

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(Civil Appellate Jurisdiction)

SECOND APPEAL NO. 463 of 2004

- 1] Shri Tarachand Jamnadas Wagwani,
aged 46 years, Occ. Agri & Business,
- 2] Shri Nathomal Jamnadas Wagwani,
Age 59 years, Occ. Agri & Business,

Both residing at Vavale Chawl,
Near Nashi Poona Road Bridge,
Nashik Road, Taluka & Dist. Nashik. ..

APPELLANTS
Org. Defts.

.. **Versus** ..

Smt. Anusayabai Bapuji Chandramore,
age 68 years, Occ. Household,
R/at Andheri, Mumbai, through his
GPA Shri Suganchand Sumberlal Munot
age 47 years, Occ. Business,
R/at Village Pasle, Taluka and
District Nashik. ..

RESPONDENT
Org. Plaintiff.

...

Mr. S.M.Gorwadkar, Senior Advocate, assisted by Shri Haridas
Rajendra Madhukar, Advocate for appellants.

Mr. Anil V. Anturkar Senior Advocate, assisted by Shri Pankaj R.
Thatte, Advocate, for Respondent

CORAM : R.K.Deshpande, J.
DATED : 2nd JULY, 2015.

ORAL JUDGMENT

1] In Regular Civil Suit No. 1097 of 1995, the trial Court has passed a decree on 27.03.2000, the operative portion of which is reproduced below;

- (1) *The plaintiff's suit is decreed with costs.*
- (2) *The Defendants or any other person on their behalf are hereby permanently restrained from creating any interest in the suit property or transferring or otherwise dealing with in interest of suit property.*
- (3) *The Defendant's transfer of certain plots in favour of other persons cannot be said legal and valid.*
- (4) *The Defendants are directed to pay cost of suit. Plaintiff to bear their own.*
- (5) *Decree be drawn accordingly.*

In Regular Civil Appeal No. 145 of 2000, the lower appellate Court has confirmed this decree and dismissed the appeal on 25.11.2003. Hence, the original defendants are before this Court in this second appeal against the concurrent findings of fact.

2] The relief claimed in the suit was that of permanent injunction restraining the defendants from dealing with the suit property in any manner by creating any third party interest.

The another relief claimed was of a declaration that the Defendant's transfer of certain plots in favour of other persons cannot be said to be legal and valid. The suit property as is seen from the original plaint is Gat No. 221, admeasuring 1 hectare and 64R, which was earlier Survey No. 28/2A. Both the courts below are concurrent in passing a decree in favour of the plaintiff. This second appeal was admitted on 22.06.2004, with the substantial question of law framed as under.

Whether the suit filed by the original plaintiff simpliciter for injunction was maintainable when the plaintiff was not in possession of the suit property on the date of institution of the suit?

3] Shri Gorwadkar, the learned Senior Counsel assisted by Advocate Shri Haridas R. Madhukar, appearing for the appellants, has invited my attention to the position summarized by the Apex Court in para 21 of its decision in the case of **Anathula Sudhakar vs. P. Buchi Reddy (dead) by L.Rs and others**, reported in **(2008) 4 SCC 594**, regarding the suit for prohibitory injunction relating to immovable property. The position summarized is reproduced below.

- (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* (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 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.

Shri Gorwardkar, the learned Senior Counsel submits that there is no prayer for declaration of title over the suit property. The plaintiff does not claim to be in possession of the suit property and therefore, such a suit simpliciter claiming permanent injunction restraining the defendants from creating third party interest or alienating the suit property was not maintainable.

4] Shri Anturkar, the learned Senior Counsel assisted by Advocate Shri P.R.Thatte, appearing for Respondent-original plaintiff has invited my attention to the issues framed by the trial Court, which are reproduced below along with the answer.

<i>Sr.</i>	<i>Points</i>	<i>Findings</i>
1.	<i>Whether Plaintiff proves enjoyment over the suit property?</i>	<i>No.</i>
2.	<i>Whether Plaintiff proves that the Defendant desire to transfer the suit property?</i>	<i>Yes</i>

- | | | |
|----|---|---------------------------|
| 3. | <i>Whether plaintiff is entitled to permanent injunction as prayed for?</i> | Yes |
| 4. | <i>What order and decree ?</i> | <i>As per final order</i> |

ADDITIONAL ISSUES

- | | | |
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| 1A. | <i>Whether the plaintiff proves titles to suit property on the date of suit?</i> | Yes |
| 3A. | <i>Whether the Defendants proves title and possession over suit property ?</i> | No. |

He submits that similar points for determination were framed by the lower appellate Court and those have been answered after taking into consideration the evidence of the only witness, who is the power of attorney holder of the plaintiff. It is urged that the lower appellate Court has recorded the finding that the plaintiff has proved ownership and possession over the suit property which is truly described in para 1 of the plaint. He submits that, in view of this, the decision of the Apex Court relied upon by the appellant supports the case of the respondent to the extent it holds that a suit for simpliciter prohibitory injunction is maintainable and while adjudicating, the court can record the findings on title and possession also.

5] After going through the pleadings and findings recorded by both the Courts below, it is apparent that the plaintiff does not claim to be in possession of the suit property.

No doubt, an averment is made in the plaint that the plaintiff is the owner of Survey No. 28/2A which is re-numbered as Gat No. 221 in the consolidation proceedings. This fact is seriously disputed by the defendants who are saying that it was a Survey No. 28/8 of which the plaintiff is the owner and it was renumbered as Gat No. 219 in the consolidation proceedings.

6] From the findings recorded by the Courts below it seems that Survey No. 28/8 belongs to one Tukaram Bala Gayake, whereas Survey No. 28/2A was owned by one Deubai Bapuji Gaidhani. The plaintiff claims to have purchased Survey No. 28/2A, which, according to him, is Gat No. 221, under the sale deed dated 27.12.1940 at Exh.37 through one Keru @ Laxman Bapuji Gaidhani, the son of Deubai. The defendants are claiming to have purchased Survey No. 28/2A from one Vinayak, who was one of the legal heirs of Deubai. The contention of the defendants is that the plaintiffs have purchased Survey No. 28/8 under the sale deed at Exh.37, which is re-numbered as Gat No. 219. Thus, there was a serious dispute not only regarding description of the property, but also in respect of identification of properties and Gat Numbers in the consolidation proceedings. In this factual background, the plaintiff could not have filed a suit simpliciter

for injunction restraining the defendant from alienating the suit property, particularly when it is not his case that he is in possession of the property. In the decision of the Apex Court in case of *Anathula Sudharkar*, cited supra, it is held that in cases where the plaintiff is not in possession of the suit property and serious dispute regarding title is raised, which involves complicated question of fact and law, the suit simpliciter for grant of prohibitory injunction against the defendant is not maintainable. The substantial question of law is, therefore, answered holding that the suit in question was not maintainable and the courts below have committed an error in passing a decree of injunction.

7] No doubt that the Courts below have framed an issue as to the title and possession of the plaintiff over the suit property. The issues are answered holding that the plaintiff has established his title and possession over the suit property, whereas the defendants have failed to establish it. As pointed out earlier, the plaintiff has not come up before the trial Court with the case that he is in possession of the property. The defendants have also not filed a counter claim seeking a decree for title and possession. The Courts below have relied upon the sale deed dated 27.12.1940 (Exh.37) produced by

the defendant record. I have gone through the said sale deed. Prima facie, it pertains to the land Survey No. 28/8 and the suit is in respect of Survey No. 28/2-A. The defendants have not produced either agreement to sale dated 18.01.1983 or the sale deed dated 06.08.1985. There is nothing on record to show as to what were the Gat Numbers given to the land covered by Survey No. 28/8 or 28/2-A. The Courts below, therefore, could not have recorded the finding on the question of title either of the plaintiff or of the defendants. This could be done only in a duly constituted suit claiming a title over the suit property. In view of this, even if the Courts below have answered the question of title, the evidence brought on record is insufficient to adjudicate the issue either one way or the other.

8] In the result, the second appeal is allowed. The decree passed by the trial Court in Regular Civil Suit No. 1097 of 1995 on 27.03.,2000, as is confirmed by the lower appellate Court in Civil Appeal No. 145 of 2000 on 25.11.2003, is hereby quashed and set aside. The Regular Civil Suit No. 1097 of 1995 is dismissed. Needless to say that it shall be open for the parties to file a suit for declaration of title and consequentially for possession and if such a suit is filed, it shall be decided in

accordance with law without being influenced by any of the observations made by the Courts below either in favour of the plaintiff or in favour of the defendants. No order as to cost.

At this stage, the learned counsel for the respondent-plaintiff prays for stay of the judgment for a further period of eight weeks from today so as to enable the respondent-plaintiff to adopt further appropriate remedy, if any, available in law.

In the facts and circumstances of the case, I do not find any substance in such a prayer. The prayer is, therefore, rejected.

(R.K.Deshpande, J.)

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Rvjalit/P.A.