

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF FEBRUARY, 2026

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BEFORE

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

REGULAR SECOND APPEAL NO. 1657 OF 2013 (DEC/INJ)

BETWEEN:

1. TAJ PARVEEN,
W/O SIRAJ PASHA,
AGED ABOUT 51 YEARS,
2. SIRAJ PASHA,
S/O ABDUL BASHEER,
AGED ABOUT 53 YEARS,

BOTH ARE PRESENTLY RESIDING AT
OPPOSITE B H V DARGHA, K G F ROAD, HYDAR
NAGAR, MULBHAGAL TALUK, KOLAR DISTRICT,
PIN: 563 131.

...APPELLANTS

(BY SRI G PAPIREDDY, SR. ADVOCATE FOR
SRI V VINOD REDDY, ADVOCATE)

AND:

1. EZAZULLA SHARIFF,
S/O LATE AZEEZULLA SHERIFF,
AGED ABOUT 45 YEARS,
2. MEHABOOB SHARIFF,
S/O LATE AZEEZULLA SHERIFF,
AGED ABOUT 38 YEARS,
3. RIYAZUIIA SHARIFF,
S/O LATE AZEEZULLA SHERIFF,
AGED ABOUT 30 YEARS,
4. ATHIFULLA SHARIFF,
S/O LATE AZEEZULLA SHERIFF,
AGED ABOUT 28 YEARS,



RESPONDENTS 1 TO 4 ARE ALL
R/AT MILLATH NAGAR, KOLAR,
PERMANENT RESIDENT OF
DARGA MOHALLA, MULBAGAL TOWN
KOLAR DISTRICT, PIN: 563131.

- 5. MOHIDDIN SHARIFF
SINCE DEAD BY LRS
- 5(a) JAMEELA,
W/O MOHIUDDIN SHARIFF,
AGED ABOUT 61 YEARS,
- 5(b) FAYAZ ULLA SHARIFF,
S/O MOHIUDDIN SHARIFF,
AGED ABOUT 41 YEARS,
- 5(c) KHADAR SHARIFF,
S/O MOHIUDDIN SHARIFF,
AGED ABOUT 39 YEARS,
- 5(d) AKBAR SHARIFF,
S/O MOHIUDDIN SHARIFF,
AGED ABOUT 37 YEARS,
- 5(e) HUSSAIN SHARIFF,
S/O MOHIUDDIN SHARIFF,
AGED ABOUT 35 YEARS,

RESPONDENTS 5(a) TO 5(e) ARE
ALL R/O DARA MOHALLA,
MULBAGAL TOWN, KOLAR DISTRICT,
PIN: 563 131.

- 6. SAMIULLA SHARIFF,
S/O LATE HAKEEM AHAMED SHAREEF,
AGED ABOUT 62 YEARS,
- 7. HYDER SHARIFF,
S/O LATE HAKEEM AHAMED SHAREEF,
AGED ABOUT 59 YEARS,
RESPONDENTS 6 AND 7 ARE
RESIDENTS OF DARA MOHALLA
MULBAGAL TOWN, KOLAR DISTRICT, PIN: 563 131.

8. D N SHIVAPRASAD SHETTY,
S/O D NARAYANA SHETTY,
AGED ABOUT 70 YEARS,
R/AT NO.55, '41ST CROSS, 8TH BLOCK,
JAYANAGAR, BENGALURU - 560 041.
(AMENDED AS PER THE ORDER
OF THIS COURT DATED 13.02.25)

...RESPONDENTS

(BY SRI G A SRIKANTE GOWDA, ADVOCATE FOR R1 TO R3,
R5(A-E) R6 & R7,
V/O/DT 20.03.2017, SERVICE OF NOTICE TO R4 IS H/S
SRI GURURAJ JOSHI AND SRI NACHIKET JOSHI, ADV. FOR R8)

THIS RSA IS FILED UNDER SEC.100 OF CPC., AGAINST
THE JUDGEMENT & DECREE DTD 26.6.2013 PASSED IN
R.A.NO.138/2012 ON THE FILE OF THE II ADDL. SENIOR
CIVIL JUDGE & JMFC., KOLAR, ALLOWING THE APPEAL AND
SETTING ASIDE THE JUDGMENT AND DECREE DATED
20.6.2012 PASSED IN O.S.NO.156/2010 ON THE FILE OF THE
PRL. CIVIL JUDGE & JMFC., MULBAGAL.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR
JUDGMENT ON 04TH FEBRUARY, 2026 AND COMING ON FOR
PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE
FOLLOWING:

CORAM: HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

CAV JUDGMENT

The Second Appeal arising from the divergent findings was admitted to answer the following substantial questions of law:

1. *Whether the Appellate Court was justified in decreeing plaintiffs' suit when the plaintiffs have failed to substantiate their title with acceptable ocular and documentary evidence?*
2. *Whether the suit of the plaintiffs was maintainable, when the plaintiffs were not granted liberty to file fresh suit on the same cause of action in O.S.No.235/2008 and O.S.No.191/2008?*
3. *Was not the suit of the plaintiff hit by Order 2 Rule 2 of CPC?*

2. During the course of hearing the learned Senior Counsel for the appellants-defendants also urged that in view of the bar under ***proviso to Section 34 of the Specific Relief Act, 1963 (Act,1963)***, the relief of declaration of title is not tenable as the plaintiffs though not in possession of the property have not claimed the consequential relief of possession but sought declaration of title and defective consequential relief of injunction.

3. Thus, the Court also heard the learned Senior counsel for the appellants and the learned counsel for the respondents on the following substantial questions of law as well.

*Whether the suit for **declaration of title and injunction** can be decreed in part granting only declaration, in case plaintiff's title is established and possession is with the defendants despite the bar contained in Section 34 of the Specific Relief Act, 1963 ?*

Or,

Can the Court declare the title and deny the consequential relief, or can mould the relief and grant the decree for possession as well if the appropriate consequential relief of possession is not claimed?

4. This second appeal is by defendants No.1 and 2. The Trial Court dismissed the suit for declaration of title and injunction. On appeal, the First Appellate Court allowed the appeal and decreed the suit in *toto*.

5. Learned Senior Counsel appearing for the defendants/appellants taking through the previous proceedings between the parties to this appeal submitted that initially, O.S.

No.191/2008 was filed by two plaintiffs (plaintiffs No. 5 and 6 of the suit O.S. No. 156/2010 from which present appeal arises) for the relief of partition, declaration and permanent injunction. Said suit was filed against the present appellants, plaintiff No. 7, and also the father of plaintiffs No.1 to 4 of O.S. No. 156/2010.

6. Acting on the memo filed by the said two plaintiffs, the suit in O.S. No.191/2008 was dismissed as not pressed vide order dated 10.06.2008. It appears that in the memo it is stated that the dispute is settled out of court. The defendants in the suit, (present appellants) did not sign the memo and did not object for withdrawal of the suit either.

7. The seven plaintiffs who are also the plaintiffs in the suit under scrutiny (O.S. No.156/2010), on 19.05.2008, filed O.S. No.235/2008 for permanent injunction for the same property and the same was dismissed for non-prosecution on 11.06.2009.

8. Later, the suit in O.S.No.156/2010 (from which the present appeal arises) is filed on 15.07.2010 seeking declaration of title and permanent injunction for the same property and same is dismissed on merits on 20.06.2012. On

the appeal by the plaintiffs, the first appeal (R.A.No.138/2012) is allowed and suit is decreed as prayed for. Present appellants who are the defendants No.1 and 2 have filed the present appeal.

9. Learned Senior counsel urged that during the pendency of R.A.No.138/2012, one more suit in O.S.No.132/2013 was filed on 26.04.2013 by the very same plaintiffs for declaration, possession and injunction and the same was dismissed as not pressed based on the memo dated 27.06.2013. It was dismissed as not pressed after the judgment in R.A. No.138/2012 as plaintiffs were granted declaration of title and injunction.

10. In addition, it is also submitted that one more suit in O.S.No.148/2014 is filed on 21.04.2014, (during the pendency of this appeal) for partition and separate possession and said suit is still pending consideration.

11. Admittedly, in O.S.No.148/2014,(suit for partition and separate possession) the present appellants were not parties and the appellants got impleaded as defendants No.5 and 6 and are contesting the suit.

12. Elaborating on the facts of the case, learned Senior counsel appearing for the defendants/appellants would urge that the total extent of the suit property is 25 guntas and out of that property the property measuring 50' x 100' feet was sold to Abdul Basith by plaintiff No.7 through unregistered sale deed dated 07.12.1989. Said Abdul Basith sold the property measuring 50'x100' in favour of defendant No.2 through the unregistered sale deed dated 23.06.1995 and thereafter, defendant No.2 executed a registered gift deed in favour of his wife defendant No.1 on 29.04.2004. Thus, it is urged that the property has been transferred from Abdul Basith to defendant No.2 and defendant No.2 to defendant No.1 and defendant No.1 is in possession of the property as of the date of the suit pursuant to the registered gift deed dated 29.04.2004.

13. Referring to the unregistered sale deeds dated 07.12.1989, 23.06.1995 and registered gift deed dated 29.04.2004 referred to above, it is urged that Trial Court rightly held that plaintiffs are not in possession and dismissed the suit.

14. Without framing proper points for consideration as required under Order XLI Rule 31 of the Code of Civil Procedure (for short 'Code'), the First Appellate Court has erroneously

come to the conclusion that the plaintiffs have established ownership and possession is another ground raised.

15. Referring to the application under Order XLI Rule 27 of the Code, filed by the appellants wherein the appellants seek production of additional documents *viz.*, the pleadings and evidence in O.S.No.132/2013 and O.S.No.148/2014, and stressing more on plaint averments in O.S.No.132/2013 urged that the plaintiffs who prayed for possession of the same property in O.S. No.132/2013 from the present appellants, cannot maintain a suit for declaration and injunction.

16. To urge that the suit without appropriate consequential relief of possession is not maintainable reliance is placed on the co-ordinate Bench of this Court in ***Sri. Aralappa Vs Sri. Jagannath And Others¹***.

17. Another contention that is pressed into service is that the suit filed by the plaintiff in O.S.No.156/2010 after the withdrawal of earlier suit in O.S.No.191/2008 is not maintainable as the plaintiffs have not sought liberty to file a fresh suit while withdrawing the earlier suit. That apart, one more suit (second suit) in O.S. No.235/2008 was filed and

¹ ***ILR 2007 KAR 339***

same was dismissed for non-prosecution. Then the third suit in O.S. No.156/2010 (from which present appeal is filed) is hit by Order II Rule 2 of the Code of Civil Procedure (Code).

18. In support of his contention, learned Senior Counsel would refer to the following judgments:

- 1. *Sarguja Transport Service vs. State Transport Appellate Tribunal, Gwalior and others*²**
- 2. *Union of India vs. Vasavi Co-op. Housing Society Ltd and others*³**
- 3. *Bondar Singh and others vs. Nihal Singh and others*⁴**
- 4. *Bangarappa vs. Rudrappa and Another*⁵**
- 5. *Alla Baksh Vs. Mohd. Hussain*⁶**
- 6. *Ramjas Foundation and Another vs Union of India and Others*⁷**

19. The learned counsel appearing for the plaintiffs/respondents No.1 to 7 would urge that the suit is maintainable as the plaintiffs have established the title as well as possession of the property.

² ***AIR 1987 SC 88***

³ ***AIR 2014 SC 937***

⁴ ***(2003) 4 SCC 161***

⁵ ***ILR 2012 KAR 1020***

⁶ ***ILR 1996 KAR 1340***

⁷ ***(2010) 14 SCC 38***

20. It is urged that the appellants cannot dispute the title of the plaintiffs as the appellants claim that Abdul Basith from whom appellant No.2 claims title, purchased the property from plaintiff No.7. Since there is no registered sale deed by plaintiff No. 7 in favour of Abdul Basith, it is urged that the plaintiffs title is established.

21. It is also urged that the suit in O.S.No.156/2010 which is filed after the withdrawal of earlier suit in O.S.No.191/2008, and dismissal of suit in O.S.No.235/2008 for non-prosecution, is not hit by Order II Rule 2 of the Code. It is submitted that cause of action for each suit is different.

22. In addition, it is also urged that the alleged sale deeds dated 07.12.1989, 23.06.1995 being unregistered cannot be looked into for any purpose including the nature of possession. Another contention is the plaintiffs No.1 to 6 are not parties to the said agreements for sale.

23. In the alternative, learned counsel appearing for the contesting respondents would also urge that, assuming that the appellants are in possession of the property, in view of the law in ***Smt. Narayanamma and others vs Sri. Rajappa and***

others,⁸ the decree for possession can be granted directing the plaintiffs to pay the Court fee required to be paid in a suit for possession.

24. The application for production of additional documents is opposed on the premise that the documents cannot be accepted at this belated stage and sufficient cause is not made out for belated production.

25. In support of his contention, the learned counsel for the contesting plaintiffs-respondents has placed reliance on the following judgements.

- 1. Padhiyar Prahladi Chenaji (Deceased) Through L.R.s v. Maniben Jagmalbhai (Deceased) Through L.R.s and Others⁹**
- 2. Maria Margadia Sequeria Fernandes and Others v. Erasmo Jack De Sequeria (D) Tr. Lrs. and Others¹⁰**
- 3. M/S Paul Rubber Industries Private Limited V. Amit Chand Mitra & Another¹¹**
- 4. Ganpatlal v. Ganga Bai and Others¹²**
- 5. Avinash Kumar Chauhan V. Vijay Krishna Mishra¹³**

⁸ **RSA No. 2681/2007 C/w RSA. No 2702/2007**

⁹ **(2022) 12 SCC 128**

¹⁰ **(2012) 5 SCC 370**

¹¹ **2022 SCC OnLine 2031**

¹² **2022 SCC OnLine MP 3371**

26. The learned counsel appearing for respondent No.8 who is impleaded would submit that he is a purchaser of the property under the registered sale deed dated 12.06.2014 from plaintiff No.4, as such, he acquired title of the property covered under the sale deed and the appellants cannot assert their possession of the property based on their alleged unregistered sale deeds. In addition, the submissions on behalf of respondents No.1 to 7 are adopted to oppose the appeal.

27. The Court has considered the contentions raised at the Bar and perused the records.

**On Maintainability Of The Suit Filed After
Withdrawing Earlier Suit Without Seeking Liberty To
File Fresh Suit.**

28. Prior to the filing of the suit in O.S.No.156/2010 for the relief of declaration and injunction, the plaintiffs No.5 and 6 (except other plaintiffs in O.S. O.S.No.156/2010), filed O.S.No.191/2008 for partition and separate possession, and in the alternative for declaration and injunction. Said suit was dismissed on a memo stating the dispute is settled Out-of-

¹³ **AIR 2009 SC 1489**

Court. Defendants did not sign the memo. Did not object for withdrawal of the suit.

29. Later, one more suit was filed in O.S.No.235/2008 on 19.05.2008 by all the plaintiffs in O.S.No.156/2010, and same was dismissed on 11.06.2009 for non-prosecution. The said suit was for permanent injunction.

30. The present suit in O.S.No.156/2010 is filed on 15.07.2010 for the relief of declaration and permanent injunction by all the plaintiffs in O.S.No.235/08.

31. The contention is, while withdrawing the suit in O.S.No.191/2008, no liberty was sought to file a fresh suit as such the suit in O.S. No.156/2010 is not maintainable.

32. It is to be noticed that, except for the plaintiffs No. 5 and 6 in O.S.No.156/2010 (subsequent suit) other plaintiffs were not the plaintiffs in former suit in O.S. No.191/2008 though they were arrayed as defendants. Thus, bar urged under Order XXIII Rule 1 (3) and (4) of the Code cannot apply to those plaintiffs in O.S. No. 156/2010 who were not the plaintiffs in O.S. No. 191/2008.

33. Though in O.S.No.235/2008 (second suit), all the plaintiffs in the third suit in O.S.No.156/2010 are parties, the suit in O.S.No.235/2008 was only a suit for bare injunction and same was dismissed for non-prosecution.

34. In the plaint of the present suit, the plaintiffs have stated that when O.S. No.235/2008 was pending there was no interference by the defendants and for said reason the suit was not prosecuted and was dismissed for non-prosecution. The alleged non-interference, as contended by the plaintiffs, was the reason for not prosecuting the said suit or not, is a different aspect of the matter. The appellants do not make a claim that the suit was abandoned giving up the claim in respect of the property or on account of some settlement said suit in O.S. No.235/2008 was not pursued. For want of pleading and evidence, in this behalf one cannot conclude that the said suit was not withdrawn or abandoned to hold that the plaintiffs *gave up the claim over the suit property.*

35. *It must be borne in mind that Order XXIII Rule 1(3) and (4) of the Code is grounded in the public policy that a person should not be subjected to repeated litigation. The contention that once a suit is withdrawn without liberty to file*

another suit, a second suit for the same property is not maintainable under any circumstances seems far-fetched. In the opinion of the Court, the provision may not have such a broad implication to hold that the remedy is lost. If so, it may have the effect of losing the right over the property as well.

36. *Order XXIII Rule 1(3) and (4) of the Code cannot be interpreted to mean that the withdrawal of a suit, in all circumstances, amounts to abandoning the right over the property thereby precluding a party from filing a fresh suit for appropriate relief. Preventing the abuse of process, rather than extinguishing a right or foreclosing a remedy, is the true philosophy behind these provisions.*

37. *Keeping in mind the object behind the provision, based on the available materials, the Court can decide whether a second suit filed after the withdrawal of a former suit (without leave) is barred or not. If not, the Court has to decide the case on merits. The Court in such an event ordinarily will have to order the plaintiff to pay the cost of earlier suit, if not ordered when the suit was withdrawn earlier.*

38. *In other words, Order XXIII Rule 1(3) and (4) of the Code is not inflexible and does not create an absolute bar to a*

second suit where liberty was not sought. However, if liberty to file a fresh suit was sought and specifically refused, such case falls into a different category. Otherwise, strict application of the literal meaning to Order XXIII Rule 1(4) would lead to the situation that the party has lost the remedy, if not the right in the property, in every subsequent suit filed after a withdrawal without liberty. Such a drastic consequence may not be the intention behind the provision. The object is only to prevent abuse of the process of the Court.

39. The earlier suit in O.S.No.191/2008 was one for declaration, partition and permanent injunction and filed by only 2 plaintiffs. The cause of action for partition is a recurring cause of action.

40. The second suit filed by the plaintiffs in O.S.No.235/2008 is not for partition and it is for injunction. Said suit is dismissed for non-prosecution. It is again well settled principle of law that in an injunction suit, the cause of action is recurring and merely because the suit is withdrawn or dismissed for non-prosecution, that does not mean that the plaintiff in the said suit cannot file one more suit if there is a different cause of action.

41. *If the different cause of action to file the subsequent suit, is also a cause of action to claim a more comprehensive relief of declaration in addition to the earlier relief of injunction, then the such subsequent suit is not hit by Order XXIII Rule 1 (3) of the Code.*

42. The third suit i.e. O.S.No.156/2010, from whose decree the present appeal is filed, is a suit for declaration and injunction and is founded on a different cause of action. As already noticed, it is not the case of the appellants that earlier suit in O.S.No.191/2008 is dismissed as withdrawn on account of settlement with the present appellants.

43. Learned Senior counsel appearing for the appellants has relied on the judgment of the Apex Court in ***Sarguja Transport Service*** (*supra*). The said judgment is delivered in the context of a Writ Petition filed after withdrawing the earlier writ petition without seeking any liberty to file fresh writ petition, *in respect of the same cause of action*. It is noticed that, in the said case the petitioner had filed a Writ Petition challenging the order passed by the Appellate Tribunal which had set aside the order of grant in favour of the writ petitioner and directed the grant in favour of contesting respondent. Said

petition was withdrawn without seeking leave to file a fresh petition. Thus, the challenge to the Order of the Tribunal has attained finality. In such event, cause of action cannot be construed as a recurring cause of action. In that context, the Apex Court held that, the petition under Article 226 of the Constitution of India invoking an extraordinary jurisdiction cannot be permitted for the same cause of action. Whereas, in the instant case, the cause of action is a recurring cause of action.

44. This being the position, the suit in O.S.No.156/2010 seeking declaration and injunction is *per se* not barred in view of withdrawal of earlier suit O.S.No.191/2008. However, the plaintiffs have to make out a case for grant of relief. Hence, the second substantial question of law is answered in favour of the respondents No.1 to 7/plaintiffs.

On Order II Rule 2 Of The Code:

45. As far as third substantial question of law which is framed with reference to Order II Rule 2 of the Code is concerned, the Court is of the view that the said question of law does not arise. Order II Rule 2 of the Code would be applicable in a situation where the plaintiff omits to include a

whole claim in respect of a cause of action and does not seek leave of the Court to file the suit in respect of the said omitted relief in a subsequent suit.

46. It is not the case of the appellants that property which is not included in the earlier suit is made the subject matter of the suit in O.S.No.156/2010. It is not the case of the appellants that the plaintiffs ought to have claimed the relief of declaration of title when they filed suit for injunction in O.S. No. 235/2008. Such a plea is not raised in the written statement. Whether the plaintiffs had a cause of action to claim the relief of declaration of title when the suit for injunction was filed in O.S.No.235/2008 is a question of fact dependent on nature of threat the plaintiffs perceived or nature of interference.

47. Thus, it is not open to the appellants now to contend that the suit is hit by Order II Rule 2 of the Code without raising the factual plea in the written statement as to what was the nature of the cause of action in the earlier suit for injunction. Thus, the third substantial question of law i.e., "*was not the suit of the plaintiff hit by Order II Rule 2 of CPC.*" does not arise or even if it does arise the answer has to be in favour of the plaintiffs.

On the plaintiffs' title over the suit property:

48. In the instant case, the appellant No.2 traces his title under the unregistered sale deed dated 23.05.1995 said to have been executed by Abdul Basith. Said Abdul Basith claims to have purchased the property from plaintiff No.7 under an unregistered sale deed dated 07.12.1989. Thus, appellant No.2 admits the title of plaintiff No.7, if not all the plaintiffs. Since Abdul Basith and appellant No.2 claim title under unregistered sale deeds and appellant No.1 claims title through a registered gift deed from appellant No.2 who did not acquire title for want of registration, there is no difficulty to hold that appellants have no title over the property.

49. The reliance on the judgment of the Apex Court in ***Vasavi Co-op. Housing Society Ltd and others*** (*supra*), is of no assistance to the case of the appellants wherein the Apex Court has reiterated the well settled legal position that in a suit for declaration of title onus is on the plaintiff and he cannot stand on the weakness of the defendants.

50. In the instant case, the plaintiffs' claim relating to inheritance of property is admitted in the cross-examination of DW.1. The property records also stood in the name of Hakeem

Ahmad Shariff since 1991. Defendant No.1 claims that said Hakim Ahmed Shariff's son - plaintiff No.7 sold the property to Abdul Basith through unregistered sale deed. There is no dispute among the plaintiffs that the suit property belongs to them though part of it stood originally in the name of plaintiff No.7 or his father. Thus, there is no difficulty in accepting the concurrent finding that the plaintiffs are the owners, more so in a situation where the appellant No.1 though claims right under a registered gift deed when the donor and donor's vendor who claim title under unregistered sale deeds did not have title.

On The Issue Relating To Possession:

51. Since the appellants also urge to consider the additional documents filed under Order XLI Rule 27 of the Code, to substantiate their contention relating to possession, it is necessary to consider whether appellants have made out a case for production of additional documents.

52. After the dismissal of suit in O.S. No.156/2010 (from which the present appeal arises) the plaintiffs filed appeal against the decree dismissing the suit in O.S. No.156/2010, and simultaneously filed suit in O.S. No.132/2013 claiming declaration and possession. After the disposal of R.A. No.

138/2012, the judgment and decree of which are questioned here, the suit in O.S. No. 132/2013 is withdrawn. Filing of suit in O.S. No.132/2013 is not in dispute. *In the said plaint the plaintiffs/respondents No. 1 to 7 seek possession from the present appellants.* This was not brought to the notice of the Appellate Court.

53. The plaintiffs have filed one more suit in O.S. No. 148/2014 for declaration and partition and the appellants are also arrayed as defendants. Said document is also not in dispute.

54. Thus, the Court is of the view that the application for production of documents, which admittedly are the pleadings of respondents No.1 to 7, in the suits filed by respondents No.1 to 7, *subsequent to the disposal of the suit in O.S. No. 156/2010*, have to be allowed as respondents No.1 to 7 have not denied the pleadings in the said subsequent suits. The question is whether matter is to be remanded to the Trial Court to consider the additional evidence allowed by this Court.

55. The Court is of the view that there is no need to remand the matter since the documents produced along with the applications under Order XLI Rule 27 of the Code are the

pleadings of the plaintiffs and the documents not being disputed, the documents can be considered in evidence.

56. On considering the said documents which respondents cannot deny, and also considering the other evidence placed before the Trial Court, the Court is of the view that the defendants/appellants are in possession of the *portion* of the suit property covered in the gift deed dated 29.04.2004 without title over it and the plaintiffs are the owners of the entire suit property.

*Whether the suit for **declaration of title and injunction** can be decreed in part granting only declaration, in case plaintiff's title is established and possession is with the defendants despite the bar contained in Section 34 of the Specific Relief Act, 1963 ?*

Or,

Can the Court declare the title and deny the consequential relief, or can mould the relief and grant the decree for possession as well if the appropriate consequential relief of possession is not claimed?

57. The learned Senior counsel appearing for the appellants stressed on Section 34 of the Act, 1963 and the

judgment of the Co-ordinate Bench of this Court in **Sri Aralappa** (*supra*) to urge that the suit is to be dismissed for not seeking relief of declaration and possession in place of declaration and injunction.

58. The Co-ordinate Bench in **Aralappa** (*supra*), interpreted the said provision and held that that granting declaration without possession would lead to an anomalous situation where the person declared as title holder is not in possession and the person in possession has no title.

59. However, the Supreme Court in **Akkamma and others V. Vemavathi and others**¹⁴, held declaration can be granted even if consequential relief is not tenable. The Apex Court held that where title is established without possession, absence of a prayer for possession and if the consequential prayer sought is defective prayer of injunction, does not bar the grant of declaratory relief, even if the defendant is in possession.

60. The Apex Court in **Akkamma** (*supra*), has noticed the judgment in **Aralappa** (*supra*).

¹⁴ (2021) SCC OnLine SC 1146

61. In **Akkamma** (supra), the prayer for consequential relief of possession was not sought in the suit and in the relief sought was declaration and injunction. In the said case the plaintiff filed a suit for bare injunction in 1982. Same was dismissed. The decree was confirmed in Appellate Court. Then in 1987 the plaintiff filed another suit for declaration and injunction. Same was dismissed holding that the plaintiff is not in possession and Court relied on judgment in **Aralappa** (supra).

62. In **Akkamma** (supra), the prayer for possession was sought as an alternative relief in the appeal before the High Court by way of amendment. It was rejected as the High Court felt that the relief should have been claimed in 1987 when the suit was filed as there was already a finding in the earlier suit that the defendant is in possession and said finding had attained finality. In the said circumstances where the relief of possession was declined for a valid reason, the Apex Court granted only the declaration of title.

63. In view of the law in **Akkamma** (supra), there is no impediment to confirm the relief of declaration granted by First Appellate Court.

64. The law laid down by the 3 Judge bench of the Apex Court in ***Mst. Rukmabai vs. Lala Laximinarayan and Others***¹⁵ is worth referring to at this stage. In paragraph 31 of the judgment referring to Section 42 of the Specific Relief Act, 1877 which is *pari materia* with Section 34 of the Act 1963 the Apex Court has held as under:-

*"31. The next question raised by the learned counsel for the appellant is that the suit should have been dismissed in limine as the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of Section 42 of the Specific Relief Act. The proviso to Section 42 of the said Act enacts that "no Court shall make any such declaration when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so". **It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.** The learned Counsel for the appellant contends that in the plaint the cause of action for the relief of declaration was given as the execution of the partition decree through the Commissioner appointed by the Court and, therefore, the plaintiff should have asked for a permanent injunction restraining the appellant from interfering with his possession. **The appellant did not take this plea in the written statement; nor was there any issue in respect thereof, though as many as 12 issues were raised on the pleadings; nor does the judgment of the learned***

¹⁵ AIR 1960 SC 335

District Judge disclose that the appellant raised any such plea. For the first time the plea based on Section 42 of the Specific Relief Act was raised before the High Court, and even then the argument advanced was that the consequential relief should have been one for partition : the High Court rejected the contention on the ground that the plaintiff, being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the other members of the family. It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; **for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act.** In the circumstance, we are not justified in allowing the appellant to raise the plea before us."

(Emphasis supplied)

65. The 3 judge bench of the Apex Court **Mst. Rukmaba**, *supra* has held that if appropriate consequential relief as mandated under Section 42 of the Specific Relief Act, 1877 is not sought the Court has to afford an opportunity to amend the plaint. Said ratio applies to Section 34 of the Act, 1963 as the provision is *pari materia* with Section 42 of the Act, 1877.

66. In addition the Apex Court has held that the plea relating to maintainability of the suit for not meeting the requirement of Section 42 is to be raised in the written statement and such plea cannot be raised in appeal.

67. In the instant case, such plea is not raised in the written statement. The Trial Court dismissed the suit for want of possession, without reference to Section 34 of the Act, 1963. The opportunity was not given to amend the plaint despite recording a finding that the plaintiffs are the owners.

68. It is also necessary to refer to Section 34 of the Act, 1963, which reads as under:-

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

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

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

(Emphasis supplied)

69. The provision aims at avoiding multiplicity of litigation and prompts the parties to make the suit comprehensive. That is the primary purpose of the provision. The provision does not intend to penalise or punish the party for not complying the requirement of the proviso to Section 34 of the Act, 1963 by denying the declaration or any other relief which the plaintiff is otherwise entitled.

70. Since the Apex Court in **Akkamma** (supra), has held that even if appropriate consequential relief is not sought and consequential relief sought (in that case) was inappropriate, relief of declaration can be granted, the word 'shall' in proviso to Section 34 may be read as "may'.

71. In case, the relief is not moulded or amendment is not permitted in deserving cases, the anomaly continues. Even if the plaintiff proves the title or establishes that he is entitled to the declaration sought, and in case the suit is to be dismissed resorting to proviso to Section 34 of the Act, 1963,

because of omission to claim consequential relief, or because of defective consequential relief, the defendant will continue to enjoy the property or will have a benefit of decree of dismissal. Such situation has to be avoided.

72. There is one more dimension to Section 34 of the Act, 1963, in the light of declaration of law in ***Akkamma*** (supra). In view of the declaration of law, which permits that the relief of declaration of title (or any other declaration sought) can be granted by declining the defective or inappropriate consequential relief, then probably armed with said declaration, the plaintiff may sue for possession of the property if he is declared as the owner. And the plaintiff may urge that the such second suit is maintainable and the cause of action is different and Order II Rule 2 of the Code does not apply. Such situation also has to be avoided.

73. It is true that the language in Section 34 of the Act, 1963 is plain, simple and unambiguous. As a general rule the plain grammatical meaning must be adhered to while construing the provision. However, such application results in weird situations described above where despite being the owner the plaintiff may lose case and despite being not the

owner, or being a trespasser, the defendant may continue to be in possession, for want of appropriate consequential prayer in the plaint. In a way that amounts to unjust enrichment.

74. *The Court is of the view that the combined reading of the Section 34 of the Act, 1963 and the ratio in two judgments of the Apex Court in **Mst. Rukmabhai**, and **Akkamma** (supra), leads to the conclusion that, before deciding the suit governed by proviso to Section 34 of the Act, 1963, instead of dismissing the suit either for want of consequential relief or appropriate consequential relief the Court has to consider the following recourse.*

- (a) If appropriate consequential relief as required under Section 34 of the Act, 1963 is not sought along with the relief of declaration, the Court has to give opportunity to the plaintiff to amend the plaint, and consider the plea for amendment before deciding the suit on merits.
- (b) The plea to amend the plaint to incorporate the appropriate prayer for consequential relief can be granted at any stage even in second appeal in High Court, subject to just exceptions governing Order VI Rule 17 of the Code.

- (c) If the plaintiff does not amend the plaint seeking appropriate consequential relief despite opportunity being granted by the Court, the plaintiff will run at the risk of dismissal of the suit.
- (d) If the plea that the suit is hit by proviso to Section 34 is not raised, in the written statement, it cannot be permitted to be raised in the appeal as held by the Apex Court in ***Mst. Rukmabhai*** (supra).
- (e) If the plea under proviso to Section 34 is not raised in the suit, even if the consequential relief is not claimed, the Court may grant the relief of declaration.
- (f) In deserving cases, if the evidence on record makes an unbeatable case for the plaintiff, and if the appropriate consequential prayer is only a formality, the Court can mould the relief and grant appropriate consequential relief subject to payment of additional court fee is any attracted.

The ratio formulated in clause(f) for clarity can be illustrated in two Examples.

- (i) In a suit for declaration of title and injunction, if the defendant sets up a plea of adverse possession, and if the plaintiff establishes title and fails to establish possession and if the defendant establishes possession but fails to establish title by adverse possession, the Court can mould the relief to grant declaration and possession as the defendant would have no defence left to permit him to contest the prayer for possession.
- (ii) In a suit for declaration that defendant has built and structure encroaching the plaintiff's property and injunction, if the defendant denies plea of encroachment, and in case encroachment within 3 years from the date of suit is proved, the Court can mould the relief to grant declaration and *mandatory injunction* instead of dismissing the suit for want of appropriate consequential relief of mandatory injunction.

75. It is also required to be noticed that, the appellants have not claimed title over the property by way of adverse possession.

76. The learned counsel for the appellants contended that had the plaintiffs sought possession, the defendants would have pleaded and proved adverse possession. This contention is legally tenable in principle.

However, in the factual matrix of the present case, the said contention is not acceptable. The reason is, Abdul Basit from whom the defendants trace their title and possession over the property did not possess the property for 12 years. Even defendant No.1 did not possess the property for 12 years from 1995 when he claims to have purchased the property through unregistered sale deed said to have been executed by Abdul Basit. Defendant No.1 claims title through defendant No.2 who did not have title and defendant No.1 did not possess the property for 12 years before filing the suit.

77. Thus, viewed from any angle, the plea of adverse possession is not available to the defendants. Thus, the contention of the defendants that they would have raised the plea of adverse possession had the suit been filed for possession cannot be accepted.

78. The omission on the part of the plaintiffs to seek the relief of possession has not caused any prejudice to the defence that could have been raised by the defendants.

79. In this backdrop, this Court is of the view that the relief of possession could have been granted by moulding the relief. However certain other facts of the case, discussed below do not permit such exercise.

80. The Court is of the view that the plaintiffs suppressed certain facts. Despite filing the suit for declaration and possession, the plaintiffs pursued the First Appeal in R.A. No.138/2012 contending that they are in possession of the property.

81. Either the plaintiffs could have pursued R.A.No.138/2012 asserting that they are in possession or having filed O.S.No.132/2013 seeking possession, they should not have filed RA No.138/2012 and should have withdrawn R.A. No.138/2012. That is not done.

82. Added to that, it was not brought to the notice of First Appellate Court that one more suit is filed by them claiming possession over the same.

83. In addition, admittedly one more suit for partition and separate possession is still pending in O.S. No.148/2014. The appellants who are said to be in possession of some portion

of the suit property claim to have put up a structure. In the said partition suit appellants are made parties. Thus, subject to proof that the appellants have put up the structure, may be appellants are either entitled to value of the structure/improvement if any made or entitled to remove the structure and fixtures. For this purpose there has to be an adjudication and there is no need to file one more suit. Said adjudication shall take place in O.S. No.148/2014.

84. It is made clear that the appellants will have no opportunity to plead title over the property, plea of Order II Rule 2, or limitation, but may make a claim to claim to dismantle the structure or claim the value of the structure.

85. Learned counsel appearing for the respondents have placed reliance on the judgment of this Court in **Narayanamma** (supra), to contend that, in case the appellants are found to be in possession of the property, there has to be a decree for possession and appellants are willing to pay the court fee.

86. The Court is of the view that, though the law laid down in **Narayanamma** (supra), would not apply to the

present case for the reasons assigned in paragraphs 80 to 83 supra.

87. In view of the fact that the defendants are found to be in possession of a portion of the suit property without title, and the plaintiffs are the established owners, the First Appellate Court's decree of declaration is confirmed.

88. However, in view of the peculiar facts already discussed, the delivery of possession shall be pursuant to adjudication in O.S. No.148/2014 pending before the Trial Court.

89. Since the plaintiffs have suppressed the fact relating to possession, and have filed multiple suits seeking different relief and subjected the defendants to multiple litigations, shall pay Rs.50,000/- cost the defendants.

90. Since, respondent No.8 is a *pendente lite* purchaser, he is bound by the Judgment.

91. Before concluding, the Court deems that following observations may not be out of place.

92. *In the light of the law laid down in **Akkamma v. Vemavathi (2021)**, the lawmakers may have to revisit the recommendations of the **9th Law Commission Report (1958)** which suggested the amendment to omit the proviso to Section 42 of the Act, 1877. Same provision finds place as Section 34 of the Act, 1963 and has been the cause for technical dismissal of substantive claims. Consequently, the debate surrounding Section 34 persists. Implementing the Commission's recommendations may serve as the solution to the controversy surrounding the proviso to Section 34, to ensure that substantive right and justice do not yield to technicality.*

93. Hence the following:

ORDER

- (i) Appeal is ***allowed-in-part***.
- (ii) Impugned judgment and decree dated 26.06.2013 passed by the II Additional Senior Civil Judge, Kolar (Itinerating at Mulbagal) in R.A.No.138/2012 are set-aside in part.
- (iii) Plaintiffs are declared as the owners of the suit schedule property.

- (iv) The Trial Court in O.S.No.148/2014 shall determine the value of the structure, if any, put up by the appellants on the suit property and shall direct the plaintiffs to pay the same to the appellants.
- (v) On such payment, the suit property shall be delivered to the plaintiffs. If the very property is purchased by the respondent No.8, and if there is consensus on the said issue between the plaintiffs and respondent No.8, said property shall be handed over to the respondent No.8 who claims to be *pendente lite* purchaser.
- (vi) If there is dispute between the plaintiffs and respondent No. 8 as to the exact portion of the property purchased by respondent No.8 who shall be impleaded as defendant No.3, same shall be decided the said suit.
- (vii) The aforementioned exercise in O.S.No.148/2014 shall be in addition to any other adjudication that requires consideration in terms of issues raised in the said proceeding. However, it is made clear that the appellants will have no opportunity to plead title over the property,

raise plea of Order II Rule 2, or limitation, but may make a claim to claim to dismantle the structure or claim the value of the structure.

(viii) Interim application for production of documents allowed.

(ix) The appellants are entitled to Rs.25,000/- towards cost from the plaintiffs.

**Sd/-
(ANANT RAMANATH HEGDE)
JUDGE**

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