

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

WRIT PETITION No. 6635 of 2016

Laxmibai Mukunda Koshti (died)
through legal representatives:

1. Ramesh S/o Mukunda Koshti (Nandurkar),
age 50 years occupation service
R/o Daily Bazaar, Nasirabad District Jalgaon
2. Pandurang S/o Mukunda Koshti (Nandurkar),
age 45 years occupation rickshaw driver
R/o as above,.
3. Shobhabai Vasudeo Rakhunde,
age 47 years occupation household R/o as above.
4. Kailash S/o Mukunda Koshti (Nandurkar),
age 35 years occupation service
R/o near Bannat Buwa Temple,
Nasirabad Taluka and District Jalgaon.
5. Devidas S/o Mukunda Koshti (Nandurkar),
age 49 years occupation service
R/o Daily Bazaar, Nasirabad Taluka and District Jalgaon.

**...Petitioners
(Original defendants)**

VERSUS

1. Dnyandeo S/o Dayaram Patil,
age 68 years occupation agriculture
R/o Nasirabad Taluka and District Jalgaon.
2. Madhukar Mukunda Koshti (Nandurkar), (died)

...Respondents

(Original plaintiff No.2, original defendant)

Mr. Girish Rane, Advocate for petitioners

Mr. R.O. Awsarmal, Advocate for respondent No.1.

CORAM : SUNIL P. DESHMUKH, J.

DATE : 18th June, 2018

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard learned counsel for both the parties finally, by consent. Learned counsel appearing for defendant no. 1 to 3 and 5, Mr. Girish Rane submits that, they are legal representatives of deceased Laxmibai Koshti who is original defendant in the Regular Civil Suit no. 77 of 2008.

2. In present writ petition petitioners – defendants no. 1 to 3 and 5 are aggrieved by common judgment and order dated 30-03-2016 passed by Ad-hoc District Judge-2, Jalgoan, on Exhibit-1 in Regular Civil Appeal no. 1710 of 2012 and on Exhibit-26 an application filed by respondent no. 1-original plaintiff for leave to adduce additional evidence where-under appellate court has framed additional issues of ownership and maintainability of suit under Order II, Rule 2 of Civil Procedure Code and has remanded the matter to trial court, directing to record findings on the same. Parties hereto are referred to hereinafter by their status in the suit.

3. Mr. Rane submits, the plaintiffs had filed three regular civil suits bearing no. 250 of 1980, 184 of 1981 and 470 of 1983 against father and paternal uncle of defendant no.1 seeking restraint on them from

causing obstruction to claimed possession of plaintiff over suit property. Suit property is a land admeasuring 2 *Hector*, 28 *Are* from gut no.51 situated at Nashirabad, Taluka and District, Jalgoan, which plaintiff had claimed to have acquired by virtue of a registered sale deed executed by father and uncle of petitioner no.1 in 1981. Contention of plaintiff was, despite sale deed in his favour executed by the father and uncle of the petitioner no. 1, the vendors had recorded their names fraudulently in crop cultivation column of 7/12 extracts with the help of revenue officers and on that basis they were obstructing plaintiff's possession. It was, inter-alia, contended by original defendants in written statement that the sale deed is a forged document and plaintiff had got the same executed by an imposter before registering authority, who had purportedly claimed that they are persons in the possession of property since long back. Those three suits had been withdrawn by the plaintiff absolutely unconditionally.

4. In regular civil suit no. 250 of 1980 father and uncle of present petitioner no.1- as defendants had filed application for impounding document i. e. sale deed in question for sending it to handwriting expert for verification of signatures. That application had been

allowed by trial court. Thereupon, plaintiff had withdrawn regular civil suit no. 250 of 1980 apprehending that forgery and illegality committed by him in getting sale deed executed in his favour would come to light, if suit was to be decided on merits.

5. Learned counsel submits further that respondent no. 1-plaintiff has again filed regular civil suit no. 77 of 2008 for perpetual injunction and putting restraint on defendants from interfering with his claimed possession. This suit is for the same purpose as the one had been in earlier suits. The suit has been dismissed observing that the plaintiff has failed to prove his possession and obstruction to the same at the hands of defendants. The court has recorded finding that defendants are proved to be in possession of suit property. It is also referred to that all the revenue decisions had been against the plaintiff in the proceedings filed by him for recording his name in crop cultivation column.

6. Similar attempt as the one in regular civil suit no. 250 of 1980 for impounding of sale deed had been made by the original defendant in the present regular civil suit no. 77 of 2008. The application had been failed under order of trial court dated 06-09-2011. High court while dismissing writ petition no. 9085 of 2011 filed

by present petitioners, challenging trial court's order of rejection of application for impounding the sale deed, had observed that, suit is simpliciter for perpetual injunction, not claiming title and that defendants had not challenged legality of the sale deed, had concurred with the reasons given by trial court.

7. In spite of this, first appellate court failed to consider the same and under misconception and misinterpretation of facts, framed additional issues of ownership and maintainability of suit and remanded the matter to trial court for giving findings on the same. Conclusions drawn by appellate court are unjust and cause grave prejudice to petitioners. As such, order of appellate court may be quashed and set aside.

8. Learned counsel for petitioners to buttress his contention, submits that trial court after considering all the aspects had dismissed the suit. First appellate court appears to be in oblivion of observations of this court in writ petition no. 9085 of 2011 and committed error in widening the scope of suit. He submits, first appellate court could to have considered the plea about maintainability of suit on the basis of provisions contained in Order II, Rule 2 and Order XXIII, Rule 1(4) of Civil Procedure Code, 1908, and ought to have considered additional issues as framed do not

arise and that it was not necessary to remand the matter and to direct trial court to record for the findings on the same.

9. Learned counsel for respondent no.1 Mr. Awsarmal submits that original defendant no. 4-respondent no. 2 herein died before present writ petition had been filed. He further submits, the petitioners have not come with clean hands before this court as they have suppressed the fact that petitioner no. 1 was debarred from participating in further proceeding of suit under order passed by trial court on 14-09-2012, for non-compliance of order of payment of costs passed by Principal District Judge, Jalgaon. Thus, original defendant no.1 has no *locus standi* to file the writ petition.

10. Learned counsel Mr. Aswarmal submits, sale deed had been executed by father and uncle of petitioner no. 1 in favour of plaintiff, and also name of plaintiff had been recorded in mutation and in 7/12 extracts. Same has never been questioned by defendants nor it was cancelled by any competent civil court. Trial court had not framed the issue of ownership, but, first appellate court has rightly reached to the root of the matter and has assigned right reasons that with issue of possession, issue of ownership ought to have been framed by trial court having regard to the principle that possession follows title. Appellate court has properly acceded to request of plaintiff. Present

writ petition does not carry any substance and merits and is liable to be dismissed.

11. In view of the aforesaid it appears that, there is no dispute about earlier rounds of litigations among the parties. On perusal of trial court's judgment it appears that defendants had opposed plaintiff right from the first suit of 1980 to present suit of 2008. It is pertinent to note that sale deed relied on in present regular civil suit no. 77 of 2008 had also been referred to and relied on in earlier regular civil suits no. 250 of 1980, 184 of 1981 and 470 of 1983. Those suits had been withdrawn unconditionally by plaintiff at different points of time. In present suit also plaintiff has claimed the same relief placing reliance on the same sale deed. It appears from the judgment of trial court in support of this contention, defendants had led evidence by placing certified copies of plaints of earlier suits on record of present suit and the record was considered by trial court.

12. Two attempts of impounding of sale deed have been made one by father of petitioner no. 1 was successful, however, on second occasion it was rejected for the reason that suit was filed by plaintiff simpliciter for injunction and not for declaration of ownership. This court in writ petition no. 9085 of 2011 had specifically observed to

that effect and confirmed the view of trial court. On perusal of plaint it appears that in plaint plaintiff has filed suit for simpliciter for perpetual injunction and sale deed is not challenged by defendants.

13. It appears that issue relating to ownership had not been raised either in the earlier suits or in present suit by respondent No.1-plaintiff. Therefore, trial court had not framed issue to that effect. Looking at the pleadings and prayers in the plaint of regular civil suit no. 77 of 2008 i. e. exhibit-A, it appears that, there is no prayer for declaration of ownership by claiming mandatory injunction. It is for the first time such prayer was made in regular civil appeal no. 1710 of 2012. Although respondent-plaintiff has claimed that he had earlier moved an application before trial court for framing additional issues in regular civil suit no. 77 of 2008 but the same was rejected by trial court. It appears that to the buttress this submission the plaintiff has not placed any material on record. Nor there appears to be any observation in this respect in judgment of trial court.

14. However, the respondent no.1 raised issue of *locus standi* of petitioner no. 1 before this court. On perusal of order passed by trial court regarding payment of costs on 14-09-2012 at Exhibit R-1, it appears that trial court had restrained petitioner no.1 from participating in proceeding of regular civil suit no. 77 of 2008 for

non-compliance of the order of Principal district judge. It may not be out of place to refer to that, despite the same evidence of petitioner no.1 has been considered by trial court, giving sufficient indication that said order stands overruled and may be omission if any to pay costs can remedied. Thereafter, petitioner no.1 has been a party in regular civil appeal no. 1710 of 2012 giving legal right to defend appeal. In the circumstances order being referred to on behalf of plaintiff may not be able to carry forward intention of respondent.

15. It transpires that the plaint of regular civil court no. 77 of 2008 respondent No.1-plaintiff has averred that ' from the date of execution of sale deed he has in the possession in the capacity of owner of suit property.' It seems that issues are sought to be raised in appeal after decision in suit when decision went against plaintiff. It appears the appellate court has framed issue of ownership under the misconception that suit was for the mandatory injunction and restoration of possession and the trial court has failed to consider the same. Appellate court without examining the record in respect of relevant aspects and facts has quashed and set aside order of trial court while the issue of possession had directly and substantially been involved in earlier suits and present suit. Accordingly trial court

has dealt with the issue of possession and decided in favour of petitioners observing that the property is in possession of defendants.

16. Dealing with the situation in present petition, it is germane to refer to the provisions of code of civil procedure. The petitioners have relied on the Order XXIII, Rule 1(4) of Code of Civil Procedure, 1908. It is clear from aforesaid that the facts on the basis of which present suit is filed, those are the same, same subject matter and same documents as had been referred in earlier suits. Respondent No.1 had omitted relief of ownership from being claimed. In present case, reliefs claimed and sought were directly and substantially involved in the earlier suits. The object of the provisions is to avoid multiplicity of proceedings and not to vex the parties over and again in a litigative process gets obfuscated.

17. Counsel for respondent No.1 contended that the cause of action in the earlier suit was distinct from the present suit and, therefore, there is no bar of referred provisions and are not applicable in present case. That earlier suits were instituted between the period 1980 to 1983 and present regular civil suit no. 77 of 2008 was of the year of 2008.

18. The issue of maintainability under order II, rule 2 sought to be raised the same is not pressed in writ petition and while advancing the submissions as well, therefore, is not being dealt with.

19. In the light of aforesaid facts and circumstances, it would be appropriate to set aside the impugned common judgment and order dated 30-03-2016 on Exhibits-1 and 26 in regular civil appeal no. 1710 of 2012 passed by Ad-hoc District Judge-2, Jalgaon, As such, impugned judgment and order accordingly is quashed and set aside.

20. Resort to remedy at appropriate stage as may be available in law would not be undermined under this order.

21. Writ petition is allowed accordingly and is disposed of. No order as to costs.

22. Rule made absolute in aforesaid term.

**(SUNIL P. DESHMUKH)
JUDGE.**