V. Nagamanemma Vs V. Nagulu Naidu

Court: Andhra Pradesh High Court

Date of Decision: March 28, 2014

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 31(1)(a)
Criminal Procedure Code, 1973 (CrPC) â€" Section 145, 145(1)
Land Acquisition Act, 1894 â€" Section 4, 4(1), 6
Specific Relief Act, 1963 â€" Section 2(b), 34, 38

Citation: (2014) 5 ALD 486 : (2014) 6 ALT 662

Hon'ble Judges: T. Sunil Chowdary, J

Bench: Single Bench

Advocate: P.V. Vidyasagar, Advocate for the Appellant; M. Dorai Raj, Advocate for the Respondent

Judgement

T. Sunil Chowdary, J.

1 This second appeal is filed challenging the decree and judgment dated 22.11.2004 passed in A.S. No. 132 of 1996 on the file of the V

Additional District Judge, Tirupati wherein and whereby the decree and judgment dated 16.08.2009 passed in O.S. No. 320 of 1991 on the file of

the I Additional District Munsif, Tirupati was reversed.

2. For the sake of convenience, parties to this appeal, will hereinafter be referred to as they are arrayed before the trial Court.

3. The case of the plaintiff, in nutshell, is that defendants 1 and 2 are son and daughter-in-law of 3rd defendant. Defendants 4 and 5 are sons of

2nd defendant. Sixth defendant is mother of defendants 7 and 8. Ninth defendant is relative of 6th defendant. Thus all the defendants are

interrelated and residents of Cherlopalle village, Tirupati Rural Mandal.

4. Initially plaintiff filed the suit for the relief of perpetual injunction. The plaintiff purchased the plaint schedule property on 18.08.1984 under a

registered sale deed from one Kandala Jayamma and her daughter by name Ratnamma, Are Guravamma, A. Ramanaidu, Medoti Sampoornamma

and K. Anandamma, and ever since he has been in possession and enjoyment of the same. K. Jayamma and her daughter Ratnamma got the entire

plaint schedule property under a settlement deed dated 06.11.1968 executed by her husband Venkata Rama Naidu. Father of the said Venkata

Rama Naidu by name K. Peddi Naidu executed a settlement deed dated 11.4.1969 in respect of his half share in favour of K. Anandamma,

Neelamma and Sampoornamma. Sampoornamma died intestate leaving behind her son A. Venkatrama Naidu (9th defendant). Therefore, A.

Venkatrama Naidu, Anandamma and Neelamma got half share in the plaint schedule property. While so, on 25.08.1991, the defendants tried to

trespass into the plaint schedule property. The 6th defendant denied the sale deed in favour of the plaintiff. Hence the plaintiff is forced to file the

suit for declaration of title that he is the absolute owner of the plaint schedule property and also for a consequential relief of perpetual injunction.

5. The third defendant died during pendency of the suit. The first defendant filed written statement on behalf of defendants 1, 2, 4 and 5 admitting

the relationship among defendants 1 to 5 and 9 and inter alia contended that the plaintiff has been in possession and enjoyment of the plaint

schedule property by virtue of registered sale deed dated 18.08.1984. The vendors of the plaintiff never executed any sale deed or any document

in favour of 6th defendant. The 6th defendant and her husband misled them and got the sale deed dated 27.10.1981 in favour of 6th defendant by

playing fraud. The vendors of the plaintiff also did not execute any agreement of sale in favour of 6th defendant at any time much less in the year

1975. K. Peddi Naidu executed two settlement deeds - one in favour of Venkata Rama Naidu and second one in favour of his daughters, K.

Anandamma, Neelamma and Sampoornamma. At no point of time, the 6th defendant was in possession and enjoyment of the plaint schedule

property fell to the share of Peddi Naidu. Defendants 1 to 5 and 9 never interfered with the possession and enjoyment of the schedule property by

the plaintiff. Therefore, they are not necessary and proper parties to the suit. Hence the suit may be dismissed.

6. Sixth defendant filed written statement denying all the averments made in the plaint inter alia contending that the documents on which the plaintiff

is placing reliance are sham and nominal. Neither the plaintiff nor his vendors have been in possession of the plaint schedule property. The plaintiff

has not mentioned the boundaries of the plaint schedule property for the reasons best known to him. This defendant is the owner of an extent of

As. 4-27 cents in Sy. No. 217 of Cherlopalle village. This defendant purchased the property under an agreement of sale dated 06.06.1975 for a

valid consideration of Rs. 26,000/- from Edoti Venkata Rama Naidu, Kandala Peddi Naidu, Kandala Venkata Rama Naidu, Gurrappa Naidu and

Kandala Jayamma.

7. On the date of agreement of sale, the vendors received Rs. 6,000/- and agreed to receive the balance consideration of Rs. 20,000/- in two

instalments i.e. a sum of Rs. 18,000/- on or before 05.12.1975 and the remaining sum of Rs. 2,000/- at the time of registration of the document.

Vendors of this defendant delivered possession of the plaint schedule property on the date of agreement of sale. In pursuance of the agreement of

sale, this defendant obtained a registered sale deed on 27.10.1981. This defendant has been in possession and enjoyment of the plaint schedule

property from 06.06.1975 without any interruption from any body. The plaintiff is none other than the cousin of the husband of this defendant.

Disputes arose between the plaintiff and the husband of this defendant due to village politics. This defendant"s husband is Sarpanch of the village.

This defendant is not aware of the settlement deeds alleged to have been executed by Peddi Naidu in favour of his daughters and son. The alleged

beneficiaries under the settlement deeds were never in possession of the property. There is a recital in the alleged settlement deeds that those

deeds will come into force after the death of said Peddi Naidu. The alleged sale deed dated 18.08.1984 in favour of the plaintiff is not legally

enforceable, in view of the agreement of sale dated 06.06.1975 in favour of 6th defendant. This defendant obtained loan from Chandragiri

Cooperative Agricultural Development Bank Limited by mortgaging the plaint schedule property. This defendant perfected title to the plaint

schedule property even by adverse possession. This defendant filed writ petition No. 10504 of 1986 challenging the notification dated 08.05.1986

issued under Sections 4 and 6 of the Land Acquisition Act and the said writ petition was allowed. This defendant submitted objections before the

Special Deputy Collector, Land Acquisition, TUDA, who made proposals to acquire the plaint schedule property. There is no cause of action to

file the present suit and that the present suit is hit by the provisions of Section 34 of the Specific Relief Act. The suit as framed" is barred by

limitation. The suit for declaration of title and perpetual injunction is not maintainable. Hence the suit may be dismissed.

8. Defendants 7 and 8 filed memo adopting the written statement filed by the 6th defendant.

9. Ninth defendant filed separate written statement inter alia stating that art extent of Ac. 4-27 cents in Sy. No. 217 of Cherlopalle village originally

belongs to three families out of which half share belongs to this defendant"s family, 1/4th share to Peddi Naidu and another 1/4th share to Kandala

Chengamma who died on 25.12.1991. Chengamma had two sons by name Gurrappa Naidu (D.1) and Venkata Rama Naidu. Venkata Rama

Naidu also predeceased her mother and his successors are Sulochana (wife), Ramesh and Giridhar (sons) who are defendant Nos. 3, 4 and 5.

They had 1/4th share in the total extent of Ac. 4-27 cents. The remaining 1/4th share was vested with Peddi Naidu who died after executing

settlement deed in favour his daughters and daughter-in-law in the year 1968 and 1969. Thus Ac. 4.27 cents was being enjoyed by three families

referred above. Anandamma, Jayamma and others have executed registered sale deed dated 18.08.1984 in favour of plaintiff in respect of 1/4th

share (plaint schedule property). There were misunderstandings between plaintiff and the husband of the 6th defendant. Sixth defendant is in

possession and enjoyment of Ac. 3.21 cents only. This defendant is not proper and necessary party to the suit. Hence the suit may be dismissed.

10. Basing on the rival contentions, the trial court framed the following issues:

i. Whether the plaintiff is entitled for permanent injunction, restraining the defendants 1 to 9 and their men from interfering with his possession and

enjoyment over the plaint schedule property?

ii. Whether there is no cause of action for the suit?

iii. Whether the suit is hit by the provisions u/s 34 of the Specific Relief Act?

iv. Whether the suit is barred by limitation?

v. Whether the 9th defendant (sic. 6th defendant) is not in possession of the total extent of Ac. 4-27 cents?

vi. Whether the 9th defendant (sic. 6th defendant) is in possession of Ac. 3021 cents.

11. The trial Court framed the following additional issue also:

Whether the plaintiff is entitled for the relief of declaration as prayed for?

12. Before the trial Court on behalf of the plaintiff, P.Ws. 1 to 6 were examined and Exs. A. 1 to A. 16 were marked. On behalf of defendants,

D.Ws. 1 to 5 were examined and Exs. B.1 to B.52 were marked.

13. After analyzing the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff is

not entitled for the relief of declaration and consequential perpetual injunction and accordingly dismissed the suit.

14. Feeling aggrieved by the dismissal of his suit, the unsuccessful plaintiff preferred A.S. No. 132 of 1996 on the file of the first appellate court

and the same was allowed in part declaring the title of the plaintiff over the plaint schedule property, but rejected the relief of perpetual injunction.

15. Aggrieved by the said decree and judgment passed by the first appellate court, the defendants 6 to 8 filed the present second appeal.

16. After hearing the learned counsel for both the parties and after perusing the grounds of appeal, the following substantial questions of law are

framed for consideration in this second appeal.

a. Whether Exs. A.2 and A.3 are either settlement deeds or Wills?

b. Whether the suit is hit by the provisions of Section 34 of the Specific Relief Act?

c. Whether the first appellate Court is justified in not deciding the issue whether the suit is barred by limitation or not?

17. Heard Sri P.V. Vidyasagar, the learned counsel appearing for the appellants/defendants and Sri M. Dorai Raj, the learned counsel appearing

for the respondent/plaintiff.

18. Question No. 1: Before considering the substantial questions of law, I am of the considered view that it is apposite to refer to the admitted

facts of the case on hand in order to avoid recapitulation of the facts and evidence.

19. An extent of Ac. 4.27 cents in Sy. No. 217 of Cherlopalle village originally belongs to three families viz., K. Venkata Rama Naidu (1/2 share

Ac. 2.13 cents), Yerram Naidu (1/4th share Ac. 1-06 cents) and Kandala. Peddi Naidu (1/4th share Ac. 1-06 cents). The lawful owners of these

three branches have executed an agreement of sale in favour of 6th defendant on 06.06.1975 under original of Ex. B.9 (photocopy). K. Venkata

Rama Naidu branch and Yerram Naidu branch have executed a registered sale deed in favour of the 6th defendant on 27.10.1981 (Ex. B.8) in

respect of Ac. 4.27 cents. Peddi Naidu executed a settlement deed in favour of Anandamma, Neelamma and Sampoornamma on 11.04.1969

(Ex. A.3) to an extent of Ac. 0-53 cents out of Ac. 4.27 cents in Sy. No. 217. On 06.11.1968 K. Venkata Rama Naidu executed a settlement

deed dated 06.11.1968 (Ex. A.2) in favour of his wife Jayamma and his minor daughter Ratnamma for an extent of Ac. 1-06 cents out of Ac. 4-

27 cents in Sy. No. 217. The legal representatives of Peddi Naidu and Venkata Rama Naidu have executed Ex. A.1 sale deed dated 18.08.1984

in favour of the plaintiff for an extent of Ac. 1-06 cents in Sy. No. 217 of Cherlopalle village. The successors in title of Peddi Naidu are not parties

to Ex. B.8 sale deed.

20. After considering the recitals of Exs. A.2 and A.3, the trial court arrived at a conclusion that these two documents are Wills but not settlement

deeds. The first appellate Court after re-appreciating the documents arrived at a conclusion that Exs. A.2 and A.3 are settlement deeds but not

Wills.

21. The learned counsel for the respondents/plaintiff submitted that Exs. A.2 and A.3 are settlement deeds but not Wills. The learned counsel for

the defendant Nos. 6 to 8/appellants submitted that Exs. A.2 and A.3 are Wills.

22. To substantiate his arguments the learned counsel for the plaintiff/respondent Nos. 2 and 3 has drawn my attention to the following decisions.

1. Koraprolu Veerabhadrayya v. Jajala Seethamma and Others AIR 1940 Madras 236, wherein at para No. 4 of the judgment, it was observed

as under:

4. I will now deal with the contention relating to the construction of Ex. A and the validity of Ex. 9. The question is whether Ex. A is a will or a

deed of gift. The question whether a certain document is testamentary or a transfer inter vivos depends not upon the mere form of the document

but upon the intention gathered from the document itself in the light of the surrounding circumstances. Various tests are formulated by Courts for

determining whether a certain document is a deed of gift, or a will. The name by which a document is styled, the registration of it, the reservation of

a life estate, the reservation of a power of revocation and the use of the present or future tense are all circumstances which are taken into

consideration in coming to one conclusion or other; all these are indications to find out the intention taken singly or cumulatively

2. Amarsing Ratansing and Anr. v. Gosai Mohangir Somvargir and Others AIR 1972 Guj 74 wherein at para No. 2 of the judgment, it was

observed as under:

....The question whether a certain document is a gift or a will depends not merely upon the from of the document, but upon the intention gathered

from the words used in the document itself. The usual tests are the name by which the document is styled, the registration of it, the reservation of

the power of revocation and the use of the present or future tense. All these are indications to fine out the intention, taken singly or cumulatively.

The mere reservation of a life estate does not necessarily indicate that the document is testamentary and that, therefore, the grant is revocable. Nor

does the fact that the donor revoked it within a few months indicate that his intention was to make a will and not a gift. In construing a document

the conduct of the parties subsequent to its execution should not be taken into consideration when there is no ambiguity in the words and

expressions used in the document.....

3. Esakkimadan Pillai Bhagavathiperumal Pillai v. Esakki Amma Mylu Pillai and Others AIR 1953 Travancore-Cochin 336 wherein it is held that:

In construing a deed, the entire document should be considered and not merely particular words, terms or even clauses and this has to be done in

the light of the surrounding circumstances.

4. In Tayi Rama Krishna Rao v. Pebbu Penchalamma 1980 (2) ALT 436 it is held as follows:

The definition excludes testamentary disposition. Various tests are reformulated by Courts for determining as to whether certain document is deed

of settlement or will. The tests in distinguishing a settlement from a Will are whether the instrument is revocable. If the document is intended to have

immediate operation, it would be a settlement though it contains provisions showing that its operation may extend beyond the life time of the owner.

A reservation of a life estate by the settlement would not render the instrument any the less a settlement. If the document is revocable, it is a Will. If

it is not revocable it is not a Will. Here use of words in the future tense does not necessarily mean that there is no present disposition of property.

The document which is not a Will in form may yet be a Will in substance and effect. The line between a Will and a conveyance reserving a life

estate is a fine one and it would be hard to define. If the document contains a term giving the right to the executant to revoke it, or if one can gather

from the terms of the document the right to revoke, then it is a Will.

23. The learned counsel for the appellants/defendant Nos. 6 to 8 relied upon the judgment in G. Narasimhulu Chetti and Others v. S.

Pandurangaiah Chetti and others AIR 1996 A.P. 24 wherein their Lordships held at para No. 20 as under:

From a reading of the above decisions cited across the bar what emerges is that the construction of a document depends upon the language of

recitals but not upon its form or nomenclature. The intention of the executant is to be gathered from the words used in the document. To find out

whether a document is a settlement or gift or a Will, the nature of the document has to be examined whether it transferred any interest in property

in praesenti or after the death of the executant. Mere delivery of possession cannot amount to transfer of interest in the property.....

24. The Hon''ble Supreme Court in P.K. Mohanram v B.N. Ananthachary (2010) 4 SCC 161, made the following observation as under.

when there is an unequivocal right in creation of praesenti though the beneficiaries were to become absolute owners of their shares after the death

of the settler, the language of the document clearly shows that all of them were to enjoy the property along with settler during his lifetime and after

his death, each of the beneficiaries was to get a specified share and it cannot lead to an inference that the document is a Will, if the document is

read as a whole, it becomes clear that it was a settlement deed.

25. Let me consider whether Exs. A.2 and A.3 are settlement deeds or Wills in the light of the principles enunciated in the cases referred supra.

26. There is a popular saying that devil does not know the mind of the human being. In order to ascertain the intention of the executant of the

document, the only course available to the Court is to scan the entire document word by word apart from taking into consideration the surrounding

circumstances. From a perusal of Exs. A.2 and A.3 it is manifestly clear that there is no ambiguity in the words used in them. It is not in dispute that

these two documents are registered as per the procedure in vogue. The nomenclature of the documents is settlement deeds. A perusal of the

recitals of these two documents clearly indicates the intention of the executant to transfer the title in favour of the beneficiaries. The recitals of these

two documents are crystal clear as to the disposition of the interest in the property in praesenti. There is no specific recital in either of these two

documents empowering the executants to revoke the documents during their life time. The possession of the property covered under these two

documents was delivered to the beneficiaries on the date of execution itself. Divesting and vesting of the title in the property forms an integral part

of the same transaction.

27. Section 2(b) of the Specific Relief Act defines ""settlement'' as an instrument other than a Will or codicil whereby the destination or devolution

of successive interests in movable or immovable property is disposed of or is agreed to be disposed of. It should be noted that in ""settlement"" the

property is disposed of or is agreed to be disposed of. So, agreement to dispose in the manner as per the terms of the deed is also ""settlement"".

The recitals of Exs. A2 and A3 satisfy the ingredients of settlement and the relationship of settlers and beneficiaries is conspicuous ex facie.

28. There is a recital in these two documents that they will come into force after the death of executants. Basing on this stray sentence the trial

court had decided the nature of the documents as Wills. Duty is cast on the Court to read the entire document so as to ascertain the intention of the

executant. At times there may be some overlappings or conflict between the sentences used in the document. It is needless to say while interpreting

a document the court has to keep in mind the purpose and object for which it was executed. The ''court shall not lose sight of this cardinal principle

of interpretation of the documents. A perusal of the entire documents clearly indicates that the executants intended to execute settlement deeds in

favour of the beneficiaries. Mere stray sentence in the document cannot defeat the very purpose of the document. Mere using of the sentence that

the deed will come into force after the death of the executant would not change the very nature of the document. These two documents have

passed various tests formulated by courts for determining a document as settlement deed. These two documents withstood the judicial scrutiny so

far as fulfilment of the ingredients of settlement deeds.

29. In the light of the foregoing discussion, I have no hesitation to hold that Exs. A.2 and A.3 are settlement deeds. Hence, I am agreeing with the

finding recorded by the first appellate court that Exs. A.2 and A.3 are settlement deeds. The finding of the trial court that Exs. A.2 and A.3 are

Wills is not legally sustainable.

Question No. 2:

30. As seen from the testimony of P.W. 1, he obtained sale deed Ex. A.1 on 18.08.1984 in respect of the plaint schedule property. P.W. 2 is the

attestor and P.Ws. 4 to 6 are executants of Ex. A. 1 sale deed. As per the testimony of these witnesses, the plaintiff has been in possession and

enjoyment of the plaint schedule property with effect from 18.08.1984. D.W. 1 also supported the version of the plaintiff. As per the testimony of

D.W. 2, they have been in possession and enjoyment of an extent of Ac. 4-27 cents in Sy. No. 217 of Cherlopalle village, which includes the

plaint schedule property by virtue of agreement of sale, original of Ex. B.9 dated 06.06.1975 and sale deed Ex. B.8 dated 27.10.1981. One

Muniratnam Naidu who is the scribe of agreement of sale, is no more. D.W. 4 who is the own brother of Muniratnam Naidu identified the

signature of his brother on agreement of sale. D.W. 5 is the scribe of Ex. B.8 sale deed. A perusal of the testimony of D.W. 3 reveals that he was

present at the time of payment of money by the 6th defendant to Jayamma and others. In the cross-examination of these witnesses, nothing is

elicited to shake their testimony. By examining D.Ws. 3 and 4, 6th defendant proved the agreement of sale as well as part payments. The recitals

of Ex. B.12 to B.17 also support the version of D.W. 2 with regard to part payments as per the terms of agreement of sale. The Courts below

recorded a finding that the agreement of sale, original of Ex. B.9, is a valid one. As per the recitals of the agreement of sale, the 6th defendant was

put in possession of the entire extent of Ac. 4.27 cents in Sy. No. 217 of Cherlopalle village. In Ex. B.1, the certified copy of No. II Adangals, Ex.

B.2, the certified copy of ROR register, Ex. B.3 10(1) account of 1364 fasli to 1390 fasli, Ex. B.49 - 10(1) account for fasli 1400 and Ex. B.50

copy of 10 (2) Adangal the name of 6th defendant is shown as owner and possessor to an extent of Ac. 4.27 cents in Sy. No. 217 of Cherlopalle

village. A perusal of Ex. B.25 to B.32 clearly reveals that the 6th defendant herein has mortgaged the property to Chittoor District Central

Cooperative Bank and availed loan. A perusal of Ex. B.39 to B.43 reveals that she also availed loan by mortgaging the plaint schedule property to

Chandragiri Cooperative Development Bank. A perusal of Ex. B.35 Gazette notification clearly reveals that in the Notification and Declaration

issued u/s 4(1) and Section 6 of the Land Acquisition Act, 1894 respectively, the name of the 6th defendant is shown as owner and possessor of

an extent of Acs. 4.27 cents in Sy. No. 217 of Cherlopalle village. A perusal of Ex. B.37 reveals that the 6th defendant along with others filed

W.P. No. 10504 of 1986 before this Court challenging the validity of the notification and the same was allowed. This Court also passed an interim

order in W.P.M.P. No. 13848 of 1986 (Ex. B.36). In Form No. III notice issued by the Special Officer TUDA (Ex. B.33), the name of the 6th

defendant is shown as owner and possessor of an extent of Ac. 4-27 cents of Cherlopaalle village. A perusal of Ex. B.34 reveals that 6th

defendant submitted a representation objecting for acquiring an extent of Ac. 4-27 cents in Sy. No. 217 of Cherlopalle village.

31. A perusal of Exs. A12, A13 and A14 reveals that the plaintiff submitted representation to the Special Deputy Collector, TUDA to inform him

about the result of acquisition proceedings. The plaintiff having come to know about the Land Acquisition proceedings did not take any steps to

protect his interest, if any, in the suit schedule property. The plaintiff did not take any steps to ascertain why the name of the 6th defendant is shown

as owner and possessor of Acs. 4-27 cents even though he claims to be the owner of an extent of Acs. 1.06 cents. An ordinary prudent man on

seeing such a notification will rush to the concerned authority with a request to issue errata to the notification in order to protect his right. Inaction

on the part of the plaintiff to challenge the Gazette Notification (Ex. B.35) and Form-III Notice (Ex. B.33) creates a doubt whether the plaintiff is

in possession of the plaint schedule property. Ex. A.4 to A. 11 are cist receipts standing in the name of vendors of the plaintiff. These documents

are no way helpful to the plaintiff to establish his possession over the plaint schedule property. The burden of proof lies on the plaintiff to establish

that he has been in possession and enjoyment of the plaint schedule property much less as on the date of filing of the suit. The material placed

before the court falls short to establish that the plaintiff was in possession of the plaint schedule property as on the date of the filing of the suit.

Various documents filed by the 6th defendant clinchingly established that she has been in possession and enjoyment of the plaint schedule property

from 06.06.1975 onwards. I am in full agreement with concurrent finding of fact recorded by the courts below that the plaintiff was not in

possession of the property at any point of time. As observed supra, the plaintiff has not challenged the specific finding of the first appellate court

that he was not in possession of the plaint schedule property.

32. The crucial question that falls for consideration is whether the first appellate Court is justified in granting the relief of declaration having held that

the plaintiff was not in possession of the property.

33. The learned counsel for the appellants/defendant Nos. 6 to 8 has drawn my attention to the ratio laid down in Shri Radha Gobinda Jew v Smt.

Kewala Devi Jaiswal AIR 1974 CALCUTTA 283 wherein it was held in paras 34, 35 and 36 as under:

34. The appellants are out of possession of these two properties and yet they did not ask for recovery of possession in the plaint. The suit

therefore does not appear to be maintainable u/s 34 of the Specific Relief Act, 1963. A Division Bench of this Court in the case of Anilabala Debi

v. Madhabendu Narain Roy, reported in 46 Cal WN 20 at p. 28 : (AIR 1942 Cal 245) of the report, says this:--

.....Where the plaintiff whose title is denied by the Defendant is out of possession and the Defendant is in possession, the "further relief (under

Section 42 of the Specific Relief Act 1877 which corresponds to Section 34 of the present Act) would be recovery of possession and a suit for

declaration of title will not be maintainable unless the plaintiff prayed for possession also.

(Words in brackets are supplied by me).

35. In that case Madhabendu was not in possession of the suit properties which were in possession of Anilabala. He claimed for a declaration that

he was the full owner of those properties and asked for art injunction restraining Anilabala from managing them and from interfering with his

management of the same. He did not claim for possession of those properties in the plaint and his prayer for injunction was rejected by the Division

Bench. The appellants before us are not in possession of these two properties and they not having claimed recovery of possession must fail in this

action because their prayer for injunction cannot be granted in view of the above decision of the Division Bench of this Court.

36. Assuming, however, that the appellants are in possession of that portion of the Calcutta property which is still under occupation of Gopinath,

but being out of possession of the remaining portion of this property, they cannot maintain this action u/s 34 of, the Specific Relief Act, 1963 on the

principles laid down by the Supreme Court in the case of Ram Saran v Smt. Ganga Devi, of the report. In that case Smt. Ganga Debi was in

possession of some of the suit properties and the plaintiffs did not ask for possession of those properties; the decision of the Supreme Court was

that the said suit was hit by Section 42 of the Specific Relief Act 1877. In the instant case the appellants are out of possession of the major portion

of the Calcutta property which is in the exclusive possession of the respondent No. I and furthermore, the appellants had never been nor are in

possession of the Nabadwip property. In the premises we overrule the contentions of Mr. Ghose and hold that this suit is not maintainable.

34. In Vinay Krishna v Keshav Chandra AIR 1993 SC 957 wherein their Lordships held in para 13 as under:

13. From the reading of the plaint it is clear that the specific case of the plaintiff Jamuna Kunwar was that she was in exclusive possession of

property bearing No. 52 as well She thought that it was not necessary to seek the additional relief of possession. However, in view of the written

statement of both the first and the second defendant raising the plea of bar u/s 42, the plaintiff ought to have amended and prayed for the relief of

possession also. In as much as the plaintiff did not choose to do so she took a risk. It is also now evident that she was not in exclusive possession

because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the

relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for

declaration.

(emphasis supplied)

35. As per the principle enunciated in the cases 7 and 8 cited supra, a person who is not in possession of immovable property is not entitled to file

a suit for declaration and consequential perpetual injunction. Initially the plaintiff filed the suit for perpetual injunction only. Pending suit, he filed a

petition for amendment of the plaint seeking the relief of declaration and the same was allowed. The plaintiff has filed the suit for declaration and

perpetual injunction despite the fact that he was not in possession of the plaint schedule property. The 6th defendant has taken a specific plea in the

written statement that the suit is hit by Section 34 of the Specific Relief Act. The facts of the case on hand are almost identical to the facts of Shri

Radha Gobinda Jew (7 supra) and Vinay Krishna (8 supra).

36. The learned counsel for the respondent Nos. 2 and 3 legal representatives of the plaintiff submitted that the suit is not hit by Section 34 of the

Specific Relief Act, as the plaintiff filed the suit for declaration and perpetual injunction. At this juncture, the crucial question that falls for

consideration is whether the present suit falls outside the purview of proviso to Section 34 of the Specific Relief Act. The Supreme Court had an

occasion to deal with the nature of consequential relief to be sought for in a suit for declaration in C. Mohammad Yunus v Syed Unnissa AIR 1961

SC 808, wherein it was observed as under:

A suit for declaration with a consequential relief for injunction, is not a suit for declaration simpliciter; it is a suit for declaration with further relief.

Whether the further relief claimed in a particular case as consequential upon a, declaration is adequate must always depend upon the facts and

circumstances of each case.

37. As per the principle enunciated in the case cited supra, the consequential relief to be sought by the plaintiff in a suit for declaration depends

upon the facts and circumstances of each case. In the present case, 6th defendant has been in possession and enjoyment of an extent of Acs. 4.27

cents in Sy. No. 217 of Cherlopalle village, which includes the plaint schedule property from 06.06.1975 onwards. The plaintiff was never in

possession of the property much less as on the date, of filing of the suit. Initially, the plaintiff filed the suit as if the relief sought by him will fall within

the parameters of Section 38 of the Specific Relief Act. After realising the strength of his case, he has sought for the relief of declaration as

postulated u/s 34 of the Specific Relief Act. Establishment of the possession over the plaint schedule property is sine qua non to grant the relief of

perpetual injunction. Establishment of title over the plaint schedule property is a condition precedent to grant the relief of recovery of possession in

favour of the plaintiff. The finding of the trial that the plaintiff was not in possession of the plaint schedule property was fully endorsed by the first

appellate court. Be that as it may, the plaintiff did not choose to challenge the finding of the first appellate court that he was out of the possession of

the plaint schedule property. The first appellate court granted the relief of declaration in favour of the plaintiff on the sole ground that the legal

representatives of Peddi Naidu are not parties to the sale deed (Ex. A1). The plaintiff being able to seek the relief of recovery of possession

omitted to do so. Mere asking of the relief of injunction is not a substitute to the relief of recovery of possession. The relief of recovery of

possession is a substantial right by itself. Suit for declaration with inadequate or irrelevant consequential relief would undoubtedly fall within the

ambit of proviso to Section 34 of the Specific Relief Act. In the present case, the plaintiff instead of asking the relief of injunction ought to have

asked the relief of recovery of possession of the plaint schedule property. The appropriate and adequate consequential relief to be sought, in this

suit, is recovery of possession.

38. Having regard to the facts and circumstances and also the principle enunciated in the cases 7th to 9th cited supra, I have no hesitation to hold

that the suit is hit by proviso to Section 34 of the Specific Relief Act. I am fully agreeing with the finding recorded by the trial court that the plaintiff

is not entitled for the relief of declaration. The finding of the first appellate court that the plaintiff is entitled for the relief of declaration is not legally

sustainable.

Question No. 3:

39. The predominant contention of the learned counsel for the defendants 6 to 8/appellants is that the suit claim is barred by limitation.

40. The trial court framed an issue i.e. ""Whether the suit is barred by limitation"" and answered the said issue affirmatively. Suffice to say, the first

appellate Court has to reassess the oral and documentary evidence available on record and arrive at its own findings without being influenced by

the findings recorded by the trial court since the appeal is continuation of the suit. Order XLI Rule 31(1)(a) CPC mandates that the first appellate

Court has to frame the points for determination covering all the issues framed by the trial court. As rightly pointed out by the learned counsel for the

appellants/defendant Nos. 6 to 8, the first appellate Court has not framed the point for determination with regard to the maintainability of the suit on

point of limitation. A perusal of the record reveals that both parties have adduced oral and documentary evidence on the point of limitation. The

material available on record is sufficient to decide this issue by this Court.

41. The plaintiff filed the suit for declaration and consequential injunction. The plaintiff has to file the suit within three years from the date the right to

sue first accrues to him in view of Article 58 of the Limitation Act, 1963, which corresponds to Article 120 of the old Act. A perusal of the same

at a glance clearly indicates that the word "first" is incorporated in the Article 58. The Legislature in its wisdom incorporated the word ""first"" in

Article 58 on a public policy that one should be more diligent and careful about his right to sue. The apex Court had an occasion to deal with

Article 120 of the Limitation Act in MST Rukhmabai v Lala Laxminarayan AIR 1960 SC 335 wherein at para No. 54 of the judgment it is held as

under:

The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and

unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and

innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives

rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

42. In C. Mohammad Yunus case (9 supra) the principle enunciated is that there can be no right to sue until there is an accrual of right asserted in

the suit and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is filed.

43. In view of the principle enunciated in the cases cited above, one has to file the suit for declaration with consequential relief within three years

from the date when the right to sue first accrues.

44. Let me consider the factual position of this case in the light of the above principle in touch stone with Article 58 of the Limitation Act.

45. The plaintiff purchased the plaint schedule property under Ex. A.1 registered sale deed dated 18.08.1984, thereby he got right over the

property. The plaintiff is entitled to protect his property from others. As per the averments in the plaint, right to sue first accrued to the plaintiff on

25.08.1991. The suit is filed in the year 1991 itself. If the contention of plaintiff is accepted, the right to sue first accrued to him on 25.08.1991

undoubtedly the suit is within the period of limitation.

46. The most significant question that falls for consideration is on which date the right to sue first accrued to the plaintiff. A perusal of Ex. A. 16

reveals that on 24.09.1984, the Plaintiff lodged a report with the Sub-Inspector of Police, Chandragiri. For better clarification, it is apposite to

refer the unnumbered para No. 2 of the complaint, which reads as hereunder:

Immediately after purchase made by me, my vendors put me in possession of the land covered by Sy. No. 217 and I took possession of the same.

I ploughed the land and again on 22.09.1984 there was a rain when I was ploughing the land on 23.09.1984. Then a big mob with the support of

V. Reddeppa Naidu came to me and threatened me with the help of rowdies and I resisted them with the help of other villagers.

47. The Taluq Magistrate cum Tahsildar of Chandragiri passed the following orders in M.C. No. 5 of 1984 (EX. A. 15).

Pending disposal of this case u/s 145 (1) Cr.P.C., I hereby restrain both parties not to interfere with the possession and enjoyment of the disputed

land.

48. A perusal of Ex. A. 15 reveals that the Plaintiff herein has received a copy of the same. A perusal of Exs. A. 15 and A. 16 clearly reveals that

the husband of the 6th defendant denied the title of the Plaintiff over the plaint schedule property on 25.09.1984 itself. The then Tahasildar of

Chandragiri had recognized the seriousness of the land dispute between the plaintiff and the husband of the 6th defendant which prompted him to

invoke the jurisdiction u/s 145 Cr.P.C. in order to maintain the peace and public tranquility in the village.

49. According to the plaintiff the 6th defendant and her husband unauthorisedly and illegally interfered with his possession and enjoyment of plaint

schedule property in the month of September, 1984. The material placed before the court clinchingly establishes that the 6th defendant and her

husband openly proclaimed that they are the absolute owners of an extent of Ac. 4.27 cents which includes the plaint schedule property in Sy. No.

217 of Cherlopalle village. The claim made by the 6th defendant and her husband is nothing short of an act of threat effectively invaded or

jeopardised right of the plaintiff, if any, over the plaint schedule property. On the other hand, the 6th defendant and her husband in unequivocal

terms denied the title of the plaintiff over the plaint schedule property, which amounts to infringement of the right of the plaintiff. The act of the 6th

defendant and her husband undoubtedly created cause of action in favour of the plaintiff.

50. Basing on the material available on record, the irresistible conclusion that can be drawn is that the right to sue to the plaintiff had first accrued

on 25.09.1984. The plaintiff ought to have filed the suit on or before 24.09.1987. As seen from the record, the present suit was filed on

03.09.1991 i.e. nearly seven years after the right to sue first accrued to the plaintiff.

51. Having regard to the facts and circumstances of the case and also the ratio laid down in Rukhmabai case (10 supra) and C. Mohammad Yunus

case (9 supra), I have no hesitation to hold that the suit claim is barred by limitation. If the court comes to a conclusion, basing on the material

available on record, the suit filed by the plaintiff is hopelessly barred by limitation; the question of granting of relief of any nature does not arise. I

am in complete agreement with the findings recorded by the trial court so far as the issue of limitation is concerned. Inadvertently, the first appellate

Court has not considered this vital aspect.

52. For the foregoing reasons, I have no hesitation to hold that there is a question of law much less substantial question of law in this second

appeal. Therefore, the finding of the first appellate court that the plaintiff is entitled for the relief of declaration only is not sustainable.

53. In the result, this second appeal is allowed, setting aside the decree and judgment dated 22.11.2004 passed in A.S. No. 132 of 1996 on the

file of the V Additional District Judge, Tirupati, so far as the relief of declaration is concerned. No order as to costs. As a sequel, miscellaneous

applications, if any pending, shall stand closed.