

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

% Judgment reserved on : 04.02.2023
Judgment pronounced on : **28.03.2023**

+ RSA 97/2019
DR MANJULA PATHAK KRIPPENDORF Appellant
versus

PREETI DAWRA & ANR. Respondents

Advocates who appeared in this case:

For the Appellant : Ms. Tara Narula, Adv. (Amicus Curiae for petitioner in person), Mr. S. Debabrata Reddy and Shivangi Sharma, Adv.

For the Respondents : Mr. Sajjan Narain, Advocate for R-1 and R-2.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

TUSHAR RAO GEDELA, J.

[The proceeding has been conducted through Hybrid mode]

1. This is a Second Appeal filed by the appellant/defendant against the order passed by the learned First Appellate Court in RCA No. 41/17 titled as “*Dr Manjula Pathak Krippendorf Vs Ms Preeti Dawra & Anr*” dated 16.07.2018, whereby the appeal under Section 96 of the Civil Procedure Code, 1908 (hereinafter referred to as “CPC”) was dismissed confirming the judgment and the decree dated 11.04.2017 passed by the learned Trial Court in CS No. 83267/16 titled as “*Preeti Dawra & Anr Vs Smt Manjula Pathak Krippendorf*”.

2. For the purpose of convenience, the parties would be referred to, as they were referred before the Trial Court.

FACTS NOTED BY THE FIRST APPELLATE COURT

3. The plaintiffs claimed to be in possession of the first floor of property no. B-56, Defence Colony, New Delhi (hereinafter referred to as “suit property”) by virtue of a registered sale deed dated 03.08.2006.

4. It was further averred that the suit property was rented out to a third party and when the tenants left the suit premises on 05.09.2010, the defendant started causing trouble by putting up locks on gates and doors of the common entrance of the suit property.

5. The plaintiffs have provided date-wise details of the instances of obstructions caused by the defendant.

6. Before the Trial Court, it was the case of the defendant that the suit property had been illegally constructed by a person/builder Sh. Vijay Dixit, who had played fraud upon the defendant by utilizing the agreement entered by her with this person.

7. It was further averred that the defendant had claimed to have a number of litigations against this person (Sh. Vijay Dixit) and has attempted to explain that this builder executed a General Power of

Attorney in favour of other persons which had been utilized in executing the sale deed in favour of the plaintiffs, therefore, the plaintiffs are illegal occupants of the suit property and moreover the construction was also illegal because it is not approved by Municipal Corporation of Delhi (hereinafter referred to as “MCD”).

8. The plaintiffs made the following prayers:

“a. Pass a Decree of permanent injunction thereby restraining the defendant and defendant's team from obstructing or Interfering, especially in respect of the plaintiffs, plaintiffs' attorney, plaintiff's tenants, heirs and assigns, and the agents and representatives of such persons, with entry and ingress into B-56, Defence Colony, New Delhi - 110024 through the external gates, access and movement through areas therein, including common doorways and common passages which are demarcated as common areas in the accompanying layout plan, access to, movement throughout, and the plaintiffs' peaceful possession of, the areas specified in sale deed dated 03.08.2006 as being exclusive owned by plaintiffs.

b. Pass a Decree of permanent injunction against the defendant and the defendant's team, thereby restraining defendant and defendant's team from locking, or causing the locking of, any gate or common door in B-56 land or B-56.

c. Pass a Decree of permanent injunction against the defendant and the defendant's team, thereby restraining defendant and defendant's team from threatening, intimidating or causing any harassment to the plaintiffs, plaintiffs' attorney, plaintiffs' tenants, heirs and assigns.”

WRITTEN STATEMENT

9. On the other hand, the defendant defended the instant suit by filing the Written Statement, wherein it is, *inter alia*, contended that the plaintiffs had concealed the material facts that the defendant had already filed a suit for declaration bearing CS (OS) No. 898/96 in the High Court of Delhi regarding the unauthorized and illegal execution of documents by the builder Sh Vijay Dixit. The plaintiffs had forcibly entered into the suit premises on 17.12.2010 after breaking the locks of the suit property. It is further stated that the plaintiffs also concealed that both the plaintiffs are financiers of Sh. Vijay Dixit, the builder, and he constructed this building no. B-56, Defense Colony from basement to top floor by ignoring all the bylaws of the MCD and due to this MCD sealed the property.

ISSUES FRAMED BY THE TRIAL COURT

10. After filing replication by the plaintiffs, the following issues were framed by the Trial Court vide its order dated 03.03.2016:-

- i. *Whether the plaintiff is entitled to decree of permanent injunction as prayed in clause (a)? OPP*
- ii. *Whether the plaintiff is entitled to decree of permanent injunction as prayed in clause (b)? OPP*
- iii. *Whether the plaintiff is entitled to decree of permanent injunction as prayed in clause (c)? OPP (Vide the separate*

statement of the learned counsel for the plaintiffs recorded on 10.04.2017, the prayer clause (c) & issue no.3 were deleted)

iv. Relief

EVIDENCE RENDERED IN THE TRIAL COURT

11. In support of their case, plaintiffs examined four witnesses in all.

12. The plaintiffs examined themselves as PW-1 & PW-4, by tendering their evidence by way of affidavits (Ex. PW-1/A & Ex. PW-4/A) and relied upon the following documents:-

- i. The registered sale deed dated 03.08.2006 marked as Mark 1 (de-exhibited being photocopies, originally mentioned as Ex. PW4/1 in the affidavit of PW-4).
- ii. PW-4 further relied upon document Ex. PW-4/32, 33, 62 to 65.

13. The plaintiffs examined Smt. Priya Prakash as PW2 who identified her signatures at Point 'A' & 'B', she has tendered her evidence by way of affidavit Ex. PW-2/A.

14. The plaintiff examined Sh. Hari Kishan as PW3 who identified his signatures at point 'A' & 'B', he has tendered his evidence by way of affidavit Ex. PW-3/A.

15. On the other hand, the defendant had failed to lead any DE despite being given several opportunities. Accordingly, the Trial Court had closed the defendant's evidence vide the order dated 20.09.2016.

THE JUDGEMENT & DECREE OF THE TRIAL COURT

16. Upon completion of trial, the suit of the plaintiffs was decreed by granting the following reliefs :-

“(i) A decree of permanent injunction passed in favour of the plaintiffs and against the defendant thereby restraining the defendant and defendant's team from obstructing or interfering, especially in respect of the plaintiffs, plaintiffs' attorney, plaintiffs' tenants, heirs and assigns, and the agents and representatives of such persons, with entry and ingress into B-56, Defence Colony, New Delhi - 110024 through the external gates, access and movement through areas therein, including common doorways and common passages which are demarcated as common areas, in the accompanying layout plan, access to, movement throughout, and the plaintiffs' peaceful possession of, the areas specified in sale deed dated 03.08.2006 as being exclusive owned by the plaintiffs.

(ii) A decree of permanent injunction is also passed in favour of the plaintiffs and against the defendant thereby defendant and defendant's team from locking, or causing the locking of, any gate or common door in B-56 land or B-56.

(iii) Cost of the suit is also awarded in favour of the plaintiffs.”

17. Aggrieved by the impugned judgment and decree dated 11.04.2017, the defendant preferred an appeal under Section 96 CPC, 1908 and Order XLI read with Section 151 CPC, 1908 primarily contending that :

17.1. A proper opportunity had not been provided to her to lead her evidence. The review application seeking permission to lead evidence was also dismissed by the Trial Court vide order dated 08.03.2017. It is further contended that the defendant filed Civil Misc. Petition No. 438/2017 before this Court which remained pending due to certain circumstances and when the matter came up for hearing on 21.04.2017, the same had been withdrawn by the counsel of defendant as infructuous, since the Trial Court had already passed final judgment and decree on 11.04.2017.

17.2. Apart from the above, the defendant had also challenged the title of the plaintiffs by seriously questioning the title documents of the plaintiffs by demonstrating that a suit was filed by her against one Sh Vijay Dixit questioning the said Dixit's competency to execute any title document in favour of third parties as she had challenged the very Power of Attorney executed by her in his favour under the Collaboration Agreement executed between herself and Sh. Vijay Dixit.

17.3. The defendant had also challenged the possession of the plaintiffs on the issue of not having taken possession by peaceful means.

THE JUDGEMENT/DECREE OF THE FIRST APPELLATE COURT

18. After going through the material before it, as also the submissions urged by the respective parties, the First Appellate Court held as under :-

“(i) The possession of the plaintiffs over the first floor of the suit property is an admitted fact and that till date there is no judicial finding/legal challenge to the sale deed dated 03.08.2006 executed in favour of the plaintiffs.

(ii) Further, a perusal of the Ld. Trial Court record shows that ample opportunities have been accorded to the defendant to present her case and on the contrary the journey of trial from its case of institution from 25.12.2010 to the final impugned judgment dated 11.04.2017 passed through various miscellaneous applications.

(iii) It is a matter of record that the defendant in her statement recorded on 06.01.2011 recorded by Ld. Trial Court stated that plaintiffs would be allowed to enter and leave the suit premises.

(iv) In a suit for permanent injunction of such kind, the Ld. Trial Court has committed no infirmity in recognizing the rights of the plaintiffs about free ingress/egress of the suit property until their rights are found to be not available by following due process of law.

(v) The dispute between the defendant and Sh. Vijay Dixit would not alter the rights of the plaintiffs unless and until it is established by process of law that there was no transfer of title based on the sale deed in favour of the plaintiffs.

(vi) *There is no infirmity in the impugned judgment and decree dated 11.04.2017 of the Ld. Trial Court and hence, the appeal of the defendant is dismissed.”*

19. Aggrieved by the said order, the defendant has filed the present second appeal under section 100 CPC, 1908.

CONTENTIONS OF THE APPELLANT/DEFENDANT

20. Ms. Tara Narula, learned Amicus Curiae, appearing for the defendant submits that the Trial Court had committed a grave irregularity amounting to a perversity of the findings on the following grounds :-

20.1. Ms. Narula, learned Amicus submits that the suit is not maintainable as per the Supreme Court Judgment in ***Anathula Sudhakar Vs P Buchi Reddy***, reported in (2008) 4 SCC 594. The plaintiffs filed a civil suit against the defendant simpliciter for permanent injunction and not sought declaration of title. She submits once a serious issue is raised over the title of the suit property in the written statement, the Trial Court should have framed issues on title. On that basis, the learned Amicus submits that as per *Anathula Sudhakar (Supra)*, once there is a serious dispute and a cloud raised over the title of the property, an injunction suit simpliciter cannot be filed. Ms. Narula, learned Amicus relies on para. 21 of the Supreme Court

judgment *Anathula Sudhakar (Supra)* which is extracted hereunder:-

“(a) Where a cloud is raised over plaintiff’s title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff’s title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff’s lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar Vs Alagammal, reported in (2005) 6 SCC 20]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the

parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexaciously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

20.2. Ms. Narula, learned Amicus, also submits that the civil suit filed by the plaintiffs before the Trial Court should have been stayed in accordance with Section 10 CPC, 1908. She submits that the sale deed submitted by the plaintiffs shows the title is traced back to Sh. Vijay Dixit. She submits that defendant had questioned the authorization given by her to Sh Vijay Dixit to act as her lawful general attorney in respect of the suit property. She submits that the defendant challenged the two Powers of Attorney, dated 21.04.1995 and 15.05.1995 by filing a Civil Suit bearing CS (OS) No. 898/1996 titled “Dr

Manjula Krippendorf Pathak Vs Vijay Dixit & Ors” which is still pending adjudication before this Court. On that basis she submits that, the former suit is a prequel to the subsequent suit and the latter ought to have been stayed as per Section 10 CPC, 1908.

20.3. The next vehement contention of Ms. Narula, learned Amicus was in respect of the deprivation of the defendant from leading defendant’s evidence and thereby violating the principles of natural justice and fair play. She submits that the First Appellate Court did not at all consider this vital issue violating the right to lead evidence and which are founded on principles of natural justice.

20.4. Ms. Narula, learned counsel appearing for the defendant submits that the actual possession is to be established by the plaintiffs in the suit for injunction, restraining the defendant from interfering with the peaceful possession. The learned Amicus relies on para 11 of the Supreme Court Judgment **Balkrishna Dattatraya Galande Vs Balkrishna Rambharose Gupta And Another**, reported in (2020) 19 SCC 119, wherein it was held as under:-

“11. The first respondent-plaintiff has filed the suit under Section 38 of the Specific Relief Act seeking permanent injunction on the ground that he is in actual possession of the suit property. Grant of permanent injunction results in

restraining the defendant's legitimate right to use the property as his own property. Under Section 38 of the Specific Relief Act, an injunction restraining the defendant from disturbing possession may not be granted in favour of the plaintiff unless he proves that he was in actual possession of the suit property on the date of filing of the suit. The earlier suit RCS No. 1004 of 1988 was filed in the year 1988 and it proceeded till 1991. In the present case, the first respondent- plaintiff has to prove his actual possession on the date of filing of the suit. The First Appellate Court concluded that the defendant-defendant had failed to prove that the plaintiff has vacated the premises in 1991 after withdrawal of earlier suit RCS No. 1004 of 1988. The contention of the defendant is that a settlement was arrived at between the parties and pursuant to that settlement, the plaintiff has vacated the premises in 1991. This has not been rebutted by the first respondent-plaintiff by adducing substantive evidence. The possession of the plaintiff cannot be based upon the inferences drawn from the circumstances. The plaintiff has to prove actual possession for grant of permanent injunction.”

20.5. Ms. Narula, learned Amicus also submits that the plaintiffs had never produced the original title documents/sale deeds on record till date. She further contends that a mere photocopy of the sale deed does not stand proved until the same is proved as a secondary evidence to make it admissible in Court. The learned Amicus relies on para 6 and 7, of the Supreme Court judgment in **J Yashoda Vs K Shobha Rani**, reported in (2007) 5 SCC 730, wherein it was held as under:-

“6. In order to consider rival submissions it is necessary to take note of Sections 63 and 65(a.) Sections 63 and 65(a)

read as follows:

"63. Secondary evidence.—Secondary evidence means and includes—

- 1) Certified copies given under the provisions hereinafter contained;*
- 2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;*
- 3) Copies made from or compared with the original;*
- 4) Counterparts of documents as against the parties who did not execute them;*
- 5) Oral accounts of the contents of a document given by some person who has himself seen it.*

65. Cases in which secondary evidence relating to documents may be given.

Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

- (a) when the original is shown or appears to be in the possession or power—
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or
of any person legally bound to produce it, and
when, after the notice mentioned in Section 66, such person does not produce it;"*

7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible though failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents."

20.6. On the above observations, Ms Narula, learned Amicus submits that it is an admitted case that no original title

documents/sale deeds were ever produced before the Trial Court nor did the Trial Court insist upon production of the same despite the vehement opposition to the ownership of the plaintiffs.

Thus, Ms Narula submits that the edifice of the case of the plaintiffs disappears and the impugned Trial Court judgment and decree as well as that of the First Appellate Court are nullity in law.

CONTENTIONS OF THE RESPONDENTS/PLAINTIFFS

21. Mr. Narain, learned counsel appearing for the plaintiffs contends that all the allegations made by the defendant against plaintiffs are incorrect, and are denied on the following grounds:-

21.1. Mr. Narain, learned counsel submits that there is no substantial question of law arising in the present appeal at all.

21.2. Mr. Narain, learned counsel also submits that a civil Suit No. 139/2013 dated 23.10.2013 titled “*Smt Manjula Pathak Krippendorf Vs Mr. A. Prakash & Anr*” was rejected by allowing an application under Order VII Rule 11 CPC, 1908 stating that,

“It has been held in the case of Anathula Sudhakar (Supra), that prohibitory injunction is concerned only with the possession and where cloud is raised over

plaintiff's title and he does not have possession, a suit for declaration and possession is the remedy and the suit for injunction simplicitor is not maintainable".

He further submits that an appeal has never been filed against this order dated 23.10.2013. The Power of Attorney and the sale deed were nowhere challenged by the defendant in the aforesaid suit.

21.3. Mr. Narain, submits that the plaintiffs are in peaceful possession of the suit property through themselves or through the tenants. He submits that the defendant never filed the suit for ejectment against the plaintiffs. He further submits that the defendant admitted that the plaintiffs are in possession prior to and subsequent to the suit.

21.4. Mr. Narain, learned counsel submits that insofar as the substantial question of law framed regarding the Trial Court not granting an opportunity to the defendant to adduce her evidence is concerned, the Trial Court has given sufficient opportunity for the defendant's evidence but the defendant never appeared before the Trial Court. He submits that even if it's admitted for the sake of the argument that the defendant was unwell based on the medical records she has submitted before the Court, the defendant could have always appeared through her counsel before the Trial Court. The learned counsel relies on para 58, 59

and 60 of the judgment of this Court titled as **Jagan Nath Chauhan Vs S C Nanda & Anr**, reported in MANU/DE/1182/2004.

21.5. Mr. Narain, learned counsel, regarding the submission of non-production of the original sale deed is concerned, took this Court to the examination-in-chief of PW-4 to submit that the original documents at the relevant time were with the bank on account of the loan the plaintiffs had taken to purchase the first floor of the suit property. He further submits that since there was no objection on behalf of the defendant raised regarding the photocopies of the sale deed, there was no need for the plaintiffs to call for the original documents from the bank. He also submits that when the photocopies of this very sale deed were not challenged in the First Appellate Court, the defendant has impliedly admitted to the secondary evidence produced by the plaintiffs.

22. This Court has given thoughtful consideration to the arguments rendered by the learned counsels for both the defendant and the plaintiffs and also considered the relevant record and the impugned judgment and proceeds to analyse and render findings and conclusions.

SUBSTANTIAL QUESTIONS OF LAW

23. After preliminary hearing of the parties, the following substantial questions of law were framed by this Court vide its order dated 12.01.2022:-

“(i) Whether the Plaintiffs have established their title in respect of the first floor of the suit properly in view of the pending challenge to the rights of Sh. Vijay Dixit through whom the Plaintiffs seek to trace their title?”

“(ii) Whether the injunction as prayed by the plaintiff in the suit could have been granted without proper title being first established in favour of the plaintiffs?”

“(iii) Whether the defendant had admitted the possession of the plaintiffs in their pleadings?”

“(iv) Whether the written statement filed by the defendant ought to have been read in totality and the Trial Court & Appellate Court arrived at an incorrect conclusion that the settled possession of the plaintiffs was admitted by the defendant?”

“(v) Whether injunction could have been granted without properly establishing the title of the plaintiffs?”

*“(vi) Whether the suit was maintainable without seeking a declaration in view of the judgment of the Supreme Court in **Anathula Sudhakar Vs P Buchi Reddy**, reported in AIR 2008 SC 2033 ?*

*“(vii) Whether the suit filed by the plaintiff ought to have been stayed in view of the provisions of Section 10 CPC owing to the pendency of Suit No 868/1996 titled **Dr. Manjula Krippendorf Pathak Vs Vijay Dixit & Ors** between the defendant and Sh. Vijay Dixit?”*

(viii) *Whether there was a justifiable ground for not granting an opportunity to the defendant to adduce evidence?*

24. As the questions (i), (ii), (v), and (vi) are interconnected, these are taken up together:-

24.1. In order to decide the aspect whether the plaintiffs were required to establish and prove their title in a suit for simple injunction, it would be relevant to examine the ratio laid down by the Supreme Court in *Anathula Sudhakar's* case. As per the ratio laid down in *Anathula Sudhakar (Supra)*, where a plaintiff's title is neither in dispute or nor under a cloud, the simplicitor suit for injunction could be decided with reference to the finding on possession. The said case also lays down that where the defendant raises a serious dispute or creates a cloud over the title of the plaintiff, the plaintiff would be relegated to a suit for declaration of title and simplicitor suit for injunction would not lie. It has also been clearly held that if the matter involves complicated questions of fact and law relating to title, the Court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

24.2. The above ratio laid down in *Anathula Sudhakar (Supra)* has been upheld by the Supreme Court in a case which is

similar to the facts obtaining in the present case, in ***T.V. Ramakrishna Reddy Vs M. Mallappa & Anr***, reported in 2021 SCC OnLine SC 674, wherein it was held that where the defendant disputes the title of the plaintiff, it is not necessary that in all those cases, the plaintiff has to seek the relief of declaration. However, a simplicitor suit for mere injunction does not lie when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, and necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.

24.3. In the present case, not only did the defendant question the title of plaintiffs, but did that vehemently and in fact disputed the very authority and competence of the person who had executed the very sale deed by challenging the Power of Attorney & General Power of Attorney executed by her in favour of Vijay Dixit, by filing a proper civil suit for declaration. The pleadings alongwith the documents were also filed by the defendant in the trial proceedings. It can be inferred from that challenge, that any subsequent document, issued by Sh. Vijay Dixit itself is doubted and questioned by the defendant. The defendant also opposed the same in the written statement. Thus, it can safely be inferred, as also by relying on the ratio of *Anathula Sudhakar (supra)*, that a serious cloud on the title of the plaintiffs was raised and a simple suit for

injunction without seeking declaration of title was not maintainable.

24.4. It is clear from the above judgments, as also the pleadings and documents before the Trial Court, that a serious dispute or a cloud had been raised over the plaintiff's title and the plaintiffs ought to have filed a suit for declaration rather than a suit for injunction simplicitor.

24.5. The questions are decided accordingly.

25. As the questions (iii) & (iv), are interconnected, these are taken up together:-

25.1. Both the Trial Court and the First Appellate Court relied upon the statement that has been given by the defendant on 06.01.2011, to the effect that the defendant would not interrupt the plaintiffs from entering and exiting from the suit property. On that basis, both the Courts below had concluded that the possession of the plaintiffs was admitted and thus did not conduct further inquiry. However, the Courts below overlooked and did not consider a vital fact placed on record by the defendant, in that, the order dated 06.01.2011 whereby defendant's statement was recorded, was challenged in appeal bearing MCA No. 18 of 2013 and set aside vide the order dated

25.07.2013 passed by the Appellate Court. The effect of the said appellate order was never examined by either of the courts below.

Having said that, it is also relevant to note that though this statement of admission had been set aside, a careful consideration of the subsequent documents and events placed on record by the defendant herself would show that the defendant has impliedly admitted the possession of the plaintiffs.

25.2. As an instance and admittedly on defendant's instructions armed personal security officers and armed private security guards were placed near entrance no.1 and other areas who obstructed and interfered in the entry of the plaintiffs and his representatives and, their access to the common as well as plaintiff's exclusive area.

That on 08.09.2010, entrance no.1 of the suit property was locked and a police complaint had to be filed by the plaintiffs on that account. Again on 16.09.2010 and 21.09.2010, plaintiffs were prevented from entering their premises as well as common areas by the armed personal security officers and armed private security guards at the behest of the defendant.

25.3. It is clear from the above activities of the defendant that she has impliedly admitted to the possession of the plaintiffs and caused obstruction therein.

25.4. Thus, from the pleadings, conduct of the defendant and the documents placed on record, it is clear that the plaintiffs were in possession, whether peaceful or otherwise is not an issue.

25.5. These questions are decided accordingly.

26. (vii) Whether the suit filed by the plaintiff ought to have been stayed in view of the provisions of Section 10 CPC owing to the pendency of suit no 868/1996 titled **Dr. Manjula Krippendorf Pathak Vs Vijay Dixit & Ors** between the defendant and Sh. Vijay Dixit ?

26.1. A plain reading of Section 10 CPC, 1908 makes it clear that where the subject matter of the suit is one and the same and parties are also the same, under such circumstances, if there are two suits between the parties, then the subsequent suit ordinarily would be stayed.

26.2. The suit bearing CS (OS) No. 868/1996 that had been filed by the defendant and is still pending adjudication, is

against one Sh Vijay Dixit, who is not a party to the present suit. The said suit seeking declaration was filed by the defendant against Sh. Vijay Dixit challenging the Power of Attorney that had been executed by the defendant in favour of Vijay Dixit on the ground that they are not legally valid and cannot acted upon by the said Sh. Vijay Dixit.

26.3. Nowhere in the aforesaid suit, the sale deed dated 03.08.2006 executed in favour of the plaintiffs, had been challenged by the defendant. One may be a consequence of another, but definitely not one which would fall within the mischief of Section 10 CPC, 1908.

26.4 Applying the principles of Section 10 CPC, 1908 to the facts of the present case it is seen that both the suits do not have any common subject matter in issue, nor are the parties same, except the defendant, Thus, the question of staying the present suit, wherefrom this appeal arises, does not arise.

26.5. This question is decided accordingly.

27. (viii) Whether there was a justifiable ground for not granting an opportunity to the defendant to adduce evidence ?

27.1. From a perusal of the records before the First Appellate Court, it is evident that the defendant had raised all the objections that she has raised in the Second Appeal in regard to the deprivation of her right to lead evidence.

27.2. So far as this substantial question of law is concerned, the First Appellate Court has passed a judgment in a perfunctory manner without taking into consideration the documents submitted by the defendant. In her First Appeal, the defendant has filed documents which are annexed alongwith the application filed before the Trial Court seeking review of the order whereby her right to lead defendant's evidence was closed. From a perusal of those, the following facts emerge:-

27.2.1 The defendant has a victim child of heinous crime under section 376 of Indian Penal Code, 1860 and as a proof thereof, the defendant attached the order of the Ld ASJ (Spl. FTC) in FIR No 192/14 titled ***State Vs Santosh Yadav & Ors.***

27.2.2 The defendant had also developed bilateral Pulmonary Tuberculosis of both lungs and the defendant has annexed the medical records by AIIMS dated 22.8.2016, 19.11.2016 & 23.11.2016.

27.2.3 The defendant further averred in her review application of order dated 08.03.2017, that she came to know about the closure of DE only on 17.02.2017, and that it was only on account of her medical condition as well as that of her daughter's vulnerable state that she was not able to appear before the Trial court to lead defendant's evidence.

27.3. Despite pertinent grounds taken challenging the closure of defendant's evidence, the First Appellate Court has not dealt with that. To examine the seriousness with which this issue was raised by the defendant, it would be apposite to extract the grounds of challenged laid before the First Appellate Court which are as under:-

“a) Because the impugned judgment dated 11/04/2017 and 20/09/2016 are bad in law and also against the principles of natural justice.

b) XXX

c) XXX

d) XXX

e) XXX

*f) Because the Ld Trial Court has decreed the suit despite the Defendant has informed the trial court that **she has***

filed a Civil Misc Petition before the Hon'ble High Court against its order and it would be listed for hearing in a day or two on 10/04/2017 and also informed the court that the Defendant has already moved a transfer Application before the Hon'ble District Judge but the Ld Trial Court has not adjourned the case to secure the ends of justice.

g) Because the Ld Trial Court has failed to provide the equal opportunity to Defendant defend her case and prove her documents, without giving her further opportunity to close her defence evidence.

h) Because the Id. Civil Judge, failed to appreciate the fact that the in the month of August 2016 the Petitioner got infected with pulmonary T.B infected, both lungs and subsequently a viral pneumonia superimposed right lung over the tubercular lesion during the pendency of the above mentioned case, hence she become physically weak, and was not in a position to pursue her case diligently.

i) Because the Id. Civil Judge, erred in ignoring the fact that the petitioner has explained adequate, cogent & strong reason for her failure to lead her defence evidence on time.

j) Because the Petitioner has not been in a condition to follow up the case as she is living with her medically challenged daughter, there is no one except the Petitioner, to look after the medically challenged daughter. The daughter of the Petitioner is the survivor and victim of heinous crime under Section 376 IPC.

k) Because the Id. Trial court also failed to appreciate the fact that the Petitioner is a senior citizen and 69 years of age, suffering from various disease and age ailment.

l) Because the Ld. Civil Judge passed the impugned order in a technical manner without appreciating the facts and circumstances of the case. Closing the opportunity of the petitioner to lead her evidence in without considering her condition is too harsh and adversely affects her case”

(bold lines by this Court for emphasis)

27.4. None of the aforesaid grounds, supported by documents, were considered at all.

27.5. There could be no cavil with the proposition that the opportunity to lead evidence before the Court of first instance is a very valuable and cherished right vested with a party and ordinarily, such rights are considered indelible, subject of course, to certain conditions and situations.

27.6. In the present case, it was the argument of the defendant that for the period that the defendant did not appear before the Trial Court for leading her evidence, she placed on record sufficient material by way of medical evidence for the consideration of the trial Court, which was not considered in the proper perspective.

27.7. It was also submitted that the defendant has a daughter, who had, unfortunately been a victim of aggravated and brutal sexual assault and had suffered extensive injuries almost killing her. It was also argued that the daughter needed constant care,

both physical as well as emotional, having regard to the spine chilling trauma she had undergone and the defendant being a single parent had to take care of such a vulnerable child.

27.8. The order dated 20.09.2016 of the Trial Court closing the right to lead evidence was also challenged by the defendant by way of CMM 438/2017 before this Court. However, before the said petition could be heard finally, the Trial Court had rendered its judgment and passed the decree in favour of the plaintiffs. The defendant thus challenged the same by way of the First Appeal.

27.9. In this regard, it would be apposite to refer to Rule 1A of Order 43 of the Code of Civil Procedure, 1908 which is extracted hereunder :-

“1A. Right to challenge non-appealable orders in appeal against decrees.--(1) Where any order is made under this Code against a party and there upon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the defendant to contest the decree on the ground that the compromise should, or should not, have been recorded.”

Applying the provision in the present facts, it is clear that the defendant had the right to raise such denial of opportunity to lead evidence as a ground of appeal and which she promptly did.

27.10. It is undeniable that the defendant did question the denial of opportunity to lead evidence by way of preferring a petition under Art 227 of the Constitution of India before this Court. However, before the aforesaid petition could be decided, the Trial Court had delivered its judgment and decree, rendering the said petition infructuous. The defendant, ostensibly, under the provisions of Order 43 Rule 1A CPC, 1908 as brought out above, raised it not only in her grounds of First Appeal but also in the Second Appeal. In fact, this Court had already framed a substantial question of law on this issue.

27.11. Though the defendant had raised a challenge to the aforesaid deprivation of right to leave defendant's evidence, by raising numerous grounds, the First Appellate Court in a perfunctory and laconic manner rejected the same without rendering any finding thereon at all. The extract of the relevant portion is as under:-

“Further, a perusal of Ld. Trial Court record shows that ample opportunities have been accorded to the defendant to present her case and on the contrary the journey of trial from its case of institution from 25.12.2010 to the final impugned judgment dated 11.04.2017 passed through various miscellaneous applications.”

27.12. Apart from the aforesaid paragraph, the impugned judgment is conspicuous by the absence of any reason whatsoever as to why the First Appellate Court concluded that ample opportunities were provided to the defendant, but not availed. The First Appellate Court appears to have deserted and abandoned its responsibility to render reasons for reaching such conclusion. This Court is of the opinion that the First Appellate Court had not rendered any findings on an issue which was before it, that too in view of the considerable number of documents placed on record.

27.13. The denial of an opportunity to lead evidence, in the telling facts of the present case, would, in the considered opinion of this Court, be a substantial question of law arising between the parties. It is settled law that the substantial questions of law falling within Section 100 CPC, 1908 are those which arise between parties and necessarily not those which are of general importance.

27.14. This Court is also persuaded by the judgment of the Rajasthan High Court in *Prabhu Dayal Vs Girraj Kishore*, reported in 1963 SCC OnLine Raj 13, in a Regular Second Appeal, wherein similar facts, the said High Court has held that unfair denial of the opportunity to lead evidence would be denial

of right to justice. The relevant paragraphs are extracted hereunder:-

“6. Again, in the present case there was an application for summoning six witnesses and that application could also be taken as the list of the witnesses by the trial court under O. 16, r. 1(i) C.P.C. There was no necessity for invoking sec. 151 in the case because that application had been filed within the period of thirty days from the settlement of issues. This could have been done had the trial court been anxious to see that the parties were not debarred from producing their evidence. It has been pointed out more than once that the rules of procedure are meant to advance the cause of justice and not to hamper it. In this connection, I may quote the following observations of the Supreme Court in Sangram Singh v. Election Tribunal Kotah (1):—

“Now a code of procedure must be regarded as such. It is ‘procedure’ something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.”

7. The learned trial Judge laid much emphasis on the technicality of the provisions and wanted to dispose of the case without caring whether the parties had been given an opportunity to lead evidence or not. One reason that has been assigned by the trial court for adopting this attitude is that the defendants had also not filed a list of the witnesses

whom they wanted to produce. The trial court could have taken a liberal attitude with regard to the defendants also and could have given them an opportunity to produce witnesses atleast in rebuttal as at that time no list was to be filed for producing evidence in rebuttal. Rule 16(1)(i) has been further amended by notification dated 20.1.61 published in Rajasthan Rajpatra dated 23.3.1961, and a new proviso has been added to the Rule as follows:-

“Provided that a party giving evidence in rebuttal may file a supplementary list of witnesses with the permission of the Court not later than fifteen days from the date of closure of the evidence of his opponent.”

27.15. Thus, predicated on the fact that neither the Trial Court nor the First Appellate Court gave any cogent reason or finding in respect of the denial of opportunity to lead evidence, this Court is of the considered opinion that such opportunity ought to have been granted keeping in view the extreme situation arising out of the compelling circumstances faced by the defendant, in respect of her daughter, as also her own medical condition. Having failed to provide the indelible right to fair trial and justice, this Court is of the firm view that the impugned judgment and decree of the First Appellate Court is liable to be set aside and is set aside.

27.16. This question is decided accordingly.

28. Additional issue raised by the learned Amicus for the defendant:-

28.1. So far as the contentions of the defendant regarding the objection to photocopies of the sale deed are concerned, suffice would it be to state that an issue which was never raised by the defendant in the First Appellate Court cannot be raised in the Second Appeal. Section 100 CPC, 1908 has a limited scope and if the defendant is not aggrieved by the issues dealt by the Trial Court and does not raise that as a ground in the First Appellate Court, the same cannot be raised in the Second Appellate Court for the first time.

28.2. The contention of the defendant, with regard to the non-production of original title/documents and placing only photocopies of the same before the Court by the plaintiffs is without any basis for the following reasons :-

i. This aspect was never put up as a challenge before the First Appellate Court by the defendant in her First Appeal or even in her Second Appeal before this Court. Having not raised the same in the grounds of appeal, there is no good reason for this Court to even examine it for academic purposes and stands rejected.

ii. Moreover, the objection to the mode, the proof, the relevancy and the overall admissibility of a document being produced in evidence has to be taken at the very first

instance when the said documents are being tendered in evidence by a witness. In case such objection is not raised immediately, no such objections thereof, can be permitted to be raised afterwards. The only caveat being, that such document is inherently inadmissible in law.

28.3 This view is fortified by the judgment of the Supreme Court in ***R. V. E. Venkatachala Gounder Vs Arulmigu Viswesaraswami & V. P. Temple And Another***, reported in (2003) 8 SCC 752. The relevant paragraphs are extracted hereunder :-

“20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be

irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite

party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.”

On the basis of the aforesaid judgment as also the fact that no objection whatsoever, to the marking and exhibiting of photocopies of title documents etc, ever having been raised or registered, the defendant is now precluded from raising the same.

28.4. That another relevant aspect which arises in respect of the aforesaid issue in the present appeal is, that though a number of grounds were raised, yet the indelible fact that stares in the face, is the non challenge to the cogent findings of fact by the Trial Court.

28.5. A fundamental question that arises and which needs consideration is, whether a party, which does not challenge the substantial findings of facts on the issues framed in trial or in appeal under Section 96 CPC, 1908, can subsequently challenge the same, that too in a Second Appeal under

Section 100 CPC, 1908 ? In the considered view of this Court, it cannot. The reasons are not a mystery. It is settled law that finality has to be attached to any *lis*. The provisions of appeals are provided so that an aggrieved party has access to redressal of its grievances or challenges to the findings or determination of issues on facts. That is precisely the reason why issues are framed in the first instance so that parties are clear as to what are the points of determination for which evidence may have to be lead.

28.6. Once the points in issue are determined by the Court of first instance on facts, the natural corollary available to any aggrieved party would be to challenge the same. In case a party does not challenge a particular determination on issue or a finding of fact by way of an appeal, it is precluded then from raising it further in second appeal. Whether such determination is considered final and binding as between the parties or as waiver and acquiescence on the part of the party not challenging the findings, it hardly matters. For, having not challenged the findings of fact, the determination on facts by the Court of first instance, becomes binding between the parties. The substratum being, finality to a *lis*.

28.7. Applying the aforesaid principle to the present case, a perusal of the First Appeal brings to fore that the challenge

to photocopies of title documents being exhibited and non production of original was not taken at all. In these circumstances, the findings of fact on the aforesaid issue would, thus, be deemed to be binding and challenge to those findings of fact and issues would not be permissible in a second appeal.

28.8. Thus, all such issues and challenges raised herein and not challenged before the First Appellate Court cannot and are not being permitted to be raised herein.

29. RELIEF

29.1 On the question of possession, the issue is held in favour of the plaintiffs and against the defendant.

29.2 On the issue of maintainability of simple suit for injunction without seeking declaration, the issue is held against the plaintiffs and in favour of the defendant.

29.3 On the issue of deprivation to lead defendant's evidence, the issue is held against the plaintiffs and in favour of the defendant.

30. Consequently, the judgment & decree of the Trial Court in Civil Suit No. 83267/2016, dated 11.04.2017 and that of the First Appellate Court in RCA No. 41/2017, dated 16.07.2018 are set aside.

31. The Appeal is disposed of in above terms with no order as to costs.

32. The assistance rendered by Ms. Tara Narula, learned Amicus is commendable and appreciated by this Court.

TUSHAR RAO GEDELA, J

MARCH 28, 2023/nd

