IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF FEBRUARY, 2024

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BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

R.S.A. NO.3189/2006 (DEC/INJ)

BETWEEN:

H.P. NAGARAJA
S/O PUTTAIAH GOWDA
AGED ABOUT 44 YEARS,
AGRICULTURIST
R/A VADDINAGADDE-HARAMBALLI
DEMLAPURA POST
THIRTHAHALLI TALUK
SHIMOGA DISTRICT-577501. ... APPELLANT

(BY SRI B.K.MANJUNATH, ADVOCATE)

AND:

CHANNAPPA GOWDA
S/O RAMAIAH GOWDA
SINCE DECEASED BY HIS LRS

(a) SHARADAMMA
W/O LATE CHANNAPPA GOWDA
AGED ABOUT 54 YEARS

(b) DIWAKAR
S/O LATE CHANNAPPA GOWDA
AGED ABOUT 33 YEARS,

(c) NAGARAJA
S/O LATE CHANNAPPA GOWDA
AGED ABOUT 31 YEARS,

(d) TULASAMMA
D/O LATE CHANNAPPA GOWDA
AGED ABOUT 44 YEARS,

(e) LAKSHMIDEVI
D/O LATE CHANNAPPA GOWDA
AGED ABOUT 14 YEARS,

(f) KALAVATHI
D/O LATE CHANNAPPA GOWDA
AGED ABOUT 38 YEARS,

(g) NAGARATHNA
D/O LATE CHANNAPPA GOWDA
AGED ABOUT 38 YEARS,

(h) VEDAVATHI
D/O LATE CHANNAPPA GOWDA
AGED ABOUT 36 YEARS,

ALL ARE RESIDENTS OF
VODDAINAGADDE-HARAMBALLI
YOGIMALALI VILLAGE, DEMALAPURA POST
THIRTHAHALLI TALUK-577501. … RESPONDENTS

(BY SRI G.LAKSHMEESHA RAO, ADVOCATE FOR R1(a-h)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGEMENT & DECREE DATED 26.08.2006 PASSED IN R.A.NO.39/2005 ON THE FILE OF THE PRL. CIVIL JUDGE (SR.DN.) & CJM, SHIMOGA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGEMENT AND DECREE DATED 30.11.2004 PASSED IN O.S.NO.123/1991 ON THE FILE OF THE CIVIL JUDGE (JR.DN.) & JMFC, THIRTHAHALLI.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 16.01.2024 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

1. Heard the learned counsel for the appellants. The learned counsel for the respondent.

2. This Regular Second appeal is filed challenging the judgment and decree dated 26.08.2006 passed in R.A.No.39/2005 by the Prl. Civil Judge (Senior Division) and CJM, Shimoga.

3. The parties are referred to as per their original rankings before the Trial Court to avoid confusion and for the convenience of the Court.

4. The factual matrix of the case of the plaintiff before the Trial Court that the suit schedule property which is morefully described in schedule-'A' belongs to the plaintiff. The land bearing Sy.No.37 of Yogimalali village, Thirthahalli taluk totally measuring 10 acres 36 guntas including the kharab land. The said land was ancestral joint

family property of the appellant and his father Puttaiah Gowda. In the year 1984 there was a partition under Palupatti dated 14.10.1984 among the plaintiff, his father and the appellant's brothers. In the said partition, an extent of 1 acre 10 guntas of wet land in Sy.No.37 of Yogimalali village, Thirthahalli taluk was allotted to the share of the plaintiff. This 1 acre 10 guntas of wet land is lying on the southern side of Sy.No.38 abutting the respondents' land. On the basis of aforesaid palupatiti the name of the appellant was entered in the mutation register extract. Hence, shown the extent of 1 acre 10 guntas of land as schedule 'A' property.

5. It is the contention of the plaintiff that during the year 1989 the plaintiff had left to Bangalore and was employed in a hotel and entrusted the cultivation of the suit schedule property to his father. During the month of April-1990, the respondents' father illegally trespassed on the suit schedule property to an extent of 23 guntas of wet land

and enclosed the said encroached area of 23 guntas by putting up a fence. The encroached area of 23 guntas which is situated on the southern side of the Sy.No.37 and eastern side of Sy.No.38 belongs to the defendants which is morefully described as 'B' schedule property which is in triangular shape. The plaintiff also approached the ADLR, Shimoga and got measure the extent of the encroached area by ADLR, Shimoga. The same was measured and prepared the sketch and encroached portion of 23 guntas in Sy.No.37 was marked in red colour in the survey sketch and identified the encroached area. It is also a case that he has issued the notice calling upon him to vacate encroached area and he has received untenable reply setting up of an adverse possession. It is also stated that the respondents' father with an ulterior motive to claim adverse possession dug a well in the encroached portion, without any other alternative, filed the suit for declaration and for possession of 'B' schedule property. The respondents are legal heirs of

original defendant Channappa Gowda. The father of the respondents appeared before the Trial Court and filed written statement inter alia contending that he is the owner of the land bearing Sy.No.38. On the western side of Sy.No.37 there is a road. He had put up the fence by the side of the said road from North-South and there is Well close to the said road. He is in possession continuously undisturbed and peaceful possession of the property more than 30 years. He has perfected the title by adverse possession.

6. The Trial Court having considered the pleadings of the plaintiff and also the defendants, framed the following:

ISSUES

1) *Whether the plaintiff proves that, he is the lawful owner of the plaint 'A' schedule property?*

2) *Does he further proves that the defendant has encroached the 'B' schedule land?*

3) *Whether the defendant proves that, he has perfected title over the property of the plaintiff if encroached, by adverse possession?*

4) *Whether plaintiff is entitled for possession of 'B' schedule land?*

5) *Whether the plaintiff is entitled for mesne profits?*

6) *Whether the plaintiff is entitled for permanent injunction as prayed?*

7) *What Decree or order?*

7. The plaintiff in order to prove his case examined as PW1 and two witnesses were examined as PW2 and PW3 and marked documents Ex.P1 to Ex.P13. On the other hand, the defendants have examined the son of the original defendant as DW1 and three witnesses were examined as DW2 to DW4 and got marked Ex.D1 to Ex.D15. The Trial Court has also appointed a surveyor from the office of ADLR as Court commissioner and the Court commissioner also examined as PW1 and got marked Ex.C1 to Ex.C4. The Trial Court after having heard the arguments of both the

counsel, answered issue Nos.1 and 3 in the Negative and issue Nos.2, 4 and 5 in the affirmative in coming to the conclusion that the plaintiff has not proved that he is a lawful owner of the plaint schedule property and defendants have encroached the 'B' schedule land. The other issue No.3 with regard to the adverse possession and answered the same as negative and answered issue Nos.4 to 6 as affirmative in favour of the plaintiff that he is entitled for possession and directed to hand over the possession of the 'B' schedule property to the appellant within three months from the date of judgment and decree granted for perpetual injunction.

8. Being aggrieved by the judgment, the respondents have preferred an appeal in R.A.No.39/2005 and appellate Court allowed the appeal and set-aside the judgment and decree of the Trial Court. Hence, the present second appeal is filed before this Court.

9. The main grounds urged in the present appeal is that reversing of judgment of the Trial Court is contrary to law and First Appellate Court has miserably fail to consider the material on record. The appellant as a co-owner can maintain a suit as a member of the joint family. However, the First Appellate Court held that Ex.D1, partition deed is not proved by the plaintiff as the said document required to be registered. The First Appellate Court committed a serious illegality in not noticing that the survey sketch produced by the appellant as Ex.P8 –survey sketch prepared by the ADLR, Shimoga showing the encroachment of 23 guntas in Sy.No.37 by the owner of the land bearing Sy.No. 38 was the most reliable document. The First Appellate Court committed patent illegality in not considering the document at Ex.P8.

10. The counsel also would vehemently contend that that finding of the First Appellate Court that the report of the Court commissioner is incomplete and unsustainable in

law. The Ex.C3 – the sketch prepared by the Court commissioner showing the encroached area of 21 guntas in yellow colour and the report of the Court commissioner namely ADLR as per Ex.C2 proved beyond reasonable doubt that the respondents have encroached upon the land belonging to the appellant to an extent of 23 guntas in Sy.No.37.

11. The counsel would vehemently contend that finding of the First Appellate Court that suit filed by appellant for possession is barred by limitation is highly arbitrary and illegal and without assigning any reasons, held that the suit is barred by limitation. The First Appellate Court fails to appreciate both oral and documentary evidence available on record in proper prospective. The existence of road or otherwise on the land in Sy.No.37 is totally inconsequential in as much as the relief sought in the suit filed by the appellant was for restoration of encroached

area of 23 guntas in Sy.No.37. Hence, the question whether there exist a road or not is totally inconsequential.

12. The finding of the appellate Court that plaintiff has not proved the possession of 'A' schedule property prior to the year 1990 is against the material on record. There is clear admission on the part of the respondents that the suit schedule property belongs to the plaintiff's family. The finding of the First Appellate Court that respondent has proved that he has been in possession of the suit schedule property prior to 1990 is not based on any documentary or oral evidence and hence the said finding is perverse.

13. It is also contended that admittedly the original defendant who is the father of the respondents herein has filed Form No.7 claiming the occupancy rights in respect of 28 guntas in land bearing Sy.No.37 showing the name of the appellant as the landlord. The Ex.P11 is the Form No.7 filed by the respondents' father, which was rejected by the

Land Tribunal. When the respondents have claimed tenancy in respect of 'B' schedule property against the appellant, they cannot claim adverse possession and this aspect of the matter has not at all considered by the First Appellate Court.

14. The counsel would vehemently contend that the very approach of the First Appellate Court is erroneous and finding given by the First Appellate Court is perverse. The counsel also argued on I.A.No.1/2022 filed under 41 Rule 27 of CPC wherein prayed the Court to produce the documents of tree classification tippani book extract, revision settlement akar bandh extract and copies of the photographs. The counsel would vehemently contend that an affidavit is filed in support of this application and the suit is filed for the relief of declaration and possession. The specific defense of the respondents that schedule furnished by the plaintiff in the plaint is improper and there is a road in the southern side of Sy.No.37. After the road in the

eastern side, the plaintiff is not in possession of any bit of land. The commissioner has not properly measured the land in Sy.No.37. The commissioner has admitted in the cross-examination that he has not measured the length and width of the road which passes through in Sy.No.37. He has not measured the total land in possession of the plaintiff and defendants. It is transpire during the course of arguments that there is a need to identify the existence of total kharab land of 35 guntas and extent of 'A' and 'B' kharab in Sy.No.37 to arrive at a just conclusion as to the alleged encroachment. Accordingly, as per the instructions of his counsel he has applied the certified copies of tippani book extract and akaar bandh extracts pertaining to Sy.No.37 of Yogimalali village. He has also taken the photographs of the land in question and these documents are necessary to decide the issue involved between the parties. Hence, those documents are necessary to arrive for a just conclusion and hence produced the documents before the Court. The

counsel would vehemently contend that the respondents are also signatory to the commissioner report which is marked as Ex.P2 and signature is marked as Ex.P2(a) and now, they cannot dispute the same.

15. The counsel appearing for the respondents in his argument vehemently contend that Sy.No.38 belongs to the respondents is on the southern side of the Sy.No.37. The counsel would vehemently contend that road divides both the Sy.No.37 and Sy.No.38. The Ex.D1 is clearly bifurcates the said properties. The counsel also would submits that the partition according to the plaintiff that was taken place on 14.10.1984. The plaintiff also pleaded with regard to the total extent of 10 acres 37 guntas and there was a partition among the family members and 7 acres 2 guntas was allotted to one of the family member excluding the kharab land. The counsel would vehemently contend that boundaries are clear in partition document and contend that

the Ex.D1 is the crucial document and also contend that the boundaries in plaint are not as per Ex.D1.

16. The counsel also would vehemently contend that there is no any encroachment and contend that the respondents are in possession for more than 30 years. The appellate Court also taken note of the said fact into consideration and discussed in detail in paragraph Nos.21 and 22 of the judgment. The commissioner report is not accepted, since the same is not correct. The counsel would vehemently contend that commissioner admits if it is a pathway it will be 3 feet and if it is a road it will be a 12 feet. The plaintiff admits in the cross-examination that road is having 20 feet measurement. The First Appellate Court in detail discussed the same and comes to the right conclusion and the same does not requires interference. The counsel would vehemently contend that 'B' schedule which is shown is a kharab land.

17. In reply to the arguments of counsel for the respondents, the counsel for the appellant would vehemently contend that the very argument of the respondents' counsel that 'B' schedule is a kharab land cannot be accepted and before filing of suit, land is measured through ADLR and even after filing of the suit is also, the commissioner has been appointed and the commissioner has given the report that there is an enforcement to the extent of 23 guntas and out of 23 guntas of land, 2 guntas is kharab land and 21 guntas of land in Sy.No.37. The very argument of respondents' counsel that the First Appellate Court not committed any error cannot be accepted.

18. The counsel in support of his argument, he relied upon the judgment reported in **(2006) 5 SUPREME COURT CASES 466 IN CASE OF SUBHAGA AND OTHERS V/S SHOBHA AND OTHERS** wherein the Apex Court held with regard to the identification of immovable

property on commission, proper mode for interference by appellate Court. A property can be identified either by boundaries or by any other specific description, once a property has been identified, even if there is any discrepancy, normally, the boundaries should be prevail. The counsel brought to notice of this Court the discussion made in paragraph Nos.5 and 6 wherein an observation is made that the commission was issued for demarcating the suit plot and commissioner showed the disputed area in the map prepared by him. The counsel by referring this judgment also would vehemently contend that the Ex.P8 and also the commissioner report Ex.C2 is very clear with regard to the Sy.No.37 and description of the Sy.No.37 is categorically demarcated in the report, the said judgment is aptly applicable to the case.

19. The counsel also relied upon the judgment of this Court reported in **ILR 2008 KAR 1840 IN CASE OF PARAPPA AND OTHERS V/S BHIMAPPA AND**

ANOTHER wherein discussed with regard to scope of Order 26 Rule 10(2) report and depositions to be evidence in the suit, admissibility of an expert's evidence. The author of the report is also to be examined in the Court on oath and an opportunity should be given to the other side to cross examine the said expert on correctness of the report. It is only then the said evidence becomes admissible and not otherwise. If the report of the commissioner/expert prepared at the instance of either of the parties of the suit or at the instance of the prosecution in a criminal case. Therefore, the expert becomes a commissioner only when Court appoints him under Order 26 of CPC. The expert is only a witness for the prosecution in a criminal case and a witness for the party who appointed him in civil cases.

20. Per Contra, the counsel appearing for the respondents in his argument submits as against the principles laid down in the said judgment, the respondents' counsel relies upon the judgment of the Apex Court passed

in **CIVIL APPEAL NO.9941/2016 IN CASE OF MARY PUSHPAM V/S TELVIF CURUSUMARY AND OTHERS** and brought to notice of this Court paragraph No.23 wherein an observation is made that suit for possession has to be described the property in question with accuracy and all details of measurement and boundaries. This was completely lacking. A suit for possession with respect to such a property would liable to be dismissed on the ground of its identifiably. The counsel by referring this judgment would vehemently contend that the First Appellate Court rightly allowed the appeal and set-aside the order of the Trial Court.

21. The learned counsel for the respondent also relied upon the judgment reported in **(2014) 2 SCC 269** in the case of **UNION OF INDIA AND OTHERS vs VASAVI COOPERATIVE HOUSING SOCIETY LIMITED AND OTHERS** wherein the Apex Court held that in absence of establishment of its own title, the plaintiff must be non-

suited even if title set up by defendants is found against them. Weakness of case set up by defendants cannot be a ground to grant relief to plaintiff. The counsel also relied upon the judgment reported in **2023 (2) KAR L.R. 572** in the case of **SMT. SUSHEELAMMA AND ANOTHER vs B M KARIAPPA** wherein this Court held that when the plaintiff is seeking declaration of his title and for possession of a portion of the survey number, he is required to establish his contention with specific identification of the property. Hence, the counsel relying upon the aforesaid judgments, would vehemently contend that the plaintiff failed to prove all these factors and hence, the First Appellate Court rightly reversed the finding of the Trial Court.

22. Having heard the learned counsel appearing for the respective counsel and also on perusal of the material available on record and considering the substantial question of law framed by this Court while admitting the appeal, this Court has to re-analyse the matter and appreciate the

material available on record. This Court would like to refer the substantial question of law framed by this Court while admitting the appeal and the same is as follows:

> "Whether the First Appellate Court was justified in holding that the suit filed by the appellant was barred by limitation?"

23. The learned counsel for the appellant would vehemently contend that only one substantial question of law is framed by this Court while admitting the appeal and this Court can frame the additional substantial question of law as per Section 100(5) of the CPC. The counsel further contends that at the time of hearing of the appeal, be allowed to argue that the case does not involve such question and reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that case involves such question, the Court can frame the additional substantial question of law.

24. This Court would like to refer the judgment of the Apex Court reported in **(2018) 6 SCC 727** in the case of **VIJAY ARJUN BHAGAT AND OTHERS vs NANA LAXMAN TAPKIRE AND OTHERS** wherein relied upon Section 100(5) of the proviso and held that while hearing the second appeal by the High Court on any other substantial question of law which was not initially framed by High Court under Section 100(4) and the High Court can exercise the powers after assigning reason for framing such additional question of law at the time of hearing of the appeal. Though the High Court has jurisdiction to frame additional question(s) by taking recourse to proviso to Section 100(5) but it is subject to fulfilling the three conditions, first "such questions should arise in the appeal", second, "assign the reasons for framing the additional question" and third, "frame the questions at the time of hearing the appeal."

25. This Court also would like to refer the judgment of the Apex Court reported in **(2018)18 SCC 645** in the case of **NARAYANA GRAMANI AND OTHERS vs MARIAMMAL AND OTHERS** wherein it is held that essential principles which have been summarized in the said judgment with regard to the framing of substantial question of law and the Court after assigning reasons, at the time of hearing second appeal High Court can frame additional substantial questions of law which were initially not framed. This Court also would like to refer the judgment of the Apex Court reported in **(2018)4 SCC 562** in the case of **SURAT SINGH (DEAD) vs SIRI BHAGWAN AND OTHERS** wherein also it is discussed the scope of sub-section (4) and (5) of Section 100 of CPC. Additional substantial questions of law can be framed by assigning reasons therefor.

26. Having heard submission of the appellant's counsel, no dispute with regard to Section 100 of CPC. Sub-

section(4) of Section 100 of CPC is clear that if the High Court is satisfied that a substantial question of law involved in any case, it shall formulate that question and sub-section (5) is also very clear that the appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue the case does not involve such question.

27. The counsel for the respondent also argued the matter in length not only on the substantial question of law framed by this Court with regard to that the suit is barred by limitation and also on merits. Having considered the grounds which have been urged in the appeal, the same is not only in respect of law of limitation but also in respect of the merit grounds which have been urged, when this Court has given opportunity for them to argue the matter on merits. If this Court satisfied, can frame additional substantial question of law and consider the same. Hence, this Court would like to extract Section 100 of CPC for the

convenience and for appreciation of the case which reads as follows:

> **"100. Second appeal.**--(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed *ex parte*.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

28. Having discussed the same with regard to the grounds urged in the appeal, an opportunity was given to the learned counsel for the respective parties to argue on merits of the appeal also and not restricted them to argue only on the substantial question of law framed by this Court, hence, it is appropriate to frame an additional substantial question of law:

> Whether the First Appellate Court committed an error in concluding based on both oral and documentary evidence placed on record and reversing the finding of the Trial Court in coming to the conclusion that the plaintiff has not proved the possession prior to 1990 and committed an error in coming to the conclusion that on the contrary, the defendant has proved the possession prior to 1990?

29. Having taken note of the substantial question of law framed by this Court earlier with regard to the law of limitation and also the substantial question of law now

framed by this Court having considered the grounds which have been urged during the course of the arguments by giving an opportunity to both of them to submit their arguments on merits as well as law of limitation, this Court has to re-analyze the material available on record.

30. This Court would like to consider both the substantial questions of law with regard to whether the suit is barred by limitation and other substantial question of law of possession. Having taken note of the grounds which have been urged and also the points framed by the First Appellate Court, it is clear that no such point is framed by the First Appellate Court with regard to the law of limitation. The points for consideration raised by the First Appellate Court are only with regard to whether the plaintiff is the owner of the suit schedule 'A' property and in the year 1990, the defendant has encroached the suit schedule 'B' property and in the absence of granting declaratory relief, whether the relief of possession can be granted and

whether the judgment and decree of the Trial Court requires to be interfered? And no such point was framed by the First Appellate Court with regard to the law of limitation. But the First Appellate Court while considering the matter on merits, discussed with regard to the law of limitation in paragraph 28 of the judgment. It is observed by the First Appellate Court in paragraph 28 that the defendant has specifically taken contention that since from ancestors, he has been in actual possession and enjoyment of the portion of the land situated beyond road towards southern side. The possession of the defendant over the said area is admitted. But it is the specific case of the plaintiff that in the year 1990, the defendant came in possession by encroaching his property, but the same is not proved by the plaintiff. The First Appellate Court taken note of Ex.P1 and other pahani extract produced by the plaintiff, it is clear that as per M.R.No.6/1973-74, 9 guntas of land was gifted by the ancestors of the plaintiff. Hence,

the plaintiff has failed to prove that he has been in possession of the suit 'A' schedule property prior to 1990. The very observation made by the First Appellate Court is erroneous.

31. It is the specific case of the plaintiff that he has derived the title in terms of the partition which had taken place between the parties. Even if it is assumed that Ex.P1 and other pahani extract produced by the plaintiff show that there was a gift to the extent of 9 guntas, the mere entry in the M.R. cannot takes away the right of the plaintiff and no document of gifting of the property is placed before the Trial Court. The claim of the plaintiff is with regard to the extent of 1 acre 10 guntas in 'A' schedule property and also it is specific that in 'B' schedule, 23 guntas is in encroachment by the defendant. The First Appellate Court comes to the conclusion that not in possession to the entire extent of 1 acre 10 guntas. The very approach of the First Appellate Court is erroneous.

32. It is also important to note that by referring the MR, the First Appellate Court comes to the conclusion that the case made out by the plaintiff is not believable but comes to the other conclusion that the defendant has proved that prior to 1990, that is from his ancestors, he has been in possession and enjoyment of the suit schedule property. This conclusion is not based on any oral or documentary evidence available on record and the First Appellate Court applied different yardstick while appreciating the evidence of the plaintiff and the defendant. The First Appellate Court even not relied any document to show that the defendant has proved that prior to 1990, he has been in possession. Hence, the very approach of the First Appellate Court that the suit is barred by limitation and the plaintiff is not in possession is erroneous.

33. Having perused the notice issued by the plaintiff it is specifically pleaded that the defendant has encroached

the property to the extent of 23 guntas in the month of April 1990 and the suit was filed immediately in the year 1991 after causing legal notice. No doubt, reply was given denying the claim of the plaintiff. The fact that the property bearing Sy.No.37 belongs to the plaintiff is not in dispute and also the fact that the defendant is the adjoining owner in respect of the property bearing Sy.No.38. It is also not in dispute that the property of Sy.Nos.37 and 38 are located adjacent to each other.

34. It is also important to note that DW1 in the cross-examination categorically admitted that he is not having ownership in respect of Sy.No.37 but he claims right in respect of Sy.No.37. He further contends that he is in possession from his ancestors and he is claiming his right. DW1 categorically admits that he cannot say when his father had purchased the property of Sy.No.38. He categorically admits that before purchasing the property of Sy.No.38, they were not having any right in respect of

Sy.No.37. He also categorically admits that he does not know whether vendor of his father has been in possession in Sy.No.37 or not. But again he claims that he is in possession of Sy.No.37 from his grandfather. In one breadth he says that the property was purchased by his father i.e., Sy.No.38 but claims that he is in possession of Sy.No.37 from the period of his grandfather. It is also admitted by him that they did not inform the plaintiff that he is in possession of Sy.No.37. But he categorically admits that he did not inform the same under the impression that the property belongs to him. He also categorically admits that he never cultivated Sy.No.37 under the impression that the said property is the part of Sy.No.38. But he claims that he is in possession from the last 100 years. In order to prove the said fact, he has not placed any documents before the Court. It is also categorically admitted that at no point of time, he has filed any application to transfer of the said property to his name. It is also important to note

that he categorically says that before purchasing the property, he has got it surveyed Sy.No.37. It is also admitted that in the sale deed, no reference of Sy.No.37. He also categorically admits that he cannot say in how much area he is in possession in Sy.No.37. He also admits that when Sy.No.37 was subjected to survey, he came to know that he is in possession of Sy.No.37 to the extent of 23 guntas. The First Appellate Court has not discussed anything about the admission given by DW1 that he is not claiming any title in respect of Sy.No.37. It is also admitted by DW1 that he never be the tenant either from the plaintiff or from his father.

35. The First Appellate Court also fails to take note of the fact that after filing of the suit only an application was filed before the Land Tribunal by filing Form VII which is marked at Ex.P11 claiming tenancy right on 30.12.1998. Same is also admitted by DW1 in the cross-examination. Though the defendant claims that he is in possession from

his ancestors, nothing was placed on record and also admission is very clear that he came to know about his possession in Sy.No.37 only after the survey made by the Court Commissioner and question of possession from last 100 years cannot be accepted. It is also important to note that the plaintiff also produced the document of Ex.P2 to show that earlier this property was measured total extent of 10 acres 36 guntas and 34 guntas of karab and after excluding the karab, the total area is 10.2 acres. It is also not in dispute that there was a partition among the family members. It is also important to note that defendant is not claiming any title in respect of Sy.No.37. It is also the claim of the plaintiff that he has derived 1 acre 10 guntas of land out of total 10 acres 2 guntas in the partition. It is also important to note that when the admission is given by DW1 that he has made an attempt to get the right in respect of the property by making an application before the Land Tribunal, even though he is not the tenant as

admitted, an attempt was made to knock off the property of the plaintiff who is the owner of the property bearing Sy.No.37 to the extent of 1 acre 10 guntas. The admission also given by DW1 in the cross-examination that on the east of the 'B' schedule property, he is having his property bearing Sy.No.38/2 and on the west of 'B' schedule property, Sy.No.37 is in existence and on the north and south of 'B' schedule property, there is a government vacant land. When this admission is very clear that on the 'B' schedule property towards the east, he is having his property bearing Sy.No.38/2. Hence, no dispute with regard to the identity of the property. The very decision of the respondent that unless the property is identified there cannot be any order of delivery of possession relying upon paragraph 23 of the judgment of the Apex Court referred supra in **Mary Pushpam**'s case and the said principle is not applicable to the facts of the case on hand since there is an

admission with regard to the identity of the property and no dispute with regard to identity.

36. It is also not in dispute that the principles laid down in the judgment of **Subhaga**'s case referred supra, a property can be identified either by boundaries or by any other specific description, once a property has been identified, even if there is any discrepancy, normally, the boundaries should prevail. Hence, the said judgment is helpful to the appellant. No doubt, in the other judgment of this Court in **Susheelamma**'s case referred supra, this Court held that seeking declaration of his title and for possession of a portion of the survey number, he is required to establish his contention with specific identification of the property. In the case on hand, there is specific identification of the property and to that effect even before filing of the suit, a survey was conducted and to that effect, the plaintiff has relied upon the document of Ex.P8. Having perused Ex.P8, it is very clear with regard to

encroachment which is shown in pink colour and Sy.No.38 is adjacent to Sy.No.37. It is also important to note that the Court Commissioner has been appointed and he has given report in terms of Ex.C2. It is also important to note that Ex.C1 - mahazar was conducted before conducting the spot inspection. The Court Commissioner's report is clear that an extent of 21 guntas was encroached by the defendant excluding 2 guntas of karab land. Hence, the report is specific that there is an encroachment. It is also important to note that in Ex.C3, a road is also shown bifurcating the land of Sy.No.37 and also the encroached portion and the said document clearly shows that 21 guntas is an encroached portion by Channappagowda though 23 guntas was earmarked and 2 guntas of land is a karab land and existence of road is also not in dispute.

37. No doubt, PW1 also in the cross-examination admitted with regard to the existence of road in Sy.No.37 and formation of road. PW1 categorically admitted that in

'B' schedule property, Taluk Pattana Panchyath has formed the road but he claims that that is 2 months back. It is also his claim that after the formation of the said road, fencing was made. In the cross-examination of PW1, nowhere the answer is elicited that defendant is in possession prior to 1990 and only they claims that they have partitioned the property only in the year 1984-85. The defendant cannot dispute the partition and the same is among the members of the family of the plaintiff. No doubt, the plaintiff also admitted in the cross-examination that road width is 20 feet to go to the place of Aklapura to Alase. It is also his case that the defendant has formed the said road in the land which was encroached by him in the month of May and also it is evidenced that after Sy.No.37, Sy.No.38 comes. PW1 also categorically admits that in Sy.No.37, the measurement of the road is 150 feet, which may come around 2 guntas. The Court Commissioner also taken note of the said road and stated that the same is a karab land

and pahani also discloses total extent of 34 guntas of karab land in the said particular survey number. Hence, the First Appellate Court failed to take note of the fact that the defendant is not having any right and he is only claiming right stating that he is in possession from his ancestors and in order to prove the same, no material is placed before the Court. The First Appellate Court committed an error making an observation in paragraph 28 that on the contrary, the defendant has proved that from 1990 his ancestors has been in possession. The said observation is an assumption and presumption and mere pleading is not enough and the same has to be proved by placing material on record and the same has not been done and no material discussion is made to form such a conclusion.

38. It is also important to note that the First Appellate Court committed an error in making an observation in paragraph 26 that during the cross-examination of CW1, he has clearly stated that there is a

pathway in Sy.No.37 of Yogimalali village but in Ex.C2 he has referred as road instead of pathway. But in the evidence, he told that it is a pathway and width of pathway is 3 feet and width of road would be 10 to 12 feet. First Appellate Court fails to take note of the fact that same is mentioned with regard to formation of said pathway by the defendant and PW1 categorically stated in his evidence that the same has been made by the defendant but the Court Commissioner categorically shown the road which passes through Aklapura to Alasevillage and the same is not in respect of the same. But it is an observation of the First Appellate Court that the report of the commissioner is incomplete as he has not measured the road and hence, onlyrelying on commissioner report, it cannot be said that there is an encroachment in Sy.No.37 and same is against the material available on record. No dispute with regard to existence of road. When the Defendant is not claiming any right in respect of Sy.No.37, but he is making an attempt

contending that he is in occupation of Sy.No.37 from his ancestors and also made an effort before the Land Tribunal by making an application for granting of tenancy in the year 1998, after filing of the suit and he was unsuccessful. Thus, the First Appellate Court committed an error in coming to the conclusion that it cannot be said that there is an encroachment in Sy.No.37 and the very claim of the defendant that he is in possession of Sy.No.37.

39. The very case of the defendant that he is in possession of Sy.No.37 and this contention is against the material available on record. There is an admission on the part of the defendant and report of the Court Commissioner that Sy.No.37 bifurcates the road and marking of document at Ex.D1 is only a partition document between the family members and title is very clear in respect of the plaintiff and hence, there is no title dispute in respect of Sy.No.37 since the defendant is also not claiming any title in respect of Sy.No.37 but only claim of the defendant that he is in

possession of the said property prior to 1990. I have already pointed out that nothing is placed on record to show that the defendant is in possession in Sy. No.37, prior to 1990.

40. On the other hand, it is the claim of the plaintiff that the defendant has encroached the property in the year 1990 and the First Appellate Court fails to take note of the claim made by the defendant claiming his tenancy right in respect of the said property and the said claim was rejected and also First Appellate Court committed an error in coming to the conclusion that it is well settled law that on the strength of weakness of the defendant, a decree cannot be passed and relied upon the citations. But, it is not a question of weakness in the case on hand since the plaintiff's claim is in respect of Sy.No.37 but the defendant's claim is in respect of Sy.No.38 that he is the owner and he is not claiming any title in respect of Sy.No.37 but his only claim is that he is in possession in Sy.No.37 from long back.

In one breath, the defendant claims that he is in possession from last 30 years and in another breath, he says that he is in possession from 100 years from his ancestors and not placed any document before the Court to show that in which year, he has purchased the property of Sy.No.38. His claim is that the father had purchased the property of Sy.No.38. Once the defendant categorically admits that he came to know about the possession of Sy.No.37 only after the survey made by the Court Commissioner, hence, the question of claiming that he is in possession from long back i.e., from more than 30 years or 100 years cannot be accepted since it is his knowledge that he is in possession only after the survey. The said fact is admitted fact on the part of DW1 that he came to know about the same only after the survey. Both oral and documentary evidence placed on record is very clear that the defendant is not in possession of the property of Sy.No.37 and he has encroached the property. When all these material available

on record, the First Appellate Court committed an error in allowing the appeal by setting aside the order of the Trial Court. The Trial Court not granted the relief of declaration taking into note of the admission available on record and given finding that there is an encroachment on the part of the defendant on the land of the plaintiff and answered issue No.2 as affirmative in coming to the conclusion that the defendant has encroached the property which belongs to the plaintiff and declined to accept the claim of adverse possession and rightly answered issue No.4 that the plaintiff is entitled for possession of 'B' schedule land and the finding given by the Trial Court on Issue Nos.2 and 4 has not been considered by the First Appellate Court when in detail, answered both the Issues in definite conclusion that the property is in encroachment by the defendant and the same is reversed without assigning the proper reason by the First Appellate Court.

41. This Court also would like to refer the judgment of the Apex Court reported in **(2008) 4 SCC 594** in the case of **ANATHULA SUDHAKAR vs P.BUCHI REDDY (DEAD) BY LRS. AND OTHERS** wherein it is held that where his title is not disputed or under a cloud but he is out of possession, held, the remedy is suit for possession with consequential injunction. This Court would like to extract paragraph 21 of the said judgment which reads as follows:

> 21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:
>
> (a) Where a cloud is raised over the 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 the 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. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter

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

42. In the case on hand no dispute with regard to the tile in respect of Sy.No.37 and the same belongs to the plaintiff. The defendant is also not claiming any title in respect of Sy.No.37 and he is the owner of Sy.No.38 which is adjacent property of the plaintiff. The principles laid down in the judgment referred supra, particularly in

paragraph 21, it is very clear that where a cloud is raised over the 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 the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simplicitor. It is also observed that 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. But persons having clear title and possession

suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

43. I have already pointed that the defendant is not claiming title in respect of Sy.No.37 but he only claims that he is in possession over the said property for a longer period but not stated that when he was put into possession in respect of Sy.No.37. It is already discussed that in one breath, he says that from 100 years and in another breath, he says that from 30 years. Thus, it is also not specifically pleaded that when Sy.No.37 was purchased by the defendant. Apart from that answer was elicited from the mouth of DW1 that he came to know about the possession

in Sy.No.37 only after the inspection made by CW1. Hence, the First Appellate Court committed an error in coming to the conclusion that without seeking the relief of declaration, a possession cannot be granted. Hence, the very approach of the First Appellate Court is erroneous. Hence, I answer both the substantial questions of law as affirmative.

44. In view of the discussions made above, I pass the following

ORDER

The appeal is ***allowed***.

The impugned judgment and decree dated 26.08.2006 passed in R.A.No.39/2005 is set aside and the judgment and decree dated 30.11.2004 passed in O.S.No.123/1991 is restored.

Sd/-
JUDGE

RHS/SN