

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 554 OF 2013
WITH
CIVIL APPLICATION NO. 1306 OF 2013 IN SA/554/2013**

Smt. Vimal Sawant @ Vimal
Anthony Cruz asservadhan

..Appellant

Vs

1.Smt.Joshephine Mary Anthony
Cruz Asservadhan, deceased,
through legal heirs;
1A) George Anthony Cruz
Asservadhan and Ors

.. Respondents

Mr. Venkatesh A. Shastry, Advocate for Appellant.
Mr.Siddharth C. Wakankar, Advocate for respondent no.1A.
Mr.Drupad S. Patil, Advocate for Respondents no. 3 to 6.

CORAM : R.G.KETKAR,J.
DATE : 26/03/2015

PC:

1. Heard Mr. V.A.Shastry, learned counsel for the appellant,
Mr Siddarth Wakankar, learned counsel for respondent no.1A
and Mr. Drupad Patil, learned counsel for respondents no.3 to
6 at length.

2. By this Appeal under section 100 of the Code of Civil
Procedure, 1908 (for short, 'C.P.C.'), the original plaintiff has
challenged the Judgment and decree dated 24.6.2013 passed
by the learned District Judge-17, Pune, in Civil Appeal No.26 of
2008. By that order, the learned District Judge allowed the
Appeal preferred by original defendants no.1 and 2 and

quashed and set aside the Judgment and decree dated 15.10.2007 passed by the learned Civil Judge, Jr.Dn., Pimpri, Pune, in Regular Civil Suit No.132 of 2001. The learned District Judge dismissed the suit. The parties shall, hereinafter, be referred to as per their status in the trial Court.

3. In support of this Appeal, Mr. Shastry submitted that defendant no.1 is first wife of Anthony Cruz Asservadhan. Defendants no.2 and 3 are children of defendant no.1 and of said Anthony. Plaintiff is the second wife of said Anthony.

4. Mr Shastry submitted that earlier defendant no.1 had instituted Regular Civil Suit No.2509 of 1988 against the plaintiff and Hindusthan Antibiotic for declaration and for issuance of succession certificate. The said suit was compromised between the plaintiff and defendant no.1. Defendant no.1 recognised and accepted that the plaintiff has $1/3^{\text{rd}}$ share in plot no.24 admeasuring 3 Gunthas, situate in Gat No.155. He submitted that on 3.4.1997, defendants no.1 and 2 executed sale deed in favour of defendants no.4 to 7. She, therefore, instituted present suit for declaration that the said sale deed is not binding on her $1/3^{\text{rd}}$ share as also for perpetual injunction restraining the defendants from alienating her $1/3^{\text{rd}}$ share. The learned trial Judge decreed the suit and declared that the sale deed executed by

defendants no.1 and 2 in favour of defendants no.4 to 7 is illegal as also issued injunction restraining the defendants from alienating the property in dispute.

5. Mr. Shastri submitted that the learned District Judge allowed the appeal and dismissed the suit only on the ground that the suit is barred in view of Section 34 of the Specific Reliefs Act, 1963 (for short, "Act"). The learned District Judge, after considering the decision of the Apex Court in the case of Union of India Vs. Ibrahim Uddin (2012) 8 Supreme Court Cases 148 held that it is not permissible to claim relief of declaration without seeking consequential relief. The learned District Judge held in paragraph 14 that the plaintiff is not admittedly in possession of the suit property. She ought to have prayed for possession.

6. In support of this Appeal, Mr .Shastri submitted that the plaintiff's /13rd share was already recognised by defendant no.1 in Regular Civil Suit No.2509 of 1988. Thus, 1/3rd share of the plaintiff in the property, in question, was already recognised and accepted by defendant no.1. In other words, the plaintiff is not claiming for the first time declaration that she has 1/3rd share in the suit property. He submitted that Section 34 of the Act will be applicable only in the event of a person claiming for the first time any legal character or any

right in the property and the same is denied by the opposite party. Since 1/3rd share in the suit property is recognised and accepted by defendant no.1, defendants no.1 to 3 have not denied plaintiff's 1/3rd share in the suit property. He, therefore, submitted that Section 34 is not applicable in the facts and circumstances of the case.

7. On the other hand, Mr. Wakankar and Mr. Patil supported the impugned order. They submitted that the plaintiff is admittedly not in possession of the suit property. Having regard to proviso of Section 34 of the Act, the plaintiff ought to have sued for possession of her 1/3rd share in the suit property. They relied upon decision in Union of India (supra).

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the plaintiff has sought declaration that the sale deed dated 3.4.1997 executed by defendants no.1 and 2 in favour of defendants no.4 to 7 is not binding on her 1/3rd share and for perpetual injunction restraining the defendants from alienating her 1/3rd share. It is not in dispute and it is admitted position that the plaintiff is not in possession of the suit property. Section 34 of the Act reads as under :-

“34. Discretion of court as to declaration of status

or right.-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.

Explanation.-A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

9. Perusal of Section 34 shows that proviso thereto lays down 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. In my opinion, in addition to seeking relief of declaration, the plaintiff ought to have sought possession of her 1/3rd share in the suit property. By omitting to seek relief of possession, the Court will not be in a position to make declaration as sought for by the plaintiff. In my opinion, once the plaintiff's 1/3rd share was recognised in earlier suit of 1988, she ought to have claimed relief of possession of her 1/3rd share. Having omitted to claim relief of possession, the learned District Judge rightly held that in view of Section 34 of the Act, the plaintiff is not entitled to any

relief in the suit. The learned District Judge rightly relied upon the case of Union of India (supra) in that regard. Hence, no case is made out for invocation of the powers under section 100 of the C.P.C. Hence, Appeal fails and the same is dismissed as it does not involve any substantial question of law. In view of dismissal of Appeal, Civil Application No.1306 of 2013 for injunction does not survive and the same is dismissed.

(R.G.Ketkar, J.)