

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

SECOND APPEAL NO.66 OF 2013

A. PASHA S/O A. WAHID (DIED), THROUGH, LRS. KAZI ASHFAK AND ORS.

VERSUS

ATIKH AHMED S/O NARLYA HUSSAIN @ HASNODDIN AND OTHERS

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Mr. Mujtaba Gulam Mustafa, Advocate for appellants

Mr. B.S. Kudale, Advocate for respondent Nos.5A to 5C

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 07th OCTOBER, 2021.

PRONOUNCED ON : 15th NOVEMBER, 2021

ORDER :

1 Present appeal has been filed by the legal representatives of the original plaintiff to challenge the Judgment and Decree passed in Regular Civil Appeal No.134/2004 by learned District Judge-1, Majalgaon, Dist. Beed, thereby the said appeal filed by the legal representatives of original defendant No.5 came to be allowed and the suit filed by the original plaintiff was dismissed.

2 Predecessor of present appellant-original plaintiff had filed Regular Civil Suit No.239/1992 for declaration of ownership and perpetual

injunction. That suit was partly decreed by the Joint Civil Judge Junior Division, Majalgaon on 16.02.2002. Only the relief of declaration was given and the relief of injunction was rejected. The legal representatives of original defendant No.5 had preferred said Regular Civil Appeal No.134/2004 (Old R.C.A. No.30/2002), which was allowed by the learned District Judge-1, Majalgaon, thereby dismissing the suit filed by the original plaintiff. Hence, this Second Appeal.

3 Heard learned Advocate Mr. Mujtaba Gulam Mustafa for appellants and learned Advocate Mr. B.S. Kudale for respondent Nos.5A to 5C.

4 It has been vehemently submitted on behalf of the appellants that in fact, the learned Trial Judge had erred in holding that the original plaintiff is not in possession of the suit property and thereby rejecting the prayer for perpetual injunction. The learned Trial Judge failed to consider that the title runs with possession. Second Appeal is a continuation of the suit and, therefore, Second appeal is maintainable on both counts, that is, for challenging the findings given by the Trial Court as well as the Judgment and Decree that is passed against them by the First Appellate Court. The plaintiff had come with a case that one Abdul Wahed had $1/3^{\text{rd}}$ share in Sy.No.254/A.

Abdul Pasha, Khurshid and Hasnoddin were the sons of Abdul Wahed. After death of Abdul Pasha, they got 1/3rd share each in the said land i.e. owned by Abdul Wahed. The suit land is to the extent of 03 Acres 10 Gunthas, more particularly described in plaint para No.1. It is the part of the share of Abdul Wahed. Plaintiffs are the heirs of Abdul Pasha. Defendant Nos.1 to 4 are the heirs of Hasnoddin. Plaintiffs are the owners and possessors of the suit land. Defendant Nos.1 to 4 being the heirs of Hasnoddin had 1/9th share in Sy.No.254-A. However, they had sold 4 acres 35 Gunthas of land to defendant No.5. Plaintiff is not party to the said sale deed and, therefore, that sale deed is not binding on him. In fact, whether the defendant Nos.1 to 4 could have sold property in excess of their share, was the question involved. Therefore, when it was held by the learned Trial Judge that the plaintiff had proved title over the suit property, the consequential prayer of injunction ought to have been granted. Therefore, the substantial questions of law are arising in this case.

5 Per contra, the learned Advocate appearing for the respondent Nos.5A to 5C vehemently submitted that the original plaintiff did not challenge the part of the decree, which was rejected, either by way of cross appeal or by way of cross objection. The title will not run with the possession, but it is vice versa, that is, the possession will run with the title.

When there was evidence on record to show that the possession was not with the plaintiff, relief of injunction was rightly rejected by the Lower Court. Further, the First Appellate Court correctly held that only the relief of declaration cannot be granted, and when the consequential prayer could have been made by the plaintiff, however, he failed to pray that, then the discretionary relief of declaration could not have been granted in favour of the plaintiff. Reliance has been placed on the decision in **Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148**, wherein it has been held that

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“Section 34 of Specific Relief Act provides that courts have discretion as to declaration of status or right. However, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so. Thus, it is not permissible to claim the relief of declaration without seeking consequential relief.”

Appeal has therefore, be properly decided. It does not require any interference. No substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, is arising in this case.

6 At the outset, it is to be noted that initially the suit that was filed was for declaration as well as permanent injunction, however, definitely, it would have been within the knowledge of the plaintiff, as to who was in

possession. The transaction between defendant Nos.1 to 4 and 5 had taken place long back. In fact, the revenue record would show that defendant No.5's name was standing in the cultivation column and it was never challenged by the plaintiff. Exhs.80 and 81 would show that in the inquiry that had taken place around 1977-79 possession of defendant No.5 has been held and confirmed from 1974 and it was continued till 1985. The suit has been filed in the year 1992; yet, the plaintiff preferred to file suit for declaration of ownership and permanent injunction. No consequential relief about taking back the possession from defendant No.5 was ever prayed even after the written statement was filed. Now, as regards question of fact is concerned, both the Courts have come to the conclusion that plaintiff had failed to prove his possession over the suit property. This Court under the scope of Section 100 of the Code of Civil Procedure cannot go much deep in that aspect, as it is question of fact, and concurrent finding of fact need not be so disturbed. Another fact to be noted is that the original plaintiff did not file cross appeal or cross objection. Reliance can be placed on **Municipal Corporation of Delhi vs. Intl. Security and Intl. Agency Ltd., AIR 2003 SC 1515**, it has been held that -

“Substantive right is the right of appeal, the form of cross objection is a matter of procedure. Even otherwise, there are three situations, viz. (1) the impugned decree is partly in favour of the appellant and partly in

favour of the respondent; (2) the decree is entirely in favour of the respondent though an issue has been decided against him; and (3) the decree is entirely in favour of the respondent and all the issues have also been answered in his favour, but there is a finding in the Judgment which goes against him. Only in the first category of cases it is necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the said finding. In the second and third category of cases in consonance with the amended Code of Civil Procedure, it is not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour.

Similar view has been taken in **Laxman Tatyaba Kankate vs. Taramati Harishchandra Dhatrak**, 2010(6) Mh.L.J. 295 (SC).

6.1 Further, similar ratio has also been taken in **Hardevinder Singh vs. Paramjit Singh and others**, 2014 (2) Mh.L.J. 126, in which reliance was placed on the decision in **Banarsi and others vs. Ram Phal**, AIR 2003 SC 1989, wherein it was observed that -

“The amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-

objection.

Thus, the suit was partly decreed and there was specific rejection of the relief of the injunction. In spite of that, the original plaintiff did not file any cross-objection or cross appeal, challenging that part of the finding and decree which had gone against him. It cannot be raised for the first time now in the Second Appeal.

7 The learned Trial Judge failed to consider that only relief of declaration cannot be given without any consequential relief. The decree of declaration was discretionary relief under Section 34 and, therefore, the ratio laid down in **Union of India** (supra) would be applicable here. That discretion was not properly and judiciously exercised by the Lower Court; the First Appellate Court has rightly exercised it and allowed the appeal, thereby dismissing the suit. Under such circumstance, there are no substantial questions of law involved in this case, as contemplated under Section 100 of the Code of Civil Procedure, requiring admission of the Second Appeal. Hence, the Second Appeal stands dismissed at the threshold.

(Smt. Vibha Kankanwadi, J.)