IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.292 OF 2015
WITH
CIVIL APPLICATION NO.657 OF 2015

Sau. Malutai Vishwas Koli … Appellant

vs.

Sau. Madhu Rajendra Shinde … Respondent

Mr.P.M.Arjunwadkar for the appellant

CORAM : K.K.TATED, J.
DATED : 19/08/2015

PC:

1 Heard the learned counsel for the appellant.

2 This Second Appeal is preferred by defendant challenging the concurrent finding of facts recorded by the courts below.

A few facts of the matter are as under:

3 The respondent plaintiff filed Regular Civil Suit No.31 of 2008 in the court of Joint Civil Judge, Junior Division, Jaysingpur, at Jaisingpur for an order of injunction restraining the appellant defendant from obstructing her peaceful possession in respect of the suit property i.e. City Survey No.1865/A/2, Area 85.5 square meter situated at Lane No.17 Jaisingpur, Tal.Shirol, Dist.Kolhapur hereinafter referred to as the suit property.

4 The plaintiff's case was that the suit property was ancestral property. Initially, the suit property was standing in the name of Shripati Krishna Mohite i.e. grand father of the plaintiff. After his death on 8/12/1982 the suit property was mutated in the name of Smt. Manjula Shripati Mohite. After the death of Manjula Shripati Mohite on 21/11/2000 the property was mutated in the name of Shivaji Shripati Mohite and thereafter the same was mutated in the name of the plaintiff. As the defendant tried to disturb her possession in respect of the suit property on the basis of will dated 18/1/2007 executed by Shivaji Mohite (father of plaintiff) the plaintiff filed the present proceeding. Considering the facts on record, the Trial Court decreed the suit with costs and restrained the appellant defendant from obstructing peaceful possession of the respondent plaintiff over the suit property by way of perpetual injunction. Being aggrieved by the decree passed by the Trial Court, the appellant defendant preferred Regular Civil Appeal No.32 of 2011 in the court of the District Judge-1, Jaysingpur at Jaysingpur. In that appeal, the appellate court framed following points for determination.

	POINTS	FINDINGS
1]	Whether the original plaintiff/respondent proves her lawful possession over the suit property?	Yes
2]	Whether the original plaintiff further proves that the defendant obstructed her possession?	Yes
3]	Whether the learned lower court properly appreciated the evidence on record?	Yes
4]	What order?	As per final order

5 Considering the evidence on record, the appellate court also held that the plaintiff proved her possession of the suit property and that cannot be disturbed by the defendant. Hence, the present Second Appeal.

6 Counsel for the appellant defendant placed on record photocopy of paper book in Regular Civil Appeal No.32 of 2011 containing copy of plaint, written statement, affidavit of examination-in-chief of plaintiff and her witnesses, affidavit of examination-in-chief of defendant and her witnesses and other important documents. Same is taken on record.

7 The learned counsel for the appellant defendant submits that both the courts below erred in coming to the conclusion that the respondent plaintiff proved her peaceful possession of the suit property. He submits that both the courts below failed to appreciate that the suit property was situated at Jaisingpur whereas the respondent plaintiff resides at Yadrav. He further submits that both the courts below failed to appreciate that simplicitor suit for injunction without declaration of title is not maintainable. He further submits that both the courts below failed to appreciate that the deceased Shivaji Mohite executed the will dated 18.1.2007 and bequeathed gave the suit property to the appellant defendant. He submits that thereafter Shivaji Mohite died within ten days i.e. 29.1.2007. He submits that on the basis of the said will, the appellant defendant became owner and possessor of the suit property. He submits that these facts are not considered by both the courts below properly and hence, the the Judgment and Decree dated passed by both the courts below are required to be set aside.

8 In support of his contention, the learned counsel for the appellant defendant relies on the authority of the Apex Court in the matters of Anathula Sudhakar vs. P.Buchi Reddy (Dead) by L.R.s & Ors.,[1] Ramji Rai & Anr. vs. Jagdish Mallah (Dead) through L.Rs. & Anr.,[2] H. Venkatachala Iyengar vs. B.Thimmajamma and others[3], Wilma Levert Canuao and others vs. Allan Sebastian D'Souza and another.[4]

9 The learned counsel for the appellant defendant submits that the Apex Court in the matter of Anathula Sudhakar vs. P.Buchi Reddy (Dead) by L.R.s & Ors. (Supra) in paragraph 17 held that a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title. He submits that the Apex Court held that simplicitor suit for injunction is not maintainable unless and until there is declaration towards ownership if it disputed by the other side. He further submits that the Apex Court in the matter of Ramji Rai & Anr. vs. Jagdish Mallah (Dead) through L.Rs. & Anr. (Supra) held that if plaintiff is not found in possession of suit property, simplicitor suit for possession is not maintainable and be dismissed. In support of this contention, he relies on paragraph 10 which reads thus:

> "On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of

1 2008(5) ALL MR 451
2 2007(3) ALL MR 371
3 AIR 1959 SC 443
4 2014(3) MH.LJ. 1

> possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [**See:** Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815]"

10 The learned counsel for the appellant defendant submits that the Apex Court in the matter of H. Venkatachala Iyengar vs. B.Thimmajamma and others (Supra) held that the onus on the propounder can be taken to be discharged on proof of the essential facts. In support of this contention, he relies on paragraph 19 which reads thus:

> "However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law,

> courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

11 The learned counsel for the appellant defendant submits that our High Court in the matter of Wilma Levert Canuao and others vs. Allan Sebastian D'Souza and another.(Supra) held that once the execution of the will is duly proved, mere fact that will was not registered is no ground to doubt authenticity of will. He submits that in the present proceeding, the appellant defendant duly proved the will dated 18.1.2007 executed by deceased Shivaji Mohite, father of the plaintiff in his favour in respect of the suit property. Hence, the judgment and decree passed by both the courts below are required to be set aside.

12 I have heard the learned counsel for the appellant at length. I have gone through the copy of plaint written statement, deposition of parties and their cross-examination as well as the judgment passed by both the courts. In the present proceeding, the respondent plaintiff filed Regular Civil Suit No.31 of 2008 simplicitor for injunction restraining the appellant defendant from disturbing her possession in respect of the suit property. Her case was that the suit property was the ancestral property of her father Shivaji Mohite. After the death of her father Shivaji Mohite, she was in possession of the suit property. Hence, the appellant defendant may be restrained by an order of injunction from disturbing her possession and same was upheld by both the courts below.

13 It is to be noted that the appellant defendant filed written statement in Trial Court. They had not filed any counter claim claiming

the ownership and or possession of the suit property. Even in cross-examination P.W.No.1 and P.W.No.2 specifically stated that plaintiff was in possession of the suit property.

14 The contention raised by the defendant about maintainability of the suit which was filed by the plaintiff simplicitor for injunction is not sustainable at all. Suit for simplicitor injunction is also maintainable if plaintiff is in possession. In the present proceeding, admittedly, both the courts below concurrently held that the plaintiff proved her possession in respect of the suit property. Even the authority cited by the defendant in the matter of Anathula Sudhakar vs. P.Buchi Reddy (Dead) by L.R.s & Ors. (Supra) held that simplicitor suit for injunction is maintainable if the plaintiff is in possession of the suit property. Hence, the suit as it was filed by the plaintiff was maintainable.

15 Though the defendant in their written statement raised objection that she is owner of the suit property on the basis of will executed by plaintiff's father, the same cannot be considered in the present proceedings because in the present proceedings, the plaintiff claimed simplicitor injunction restraining defendant not to disturb her possession in respect of the suit property. Though the defendant filed his written statement, they failed to claim any counter claim.

16 The appellant defendant placed on record copy of will and also examined the witnesses in support of will and also the authorities of the Apex Court. Same are not relevant in the facts and circumstances of the present case. In the present case, admittedly, the plaintiff in a suit claimed simplicitor injunction not to disturb her possession.

Hence, the issue about the appellant defendant's ownership cannot be considered in a suit filed by the plaintiff. Hence, the objection raised by the defendant does not survive.

17 In any case both the courts below concurrently held that the plaintiff proved her possession of the suit property and that cannot be disturbed by the defendant. Considering the concurrent findings of fact of both the courts below, I am of the opinion that the appellant defendant failed to make out any substantial question of law. Hence, Second Appeal stands rejected.

18 In view thereof, nothing survives in the Civil Application. Civil Application is dismissed as infructuous.

(K.K.TATED, J.)