil Court, Greater Bombay, Borivali

Division, whereby the suit preferred by the appellants in Appeal No.296 of 2011 came to be dismissed.

**2.** Shorn of unnecessary details the background facts leading to these appeals can be stated as under:

(a) The plaintiffs – appellants in First Appeal No.296 of 2011 are the trustees of Shri Laxmi Hardevi Tejbhan Grover Manavkosh, a charitable trust. The trust is the owner of the property bearing Survey No.257 Hissa No.1 of Danda, Bandra (W), Andheri, under City Survey No.1336, admeasuring 635 Sq. Yards. equivalent to 531.5 Sq. Mtrs., more particularly described in the Schedule (Exhibit-B) annexed to the plaint. The defendant is a Cooperative Housing Society registered under the Maharashtra Cooperative Societies Act, 1960 (“the Act, 1960”).

(b) Pursuant to the Deed of Gift dated 2<sup>nd</sup> April, 1975, executed by the partners of M/s. Navneet Builders, the plaintiff, acquired ownership over the suit property. The defendant is a Co-operative Housing Society of allottees of flats in a building known as Somerset Apartment standing on the property bearing City Survey No.3165, 3166, 3167 and 3168 of Bandra (W), adjoining and lying to the South of the suit property.

(c) The plaintiffs claimed that at the beginning of the year 1996, the plaintiffs noticed that the defendant - society had

encroached over eastern corner of the suit property and carried out fillings and constructed a wall and allowed some of the members of the defendant - society to park their vehicles over the suit property. The plaintiffs addressed a notice on 24<sup>th</sup> February, 1996 calling upon the defendant - society and its members to refrain from trespassing over the suit property and/or parking any vehicles thereon or any part thereof. In response thereto vide letter dated 15<sup>th</sup> April, 1996, the defendant, whilst falsely denying the contents of the notice, contended that the defendant had instituted a suit being Suit No.3197 of 1998 in the Bombay High Court against the builders and others.

(d) The plaintiffs took inspection of the papers and proceedings in the said suit. It transpired that the defendant had prayed for a declaration against Ambit Corporation, R. L. Ramchandani and C. T. Ramchandani that the defendant has become owner of the building known as Somerset Apartment and the land admeasuring 5,078 sq. yards on which the said apartment stood. The plaintiffs averred that subject matter of Suit No.3191 of 1988 was totally distinct and the said suit did not relate to the suit property.

(e) As the defendant did not refrain from the unlawful act of trespassing over the suit property and infringing the rights of

the plaintiffs, a pre-suit notice under Section 164 of the Act, 1960 was addressed on 16<sup>th</sup> May, 1997. After the expiry of the stipulated period, the plaintiffs instituted the suit with the assertions that the acts of the defendant and its members in carrying out filling at the suit property site, constructing wall and parking vehicles on a portion of the suit property constitute trespass on the suit property. The defendants have thus invaded and threatened to invade ownership and possessory right of the plaintiffs over the suit property. Hence, the suit for perpetual injunction restraining the defendant and its members, their servants and agents from entering upon the suit property and/or parking any vehicles thereon or any part thereof.

(f) The defendant resisted the suit by filing a written statement. At the threshold, the jurisdiction of the City Civil Court to entertain and try the suit was called in question as the value of the suit property far exceeded the then limit of the pecuniary jurisdiction of the City Civil Court. The defendant further contended that since the defendant had been in use, occupation and possession of the suit property since the year 1983-1984, during which Somerset Apartment was completed, the defendant has perfected its title by adverse possession and the suit was thus barred by law of limitation.

(g) The suit was also assailed on the ground that the plaintiffs have failed to furnish the correct description of the suit property as mandated by the provisions contained in Order VII Rule 3 of the Code. Though the plaintiffs have alleged that there was an encroachment over a portion of the suit property yet no proper description of the encroached portion or a sketch showing the location and extent of encroachment has been annexed to the plaint. On this sole ground, according to the defendant, the suit deserved to be dismissed.

(h) It was contended that the plaintiffs have not substantiated their claim of being the owner of the suit property. Nor the plaintiffs claim of being in possession of the suit property is sustainable. Therefore, a suit for injunction simplicitor, when the plaintiffs claim to be dispossessed of a portion of the suit property is not maintainable.

(i) In view of the aforesaid rival pleadings, the learned Judge, City Civil Court, framed issues. Plaintiff no.1 Latlikumar Grover (PW-1) ventured into the witness box in support of the plaintiffs claim. Documents were tendered by the plaintiffs to further substantiate their claim. The defendant neither examined any witness nor tendered any document to bolster up its defence.

(j) After appraisal of the oral evidence and documents tendered for his perusal, the learned Judge was persuaded to return a finding that the plaintiffs are the owners of the suit property and the defendant failed to prove that it perfected title to the suit property by way of adverse possession. The learned Judge, however, held that the suit was bad for want of proper description of the suit property. Consistent with this finding, the learned Judge proceeded to non-suit the plaintiffs by holding that since the plaintiffs had not prayed for removal of encroachment and recovery of possession of the alleged encroached area, the plaintiffs were not entitled to the relief of perpetual injunction restraining the defendants and its members from entering upon the suit property and/or parking vehicles thereon.

3. Being aggrieved by and dissatisfied with the impugned judgment and decree, the plaintiffs have preferred Appeal No.296 of 2011. The defendant has also preferred appeal, being Appeal No.1407 of 2011, being aggrieved by the finding that the plaintiffs established their ownership over the suit property and, conversely, the defendant failed to establish that it became owner of the suit property by way of adverse

possession. By an order dated 29<sup>th</sup> July, 2011, both the appeals were directed to be heard together.

4. I have heard Mr. Godbole, the learned Counsel for the appellants – plaintiffs and Mr. Shah, the learned Counsel for the respondent. The learned Counsels have taken me through the pleadings, evidence and documents on record.

5. Mr. Godbole strenuously submitted that the learned Judge committed a grave error in dismissing the suit despite recording a positive finding that the plaintiffs were the owners of the suit property and the defendant failed to establish that it perfected title to a portion of the suit property by way of adverse possession. Mr. Godbole would urge that the moment a finding was recorded that the defendant failed to prove its case of adverse possession, a decree for perpetual injunction, which is essentially consequential, ought to have been passed. Mr. Godbole further submitted that the finding that the suit was bad for want of proper description of the suit property is vitiated by non-consideration of the relevant material on record, especially the report of local inspection dated 2<sup>nd</sup> December, 2000, carried out by the learned Judge, City Civil Court, who was then seized with the matter, and the Court Commissioner's

Report to which a copy of the map prepared pursuant to measurement by the Cadestal Surveyor was annexed.

6. Mr. Godbole would further urge that the learned Judge committed an error in law in recording a finding that the suit for injunction simplicitor was not maintainable unless the plaintiffs prayed for possession of the encroached portion. According to Mr. Godbole, firstly, there is no such immutable rule of law. Secondly, the learned Judge lost sight of the nature of the dispute and the actual situation at the suit property, which was admittedly a open plot. Laying emphasis on the fact that the defendant made no effort, worth its name, to establish its case of adverse possession, Mr. Godbole submitted that the decree of perpetual injunction ought to have been passed.

7. Per contra, Mr. Shah, supported the impugned judgment to the extent it negated the claim of the plaintiffs. Inviting the attention of the Court to the averments in paragraphs 10 and 12 of the plaint, which suggest that the defendants had encroached upon a certain portion of the suit property, Mr. Shah submitted that it was incumbent upon the plaintiffs to furnish the location and extent of encroachment, annex a map to the plaint, and also seek a decree for restoring the possession. In the absence

of such pleadings and prayers, according to Mr. Shah, the suit for perpetual injunction simplicitor was not maintainable.

8. Mr. Shah laid stress on the fact that the report of local inspection as well as the Court Commissioner's Report run counter to the case of the plaintiffs of encroachment over the suit land allegedly by erection of wall. The reports record that there was no wall at the site nor any visible sign of demarcation between the suit property and the defendant's premises. The learned Judge, according to Mr. Shah, in the aforesaid circumstances was justified in negating the claim for perpetual injunction.

9. To buttress the aforesaid submission, Mr. Shah placed a very strong reliance on a judgment of the Supreme Court in the case of *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs. And others<sup>1</sup>*, wherein the Supreme Court adverted, *inter alia*, to the question as to what is the scope of a suit for perpetual injunction relating to immovable property? I will advert to this judgment a little later.

10. Before adverting to deal with the aforesaid submissions, I deem it in the fitness of things to briefly deal with the challenge to the impugned judgment and decree by the defendant in

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<sup>1</sup>(2008) 4 Supreme Court Cases 594.

Appeal No.1407 of 2011. As indicated above, the defendant sought to challenge the finding of ownership in favour of the plaintiffs and the negation of the defendant's claim of adverse possession. Mr. Shah, the learned Counsel for the appellant – defendant in Appeal No.1407 of 2011 made a faint attempt to assail the impugned judgment on the aforesaid counts.

11. The learned Judge on the aspect of the ownership of the plaintiffs over the suit property, adverted to the instruments under which the plaintiffs acquired the ownership, especially, the Gift Deed dated 2<sup>nd</sup> April, 1975 and the preceding Conveyance Deed dated 10<sup>th</sup> February, 1964 in favour of the plaintiffs doner. It is imperative to note that during the course of cross-examination of Lalitkumar Grover (PW-1) nothing material could be elicited to throw a cloud of doubt over the title of the plaintiffs. On the contrary, it was suggested that the plaintiffs claim ownership over the suit property on the basis of the Deed of Gift dated 2<sup>nd</sup> April, 1975. In this view of the matter, the finding recorded by the learned Judge that the plaintiffs succeeded in establishing their ownership over the suit property is impeccable.

12. This takes me to the defendant's claim of adverse possession. Mr. Shah, despite the handicap of no evidence

having been adduced in proof of the said plea, made an attempt to demonstrate that the defendant successfully perfected its title to the suit property by way of adverse possession, by relying upon the assertions in the plaint that the defendant had encroached over the portion of the suit property.

**13.** I am afraid to accede to aforesaid submissions. There is next to no evidence to substantiate the defence of acquisition of ownership by way of adverse possession. A bald assertion in the written statement that the defendant has acquired ownership by way of adverse possession is of no assistance. A plea of adverse possession is impregnated with an admission of the title of the true owner and assertion of possession in denial of the true owner's title with the attendant characteristics of such possession being peaceful, open and continuous.

**14.** Mr. Godbole was justified in canvassing a submission that, in the case at hand, in the absence of evidence on behalf of the defendant, the trial Court was not at all called upon to delve into the issue as to whether the alleged possession of the defendant satisfied the tests for a valid perfection of title by adverse possession. Mr. Godbole placed reliance on a judgment of the Supreme Court in the case of *T. Anjanappa and others vs.*

*Somlingappa and another<sup>2</sup>*, wherein the characteristic of adverse possession was expounded. Paragraph 26 reads as under:

“26. It is well recognized proposition in law that mere possession however long does not necessarily means that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.”

15. In the light of the aforesaid requirements in law, reverting to the facts of the case, it would be suffice to note that the defendant made no effort to establish its case of adverse possession. No fault can thus be found with the finding recorded by the learned Judge, on this aspect of the matter.

16. This propels me to the pivotal issue of the entitlement of the plaintiffs to the relief of perpetual injunction. Whether the trial Court was justified in non-suiting the plaintiffs on the ground that the plaintiffs did not seek the relief of recovery of possession of the allegedly encroached portion of the suit property?

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**2**(2006) 7 Supreme Court Cases 570.

17. Indeed, the plaintiffs approached the Court with a case that in the year 1996, the defendant encroached over the eastern corner of the suit property and carried out filling and constructed a wall and the members of the defendant society started to park their vehicles over the said portion. The plaintiffs averred that the said acts of the defendant – society and its members constituted trespass and invaded and threatened to invade the rights of the plaintiffs.

18. Mr. Lalitkumar Grover (PW-1) conceded in the cross-examination that the assertions in the plaint that in the year 1996 the defendant encroached over the eastern corner of the suit property, constructed a wall thereon and allowed its members to park their vehicles were correct. He went on to concede that even after the notice dated 24<sup>th</sup> February, 1996 (Exhibit-18) calling upon the defendant - society to refrain from parking the vehicles over the suit property, the members of the defendant – society continued to park their cars till the filing of the suit. Mr. Lalitkumar Grover (PW-1), however, expressed his inability to state the area which was found in possession of the defendant - society during the measurement by the Cadestral Surveyor. Nor he could describe area of the suit property where the members of the defendant – society used to park their cars.

19. On the strength of the aforesaid pleadings and evidence of Lalitkumar Grover (PW-1), the learned Judge was persuaded to draw an inference that the plaintiff failed to describe the suit property in conformity with the mandate contained in Order VII Rule 3 and in the absence of a prayer for possession of an allegedly encroached definite portion of the suit property, the plaintiffs were not entitled to the relief of perpetual injunction.

20. Order VII Rule 3 of the Code of Civil Procedure, (Bombay Amendment) reads as under:

“Order VII Rule 3: Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. **In case of encroachment, sketch showing as approximately as possible the location and the extent of the encroachment shall also be filed along with the plaint.**

21. Mr. Godbole would urge that the description of the property in Schedule (Exhibit-B to the plaint) satisfies the requirement of Rule 3 as the suit property has been identified with reference to its survey number and city survey number and location and boundaries thereof are also furnished. Mr. Shah, on the contrary, laid emphasis on the fact that sketch showing the allegedly encroached portion was not filed along with the plaint.

**22.** The controversy is required to be appreciated in the context of two documents of vital importance, which throw light on the situation at the spot. First, the Memorandum of Local Inspection carried out on 2<sup>nd</sup> December, 2000 by the Judge, City Civil Court. It records as under:

“The suit site was pointed out by the representative of the plaintiff and the Secretary of the defendants. There is no visible demarcation as between the plot of land belonging to the defendants and the suit property. The only access for going to the suit property is through the gate of the building – Somerset Apartments – belonging to the defendants Society.

There is no wall anywhere on the suit property. The Inspection concluded at about 4.40 p.m.”

**23.** Second, the report of the Cadestral Surveyor dated 1<sup>st</sup> October, 2002, wherein also no encroachment was shown.

**24.** The situation which thus obtains is that the suit property was open. There was no demarcation at site to separate the suit property and the property of the defendant. At this stage, the nature of the alleged encroachment assumes significance. What the plaintiffs asserted was that the defendant – society and its members levelled and filled the suit land and the defendant – society’s members parked their vehicles. It is true that the claim of the plaintiffs that the defendant – society constructed a wall was found to be untrue. However, that does not demolish the entire case of the plaintiffs in the context of the nature of

encroachment and consequent infringement of the rights of the plaintiffs. The Report of Local Inspection records a very decisive element that there was no access to the suit property except through the gate of the building Somerset Apartment belonging to the defendant – society. In such a situation, the insistence for exact pleadings, including a sketch, and proof of the approximate area allegedly encroached upon by the defendant – society does not seem justifiable.

25. At this juncture, it may be apposite to consult the pronouncement of the Supreme Court in the case of ***Anathula Sudhakar*** (supra), wherein the Supreme court elaborately considered the scope of the suit for prohibitory injunction in different situations. The observations of the Supreme Court in paragraphs 12 to 16 are instructive and, thus, extracted below:

“12. On the contentions urged, the following questions arise for our consideration in this appeal:

(i) What is the scope of a suit for prohibitory injunction relating to immovable property?

.....

***Re : Question (i)***

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.”

26. The legal position was summarized by the Supreme Court in paragraph 21 as under:

“To summarize, 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* (supra)]. 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 plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

27. A submission was sought to be advanced on behalf of the defendant – society primarily based on the proposition at 13.3 extracted above. It was urged that in the case at hand the title of the plaintiffs was in dispute and from the own showing of the plaintiffs they were not in possession of a portion of the suit property which was allegedly encroached by the defendant –

society and, in such a situation, it was incumbent upon the plaintiffs to file a suit for declaration, possession and injunction.

28. I am unable to persuade myself to agree with the submission of Mr. Shah that the moment the plaintiff does not seek the relief of possession, the suit for injunctive relief becomes unsustainable. In my considered view, the said issue turns upon the nature of the injunctive relief. In the case of *Anathula Sudhakar* (supra) the Supreme Court adverted to distinct considerations which may arise where the property in question is a building or building with appurtenant land and the property which is a vacant site. In the latter case, as explicitly observed in paragraph 16 of the above judgment, the principle which governs the resolution of the dispute is that possession follows title. If two persons claim to be in possession of vacant suit site, the one who is able to prove his title thereto will be considered to be in possession as against the person, who is not able to establish his title. It is imperative to note that in the summation in sub-para (a) of paragraph 21 extracted above, the Supreme Court in clear and explicit terms enunciated that where the plaintiffs title is not in dispute or under 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 plaintiffs lawful possession or threat of dispossession, it is sufficient to sue for an injunction simplicitor.

29. These principles govern the fact situation in the case at hand. The nature of interference with the plaintiffs lawful possession was, making use of the portions of the suit property by the members of the defendant to park their vehicles. The defendant – society and its members thus essentially threatened the plaintiffs proprietary title over the suit property. In this view of the matter, a suit for injunction simplicitor cannot be said to be untenable.

30. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of *Vishram alias Prasad Govekar and ors. vs. Sudesh Govekar (Dead) by Legal Representatives and ors.*<sup>3</sup>, wherein the plaintiffs had sought the relief of mandatory injunction seeking demolition of the construction carried out by the defendant over the suit property therein, with the allegation that it was illegally put up by the defendant on the plaintiffs land. In that case also, the tenability of the suit was challenged on the ground that the plaintiffs were not in possession of the suit property. Distinguishing the

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**3**(2017) 11 Supreme Court Cases 345.

judgment in the case of *Anathula Sudhakar* (supra) the Supreme Court held that the assertion that the defendants have carried out illegal construction did not imply that the plaintiffs admitted possession of the defendants over the suit land and, therefore, the suit was not untenable in the absence of any relief of possession.

**31.** The plaintiffs, in the case at hand, stand on a better footing. There is a justifiable finding that the plaintiffs have succeeded in establishing title over the suit property. As the suit property is a vacant site, it was necessary for the trial Court to record a finding on title as *de jure* possession has to be established on the basis of title to the property. To add to this, the defendant – society failed to adduce evidence, in support of, much less establish, to the hilt, its case that it perfected title over the suit property by way of adverse possession. Having recorded such findings, trial Court could not have declined to grant the relief of injunction.

**32.** The vary stand of the defendant – society that portion of the suit property was in its possession and its members were parking cars over the said portion, constituted a threat of dispossession and breach of obligation on the part of the defendant – society. In such a situation, the fact that the

plaintiffs did not seek relief of possession could not have been construed as a factor dis-entitling the plaintiffs from the relief of perpetual injunction which emanated from the incidence of ownership over the suit property.

**33.** For the foregoing reasons, I am inclined to hold that interference is warranted in the impugned judgment. Order of dismissal of the suit is required to be set aside. Consequently, the plaintiffs are entitled to a decree for perpetual injunction. Resultantly, Appeal No.296 of 2011 deserves to be allowed, whereas Appeal No.1107 of 2011 deserves to be dismissed.

**34.** Hence, the following order:

**: O R D E R :**

- (i) Appeal No.1407/2011 stands dismissed with costs.
- (ii) Appeal No.296 of 2011 stands allowed with costs.
- (iii) The impugned judgment and decree stands set aside.
- (iv) The SC Suit No.7239/1998 stands decreed in terms of prayer Clause (a), which reads as under:

“(a) that the defendants, their members, servants and agents be restrained by a permanent order and injunction of this Hon’ble Court from in any manner directly or indirectly entering upon the property described in Exhibit-B to the plaint or parking any vehicles thereon or any part thereof.”

- (v) Decree be drawn up accordingly.

In view of disposal of First Appeal No.296 of 2011, Civil Application No.2334 of 2014 does not survive and stands disposed.

**[N. J. JAMADAR, J.]**

At this stage, the learned Counsel for respondent in Appeal No.296 of 2011, seeks stay to the execution and operation of this judgment.

The learned Counsel for the appellants opposes the prayer.

Since this Court has decreed the suit, which was dismissed by the trial Court, to advance the cause of justice, the execution and operation of this judgment is stayed for the period six weeks from today.

**[N. J. JAMADAR, J.]**