

(2016) 10 DEL CK 0098
In the Delhi High Court
Case No : RSA No. 297 of 2015.

**North Delhi Municipal Corporation - Appellant @HASH Prashant Narula
and Others**

Date of Decision : 05-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 37, Section 38

Citation : (2016) 234 DLT 56 : (2016) 160 DRJ 113

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Ms. Mini Pushkarna, Standing Counsel for NDMC with Ms. Vasundhara Nayyar, Ms. Mohila Yadav and Ms. Anushruti, Advocates, for the Appellant; Mr. Ravinder Sethi, Sr. Advocate with Mr. Rajiv Kumar Ghawana, Mr. Puneet Sharma, Mr. R.H. Sharma and R.D. Sharma,

Final Decision : Allowed

Judgement

Valmiki J. Mehta, J. - This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the North Delhi Municipal Corporation/defendant against the concurrent Judgments of the courts below; of the Trial Court dated 5.12.2013 and the First Appellate Court dated 23.2.2015; by which the courts below have decreed the suit for declaration and permanent injunction filed by the respondent nos. 1 and 2/plaintiffs with respect to the suit property failing in Khasra no. 262, 258 and 217/4 of Village Bhrola, Delhi.

Neither in the plaint nor in the site plan filed with the plaint area of the suit property is specified, however, counsel for respondent nos. 1 and 2/plaintiffs state that the suit property is a plot admeasuring 300" X 80" as stated in the Agreement to Sell/Ex. PW 1/3 dated 4.12.1998 executed by respondent no. 2/Sh. Jai Prakash/plaintiff no. 2 in favour of respondent no. 1/Sh. Prashant Narula/plaintiff no. 1. The suit has been decreed by the courts below in favour of respondent nos. 1 and 2/plaintiffs by declaring that the appellant is having no right, title and interest in the suit land depicted in the site plan Ex. PW 1/4 and a decree for permanent injunction is passed restraining the appellant/defendant

no. 1 from raising any construction on the suit land.

2. The facts of the case are that the plaintiffs/respondent nos. 1 and 2 filed the subject suit for declaration and permanent injunction with respect to the suit property pleading that they are the owners in possession of the suit property. Respondent no. 2/plaintiff no. 2 was pleaded to be the owner of the suit property by virtue of the suit property belonging to his forefathers as shown in the revenue record, and that respondent no. 2/plaintiff no. 2 had transferred rights in the suit property to respondent no. 1/plaintiff no. 1 in terms of an Agreement to Sell dated 4.12.1998/Ex. PW1/3. The subject suit was filed pleading that the appellant/defendant no. 1 sometimes allows persons to use the suit property for holding marriages although appellant/defendant no. 1 has no right and title over the suit property which is owned by respondent no. 2/plaintiff no. 2. Respondent nos. 1 and 2/plaintiffs therefore served a Notice dated 7.12.2004 upon the appellant/defendant no. 1 not to allow any person to use the plot, but instead the appellant/defendant no. 1 tried to raise a boundary wall over the suit property and therefore the subject suit came to be filed. It was also the case of respondent nos. 1 and 2/plaintiffs that the suit property had never been acquired and therefore the appellant/defendant no. 1 had no right, title and interest to the suit property.

3. Appellant/defendant no. 1 had contested the suit and denied possession and title of the plaintiffs/respondent nos. 1 and 2 to the suit property.

It was pleaded that the appellant/defendant no. 1 was the owner of the suit property, either because the same had earlier vested in the gaon sabha and that consequently when the village was urbanised under Section 507 of the Delhi Municipal Corporation Act, 1957, then by virtue of Section 150 (3) of the Delhi Land Reforms Act, 1954, the suit property vested in the Union of India or that the suit property was in the ownership of the Municipal Corporation of Delhi because of the fact that the colony was regularised by the Municipal Corporation of Delhi in terms of its Resolutions dated 14.12.1960/Ex. DW 1/3 and 16.9.1964/Ex. DW 1/5 whereby parks and open areas/common spaces such as the suit property stands vested in the appellant/defendant no. 1. The suit property as per the relevant resolutions and the accompanied lay out plans of the appellant/defendant no. 1 was shown to be a park. Suit was hence prayed to be dismissed.

4. Defendant no. 2/respondent no. 3 is M/s Adarsh Nagar Green Residents Welfare Association (Regd.) who denied the claim of the plaintiffs/respondent nos. 1 and 2 by pleading that the suit land is Government land and it is in exclusive possession of the appellant/defendant no. 1 for over forty years.

5. After pleadings were complete, the trial court on 9.12.2005 framed the following issues:-

"1. Whether the plaintiff is entitled to the relief of declaration as prayed for?

OPP

2. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

OPP

3. Whether the plaintiff has valued his suit correctly for the purpose of court fees and jurisdiction? Onus on both 4. Whether the plaintiff no. 1 has not locus standi to file or institute the present suit?

OPD

5. Whether the suit of the plaintiff is barred under Sections 477/489 of Delhi Municipal Corporation Act?

OPD

6. Whether the suit of the plaintiff is not maintainable in view of Order 7, Rule 3 of Code of Civil Procedure as stated in para 1 of the preliminary objections of the written statement of MCD?

OPD

7. Relief."

6. Parties led evidence and proved documents which is stated in paragraphs 18 to 27 of the judgment of the trial court and which paragraphs read as under:-

"Plaintiffs" Evidence

18. The plaintiffs have examined Mr. Desh Deepak Tyagi as PW 1. Mr. Desh Deepak Tyagi is the son of plaintiff no. 2 and is also an attorney of both the plaintiffs. He has tendered his affidavit Ex. P-1 in evidence. In his affidavit, he reiterated the averments made in the plaint. He asserted that the plaintiff no. 2 is a co-owner of the suit property. He stated that the plaintiff no. 2 has entered into an agreement to sell with the plaintiff no. 1 and that the said agreement to sell was executed on 04.12.1998. He stated that possession of the suit property was handed over to the plaintiff no. 1 in part performance of the agreement to sell. He further stated that the defendant sometimes allows third parties to use an adjoining park without clarifying that it is only that park which is to be used and as a result, those persons enter and use the suit property. PW1 identified and relied upon a General Power of Attorney as Ex. PW 1/1. He identified the khatoni of the suit property as Ex. PW 2/1. He identified the agreement to sell as Ex. PW 1/3, the site plan as Ex. PW 1/4, notice dated 07.12.2004 as Ex. PW 1/5, copy of plan attached to the notice as Ex. PW 1/6, reply of post office as Ex. PW 1/7, khasra girdawari as Ex. PW 2/2, a wedding invitation card as Ex. PW 1/9 and copy of a resolution passed by the defendant no. 1 as mark "A". PW1 was cross-examined on behalf of the defendant no. 1. After amendment of written statement and after impleadment of defendant no. 2, PW1 was again cross-examined on behalf of defendants. PW 1 was then discharged.

19. The plaintiffs examined Mr. Salim Ahmed, Patwari as PW2. PW2 identified the

khatoni as Ex. PW2/1 and girdawari as Ex. PW2/2. He was cross-examined and was then discharged.

20. The next witness brought by the plaintiffs was Mr. Prashant Narula (plaintiff no. 1) as PW3. PW3 tendered his affidavit Ex. P-3 in evidence. In his affidavit, he stated that he had entered into an agreement to sell with respect to the suit property. He deposed that the defendant no. 1 allows the public to use Subhash Park and those persons mistakenly enter into the suit property. He asserted that he is the owner of the suit property. PW3 was cross-examined on behalf of defendants. After the defendant no. 1 amended its written statement and after the defendant no. 2 was impleaded as a party to the suit, the said defendants again cross-examined PW3. PW3 was then discharged.

21. No other evidence was led by the plaintiffs. Plaintiffs' evidence was closed.

Defence Evidence

22. The defendant no. 2 did not adduce any evidence in support of its case.

23. The defendant no. 1 led evidence. Before amendment of written statement, the defendant no. 1 had examined Dr. Vidhya Sagar Sharma, Mr. Puran Chand and Mr. Dharam Chand Batra as DW 1, DW 2 and DW 3 respectively. They had tendered their affidavits in evidence and had been cross-examined on behalf of plaintiffs.

24. After amendment of written statement, the defendant no. 1 examined Mr. Nanak Chand, Deputy Director, Horticulture, North Delhi Municipal Corporation as DW 1. Mr. Nanak Chand tendered his affidavit Ex. D1W1/A in evidence. In his affidavit, he stated that North Delhi Municipal Corporation is the owner and is in possession of the suit property. He stated that the suit property was maintained as a park. He further stated in his affidavit that there are two rooms and a urinal on the suit property and that the defendant no. 1 has been booking the suit property for holding events for the benefit of local residents. He further stated in his affidavit that the standing committee of North Delhi Municipal Corporation has passed resolution dated 14.12.1960 thereby sanctioning the regularisation plan of Adarsh Nagar, Delhi.

He stated that the lay out plan was modified by resolution dated 16.09.1964. He stated that in the original lay out plan as well as modified lay out plan, the suit property has been shown as a park. He further stated that the "market community" of Municipal Corporation of Delhi passed resolution dated 20.01.1978 thereby taking "on record" all vacant municipal land including the suit property. He stated that the plaintiffs have no right, title or interest over the suit property. The witness has identified and relied upon the following documents:

- a. Lay out plan as Ex. DW 1/1;
- b. Photographs of the suit property as Ex. DW 1/2;
- c. Copy of resolution dated 14.12.1960 as Ex. DW 1/3;

- d. Layout plan as Ex. DW 1/4;
- e. Copy of resolution dated 16.09.1964 as Ex. DW 1/5;
- f. Modified layout plan as Ex. DW 1/6;
- g. Copy of resolution dated 20.01.1978 along with annexure as Ex. DW 1/7 collectively.

DW 1 was cross-examined and was then discharged.

25. The defendant no. 1 examined Mr. Abhay Singh as D1W2. Mr. Abhay Singh identified and relied upon resolutions dated 14.12.1960 and 16.09.1964 as Ex. DW 1/3 and Ex. DW 1/5 respectively. He was then discharged.

26. The defendant no. 1 then examined Mr. Hemant Kumar, Rent Collector as D1W3. The said witness identified the record of vacant municipal land as Ex. DW 1/7. He was cross-examined and was then discharged.

27. The defendant no. 1 then examined Mr. Sunder Lal, architectural assistant as D1W4. The said witness identified the copy of lay out plan as Ex. DW 1/5. The witness was cross-examined and was then discharged. The defendant no. 1 closed its evidence."

(emphasis is mine)

7. Trial court also before discussing the issues has referred to a Local Commissioner being appointed to inspect the suit property and who had reported that the suit property is an open plot with no gate, a small boundary wall and was used for wedding purposes and that the suit property lies in Adarsh Nagar and not in Majlis Park. Local Commissioner, however, was not able to ascertain the khasra numbers of the suit property. This has been stated in paragraph 28 of the judgment of the trial court which reads as under:-

"28. By order dated 07.11.2009, the Ld. Predecessor of the Court appointed a local commissioner to inspect the suit property. The local commissioner Mr. Mayank Bansal, Advocate filed his report. In his report, he stated that the suit property comprises of an open plot with no gate, a small boundary wall on three sides and a high wall on the northern side. He further stated that the plot was being used for a wedding. He also stated that queries revealed that the suit property lies in Adarsh Nagar and not in Majlis Park. He further stated that no dispensary was found to be existing on the suit property. He stated that he was unable to ascertain the khara number of the suit property."

8. Trial court also dealt with issue nos. 1 and 2 together and under issue nos. 1 and 2 pertaining to entitlement of the plaintiffs to the reliefs of injunction and declaration cases of the parties along with the evidences led have been discussed under various heads being:-

(i) Whether evidence points towards voluntary transfer or acquisition of land in favour of the defendant no. 1;

- (ii) Whether evidence suggests adverse possession or even possession of the defendant no. 1;
- (iii) Whether evidence shows acquisition of ownership by vesting from gram sabha;
- (iv) Presumption and onus of proof;
- (v) Effect of lay out plan;
- (vi) Value of testimony of PW1;
- (vii) Value of testimony of PW3;
- (viii) Whether the suit property falls under the khasra numbers mentioned in the khatoni and khasra girdawari; demarcation of the suit property;
- (ix) Contention of defendant no. 1 that plaintiffs' evidence is different from their plaint;
- (x) Use and occupation of the suit property;
- (xi) Whether the suit is not maintainable for want of prayer for recovery of possession; etc. etc.....

9. The aforesaid subjects and other subjects have been dealt with by the trial court in a prolix judgment from paragraphs 31 to 160 from internal pages 9 to 71 of the judgment of the trial court. Respondent nos. 1 and 2/plaintiffs have been held entitled to the reliefs of declaration and injunction by holding that respondent nos. 1 and 2/plaintiffs were in possession of the suit property and that the appellant/defendant no. 1 had failed to prove its case of ownership of the suit property and which was proved to be of the respondent nos. 1 and 2/plaintiffs. The first appellate court has upheld the findings and conclusions of the trial court by its impugned Judgment dated 23.2.2015.

10. Issue nos. 1 and 2 are the main issues which are called for decision in the present second appeal and which issues can be divided under the following heads as argued on behalf of the parties:-

- (i) Whether the appellant is the owner of the suit land or the respondent nos. 1 and 2 are the owners of the suit land?
- (ii) Even if the appellant is not the owner of the suit land then whether the appellant has a right to be in possession and management of the suit land in view of the ratio of the judgment of the Supreme Court in the case of Pt. Chet Ram Vashist (Dead) by LRs. v. Municipal Corporation of Delhi, (1995) 1 SCC 47?
- (iii) Who is in possession of the suit land, i.e whether it is the appellant who is in possession of the suit land or whether the respondent nos. 1 and 2 are in possession of the suit land?
- (iv) If respondent nos. 1 and 2 are not in possession of the suit land whether the

suit as framed only for declaration and injunction would be maintainable in the absence of the respondent nos. 1 and 2 being in physical possession of the suit land?

11. The following substantial questions of law, therefore, arise for determination in this second appeal:-

"(i) Whether the courts below have committed gross illegality and perversity in holding that the respondent nos. 1 and 2/plaintiffs are the owners of the suit land in view of the fact that the specific suit land of 2667 sq. yds of the subject khasra numbers of the suit land are not shown to be owned by respondent no. 2/plaintiff no. 2 and his forefathers in the revenue record, inasmuch as, portion of the land of the subject khasra number is not owned by the respondent no. 2/plaintiff no. 2 and his forefathers because the same was sold to M/s Capital Housing Limited in terms of the Sale Deed dated 28.4.1958 by the forefathers of respondent no. 2/plaintiff no. 2?

And

Whether the courts below have not committed complete illegality and perversity in holding that the documents Ex. PW2/1 and PW2/2 being khatoni and khasra girdawari respectively of the suit land have proved ownership of the suit land of respondent nos. 1 and 2/plaintiffs, inasmuch as, the specific khasra numbers which are the subject matter of the suit in these very revenue record documents are shown to be also in the co-ownership of M/s Capital Housing Limited as M/s Capital Housing Limited as 7th co-owner?

(ii) Whether the courts below have arrived at a finding and conclusion which is ex facie illegal in view of the ratio of the judgment of the Supreme Court in the case of Pt. Chet Ram Vashist (supra) which holds that when a lay out plan is approved of a colony under Section 313 of the Delhi Municipal Corporation Act, 1957, then, even if land of the owner is not acquired, such land of an owner which is public land being street, park, open space, etc etc, the same will vest for management and use in the corporation and the legal owners are only owners in trust and they cannot sell the land owned by them or use it in any manner for their benefit?"

12(i). As regards ownership of the suit land, in my opinion, appellant/defendant no. 1 cannot be held to be the owner of the same in view of the fact that the appellant/defendant no. 1 has not proved that the suit land was acquired under the Land Acquisition Act, 1894, and also because the appellant/defendant no. 1 has failed to prove that on the date of urbanization of the village in which the suit land was located, the suit land was village common land vesting in the gaon sabha.

(ii) Admittedly, no document has been filed by the appellant/defendant no. 1 to show the suit land being acquired by the appellant or by the Union of India under the Land Acquisition Act and then transferred to the appellant, and therefore,

appellant/defendant no. 1 is not the owner on account of acquisition of the suit land.

(iii) As regards the land vesting in gaon sabha on the date of urbanization, it is noted that no documentary evidence whatsoever to prove this fact was led by the appellant/defendant no. 1 in the trial court. Even if we take as documentary evidence being the khatoni of 2008-09 filed by the appellant/defendant no. 1 in the first appellate court, and which revenue record/khatoni of the suit land for the year 2008-09 shows that the suit land is barren land owned by gaon sabha, yet, the issue is that whether this document being the khatoni of the year 2008-09 is enough for proving ownership of the suit land of the appellant/defendant no. 1. In my opinion, this solitary document cannot show ownership of the appellant/defendant no. 1 of the suit land because of various reasons. Firstly so that the suit land vested in the Union of India under Section 150 (3) of the Delhi Land Reforms Act as a pre-condition the vesting of the suit land in the gaon sabha has to be shown as on the date of urbanization of the village when the notification under Section 507 of the Delhi Municipal Corporation Act was issued, and, there is no evidence led as to when is this notification issued under Section 507 of the Delhi Municipal Corporation Act, i.e there is no evidence that urbanization notification was issued in the year 2008-09 and which is the year of khatoni filed by the appellant showing the suit land to be in the ownership of gaon sabha as barren land. Secondly, the subject suit itself had already been filed on 7.3.2005 and by which date there is no dispute that the suit land had already been urbanized way back. Unfortunately, it has not come on record either in the courts below or even before this Court, by either of the parties, that what is the date of the notification under Section 507 of the Delhi Municipal Corporation Act urbanizing the village in which the suit land is located. I had put a specific query to counsels for all the parties but none of the counsels could refer to the document being the notification under Section 507 of the Delhi Municipal Corporation Act on record nor could they give the date of this notification. Therefore, I cannot hold the appellant/defendant no. 1 to be the owner of the suit land on account of the suit land being vested in the gaon sabha on the date of urbanization and therefore vesting in the Union of India by virtue of Section 150 (3) of the Delhi Land Reforms Act.

13(i) The related issue is as to whether the respondent nos. 1 and 2/plaintiffs are and can be declared to be the owners of the suit land. For this purpose, the respondent nos. 1 and 2/plaintiffs have relied upon the testimony of Patwari Salim Ahmed who deposed as PW2 for the respondent nos. 1 and 2/plaintiffs and he proved the khatoni and khasra girdawari as Ex. PW2/1 and Ex. PW2/2 respectively. A reference to these documents Ex. PW2/1 and Ex. PW2/2 shows that by these documents it cannot be held that respondent nos. 1 and 2/plaintiffs are the owners of the suit land for various reasons.

(ii) Firstly, mutation in the revenue record is only an indication of title and mutation in the revenue record does not itself confer title or give finality to the

title.

(iii) Secondly, even assuming that the mutation record will confer title in the facts of the present case because the suit land is shown to be of the forefathers of the respondent no. 2/plaintiff no. 2, yet, the total area of khasra nos. 262, 258 and 217/4 in these revenue records is shown as to be a total of 113 bighas and 2 biswas. (One bigha is 1000 sq. yards and 1 biswa is 50 sq. yards).

The suit land comprised in subject khasra numbers is shown to be in the ownership, not only of different persons who are the forefathers of the respondent no. 2/plaintiff no. 2, but also the co-ownership to the extent of 7th of the total of 113 bighas and 2 biswas of suit land including of subject khasra numbers is shown to be of a company M/s Capital Housing Limited. There is no demarcation report existing in the record of this Court nor is there any akshajara (revenue map) proved by the respondent no. 2/plaintiff no. 2 demarcating the different portions of the total area of 113 bighas and 2 biswas, including of suit land of subject khasras falling in this total land, in the names of different forefathers of the respondent no. 2/plaintiff no. 2 with the specific demarcated portion in the ownership of M/s Capital Housing Limited.

Therefore, in the absence of any demarcation it is not possible for this Court to hold that the suit land having an area of 300" X 80" i.e 24,000/- sq. ft or 2667 sq. yards or 2 bighas and 13 biswas only was of the forefathers of respondent no. 2/plaintiff no. 2 and did not fall to the share of the company M/s Capital Housing Limited who were also the co-owners as per Ex. PW2/1 and Ex. PW2/2.

While on this aspect it needs to be mentioned that appellant/defendant no. 1 has filed in this Court a sale deed executed by the forefathers of respondent no. 2/plaintiff no. 2 in favour of M/s Capital Housing Limited. It is agreed by the counsels for the parties that this Court can refer to this certified copy of the sale deed (and which in any case this Court could have because of Section 90 of the Indian Evidence Act, 1872 because it is a document more than 30 years old), and a reference to this sale deed shows that various forefathers of respondent no. 2/plaintiff no. 2 along with their brothers etc had sold 7th share in lands belonging to them, including 7th share of the suit land comprised in subject khasra nos. 258, 262 and 217/4 (suit land) to M/s Capital Housing Limited.

This sale deed is with respect to a total area of 611 bighas and 13 biswas. The sale deed also mentions about M/s Capital Housing Limited after taking over of possession of the subject land under an earlier agreement to sell, for the land preparing a scheme and lay out plan for development and construction of residential houses, buildings, etc and developed into a colony known as Adarsh Nagar i.e. on the land subject matter of the sale deed a colony was carved out.

The sale deed is accompanied by a detailed map/site plan as to which land is transferred to M/s Capital Housing Limited and which land totals to, as already stated above, an area of 611 bighas and 13 biswas and part of which land is the suit land which is comprised in khasra nos. 262, 258 and 217/4.

(iv) Therefore, it is not possible to hold respondent nos. 1 and 2/plaintiffs as the owners of the suit land because there is no demarcation report on record or any document showing demarcation that the suit land is that land which did not vest with M/s Capital Housing Limited and continued to vest with the forefathers of respondent no. 2/plaintiff no. 2 and that the suit land is this land. I note that on behalf of the appellant/defendant no. 1 it is vehemently contended and argued that the suit land in fact is part of the land which was sold under the Sale Deed dated 28.4.1958 by forefathers of the respondent no. 2/plaintiff no. 2 to M/s Capital Housing Limited and which M/s Capital Housing Limited developed a residential colony on the entire land which came to be owned by the M/s Capital Housing Limited under the Sale Deed dated 28.4.1958 and that the suit land in fact is part of this developed colony and shown as a park. Therefore, I hold that in the absence of any demarcation existing on record distributing land as between M/s Capital Housing Limited and the forefathers of the respondent no. 2/plaintiff no. 2, then as to whether the suit land falls in the land which was sold to M/s Capital Housing Limited or remained with the forefathers of the respondent no. 2/plaintiff no. 2, is not clear and hence this Court cannot hold that the suit land forms that part of the land which remained with and continued to vest in the ownership of the respondent no. 2/plaintiff no. 2 and his forefathers and that in fact in my opinion, rightly as will be discussed below, the suit land in fact became part of the colony which was developed by M/s Capital Housing Limited on the land which was purchased by it under the Sale Deed dated 28.4.1958 and which included land in the subject khasra nos. 262, 258 and 217/4. To complete the narration, I would like to note that the Sale Deed dated 28.4.1958 in para 1 refers that the total area transferred to M/s Capital Housing Limited in the subject khasra no. 262, 258 and 217/4 is an area of 56 bighas and 12 biswas, once again showing that unless there is specific demarcation evidence on record of this case of the different areas of M/s Capital Housing Limited and of the respondent no. 2/plaintiff no. 2 and his forefathers, it cannot be held that the suit land is that part of the subject khasra numbers which did not fall in the ownership of M/s. Capital Housing Limited and continued in the ownership of respondent no. 2/plaintiff no. 2 and his forefathers.

(v) Therefore, it is held that even the respondent nos. 1 and 2/plaintiffs have failed to prove their ownership of the suit land.

14(i) For the sake of arguments, let me now proceed on the basis and assumption that respondent no. 2/plaintiff no. 2 and his forefathers continued to be the owners of the suit land. Even if the respondent nos. 1 and 2/plaintiffs continued to remain the owners of the suit land, yet, in my opinion they would not have such ownership of the suit land so as to use and construct upon the same, because, the suit land is now part of a developed colony and shown as an open park/land in terms of the resolutions and lay out plans Ex. DW 1/4 and Ex. DW 1/6 of the appellant/defendant no. 1 regularising the entire colony on the land and which is proved by the Resolutions dated 14.12.1960/Ex. DW 1/3 and 16.9.1964/Ex. DW 1/5. I note that on behalf of respondent nos. 1 and 2/

plaintiffs, it was very vehemently argued that these resolutions being only photocopies are not proved and thus cannot be relied upon however, the lay out plans of the colony which have been proved as Ex. DW 1/4 and Ex. DW 1/6, in my opinion have been duly proved and exhibited. This argument of respondent nos. 1 and 2/plaintiffs of the lay out plans Ex. DW 1/4 and Ex. DW 1/6 not being proved as they being only photocopies is a misconceived argument because it is seen that these site plans are part of and are attached to the Resolutions of the appellant/defendant no. 1 dated 14.12.1960/Ex. DW 1/3 and 16.9.1964/Ex. DW 1/5 and these are in fact certified copies of the record in possession and custody of the appellant. As per Section 493 of the Delhi Municipal Corporation Act certified copy can be taken as the original and there is no need of bringing an original in court to prove the certified copies. Therefore, I reject the argument that documents being the lay out plans Ex. DW 1/4 and Ex. DW 1/6 are not proved because they are only photocopies, inasmuch as, actually these photocopies are certified copies of the appellant/defendant no. 1.

(ii) Also, there is another reason to reject the argument urged on behalf of the respondent nos. 1 and 2/plaintiffs that the site plans/lay out plans Ex. DW 1/4 and Ex. DW 1/6 are not proved, inasmuch as, after objection that these documents are only photocopies was raised by the respondent nos. 1 and 2/plaintiffs (objection to the exhibition of the lay out plans during the testimony of DW 1/Sh. Nanak Chand), appellant thereafter led evidence of D1W4/Mr. Sunder Lal, Architectural Assistant and who had brought the original lay out plans. In the deposition of D1W4/Mr. Sunder Lal there are two typing mistakes in referring to lay out plans certified copies of which were already exhibited as Ex. DW 1/4 and Ex. DW 1/6 as wrongly being Ex. DW 1/3 and Ex. DW 1/5, however, actually Ex. DW 1/3 and Ex. DW 1/5 in the deposition of D1W4/Mr. Sunder Lal actually are Ex. DW 1/4 and Ex. DW 1/6 because reference to exhibits is reference to lay out plans and lay out plans are not Ex. DW 1/3 and Ex. DW 1/5 which are, in fact, the Resolutions of the appellant/defendant no. 1 dated 14.12.1960 and 16.9.1964. Therefore, not too much capital can be made by the respondent nos. 1 and 2/plaintiffs of the typing mistake in recording the deposition of D1W4/Mr. Sunder Lal.

(iii) There is another way of looking at the matter and which is that the site plans are part of the Resolutions of the appellant dated 14.12.1960 and 16.9.1964 proved respectively as Ex. DW 1/3 and Ex. DW 1/5, and it is seen that the lay out plans are part of these resolutions of the years 1960 and 1964, and therefore when reference is made to Ex. DW 1/3 and Ex. DW 1/5 in the statement of D1W4/Mr. Sunder Lal, the reference is to these resolutions as a whole which are not only the resolutions but also the lay out plans annexed to those resolutions because the lay out plans form part of the resolutions on account of such lay out plans being lay out plans of the colony which were approved by the appellant in terms of its resolutions of 1960/Ex. DW 1/3 and 1964/Ex. DW 1/5.

Therefore, I reject the argument urged on behalf of the respondent nos. 1 and 2/

plaintiffs that the lay out plans and the resolutions Ex. DW 1/3 to Ex. DW 1/6 are not duly proved in accordance with law.

15(i) Once we see that the lay out plans are duly proved, it is also seen that indubitably the suit property forms part of these lay out plans by which the colony is regularised and the suit land is shown as open land within the colony.

For cross-reference purposes, reference is once again invited to the sale deed in favour of M/s Capital Housing Limited and as per which a part of the subject khasra numbers also form part of the land which was sold to M/s Capital Housing Limited and which M/s Capital Housing Limited had developed a colony in the total land which was acquired under its Sale Deed dated 28.4.1958. Therefore, the appellant has proved that the suit land is a land which forms part of the approved and regularised colony which was the subject matter of the resolutions and the lay out plans Ex. DW 1/3 to Ex. DW 1/6.

(ii) It is now to be then seen that what in law is the effect of the suit land becoming part of a regularised colony as per a lay out plan, taking that ownership thereof did not vest with the appellant because it was not acquired and was not part of gaon sabha land which would vest in the Union of India because of Section 150 (3) of the Delhi Land Reforms Act. The answer to this is contained in the ratio of the judgment in the case of Pt. Chet Ram Vashist (supra) and therefore let us examine the ratio of this judgment. The relevant paras of this judgment relied upon by both the parties are paras 4 to 6, and these paras read as under:-

"4. Section 313 of the Act reads as under:

"313. Lay-out plans.? (1) Before utilising, selling or otherwise dealing with any land under Section 312, the owner thereof shall send to the Commissioner a written application with a lay out plan of the land showing the following particulars, namely:

(a) The plots into which the land is proposed to be divided for the erection of buildings thereon and the purpose or purposes for which such buildings are to be used;

(b) The reservation or allotment of any site for any street, open space, park, recreation ground, school, market or any other public purposes;

(c) The intended level, direction and width of street or streets;

(d) The regular line of street or streets;

(e) The arrangements to be made for levelling, paving, metalling, flagging, channelling sewerage, draining, conserving and lighting street or streets.

(2) The provisions of this Act and the bye-laws made thereunder as to width of the public streets and the height of buildings abutting thereon shall apply in the case of streets referred to in sub-section (1) and all the particulars referred to in

that sub-section shall be subject to the sanction of the Standing Committee.

(3) Within sixty days after the receipt of any application under sub-section

(1) the Standing Committee shall either accord sanction to the layout plan on such conditions as it may think fit or disallow it or ask for further information with respect to it.

(4) Such sanction shall be refused?

(a) if the particulars shown in the lay-out plan would conflict with any arrangements which have been made or which are in the opinion of the Standing Committee likely to be made for carrying out any general scheme of development of Delhi whether contained in the master plan or a zonal development plan prepared for Delhi or not; or (b) if the said lay-out plan does, not conform to the provisions of this Act and bye-laws made thereunder; or (c) if any street proposed in the plan is not designed so as to connect at one end with a street which is already open.

(5) No person shall utilise, sell or otherwise deal with any land or lay-out or make any new street without or otherwise than in, conformity with the orders of the Standing Committee and if further information is asked for, no step shall be taken to utilise, sell or otherwise deal with the land or to layout or make the street until orders have been passed upon receipt of such information:

Provided that the passing of such orders shall not be in any case delayed for more than sixty days after the Standing Committee has received the information which it considers necessary to enable it to deal with the said application.

(6) The lay-out plan referred to earlier in this section shall if so required by the Standing Committee, be prepared by a licensed town planner."

None of its provisions entitled the Corporation to claim any right or interest in the property of the owner. Sub-section (3) empowers the Standing Committee to accord sanction to the lay-out plan on such conditions as it may think fit. The expression, "such conditions" has to be understood so as to advance the objective of the provision and the purpose for which it has been enacted. The Corporation has been given the right to examine that the lay-out plan is not contrary to any provision of the Act or the rules framed by it. For instance a person submitting a lay out plan may be required to leave certain open space or he may be required that the length and width of the rooms shall not be less than a particular measurement or that a coloniser shall have to provide amenities and facilities to those who shall purchase land or building in its colony. But the power cannot be construed to mean that the Corporation in the exercise of placing restrictions or imposing conditions before sanctioning a lay-out plan can also claim that it shall be sanctioned only if the owner surrenders a portion of the land and transfers it in favour of the Corporation free of cost. That would be contrary to the language used in the Section and violative of civil rights which vests in every owner to hold his land and transfer it in accordance with law. The

resolution passed by the Corporation directing the appellant to transfer the space reserved for tube wells, school and park in its favour free of cost was depriving the owner of its property and vesting it in the Corporation against law. The finding of the High Court that such condition did not amount to transfer of ownership but it was only a transfer of the right of management cannot be accepted. The two rights, namely, of ownership and of management, are distinct and different rights. Once a vacant site is transferred in favour of another free of cost then the person transferring it ceases to be owner of it. Whereas in transfer of right of management the ownership continues with the person to whom the property belongs and the local authority only gets rights to manage it. But the conditions imposed by the Standing Committee clearly meant to transfer the ownership in favour of the Corporation. The Corporation as custodian of civil amenities and services may claim and that would be proper as well, to permit the Corporation to regulate, manage, supervise and look after such amenities but whether such a provision can entitle a Corporation to claim that such property should be transferred to it free of cost appears to be fraught with insurmountable difficulties. The law does not appear to be in favour of the Corporation. Public purpose is, no doubt, a very important consideration and private interest has to be sacrificed for the welfare of the society. But when the appellant was willing to reserve the two plots for park and school then he was not acting against public interest. This cannot be stretched to create a right and title in favour of a local body which utmost may be entitled to manage and supervise only.

5. The power directing transfer of the land has been exercised Under Section 313 of the Act. This Section falls in Chapter XV which deals with streets.

The public streets are dealt from Section 298 to Section 311 whereas private streets are dealt from Section 312 to Section 330 Section 312 obliges an owner of any land utilising, selling, leasing out or otherwise disposing of the land for the construction of building to lay-out and make a street or streets giving access to the plots into which the land may be divided and connect it with an existing or public street. Section 313 requires such owner to submit a lay-out plan before utilising the land for any of the purposes mentioned in Section 312 and send it to the Commissioner with a lay-out plan showing the particulars mentioned in clauses (a) to (e). The reservation or allotment of any site in the lay-out plan for any open space, park or school is to be provided by clause (b) of Section 313.

Section 316 entitles the Commissioner to declare a private street to be a public street on the request of owners. Section 317 prohibits a person from constructing or projecting any structure which will encroach overhang project in a private street. In fact the entire cluster of Sections from 312 to 330 of which Section 313 is a part, deals with private streets only. There is no provision in this chapter or any other provision in the Act which provides that any space reserved for any open space or park shall vest in the Corporation. Even a private street can be declared to be a public on the request of owners of the building and then only it vests in the Corporation. In absence of any provision, therefore, in the Act

the open space left for school or park in a private colony cannot vest in the Corporation. That is why in England whenever a private colony is developed or a private person leaves an open space for park to be used for public purpose he is required to issue what is termed as "Blight Notice" to the local body to get the land transferred in its favour on payment of compensation. Section 313 which empowers the Commissioner to sanction a lay-out plan, does not contemplate vesting of the land earmarked for a public purpose to vest in the Corporation or to be transferred to it. The requirement in law of requiring an owner to reserve any site for any street, open space, park, recreation ground, school, market or any other public purpose is not the same as to claim that the open space or park so earmarked shall vest in the Corporation or stand transferred to it. Even a plain reading of Sub-section (5) indicates that the land which is subject-matter of a layout plan cannot be dealt with by the owner except in conformity with the order of the Standing Committee. In other words the Section imposes a bar on exercise of power by the owner in respect of land covered by the lay-out plan. But it does not create any right or interest in the Corporation in the land so specified. The resolution of the Standing Committee, therefore, that the area specified in the layout plan for the park and school shall vest in the Corporation free of cost, was not in accordance with law.

6. Reserving any site for any street, open space, park, school etc. in a lay-out plan is normally a public purpose as it is inherent in such reservation that it shall be used by the public in general. The effect of such reservation is that the owner ceases to be a legal owner of the land in dispute and he holds the land for the benefit of the society or the public in general. It may result in creating an obligation in nature of trust and may preclude the owner from transferring or selling his interest in it. It may be true as held by the High Court that the interest which is left in the owner is a residuary interest which may be nothing more than a right to hold this land in trust for the specific purpose specified by the coloniser in the sanctioned lay-out plan. But the question is, does it entitle the Corporation to claim that the land so specified should be transferred to the authority free of cost. That is not made out from any provision in the Act or on any principle of law. The Corporation by virtue of the land specified as open space may get a right as a custodian of public interest to manage it in the interest of the society in general. But the right to manage as a local body is not the same thing as to claim transfer of the property to itself. The effect of transfer of the property is that the transferor ceases to be owner of it and the ownership stands transferred in the person in whose favour it is transferred.

The resolution of the Committee to transfer land in the colony for parks and school was an order for transfer without there being any sanction for the same in law."

(emphasis is mine)

16. The emphasised portion of the aforesaid paras do show that the ownership of land which is part of a developed colony and with respect to which a lay out plan

is sanctioned under Section 313 of the Delhi Municipal Corporation Act, ownership thereof in the strict sense of the term will not rest with the appellant/MCD but will continue to vest with the owners, however, the legal owner is only a trustee of the said land but administration of the said land will vest in the corporation for its management and use. The emphasised portion of para 6 of the judgment in the case of Pt. Chet Ram Vashist (supra) clearly holds that the effect of an area being reserved for a street or an open space or a park etc in a lay out plan for a public purpose results in the owner ceasing to be the owner of such land and the legal owner though formally not divested of ownership will have an obligation in the nature of trust because the land is for the benefit of the public in general and thereby the owner is precluded from transferring or selling his interest in the same. The judgment in the case of Pt. Chet Ram Vashist (supra) is directly under the provisions of the Delhi Municipal Corporation Act which applies to the suit land and which suit land forms part of a regularised colony with respect to which lay out plans have been approved under Section 313 of the Delhi Municipal Corporation Act by the appellant/MCD in terms of its resolutions of the years 1960 and 1964 Ex. DW 1/3 to Ex. DW 1/6. Therefore, in view of the ratio of the judgment of the Supreme Court in the case of Pt. Chet Ram Vashist (supra) even if for the sake of arguments, respondent nos. 1 and 2/plaintiffs are taken as owners of the suit land, even then, they do not have any rights in the same for selling or transferring of the same or using the same because the management and use thereof will vest in the corporation for the public purposes as stated in the lay out plan which is approved under Section 313 of the Delhi Municipal Corporation Act. I therefore hold that even if the respondent nos. 1 and 2/plaintiffs technically are owners, however they are only owners in trust for the public in general and the appellant is entitled to manage and use the land and that the respondent nos. 1 and 2/plaintiffs cannot seek any right or benefit in the suit land for selling or transferring the same or making any construction on the same as the owners.

17. Reliance placed on behalf of respondent nos. 1 and 2/plaintiffs on the judgment of the Supreme Court in the case of Raju S. Jethmalani and Others v. State of Maharashtra and Others (2005) 11 SCC 222 is misconceived for the reason that the said judgment deals with the situation of facts and law prevailing as per the Maharashtra Regional and Town Planning Act, 1966 and not the Delhi Municipal Corporation Act and the judgment in the case of Pt. Chet Ram Vashist (supra) directly deals with the factual and legal position in terms of the provision of Section 313 of the Delhi Municipal Corporation Act and which is therefore applicable in this case. Respondent nos. 1 and 2/plaintiffs therefore can take no benefit of the judgment in the case of Raju S. Jethmalani (supra).

18. In view of the above discussion, it is held that respondent nos. 1 and 2/plaintiffs have not proved themselves to be the owners of the suit land and even if they have proved themselves to be owners of the suit land because the suit land forms part of that land which presumably continued to vest with the respondent nos. 1 and 2/plaintiffs as that part of the land which was not sold to

M/s Capital Housing Limited under the Sale Deed dated 28.4.1958, however, in view of ratio of the judgment in the case of Pt. Chet Ram Vashist (supra), respondent nos. 1 and 2/plaintiffs are only owners in trust and they cannot sell or alienate the same or make construction on the same and the right of the management of the suit land will be with the appellant/MCD in terms of the approved lay out plans Ex. DW 1/4 and Ex. DW 1/6 as approved by the resolutions of the corporation of the years 1960 and 1964 which are Ex. DW 1/3 and Ex. DW 1/5 respectively.

19. No doubt that possession would follow title in view of the judgment of the Supreme Court in the case of Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and Ors. (2008) 4 SCC 594, however, the ratio of the judgment in the case of Anathula Sudhakar (supra) will have to be read with two other judgments of the Supreme Court in the cases of M.K. Rappai and Ors. v. John and Ors. (1969) 2 SCC 590 and Vinay Krishna v. Keshav Chandra and Another 1993 Supp (3) SCC 129 and which hold that once a person is not in possession of a land, a simple suit for declaration would be barred under Section 34 of the Specific Relief Act, 1963 because declaration cannot be granted in the absence of claiming further relief of possession.

20. At this stage, let me reproduce the relevant paras of the judgments of the Supreme Court in the cases of Anathula Sudhakar (supra), M.K. Rappai and Ors. (supra) and Vinay Krishna (supra) and which read as under:-

"Paras of Anathula Sudhakar (supra)

"13. 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.

13.1. 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.

13.2. 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.

13.3. 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.

14. 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.

15. 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.

16. 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.

XXXXX XXXXX

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

(a) Where a cloud is raised over 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*). 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."

Paras of M.K. Rappai and Ors. (*supra*)

"10. Counsel for the respondents contended that the decision of the High Court could be upheld because all that it said was that the plaintiffs were entitled to a right and the question of appointment would be canvassed in the suit. This contention is unacceptable because a suit for a bare declaration of right without further relief for possession and other reliefs as the facts and circumstances would require is not supportable.

xxxxx

12. If as we held that the appointment of new trustees falls within Section 92 of the Code can it yet be said that the plaintiffs will be entitled to a bare declaration of their right to be appointed. In the first place, it will be granting them the right to be appointed which itself is the foundation of appointment. If the appointment falls within the vice of Section 92 any decision giving them the right to be appointed will be pre-judging the question and will be an impediment as far as the defendants are concerned in questioning the right of the plaintiffs to be appointed as trustees. Secondly, it is well settled that if any matter is directly prohibited, the same cannot be achieved indirectly. The appointment of new trustees is prohibited in the absence of the compliance with the provisions of Section 92 of the Code. If a right is granted to the plaintiffs to be appointed as trustees it will amount to an indirect way of giving the plaintiffs the relief of the right to be appointed. It will be particularly so because the right will be *resinclusa* and will, therefore, be *res judicata*. The right will not be open to be questioned in subsequent proceedings. Thirdly, if the appointment of new trustees cannot be proceeded with in the absence of compliance with the provisions of Section 92 of the Code and when a suit has been instituted by the plaintiffs for the self-same reliefs after compliance with Section 92 of the Code it is all the more necessary that the entire question of appointment which presupposes as its foundation the right to be appointed should be gone into the newly instituted suit in 1965 to which reference is made earlier. Fourthly, a bare declaration of right will be within the mischief of Section 42 of the Specific Relief Act, 1877 and Section 34 of the Specific Relief Act, 1963."

Paras of Vinay Krishna (*supra*)

"13. We have carefully considered the above arguments. We are clearly of the view that bar under Section 42 of the Specific Relief Act would undoubtedly operate in this case. (We may add that present Section 34 is in *pari materia*.)

Section 42 of the Specific Relief Act, 1877 reads as under:

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a

declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

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

14. From the reading of the plaint it is clear that the specific case of the plaintiff Jamuna Kunwar was that she was in exclusive possession of property bearing No. 52 as well. She thought that it was not necessary to seek the additional relief of possession. However, in view of the written statement of both the first and the second defendant raising the plea of bar under Section 42, the plaintiff ought to have amended and prayed for the relief of possession also. In as much as the plaintiff did not choose to do so she took a risk. It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration.

15. The plea of permissive possession is not stated anywhere in the plaint.

Therefore, we cannot permit at this stage such a plea to be raised. In *Md. Aftabuddin Khan* case what was held is to the following effect [AIR p.75, para 15]

"Long arguments had been advanced before us that a suit merely for a declaratory relief when the plaintiffs were out of possession was not maintainable. Reliance had been placed on the provisions of Section 34 of the Specific Relief Act. While Mr. Dutta contended that the said bar applied to the suit, Mr. Mahapatra for the respondent claimed that it was not a suit covered by Section 34 of the Specific Relief Act. It is true that the plaintiffs had alleged that they were still in possession notwithstanding the alienation.

The Court, however, found that plaintiffs were not in possession.

Undoubtedly, plaintiffs were obliged to ask for recovery of possession in order to have an effective decree. Mr. Mahapatra's contention that the bar of Section 34 of the Specific Relief Act would not arise where in the plaint there is an assertion that possession is with plaintiff though as a fact it is not, does not appeal to us as a sound proposition in law. Finding this defect and relying upon the general prayer in the plaint and keeping in view the power of the Court to grant such reliefs as a party before it may be found entitled to, the Court directed the plaintiffs to recover possession on payment of the requisite Court-fees. We agree with Mr. Dutta that if an amendment of the plaint had been asked for, it would have been more appropriate than the Court exercising suo motu jurisdiction. But we are not inclined to agree that the Court had no jurisdiction to do what has been done. Mr. Dutta was not in a position to indicate to us what prejudice has been caused to the defendants by not requiring the plaintiffs to make a formal application for amendment for addition of the relief of recovery of possession and

in not giving an opportunity to the defendants to file a counter. In this view of the matter, we are not inclined to accept the contention of Mr. Dutta that the learned single Judge committed an error of jurisdiction in allowing the relief of recovery of possession."

This decision has no application to the facts of this case for the simple reason that therein it was found that no prejudice had been caused to defendants by not requiring the plaintiffs to make a formal application for amendment of the plaint.

In the case in hand, it has been found that defendants Keshav Chandra and Jagdish Chandra as well as the tenants were in possession and that Keshav Chandra was in possession of part of the property in his own right and that Jagdish Chandra had no right or title to House No. 52. In order that a decree could be passed for possession in respect of the portion of the House No. 52 which was in possession of Jagdish Chandra, it is necessary to determine the portion of House No. 52 which was in possession of Jagdish Chandra as well as the portion in which Keshav Chandra was entitled to remain in possession. This could be done only after the plaint had been amended and, therefore, without an amendment of the plaint, a decree for possession could not be passed in respect of the portion of House No. 52 in possession of Jagdish Chandra. As a matter of fact suit No. 37/65 was filed for ejectment of the defendants. No doubt that suit came to be consolidated along with the present suit. But once the bar under Section 42 of the Specific Relief Act became operative, in that the title itself was in jeopardy, no relief could be granted with reference to ejectment. The High Court is right in this conclusion in this regard. Therefore, the consolidation does not improve the position of the plaintiff. It was held in Supreme General Films Exchange case at page 535 quoting the earlier ruling of this Court in Veruareddi Ramaraghava Reddy v. Konduru Seshu Reddy that Section 42 of the Specific Relief Act is not exhaustive and independent of that section a declaratory relief can be granted. It requires to be noted that in that case the suit was for declaration that the compromise decree was not binding on the deity. Hence, it fell outside Section 42 of the Act. Supreme General Films Exchange case itself related to a lease. But we are confronted in the present situation with a declaration of title in relation to immovable property which is specifically covered under Section 42 of the Specific Relief Act. So, this again does not lend any support to the appellant.

16. Merely because the plaint says in the prayer such other relief be granted to the plaintiff it does not mean that without a specific plea for possession and disregarding bar under Section 42 (proviso) of the Specific Relief Act, the suit could be decreed even with reference to the portions of which the plaintiff has been in possession. In the result, we find no merit in the appeal which stands dismissed. There will be no order as to costs."

(emphasis is mine)

21(i). Once the respondent nos. 1 and 2/plaintiffs have failed to prove their title

and the suit property being vacant land, hence the respondent nos. 1 and 2/plaintiffs cannot claim that they are in possession of the suit land. Also, it is seen that the physical possession of the suit land is not with the respondent nos. 1 and 2/plaintiffs and therefore the simpliciter suit for declaration and injunction would not be maintainable in view of the judgments of the Supreme Court in the cases of Anathula Sudhakar (supra), M.K. Rappai and Ors. (supra) and Vinay Krishna (supra).

(ii) That the respondent nos. 1 and 2/plaintiffs were not in possession of the suit land on the date of filing of the suit becomes clear from the averments in the plaint itself because the plaint itself talks of the appellant/defendant no. 1 using the suit property for holding the marriage functions. The admission that the respondent nos. 1 and 2/plaintiffs are not in physical possession of the suit land and the appellant/defendant no. 1 is using the same and hence is in possession of the same becomes clear from paras 3,4 and 7 of the plaint and which read as under:-

"3. That the plaintiff came to know that sometimes defendant allows some persons off and on to use the same for some marriages, though the defendant has set the right over the same. It is exclusive ownership of plaintiff No. 2.

4. That the both the plaintiffs therefore served notice to the defendant through counsel dated 7/12/2004 to not allow any person to sue the said plot without written permission of the plaintiffs and that the same may be treated as notice under MCD Act.

xxxxx xxxxx

7. That though the defendant vide its resolution No.1101 dated 14/2/1980 as item no. 89 and 9(3) had resolved that sites which have been earmarked for parks, schools, open-spaces and other community facilities would be immediately acquired through Secretary (L&B) Delhi and that L&B shall make arrangement for allotment or alternative plots in lieu but till date it has neither been acquired by L&B Delhi nor any alternative plot allotted to the owners. Therefore, the defendant has got no any right to use or allow to use the plot without written permission of the plaintiff."

(underlining added)

22(i) That the respondent nos. 1 and 2/plaintiffs are not in physical possession of the suit land also becomes clear from the photographs which were filed and proved by the appellant/defendant no. 1 before the trial court and which photographs have been proved and exhibited as Ex. DW 1/2. These photographs show that the suit land is properly bounded by high boundary walls, there is an entry gate along with grills, and that a marriage pandal was in the process of being erected on the suit land. Therefore, it is the appellant/defendant no. 1 who is in possession of the suit land as demonstrated from the photographs Ex. DW 1/2 and not the respondent nos. 1 and 2/plaintiffs.

(ii) In my opinion, the respondent nos. 1 and 2/plaintiffs cannot take benefit of the khatoni and khasra girdwari Ex. PW2/1 and Ex. PW2/2 respectively to prove their possession of the suit land inasmuch as the suit was filed on 7.3.2005 and the khatoni and the khasra girdwari are of the years 1988-89 i.e. around 15 years prior to filing of the suit i.e. not of the date of filing of the suit. As held in the case of Anathula Sudhakar (supra), before a plaintiff succeeds in a suit for injunction, it is necessary to show that the plaintiff (respondent nos. 1 and 2/plaintiffs in this case) was in possession of the suit property on the date of filing of the suit. Therefore, the documents Ex. PW 2/1 and Ex. PW 2/2 of the years 1988-89 cannot in any manner establish physical possession of the suit property of the respondent nos. 1 and 2/plaintiffs as on 7.3.2005 when the suit was filed.

23. I therefore hold that it is the appellant/defendant no. 1 who is in possession of the suit land and not the respondent nos. 1 and 2/plaintiffs and once the respondent nos. 1 and 2/plaintiffs are not in possession of the suit land, the suit for declaration and injunction simpliciter would not be maintainable in the absence of respondent nos. 1 and 2/plaintiffs failing to seek the relief of possession. Even if for the sake of arguments let us take the respondent nos. 1 and 2/plaintiffs as the owners of the suit land, but since the physical possession of the suit land is not with the respondent nos. 1 and 2/plaintiffs, hence, a simple suit for declaration and mandatory injunction will not lie in the absence of claiming any relief of possession of the suit land and respondent nos. 1 and 2/plaintiffs cannot by a non-maintainable suit be successful in taking possession in the garb of seeking reliefs of declaration and injunction when the respondent nos. 1 and 2/plaintiffs are not in physical possession of the suit land. Of course, the above conclusion is independent to and in addition to the findings and conclusions given above that respondent nos. 1 and 2/plaintiffs are not the owners of the suit land and therefore in any case not entitled even to the relief of declaration and injunction as claimed. A person who is not the owner in possession is neither entitled to declaration nor injunction in view of the ratios of the judgments of the Supreme Court in the cases of Anathula Sudhakar (supra), M.K. Rappai and Ors. (supra) and Vinay Krishna (supra).

24. On behalf of respondent nos. 1 and 2/plaintiffs it was also sought to be argued by placing reliance upon the language of resolutions of appellant/defendant no. 1 of the years 1960/Ex. DW 1/3 and 1964/Ex. DW 1/5 to argue that these resolutions concede to the ownership of the forefathers of the respondent no. 2/plaintiff no. 2, however, this argument is misconceived not only for the reason that these resolutions of appellant of the years 1960 and 1964 do not deal with or concern the aspect of whether the specific suit land comprised in the specific khasra numbers continued to vest with the forefathers of respondent no. 2/plaintiff no. 2, with the fact as already stated above that even if the ownership continued to vest of the specific khasra number being the suit land in respondent no. 2/plaintiff no. 2, yet, ownership of the respondent nos. 1 and 2/plaintiffs was only an ownership in trust for and on behalf of the general public with the right of the appellant to use and manage the suit land as an open land

in terms of approved lay out plans Ex. DW 1/4 and Ex. DW 1/6 and further that no rights in the suit land as owners can be exercised by the respondent nos. 1 and 2/plaintiffs vide the ratio of the judgment in the case of Pt. Chet Ram Vashist (supra). This argument of the respondent nos. 1 and 2/plaintiffs is also therefore rejected.

25. In view of the above, the substantial questions of law framed in para 11, and issues to be decided as raised in para 10, are answered in favour of the appellant/defendant no. 1 and against the respondent nos. 1 and 2/plaintiffs, and accordingly this Regular Second Appeal is allowed by setting aside the impugned Judgments of the courts below dated 5.12.2013 (of the Trial Court) and 23.2.2015 (of the First Appellate Court) and the suit of the respondent nos. 1 and 2/plaintiffs will stand dismissed. Parties are left to bear their own costs.