

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No.89 of 2015
With
Civil Application No.4079 of 2015
And
Civil Application No.12200 of 2015**

Shankar s/o Gangadhar Mukhedi
And Others.

.. Appellants.

Versus

Chandraprakash s/o Bhagwanrao
Kulkarni.

.. Respondents.

Shri. A.V. Patil, Advocate, holding for Shri. Upendra B.
Bilollikar, Advocate for appellants.

Shri. Vivek Bhavthankar, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 6th OCTOBER 2015

ORDER:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Appeal No.26/2010 which was pending in the Court of District Judge-1 Biloli, District Nanded. The appeal was filed by the present respondent, plaintiff to challenge the judgment and decree of Regular Civil Suit No.22/2008 which was pending in the Court of the Civil Judge, Junior Division, Biloli. The suit was filed

by the present respondent for relief of injunction but the suit was dismissed by the trial Court. As the decree of injunction is given in favour of the respondent, plaintiff, by the First Appellate Court, the defendants have challenged the said decision in the present proceeding. Both the sides are heard.

2) The suit was filed in respect of two portion of House No.1504 situated within limits of Municipal Council Biloli. Description of these two portions is given in the plaint. It is the case of the plaintiff that one Gangadhar Mukhedi was exclusive owner of the two portions of the suit property and the property was standing in the record of rights and record of assessment in the name of Gangadhar. Defendant No.1 Shankar is son of Gangadhar and defendant Nos.2 and 3 are sons of defendant No.1.

3) It is the case of the plaintiff that for fulfillment of family needs, Gangadhar first sold one portion to one Sudhakar Jadhav in the year 2001 under registered sale deed and that portion was mutated in the name of Jadhav. It is contended that said Jadhav then sold this portion to

Maruti Patait under registered sale deed. It is contended that Gangadhar then sold the second portion of the house under registered sale deed dated 4-3-2005 in favour of the plaintiff. It is contended that Patait also sold the first portion to the plaintiff under registered sale deed in the year 2005 and these portions are adjacent to each other. It is contended that the plaintiff has purchased area of this house having size 70 x 25 ft. It is contended that remaining portion of 70 x 13 ft was not sold by Gangadhar and it was in possession of Gangadhar till his death.

4) It is contended that there was some dispute between Gangadhar and the defendants and Gangadhar had filed suit against them which was numbered as 38/2005.

5) It is the case of the plaintiff that the defendant had challenged the mutation made in favour of the plaintiff by filing objection with local body but the objection was rejected and so in the revenue record and the assessment record name of the plaintiff is entered as owner of the portion purchased by under two sale deeds.

6) It is the case of the plaintiff that the suit property was the self acquired property of Gangadhar and further it was sold for legal necessity by Gangadhar. It is contended that the defendants are trying to interfere possession of in these portions of the plaintiff and so he was required to file the suit. It is contended that cause of action took place on 5-3-2008 when the defendants tried to use force to dispossess the plaintiff from the suit property by throwing the household articles of the plaintiff outside the suit property. Relief of injunction was claimed to protect the possession.

7) The defendants contested the suit by filing written statement. they contended that plaintiff is not in possession. They contended that the suit for injunction is not maintainable when relief of declaration of ownership is not claimed. It is contended that in the sale deeds the property purchased is described as open space but the plaintiff is contending that he is occupying house and the defendants are trying to dispossess him.

8) It is the case of the defendants that Gangadhar was not the exclusive owner of the House No.1504. It is contended that the house was ancestral and joint family property of Gangadhar and defendant No.1. It is denied that for fulfilling family needs, Gangadhar sold the property under two separate sale deeds. It is contended that Maruti Patait had filed civil suit against defendant No.1 in the year 2003 but the suit was withdrawn by him. It is contended that notice was also published by defendants in local news paper to show that they had objection to the transactions, if any, Gangadhar wanted to make and that was done on 24-7-2003. It is contended that the defendants are in possession of the suit property. It is contended that no title has passed to the plaintiff. Ultimately they prayed for dismissal of the suit.

9) Issues were framed by the trial Court and both sides gave evidence. The trial Court dismissed the suit by holding that plaintiff had failed to prove that he was in exclusive possession and the trial Court had further held that it was necessary for the plaintiff to claim relief of declaration of title. The first appellate Court has reversed

the findings and has held that in view of the sale deeds made in favour of the plaintiff there was no necessity of claiming relief of declaration of ownership. In view of the evidence given which includes the record of making payment of compensation to the plaintiff in respect of collapse of the house and other circumstances the appellate Court has held that the plaintiff was in possession of the suit property on the date of the suit and he is entitle for the relief of injunction.

10) The learned counsel for the appellants mainly submitted that in view of the ratio of the case reported as **AIR 2008 SC 2033 (Anathula Sudhakar v. P. Buchi Reddy)** it was necessary for the plaintiff to seek relief of declaration and as such relief was not claimed, the suit for injunction simpliciter is not tenable. He also submitted that the contents of the sale deeds show that vacant portion, open space, was sold and so it was not possible for the plaintiff to prove that he was in possession of the space shown to be sold under the two sale deeds.

11) It is not disputed that the property was shown in the name of the father of defendant No.1 in record of rights at the relevant time. The parties are Hindus. When Gangadhar was father of defendant No.1 and as it is the case of the defendant No.1 that there was joint Hindu family, the court is initially required to go with the presumption that father of defendant No.1 was karta of the joint family. In such a case, the Court is not expected to take decision on the contentions of the defendant No.1 that no title had passed in favour of the plaintiff and no property could have been transferred by Gangadhar. When father was the Kara he had special power under Hindu law and he could have even effected partition of the joint family property. Karta has the power of alienation of property for legal necessity. Such power is with the father also when he is Karta and the property is Joint Hindu Family property. In view of this position of Hindu law, when father sales the property which was standing in his name it becomes necessary to the person like defendant No.1 to take steps for setting aside his father's alienation of ancestral property. In that case suit will be governed by Article 109 of the Limitation Act 1963. No such relief is

claimed till today by defendant No.1. As the sale needs to be treated as voidable at the instance of the person like defendant No.1, unless and until the sale is set aside, it cannot be said that the purchaser had not become the owner under the sale deed. The first sale deed was executed by Gangadhar in the year 2001 but that sale deed was not challenged. It is not disputed that on the basis of these sale deeds mutations were made and even in the assessment record name of the first purchaser and the name of the plaintiff came to be entered. Assessment record is prepared on the basis of possession as general tax is required to be recovered from the person who is found in possession of the property. In view of these circumstances, it cannot be said that defendant No.1 had no knowledge about the transactions made by his father. When he was required to take steps provided in Hind law, he did not take steps and such defences cannot be considered in the suit filed for relief of injunction simpliciter.

12) In the case of Anathula Sudhakar (cited supra) on which reliance is placed by the learned counsel for the

appellants, defendants, the law in this regard is summarised in para 17 and that paragraph is as under :-

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

(a) Where a cloud is raised over plaintiffs title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiffs 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 plaintiffs 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 finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar (supra)). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

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

13) There cannot be any dispute over the proposition made by the Hon'ble Apex Court in the case cited supra. The facts of the present case are different. Name of the plaintiff is entered in the assessment record and further when one structure which was present on this property collapsed, compensation was paid by Government to the plaintiff. Thus, there is record to show that plaintiff came in possession under the sale deeds and though it is not mentioned in the sale deed that there was some structure, actually there was some structure though it was not in good condition. In view of the facts of the present case, it cannot be said that there was nothing with the plaintiff to prove that he was in possession. Further

he is title holder. So the observations made by the Apex Court in the case cited supra cannot help the defendant No.1.

14) The trial Court did not consider the aforesaid position of law and also the record in proper perspective. The appellate court has corrected the error. In view of the discussion made above, this Court holds that there is nothing on the basis of which substantial questions of law can be formulated.

15) In the result, the appeal stands dismissed. Civil applications stand disposed of.

16) Learned counsel for the appellants requested for continuation of interim relief, status quo, given by this Court for further period of four weeks. The interim relief is continued for further four weeks from today.

Sd/-
(T.V. NALAWADE, J.)

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