

101 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2424-1999 (O&M)
Date of Decision: 08.02.2023

Baggar Singh (deceased) through his Legal Representatives and others
..... Appellants

Versus

Nand Kaur and others Respondents

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Prateek Mahajan, Advocate,
Mr. Daanish Mahajan, Advocate and
Mr. Ashish Gupta, Advocate,
for the appellants.

Mr. Vinod K. Kataria, Advocate,
for respondent No.5.

Mr. Harsh Aggarwal, Advocate,
for the LRs of deceased-Inder Singh-respondent No.6(c).

RAJBIR SEHRAWAT, J. (ORAL)

1. “Suit for declaration of title only is not maintainable unless possession is claimed in the same suit” is the cut-and-dried argument and the law point raised and resisted in this case. Therefore, this Court is to consider and decide whether there is any such proposition of law, and can there be, at all, any such preposition of law under the relevant statutory provisions. If yes; how, and if not; why?

2. This is an appeal challenging the judgment and decree dated 09.02.1999 passed by the Additional District Judge, Faridkot, whereby the judgment and decree dated 22.12.1993 passed the Additional Senior Sub-

Judge, Faridkot, was upheld; though upsetting findings on one of the issues.

3. The brief facts, as involved in the present case, are that the appellants-plaintiffs filed the suit asserting therein that the plaintiffs are owner in possession of the suit land as joint shareholders and hence they are entitled to the correction of the entries in the record, and further; that the sale deed dated 26.09.1988 executed by Parsin Kaur, the defendant No.2, in favour of defendant No.5 was null and void. To substantiate their assertions, they had pleaded in the suit that originally defendant No.1-Nand Kaur, who is sister of the plaintiff No.1; was the owner to the extent of one-tenth share of the total land measuring 68 Kanals 08 Marlas. Puran Singh, who was the father of the plaintiffs No.2 and 3 and also another brother of Nand Kaur, expired about 8-9 years back and his estate has been succeeded by his only two daughters, namely, Jang Kaur and Chotto, who are plaintiffs No.2 and 3. Mutation to this effect had also been entered in their name. Plaintiffs No.4 to 7 and defendants No.3 and 4 are the sons, daughters and widow of Nanak Singh, who was the third brother of Nand Kaur. Nand Kaur had sold her one-tenth share to defendant No.2-Parsin Kaur, who is not related to the family, vide sale deed dated 19.02.1968 for a sale consideration of Rs.3,000/-. Challenging the said sale deed, plaintiff No.1 and Puran Singh, father of the plaintiffs No.2 and 3 and Nanak Singh, the predecessor of plaintiffs No.4 to 7 and defendants No.3 and 4, had filed suit No.20 dated 08.01.1969 for pre-emption of the said suit land. Plaintiff No.1, and father of plaintiffs No.2 and 3; and Nanak Singh-predecessor of plaintiffs No.4 to 7 and defendants No.3 and 4; had claimed one-third share each out of one-

tenth share of Nand Kaur; which was subject matter of the pre-emption of the suit. The sale which was subject matter of the pre-emption was for a consideration of Rs.3,000/-. The Civil Court handling the pre-emption suit ordered the plaintiffs to deposit one-fifth share of Rs.3,000/-, i.e. Rs.600/- as per the provisions of the Punjab Pre-emption Act, 1913. The said amount is stated to have been deposited on 10.04.1969. The said suit was tried and decided by the Sub-Judge First Class and was decreed in favour of the aforesaid plaintiff No.1 and the predecessor-in-interest of the remaining plaintiffs and two of the defendants, vide judgment and decree dated 10.07.1969, subject to payment of Rs.3,230/- to Parsin Kaur-defendant No.2 upto 05.10.1969. The amount of Rs.600/- already deposited was ordered to be deducted. The balance amount was paid to Parsin Kaur on 04.10.1969 and she had withdrawn Rs.600/- from the Court on 06.10.1969.

4. However, as is coming from the facts of this case, Parsin Kaur executed the sale deed dated 26.09.1988 in favour of the defendant No.5 Nazir Singh. The said sale deed is stated to have been executed through General Power of Attorney holder of Parsin Kaur, namely, Harnam Singh, defendant No.6. However, no mutation of this sale was entered in the revenue record on the basis of the said sale deed executed by Parsin Kaur in favour of defendant No.5. As a matter of fact, the original co-sharer, namely, Nand Kaur continued to be recorded in the revenue record as co-sharer in the suit property through out. It is challenging the said sale deed executed by Parsin Kaur - defendant No.2 in favour of defendant No.5 that the occasion to file the suit involved in the present proceedings arose. Hence, the suit

was filed.

5. In the suit, the plaintiffs examined, in all, eight witnesses. PW1-Bhola Nath was examined to prove the receipt of money by Parsin Kaur pursuant to the judgment and decree passed in pre-emption suit, PW2-Dalip Singh Dhaliwal, who was Clerk to D. K. Bedi, Advocate, was examined as scribe of the receipt qua payment of the money to Parsin Kaur, PW3-Civil Nazar, who proved the deposit of one-fifth amount as ordered by the Court in pre-emption suit, PW4-Ahlmad Rajinder Kumar to prove the description of the suit and to produce the relevant Register which contained relevant entries qua filing of pre-emption suit and to the effect that the suit was decreed on the basis of the compromise, PW5-Pritam Singh Rahi, retired Reader, was examined to prove the entries made in the deposit register produced by the above-said other official witnesses. Baggar Singh plaintiff No.1 himself appeared as PW-6. PW7-Ranjit Singh, Record Keeper, of the Court was examined to prove the fact that the fire had broken-out in the record room of the Court in June, 1984, and that the other relevant record pertaining to pre-emption suit had been destroyed in that fire and PW8-Harbans Lal, Clerk of the Court to prove the fact that the plaintiffs had applied for the certified copy of the decree passed in the pre-emption suit and that the office had denied the same by saying that the record was not available, the same having been destroyed in the fire incident. Besides this, the plaintiffs led in evidence the documents, Exhibits PX1 to PX17, which included the Jamabandi, the Mutation record, and the record regarding correction of Khasra Girdawari from name of Nand Kaur to the name of the

plaintiffs, besides leading in evidence, the receipt of payment of money to Parsin Kaur as Exhibit P2.

6. On the other hand, the defendants examined only Nazir Singh as DW1, who is the purchaser of the property from Parsin Kaur vide the sale deed impugned in the present suit. In documentary evidence, the defendants led Exhibits D1 to D3. Exhibit D1 is the initial sale deed dated 19.02.1968 from Nand Kaur to Parsin Kaur, Exhibit D2 is the power of attorney; statedly; executed by Parsin Kaur in favour of Harnam Singh and Exhibit D3 is the sale deed dated 29.06.1988 which is questioned in the present suit. No other evidence was led.

7. After appreciating the material on record and hearing the parties, the Trial Court dismissed the suit. Aggrieved against the judgment and decree passed by the Trial Court, the plaintiffs/appellants preferred first appeal before the Court of Additional District and Sessions Judge, Faridkot. However, even the same was declined by the lower Appellate Court, though reversing finding of the Trial Court on one issue. Hence, the present appeal.

8. Arguing the case, the learned counsel for the appellants has submitted that the plaintiffs have duly proved on record the fact that they had filed the pre-emption suit and that the same was duly decreed by the Court. To prove these facts, they have duly examined the relevant court officials; who have produced the available Court record entries; showing the factum that the plaintiffs had, in fact, filed the suit and the same was decreed. These entries also show that the statutory one-fifth share of the sale consideration was duly deposited by the plaintiffs in the pre-emption suit.

Not only that, even the entries qua release of money deposited with the Court to Parsin Kaur by the Court has been duly proved on record. Besides this, the plaintiffs have duly proved the fact that the balance of the sale consideration was duly paid to the vendee of the pre-emption suit, i.e. Parsin Kaur. The marginal witness to the said receipt has been examined by the plaintiffs. Even the vendee of the pre-emption suit, namely Parsin Kaur has admitted the fact that she had received the money of balance pre-emption sale consideration; while filing written statement in the present suit. Although, subsequently; she did not pursue the suit as such, however, to be sure on the fact the plaintiffs had filed application before the Court for 'admission and denials' of the facts by Parsin Kaur. On that application, the Trial Court had directed Parsin Kaur to respond to the queries raised by the plaintiffs, and in her reply, again, Parsin Kaur categorically admitted that she had received the balance of the pre-emption sale consideration. However, both the Courts below have gone wrong in law in recording finding to the contrary; and in discarding the evidence of the Court officials witnesses on the ground either that the same was not in the handwriting of the concerned witness PW4 or that the PW5, in whose hand-writing entry was made, was not personally knowing the parties. Learned counsel has relied upon the judgments rendered by Hon'ble the Supreme Court in the case of **Vishwa Vijay Bharti Vs. Fakhrul Hassan, 1976 AIR (Supreme Court) 1485** and **Parmeshwari Devi (Smt.) Vs. State and another, (1977) 1 Supreme Court Cases 169**, as also the judgment rendered by this Court in the case of **Rajinder Singh Vs. Rustam Singh, 2014(3) PLR 402** and the judgment

rendered by the Calcutta High Court in the case of **Kotulpur Farmer's Service Co-operative Society Ltd. Vs. Sayera Bibi, 2019(4) ICC 750** to contend that this approach of the Courts below is totally non-sustainable because once the witness is called to produce the record, then it is not even necessary to subject such witness to cross-examine, and that since the record is official record, it is not necessary that the same should be in his handwriting. The said witness is producing the official record which otherwise is admissible in evidence as such. Moreover, the Courts below have not even dealt with the evidence of PW3 and PW8, who again; are the Court officials who have been produced as witnesses. The evidence of PW5 has also been wrongly rejected on the ground that he was not personally knowing the parties; because it was nobody's case that he personally knew anybody, rather, he was examined as the then official witness. Court officials are not required to know the parties personally. Even the scribe of the receipt qua payment of money to Parsin Kaur has wrongly been discarded by the Court on the ground that he has admitted that the money was not paid in his presence and that he was not a regular deed-writer. Learned counsel has submitted that this witness was not examined as witness of the payment, rather, he was only examined as scribe of the receipt which was duly thumb-marked by Parsin Kaur. The other marginal witness of the receipt has duly proved the factum of the payment of the money to Parsin Kaur. The second marginal witness to the receipt could not be examined by the plaintiffs only because he had already expired on the date when the testimony was to be recorded. Moreover, the testimony of the

second marginal witness was not even mandatory as per the law.

9. Learned counsel has further submitted that although the defendant No.6-Harnam Singh is stated to be General Power of Attorney holder of Parsin Kaur, however, even he has not been examined by the defendants to prove the power of attorney in his favour. In fact, nobody has been examined to prove the power of attorney of Parsin Kaur in favour of Harnam Singh. This fact becomes significant because the plaintiffs had denied the execution of power of attorney by Parsin Kaur in favour of Harnam Singh and the said Parsin Kaur had even admitted having received money in pre-emption suit, and therefore, she was not even entitled to sell the suit property. Learned counsel has also submitted that both the Courts below have gone wrong in law in discarding the admission made by the said Parsin Kaur only on the ground that she allegedly filed an application at the fag-end of the trial of the suit for being examined as a witness, though the same was declined by the Court. The sale deed in favour of defendant No.5 Nazir Singh is on the face of it fraudulent and fabricated because he is related to the stated GPA holder Harnam Singh as brother-in-law of his son Inder Singh, and when he was cross-examined in the suit, he could not even disclose the identity of the suit property which he alleged to have purchased from Parsin Kaur. He was not even aware of the Khasra Numbers which he claimed to have purchased. Therefore, it is obvious that he never purchased the property in question, and it was all fraud committed by Harnam Singh. Qua the aspect of possession, learned counsel for the appellants has submitted that defendant No.5-Nazir Singh has admitted in cross-

examination that Parsin Kaur herself was not in possession of the suit property, therefore, there is no question of Nazir Singh getting possession from Parsin Kaur. The alleged purchaser, defendant No.5-Nazir Singh, never came to be reflected in the revenue record; either as owner or in possession of the suit property. The same continued to be in the name of the original co-sharers; including the plaintiffs and Nand Kaur. Hence, the appellants-plaintiffs continued to be in possession of the suit property. Rather, the sale by Nand Kaur already having been pre-empted by the plaintiffs, the entries qua Khasra Girdawaries were wrongly continuing in the name of Nand Kaur, therefore, the appellants had filed an application for getting the Khasra Girdawaries corrected in their name; and the same was duly allowed by the competent authority vide Exhibit PX16. Accordingly, the Khasra Girdawari from 1988 were corrected in the name of the plaintiffs and the mutation to that effect was entered vide Exhibit PX14.

10. On the other hand, learned counsel for the respondents-defendants have jointly submitted that the suit filed by the plaintiffs was only qua declaration of title. No possession was sought for. Therefore, suit itself was not maintainable. Learned counsel have relied upon the judgments rendered by Hon'ble the Supreme Court in the cases of **Vinay Krishna Vs. Keshav Chandra and another, 1993 AIR (Supreme Court) 957, Delhi Metro Rail Corporation Ltd. Vs. Tarun Pal Singh and others, 2018(1) Scale 343 and Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar Vs. Chandran and others, 2017(2) R.C.R.(Civil) 1** to buttress their arguments. Hence, it is submitted that no interference by

the Court is called for. Learned counsel have further submitted that, moreover, the judgment and decree of the pre-emption suit claimed by the plaintiffs/appellants is not on record. Therefore, no significance can be attached to those alleged proceedings. The said proceedings are liable to be ignored altogether. Moreover, any decree in pre-emption suit is required to be drawn in consonance with the Order 20 Rule 14 of the CPC; which requires that in case of failure to make the payment the suit shall be deemed to have been dismissed. Since, the plaintiffs themselves claimed that the payment was made out of the Court, therefore, in view of the provisions contained in Order 21 Rule 2 of the CPC the Court was required to be notified to that effect. However, there is no evidence that the Court was ever notified. The receipt stated to have been issued by Parsin Kaur Exhibit P2 is not proved on record as per the law; because its scribe has said that no payment was made in front of him and the marginal witness has admitted in cross-examination that he did not know the parties personally. Learned counsel has further submitted that the plaintiffs were not in possession of the land because the plaintiff No.1 himself has admitted in the cross-examination that he was not given any possession by Parsin Kaur (after pre-emption suit) because she was not in possession. So far as the revenue records are concerned, learned counsel has submitted that the Jamabandi for the year 1972-1973, 1982-1983, 1987-1988 are Exhibits PX2, PX3 and PX4, which show that Nand Kaur was still in possession of the suit property. Since Parsin Kaur; the vendor of defendant No.5-Nazir Singh was already co-sharer with the plaintiffs to the extent of six-tenth share, which was

earlier sold by other co-sharers to her deceased husband, therefore, the vendors of defendant No.5 namely Parsin Kaur was also in joint possession of the property even before purchase of suit property. The aforesaid Nand Kaur was shown in specific possession of Khasra No.585 min. measuring 04 Kanals 10 Marlas, which was based upon the Khasra Girdawari. With the sale of the same to Parsin Kaur; she got the possession of the said Khasra Number, and accordingly, from Parsin Kaur the defendant No.5 got the possession of the same. Hence, it is obvious that the plaintiffs were not in possession of the suit property at the time of filing of the suit. There is also a recital in the sale deed executed on behalf of Parsin Kaur in favour of defendant No.5-Nazir Singh that the possession has been delivered. Learned counsel has further submitted that change of Khasra Girdawaries and the Mutations in favour of the plaintiffs had happened during pendency of the suit, therefore, those cannot be read in the present suit. Moreover, the plaintiffs have not even led in evidence from their side the sale deed executed by Nand Kaur in favour of Parsin Kaur or another sale deed executed by Parsin Kaur in favour of DW5-Nazir Singh. Therefore, their suit was without any basis. Learned counsel has further submitted that since the receipt Exhibit P2 was executed by Parsin Kaur and she has not been examined as a witness, therefore, the receipt Exhibit P2 can also not be read in evidence.

11. As reply to the arguments raised by learned counsel for the respondents, learned counsel for the appellants has submitted that claiming possession with a declaratory decree is not a mandatory condition in all

situations. In the present case, since the plaintiffs were already in possession being co-sharer with Nand Kaur and even the Mutation and Khasra Girdwaris stood corrected in their favour, therefore, they were not required to seek any possession along with declaration of sanctity of their title. Learned counsel has relied upon the judgments rendered by Hon'ble the Supreme Court in the cases of **Deo Kuer and another Vs. Sheo Prasad Singh and others, 1966 AIR (Supreme Court) 359** and **M/s Supreme General Films Exchange Ltd. Vs. His Highness Maharaja Sir Brijnath Singh ji Deo of Maihar and others, 1975 AIR (Supreme Court) 810**, as well as, judgment rendered by this Court in the case of **Shingara Singh Vs. Nasib Kaur through LRs Karamjit Kaur and others, 2016(3) R.C.R. (Civil) 10**, judgment rendered by Manipur Judicial Commissioner Court in the case of **Arambam Ongbi Jamini Devi and others vs. Soram Chaoba Singh and others, 1956 AIR (Manipur) 42** and the judgment rendered by Calcutta High Court in the case of **Aisa Siddika and others Vs. Bidhu Sekhar Banerjee and others, 18 Ind. Cas. 633 (Cal)** to buttress his arguments that provisions contained in Section 34 of the Act is not mandatory in nature *dehors* the factual conspectus attending the case. Suit for declaration of a title can very well be filed outside the scope of Section 34 of the Act; as well. Hence, the argument of the learned counsel for the respondents qua non-maintainability of the suit is not sustainable. Moreover, no specific finding was recorded by the Trial Court in that regard. The lower Appellate Court has also wrongly recorded the finding in that regard because no such issue was ever framed nor any such argument was raised during the

trial. It is further submitted by the learned counsel for the appellants that even the testimony being relied upon by the learned counsel for the defendants; says that the possession was not given by the Parsin Kaur to Nazir Singh because she herself was not in possession. Therefore, it is obvious that the plaintiffs were in possession and defendants never got the possession of the suit property. Learned counsel has further submitted that learned counsel for the respondents is not factually correct in submitting that the sale deed was not led in evidence by the plaintiffs. In fact, the sale deed allegedly executed by Parsin Kaur in favour of Nazir Singh has duly been led in evidence by the plaintiffs as Exhibit P3 and so far as the initial sale deed executed by Nand Kaur in favour of Parsin Kaur is concerned, the same was not required to be led in evidence specifically, because the defendants had admitted on the record of the trial Court that they did not dispute the factum of the said sale deed, and even the lower appellate court has so recorded.

12. Having heard the learned counsel for the parties, this Court finds substance in the arguments raised by the learned counsel for the appellants.

13. Social organization is a tool devised by humanity to avoid individual might harming the other weaker ones, by ensuring prevalence of order in the society. In a democracy, the mean to ensure the order is the device of 'Rule of Law'. Accordingly, the rights of the citizen are defined by the basic governance document of the country, i.e. the Constitution or through various statutes, as deemed appropriate by the legislature. A

plethora of such rights are civil rights. For enforcement of such civil rights, the courts of law and the legal remedies are provided in a legal system. In our legal system, Section 9 of the Code of Civil Procedure permits citizen to bring all kind of suits relating to civil rights except those which are specifically barred by law. The Right to Property is also declared to be a civil right by the said section, even if the same is dependent upon the religious rights. Therefore, the suits regarding property could very well be brought within the rights permitted under the Code of Civil Procedure. Since the law has enabled citizen to bring suit to the court of law, it has also provided for modalities of proof of the existence of such rights. The Indian Evidence Act has taken care of all such modalities. As per the Indian Evidence Act, as interpreted by various judicial pronouncements, the standard of proof in criminal case is proving facts 'beyond reasonable doubt', whereas, in case of civil litigation, the standard of proof is bringing a fact within 'preponderance of probabilities'. Hence, a citizen is entitled to bring a suit to the court and he is entitled to get his claim materialized through the court of law; by proving the facts involved in the matter; by bringing the same within 'preponderance of probabilities'. Article 14 of the Constitution of India grants a fundamental right of equality before law and equal protection of law. The phrase 'equal protection of law', obviously, would include a right of the citizen to get his legal right enforced through legal mechanism and, thus to get relief from the court of law; if he has succeeded in proving the case as per the standards of evidence prescribed under the law. Once the citizen has proved his claim as required under law; then no

Court has any authority to decline the same to the citizen. Declining the relief to a person, who otherwise is, entitled to the same under the law, would be negation of the Article 14 of the Constitution of India. Hence, any provision of law creating scope for denial of relief to a citizen despite proof of his claim, would necessarily, be the denial of 'Rule of Law' and thus, would be antithesis to the 'Rule of Law'. Such a provision is bound to be unconstitutional, as per Article 13; being violative of Article 14 of the Constitution of India. Article 13 of the Constitution reads as under: -

“13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires:

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

A perusal of Article 13 makes it obvious that no law can be made which violates fundamental rights, and no pre-constitutional law can continue if the same is inconsistent with fundamental rights guaranteed to citizen by the Constitution. Therefore, no law can authorize a court of law to decline relief to the plaintiff despite he having proved his claim as per the legal standards. Any such 'discretion' of the Court to deny the relief, again, would be violative of Article 14 of the Constitution of India. Needless to say, that the 'discretion of the Court' involved in making assessment of the evidence led on the file; to arrive at a conclusion qua the claim of the plaintiff is not the same thing as the 'discretion to deny the relief' to such a citizen despite he having proved his case as per the standards of proof mandated under the law. While the discretion in the former situation is inherent in the functioning and powers of the Court, the latter is impinging upon the fundamental rights of a citizen. Under the Indian Constitution, no Court has power to deny equal protection of law by denying the equality before law in the name of 'exercise of discretion', except to the extent of discretion to be exercised by the Constitutional Courts, and even that only where it is specifically provided by the Constitution of India itself.

14. In the light of the above-said general principles, the provisions contained in Section 34 of the Specific Relief Act is to be considered, which is reproduced herein-below: -

“34. Discretion of court as to declaration of status or right: - Any person entitled to any legal character, or to any right as to any property, may institute a suit against

any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, **and the plaintiff need not in such suit ask for any further relief:**

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation: - A trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.”

A bare perusal of the aforesaid language of the Act points to the ingredients of the main body of the Section as under: -

- (i) Any person is entitled to institute a suit for declaration.
- (ii) Such a suit must relate to his entitlement to any legal character or any right as to any property.
- (iii) The suit has to be against any person denying or interested in denying the title or character or right of a person instituting a suit.
- (iv) The Court may, in its discretion, make a declaration in that suit.
- (v) Plaintiff need not, in such a suit, ask for any further relief.

However, the *Proviso* to the main section prohibits the Court from making any such declaration where plaintiff, being able to seek further relief, omits to do so.

15. *Dehors* the consideration upon the Constitutional validity of the Section qua the 'discretion' granted to the court to deny relief to the plaintiff despite he having proved the same as required under the law, there would not have been any problem in implementing the Section 34 had either the ingredient No.(v) above-mentioned; or the *Proviso* to Section; not been the part of Section 34 of the Specific Relief Act. Then the Section would have made a harmonious reading and would have been worth implementation without any further complications. However, the ingredient No.(v) mentioned above; gives an option to the plaintiff that he need not ask for any further relief in such a suit for declaration. Use of the words "need not" ask; in this Section; clearly show that it is not mandatory for the plaintiff to seek any other or further relief in the suit for declaration of title; even if he can do so. This is the option and liberty left to the plaintiff. This is the simple meaning of the English language used in this ingredient of the Section; and is also historically; intended to be so; as would be seen in the coming paragraphs of this judgment. Therefore, it is obvious that even if the plaintiff is having any other relief available to him, then also he "need not" club such a relief in a suit for declaration under Section 34 of the Specific Relief Act. This volition has been left to the discretion of the plaintiff that he may opt to claim any further relief than mere declaration; or may not opt to claim any further relief than mere declaration; and he may still, lawfully, 'institute' the suit for declaration. However, the *Proviso* prohibits the court from granting declaration if the plaintiff has opted not to claim any further relief, even if one is available to him. Therefore, the *Proviso* as contained in Section 34 of

the Specific Relief Act, is neither by way of 'exception' to nor by way of any 'saving' of the provisions of main provision of Section 34. Rather, it is mutually destructive with the main provision of the Section itself. It can occur to an uninitiated mind that since the *Proviso* talks about a specific type of declaration i.e. the declaration of 'title' therefore it is by way of an 'exception' to the main provision of the Section, however, this would be equally fallacious; because if the expression 'title' is interpreted as a right independent of 'entitlement to' any 'legal character' or to any 'right as to any property'; as is used in the main provision of the section, then the court would not have even any authority to grant any declaration of 'title' under the language used in the main provision of the section, in the first place. Hence, the *Proviso* denies to plaintiff relief for a factor which is optional for him under the main provision itself. But it is beyond comprehension as to how the Court can be permitted to deny a relief to the plaintiff, to which he is otherwise entitled under the law, only for not doing something which is purely optional and voluntary for him under the same provision of law. It is unfortunate that no Court has so far read the language of the *Proviso* viz-a-viz the language of ingredient No.(v); above-mentioned; of the main body of the Section 34 of the Specific Relief Act. If *Proviso* is given effect, then the ingredient No.(v) of the main Section is rendered as totally redundant, and if this ingredient of the Section is given effect, then the *Proviso* has to be forgotten. Probably this dilemma has led all the Courts to brush this inconsistency under the carpet, by avoiding reading it between the lines. In almost all the judgments brought to the notice of this Court by the counsels

or otherwise coming to the notice of this Court; language of Section 34 of the Specific Relief Act (or of Section 42 of the old Act) is just reproduced in the judgment, and thereafter, the attention of the Court is diverted to only the *Proviso* or to the interpretation of the expression 'further relief'. Interpretation of ingredient No.(v) above; is consistently missing in all the judgments. As a result, a plethora of litigation has been created by the confusion and absurdity created by this *Proviso*. Resultantly, a provision, which perceivably, was intended to avoid multiplicity of the litigation has generated more litigation than that which could have come had the *Proviso* not been included in the statute.

16 In view of the complication created and unnecessary litigation generated by this *Proviso* and in view of the fact the legal systems which had introduced this provision in India; themselves have amended their laws and have created provisions enabling only declaratory judgments and orders; without the above-said *Proviso* or a provision similar to one contained in *Proviso* to Section 34 of the Specific Relief Act, even the Law Commission of India, in its 9th report, had recommended for deletion of the *Proviso* to Section 34. For example; in British legal system, Order 25 Rule 5 of RSC 1883 (Rules of Supreme Court and County Courts of England and Wales, which governed Rules for Civil Procedure contained the provision as under:-

“No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights **whether any consequential relief**

is or could be claimed or not”

Even their current Civil Procedure Rules 1998, as amended by Civil Procedure (Amendment) Rules 2001, in Part 40 (III) contain the provision as under: -

III – Declaratory Judgments

40.20 The court may make binding declarations whether or not any other remedy is claimed

Similar is the provision in United State of America, where under Uniform Declaratory Judgments Act finalized in 1922, it has been provided as under: -

SECTION 1. [Scope.] Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Under the abovesaid Act if the plaintiff succeeds in getting the declaratory decree, then he can get the supplemental relief by filing separate petition before the court competent to grant such supplemental relief, as is provided in section 8, which reads as under:

SECTION 8. [Supplemental Relief.] Further relief based

on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

So, none of these Jurisdictions has retained the language analogous to the *Proviso* contained in Section 34 of the Specific Relief Act. Rather, the Declaratory Judgment has been hailed as “the symbol of twentieth century conception of law” (*Jennings Declaratory Judgments against Public Authorities (1932) 41 Yale L.J. P 407, 416*). The necessity and pertinence of the declaratory judgments has rightly been highlighted in the objects and reasons of the Uniform Declaratory Judgments Act, some of which are as reproduced as under: -

“Today our courts are operated largely on the fundamental idea of giving to an injured party reparation and redress. Certainly, it is still a primary rule of jurisdiction that until a party has been hurt, and has suffered loss, he has no standing in court.

This ancient rule of jurisdiction has long been found too narrow to meet the requirements of modern social, industrial and economic conditions. Men ought

not be forced to the necessity of encountering damage or assuming ruinous responsibilities before they are permitted to seek and secure a court decision as to their rights and duties. Such a scheme puts a premium upon delinquency and penalties altogether out of harmony with a proper conception of law, order and justice. It should be the primary purpose of the State to save its citizens from injury, debt, damage and penalties; and to this end the highest function of the court ought to be to decide, when possible, the controversies of parties before any loss has been suffered or any offense committed. The Declaratory Judgment aims at abolishing the rule which limits the work of the courts to a decision which enforces a claim or assesses damage or determines punishment. The Declaratory Judgment allows parties who are uncertain as to their rights and duties, to ask a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured.”

“The Declaratory Judgment principle is of Roman origin. It spread over the principal part of continental Europe long before the American colonies became the United States. It has been in effect in Scotland for over three centuries. In England it has existed since 1852 with

ever-broadening scope and increased influence. It is used in the greater part of the British colonies and dominions, including Canada. Experience has demonstrated in the countries where the Declaratory Judgment procedure has been adopted that its use has resulted in a great saving in actual litigation, thereby anticipating those long, bitter and expensive controversies that follow highly litigated cases for breach of contracts and denial of rights, which can be avoided by the adoption and use of the Declaratory Judgment procedure.”

“In most cases each party to a transaction wish to do right and act honestly. If at the outset of a controversy over a jural relation, a judgment could be obtained setting forth rights and duties, everyone would at once abide the decision, and all hostile litigation and bad feeling would be avoided. It is only because parties are now forced to wait until money loss has been suffered or criminal penalties are involved, before they are permitted to come into court, that so many bitter contests attend proceedings in court. Out of this bitterness, resulting from property interests or personal liability being at stake, we have the practice of cases characterized by ugly charges and counter-charges, criminations and recriminations, false witnesses and perjury. If before injury has been inflicted,

the parties could obtain a decision on questions in dispute, much of the undesirable features of present-day litigation might be eliminated.

The highest function of the law is the preservation of peace. The State serves such purpose poorly when it compels a citizen to wait until a difference as to the construction of a contract has developed into a struggle to secure or save valuable property; when it delays a matter of the interpretation of a statute until it involves a fight for liberty.

“A stitch in time saves nine.” Nowhere can this homely adage be applied to better advantage than in court affairs. Nowhere has its application been denied except in court. The Declaratory Judgment is “a stitch in time”.

Therefore, there could not; possibly; have been any plausible justification for not accepting the recommendation of law commission qua removal of the *Proviso* to Section 34, which would have brought the benefits of declaratory judgments to Indian people as well, besides removing inherent inconsistency created by the *Proviso*.

17. The introduction of this provision and its continuation in India; despite its original proponents no more adhering to it; also makes a curious case history. In England, earlier concept had been that “so long as all goes well, the action of law is dormant” (*Holland, Jurisprudence, 9th Edition P 310*), and that “Justice is administered only against wrong-doer, in act or

intent” (*Salmond, Jurisprudence 5th Edition P 71*). Moreover, the Equity Courts delivered justice based on good conscience; which required that injury to one's right or interest should be compensated or restored. Therefore, the Chancery Courts insisted that before a subject could come to the Equity Court, he must have suffered injury; so that the court could grant executory relief to him; so as to compensate him or restore his right. Therefore, it was the practice in the Court of Chancery not to make declaratory decrees or orders unaccompanied by any other consequential relief. Accordingly, it had been the view of the successive Lord Chancellors that that the Common Law Courts may grant mere declarations of legal Rights but the Equity Courts were not to venture into granting mere declaratory decrees; because it amounted to only expression of opinion without effective equity grievance being involved. But after transfer of jurisdiction of Courts of Exchequer to Chancery Courts in 1841, in exceptional facts and circumstances the Chancery Court also started granting declaratory judgments in favour of the plaintiffs even in those Equity cases where it could not give full effect to its declaration. In fact, the Scotland legal system had three types declaratory actions, i.e. pure declaration alone; of jural relations, declaration with executory relief, and the adjudicatory declaration qua right and title. In England Lord Brougham is credited with initiating an agitation in favour of the declaratory decrees by observing that the Scotland enjoyed great benefit by enabling persons who apprehend future litigation to proceed by way of a declaratory action to have their rights determined. He highlighted the advantages of merely the declaratory decrees in his famous opinion

delivered by him in 1846 in House of Lords in case of **Earl of Mansfield versus Stewart** (*5 Bell, 139, 160*), as under:

“I cannot close my observation in this case without once more expressing my envy, as an English Lawyer, of the Scotch Jurisprudence, and of those who enjoy under it, the security and the various facilities and conveniences which they have from that most beneficial and most admirably contrived form of proceeding called declaratory action. Here, you must wait till a party chooses to bring you into court; here, you must wait till possibly your evidence is gone; here, you have no means whatever, in ninety-nine cases out of hundred, of obtaining the great benefit of this proceedings”

He even pushed several Bills in Parliament for ushering declaratory action in English legal system. His efforts resulted in relaxing the things, when the Court of Chancery Procedure Act 1852, (‘An Act for the Relief of Suitors of the High Court of Chancery - 15 & 16 Victoria Cap. 87’), vide S. 50 made a provision that no suit should be open to objection on the ground that a merely declaratory decree or order was sought thereby, and it would be lawful for the court to make binding declarations of right without granting consequential relief. The exact language read as under:

“50 No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to

make binding declarations of right without granting consequential relief’

18. By Section XXIX of Act VI of 1854, of Governor General-in-Council (An Act to amend the Practice and the Course of Proceeding on the Equity side of Her Majesty’s Supreme Courts of Judicature at Fort William in Bengal, Madras, and Bombay), Section 50 of the Chancery Procedure Act 1852 was transplanted to India in the exact same language; and made applicable to then existing Supreme Courts in India. For the courts other than the courts established by Charters; the Civil procedure was codified in India, for the first time, by the Civil Procedure Code, 1859, where the form of remedy under Section XXIX of Act VI of 1854 was incorporated as Section 15 of that Act which read as under:

"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

In 1862 the provisions of the Civil Procedure Code of 1859 were extended to the High Courts established by Charters when the Supreme Courts were abolished and the High Courts were established. Hence, till this time the provision in India was exactly the same as in English legal system.

19. Although, there had been some relaxation in provisions for Equity Courts in England as contained in Section 50 of the Chancery Procedure Act 1852, however, the words “without granting consequential

relief” used in this section again divided the Courts there. Some courts held that these words would imply that the plaintiff can seek declarations qua his status or entitlements so as to prevent future disputes qua his status or rights; even if no consequential relief could, possibly, be claimed by the plaintiff; and further, that even if any consequential relief is available to the plaintiff; he need not claim the same; and the court can grant the declaration without any consequential relief. Mere claim for declaration was sufficient for instituting and maintaining the suit in Equity. In **Fletcher v Rogers, (1853) 10 Hare App. XIII** the court held so and granted declaratory decree regarding the future interest in estate; of such children who might be alive on the death of their respective parents. No insistence was made on availability of any consequential or coercive relief to the plaintiff as precondition for maintaining the suit.

However, most of the courts were not ready to shake-off the rigidity of Equity claims and held that though these words conferred upon the Equity Courts discretion to grant declaratory decree without accompanying consequential relief, however in all such suits claim of the plaintiff must have been such in which some consequential relief would have been possible and could have been granted by the equity court, if the need be. That means that the plaintiff must have already suffered some injury requiring restoration or the compensation in equity, though he may not opt for such relief while seeking declaration. Therefore, the declaration could be granted by the court only in those cases where it is as an incident to the coercive or consequential relief, which the plaintiff has chosen not to claim.

In case of **Garlick v Lawson (1853) 10 Hare App. XIV**, scope of Section 50 was explained by Vice Chancellor Wood as under:

“It enabled the Court, in its discretion, where it should appear to be necessary for the administration of an estate or to the relief to which the plaintiff might be entitled to make a decree, notwithstanding it should be merely declaratory.”

Likewise, in case of **Lady Langdale v Briggs (1856) 8 de G. M. and G., 391, 427)** Chancellor Turner held that:

“Section 50 does not extend the cases in which declaration of right may be made, but merely enables the court to declare the rights without following up the declaration by the directions which, under the old practice, have been necessarily consequent upon them”

This dichotomy in judgments had led to creation of more liberal provisions; clearly making the consequential relief irrelevant, as is clear from the provisions of Order 25 Rule 5 of RSC mentioned above reading as under:

“No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights **whether any consequential relief is or could be claimed or not**”

As mentioned above, this provision was further relaxed making

only the declaratory decree possible, as per the provision of Civil Procedure Rules 1998, as amended by Civil Procedure (Amendment) Rules 2001, in Part 40 (III), again; reproduced hereinbelow: -

III – Declaratory Judgments

40.20 The court may make binding declarations whether or not any other remedy is claimed

Hence, under British system it is purely optional for the plaintiff whether to claim or not to claim any ‘consequential’ or ‘coercive’ or ‘further’ relief in a suit for seeking declaration. He cannot be non-suited on the ground that he had some further relief also available to him and he had not claimed the same.

20. However, for India, in 1877 the Civil Procedure Code, 1859 was repealed and the Civil Procedure Code of 1877 was enacted. The provision regarding declaratory action was transferred from Civil Procedure Code to Specific Relief Act 1877; which was passed in the same year; and it contained the provision in Section 42; which reads as under:

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Bar to such declaration.

Provided that no Court shall make any such

declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation: - A trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

Illustrations

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(b) A bequeaths his property to B, C and D, “to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.” No such children are in existence. In a suit against A’s executor, the Court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is

void for uncertainty. The Court may make the declaration.

(d) A alienates to B property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is so entitled.

(e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survives her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(g) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(h) A bequeaths property to B for his life, with remainder to B's wife and her children if any, by B, but if B die

without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children, may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

It is clear from the language of this section that the main body of this section is akin to; and is in consonance with; the provisions contained section 50 of the Act of 1852 (England); and in Section 15 of Civil Procedure Code 1859 (India), as interpreted by most of the restrictive English judgments, like in **Garlick v Lawson** (Supra), and **Lady Langdale v Briggs** (supra). However, the bar created in the second part of the Section is an attempt to rule out any application of liberal interpretation as given in case of **Fletcher v Rogers** (supra). However, the draftsman of this section had forgotten that though the abovesaid two categories of cases were dichotomous in nature qua availability of coercive relief with the plaintiff as a condition for granting declaratory relief, but both of them recognized that the fact that plaintiff need not claim any further relief for maintaining his suit, and that the Court could grant declaration even if some other relief was not claimed by him in the same suit. It deserves to be recollected here that even in the restrictive judgments in **Garlick v Lawson** (Supra), and **Lady Langdale v Briggs** (supra) the courts had conceded the right and option with the plaintiff not to claim any further relief and to seek only a declaration, even if any other relief was available to him and, thus could have been claimed by the plaintiff. On the other hand, the second part of

Section 42 of the Specific Relief Act 1877 virtually punishes the plaintiff by mandating denial of declaration to him if some consequential or coercive or further relief was possible to be claimed; but was not claimed by him. Hence, in his confusion; the draftsman had gone even against the equity position in England. The *Proviso* in the second part of the Section bound down the plaintiff to claim relief available to him; if he wanted to get a decree of declaration of his status or title. If did not so claim; his suit was to be dismissed. Therefore, the very aspect of option of not seeking any other relief; which was permissible under the first part of the Section had been made a ground to ban the relief by the *Proviso* comprising second part of the Section, if the optional relief was not claimed. Hence, this *Proviso* represents a classic case of logical absurdity. Moreover, Section 42 had been a total retrograde step; taking the law relating to the declaratory judgments in India even lower to the one existing in Civil Procedure Code 1859 (India); and even prior to the Chancery Courts Procedure Act 1852. Rather, this *Proviso* drowned the preposition in the Indian law to the primitive form in which it existed in England at the stage of their initial legal learnings. No reason is forthcoming, from anywhere, for introduction of this logically absurd and historically primitive provision in Indian Law, the interpretation of which could be only in the mind of its draftsman; which went along-with him on his death. No rational mind; interested in giving effect to each part of the Section; could decipher the workable meaning of this Section. The situation was made more complicated by the illustrations attached to this section, which provided for declaration of future interest and even

declaration without coercive consequent relief and even suggested declaration of title without consequent relief of possession.

21. Much to the chagrin of the Indian litigant; while the British were ever liberalizing their own law, they put the Indian litigant to the old and stale law on the point, with an added and compounded irreconcilable confusion. The idea behind this approach appears to be only one; that the British considered the Indians as irascible, illiterates and prone to frivolous litigation, as has come in some of the Judgment from the Privy Council. Therefore, the illogical absurdity in *Proviso* to Section 42 mentioned above; was presented in India; disguised as an attempt to minimize litigation. As mention above, the Law Commission of India recommended removal of the *Proviso* contained in the second part of the Section, however, the same has not been accepted, and while enacting the Specific Relief Act 1963, the same absurdity has been continued by retaining the same language in Section 34 of the Act as was in section 42 of the Specific Relief Act 1877, minus the Illustrations. Again, no reason or object is forthcoming as to how and why this primitive preposition of English Law has been continued in India despite the same already having been abandoned by the Britishers. If the law of pure 'Declaratory Judgments' was the Twentieth Century concept of law, in the words of Jennings, then there was no reason to deny this twentieth century law to the Indian populace. If the Indian law framers considered the *Proviso* to be a means to contain litigation; then this object already stands provenly defeated. Finding themselves in a fix qua the language used in the main body of the Section and in the *Proviso*, the Courts

in India have been struggling to, somehow, give effect to it by trying to find a meaning of the term 'further relief' used in the *Proviso* to Section, though forgetting the words plaintiffs 'need not ask' any further relief. However, again the same dilemma presents before the Court; because the same term 'further relief' is used in both, in the option clause of the main body of the Section, as well as, in the language of the *Proviso*. Therefore, whatever meaning is assigned to the term 'further relief'; that is bound to be at the option of the plaintiff as per main body of the Section and the same thing is bound to be destructive of his suit because of the *Proviso* if the optional relief is not claimed by him. Therefore, even as per the measure of the term 'further relief', the language of the main body of the Section and the one in the *Proviso* becomes mutually destructive, and hence, thereby making a case for the *Proviso* to go from the statute book. The resultant confusion has also created huge litigation. Hence, there is a foolproof case for change of Law in India as well, by removing the *Proviso* to the Section 34 of the Specific Relief Act.

22. However, the proposition that the suit for declaration of title per se is not maintainable unless the possession is claimed for; is not supported even by the provisions of the Specific Relief Act, rather, is altogether ruled out by the other provisions contained elsewhere, which will be seen hereinbelow. First of all, the language of the Section 34 of the Specific Relief Act itself makes it clear that it does not prohibit the plaintiff from filing a suit without any accompanying relief of possession. No such language is used in Section 34 of the Act. Even if the language of the *Proviso* to the Section,

with all its absurdity, is given effect to, then also, at the best, the same only mandates the Court not to exercise its 'discretion' to grant relief in favour of the plaintiff. Needless to say, that merely because the Court is unable to grant or is prohibited from granting relief to the plaintiff in a suit would not mean that suit itself is not legally instituted or is not maintainable. This is even the essence of the English judgments mentioned above. Non-maintainability of suit and incapability of the Court to exercise its discretion in favour of the plaintiff are not the same thing. The suit would be very much maintainable unless specifically prohibited by a provision of law. Such prohibition cannot be introduced by judicial interpretation having effect of adding words and phrases to a provision of law; where no such words or phrases exist in the statute. Moreover, introducing non-maintainability of suit through judicial interpretation also creates a strange legal position. This results in telling to a litigant; at the end of his litigation at highest court of the country; and after he already having incurred huge costs and having wasted decades; a fact which should have been clear to him on the first day when he approached the court to institute his suit in the first instance. Even at the level of the highest court of country interpretation qua maintainability cannot, necessarily be static and unchangeable. Just as is the saying that the 'equity changes with the foot of the Chancellor', legal interpretation is amenable to change with the 'Head of the Judge'. Therefore, availability of remedy of suit cannot be left to the semantics of interpretation by the experts having the luxury of expressing, differing, reviewing, revising, reversing, referring the matter to larger strength Benches or even

leaving the issue open for years. In the meantime, unforeseen, uncalled for or totally undesirable consequence can visit the plaintiff. This is the reason why it is jurisprudentially settled that a remedy or non-availability thereof; is always a function; better left to the Statutory Law and; not of the Court Made law.

23. Otherwise also, the Section 34 nowhere talks about clubbing relief of “possession” with suit for declaration of title. When, where, how and why the relief of “possession” has been taken to be any 'further relief' or as the ‘only’ 'further relief' to the relief of declaration of title; is not clear from any provision of law or any judgment as such, as is seen in the abovementioned English judgments, and as would be seen in the Indian judgments in the coming paragraphs of this judgment.

24. Moreover, there are provisions contained in the Specific Relief Act itself and in the Code of Civil Procedure which even rule out the possibility of clubbing the relief of seeking possession with relief of declaration. The said provisions are reproduced herein-below: -

“5. Recovery of specific immovable property: - A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

6. Suit by person dispossessed of immovable property:

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person [through whom he has been in possession or any person] claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

- (2) No suit under this section shall be brought—
- (a) after the expiry of six months from the date of dispossession; or
 - (b) against the Government.
- (3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
- (4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

41. Injunction when refused:- An injunction cannot be granted—

- (a) to (d) XXX XXX XXX
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;
- (ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.
- (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to be the assistance of the court;

(j) when the plaintiff has no personal interest in the matter.

Order II Rule 4 of the CPC

4. Only certain claims to be joined for recovery of immovable property:- No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.”

25. A perusal of the above-said provisions makes it clear that Section 41 of the Specific Relief Act specifically provides that the provisions in this Act would not disentitle the plaintiff from claiming relief in any suit other than the suit filed under the Specific Performance Act; if he is having an efficacious alternate remedy. Beside this, there are other claims and situation where relief under the Specific Relief Act cannot be granted as such, and the matter has to be left to other usual mode of court proceedings under some other provisions. The same was the position under English law, where the Chancery Court was not to entertain the suit if the plaintiff had any other remedy to go to the Common law Courts to seek his relief. This section recognizes the fact that the Specific Relief Act is not the exclusive

provision for filing the suit for seeking relief, including that of declaration. There can be the suit for declaration or injunction or possession even outside the scope of provisions of Specific Relief Act. This has even been so held by the Hon'ble Supreme Court of India in case of **M/s Supreme General Films Exchange Ltd.** (supra) wherein, while interpreting Section 42 of the Specific Relief Act, 1877, which had the provision as is exactly contained in Section 34 of the new Specific Relief Act, 1963, it has so held: -

14. “Kishori Lal's case (supra) was cited to show that declaratory decrees falling outside [Section 42](#) of the Specific Relief Act are not permissible because [Section 42](#), Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this Court when it declared in [Veruareddi Rmaranghava Reddy v. Konduru Seshu Reddy, 1966 Supp SCR 270 \(at p.277 of SCR\)](#)

"In our opinion, Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of Section 42 of the Specific Relief Act".

15. The result is that Section 42 merely gives statutory recognition to a well-recognized type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside

Section 42.”

26. Hence, it is obvious that Section 34 of the Specific Relief Act is neither the sole provision for seeking declarations of ones right or title nor it prohibits the plaintiff from seeking any other alternate efficacious remedy, including the declaration of his status and title under general law, by exercising his right to equality before law and equal protection of law, which is a basic principle of rule of law; and for which such a plaintiff is entitled to bring a suit under Section 9 of the Code of Civil Procedure. Therefore, a declaration cannot be denied to a plaintiff only because his case does not fall within four corners of Section 34 of Specific Relief Act. India does not have dual stream of courts like the Courts of Equity and the Common Law Courts, which once prevailed in English System. Here equity in courts of law is recognized only to the extent it is embodied in the statutory law. Specific Relief Act is a legislation in equity. Its purpose is to remove the injury to the right or status of the plaintiff by restoration or by compensation. Discretion in granting relief has to be limited to the purpose of choosing one of such relief by the court. Power to deny relief, altogether, by the court in ‘its discretion’ cannot be countenanced in India because of the Constitutional mandate of ‘Rule of Law’ as mentioned in foregoing paragraphs. Therefore, even in exercise of equity jurisdiction under Specific Relief Act court has no authority to decline relief of declaration of title or of right to property of a person in ‘its discretion’ unless the court assumes that there is an alternate remedy under general law, where the citizen can seek such a declaration. After all, title to property is a legal right based on specified transactions of transfer of title duly recognized by the State.

Therefore, any declaration of title could be a declaration *in rem*. It may not be limited to the equity of declaration between specified parties. Once a citizen has proved before the court of law the transaction of transfer of title in his favour then the court has no authority to deny the declaration of such right in favour of such citizen, by taking shelter under the irrelevant equity considerations included in the Specific Relief Act, like the plaintiff not coming to the court with 'clean hands' or the court having power not to grant the relief 'in its discretion'. The court is bound to recognize and declare the right of the citizen because title to a property cannot be abolished on the strength of the 'discretion of the court' or because of the citizen 'coming to the court with not so clean hands'. Hence the suit for declaration of title and also a separate suit for possession would be very much maintainable, as a matter of legal right, under CPC even outside the scope of the Specific Relief Act. However, to remove unnecessary confusion between legal right and equity relief; which sometimes appear to be at cross-ends; Section 34 of the Act deserves to be amended by removing the words 'in its discretion' from this Section as well, like these words were removed from Section 10 of the Act by the Amendment in the year 2018. Still further, a cumulative perusal of the above-said provisions shows that suit for 'possession' is not even the concern of the Specific Relief Act. Section 5 of the Specific Relief Act has specifically left the remedy of suit for 'possession' to be availed in the manner and as provided under the provisions of the Code of Civil Procedure. Specific Relief Act has a limited concern qua claim for 'possession' of the property; to the extent that a

person dispossessed of his immovable property within the duration of six months can seek restitution of his possession under Section 6 of the Specific Relief Act. This is an equity relief not even dependent upon any title to the property. This is only by way of equity of restoration of status. Beyond that 'possession' is not the concern of the Specific Relief Act. Rather, the Act deals with, more or less, the contractual aspects between the specified parties where the Court is to grant specific types of equity relief, binding only the specific parties.

27. Coming to the Section 5 of the Specific Relief Act and provision of the Code of Civil Procedure, it is clear that Section 5 of the Specific Relief Act leaves the issue of possession to the provisions of the Code of Civil Procedure. Code of Civil Procedure does not prohibit the filing a suit for possession even if it is not accompanied by prayer for relief of declaration of title. Mere suit for 'possession' is very much maintainable under Order II Rule 4 of the CPC. Rather, it is mandated to be only a suit for 'possession' except under some permitted and specified circumstances. As mentioned above, 'institution' of a suit for mere declaration of title is not barred even by bare language of Section 34 of the Specific Relief Act. Hence, the suit for 'possession alone' is very much maintainable under provisions of Section 9 and Order II Rule 4 the Code of Civil Procedure. Still further Order II Rule 4, reproduced above, positively prohibits clubbing of any other relief with relief of possession, except specifically permitted relief under the provisions of this rule itself, or as permitted by the Court. By any reading of the language of Order II Rule 4 or any interpretation thereof,

suit for relief of declaration, as contemplated by Section 34 of the Specific Relief Act, cannot be read into the language of provisions of Order II Rule 4 of the CPC, as any mandatory requirement qua claiming relief of possession. Hence Suit for Possession can not even be clubbed with a suit for declaration filed under section 34 of the Specific Relief Act. Under Order II Rule 4 (c), both these reliefs can be clubbed, if so desired by the plaintiff, however subject to the fact that cause of action giving rise to both the relief is the same. But by any means it is not compulsory qua maintainability of the suit.

28. The next issue is whether the relief of possession can be taken as 'further relief' to the relief of declaration for the purpose of Section 34 of the Specific Relief Act. The term 'further relief', as has been used in Section 34 of the Specific Relief Act, has been interpreted to mean; a relief which gives immediate coercive effect to the declaration itself; by attaching the Court sanction to it qua the execution of the declaratory decree. However, some Courts also have interpreted that since the Section has used the words 'the plaintiff is able to seek', therefore, the term 'further relief' referred to in this Section shall include such a relief as the plaintiff would have been in a position to claim from defendant in an ordinary suit; by virtue of the title which he seeks to establish in the declaratory suit. But this has not been the interpretation by even the English judgments referred above. Even the Full Bench judgment of this Court in **Sadhu Singh and others Vs. Pritam Singh and another**, AIR 1976 P H 38 has held that the relief of possession is an independent relief in itself; in terms of Order II Rule 4 even qua the claims permissible to be clubbed with it under this Rule, and hence is not

necessarily required to be clubbed with any other reliefs, and hence, subsequent suit for seeking possession would not even be hit by constructive *res judicata*. Therefore, relief of possession is totally independent relief under the law and is not required or even permitted to be joined with any other relief; as further relief thereof. Moreover, the Limitation Act prescribes limitation period for suit for declaration to be only three years; as per Article 58 in Schedule of Limitation Act, whereas, the limitation for suit for possession; whether based on title or on wrongful dispossession, is 12 years as per Articles 64 and 65 of the Schedule. This also clearly shows that the relief of possession is totally independent of relief of declaration and it can be claimed much after the expiry of limitation for suit for declaration. A citizen cannot be forced to file a suit for possession within three years limitation period by creating an artificial connection between the two relief through judicial interpretations. There cannot be any estoppel against the statute of limitation, much less the same being created through judicial interpretation of some other statutory provision, particularly, when such interpretation of such other statutory provision itself is based on non-existent words and phrases in such other statutory provisions (reference here being section 34 of Specific Relief Act). Still further, the Court Fee Act also envisages suit for declaration with and without consequential relief. Suit for possession is separately envisaged. The court fee for suit for declaration with consequential relief is separately provided for and the Court Fee for suit for possession is separately provided for. There is huge difference between the two. Therefore, the relief of possession cannot be clubbed even as a

consequential relief to the relief of declaration. When it is separate relief which the plaintiff can claim within twelve years as per the availability of amount of court fee with him, then he cannot be forced to claim relief of possession by paying the court fee right now. He may not be having the necessary amount of court fee right now. Therefore, his right to get declaration of his title to a property cannot be defeated by; first insisting that he should necessarily claim possession with declaration; and then by saying that his suit is liable to be dismissed for non-payment of the court fee. Such strangulation of the rights of the citizen is not either the policy of law or the philosophy of law. This would, unfortunately, reflect only the frustration of the legal system due to its inability to cope with the ever-increasing litigation load; and as a ploy to increase revenue from the court fee. Otherwise, there is no basis for treating relief of possession even as a 'further relief' to the relief of declaration of title.

29. Although earlier the Hon'ble Supreme Court had held in case of **Vinay Krishna** (supra) and in case of **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar** (supra) that the possession is the 'further relief' and therefore, the suit for declaration only would not be maintainable unless the possession is claimed in the same, however, a perusal of the said judgments shows that in none of the said judgments, the Hon'ble Supreme Court have explained from its own side the meaning of the language used in Section 34 of the Specific Relief Act. Rather, the Court have gone either to the facts and circumstances of the case; or have relied upon the earlier judgments rendered by the earlier benches. In

case of **Vinay Krishna** (supra) the earlier decision of a bench of equal strength has been sought to be distinguished only with reference to the particular facts of that case and the *Proviso* to Section 34 has been held to be mandatory, whereas, in case of **M/s Supreme General Films Exchange Ltd.** (supra), it was held to be discretionary only. But as per the law laid down by the Constitution Bench of Supreme Court in case of **National Insurance Company Limited Vs. Pranay Sethi and others, (2017) 16 SCC 680**, in such a situation, the earlier judgment shall prevail as a precedent and not the later one. In case of **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar** (supra) the Hon'ble Supreme Court has relied only upon another judgment rendered in **Ram Sharan and another Vs. Smt. Ganga Devi, AIR 1972 Supreme Court 2685** and has held as under:-

“35. In the present case, the plaintiff having been found not to be in possession and having only sought for declaratory reliefs, the suit was clearly not maintainable and has rightly been dismissed by the trial court. In this context the reference is made to the judgment of this Court reported in **Ram Sharan and Anr. versus Smt. Ganga Devi, AIR 72 SC 2685**, wherein para 1 & 4 following was stated:

"1. This is a plaintiffs' appeal by special leave. Ram Sharan and Raghubir Sharan, the plaintiffs are brothers. They jointly owned suit property with Chhabili Kuer widow of Lalita Prasad. After the death of Chhabili Kuer on February 8, 1971, Ganga Devi the defendant in the suit came forward as the legal representative of Chhabili Kuer and got

the mutation effected in her name in the place of the deceased Chhabili Kuer. In 1958, the plaintiffs brought this suit for a declaration that they are the sole owners of the suit properties. They did not claim possession either of the entire or even any portion of the suit properties.

4. We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding Courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable.”

36. The plaintiff, who was not in possession, had in the suit claimed only declaratory relief along with mandatory injunction. Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit.”

Hence, it is clear that in none of the above-said judgments, there is a specific consideration and explanation of the language of Section 34 viz-a-viz the meaning of the words 'further relief' used in the main Section, as well as, used in the *Proviso* to the main section. Nowhere it has been pronounced as to why and how the relief of possession shall be the 'further relief' or how and why the relief of possession shall be the 'only' 'further relief' to have the effect of non-suiting the plaintiff, if not claimed with relief of declaration. These are the decisions delivered with reference to the facts and circumstances of the case; by either agreeing or disagreeing with the respective High Courts.

30. On the contrary, in the latest judgment rendered by the Hon'ble Supreme Court in case of **Akkamma and others Vs. Vemavathi and others, [2022(1) RCR (Civil) 299]**, it has been specifically held that the 'further relief' would be any consequential relief which can add a coercive element qua the execution of the declaratory decree. Hence, even the consequential relief of injunction, sought with the declaratory decree, without seeking possession has been held to be enough compliance of the *Proviso* to Section 34 of the Specific Relief Act. Rather in this judgment, the Supreme Court has held that a declaratory decree can be granted even in absence of claim for possession. The relevant paragraphs of the judgment rendered in case of **Akkamma and other** (supra) are reproduced herein-below: -

“16. The prohibition or bar contained in *Proviso* to Section 34 of the 1963 Act determines the maintainability of a suit and that issue has to be tested on

the basis the plaint is framed. If the plaint contains claims for declaratory relief as also consequential relief in the form of injunction that would insulate a suit from an attack on maintainability on the sole ground of bar mandated in the *Proviso* to the aforesaid section. If on evidence the plaintiff fails on consequential relief, the suit may be dismissed on merit so far as plea for consequential relief is concerned but not on maintainability question invoking the *Proviso* to Section 34 of the 1963 Act. If the plaintiff otherwise succeeds in getting the declaratory relief, such relief could be granted. On this count, we do not accept the ratio of the Karnataka High Court judgment in the case of Sri Aralappa (supra) to be good law. In that decision, it has been held:

“31. Even if the plaintiff comes to Court asserting that he is in possession and that if it is found after trial that he was not in possession on the date of the suit, even then, the suit for declaration and permanent injunction is liable to be dismissed as not maintainable, as no decree for permanent injunction can be granted if the plaintiff is not in possession on the date of the suit. In such circumstances, it is necessary for the plaintiff to amend the plaint before the judgment and seek relief of possession. Therefore, a suit for declaration of title and permanent injunction, by the plaintiff who is not in possession on the date of the suit, when he is able to seek further relief of recovery of possession also, omits to do so, the Court shall not make any such declaration and the suit is liable to be dismissed as not maintainable.”

17. So far as the reliefs claimed in the suit out of which this appeal arises, prayer for declaration was anchored on two instances of interference with the possession of land of the plaintiffs and injunctive relief for restraint from interference with the property was also claimed. But possession of the said property by the original plaintiff was not established. The alternative relief sought to be introduced at a later stage of the suit was also found to be incapable of being entertained for the reason of limitation. Thus, the foundation of the case of the plaintiffs based on these two factual grounds collapsed with the fact-finding Courts rejecting both these assertions or allegations. But that factor ought not to be a ground for denying declaration of ownership to the plaintiffs. There is no bar in the Specific Relief Act, 1963 in granting standalone declaratory decree. The Trial Court came to a positive finding that the original plaintiff was the owner of the suit-property. But it held that in absence of declaration of relief of possession by the plaintiff, declaration of title cannot be granted. We have already expressed our disagreement with this line of reasoning. It seems to be a misconstruction of the provisions of Section 34 of the 1963 Act. The Trial Court and the High Court have proceeded on the basis that the expression “further relief” employed in that *Proviso* must include all the reliefs that ought to have been claimed or might have been granted. But in our view, that is not the requirement of the said Proviso. This takes us to the corollary question as to whether the 1987 suit could have been held to be barred under the principle contained in Order II Rule 2 of the Code of Civil Procedure, 1908. In our opinion, the said provisions of the Code would not

apply in the facts of this case, as the denial of legal right in the 1987 suit is pegged on two alleged incidents of 15th and 25th February, 1987. These allegations can give rise to claims for declaration which obviously could not be made in the 1982 suit. The claim for declaratory decree could well be rejected on merit, but the suit in such a case could not be dismissed invoking the principles incorporated in Order II Rule 2 of the Code of 1908.

18. The High Court has proceeded on the footing that in the subject-suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the Proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count fails on merit, for that reason alone the suit ought not to fail in view of aforesaid prohibition incorporated in Section 34 of the 1963 Act.”

31. Hence, it can be safely held that neither the relief of possession is a 'further relief' in terms of Section 34 of the Specific Relief Act qua the declaratory decree; nor is there any legal warrant for holding that suit for declaration simpliciter is not maintainable if the possession is not claimed by the plaintiff along with the declaratory decree. Rather, importing this preposition to the Section 34 of the Specific Relief Act creates an unfortunate situation where a fact; which should have been clear to the citizen on the date when he approaches the Court for Institution of Suit; can be told to him only at the end of litigation in his suit, after passing through

the entire hierarchy of Courts, and even that in uncertain terms; which can change from court to court with the interpretation by the particular courts.

32. Otherwise also, in the present case, the plaintiffs had claimed that they are in possession of the property and their declaration was only regarding declaring them as owner in possession along with other co-sharers, therefore, it was implicit that, as per their pleadings, they were in possession of the property. Hence, they were not mandatorily required to claim possession to maintain the suit for declaratory decree. So far as the 'further relief' is concerned, a perusal of the suit filed by the plaintiffs shows that they had, in fact, claimed a consequential further relief of correction of entries in the revenue record in their favour. Hence, their suit cannot be said to be without claiming any 'further relief' beyond the declaratory decree. They had, in fact, sought a 'further relief' to give coercive teeth to the declaratory decree, if any, to be passed in their favour. Hence, the suit in the present case, by any means, cannot be held to be non-maintainable. The present case is squarely covered by the above-said judgment of the Supreme Court in case of **Akkamma and others** (supra).

33. Coming to the arguments on other merits of the matter, this Court finds that the plaintiffs had raised specific pleadings qua the earlier pre-emption suit and the decree having been passed in the same in their favour. It is also not disputed that the official record of the said suit stood destroyed in the incident of fire in the Court. The said incident has been proved on record by the plaintiffs by producing the relevant court witness, along with the record. Not only that, the plaintiffs had even proved on

record the other facts regarding filing of the suit, disposal of the suit and withdrawal of the money by the vendee of the pre-emption suit, by summoning the record of the concerned Court. The said witnesses have wrongly been discarded by the Courts below merely on the ground that either the record was not in their handwriting or that they were not personally known to the parties to the said suit. However, the Courts' officials are neither required to be known to the parties to the suit nor is the record which is being produced by the official witness required to be in his handwriting. A witness examined to produce the official record before the Court is not even a witness in the sense of words. He is not even required to be subjected to the cross-examination. The reliance of the counsel for the appellants on the judgments rendered in cases of **Vishwa Vijay Bharti** (supra), **Parmeshwari Devi (Smt.)** (supra), **Rajinder Singh** (supra) and **Kotulpur Farmer's Service Co-operative Society Ltd.** (supra) in this regard, is well placed. If the record, produced by the said official witnesses is seen, then it is well proved that the plaintiffs had, in fact, filed a suit for pre-emption against Parsin Kaur qua the sale deed executed in her favour by Nand Kaur. In the said suit one-fifth of the sale consideration was duly deposited by the plaintiffs as per order of the Court and as per requirement of the Pre-emption Act. The said suit was decreed in favour of the plaintiffs by way of compromise. The one-fifth amount of the sale consideration, which was deposited with the Court, was duly withdrawn by Parsin Kaur after the decision of the case. So far as the balance sale consideration is concerned, Parsin Kaur herself has filed a written statement in the suit and

she has admitted the fact that she had, in fact, received the balance sale consideration of Rs.3,230/-. Hence, the pre-emption of the sale in favour of Parsin Kaur by the plaintiff No.1 and the predecessor-in-interest of the remaining plaintiffs and some of the defendants, is duly proved on record.

34. Although, the counsel for the respondents has disputed the factum of payment of the balance sale consideration to Parsin Kaur, however, even this argument is totally bereft of any merits. It is available on record that the plaintiffs had asserted the factum of having paid the balance sale consideration of Rs.3,230/- on 04.10.1969 and the said fact has been duly admitted by Parsin Kaur by filing her separate written statement. Since after filing the written statement, Parsin Kaur had stopped appearing before the Court, therefore, to prove the factum of receipt of money by Parsin Kaur, the plaintiffs had even moved an application for “admission and denial” of facts by Parsin Kaur. The Court allowed the said application and had directed Parsin Kaur to admit or deny the facts pleaded by the plaintiffs. The said Parsin Kaur had admitted the factum of receipt of money even in these admissions. Hence, there was hardly any more requirement of evidence to be led by the plaintiffs qua this fact. Still the plaintiffs led in evidence the receipt earlier executed by Parsin Kaur qua having received the balance sale consideration as Exhibit P-2. The plaintiffs have duly examined the scribe of the receipt, as well as, the only alive marginal witnesses of the said receipt. The Courts below have gone wrong in disbelieving these witnesses by observing that the scribe has said that money was not paid in his presence and that the marginal witness has said that he

was not personally known to the parties to the receipt. However, the scribe of the receipt was not examined by the plaintiffs as a witness to the factum of payment of money. The factum of payment of money was proved by the marginal witness of the receipt Exhibit P-2. Even the marginal witness was examined to prove the factum of payment of money, for which he was not required to know the parties personally. Hence, even the receipt of payment of money by Parsin Kaur, as balance sale consideration in the pre-emption suit, stand duly established on record.

35. Since the plaintiffs have succeeded in proving on record that the sale of her share by Nand Kaur in favour of Parsin Kaur was duly pre-empted by the plaintiffs, therefore, it is clear that Parsin Kaur had no salable interest to transfer in favour of Nazir Singh, the purchaser of the impugned sale deed. Hence, the sale deed in favour of Nazir Singh has to be held to be void. Parsin Kaur could not have transferred any right which she herself did not have on the date of execution of the sale deed in favour of Nazir Singh. Moreover, the defendant has not led any evidence to prove the alleged sale in his favour. Neither he has examined the exultant of the sale deed nor he examined any attesting witness of the sale deed; as such. Rather, he has even shown ignorance qua the identity of the land or location of the land. This lends credence to the assertion of the appellants that the alleged sale transaction in favour of Nazir Singh was the shame transactions, fabricated by Harnam Singh to whom Nazir Singh was directly related; being the brother-in-law of son of Harnam Singh. Moreover, Harnam Singh is alleged to have transferred the property in favour of Nazir Singh acting as power of

attorney holder from Parsin Kaur. However, even the power of attorney has not been proved on record, by any evidence, whatsoever. Neither Parsin Kaur has been examined as a witness to prove the GPA nor Harnam Singh has stepped into the witness box to own or prove the said power of attorney. Therefore, the assertion of the appellants that no sale deed was executed in favour of Nazir Singh either by Parsin Kaur or under her authority has gone totally un rebutted.

36. In view of the above, findings merit in the arguments raised by the learned counsel for the appellants, this Court is of the considered opinion that the judgments and decrees passed by the Courts below deserve to be set aside. The suit filed by the appellants/plaintiffs deserves to be decreed. Ordered accordingly.

37. The appeal stands allowed in the above-said terms.

38. However, it is also ordered that the copy of this judgment be sent to the Ministry of law and Legislative Affairs, Government of India, and the said Ministry is directed to reconsider the issues: -

- (i) whether the words 'in its discretion' used in Section 34 of Specific Relief Act should be removed so as to confirm a definite right with the citizen to get a declaration of his title to property even in a suit under this Act; and for bringing this provision in consonance with the 'Rule of Law' envisaged under Article 14 of the Constitution?
- (ii) whether the *Proviso* to Section 34 of the Specific

Relief Act, at all, deserves to be retained in the Act in view of the abovementioned history; and in view of the inconsistency and absurdity arising from the language of *Proviso* vis-à-vis the language of the main part of the Section; or it should be removed from the said Section, so as to save the poor litigants from the harassment resulting from vastly varying and even juxtaposing court interpretations of this *proviso*?

After reconsideration, the competent authority be apprised on the aspect qua desirability of bringing it to the notice of the Parliament. After all, the Parliament may not be averse to appreciating the plight of litigating citizen who, because of this *proviso*, are being told a legal position only after having incurred huge litigation costs and after having wasted decades in litigating throughout the hierarchy of Courts, and even that not in certain and definite terms, although the said legal fact is such which should have been statutorily clear to him on the very first day; when he approached the first court for Instituting his suit.

All pending civil miscellaneous applications, if any, be also disposed of; as such.

(RAJBIR SEHRAWAT)
JUDGE

08.02.2023
adhikari

Whether speaking/reasoned	Yes
Whether Reportable	Yes