

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 443 of 2006**

1. Khomanlal Chandrakar (died) through Lrs.

(a) Smt. Mandavi Devi Chandrakar @ Dhelabai Chandrakar, W/o Late Khomanlal Chandrakar, Aged about 65 years.

(b) Smt. Sabya Chandrakar, D/o Late Khomanlal Chandrakar, Aged about 46 years.

(c) Smt. Anjana Chandrakar, D/o Late Khomanlal Chandrakar, Aged about 43 years.

(d) Akhilesh Chandrakar, S/o Late Khomanlal Chandrakar, Aged about 36 years.

All the above R/o Station Road, Mahasamund, Tahsil & Distt. Mahasamund, Chhattisgarh.

----- Appellants/Defendants

Versus

1. Tarendra Kumar, Aged about 42 years, S/o Pokhanlal Chandrakar.

2. Dulari Bai Wd/o Pokhanlal Chandrakar, Aged about 62 years.

----- Respondents/Plaintiffs

For Appellants	:	Mr. Anurag Singh, Advocate
For Respondents	:	Mr. Prateek Sharma and Mr. Ravindra Sharma, Advocates

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

10/12/2019

1. This second appeal preferred by the defendants was admitted for hearing on the following substantial questions of law:-

"1. Whether document Ex. D-1 which is a document of family settlement requires registration so that it may be recorded as an effective instrument ?

2. Whether the suit of the respondent is maintainable without seeking relief of declaration of title when they are not in possession of the said land on the date of filing of the suit ?"

2. Plaintiff No. 1 is the nephew of defendant No. 1.

The two plaintiffs filed a civil suit for mandatory injunction and for defendants to hand over the possession of the suit property to them after removal of the superstructure stating *inter alia* that they are the title-holders of the suit property bearing khasra No. 464/2 and 459/2 and are in possession of the said suit property in which defendants have illegally encroached upon by constructing a house and also by affixing stone cutting machinery on some part of the land

for which they have also obtained an electricity connection illegally without taking permission from the Municipal Corporation, Mahasamund and if the defendants are not stopped from raising the said construction, plaintiffs' entry into their own house would become difficult, as such, the defendants be restrained from constructing the house and mandatory injunction be granted in their favour for removing the superstructure and then delivering the possession of the suit property to them.

3. Defendants set up a plea that the suit property fell in their share during the family partition held in the year 1965-66 vide Ex. D/1 dated 30/05/1983, as such, plaintiffs' bare suit for mandatory injunction without seeking the relief of declaration of title is not maintainable and is liable to be dismissed.
4. Learned trial Court, upon evaluation and appreciation of oral and documentary evidence on record, reached to the conclusion that plaintiffs are the title-holders of the suit property (See: para 25) and consequently, recorded a finding that defendants have illegally encroached upon the suit property by constructing house and

affixing machinery which is improper and thereby, decreed the suit of the plaintiffs vide its judgment and decree dated 21/12/2001 and granted mandatory injunction in their favour under Section 39 of the Specific Relief Act, 1963 (hereinafter, "the Act").

5. On appeal being preferred by the defendants, learned first appellate Court affirmed the judgment and decree of the trial Court and dismissed defendants' appeal vide its judgment and decree dated 26/09/2006 against which this second appeal has been preferred by them under Section 100 of the CPC in which two substantial questions have been formulated and set out in the opening paragraph of this judgment.

6. Mr. Anurag Singh, learned counsel for the appellants/defendants would submit that the trial Court is absolutely unjustified in decreeing the suit of the plaintiffs which was only for grant of mandatory injunction and for removal of the superstructure and then handing over the possession of the suit property to the plaintiffs. They did not pray for declaration of title which was necessary as it is the case of the defendants that the suit property fell in

their share in the family partition vide Ex. D/1 dated 30/05/1983, but the trial Court, while deciding the entire four issues, simply recorded a finding that since plaintiffs are the title-holders of the suit property, therefore, construction raised by the defendants upon their land is impermissible and proceeded to grant the relief of mandatory injunction in their favour without satisfying himself as to whether the necessary requirements for grant of mandatory injunction have been made out by the plaintiffs or not. The first appellate Court, too, without recording any specific reasons, blindly affirmed the judgment and decree of the trial Court which is wholly impermissible and bad in law, as such, the impugned judgment and decree deserves to be set aside and the second appeal deserves to be allowed.

7. Mr. Prateek Sharma and Mr. Ravindra Sharma, learned counsel for the respondents/plaintiffs would submit that plaintiffs have clearly stated that they are the title-holders of the suit property and the trial Court, after examining the title of the plaintiffs, has rightly held them to be the title-holders of the suit property and

proceeded to grant mandatory injunction in their favour by a well-reasoned and well-speaking judgment which has already been affirmed by the first appellate Court, therefore, the second appeal deserves to be dismissed by answering the substantial questions of law in favour of the plaintiffs.

8. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and perused the records with utmost circumspection.

9. For the sake of convenience, substantial question of law No. 2 is taken up first for consideration.

10. It is true that the parties are related to each other and plaintiffs are claiming that they have purchased the suit property vide Ex. P/1 dated 16/06/1969, therefore, they are the title-holders of the suit property whereas it is the case of the defendants that they have acquired the suit property in family partition vide Ex. D/1 dated 30/05/1983.

11. Plaintiffs filed a suit mainly for mandatory injunction and possession stating that they are the title-holders of the suit property on which defendants have illegally encroached upon by way

of constructing a house and affixing stone cutting machinery and obtained illegal electricity connection without the permission of Municipal Corporation, Mahasamund and filed the suit for mandatory injunction and possession.

12. The trial Court framed four issues which are quoted herein-below along with their conclusions :-

	वाद प्रश्न	निष्कर्ष
1.	क्या प्रतिवादीगण द्वारा वाद भूमि ख. न. 464/1, 464/2 के प्लॉट न. - 22, 24, 25 के रकबा क्रमशः 0.014, 0.06 एवं 0.013 हे. वादी के स्वामित्व की भूमि पर अतिक्रमण कर मकान निर्माण मशीनरी लगाई जा रही है?	हाँ
2.	क्या प्रतिवादीगण के द्वारा वाद भूमि पर 1955-56 से आरा मशीन स्थापित कर लगातार निर्विधन उपयोग कर रहे हैं ?	नहीं
3.	क्या वादी का दावा म्याद बाहर है?	नहीं
4.	क्या वाद भूमि पारिवारिक व्यवस्था पत्र दिनांक 30-5-83 के अनुसार प्रतिवादी क्रमांक - 1 के प्राप्त हुआ था ?	नहीं

13. A careful perusal of the judgment of the trial Court would show that while deciding the issue No. 1, in paragraphs 8 to 25, the trial Court has

discussed the threadbare evidence of the parties and the documents filed by them and reached to the conclusion that suit property was owned by the plaintiffs. In paragraph 25, the trial Court has specifically recorded a finding that plaintiffs are the title-holders of the suit property and defendants have failed to establish their title and immediately thereafter, held that defendants are encroaching upon plaintiffs' land by way of constructing a house and affixing machinery and thereby, answered issue No. 1 in favour of the plaintiffs and against the defendants. Then, resultantly, in paragraph 29, the trial Court restrained the defendants from constructing house on the suit property owned by the plaintiffs and granted mandatory injunction in favour of the plaintiffs directing the defendants to remove the superstructure and deliver peaceful possession of the suit property to the plaintiffs.

14. It is not in dispute that the suit was only for mandatory injunction under Section 39 of the Act and for handing over the possession of the suit property after removal of superstructure which the defendants have allegedly constructed upon

the suit property. Defendants have seriously disputed the title of the plaintiffs while filing reply, but the plaintiffs have merely stated that they are the title-holders of the suit property but did not state their source of title.

15. In ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandran and Ors.***¹, their Lordships of the Supreme Court have clearly held in paragraph 22 that unless there is a pleading especially with regard to the source of title, the defendant in a suit has no opportunity to rebut such pleading thus an evidence with regard to which there is no pleading cannot be relied upon by the plaintiff for setting up his title in a suit.

16. In the instant case, though the plaintiffs only sought the relief of mandatory injunction under Section 39 of the Act but they did not claim any title over the suit property by seeking the relief of declaration of title under Section 34 of the Act. The trial Court, while deciding issues No. 1 to 4, only dealt with title of the plaintiffs in paragraphs 8 to 25 and came to the conclusion that plaintiffs are title-holders of the suit property as defendants have failed to

¹ (2017) 3 SCC 702

establish their title and therefore, proceeded to grant mandatory injunction in favour of the plaintiffs ultimately, restraining the defendants from raising construction and delivering the peaceful possession of the suit property to the plaintiffs after removal of the superstructure.

17. The suit was for mandatory injunction simpliciter under Section 39 of the Act. If title of the plaintiffs was under the cloud after the reply was filed by the defendants, plaintiffs themselves could have amended the plaint seeking for relief of declaration of title as well under Section 34 of the Act.

18. In the matter of **Anathula Sudhakar v. P. Buchi Reddy (dead) by Lrs. and Ors.**², the Supreme Court formulated the question as to when a mere suit for permanent injunction would lie and when it is necessary to file a suit for declaration of title and/or possession with injunction as a consequential relief and observed as under :-

“21..(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*³). 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."

19. Reverting to the facts of the present case, plaintiffs' suit was barely for mandatory injunction under Section 39 of the CPC and as observed above, plaintiffs' title was seriously disputed by the defendants but the suit was only for injunction simpliciter and the prayer for injunction ought to have been decided with reference to the finding of possession as held by the Supreme Court in **Anathula Sudhakar** (supra) in para 21 (c). Finding of title cannot be recorded in a suit for injunction as there is no necessary pleading by the plaintiffs regarding the source of title from which they have derived the title

over the suit property and the averment regarding title is absolutely absent in the plaint. Though issue No. 1 has been framed by the trial Court in this regard that whether encroachment is being made by the defendants on the land held by the plaintiffs, but the question of title, as held by the Supreme Court, is a complicated question of fact and law wherein the Court can 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. As such, the trial Court committed illegality in deciding the complicated issue of title without there being any specific pleading on behalf of the plaintiffs, though defendants have raised some pleading with regard to their title over the suit property, yet the question of title could not have been adjudicated by the trial Court in a bare suit for injunction particularly, when the trial Court, while deciding the application for temporary injunction on 27/03/1993, has already recorded a finding that the construction made by the defendants has already been completed and that too, much prior to the date of institution of the suit. The parties ought to have been

relegated to get their issues resolved by filing a comprehensive suit for declaration of title. The first appellate Court took no pain to find out whether the trial Court has proceeded rightly in recording a finding based on title despite the fact that plea of title in the plaint is totally missing, which was absolutely necessary for the reason that plaintiffs' suit was only for the relief of mandatory injunction, but the first appellate Court has failed to perform its duty to consider the whole case in an appeal under Section 96 of the CPC.

20. Now, the question is whether the trial Court is justified in granting the relief of mandatory injunction to the plaintiffs under Section 39 of the Act by directing the defendants to deliver peaceful possession of the suit property to the plaintiffs after the removal of superstructure ?

21. Section 39 of the Specific Relief Act, 1963 states as under :-

"S. 39. Mandatory injunctions. - When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach

complained of, and also to compel performance of the requisite acts."

22. Mandatory injunction is an injunction in a positive form, requiring a person or party to a suit to do a particular thing. It provides a remedy where it is not possible to restore the status quo, unless the wrongdoer is made to undo the wrong, which he has committed. It is granted when to prevent a breach of obligation, it is necessary to compel the performance of certain acts. It aims at restoration of things to status quo ante. A mandatory injunction cannot be granted to create a new state of things. Where the possession of the plaintiff has been violated pending proceedings, an order of mandatory injunction can be passed to restore possession. The two elements which must be considered for the grant of mandatory injunction as per The Specific Relief Act, 1963 14th Edition by Pollock & Mulla are as under :-

"(i) what acts are necessary in order to prevent a breach of the obligation; and
(ii) whether these acts are such as the court is capable of enforcing."

In order to grant mandatory injunction, the plaintiff must show that there has been a breach

of legal obligation and that it is necessary to maintain the status quo.

23. In the matter of ***Maria Margarida Sequeria Fernandes and Ors. v. Erasmo Jack de Sequeria (Dead) through Lrs.***⁴, the Supreme Court has reiterated the principle of law with regard to the suit for mandatory injunction. Paragraph 80 of the report states as under :-

Suit for Mandatory Injunction

"80. It is a settled principle of law that no one can take law in his own hands. Even a trespasser in settled possession cannot be dispossessed without recourse of law. It must be the endeavour of the Court that if a suit for mandatory injunction is filed, then it is its bounden duty and obligation to critically examine the pleadings and documents and pass an order of injunction while taking pragmatic realities including prevalent market rent of similar premises in similar localities in consideration. The Court's primary concern has to be to do substantial justice. Even if the Court in an extraordinary case decides to grant ex-parte ad interim injunction in favour of the plaintiff who does not have a clear title, then at least the plaintiff be directed to give an

undertaking that in case the suit is ultimately dismissed, then he would be required to pay market rent of the property from the date when an ad interim injunction was obtained by him. It is the duty and the obligation of the Court to at least dispose off application of grant of injunction as expeditiously as possible. It is the demand of equity and justice."

24. In the celebrated case of **Dorab Cawasji Warden v.**

Coomi Sorab Warden and Ors.⁵, the Supreme Court has laid down guidelines for grant of interlocutory mandatory injunctions, which are as follows :-

"16...(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

25. Recently, in the matter of **Golden Valley**

Educational Trust Oorgam v. Vokkaligara Sangha⁶,

the Karnataka High Court laid down the parameters

⁵ (1990) 2 SCC 117

⁶ 2013 SCC Online Kar 10461

as to when mandatory injunction can be granted and in paragraph 43 summarized as under :-

"From the aforesaid decisions, the law in respect of mandatory injunction could be summarized as under:-

The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course'. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly. Where the defendant has acted without regard to his neighbour's rights or has tried to steal a march on him or has tried to evade the jurisdiction of the Court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour, he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff. The principles governing the grant of Injunctions are the same, whether the acts sought to be restrained are a breach of contract or a tort. In both cases there must be no acquiescence and

damages must not be a sufficient remedy, and the restoration of things to their former condition must be the only relief which will meet the requirements of the case. Prompt action is essential if a mandatory Injunction is the desired remedy. Where a plaintiff has not brought his suit or applied for an Injunction at the earliest opportunity, but has waited till the act complained of by him has been completed, and then asks for a mandatory Injunction, such an Injunction will not in general be granted. The Court will seldom interfere to pull down a building which has been erected without complaint. A landlord should not have a mandatory Injunction for demolition of a building unless he has not only objected to such building but has also taken legal steps to prevent it. But where the defendant has acted reasonably though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. Firstly, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at

law and all his consequential remedies in equity. The Court in the exercise of its discretion will be guided by consideration of justice, equity and good conscience and that it is not possible for the Court to lay down inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused. A mandatory injunction is a discretionary relief and delay is a factor which has to be taken into account while granting it, where a case for grant of this relief is otherwise made out and that such delay, however to be a disqualifying circumstance, must amount to waiver or abandonment of the rights sought to be enforced or acquiescence in the act complained of or laches, after the act is done. One of the tests to determine whether a mandatory injunction should or should not be granted is whether the plaintiffs, who objected to the constructions being made by a co-owner on a joint land, did so at the earliest or waited till the constructions had been completed. In the first case injunction would normally be issued, whereas if the constructions had been allowed to be completed, an injunction would normally be refused, as the basis for refusing injunction would be that by their conduct in not objecting at the

earliest stage, the joint co-owners had induced the maker of constructions to believe that he could make it, and in doing so spent money and effort. Before the plaintiff could claim such mandatory injunction, he should establish that he did not stand by and allow the injury to be caused to him. If the evidence discloses that the plaintiff did make it possible to the defendant to cause that injury such as unauthorized construction and never took any step such as the institution of a suit and an application for injunction restraining the defendant when such unauthorised construction was in progress and comes to the Court with his suit only after such unauthorised construction was completed, the case would not be one for a mandatory injunction but only for damages."

26. In the aforementioned case, the Karnataka High Court has pondered over when mandatory injunction can be granted and has clearly held that in a case where the plaintiff objected to the construction raised by the co-owner on the joint land mandatory injunction should be granted, but where the plaintiff waited to object till the construction had been completed injunction should be refused.

27. In the instant case, it is quite vivid that the suit was filed by the plaintiffs for mandatory injunction when the construction had already completed by the defendants which has been duly recorded by the trial Court in its order dated 27/07/1993 while rejecting plaintiffs' application for temporary injunction, yet the plaintiffs did not take any pain to amend the plaint and convert the suit by making suitable amendment with regard to the relief of declaration of title and for possession of the suit property. They proceeded with the originally filed suit without claiming the necessary relief and further not converting the suit into a comprehensive suit for declaration of title and possession. Not only this, the trial Court too, did not examine the case of the plaintiffs whether they are entitled for grant of mandatory injunction in terms of Section 39 of the Act and granted decree in their favour without satisfying himself as to whether the necessary requirements for grant of mandatory injunction is made out or not by holding the plaintiffs to be title-holders.

28. As noticed herein-above, the trial Court recorded a finding on the question of title of the plaintiffs qua the title of the defendants and reached to the conclusion that plaintiffs are the title-holders of the suit property and defendants are not the title-holders and immediately thereafter, returned a finding that defendants are encroaching upon plaintiffs' land and ultimately, granted the relief of mandatory injunction to the plaintiffs directing the defendants to hand over the possession of the suit property to the plaintiffs after removing the superstructure. No such finding has been recorded by the trial Court that plaintiffs are entitled for mandatory injunction in terms of Section 39 of the Act holding that possession of the plaintiffs has been violated pending proceedings and therefore, mandatory injunction is issued to restore possession. What the trial Court has done is firstly, converted the suit for mandatory injunction into declaration of title without necessary pleadings and thereafter, issued mandatory injunction under Section 39 of the Act directing defendants to deliver the

possession of the suit property to the plaintiffs which is absolutely contrary to law for the reasons noticed herein-above that the plaintiffs were required to file a comprehensive suit for declaration of title which they did not do and further no source of title was averred in the plaint by them so that the other side could be noticed and answer the suit for declaration of title therefore, the trial Court could not have held that plaintiffs are the title-holders of the suit property and thereafter, could not have granted mandatory injunction in their favour in absence of the necessary ingredients as per Section 39 of the Act.

29. As a fallout and consequence of the aforesaid discussion, the judgment and decree passed by the trial Court as affirmed by the first appellate Court cannot be maintained for the reasons mentioned herein-above and thus, are hereby set-aside while answering the substantial question of law No. 2 and subsequently, substantial question of law No. 1 need not be answered and as such, plaintiffs' suit is dismissed.

30. Since, it has been held that plaintiffs ought to have filed a comprehensive suit for declaration of title or a suit for possession based on title, liberty is reserved in favour of the plaintiffs to file a comprehensive suit for declaration of title and/or suit for possession based on title in accordance with law. The question of title upon the suit property would remain open to be considered by the jurisdictional civil Court afresh and since, the judgment and decree of both the Courts have been set aside, the question of title would be separately adjudicated without being prejudiced by the impugned judgment and decree passed by both the Courts below which has been set aside by this judgment.

31. The second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

32. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge