

APHC010064342004



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3368]

THURSDAY, THE EIGHT DAY OF MAY
TWO THOUSAND AND TWENTY FIVE

PRESENT

THE HONOURABLE SRI JUSTICE B V L N CHAKRAVARTHI

SECOND APPEAL No: 836/2002

Between:

- 1.ABDUL SHUKUR (DIED)
- 2.SHAIK MOHD. ABDULLA, S/o.LATE ABDUL SHUKKUR, MUSLIM, AGED ABOUT 58 YEARS, R/o.2nd WARD, ADONI, KURNOOL DISTRICT.
- 3.NOUSHAD SYED, S/o.LATE ABDUL SHUKKUR, MUSLIM, AGED ABOUT 55 YEARS, R/o.2nd WARD, ADONI, KURNOOL DISTRICT.
- 4.SHAKEE AHMAD SYED, S/o.LATE ABDUL SHUKKUR, MUSLIM, AGED ABOUT 48 YEARS, R/o.2nd WARD, ADONI, KURNOOL DISTRICT.

APPELLANTS No.2 TO 4 ARE BROUGHT ON RECORD AS L.Rs. OF THE DECEASED SOLE APPELLANT AS PER COURT ORDER DATED 10.09.2024 PASSED IN I.A.No.3 OF 2024.

...APPELLANTS

AND

- 1.SYED NIZAMUDDIN @ AFZAL MIAH, S/o.SYED MEERA MOHIDDIN HUSSAINI, MUSLIM, AGED ABOUT 60 YEARS, R/o.D.No.89, HAWANNAPET, ADONI, KURNOOL DISTRICT.

...RESPONDENT(S):

Counsel for the Appellants:

1.A.V. SIVAIAH

Counsel for the Respondent(S):

1.A.M. QURESHI

The Court made the following:

HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

S.A.No.836 OF 2002

Between:

1. Abdul Shukur (died).
2. Shaik Mohd. Abdulla, S/o.Late Abdul Shukkur,
Muslim, Aged about 58 years,
R/o.2nd Ward, Adoni, Kurnool District.
3. Nushad Syed, S/o.Late Abdul Shukkur,
Muslim, Aged about 55 years,
R/o.2nd Ward, Adoni, Kurnool District.
4. Shakeel Ahmad Syed, S/o.Late Abdul Shukkur,
Muslim, Aged about 48 years,
R/o.2nd Ward, Adoni, Kurnool District.

Appellants No.2 to 4 are brought on record
as L.Rs. of the deceased sole appellant as
per Court Order dated 10.09.2024 passed in
I.A.No.3 of 2024.

.... **APPELLANTS**

Versus

Syed Nizamuddin @ Afzal Miah,
S/o.Syed Meera Mohiddin Hussaini,
Muslim, Aged About 60 years,
R/o.D.No.89, Hawannapet,
Adoni, Kurnool District.

.... **RESPONDENT**

DATE OF JUDGMENT PRONOUNCED : **08.05.2025**

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

1. Whether Reporters of Local Newspapers
may be allowed to see the Judgment? Yes/No
2. Whether the copy of Judgment may be
marked to Law Reporters/Journals? Yes/No
3. Whether His Lordship wish to see the
fair copy of the Judgment? Yes/No

JUSTICE B.V.L.N.CHAKRAVARTHI

*** HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI**

+ S.A.No.836 OF 2002

% 08.05.2025

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R/o.D.No.89, Hawannapet,
Adoni, Kurnool District.

.... RESPONDENT

! Counsel for the Appellants : Sri A.V.Sivaiah

**^ Counsel for the
Respondent : Sri A.M.Qureshi**

< Gist:

> Head Note:

? Cases referred:

- 1. AIR 2008 SC 2033**
- 2. AIR 2017 CC 2859 (HYD)**

This Court made the following:

THE HON'BLE SRI JUSTICE B.V.L.N. CHAKRAVARTHI

SECOND APPEAL No.836 OF 2002

J U D G M E N T :

This Second Appeal preferred by the appellant/defendant under Section 100 of the Code of Civil Procedure 1908, assailing the decree and judgment, dated 15.07.2002, on the file of the learned Senior Civil Judge, Adoni, passed in A.S.No.13 of 1997.

02. Heard Sri A.V.Sivaiah, learned counsel for the Appellant/Defendant. Perused the material on record.

PLEADINGS:

03. The appellant is the defendant. The respondent is the plaintiff in the suit. The parties in this Second Appeal shall hereinafter be referred to as arraigned in the Original Suit, for convenience and clarity.

04. The suit in O.S.No.2/1984 on the file of the learned Addl.District Musnif, Adoni, was filed seeking the relief of permanent injunction, restraining the defendant from interfering with the peaceful possession and enjoyment of schedule mentioned open site (Asharkhana) by the plaintiff.

05. The learned trial Court partly decreed the suit granting permanent injunction in favour of plaintiff, to the extent of performing Ashar in the plaint schedule site, on every Milad-un-Nabi day and dismissed the rest

of the suit claim vide judgment and decree dated 07.10.1996. The plaintiff preferred appeal in A.S.13/1997 on the file of the learned Senior Civil Judge, Adoni, challenging the judgment and decree of the learned trial Court. The learned Senior Civil Judge, Adoni, vide judgment and decree dated 15.07.2002 allowed the first appeal with costs, setting aside the judgment and decree of the learned trial Court.

06. The case of the plaintiff is that the grandfather of the plaintiff, later his father and himself, performing the Pedda Ashar (the function celebrated on Milad-un-Nabi day every year) in between 04.00 p.m. and 05.30 p.m. in the schedule mentioned Asharkhana site, they also performing the Urus of Syed Khaja Ameenuddin Hussaini Uruf Syed Masoom Peera Hussaini, from 09.06.1969. The plaintiff has been performing the Pedda Asher. The plaint schedule Asharkhana was given to Sri Nawab Nawaj Khan by his ancestors, and later to the grandfather and father of plaintiff, they were receiving Rs.105/- from the Wakf Board for performing the religious ceremonies. While so, the defendant, who is nearby resident, with an ulterior motive to grab the plaint schedule property, has been attempting to occupy the same high-handedly. On 13.01.1994 the defendant attempted to keep his vehicle in the plaint schedule site, but it was resisted. The defendant threatening to occupy the site. Hence, the suit for permanent injunction.

07. The case of the defendant is that the plaintiff schedule site belongs to Wakf Board. Brother of the defendant during his lifetime sent an application to lease the plaintiff schedule site to him, for running fuel depot. Wakf Board leased the schedule site on a rent of Rs.10/- per month on 16.01.1969. Since then, defendant's brother running charcoal depot in the name of "Rayalaseema Charcoal Wood Depot". After death of his brother, the defendant is running the said Fuel Depot. It was closed one year back i.e., prior to 25.02.1994. In the said open site, there is a big neem tree. One of the branches fallen down on the shed, then shed collapsed. Electricity connection was disconnected. The defendant has been parking his vehicle for the 8 years. Now the defendant wanted to restore the Fuel Depot, by erecting new shed. About 2½ months ago, the plaintiff approached him and requested to give half of the plaintiff schedule property to him, but defendant refused his request; Hence, the plaintiff filed a false suit. The present suit is not maintainable against a lessee. There is no cause of action to file the suit.

ISSUES:

08. Basing on the above pleadings, the trial Court settled the following issues for trial:

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. To what relief?

EVIDENCE:

09. During trial, on behalf of the plaintiff, five witnesses were examined as P.Ws-1 to 5, and 11 documents were marked as Exs.A-1 to A-11. On behalf of the defendant, five witnesses were examined as D. Ws-1 to 5, and 22 documents were marked as Exs.B-1 to B-22. On behalf of third party, two documents were marked as Exs.X-1 and X-2.

FINDING OF THE TRIAL COURT:

10. The learned trial Court on consideration of the above oral and documentary evidence, held that the plaintiff proved that he has been showing Ashar, in the schedule site once in a year on Milad-un-Nabi day. But he did not prove continuous possession of the suit site. Hence, the plaintiff is not entitled to permanent injunction as prayed for, and however, entitled to injunction to the extent of his right to show Ashar in the schedule site, on every Milad-un-Nabi day. Accordingly, partly decreed the suit and dismissed the rest of the suit claim.

FINDING OF THE FIRST APPELLATE COURT:

11. The learned Senior Civil Judge, Adoni, on the question Whether the suit site is being used to perform Ashar on Milad-un-Nabi? Whether it amounts to lawful possession of the plaintiff? held that the plaintiff proved the possession and enjoyment of the suit premises and has been

performing Ashar Shariff on Mild-un-Nabi evert year. Consequently, allowed the appeal, setting aside the decree and judgment of the learned Junior Civil Judge, Adoni, dated 07.10.1996, and decreed the suit for permanent injunction as prayed for, with costs.

12. Challenging judgment of the learned First Appellate Court, the Second Appeal preferred by the defendant. The Second Appeal was admitted on 25.02.2002, for the following substantial questions of law.

13. **SUBSTANTIAL QUESTIONS OF LAW:**

1. Whether the lower Appellate Court is right in decreeing the suit even in the absence of that pleading that the plaintiff was in possession of the schedule land as on the date of suit?
2. Whether a suit for permanent injunction lies even without the plaintiff's possession of the suit schedule site?
3. Whether the lower Appellate Court is right in placing the burden on the Appellant?
4. Whether the lower Appellate Court is right in decreeing the suit without any evidence?
5. Whether the lower Appellate Court is right in holding that Ex.A-1 (1971) shows possession of the plaintiff as on the date of suit?
6. Whether the lower Appellate Court is right in holding that the plaintiff is in possession based on the evidence of defendant?

14. **CONTENTIONS OF THE RESPECTIVE COUNSEL IN THE SECOND APPEAL:**

The learned counsel for the appellant/defendant would contend that the learned trial Court found that the suit site was not in possession of the plaintiff. However, restrained the defendant from interfering with the right of the plaintiff from performing Ashar on Milad-un-Nabi every year, as performed earlier by the plaintiff, his father and Sri Nawab Nawaj Khan in the suit site.

He would further contend that the learned First Appellate Judge did not appreciate the evidence in right perspective and came to a wrong opinion regarding possession of the suit site and erroneously decreed the suit, though the plaintiff is not in possession of the suit site on the date of suit.

He would further submit that, Ex.B-1 would disclose that the suit site belongs to Wakf Board and it was leased to the brother of the defendant, and the evidence on record would disclose that the brother of the defendant established wood business in the name and style of "Rayalaseema Charcoal Wood Depot" by constructing a shed in the said site. After death of defendant's brother, defendant has been continued the business. Therefore, the learned I Appellate Judge committed error in appreciating the evidence with regard to the

possession of the plaintiff over the suit site. In that view of the matter, the suit for permanent injunction ought not to have decreed, when the plaintiff failed to prove possession over the suit schedule property. The burden of proof lies on the plaintiff to prove his possession over the suit site, to claim a decree for permanent injunction.

15. The respondent/plaintiff would contend that the suit site is a sacred place known as "Pedda Asharkhana" used for performing Ashar every year on Milad-un-Nabi day from 04.00 p.m. to 05.30 p.m. It belongs to religious institution, Ashar Sheriff was managed by Sri Nawab Nawaj Khan. He was performing Ashar initially, and a sum of Rs.105/- was paid by Wakf Board for performing Ashar services. Later, father of the plaintiff Sri Syed Meera Mohiddin Hussaini had been performing Ashar, every year during his lifetime. Subsequently, the plaintiff has been performing Ashar every year in the suit site and receiving a sum of Rs.105/- towards service charges. While so, the defendant is trying to interfere with the rights of the plaintiff to maintain the suit site, to perform Ashar every year.

ANALYSIS:

16. The plaintiff filed the suit for permanent injunction in respect of an open site described in the plaint schedule. The contention of the plaintiff is that the suit site belongs to a religious institution. It was used as a

sacred place for performing Ashar every year on the date of Milad-un-Nabi on payment of Rs.105/- by Wakf Board to the person performing Ashar. Sri Nawab Nawaj Khan initially performed the Ashar. Later, father of the plaintiff performed the Ashar in the suit site. Thereafter, the plaintiff has been performing the Ashar in the suit site.

17. Admittedly, the learned trial Court as well as the learned First Appellate Court basing on the evidence placed by the plaintiff concurrently found that the suit site has been used as a sacred site, for performing Ashar every year on Milad-un-Nabi day from 04.00 p.m. to 05.30 p.m. Both the Courts below also found concurrently that one Sri Nawab Nawaj Khan performed Ashar initially. Later, the father of plaintiff performed it, and subsequently the plaintiff has been doing it for several year in the suit site on payment of Rs.108/- by Wakf Board. It was also found that the suit site shall be maintained clean and tidy being a sacred site to perform Ashar every year on Milad-un-Nabi day.

18. It is settled law that in a suit for permanent injunction relating to an immovable property based on possession, the burden of proof is on the plaintiff to prove possession and enjoyment of the suit property, on the date of suit.

19. The Hon'ble Apex Court in the case of **Anathula Sudhakar Vs. P.Buchi Reddy (dead) by L.Rs and others**¹, held in para 13 as follows:

“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.”

20. In the case on hand, the disputed property is an open site on the date of the suite, even as per the case of the defendant. Both the Courts below concurrently found that it has been used as a sacred site, for several years, from the period of Sri Nawab Nawaj Khan to perform Ashar on payment of Rs.108/- by Wakf Board, in the suit site. They further concurrently found that after Sri Nawab Nawaz Khan, Ashar was

¹ AIR 2008 SC 2033

performed by the plaintiff's father. Later by the plaintiff continuously onto the date of suit.

21. The Hon'ble Apex Court in **Anathula Sudhakar's** case considered the issue of possession with respect to a vacant site also, and held in para 14, as follows:

“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.”

22. Therefore, in a suit relating to a vacant site, even if it is for a mere injunction, the issue is one of possession, for deciding the de jure

possession. In the case on hand, basing on factual matrix, the learned First Appellate Court observed that plaintiff by establishing that the suit site has been used as a sacred place, for several years, including onto the date of suit, for performing Ashar, proved the continuous enjoyment of the suit site; therefore, plaintiff proved de jure possession over the suit site on the date of the suit, against the defendant.

23. It is an admitted fact that the plaintiff was authorised to perform Ashar in the suit site, and has been performing Ashar every year on the suite site.

24. The defendant plead additional fact that the suit property belongs to Wakf Board, and it was leased to his brother; After death of defendant's brother, defendant came into possession and continued the business; He admits that on the date of suit, no business has been carried on the site, no electricity connection and it is an open site.

25. The learned First Appellate Court on additional fact pleaded by the defendant held that the defendant did not prove Ex.B-1 by summoning officials of the Wakf Board. Therefore, the learned First Appellate Court considered Ex.B-1 in a proper perspective, and refused to accept Ex.B-1, for lack of evidence to prove its content. The learned First Appellate Court also considered Ex. B-23, marked in the First

Appeal at the instance of the defendant, and held that it will not improve the case of the defendant. Further, it was also found that the defendant did not prove that he is the legal representative of his deceased-brother, and alleged lease transferred to him; Therefore, he cannot claim any rights based on the lease deed.

26. Hence, in the light foregoing discussion, contention of the appellant/defendant that the learned First Appellate Court erroneously decreed the suit, on the sole basis of evidence placed by the defendant is not correct.

27. The burden of proof loses much of its importance when both sides adduced evidence. It is true the initial burden of proof is on the party making a claim. Its importance become less once both parties present evidence. The Court has to assess the evidence presented by both parties to arrive at a just decision. The Court will consider the overall evidence to determine the outcome of the case.

28. The High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, in the case of **K.Arjuna Rao Vs. Katuru Yedukondalu**², in Civil Revision Petition No.3262 of 2013 dated 10.03.2017 in para Nos.6 and 7, held as follows:

² 2017 AIR CC 2859 (HYD)

“Order XIV of CPC deals with framing of the issues. While framing the issues the court has to keep in mind the scope of Order XVIII Rule 1 of CPC. The underlying object of Order XIV of CPC is mainly to focus on the lis involved in the suit, which is the basis for framing of the issues for adjudication, thereby to enable the parties to adduce evidence to substantiate their stand. A perusal of Order XVIII Rule 1 of CPC clearly demonstrates that, as a general rule, the plaintiff has the right to begin the suit, exception is the right of the defendant to begin. Who has to begin the suit depends upon the facts and circumstances of each case. There is no obligation on the part of the defendant to begin the suit first. Though Order XVIII Rule 1 of CPC does not obligate the defendant to begin the trial, the defendant has to come into the witness box at the first instance, if the burden of proof lies on him on all the issues. Even when burden of proof lies on the defendant on the main issue, he has to begin the trial, though the burden of proof on the other issues lies on the plaintiff. However, Rule 3 of Order XVIII of CPC enables the party who begins the suit to reserve his or her right to adduce rebuttal evidence.”

“It is needless to say that Sections 101 to 104 of the Evidence Act deal with burden of proof. It is a settled principle of law that burden of proof lies on the person, who would fail if no evidence is adduced on either side. The burden of proof is always static and does not shift. If the plaintiff discharges the burden cast on him, the onus of proof shifts on the defendant to substantiate the stand taken by him. The onus of proof shifts from one party to the other party depending upon facts and circumstances of each case. If both parties adduce evidence, the onus of proof loses its

significance. The basis to begin the suit depends upon whom the burden of proof lies on the main issue.”

29. In the case on hand, the defendant admits that the suit site has been used as ‘Asharkhana’ to show Ashar on Milad-un-Nabi day every year. Evidence on record would show that Ashar was initially performed by Sri Nawab Nawaz Khan. Later, by the father of the plaintiff during his lifetime. After demise of the father of the plaintiff, the plaintiff has been performing Ashar in the suit site on payment of Rs.108/- by Wakf Board, maintaining the suit site in a tidy and neat condition. The defendant took an additional plea that the suit site was leased to his brother by Wakf Board. After his demise, the defendant came into possession and continued business of his brother for some time. Therefore, the defendant admits the material part pleaded by the plaintiff. But he pleads certain additional facts which are in exclusive knowledge of the defendant. In view of section 106 of the Indian Evidence Act, if the defendant pleads certain additional facts within his knowledge, the burden of proof is on the defendant to prove said facts. Both the Courts below found that the plaintiff proved that the suit site allocated to perform Ashar on the suit site every year on Milad-un-Nabi day. Accordingly, Ashar has been performed every year on the suit site, initially by Sri Nawab Nawaz Khan. Later by the father of the plaintiff

and after his demise, by the plaintiff on payment of Rs.105/- by Wakf Board. In those circumstances, the burden is upon the defendant to prove the additional facts pleaded by him i.e., lease in favour of his brother, business carried on the suit site by his brother, and after demise of his brother, lease was transferred in favour of the defendant, and that he carried on the business in the suit site. The learned trial Court committed serious error on this aspect and failed to consider this material aspect. Whereas the learned First Appellate Court considered this aspect in detail and gave reasons for its finding as to why the defendant failed to prove the additional facts pleaded by him.

30. In the light of foregoing discussion, this Court has no hesitation to concur with the finding of learned First Appellate Court that the defendant failed to prove the additional fact, to say that he discharged burden of proof, as laid down under section 106 the Indian Evidence Act.

31. In these circumstances, the contention of the defendant that the suit was decreed without any evidence is not tenable. The learned First Appellate Court is right in holding that the plaintiff proved possession of the suit site on the date of the suit. The learned First Appellate Court also right in decreeing the suit for permanent injunction, as prayed for by the plaintiff.

32. Hence, this Court is of the considered opinion that there are no grounds to interfere with the judgment and decree passed by the learned First Appellate Court.

CONCLUSION:

33. In the light of foregoing discussion, the Second Appeal is liable to be dismissed.

RESULT:

34. In the result, the Second Appeal dismissed, confirming the judgment and decree dated 15.07.2002 in A.S.13/1997 on the file of Senior Civil Judge, Adoni, with costs throughout.

As a sequel, interlacutory applications pending, if any, in this Second Appeal, shall stand closed.

JUSTICE B.V.L.N. CHAKRAVARTHI.

08.05.2025

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THE HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

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S.A.No.836 OF 2002

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08th May, 2025

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