SHIVSHANKARA & ANR.

v.

H.P. VEDAVYASA CHAR

(Civil Appeal No. 10215 of 2011)

MARCH 29, 2023

[B. R. GAVAI AND C. T. RAVIKUMAR*, JJ.]

Abatement: Abatement of suit – Non-joinder of necessary parties – Non-impleadment of all other legal heirs of deceased defendant – Effect of – Held: In the event of death of one of the defendants, when the estate/interest was being fully and substantially represented in the suit jointly by the other defendants along with deceased defendant and when they are also his legal representatives, by reason of non-impleadment of all other legal heirs consequential to the death of the said defendant, the suit would not abate – Such suit not bad for non-joinder of necessary parties of all his legal heirs/representatives.

Amendment: Amendment of pleadings at appellate stage – Permissibility of – Held: While dealing with such prayers, the Courts should avoid hyper technical approach – Circumstances attending to the particular case are to be taken into account to allow or not to allow such prayer – It is allowable only in rarest of rare circumstances – It cannot be granted on the mere request, especially at the appellate stage – On facts, trial court allowed the amendment of the plaint, and the defendants were given multiple opportunities to file an additional written statement, which they did not avail and the suit was decreed – Subsequent developments culminated in the impugned judgment wherein the High Court declined permission to amend the written statement to the defendants – High Court observed that grant of amendment of written statement, if at that stage would have necessitated framing of fresh issues and de novo trial – Thus, no perversity or illegality with the rejection of the prayer for amendment of the written statement.

* Author

Suit: Suit for possession, based on possessory title – Facts disclosing no title in either party at the relevant time – Prior possession – Relevance of – Held: In such circumstances, when the facts disclose no title in either party, at the relevant time, prior possession alone decides the right to possession of land in the assumed character of owner against all the world except against the rightful owner.

Suit: Suit for injunction and for recovery of possession by respondent against the appellants – Maintainability of – Held: On a careful consideration of the available pleadings of the appellants, the High Court held that they did not disclose their defence in their written statement and at the same time did not even contend that they are in possession of the suit property – Thus, the High Court correct in holding the question of maintainability of the suit in the affirmative and in favour of the respondent – Trial court after carefully considering the evidence on record held that the respondent is entitled to get back the possession of suit schedule property from which he was dispossessed – After careful consideration of the additional evidence recorded and transmitted to the High Court by the trial court and considering all contentions and aspects, the High Court only confirmed the judgment and decree of the trial court – Thus, when the concurrent findings of the courts below are the outcome of the rightful consideration and appreciation of materials on record, they do not call for any interference.

Transfer of Property Act, 1882: s. 52 – Transfer of property pending suit relating thereto – Doctrine of Lis pendens – Held: Import of s. 52 is that if there is any transfer of right in immovable property during the pendency of a suit such transfer will be non est in the eye of law if it will adversely affect the interest of the other party to the suit in the property concerned – Wherever TP Act is not applicable, such principle in the said provision of the Act, based on justice, equity and good conscience is applicable in a given similar circumstance, like Court sale etc – On facts, the suit from which the appeal arises was one based on possessory title, the legality of sale deed need not be gone into in this appeal and rightly has not been gone into by the High Court – High Court declined to act upon the same, in the light of the doctrine of lis pendens.

Pleadings: Proof offered without pleadings – Relevance of – On facts, claim for possession/ownership over the suit property by the defendants – Original defendants failed to raise sufficient and appropriate pleadings in the written statement that they have better right for possession of the suit properties – No amount of proof offered without appropriate pleadings would have any relevance – Finding of the High Court that any volume of evidence sans appropriate pleadings would be of no avail is correct.

Dismissing the appeal, the Court

HELD:

1.1 There can be no doubt with respect to the settled position that the Court to which the case is remanded has to comply with the order of remand and acting contrary to the order of remand is contrary to law. In other words, an order of remand has to be followed in its true spirit. [Para 7]

1.2 In dealing with prayers for amendment of the pleadings the Courts should avoid hyper technical approach. But at the same time, the Court should keep reminded of the position that the same cannot be granted on the mere request through an application for amendment of the written statement, especially at the appellate stage where what is called in question is the judgment and decree passed by the trial court and in other words, after the adverse decree and without a genuine, sustainable reason. The circumstances attending to the particular case are to be taken into account to consider whether such a prayer is allowable or not and no doubt, it is allowable only in rarest of rare circumstances. In the case on hand, prayer to amend the plaint was allowed by the trial court. Accordingly, the amendment was carried out by the plaintiff. Indisputably, thereafter, during the span of one year or thereabouts more than eight opportunities were given to the defendants therein to file additional written statement, if any. Indubitably, the materials on record would reveal that the opportunities were not availed and no additional written statement was filed. Thereafter, based on the pleadings, issues were framed. Obviously, the defendants did not

adduce any evidence for the reasons best known to them. The suit came to be decreed thereafter. All the subsequent developments which ultimately culminated in the impugned judgment is discussed. Evidently the High Court observed that if the amendment of written statement was allowed at that stage, it would have necessitated framing of fresh issues and parties were to agitate their rights as if in a *de novo trial.* In the circumstances thus revealed from the materials on record and when such aspects and evidence were taken into account by the High Court to decline permission to amend the written statement, there is no reason or justification to interfere with it. [Para 14 & 15]

1.3 In the wake of the admission by DW-1, the attempt to bring in new plea by amending the written statement that the second defendant (the deceased second appellant) had purchased the suit schedule property as per the sale deed dated 05.10.2000 has to be seen. Since admittedly and indisputably the suit from which the appeal arises was one based on possessory title, the legality of the sale deed need not be gone into in this appeal and rightly has not been gone into by the High Court. Evidently, the High Court declined to act upon the same, in the light of the doctrine of lis pendens. Even if it is taken for granted that the provisions under Section 52 of the Transfer of Property Act are not applicable as such in the case on hand it cannot be disputed that the principle contained in the provision is applicable in the case on hand. It is a well-nigh settled position that wherever TP Act is not applicable, such principle in the said provision, which is based on justice, equity and good conscience is applicable in a given similar circumstance, like Court sale etc. Transfer of possession pendente lite will also be transfer of property within the meaning of Section 52 and, therefore, the import of Section 52 is that if there is any transfer of right in immovable property during the pendency of a suit such transfer will be non est in the eye of law if it will adversely affect the interest of the other party to the suit in the property concerned. The effect of Section 52 is that the right of the successful party in the litigation in regard to that property would not be affected by the alienation, but it

does not mean that as against the transferor the transaction is invalid". [Para 16]

1.4 The prohibition by application of the principles of the doctrine of lis pendens would take its effect with the institution of the suit. There is no hesitation to hold that the High Court was perfectly justified in the circumstances, to come to the conclusion, while considering the application for amendment of the written statement filed at the appellate stage, that granting the same would have, in effect, necessitated framing of fresh issues and constrained the parties to agitate their rights as if in a de novo trial. The aspects is referred solely to drive home the point that since the subject suit is based only on possessory title viz., on the basis of prior possession the finding and consequential rejection of the prayer for amendment of written statement to bring in the plea of purchase of the property pending the suit by the deceased second appellant cannot be said to be ground resulting in grave injustice. [Para 16]

1.5 There was considerable delay in seeking amendment of the written statement or filing additional written statement and no sustainable reason was assigned as to why such prayers were not sought in the trial court while the original proceedings were pending before it. It is also relevant to note that such prayers were also not made before the High Court when the High Court initially disposed of RFA and also before this Court in the Civil Appeal against the said judgment. The impact and effect of the order of remand passed by this Court assumes great relevance. If the judgment of the High Court was not modified by this Court as per judgment in the Civil Appeal, it would have had the effect of reviving the suit in full and in such eventuality, the suit should have been deemed to be pending. [Para 20, 21]

1.6 In view of the subsequent judgment of this Court in the said Civil Appeal directed against the order of remand in RFA, the judgment of the High Court got merged in it. As per the same, the scope of proceedings before the trial court was confined only to record the additional evidence of defendants and to

transmit the same to the High Court so as to enable the High Court to dispose of the RFA afresh. The trial court could not have expanded the scope of the proceedings before it contrary to the order of remand and hence, the trial court was perfectly correct in rejecting the application for amending the written statement [Para 22]

1.7 In the totality of the circumstances, taking into account the relevant reasons assigned by the High Court for disallowing the prayer for amendment of the written statement and taking note of the delay and the failure to offer any reason therefor and the reasons mentioned there is no perversity or illegality with the rejection of the prayer for amendment of the written statement. On the questions as to maintainability of the suit, whether the suit is bad for non-joinder of necessary parties as also whether the suit ought to have been held as abated against all the defendants for non-substitution of all the legal heirs on the death of the original third defendant, the courts below returned concurrent findings against the appellants. [Para 23, 24]

1.8 It cannot be understood as to how the plea regarding the maintainability of the suit arise for consideration. The contention of the appellants is that it was filed under section 6 of the Specific Relief Act and while disposing of the Civil Appeal, this Court held against the respondent/ the plaintiff that the suit is not one under Section 6 of the Specific Relief Act. Ergo, according to the appellants, the relief claimed for possession by the plaintiff/the respondent was not entertainable as he being a person claiming only possessory title and the original defendant No. 2/ the deceased appellant No. 2 being the lawful owner of the suit schedule property. Though the contentions appear to be attractive and acceptable at the first blush the fact is that they are absolutely untenable and rightly held against them, in view of the materials on record. It is true that the respondent/ the plaintiff had a case that O.S. No. 6456 of 1993 filed under Section 6 of the Specific Relief Act and even after, the judgment in the Civil Appeal he seems to have attempted to resurrect the said question. But

this Court is entirely in agreement with the High Court that the question whether the suit is one under Section 6 of the Specific Relief Act is not now available for consideration as it was held otherwise by this Court in the judgment in the Civil Appeal and as such it had attained finality. On the face of judgment in the Civil Appeal the conclusion that O.S. No. 6456 of 1993 is not one under Section 6 of the Specific Relief Act is not revisitable. Evidently, even-after holding thus and upon modifying the judgment of the High Court, this Court directed only for fresh disposal of the RFA and in that regard the trial court was directed to record the additional evidence of the defendants and to transmit the same to the High Court along with a report. [Para 25, 26]

1.9 It is evident that on a careful consideration of the available pleadings of the defendants, the High Court held that they did not disclose their defence in their written statement and at the same time did not even contend therein that they are in possession of the suit property. In such circumstances, when the facts disclose no title in either party, at the relevant time, prior possession alone decides the right to possession of land in the assumed character of owner against all the world except against the rightful owner. In that context, it is worthy to refer to the maxim "Possessio contra omnes valetpraeter eur cui ius sit possessionis' (he that hath possession hath right against all but him that hath the very right)". The High Court is correct in holding the question of maintainability of the suit in the affirmative and in favour of the respondent herein. [Para 30 & 31]

1.10 As regards the abatement the question whether the suit ought to have been held as abated against all the defendants as contended by the appellants for non-substitution and owing to the failure to implead all the legal representatives on the death of the original third defendant. The contention that the suit is bad for non-joinder of necessary parties is also raised based on the same reason. Hence, these questions are to be considered jointly. Obviously, the courts below declined to uphold the said contentions of the defendants. It is to be

noted that the appellants have also raised a contention that SMS which is an organization and SVR ought to have been impleaded as parties to the suit and in view of their non impleadment, the suit is bad for non-joinder of necessary parties. When that be the position and when the subject suit is one based on prior possession the appellants are not justified in contending that the suit is bad for non-joinder of SM Sangha and SVR. [Para 32]

1.11 The appellants have also contended that the suit ought to have been held as abated against all the defendants owing to non-substitution of all the legal representatives of the deceased defendant No. 3 upon his death. This contention is bereft of any basis and merits and was rightly repelled by the courts below. In that regard it is to be noted that the first appellant and deceased second appellant as also their father were all arrayed in the suit as defendants and they were jointly defending the suit. Upon the death of original third defendant, the original defendants No.1 and 2, who are sons of the original defendant No.3 fully and substantially representing the joint interest contested the suit and, thereafter, after suffering an adverse judgment and decree in the suit diligently preferred the appeal before the High Court which ultimately culminated in the impugned judgment and decree. Even thereafter, obviously they are diligently prosecuting the joint interest, even if the contention of joint interest is taken as correct, by filing the captioned appeal. [Para 33]

1.12 The same analogy is applicable in a case where even in the event of death of one of the defendants, when the estate/ interest was being fully and substantially represented in the suit jointly by the other defendants along with deceased defendant and when they are also his legal representatives. In such cases, by reason of non-impleadment of all other legal heirs consequential to the death of the said defendant, the defendants could not be heard to contend that the suit should stand abated on account of non-substitution of all the other legal representatives of the deceased defendant. In this case, it is to be noted that along with the deceased

3rd defendant the original defendant Nos. 1 and 2 were jointly defending their joint interest. Taking into account the fact that the appellants/ the original defendants No. 1 and 2 despite the death of original defendant No.3 defended the suit and preferred and prosecuted the first appeal. Upon the death of the second appellant the joint interest is being fully and substantially taken forward in this proceeding as well by the first appellant along with the substituted legal representatives of the deceased second appellant, there is no reason to disagree with the conclusions and findings of the courts below for rejecting the contention that suit ought to have held abated owing to the non-substitution of all the legal heirs of deceased third defendant against all defendants. For the same reason, the submission that the suit was bad for non-joinder of necessary parties of all his legal heirs/ representatives also fails. [Para 36]

1.13 There is yet another reason why the contention that suit was bad for non-joinder of necessary parties due to failure to bring on record the legal representatives of the deceased third defendant should fail. Relying on Exhibit D-1 it is contended that pursuant to the agreement for sale of the suit schedule property executed in favour of the first appellant/ the first defendant jointly by SMS and SVR its possession was handed over to the first appellant. Its rejection by the High Court is upheld. However, what is being taken out of the said contention is that based on the same the appellants cannot raise a ground of non-joinder of necessary parties, as the first appellant was arrayed as a party in the very suit itself and he being the person in favour of whom the same was allegedly executed. The contention raised based on Exhibit D-2 sale deed was also repelled by the High Court and is upheld. The note is taken of the same again solely to stress upon the position that the case built upon the same can in no way be the basis for raising a contention of non-joinder of necessary party/parties. This is because the deceased second appellant who was shown as the vendee thereunder was the original second defendant in the suit. For the reasons the contention of non-joinder of necessary parties fails. [Para 37]

1.14 The courts below are correct in holding that the defendants did not have a case of ownership over the suit schedule property and such a case sought to bring out based on Exhibit D-2 was repelled by the High Court and the same is upheld. They have also failed to establish any better claim for possession. The finding of the High Court that any volume of evidence sans appropriate pleadings would be no avail is the correct exposition of law. [Para 38]

1.15 In such circumstances, there is absolutely no hesitation to hold that the original defendants failed to raise sufficient and appropriate pleadings in the written statement that they have better right for possession of the suit properties. No amount of proof offered without appropriate pleadings would have any relevance. The courts below have rightly relied on the evidence of PW-5 to hold forceful dispossession of the defendants from 'B' schedule property. Nothing is on record to uphold the said finding. As regard the issue whether the impugned judgment is inflicted with perversity or any patent illegality warranting interference in invocation of the power under Article 136 of the Constitution of India. The sound reasons given by the courts below persuade to answer it in the negative. After carefully considering the evidence on record the trial court arrived at the conclusion that the respondent/ the plaintiff is entitled to get back the possession of suit schedule property from which he was dispossessed and even after careful consideration of the additional evidence recorded and transmitted to the High Court by the trial court and considering all contentions and aspects the High Court only confirmed the judgment and decree of the trial court. When the concurrent findings of the courts below are the outcome of the rightful consideration and appreciation of materials on record they do not call for any interference. Taking into account the fact that the suit was indisputably filed based on prior permission and illegal dispossession there is no reason to place sale deed executed (even if by the owners) in favour of the deceased second appellant to

displace the concurrent findings of the courts below on the entitlement of the respondent/the plaintiff for a decree as granted by the trial court and confirmed by the High Court. [Para 39, 40, 41]

Thomson Press (India) Ltd. v. Nanak Builders and Investors Private Limited **(2013) 5 SCC 397 : [2013] 2 SCR 74;** *Gayathri Women's Welfare Association v. Gowramma And Anr.* **(2011) 2 SCC 330 : [2011] 2 SCR 47;** *Pandit Ishwardas v. State of Madhya Pradesh And Ors.* **(1979) 4 SCC 163 : [1979] 2 SCR 424;** *United Bank of India, Calcutta v. Abhijit Tea Co. (P) Ltd. & Ors.* **(2000) 7 SCC 357 : [2000] 3 Suppl. SCR 153;** *Rukhmanand v. Deenbandh 1971 JLJ SN 159; Krishna Ram Mahale (Dead), By LRs v. Mrs. Shobha Venkat Rao* **(1989) 4 SCC 131;** *Nair Service Society Ltd v. Rev. Father K. C. Alexander & Ors.* **AIR 1968 SC 1165 : [1968] SCR 163;** *Mustapha Saheb v. Santha Pillai* **(1900) ILR 23 Mad 179;** *Bhurey Khan v. Yaseen Khan (Dead) By LRs. And Ors.* **(1995) 3 Supp. SCC 331;** *State of Andhra Pradesh through Principal Secretary and Ors. v. Pratap Karan and Ors.* **(2016) 2 SCC 82 : [2015] 12 SCR 702;** *Duggi Veera Venkata Gopala Satyanarayana v. Sakala Veera Raghavaiah and Anr.* **(1987) 1 SCC 254 : [1987] 1 SCR 674;** *Hasmat Rai & Anr. v. Raghunath Prasad* **(1981) 3 SCC 103 : [1981] 3 SCR 605;** *Union of India v. Ibrahim Uddin and Anr.* **(2012) 8 SCC 148 : [2012] 8 SCR 35 – referred to.**

R.F.V. Heuston, Salmond on the Law of Torts **4 (17th Edn., 1977) – referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10215 of 2011.

From the Judgment and Order dated 09.09.2010 of the High Court of Karnataka at Bangalore in RFA No. 1966 of 2007.

Ms. Kiran Suri, Sr. Adv., T. S. Shanthi, Narendra Kumar, Sanjeev Kumar, Advs. for the Appellants.

Narendra Hooda, Sr. Adv., Aljo K. Joseph, Shaurya Lamba, Ms. Shelna K., Ritesh Kumar Chowdhary, Advs. for the Respondent.

The Judgment of the Court was delivered by

C. T. RAVIKUMAR, J.

1. The defendant Nos. 1 and 2 in O.S. No.6456 of 1993 on the file of the Court of XIV Additional City Civil Judge, Bangalore, filed this appeal under Article 136 of the Constitution of India, calling in question the judgment and decree dated 09.09.2010 passed by the Hon'ble High Court of Karnataka at Bengaluru in RFA No.1966 of 2007. They are the sons of the third defendant in the said suit, who died during its pendency. They filed the stated first appeal on being aggrieved and dissatisfied with the judgment and decree dated 04.07.2007 in O.S. No.6456 of 1993. During the pendency of the captioned appeal, the second appellant died and consequently his legal heirs were impleaded as additional appellants 2.1 to 2.4. Ergo, in this appeal, hereafter the original first appellant and the impleaded legal heirs of the deceased second appellant are collectively described as 'appellants', unless otherwise specifically mentioned. The respondent herein was the plaintiff in the said suit which was filed originally praying thus: -

"to grant a judgment for decree of permanent injunction restraining the first and second defendants either by themselves or through anyone on their behalf from interfering in the plaintiffs right, title and interest over and in the suit schedule property including creating documents alienating the property to others and award cost and grant such other relief (s) as deemed fit and proper under the circumstances to the interest of justice and equity."

2. The appellants herein filed written statement contending, inter alia, that the subject suit is not maintainable, that there is no prayer for possession, that the suit was not valued correctly and that the real owners of the suit property was not arraigned as parties. Subsequently, the plaintiff / respondent herein got amended the plaint by adding paragraph 9 (a), schedules A, B and 'C' and also prayers qua them viz., prayer 'b'. Compositely, the suit property, which is a house bearing No. B-91, has been described as 'A schedule' and out of which a portion measuring 35' x 40', within the boundaries mentioned, has been described as 'B schedule'. 'C schedule' is the portion of the premises bearing No. B-91 as described therein. To be precise, the prayers in the amended plaint read as under: -

"(a) a judgment and decree of perpetual injunction against the defendants 1 to 3 directing the defendants to restore the possession of the schedule premises to the plaintiff and not to interfere in the plaintiffs' lawful possession and enjoyment of the schedule property in any manner whatsoever.

(b) A judgment and decree against the defendants for mandatory injunction directing the defendants to restore the possession of the 'B' schedule property, which is marked

'ABCD' in the annexed sketch, and there may be decree for permanent injunction against the defendants for 'CDEF' portion which is marked as 'C' schedule to the plaint and there may be a decree for the enquiry into the mesne profits with Order XVIII Rule 12 of CPC, and also there may be a decree for the cost of the suit, with such other relief or reliefs as this Hon'ble Court deems fit in the circumstances of the case.:

3. Obviously, the defendants did not challenge the order allowing the amendment of the plaint and also did not file additional written statement after the amendment.

4. The Trial Court framed the following issues based on the pleadings on both sides:

   1) Whether the suit is bad for mis-joinder or non-joinder of necessary parties?

   2) Whether the Court fee paid on the plaint is insufficient?

   3) Whether the plaintiff is entitled for possession of the suit schedule premises?

5. Though the plaintiff/respondent herein adduced oral and documentary evidence in support of his claims, the defendant therein did not lead any evidence, at all. The Trial Court, after considering the evidence and the provisions of law applicable partly decreed the suit as per judgment dated 04.07.2007, holding that the plaintiff/respondent herein, is entitled to recover possession of suit 'B' schedule property from the defendants and consequently directed the defendants to vacate and deliver suit 'B' schedule property to the plaintiff (the respondent herein) within two months from that day. Further, it was also decreed that the plaintiff would be entitled to recover possession of 'B' schedule property from the defendants by due process of law in case of failure on the part of

the defendants to vacate and deliver the suit 'B' schedule property within the period stipulated. Furthermore, the defendants were restrained by perpetual injunction from interfering with the peaceful possession and enjoyment of 'C' schedule property by the plaintiff.

6. As noted earlier, defendant No. 3 died during the pendency of the suit. The surviving defendants viz., the original defendant Nos.1 and 2 challenged the judgment and decree dated 04.07.2007 of the trial Court before the High Court in RFA No.1966 of 2007. In the said first appeal, they filed an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short, the CPC') seeking permission to produce additional evidence. Virtually, they did not adduce any evidence whatsoever before the trial court. The respondent herein (the plaintiff) objected to the maintainability of the appeal as the original suit viz., O.S. No.6456 of 1993 was filed under Section 6 of the Specific Relief Act, 1963. The High Court dispelled the said objection and as per judgment dated 29.10.2007 allowed the application for production of additional evidence and remanded the matter to the trial Court for fresh disposal after affording an opportunity to the defendants viz., the first appellant herein and the deceased second appellant to lead additional evidence. The said judgment of the High Court dated 29.10.2007 was challenged by the plaintiff/respondent herein before this Court in SLP (Civil) No.1279 of 2008 essentially, contending that the said suit being one filed under Section 6 of the Specific Relief Act, the appeal filed before the High Court being RFA No.1966 of 2007 was incompetent. Leave was granted by this Court and the Civil Appeal arising from the SLP viz., Civil Appeal No.5201 of 2009 was dispose of as per judgment dated 03.09.2009 holding that O.S. No.6456 of 1993 was not one under Section 6 of the Specific Relief Act, as the relief sought for did not fall within its scope. While, virtually, remanding the matter thereunder to the High Court for fresh disposal of the appeal the trial Court was directed to record the evidence as directed by the High Court and to submit a report thereon to the High Court to enable it to dispose of the appeal within the time stipulated.

7. Before proceeding with the matter further, we think it appropriate to consider the impact of such an order of remand as it would certainly deconvolute consideration of this appeal. There can be no doubt with respect to the settled position that the Court to which the case is remanded

has to comply with the order of remand and acting contrary to the order of remand is contrary to law. In other words, an order of remand has to be followed in its true spirit. True that in this case the High Court, originally, as per judgment dated 29.10.2007 remanded the matter to the trial Court for fresh disposal and while doing so, it also directed the trial Court to afford opportunity to the defendants to lead evidence. But then, the same was modified by this Court and as per the judgment in C.A. No.5201 of 2009 the matter was remanded to the High Court for fresh disposal of RFA No.1996 of 2007 and the further direction to the trial Court was only to record the evidence as directed by the High Court and to forward it along with report to enable the High Court to dispose of the appeal taking into account the additionally recorded evidence of the defendants as well. Thus, it is evident that the direction to the trial Court for recording the evidence and submitting it along with report will not efface the evidence already on record or will not be having the effect of setting aside of the judgment and decree passed by the trial Court and indisputably, its purpose was only to enable the High Court to consider RFA No.1996 of 2007 carrying challenge against the judgment and decree of the trial Court in O.S. No.6456 of 1993, not only based on the evidence already considered by the trial Court but also based on the additionally recorded evidence of the defendants based on its judgment dated 29.10.2007.

8. Now, we will proceed with the matter further. In fact, in the meanwhile, pursuant to the order of remand by the High Court the Trial Court took up the matter and posted it for defendants' evidence. The original defendant Nos. 1 and 2 (the first appellant herein and the deceased second appellant) filed an application for amendment of the written statement before the Trial Court. Besides the same, three more applications were filed before the Trial Court viz., (1) seeking permission to file additional written statement; (2) seeking permission to produce 8 documents; and (3) to recall PW-1. The Trial Court allowed only the applications for permission to produce documents and to recall PW-1, by order dated 13.11.2007. The plaintiff/respondent herein challenged the same before the High Court in WP No. 18328 of 2007 and consequently, the High Court stayed the said order dated 13.11.2007. It was thereafter that Civil Appeal No. 5201 of 2009 was disposed of by this Court in the manner mentioned above. Pursuant to this Court's order dated 03.08.2009 the Trial Court took up the matter and posted it for the evidence of the

defendants. They filed I.A. No. 8 of 2009 seeking permission to amend the written statement which came to be dismissed by the Trial Court. Thereafter, the second defendant filed affidavit in lieu of chief examination and got marked Exhibits D-1 to D-9 and he was also cross-examined. However, they did not examine any other witnesses. Later, the Trial Court transmitted the recorded evidence to the High Court along with its report.

8.1 Pursuant to the receipt of the report and recorded evidence the High Court took up RFA No. 1966 of 2007. The defendants viz., the appellants therein filed three interlocutory applications before the High Court as hereunder:-

1) Misc. Civil Application No. 10400/2010 under Order 41 Rule 2 read with Section 151 CPC to raise additional grounds 16A and l6B in the Appeal.

2) Misc. Civil Application No. 11451/2010 under Order 41 Rule 2 read with Section 151 CPC to raise additional grounds 16C and 16D in the appeal.

3) Misc. Civil Application No.11452/2010 under Order 6 Rule 17 read with 151 CPC for amendment of written statement.

8.2 Misc. Civil Application No. 10400/2010 to raise additional grounds was allowed on consent. However, the other two applications were vehemently opposed. After hearing the parties on the main appeal as also on the other two applications referred above, the Hon'ble High Court formulated the following points for consideration: -

(i) "Whether the application Misc.Civil.No.11452 /2010 filed by the appellants under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure seeking amendment of the written statement to incorporate paragraphs 26(b) to 26(e) deserves to be allowed or rejected?"

(ii) Whether the application Misc. Civil No.11451/2010 filed under 41 Rule 2 r/w Section 151 of the Code of Civil Procedure by the appellants to raise additional grounds in this appeal as ground No. l6C & 16D is to be allowed or dismissed?"

(iii) Whether the suit as brought is maintainable or not?

(iv) Whether the suit is bad for non-joinder of necessary parties?

(v) Whether the judgment and decree passed by the XIV Addl. City Civil Court in O.S. No.6456/1993 dated 4-7-2007 is to be reversed, confirmed or modified?

(vi) What order?"

9. After elaborately considering the contentions, the evidence adduced by both sides with reference to the rival pleadings, the High Court answered the points formulated against the appellants herein and in favour of the respondent herein. Misc. Application Nos. 11451 of 2010 and 11452 of 2010, seeking respectively amendment of the written statement and permission to raise additional grounds viz., ground No.16 (c) and 16(d), were dismissed. Point No.3 in regard to the maintainability of the suit raised by the appellants therein was rejected and suit was held as maintainable. On the question whether the suit is bad for non-joinder of necessary parties viz. point No.4, it was held in the negative. Based on conclusions and findings on the points formulated it was held that the respondent herein/the plaintiff is entitled to the judgment and decree as decreed by the Trial Court and consequently the appeal was dismissed with cost and the judgement and decree of the Trial Court was confirmed. Hence, this appeal.

10. Heard, Ms. Kiran Suri, learned Senior Counsel for the appellants and Mr. Narender Hooda, learned Senior Counsel for the respondent.

11. The appellants have raised multiple grounds to assail the judgment of the High Court. It is contended *inter alia* that the plaintiff/the respondent herein had failed to establish his possession over plaint 'B' schedule property. That apart, it is contended that the High Court had failed to consider the contention that the subject suit was actually abated owing to the failure of the respondent herein/the plaintiff to bring on record the legal representatives of Sri Hanumaiah, the third respondent who breathed his last during the pendency of the subject suit. It is their further contention that Sri Rama @ Ramamurthy, the deceased second defendant had purchased the suit property from Sriman Madhwa Sangha which is an organisation and Sri Vittal Rao as per sale deed executed on 05.10.2000 jointly by the latter and the authorised representative of the former organisation and therefore, the High Court ought not to have confirmed the judgment and decree of the trial Court.

12. We have already taken note of the fact that the Misc. Civil Application carrying the prayers for amendment of the written statement by incorporating paragraphs 26 (b) to 26 (e) and for raising additional grounds in the appeal were dismissed by the High Court. The points formulated qua those prayers were jointly considered by the High Court owing to the interlacement of the relevant facts. The avowed purpose of the proposed amendment was obviously to bring in the contention that the suit property was purchased by the deceased second appellant from Sriman Madhwa Sangha and Sri Vittal Rao as per sale deed dated 05.10.2000.

13. Evidently, in this case the Trial Court decreed the suit on 04.07.2007 and the original defendants 1 and 2 viz., the first appellant and the deceased second appellant in this appeal, preferred appeal viz., RFA No.1966 of 2007 challenging the same. In the said appeal, an application under Order XLI Rule 27 CPC seeking permission to adduce additional evidence was filed raising the contention that they were not given opportunity to adduce evidence. The said appeal came to be disposed of by the High Court as per judgment and decree dated 29.10.2007, whereunder the said application was allowed and the appellants therein/the original defendants 1 and 2, were given permission to lead additional evidence before the Trial Court. Furthermore, an opportunity to cross-examine the said defendants were given to the respondent herein/the plaintiff. A direction was also given to the Trial Court thereunder to dispose of the case on merits in so far as 'B' schedule property is concerned. It is aggrieved by the said judgment and decree dated 29.10.2007 of the High Court that the respondent herein/the plaintiff filed a Civil Appeal No.5201 of 2009 arising out of SLP (C) No.1279 of 2008 before this Court and which came to be disposed of modifying the judgment and decree of the High Court dated 29.10.2007 by directing the Trial Court to record the evidence 'as directed by the High Court' and transmit the records to the First Appellate Court viz., the High Court and such other directions as mentioned hereinbefore. The impugned order was passed thereafter by the High Court whereby the judgment and decree of the Trial Court was confirmed. It is thus obvious that there are concurrent findings against the appellants and in favour of the respondent herein. Normally, an in-depth consideration is not the rule in an appeal by Special Leave filed under Article 136 of the Constitution of India when the findings are concurrent, in the absence of exceptional circumstances. Nonetheless,

taking into account the facts that the captioned appeal is of the year 2011 and an interim direction to the parties to maintain the status quo was passed as early as on 25.02.2011, we are inclined to deal with the conclusions and also the contentions of the parties appropriately.

14. We are not oblivious of the settled position that in dealing with prayers for amendment of the pleadings the Courts should avoid hyper technical approach. But at the same time, we should keep reminded of the position that the same cannot be granted on the mere request through an application for amendment of the written statement, especially at the appellate stage, where, what is called in question is the judgment and decree passed by the trial Court and, in other words, after the adverse decree and without a genuine, sustainable reason. In short, the circumstances attending to the particular case are to be taken into account to consider whether such a prayer is allowable or not and no doubt, it is allowable only in rarest of rare circumstances. In the case on hand, prayer to amend the plaint was allowed by the Trial Court as per order dated 01.09.1995. Accordingly, the amendment was carried out by the plaintiff. Indisputably, thereafter, during the span of one year or thereabouts more than eight opportunities were given to the defendants therein to file additional written statement, if any. Indubitably, the materials on record would reveal that the opportunities were not availed and no additional written statement was filed. Thereafter, based on the pleadings, issues were framed. Obviously, the defendants did not adduce any evidence for the reasons best known to them. The suit came to be decreed thereafter as mentioned earlier. We have also discussed in detail all the subsequent developments which ultimately culminated in the impugned judgment dated 09.09.2010 in RFA No.1966 of 2007, including the slight modification of the judgment and decree of the High Court dated 29.10.2007 in terms of the judgment of this Court in Civil Appeal No.5201 of 2009. Pursuant to the judgment in the said Civil Appeal by this Court, in terms of the surviving directions of the High Court in its judgment dated 09.09.2010, which virtually merged with the judgment in C.A. No.5201 of 2009 the second defendant viz., the deceased second appellant herein filed his affidavit in lieu of his examination-in-chief on 16.09.2009 and got marked Exhibits D-1 to D-9. He was then cross examined. No other witnesses were examined on behalf of the defendants.

15. The materials on record and the impugned judgment passed by the High Court would reveal that the original defendants 1 and 2, who were the appellants before the High Court raised various contentions in support of their prayers for amendment of the written statement as also for permission to raise additional grounds in the appeal, before the High Court and they were also reiterated before us. It is contended that the delay in seeking such prayers by itself cannot be a reason to reject the prayers made in the stated Misc. Civil Applications and further that allowing such prayers would not have, in any way, caused prejudice to the respondent herein/the respondent therein. The chronology of events referred to hereinbefore in this judgment were evidently weighed with the High Court while considering the said applications and also answering the points formulated qua those prayers. The fact that the defendants were given opportunities to file additional written statements for not less than eight times after the amendment of the plaint, in between the period 07.03.1996 till the framing of the issues viz. 15.04.1997, that in the interlocutory application filed in RFA No.1966 of 2007 based on which the trial Court was directed to afford opportunity to the defendants to adduce evidence as per judgment and decree passed on 29.10.2007 they sought permission only to adduce evidence, contending that they were deprived of opportunity to adduce evidence and even at that point of time no permission was sought for amending the written statement, were taken into consideration by the High Court. Evidently, the High Court also observed that if the amendment of written statement was allowed at that stage, it would have necessitated framing of fresh issues and parties were to agitate their rights as if in a *de novo* trial. That apart, the High Court, inter alia considered the following aspects as well:

That, in the written statement filed by the defendants they did not disclose their defence and at the same, they also did not plead therein that they are in possession of the suit property.

That their plea, essentially attracts the principle of '*just tertii'*, which expression in Latin means 'right of a third party', that the third parties, according to them, are Sriman Madhwa Sangha, which is an organisation and Sri Vittal Rao, that it has come in evidence that those third parties filed a petition for evicting the respondent herein/plaintiff as HRC No. 10020 of 1991. The fact is that the defendants had pleaded that the ownership of the suit property was with the said third parties and did

not claim possession specifically and it is thereafter that they sought to bring in a plea that pursuant to an agreement for sale entered into between those parties viz., the first defendant/the first appellant herein viz., Exhibit D-1 dated 01.03.1993 possession of the suit schedule property was delivered to the first appellant. But the crucial reason assigned by the High Court to dispel them is that the first defendant/the first appellant herein did not enter the box and the deceased second defendant/the second defendant while being examined as DW-1, during his chief examination itself admitted that the respondent herein/the plaintiff was then in possession of the suit schedule 'A' property (which also includes 'B' schedule) viz., in and vide paragraph 8 of his affidavit filed in lieu of chief examination. That apart, it was noted that during the cross-examination DW-1 admitted that as on the date of Exhibit D-1, possession of the property was not taken as Sriman Madhwa Sangha assured to secure possession and hand it over to the first defendant. In the circumstances thus revealed from the materials on record and when such aspects and evidence were taken into account by the High Court to decline permission to amend the written statement, we do not find any reason or justification to interfere with it.

16. To fortify our view, we will consider certain other aspects as well. In the wake of the above-mentioned admission by DW-1, the attempt to bring in new plea by amending the written statement that the second defendant (the deceased second appellant) had purchased the suit schedule property as per Exhibit D-2, sale deed dated 05.10.2000 has to be seen. Since admittedly and indisputably the suit from which the appeal arises was one based on possessory title, the legality of Exhibit D-2 sale deed need not be gone into in this appeal and rightly has not been gone into by the High Court. Evidently, the High Court declined to act upon the same, in the light of the doctrine of *lis pendens.* Even if it is taken for granted that the provisions under Section 52 of the Transfer of Property Act are not applicable as such in the case on hand it cannot be disputed that the principle contained in the provision is applicable in the case on hand. It is a well-nigh settled position that wherever TP Act is not applicable, such principle in the said provision of the said Act, which is based on justice, equity and good conscience is applicable in a given similar circumstance, like Court sale etc. Transfer of possession *pendente lite* will also be transfer of property within the meaning of Section 52 and, therefore, the import of Section 52 of the TP Act is that if there

is any transfer of right in immovable property during the pendency of a suit such transfer will be *non est* in the eye of law if it will adversely affect the interest of the other party to the suit in the property concerned. We may hasten to add that the effect of Section 52 is that the right of the successful party in the litigation in regard to that property would not be affected by the alienation, but it does not mean that as against the transferor the transaction is invalid. In the decision in ***Thomson Press (India) Ltd. v. Nanak Builders and Investors Private Limited***[1], this Court held the provision of Section 52 pf the Transfer of Property Act, 1882, did not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.

There can be no doubt with respect to the position that the prohibition by application of the principles of the said doctrine would take its effect with the institution of the suit. Be that as it may, we have no hesitation to hold that the High Court was perfectly justified in the circumstances, to come to the conclusion, while considering the application for amendment of the written statement filed at the appellate stage, that granting the same would have, in effect, necessitated framing of fresh issues and constrained the parties to agitate their rights as if in a *de novo* trial. We referred to the aforesaid aspects solely to drive home the point that since the subject suit is based only on possessory title viz., on the basis of prior possession the finding and consequential rejection of the prayer for amendment of written statement to bring in the plea of purchase of the property pending the suit by the deceased second appellant cannot be said to be ground resulting in grave injustice.

17. It is also not inappropriate in this context, to refer to another indisputable position. The materials on record would reveal that before passing of the judgment and decree the trial Court, afforded several opportunities to the defendants to file additional written statement but they failed not only to file additional written statement but also failed to file any application for amendment of the written statement before the trial court during the pendency of original proceedings before it. It is a fact that the defendants filed an application for amendment of the written statement before the trial Court when the matter was sent to the trial Court pursuant to the order of this Court in CA No. 5201 of 2009 for recording the evidence

1 (2013) 5 SCC 397

solely for the purpose of forwarding the same along with a report to the High Court to enable the High Court to dispose of RFA No. 1966 of 2007. So also, it is an indisputable fact that even while filing an application with prayer to grant permission for amendment of the written statement in RFA No.1996 of 2007 the defendants had not assigned any reasons for delay and no reasonable explanation was given for not filing such an application before the trial Court when the original proceedings were pending before the trial Court. What was assigned as a reason is that they could not file an additional written statement owing to mistake and by oversight. No other reason was assigned for non-filing of application for amendment of written statement.

18. In the contextual situation, it is relevant to refer to the decision of this Court in ***Gayathri Women's Welfare Association v. Gowramma And Anr.***[2] wherein the observation in the decision of this Court in ***Pandit Ishwardas v. State of Madhya Pradesh And Ors.***[3] at paragraph 34 which was quoted with agreement, as under: -

> *"34. In Ishwardas, it has been observed as follows*
>
> *(SCC P. 166, Para 5):*
>
> *5. There is no impediment or bar against an appellate court permitting amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the appellate court should observe the well-known principles subject to which amendments of pleadings are usually granted. Naturally one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise. But, there is no prohibition against an appellate court permitting an amendment at the appellate stage merely because the necessary material is not already before the court."*

19. After quoting the same it was observed in ***Gayathri Women's Welfare Association's*** case (supra) thus: -

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2 (2011) 2 SCC 330

3 (1979) 4 SCC 163

"These observations clearly indicate that one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if made at the appellate sage, the reason why it was not sought in the trial court."

20. It is to be noted that in the case on hand also as stated earlier, there was considerable delay in seeking amendment of the written statement or filing additional written statement and no sustainable reason was assigned as to why such prayers were not sought in the trial court while the original proceedings were pending before it. It is also relevant to note that such prayers were also not made before the High Court when the High Court initially disposed of RFA No. 1966 of 2007 as per judgment dated 29.10.2007 and also before this Court in CA No. 5201 of 2009 directed against the said judgment.

21. In the afore-mentioned contextual situation, the impact and effect of the order of remand passed by this Court in CA No.5201 of 2009, assumes great relevance. We have considered and come to a conclusion on this aspect as can be seen from paragraph 5 (supra). If the judgment of the High Court in RFA No.1996 of 2007 was not modified by this Court as per judgment in CA No.52001 of 2009 it would have had the effect of reviving the suit in full and in such eventuality, the suit should have been deemed to be pending. In that context, it is apposite to refer to paragraph 16 of the decision of this Court in ***United Bank of India, Calcutta v. Abhijit Tea Co. (P) Ltd. & Ors.***[4], which reads thus:-

"16. But, it is now well settled that an order of remand by the appellate court to the trial court which had disposed of the suit revives the suit in full except as to matters, if any, decided finally by the appellate court. Once the suit is revived, it must, in the eye of the law, be deemed to be pending — from the beginning when it was instituted. The judgment disposing of the suit passed by the Single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial court is restored, as a matter of law. The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit and if any

4 (2000) 7 SCC 357

interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded."

22. In view of the subsequent judgment of this Court in Civil Appeal No.5201 of 2009, dated 03.09.2009, directed against the order of remand in RFA No.1996 of 2007, the judgment of the High Court got merged in it. As per the same, the scope of proceedings before the trial Court was confined only to record the additional evidence of defendants and to transmit the same to the High Court so as to enable the High Court to dispose of RFA No.1996 of 2007 afresh. In short, in view of the settled position, the trial Court could not have expanded the scope of the proceedings before it contrary to the order of remand and hence, the trial Court was perfectly correct in rejecting the application for amending the written statement. In this context, the direction of the High Court of Madhya Pradesh in ***Rukhmanand*** v. ***Deenbandh***[5], assumes relevance. It reads thus:-

"It is settled law that when a suit is remanded for a decision afresh with certain specific directions, the jurisdiction of the trial Court after remand depends upon the terms of the order of remand and the trial Court cannot either consider matters other than those specified in the remand order, or enter into questions falling outside its limit. There was, therefore, no jurisdiction in the learned trial Judge to allow an amendment of the pleadings which was outside the scope of the remand order."

23. In the totality of the circumstances, especially taking into account the relevant reasons assigned by the High Court for disallowing the prayer for amendment of the written statement and taking note of the delay and the failure to offer any reason therefor and the reasons mentioned hereinbefore we see no reason at all to hold any perversity or illegality with the rejection of the prayer for amendment of the written statement.

24. We have noted the points of agreement in the judgments of the courts below. On the questions as to maintainability of the suit, whether the suit is bad for non- joinder of necessary parties as also whether the suit ought to have been held as abated against all the defendants for

5 1971 JLJ SN 159

non-substitution of all the legal heirs on the death of the original third defendant, the courts below returned concurrent findings against the appellants.

25. We are at a loss to understand as to how the plea regarding the maintainability of the suit arise for consideration. The contention of the appellants is that it was filed under section 6 of the Specific Relief Act and while disposing of C.A. No. 5201 of 2009 this court held against the respondent herein/ the plaintiff that the suit is not one under Section 6 of the Specific Relief Act. Ergo, according to the appellants, the relief claimed for possession by the plaintiff/the respondent herein was not entertainable as he being a person claiming only possessory title and the original defendant No. 2/ the deceased appellant No. 2 being the lawful owner of the suit schedule property. Though the contentions appear to be attractive and acceptable at the first blush the fact is that they are absolutely untenable and rightly held against them, in view of the materials on record.

26. It is true that the respondent herein/ the plaintiff had a case that O.S. No. 6456 of 1993 filed under Section 6 of the Specific Relief Act and even after, the judgment in C.A. No. 5201 of 2009 he seems to have attempted to resurrect the said question. But we are entirely in agreement with the High Court that the question whether the suit is one under Section 6 of the Specific Relief Act is not now available for consideration as it was held otherwise by this court in the judgment in C.A. No. 5201 of 2009 and as such it had attained finality. On the face of judgment in C.A. No. 5201 of 2009 the conclusion that O.S. No. 6456 of 1993 is not one under Section 6 of the Specific Relief Act is not revisitable. Evidently, even-after holding thus and upon modifying the judgment of the High Court dated 29.10.2007 this Court directed only for fresh disposal of RFA No. 1996 of 2007 and in that regard the trial Court was directed to record the additional evidence of the defendants and to transmit the same to the High Court along with a report.

27. Indisputably, the case of the respondent herein/the plaintiff is based on prior possession and illegal dispossession by the respondents. During his cross- examination also PW-1 the respondent herein deposed that he is not claiming a right of ownership in the subject suit. Therefore, the question is how the appellants can claim that such a suit is not maintainable. It is also a fact that after carefully scanning the pleadings

and evidence of the defendants, the High Court, as per the impugned judgment, held that what is raised by the defendants to resist the case of the plaintiff / the respondent herein is nothing but a plea that attracts the principle of "*jus tertii*", which in Latin means 'right of a third party.' In fact, it is a plea against a claim of interest in property, raised in defence that a third party has a better right than the claimant. In this context, it is relevant to refer to R.F.V. Heuston, *Salmond on the Law of Torts* 4 (17th Edn.,1977), in which it was observed that no defendant in an action of trespass can plead the *'jus tertii'* that the right of possession outstanding in some third person. Obviously, to buttress their contention that the suit is maintainable, based on the contention of the defendants that the right of possession is outstanding in some third person that attract the principal of *'jus tertii'* and that they, therefore, are not justified in challenging the maintainability of the suit the defendant relied upon the decision of this Court in ***Krishna Ram Mahale (Dead), By LRs v. Mrs. Shobha Venkat Rao***[6]. The impugned judgment would reveal that based on the exposition of law in the aforesaid decision and taking note of the factual position, the High Court has come to the conclusion that the challenge made by the defendants regarding the maintainability of the suit is untenable. In that context, the High Court has also considered the decision of this Court in ***Nair Service Society Ltd v. Rev. Father K. C. Alexander & Ors.***[7] In the said decision, this Court held that it could not be said that after a period of six months is over, a suit based on prior possession alone, is not possible and it in so far as relevant reads thus: -

"15. We agree as to a part of the reasoning but with respect we cannot subscribe to the view that after the period of 6 months is over a suit based on prior possession alone, is not possible. Section 8 of the Specific Relief Act, 1963 does not limit the kinds of suit but only lays down that the procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of six months. Under Section 9 of the Civil Procedure Code, it is all suits of civil nature are triable except suits of which their cognizance would either expressly or impliedly barred."

6 (1989) 4 SCC 131

7 AIR 1968 SC 1165

28. In **Nair Service Society Ltd. case** (supra) this Court quoted the following observations made in ***Mustapha Saheb v. Santha Pillai***[8]***,*** with agreement: **-**

".....that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that "possession was without any title."

29. In view of the aforesaid decisions and the factual position obtained in this case, in our opinion, the decisions sought to be relied on by the appellants are really of no assistance.

30. It is evident that on a careful consideration of the available pleadings of the defendants, the High Court held that they did not disclose their defence in their written statement and at the same time did not even contend therein that they are in possession of the suit property. According to us, in such circumstances, when the facts disclose no title in either party, at the relevant time, prior possession alone decides the right to possession of land in the assumed character of owner against all the world except against the rightful owner. In that context, it is worthy to refer to the maxim *'Possessio contra omnes valet praeter eur cui ius sit possessionis'* (he that hath possession hath right against all but him that hath the very right)".

31. In the light of the factual position obtained in this case and legal position settled in the decisions referred supra we are of the firm view that the High Court is correct in holding the question of maintainability of the suit in the affirmative and in favour of the respondent herein.

32. Now, we will consider the question whether the suit ought to have been held as abated against all the defendants as contended by the appellants for non- substitution and owing to the failure to implead all the legal representatives on the death of the original third defendant- Hanumaiah. The contention that the suit is bad for non-joinder of necessary parties is also raised based on the same reason. Hence, these questions are to be considered jointly. Obviously, the Courts below declined to uphold the said contentions of the defendants. It is to be noted that the appellants have also raised a contention that Sriman Madhwa Sangha which is

8 (1900) ILR 23 Mad 179

an organization and Sri Vittal Rao ought to have been impleaded as parties to the suit and in view of their non impleadment, the suit is bad for non-joinder of necessary parties. While considering the same, the fact that the aforesaid Sriman Madhwa Sangha and Sri Vittal Rao filed a petition for eviction against the respondent herein as HRC No.10020 of 1991 wherein it was stated that the first respondent therein (the respondent herein) is in occupation of a portion of the schedule property and he has illegally and unauthorizedly sub-let the other two portions of the property to the second and third respondents therein, namely Shri B. Ramachandra Rao and Sh. N. Murlidhara Rao on monthly rental of Rs.400/- and Rs.300/- respectively and has been collecting the rents from them, rightly taken into consideration by the High Court, requires to be borne in mind. That apart, the fact that while being examined as DW-1 the deceased second appellant herein had deposed that no possession was taken after execution of Exhibit D-1 agreement for sale dated 01.03.1993 as Sriman Madhwa Sangha had assured to secure possession and hand over the possession to the first appellant herein/ the first defendant. When that be the position and when the subject suit is one based on prior possession the appellants herein are not justified in contending that the suit is bad for non-joinder of Sriman Madhwa Sangha and Sri Vittal Rao.

33. As noticed earlier, the appellants have also contended that the suit ought to have been held as abated against all the defendants owing to non-substitution of all the legal representatives of the deceased defendant No. 3 upon his death. This contention is bereft of any basis and merits and was rightly repelled by the courts below. In that regard it is to be noted that the first appellant and deceased second appellant as also their father Hanumaiah were all arrayed in the suit as defendants and they were jointly defending the suit. Upon the death of original third defendant viz., Hanumaiah the original defendants No.1 and 2, who are sons of the original defendant No.3 fully and substantially representing the joint interest contested the suit and, thereafter, after suffering an adverse judgment and decree in the suit diligently preferred the appeal before the High Court which ultimately culminated in the impugned judgment and decree. Even thereafter, obviously they are diligently prosecuting the joint interest, even if the contention of joint interest is taken as correct, by filing the captioned appeal.

34. In the contextual situation the following decisions assumes relevance. The decision in ***Bhurey Khan v. Yaseen Khan (Dead) By LRs. And Ors.***[9] was referred to in the impugned judgment by the High Court to reject the aforesaid contention of the appellants therein viz. original defendant Nos. 1 and 2. In paragraph 4 of the decision in **Bhurey Khan's** case, this Court held thus:-

"……the estate of the deceased was thus sufficiently represented. If the appellant would not have filed any application to bring on record the daughters and the widow of the deceased the appeal would not have abated under Order 22 Rule 4 of the Code of Civil Procedure as held by this Court in Mahabir Prasad v. Jage Ram [(1971) 1 SCC 265 : AIR 1971 SC 742] . The position, in our opinion, would not be worse where an application was made for bringing on record other legal representatives but that was dismissed for one or the other reason. Since the estate of the deceased was represented the appeal could not have been abated."

35. In the decision in ***State of Andhra Pradesh through Principal Secretary and Ors. v. Pratap Karan and Ors.***[10], this Court held:-

"40. In the instant case, the plaintiffs joined together and filed the suit for rectification of the revenue record by incorporating their names as the owners and possessors in respect of the suit land on the ground inter alia that after the death of their predecessor-in-title, who was admittedly the pattadar and khatadar, the plaintiffs succeeded the estate as sharers being the sons of khatadar. Indisputably, therefore, all the plaintiffs had equal shares in the suit property left by their predecessors. Hence, in the event of death of any of the plaintiffs, the estate is fully and substantially represented by the other sharers as owners of the suit property. Therefore, by reason of non- substitution of the legal representative(s) of the deceased plaintiffs, who died during the pendency of the appeal in the High Court, entire appeal shall not stand abated. Remaining sharers, having definite shares in the estate of the deceased, shall be entitled to proceed with the appeal without the appeal having been abated. We, therefore, do not find any reason to agree with the submission made by the learned counsel appearing for the appellants."

9 1995 Supp. (3) SCC 331

10 (2016) 2 SCC 82

36. We are of the considered view that the same analogy is applicable in a case where even in the event of death of one of the defendants, when the estate/interest was being fully and substantially represented in the suit jointly by the other defendants along with deceased defendant and when they are also his legal representatives. In such cases, by reason of non-impleadment of all other legal heirs consequential to the death of the said defendant, the defendants could not be heard to contend that the suit should stand abated on account of non-substitution of all the other legal representatives of the deceased defendant. In this case, it is to be noted that along with the deceased 3rd defendant the original defendant Nos. 1 and 2 were jointly defending their joint interest. Hence, applying the ratio of the aforesaid decision and taking into account the fact that the appellants/ the original defendants No. 1 and 2 despite the death of original defendant No.3 defended the suit and preferred and prosecuted the first appeal. Upon the death of the second appellant the joint interest is being fully and substantially taken forward in this proceeding as well by the first appellant along with the substituted legal representatives of the deceased second appellant, we do not find any reason to disagree with the conclusions and findings of the courts below for rejecting the contention that suit ought to have held abated owing to the non- substitution of all the legal heirs of deceased third defendant against all defendants. For the same reason, the contention that the suit was bad for non-joinder of necessary parties of all his legal heirs/ representatives also has to fail

37. There is yet another reason why the contention that suit was bad for non-joinder of necessary parties due to failure to bring on record the legal representatives of the deceased third defendant Sri. Hanumaiah should fail. We have already noted the case which the defendants sought to bring in, without taking up necessary pleadings in the written statement filed in the suit. Relying on Exhibit D-1 it is contended that pursuant to the agreement for sale of the suit schedule property executed in favour of the first appellant herein/the first defendant jointly by Sriman Madhwa Sangha and Sri Vittal Rao its possession was handed over to the first appellant herein. We have already upheld its rejection by the High Court. However, what we are taking out of the said contention is that based on the same the appellants cannot raise a ground of non-joinder of necessary parties, as stated above, as the first appellant was arrayed as a party in the very suit itself and he being the person in favour of

whom the same was allegedly executed. The contention raised based on Exhibit D-2 sale deed was also repelled by the High Court and we have also upheld the same. We took note of the same again solely to stress upon the position that the case built upon the same can in no way be the basis for raising a contention of non-joinder of necessary party/parties. This is because the deceased second appellant who was shown as the vendee thereunder was the original second defendant in the suit. For the reasons above also the contention of non-joinder of necessary parties must fail.

38. We have already found that the courts below are correct in holding that the defendants did not have a case of ownership over the suit schedule property and such a case sought to bring out based on Exhibit D-2 was repelled by the High Court and we have upheld the same. They have also failed to establish any better claim for possession. The finding of the High Court that any volume of evidence sans appropriate pleadings would be no avail is the correct exposition of law. In the decision in ***Duggi Veera Venkata Gopala Satyanarayana v. Sakala Veera Raghavaiah and Anr.***[11], this Court agreed with the observation made in the earlier decision in ***Hasmat Rai & Anr. v. Raghunath Prasad***[12] that any amount of proof offered without pleadings is generally of no relevance. In Duggi Veera Venkata Gopala Satyanarayana (supra) with respect to the aforesaid observations in Hasmat Rai & Anr. (supra) this Court held, 'we respectfully agree with the above statement of law and reiterate the same.' Further, it is also relevant to refer to paragraph 85.6 of the decision in ***Union of India v. Ibrahim Uddin and Anr.***[13]**,** which reads thus:-

"85.6. The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and the parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it."

11 (1987) 1 SCC 254

12 (1981) 3 SCC 103

13 (2012) 8 SCC 148

39. In such circumstances, we have absolutely no hesitation to hold that the original defendants failed to raise sufficient and appropriate pleadings in the written statement that they have better right for possession of the suit properties. No amount of proof offered without appropriate pleadings would have any relevance. The Courts below have rightly relied on the evidence of PW-5 to hold forceful dispossession of the defendants from 'B' schedule property. Nothing is on record to uphold the said finding.

40. After considering and answering the questions, mentioned as above, we bestowed our anxious consideration to find whether the impugned judgment is inflicted with perversity or any patent illegality warranting interference in invocation of the power under Article 136 of the Constitution of India. The sound reasons given by the courts below persuade us to answer it in the negative. After carefully considering the evidence on record the Trial Court arrived at the conclusion that the respondent herein/ the plaintiff is entitled to get back the possession of suit schedule property from which he was dispossessed and even after careful consideration of the additional evidence recorded and transmitted to the High Court by the trial court and considering all contentions and aspects with reference to plethora of decisions the High Court only confirmed the judgment and decree of the trial court. As observed earlier, when the concurrent findings of the courts below are the outcome of the rightful consideration and appreciation of materials on record they do not call for any interference.

41. Thus, taking into account the fact that the suit was indisputably filed based on prior permission and illegal dispossession we do not find any reason to place Exhibit D-2 sale deed executed (even if by the owners) in favour of the deceased second appellant to displace the concurrent findings of the courts below on the entitlement of the respondent herein/ the plaintiff for a decree as granted by the trial court and confirmed the High Court. In the said situation, this appeal has to fail. Consequently, it is dismissed. In the circumstances, there will be no order as to costs.

Headnotes prepared by: Nidhi Jain
(Assisted by : Rakhi, LCRA)

Result of the case: Appeal dismissed