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

**CIVIL APPLICATION NO. 8351 OF 2017
IN/WITH
SECOND APPEAL (ST.) NO. 19531 OF 2017**

Mahendra s/o Motilal Lodha,
Age: 59 years, Occu: Business & Agriculture,
R/o. Poonam Motinagar, Market Yard,
Ahmednagar, Dist. Ahmednagar

..APPLICANT/APPELLANT

VERSUS

1. Shaikh Iliyas Shaikh Gulab,
Age: 45 years, Occu: Agriculture

2. Rukhvayya Begum w/o Sk. Iliyas,
Age: 40 years, Occu: Agriculture,

R.Nos. 1 and 2 both R/o. Ghodegaon,
Tq. Gangapur, Dist. Aurangabad

3. Sou. Nasima Begum w/o Sk. Habib,
Age: 42 years, Occu: Household,
R/o. Mansoor Colony, Gangapur,
Tq. Gangapur, Dist. Ahmednagar

4. Manish s/o Arjun Ingle,
Age : 46 years, Occu: Agriculture,
R/o. Brahman Karanja, Ahmednagar,
Dist. Ahmednagar
(Dismissed in CRA)

..RESPONDENTS

Mr V. D. Hon, Senior Advocate i/b Mr A. V. Hon, Advocate for
applicant/appellant;
Mr Hemant Surve, Advocate for respondent Nos.1 to 3

CORAM : N.W. SAMBRE, J.

DATE : 31st July, 2017

ORAL ORDER

Heard.

(2)

2. In view of no objection of respondents, delay of 416 days caused in filing second appeal stands condoned. Civil Application stands allowed.

3. Present applicant/appellant filed Regular Civil Suit No. 107 of 2000 in the Court of learned Civil Judge Junior Division, Gangapur, on 25th May, 2000, based on Exh.73 – sale deed dated 30th July, 1997 for perpetual injunction and declaration. It is the case of the appellant-plaintiff that by virtue of Exh.73, he became owner of the land Gat No. 76 to the extent of 7 Acres 2 Gunthas, situated at Village Ghodegoan, Tq. Gangapur, Dist. Aurangabad. It is claimed that he is in possession of the said suit property from the date of execution of sale deed.

4. The suit in question came to be partly decreed by the learned Trial Court, vide judgment and decree dated 8th October, 2008, declaring the present appellant as owner of the suit property. However, his claim for grant of injunction came to be rejected.

5. The defendants preferred Regular Civil Appeal No. 112 of 2012 before the learned Ad Hoc District Judge, Vaijapur, which came to be allowed on 22nd January, 2016 by recording findings that the suit simplicitor for declaration of title is not maintainable under the provisions of Sections 34 and 42 of the Specific Relief Act, 1963.

6. The fact remains that against rejection of part claim, particularly about injunction, no appeal is carried by the present appellant before the learned appellate Court.

(3)

7. In the aforesaid background, Mr Hon, learned Senior Counsel appearing for applicant-appellant would urge that the provisions of Section 42 of the Specific Relief Act in the given circumstances are not applicable. He would rely upon the principle that the appeal is continuation of suit and as such, cause of action cited in the suit is required to be appreciated even today. According to him, the Apex court in the matter of **Anathula Sudhakar vs. P. Buchi Reddy (Dead) by L.Rs. & ors.** reported in **(2008) 4 Supreme Court Cases 594**, particularly while answering the question raised before it, has held that in a suit for declaration and injunction, it is open for the Trial Court to decide the issue of declaration of ownership.

8. Per contra, learned Counsel appearing on behalf of respondents-defendants would urge that the plaintiff has abandoned his claim for injunction having suffered dismissal before the Trial Court as no appeal was carried out against such order for rejection of prayer for injunction. According to him, in such eventualities, the present appellant having accepted the decree for rejection of prayer for injunction, the Trial Court has rightly held that the suit simplicitor for declaration is not maintainable. He sought dismissal of the appeal.

9. From the record, it depicts that the present respondents filed their written statement at Exh. 21, wherein the respondents denied that the appellant is in possession of the suit property. The Trial Court, based on the pleadings, framed issues at Exh. 43 and answered the issue of title in favour of the appellant. The issue as regards possession of the present appellant over the suit property was answered against the appellant, so also issue of injunction.

(4)

10. Feeling aggrieved by the judgment and decree passed in favour of the appellant by declaring him as having title to the suit property, the defendants preferred an appeal before the learned Ad Hoc District Judge, Vaijapur, being Regular Civil Appeal No. 112 of 2012.

11. The appellant-original plaintiff has neither preferred any independent appeal against findings of the Trial Court for rejecting the prayer for injunction and having held him not in possession of the suit property, nor filed any counter appeal to the appeal filed by the present respondents.

12. As a consequence, the judgment of the Trial Court, rejecting the prayer of the present appellant-plaintiff for injunction has attained finality. The appellant, having not questioned the said judgment before the learned appellate Court has to be viewed as the appellant-plaintiff is abandoning the claim for injunction moved before the learned Trial Court.

13. In the aforesaid background, if the claim of the appellant is considered that the cause of action and the prayer in the suit on the date of filing is required to be considered, particularly in view of the principle that the appeal is continuation of suit, in my opinion, the very conduct of the appellant of accepting the judgment and decree passed by the learned Trial Court of rejection of prayer for injunction, is to be inferred as appellant giving-up the claim for injunction having not questioned the same in an appeal.

(5)

14. Though the appellant has relied upon the judgment of the Apex Court in the matter of **Anathula Sudhakar** (cited supra), it is required to be noted that the said judgment, while answering the question (i) (d) raised before it, has held that it is in exceptional case, if the appellant-plaintiff demonstrates that he is the owner of the property by a straight case, then only in a case for injunction and declaration, the Trial Court may answer the issue of declaration of ownership. If the said judgment is considered in its true perspective, it is noticed that the judgment is rendered in view of presumption that such party, who claims relief of injunction and declaration remains in possession of the suit property.

15. Though the appellant in the present case has claimed that he is in possession of the suit property, however, having answered such issue against appellant including that of issue of injunction, the said judgment is of hardly any assistance to the appellant. It is worth to note here that the appellant has not questioned the findings of the Trial Court before the learned first appellate Court and is rather questioning the same in this second appeal.

16. Apart from above, the appellant has failed to demonstrate an exceptional case before the learned Trial Court or before this Court so as to infer that this Court must answer the issue of declaration of ownership.

17. The appellate Court, having regard to the scheme of Sections 34 and 42 of the Specific Relief Act, in view of the judgment of the Apex Court in the matter of **Anathula Sudhakar**, cited before, rightly held that the appellant's suit simplicitor for declaration of title is not maintainable, particularly when the judgment and the decree of rejection of prayer for injunction is answered against him.

(6)

18. For the aforesaid reasons, in my opinion, no substantial question of law is involved in the present second appeal. As such appeal fails, stands dismissed.

19. At this Stage, Mr Hon, learned Senior Counsel would urge that as the appellant has not claimed relief of possession in the suit in question, in case, such fresh suit is brought into action, liberty be granted to the appellant for the same.

20. Admittedly, there was no relief of possession claimed in the suit. In such eventualities, in case, suit for possession is brought into action, the learned Court below shall decide the same on its own merits, without being influenced by the findings recorded herein. The time consumed before this Court be also considered, if the issue of limitation crops up. However, all the issues as shall be raised before the Court below shall be considered subject to scrutiny of law.

(N.W. SAMBRE, J.)

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