

CASE NO.:
Appeal (civil) 6191 of 2001

PETITIONER:
Anathula Sudhakar

RESPONDENT:
P. Buchi Reddy (Dead) By LRs & Ors

DATE OF JUDGMENT: 25/03/2008

BENCH:
R. V. Raveendran & P. Sathasivam

JUDGMENT:
J U D G M E N T
(Reportable)

CIVIL APPEAL NO.6191 OF 2001

R.V. RAVEENDRAN, J.

This appeal by special leave is by the defendant in a suit for permanent injunction. Puli Chandra Reddy and Puli Buchi Reddy were the plaintiffs in the said suit. Both are now no more. The Legal Representatives of Puli Chandra Reddy are Respondents 2 to 5 and Legal Representatives of Puli Buchi Reddy are Respondent 1 (i) to (iii). The suit related to two sites bearing no. 13/776/B and 13/776/C measuring 110 sq. yards and 187 sq. yards in Matwada, Warangal town, together referred to as the 'suit property'.

2. Plaintiffs 1 and 2 claimed to be the respective owners in possession of the said two sites having purchased them under two registered sale deeds dated 9.12.1968 (Exs.A1 and A2) from Rukminibai. The plaintiffs further claimed that the said two sites were mutated in their names in the municipal records. They alleged that on 3.5.1978, when they were digging trenches in order to commence construction, the defendant interfered with the said work. The plaintiffs, therefore, filed suit OS No.279 of 1978 in the file of Principal District Munsiff, Warangal, for a permanent injunction to restrain the defendant from interfering with their possession.

3. Defendant resisted the suit. He claimed that suit property measuring 300 sq. yards in Premises No. 13/776 was purchased by him from K. V. Damodar Rao (brother of plaintiffs' vendor Rukminibai) under registered sale deed dated 7.11.1977 (Ex.B1); that he was put in possession of the suit property by Damodar Rao; that the suit property had been transferred to his name in the municipal records; that he applied for and obtained sanction of a plan for construction of a building thereon; and that he had also obtained a loan for such construction from the Central Government by mortgaging the said property. According to him, when he commenced construction in the suit property, the plaintiffs tried to interfere with his possession and filed a false suit claiming to be in possession.

4. The trial court framed the following issues - (i) whether the plaintiffs are in exclusive possession of the suit sites (house plots)? (ii) whether the defendant has interfered with the possession of the plaintiffs over the suit plots? (iii) whether the plaintiffs are entitled to permanent injunction; and (iv) to what relief. The plaintiffs examined themselves as PW1 and PW2. They examined their vendor Rukminibai as PW4. Puli Malla Reddy and Vadula Ramachandram examined as PW3 and PW5, were the purchasers of two adjacent sites from Rukminibai. One of them (PW3) was the cousin of plaintiffs and was also the scribe and attestor in respect of the two sale deeds

in favour of plaintiffs. Plaintiffs exhibited the two sale deeds dated 9.12.1968 in their favour as Ex.A1 and A2 and municipal demand notices and tax receipts, all of the year 1978 onwards, as Ex.A3 to A11. A plan showing the sites was marked as Ex.A12. Two letters said to have written by Damodar Rao were marked as Ex.A13 and A14. The sale deed executed by Rukminibai in favour of PW3 was marked as Ex.X1 and sale agreement in favour of PW5 was marked as Ex.X2. The defendant gave evidence as DW1 and examined his vendor Damodar Rao as DW2. He exhibited the certified copy of the sale deed dated 7.11.1977 in his favour as Ex.B1, a certified copy of mortgage deed executed by him in favour of Central Government as Ex.B2, the licence and sanctioned plan for construction of a house in the suit plot as Ex.B3 and B4 and the loan sanction proceedings as Ex.B5. He also exhibited a property tax receipt dated 12.2.1978 issued to Damodar Rao (Ex.B6), water charge bill dated 20.9.1978 for house No. 13/775 and 13/776 issued to Damodar Rao (Ex.B7), and property tax receipts dated 19.2.1972, 14.10.1973, 28.3.1970 and 13.11.1968 in the name of Damodar Rao (Ex. B8 to B11).

5. There was no dispute that the site purchased by the defendant from Damodar Rao under deed dated 7.11.1977 is the same as the two sites purchased by plaintiffs from Rukminibai under sale deeds dated 9.1.1968. There is also no dispute that the suit property is a vacant plot and it was originally portion of the backyard of the property bearing nos. 13/775 and 13/776, belonging to Damodar Rao, and that he was shown as registered owner of the said properties No.13/775 and 13/776 in the municipal records.

6. The plaintiffs led evidence to the effect that Damodar Rao orally gifted the backyard portion of No.13/775 and 13/776, (separated from the main building by a dividing wall) to his sister Rukminibai in the year 1961, by way of 'Pasupu Kumkumam' (a gift made to a daughter or sister, conferring absolute title, out of love and affection, with a view to provide for her); that Rukminibai sold three portions of the gifted site to PW3, plaintiff No.1, plaintiff No.2 in the year 1968 and they were in possession ever since 1968; and that an agreement of sale was also entered in regard to another portion with PW5 as per Ex.X2. On the other hand, defendant led evidence denying that the suit property was given to Rukminibai by way of 'Pasupu Kumkumam'. His vendor Damodar Rao gave evidence that he was the owner of the suit property and he sold it to the defendant under deed dated 7.11.1977 and put him in possession thereof. While plaintiffs alleged that plots were mutated in their names after their purchase, defendant alleged that the suit property purchased by him was a part of plot No.13/776 which stood in the name of Damodar Rao in the municipal records. Neither party produced the order of mutation or any certificate from the municipal authorities, certifying or showing mutation to their names. They only produced tax receipts. The tax receipts produced by plaintiffs showed that they had paid taxes from 1978 onwards, that is for a period subsequent to the sale by Damodar Rao in favour of defendant. Plaintiffs did not produce any tax paid receipt to show that the property stood in the name of Rukminibai. Nor did they produce any tax receipt for the period 9.12.1968 (date of purchase by plaintiffs) to 7.11.1977 (date of purchase by defendant). The defendant produced tax receipts to show that the suit property stood in the name of his vendor Damodar Rao till the date of sale in his favour.

7. The trial court decreed the suit by judgment dated 31.12.1985. Relying on the two sale deeds in favour of plaintiffs, the tax paid receipts and the oral evidence, it held that plaintiffs were in possession of the suit property from the date of purchase and the defendant had interfered with their possession. The defendant filed an appeal challenging the judgment and decree of the trial court before the Addl. District Judge, Warangal. The first appellate court held that the defendant was in possession of the suit property and the plaintiffs had not made out, even prima facie, either title or possession over the suit property. It was of the view that in the circumstances a mere suit for injunction was not maintainable, and at least when the defendant filed his written statement denying the title of plaintiffs and setting up a clear and specific case of title in himself, the plaintiffs ought

to have amended the plaint to convert the suit into one for declaration and injunction. Consequently it allowed the appeal by judgment and decree dated 9.12.1991 and dismissed the suit. Being aggrieved, the plaintiffs filed SA No.29 of 1992.

8. The High Court by its judgment dated 18.1.1999 allowed the second appeal and restored the judgment and decree of the trial court. For this purpose, the High Court examined the evidence in detail and recorded the following findings:

(i) There was an oral gift of the backyard portion (No.13/776) by way of 'pasupu kumkumam' by Damodar Rao in favour of his sister Rukminibai in the year 1961. As a gift of an immovable property in favour of a daughter or sister by way of 'Pasupu Kumkuman' could be oral, the absence of any registered document did not invalidate the gift.

(ii) Damodar Rao negotiated with plaintiffs, for sale of the two sites, on behalf of his sister Rukminibai, representing that his sister was the owner thereof and attested the sale deeds executed by his sister Rukminibai in favour of plaintiffs as a witness and identified her as the executant of the sale deeds before the Sub-Registrar. Those acts of Damodar Rao supported the claim of Rukminibai that there was a oral gift. Alternatively, even if there was no gift in favour of Rukminibai, and Damodar Rao was the owner, the aforesaid acts of Damodar Rao showed that with his implied consent, Rukminibai represented to be the ostensible owner of the suit property and transferred the same to plaintiffs for consideration. This attracted the provision of section 41 of Transfer of Property Act, 1882 and therefore the transfers in favour of plaintiffs was not voidable at the instance of Damodar Rao or his successor in interest on the ground that Rukminibai was not the owner of the suit property.

The High Court consequently held that plaintiffs had established their title in regard to the two vacant sites purchased by them and drew an inference that possession was presumed to be with them by applying the principle of possession follows title. The High Court also held that it was not necessary to plaintiffs to sue for declaration of title, as the question of title could be examined incidental to the question of possession.

9. The said judgment is challenged by the defendant, in this appeal by special leave, on the following grounds :

(a) The suit for permanent injunction without seeking declaration of title was not maintainable on the facts of the case. At all events, the High Court ought not to have recorded a finding of fact on a seriously disputed and complicated issue of title, in a suit for a mere injunction.

(b) The first appellate court held that plaintiffs had neither established their title nor their possession and their remedy was to file a suit for declaration and consequential relief. The High Court, in a second appeal, ought not to have reversed the said decision of the first appellate court, by the process of examining and recording a finding on title, even though there was no issue regarding title.

(c) An oral gift by a brother to a sister was not permissible. At all events, such an oral gift even if permissible, can be made only at the time of a partition or at the time of marriage of the sister, with a view to making a provision for her. The High Court erred in holding that there was a valid oral gift by Damodar Rao in favour of Rukminibai.

(d) There was no plea in the plaint about the ostensible ownership of Rukminibai or about any acts of Damodar Rao which demonstrated the consent of Damodar Rao to such ostensible ownership. Nor was there any plea about due and diligent enquiries by the plaintiffs regarding title before purchase. Therefore the High Court erred in holding that the sales in favour of plaintiffs were protected by section 41 of the Transfer of Property Act,

1882.

(e) In the absence of pleadings and an issue regarding title, the defendant had no opportunity to effectively lead evidence on the question of title.

(f) The High Court erred in equating plaintiffs' failure to produce title deeds of their vendor to defendant's failure to produce the title deeds of his vendor. The High Court overlooked the fact that there was no dispute that defendant's vendor Damodar Rao was the earlier owner of the suit property and it was for the plaintiffs who had set up a case that their vendor Rukminibai derived title from Damodar Rao under an oral gift, to prove the said claim.

10. On the contentions urged, the following questions arise for our consideration in this appeal:

(i) What is the scope of a suit for prohibitory injunction relating to immovable property?

(ii) Whether on the facts, plaintiffs ought to have filed a suit for declaration of title and injunction ?

(iii) Whether the High Court, in a second appeal under section 100 CPC, examine the factual question of title which was not the subject matter of any issue and based on a finding thereon, reverse the decision of the first appellate court?

(iv) What is the appropriate decision?

Re : Question (i) :

11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it

does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

13. In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.

14. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

15. There is some confusion as to in what circumstances the question of title will be directly and substantially in issue, and in what circumstances the question of title will be collaterally and incidentally in issue, in a suit for injunction simpliciter. In *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple vs. Rajanga Asari* \026 AIR 1965 Mad. 355, the Madras High Court considered an appeal arising from a suit for possession and injunction. The defendant contended that the plaintiff had filed an earlier suit for injunction which was dismissed, and therefore the plaintiff was precluded from agitating the issue of title in the subsequent suit, being barred by the principle of *res judicata*. It was held that the earlier suit was only for an injunction (to protect the standing crop on the land) and the averments in the plaint did not give rise to any question necessitating denial of plaintiff's title by the defendant; and as the earlier suit was concerned only with a possessory right and not title, the subsequent suit was not barred. There are several decisions taking a similar view that in a suit for injunction, the question of title does not arise or would arise only incidentally or collaterally, and therefore a subsequent suit for declaration of title would not be barred. On the other hand, in *Sulochana Amma vs. Narayanan Nair* \026 1994 (2) SCC 14, this Court observed that a finding as to title given in an earlier injunction suit, can operate as *res judicata* in a subsequent suit for declaration of title. This was on the premises that in

some suits for injunction where a finding on possession solely depended upon a finding on the issue of title, it could be said that the issue of title directly and substantially arose for consideration; and when the same issue regarding title is put in issue, in a subsequent title suit between the parties, the decision in the earlier suit for injunction may operate as res judicata. This Court observed :

"Shri Sukumaran further contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata."

This was reiterated in Annaimuthu Thevar v. Alagammal \026 2005 (6) SCC 202.

16. This Court in Sajjadanashin Sayed Md. Vs. Musa Dadabhai Ummer \026 2000 (3) SCC 350, noticed the apparent conflict in the views expressed in Vanagiri and Sulochana Amma and clarified that the two decisions did not express different views, but dealt with two different situations, as explained in Corpus Juris Secundum (Vol.50, para 735, p.229):

"Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title."

In Vanagiri, the finding on possession did not rest on a finding on title and there was no issue regarding title. The case related to an agricultural land and raising of crops and it was obviously possible to establish by evidence who was actually using and cultivating the land and it was not necessary to examine the title to find out who had deemed possession. If a finding on title was not necessary for deciding the question of possession and grant of injunction, or where there was no issue regarding title, any decision on title given incidentally and collaterally will not, operate as res judicata. On the other hand, the observation in Sulochana Amma that the finding on an issue relating to title in an earlier suit for injunction may operate as res judicata, was with reference to a situation where the question of title was directly and substantially in issue in a suit for injunction, that is, where a finding as to title was necessary for grant of an injunction and a specific issue in regard to title had been raised. It is needless to point out that a second suit would be barred, only when the facts relating to title are pleaded, when a issue is raised in regard to title, and parties lead evidence on the issue of title and the court, instead of relegating the parties to an action for declaration of title, decides upon the issue of title and that decision attains finality. This happens only in rare cases. Be that as it may. We are concerned in this case, not with a question relating to res judicata, but a question whether a finding regarding title could be recorded in a suit for injunction simpliciter, in the absence of pleadings and issue relating to title.

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

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

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

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. 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 straight-forward, 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 plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

Re : Question (ii) :

18. Rukminibai did not have any title deed to the suit property. The case of plaintiffs during arguments was that the gift made in the year 1961, being by way of 'Pasupu Kumkumam' in favour of a sister by a brother, could be oral and did not require a registered instrument. But the property allegedly gifted to Rukminibai was not mutated in the name of Rukminibai in the municipal records, but continued in the name of Damodar Rao even after 1961. Damodar Rao was a resident of Warangal and staying in the house adjoining the suit property. Rukminibai was a resident of Hyderabad. Therefore, as on the date of sales in favour of the plaintiffs 9.12.1968, Rukminibai had neither any title deed nor actual possession. Nor was the property mutated in her name in the municipal records. The tax paid receipts produced by the plaintiffs related to a period subsequent to the execution of the sale deeds by Rukminibai in their favour and subsequent to the sale by Damodar Rao in favour of defendant. On the other hand, the suit property was sold in favour of the defendant by Damodar Rao who was shown as registered owner in the municipal records and who even according to the plaintiffs was the original owner of the property.

19. The first appellate court found that the evidence of plaintiffs and their witnesses as to the title of plaintiffs' vendor Rukminibai was sketchy and inconsistent. It referred to three versions as to how Rukminibai got the property. The first version (as per PW1) was that the suit property belonged to Rukminibai's father and he had given it to his daughter Rukminibai by way of 'Pasupu Kumkumam'. The second version (as per PW2) was that after the death of Rukminibai's father, there was an oral partition between K. V. Damodar Rao and Rukminibai and at that partition, the suit property was allotted to Rukminibai. But both PW1 and PW2 admitted that they did not make any enquiry with Rukminibai about her title. The third version (as per PW4 - Rukminibai) was that Damodar Rao made an oral gift of the plot in her favour by way of 'Pasupu Kumkumam' in the year 1961. She admitted

that there was no special occasion for gifting the plot to her in the year 1961, as she was married long prior to 1961.

20. The suit sites were vacant plots. Both sides admitted that Damodar Rao was the original owner and that entire property stood in his name. The defendant claims title through Damodar Rao. The plaintiffs claim title through Rukminibai who neither has any deed of title nor any document in support of title or possession. Admittedly, there was no mutation in her name. This means that plaintiffs claim title through someone who claimed to be owner in pursuance of an oral gift in the year 1961 without the property being mutated in her name, whereas the defendant claims title from the person who was admittedly the original owner who was registered as owner in the revenue records. Necessarily, therefore, prima facie it has to be held that defendant had made out possession following title.

21. The plaintiffs and their witnesses gave evidence to the effect that Damodar Rao represented that his sister Rukminibai was the owner of the plot and negotiated for sale of the several portions thereof in favour of plaintiffs and PW3, and that Damodar Rao had attested the sale deeds in their favour and identified his sister as the vendor & executant before the Sub-Registrar, at the time of registration of the sale deeds. It is no doubt true that if that was the position, it is possible for them to contend that having regard to section 41 of Transfer of Property Act, when the ostensible owner Rukminibai sold the property with the implied consent of Damodar Rao, the defendant as a transferee from Damodar Rao could not contend that the sales were not valid. They also alleged that defendant was a close relative of Damodar Rao and the sale in favour of defendant was only nominal, intended to defeat their title. But Damodar Rao in his evidence denied having made the oral gift or having attested the sale deeds in favour of plaintiffs. He also denied having identified his sister at the time of registration of the sale deeds. Whether Rukminibai's evidence and other plaintiffs' witnesses should be believed or whether evidence of Damodar Rao should be believed on the question of title, can be examined only when there are necessary pleadings and an issue regarding title. Further, where title of plaintiffs is disputed and claim for possession is purely based on title, and the plaintiffs have to rely on various principles of law relating to ostensible ownership and section 41 of TP Act, validity of a oral gift by way of 'pasupu kumkum' under Hindu Law, estoppel and acquiescence, to put forth a case of title, such complicated questions could properly be examined only in a title suit, that is a suit for declaration and consequential reliefs, and not in a suit for an injunction simpliciter.

Re : Questions (iii) and (iv)

22. The High Court formulated the following as substantial questions of law:

"(i) Whether the plaintiffs' suit for permanent injunction without seeking declaration of title is maintainable under law?

(ii) Whether the acts and deeds of Damodar Rao (DW-2) made the plaintiffs to believe that Rukminibai is the ostensible owner of the suit property and thus made them to purchase the suit property for valid consideration and, therefore, the provisions under Section 41 of the Transfer of Property Act are attracted and as such DW-2 could not pass on a better title to the defendant under Ex.B-1?

(iii) Whether the alleged oral gift of the suit property in favour of Rukminibai by DW2 towards pasupukumkum is legal, valid and binding on DW2 though effected in contravention of the provisions under Section 123 of the Transfer of Property Act?"

Having regard to the pleadings and issues, only the first question formulated by the High Court can be said to arise for its consideration in the second appeal. The second and third questions did not arise at all, as we will

presently demonstrate.

23. The second question of law formulated by the High Court is a mixed question of fact and law, that is whether the factual ingredients necessary to claim the benefit of section 41 of the Transfer of Property Act were made out by plaintiffs. To attract the benefit of section 41 of TP Act, the plaintiffs had to specifically plead the averments necessary to make out a case under section 41 of the T.P. Act and claim the benefit or protection under that section. The averments to be pleaded were :

- (a) that Rukminibai was the ostensible owner of the property with the express or implied consent of Damodar Rao;
- (b) that the plaintiffs after taking reasonable care to ascertain that the transferor or Rukminibai had the power to make the transfer, had acted in good faith in purchasing the sites for valid consideration; and
- (c) that therefore, the transfer in favour of plaintiffs by Rukminibai was not voidable at the instance of Damodar Rao or any one claiming through him.

These pleas were not made in the plaint. When these were not pleaded, the question of defendant denying or traversing them did not arise. In the absence of any pleadings and issue, it is ununderstandable how a question of law relating to section 41 of TP Act could be formulated by the High Court.

24. The third question of law formulated by the High Court, is also a mixed question of fact and law \026 firstly whether there was an oral gift and secondly whether the alleged oral gift was valid. Here again, there was no averment in the plaint in respect of any gift, oral or otherwise, by Damodar Rao in favour of Rukminibai or about its validity. Consequently there was no opportunity to the defendant to deny the oral gift in his written statement. There was no issue on this aspect also. Therefore, this question, which could not have been considered in the suit, could not also have been considered in the second appeal.

25. The High Court, in the absence of pleadings and issues, formulated in a second appeal arising from a suit for bare injunction, questions of law unrelated to the pleadings and issues, presumably because some evidence was led and some arguments were advanced on those aspects. The only averment in the plaint that plaintiffs were the owners of the suit property having purchased the same under sale deeds dated 9.12.1968, did not enable the court, much less a High Court in second appeal, to hold a roving enquiry into an oral gift and its validity or validation of ostensible title under section 41 of TP Act. No amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled.

26. The High Court while reversing the decision of the first appellate court, examined various aspects relating to title and recorded findings relating to title. It held that gifting a property to a daughter or sister by way of 'Pasupu Kumkumam', could be done orally and did not require a registered instrument. Even though there was no independence evidence of oral gift except the assertion to Rukminibai (which was denied by Damodar Rao), the High Court, held that there was an oral gift in her favour. It also accepted the evidence of PW3 and PW5 and plaintiffs, that Damodar Rao negotiated for the sale of the plots representing that they belonged to his sister Rukminibai and that he attested the sale deeds as a witness and identified the Rukminibai as the executant before the Sub-Registrar and therefore, section 41 of TP Act came to the aid of plaintiffs and Damodar Rao was estopped from denying the title of his sister. The High Court in a second appeal arising from a suit for an injunction, could not have recorded such findings, in the absence of pleadings and issue regarding title.

27. We are therefore of the view that the High Court exceeded its jurisdiction under section 100 CPC, firstly in re-examining questions of fact, secondly by going into the questions which were not pleaded and which were not the subject matter of any issue, thirdly by formulating questions of law which did not arise in the second appeal, and lastly, by interfering with the well reasoned judgment of the first appellate court which held that the plaintiffs ought to have filed a suit for declaration.

28. We are conscious of the fact that the suit was filed in the year 1978 and driving the plaintiffs to a fresh round of litigation after three decades would cause hardship to them. But the scope of civil cases are circumscribed by the limitations placed by the rules of pleadings, nature of relief claimed and the court fee paid. The predicament of plaintiffs, was brought upon themselves, by failing to convert the suit to one for declaration even when the written statement was filed, and by not seeking amendment of issues to include an issue on the question of title. In the absence of a prayer of declaration of title and an issue regarding title, let alone the pleadings required for a declaration of title, the parties cannot be said to have an opportunity to have a full-fledged adjudication regarding title.

29. We, therefore, allow this appeal, set aside the judgment of the High Court and dismiss the suit. Nothing stated herein or by the courts below shall be construed as expression of any opinion regarding title, in any future suit for declaration and consequential reliefs that may be filed by the Appellants, in accordance with law. Parties to bear their respective costs.