

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO. 303/2005

**Shri Shriram s/o Govinda Sadatkar,
(Since deceased through L.R's)**

Amendment
carried out as per
order dated
12/03/2019

- 1) Shri Gulabrao s/o Shriram Sadatkar,
(Son of the deceased appellant)
Age 60 years, Occ: Agriculturist,
R/o Dhamani, Tah. Manora, District: Washim.
- 2) Shri Sudhakar s/o Shriram Sadatkar,
(Son of the deceased appellant)
Age 41 years, Occ: Agriculturist,
R/o Singdoh, Tah. Manora, District: Washim.
- 3) Shri Ajabrao S/o Shriram Sadatkar
(deceases son of the appellant)
(since deceased through legal heirs)
- 3(i) Smt. Shobhabai Wd/o Ajabrao Sadatkar
Age: 60 years, Occ: Household, R/o Talap
(bu), Tq. Manora, Post. Talap, District:
Washim.
- 3(ii) Smt. Archana w/o Ganesh Thakare
Age: 35 years, Occ: Household,
R/o Ajani, Post. Dhamni, Tq. Manora,
District: Washim.
- 3(iii) Shri Gopal S/o Ajabrao Sadatkar
Age: 32 years, Occ: Agriculturist,
R/o Talap (bu), Tq. Manora, Post.
Talap, District: Washim.
- 3(iv) Shri Gajanan Ajabrao Sadatkar,
Age: 30 years, Occ: Agriculturist,
R/o Talap (bu), Tq. Manora, Post.
Talap, District: Washim.

3(v) Smt. Bharti W/o Pramod Umale
Age: 28 years, Occ: Household, R/o
Zodga, Tq. Karanja (Lad), District:
Washim.

.....APPELLANTS

...V E R S U S...

Shri Bhaurao S/o Shrawan Sadatkar,
Age: 55 years, Occupation : Agriculturist,
R/o Singdoh, Tq. Manora, Dist. Akola
(presently District Washim)

...RESPONDENT

Mr. A.P. Bhuibhar, Advocate h/f Shri R.D. Bhuibhar, Advocate for
Appellants.

CORAM :- **S.M. MODAK, J.**
RESERVED ON :- **12/10/2021**
PRONOUNCED ON :- **29/10/2021**

JUDGMENT

Heard.

2. This is an appeal preferred by the defendant against the judgment and decree passed by the Court of Ad-hoc Additional District Judge, Washim on 04/02/2005. By the said judgment, the First Appellate Court allowed the appeal and decreed the suit. The defendant is restrained from interfering with the possession of the plaintiff over the suit land.

3. The Trial Court has dismissed the suit for the reason that plaintiff could not prove his possession over the suit land and also for the reason that simpliciter suit for permanent injunction is not maintainable. Whereas, the First Appellate Court reversed those findings and held that plaintiff is having better title than that of defendant. While admitting the appeal on 20/07/2005, this Court has framed following substantial questions of law:

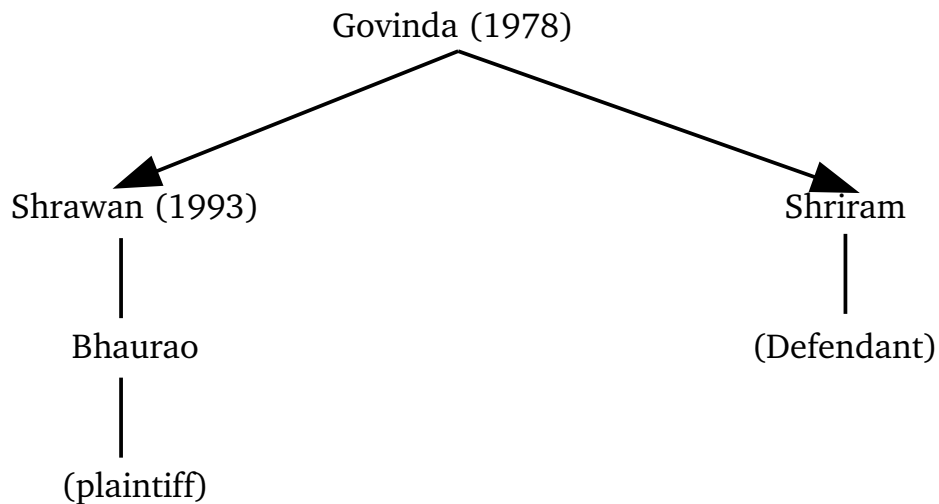
“Whether the suit for permanent injunction without claiming the relief of declaration is maintainable in view of Section 34 of the Specific Relief Act, 1963?”

4. This substantial question of law was framed after hearing both the sides. In the regular course when the appeal had come up for hearing, learned Advocate for the respondent withdrew the power on 19/01/2021. This Court has issued notice to respondent. Though it was served, respondent had chosen to remain absent. Hence, this Court is left with no alternative but to hear the learned Advocate Shri Bhuibhar for the appellant. With his assistance, the record is produced. He relied upon three of the judgment.

5. His main thrust of argument is non-maintainability of the simpliciter suit for injunction. He mean to say that the plaintiff

ought to have prayed for declaration considering line of defence taken in a written statement. For appreciating this objection, it will be necessary to understand few facts. From the pleadings of both the sides, the following facts emerge.

Plaintiff- Bhaurao is the son of one Shrawan. The said Shrawan was having a brother by name Shriram. He is the sole defendant. The name of their father is Govinda. The genealogical tree as follows:



Filing of the suit

6. The suit property is Gat No.64 admeasuring 0.59 R situated at village Singdoh, Taluka Manora, District Washim. The suit land is an ancestral property consisting of the shares of Govinda and his two sons Shrawan and Shriram. Prior to consolidation, the suit land was referred to as Survey No.101.

Apart from that, there is also a land bearing Survey No.134. During the lifetime of father- Govinda, in the year 1976, there was an oral partition. The distribution as below:

Shrawan (father of plaintiff)	Shriram (defendant)	Govinda (father)
1.55 R from Survey <u>No.134/2</u>	1.20 R from Survey <u>No.134/2</u>	0.59 R from Survey <u>No.101</u>

Father Govinda expired in the year 1978. He was being looked after by his son Shrawan (father of plaintiff). Father- Govinda gave this 0.59 R i.e. suit land to Shrawan, father of plaintiff. This is the subject matter of the suit. When defendant tried to obstruct possession of plaintiff over suit in the month of June, 1995, plaintiff filed a suit for permanent prohibitory injunction.

Written Statement

7. The theory of oral partition is not accepted by defendant. According to him, he along with brother Shrawan and father- Govinda sold away 3 acres of land out of Survey No.134/2 to one Uttam Gawande. Remaining land remained joint till the lifetime of father- Govinda. After the death of father- Govinda, both the brothers have partitioned the land and 0.30 R from Survey No.101 i.e. Gat No.64 came to the share of defendant. He

has tried to offer an explanation that the name of his brother Shrawan has appeared on 7/12 extract due to mistake while carrying out consolidation proceedings.

Outcome of suit

8. On the background of above pleadings, the Trial Court has framed the issues. Both the parties adduced oral as well as documentary evidence. The plaintiff examined himself. Whereas, the defendant examined himself and one Prithwiraj Rathod. On this evidence, the Trial Court has not found the evidence of plaintiff weighty as compared to the evidence adduced by the evidence. Even, the Trial Court has given weightage to the evidence of Prithwiraj Rathod for the defendant. There is one more reason why the Trial Court dismissed the suit. The plaintiff has simply asked for permanent injunction. He has not asked for declaration as to the title. As a result, the suit came to be dismissed.

First appeal

9. However, the First Appellate Court has re-appreciated the evidence and concluded that the plaintiff is having better title than the defendant and accordingly defendant was injected from

distributing possession out of plaintiff. The First Appellate Court has not expressed his opinion on necessity of asking for declaration of suit also.

Second appeal

10. On this background, the finding is given by both the Courts below and the law on this point needs to be looked into. The appellant relied upon following judgments:

- i) *Santosh Hazari Vs. Purushottam Tiwari* reported in *AIR 2001 SC 965*.
- ii) *Ganpati Munjaji Renge Vs. State of Maharashtra and others* reported in *1998 (2) Mh.L.J. 845*.
- iii) *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and others* reported in *AIR 2008 SC 2033*.

Possession of the plaintiff over the suit land

11. The Trial Court has framed issue no.1 on this aspect. It was answered in the negative. Whereas, the First Appellate Court has also framed point no.1 on that aspect. In addition to said issue, 'whether ownership is proved by the plaintiff' is also included in point no.1. This was answered in the affirmative. The person may be in possession of a land in different capacities, as an

owner, as a tenant, as a lessee. There is no dispute that plaintiff has not asked for declaration as to his ownership over the suit land. The First Appellate Court has framed point no.1 “whether the plaintiff is an owner”, it is framed because the plaintiff has claimed to be in possession as an owner. It will be material to consider what are the reasoning given by the First Appellate Court while answering point no.1 in favour of the plaintiff (which was answered by the Trial Court against the plaintiff). The First Appellate Court has given following reasoning prior to coming to that conclusion -

Reasoning

- a) There is no dispute amongst the parties as to nature of the suit property being an ancestral joint family property.
- b) Theory of oral partition has been put up by the plaintiff- land admeasuring 0.59 R i.e. the suit land is retained by Govinda- father of the defendant – there is no document on record supporting the theory of retention.
- c) To support this theory of partition of remaining land (what remains after selling 3 acres of land from Survey No.134), the defendant has not produced any documentary evidence on record. The theory of selling the land to Uttam is imaginary story. The defendant is silent over theory of

retention of land by father- Govinda.

- d) The 7/12 extract at Exhibit-37 shows that the suit land had come to the share of Shrawan – father of the plaintiff in 1976 oral partition.
- e) Photocopy at Exhibit- 26/2 shows the names of both the brothers – (original is not forthcoming) – on what basis the names of both the brothers are entered is not clear.
- f) Except these documents, defendant does not rely upon any other document.
- g) Exhibit-37 is sufficient to accept the claim of plaintiff.
- h) No document is placed on record by defendant that he has protested before the Revenue Authorities for correction of record on rights.
- i) Plaintiff's theory appears probable. Father- Govinda must have given land of 0.59 R to plaintiff's father.
- j) No documentary evidence to that effect, but theory of plaintiff cannot be discarded. The Trial Court disbelieved the theory of giving of land by Shrawan to the plaintiff in the year 1992, by raising unnecessary queries in mind.
- k) Plaintiff's father has not transferred the land in the name of plaintiff by executing any gift deed or will but, he has executed deed of partition. The original is not come forward

but it cannot be discarded.

- l) Oral partition is also admissible and it can be gathered from the conduct of the parties.
- m) The defendant has not raised any objection to the name of the plaintiff on 7/12 extract from 1978 to 1993.
- n) The defendant is claiming right over 0.30 R out of 0.59 R.
- o) The plaintiff has proved better title than the defendant.

12. On the background of above reasoning, it is necessary to consider whether the plaintiff ought to have asked for declaration as to his ownership.

The case law relied upon by the appellant

13. **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and others** reported in **AIR 2008 SC 2033** – The suit of the plaintiff for permanent injunction was decreed by the Trial Court whereas the First Appellate Court dismissed the suit for the reason that defendant was found to be in possession and simpliciter suit for injunction was not maintainable. When the appeal was argued before the Hon'ble Supreme Court, certain guidelines were laid down. Those find placed in paragraph no.11. They can be summarized as follows: -

paragraph no.11.1 –

plaintiff is in lawful possession – interfered by the defendant
– suit for simpliciter injunction will lie.

Paragraph no.11.2 –

suit for possession and injunction will lie when title of the
plaintiff is not disputed and he is not in possession.

Paragraph no.11.3 –

when the plaintiff is in possession.

a) title is in dispute – and a threat of dispossession – suit will have
to include declaration of title and injunction

b) Where title is in dispute – plaintiff is not in possession/ not able
to establish possession – the suit will have to be for declaration,
possession and injunction.

Furthermore, it has been held “which are the direct and
substantial issues and which are the ancillary issues”. The issue of
title will be important when there is a vacant site and issue of
possession is there. Without deciding the issue of title, it will be
difficult to decide the issue of possession. The Court should not
investigate about title in a suit for injunction. However, when the
matter involves complicated question of facts and law relating to
title, necessity of deciding the issue of title, the Court should
relegate the parties to the remedy of filing comprehensive suit for

declaration as to title.

14. After making above said observations, the Hon'ble Supreme Court was pleased to observe that there was need to ask for declaration of title and as it was not asked, suit came to be dismissed.

15. *Ganpati Munjaji Renge Vs. State of Maharashtra and others* reported in 1998 (2) Mh.L.J. 845 – it was observed that mutation entries do not confer any title.

16. *Santosh Hazari Vs. Purushottam Tiwari* reported in AIR 2001 SC 965 - It is on the point of exercise of power by the First Appellate Court. What precaution should be taken by the First Appellate Court if at all the decision of the Trial Court is to be reversed, is laid down. It was observed that while writing the judgment of reversal following principles should be followed -

a) The finding recorded by the Trial Court on the basis of conflicting evidence – must weigh the mind of the First Appellate Court.

- b) If appraisal of the evidence by the Trial Court suffers from material irregularity or is based on inadmissible evidence – then those findings can be set aside.
- c) If there is a special feature about the evidence of a particular witness and it has escaped the notice of the Trial Court then the only interference is warranted.

Observations

17. The decision of this appeal hinges on two questions:

- a) Whether on the said facts declaration of title is required?

&

- b) Whether the First Appellate Court was justified in reversing the findings of the Trial Court?

Filing of Simpliciter suit for injunction

18. If we read the observations by Hon'ble Supreme Court in case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and others** (*supra*), we may find that consideration for dealing with a simpliciter suit for injunction is different from consideration for deciding the suit for declaration of title and permanent injunction. The relief of declaration of title is

governed as per the provisions of Section 34 of the Specific Relief Act (the Said Act). It contemplates denial of title by a person of another person and filing of a suit seeking assistance of the Court for declaration of right to property. Whereas, the relief of perpetual injunction is governed as per the provisions of Section 38 of the Said Act. It can be filed when the wrongdoer is committing breach of his obligation. The provisions of Section 38 of the Said Act, nowhere say that suit for simpliciter injunction is not maintainable but it has to be accompanied by other relief (though such provision finds place in the provisions of Section 34 of the Said Act).

19. On this background, it will be material to consider the logic behind insisting for seeking relief of declaration along with the relief of permanent injunction. If the plaintiff himself will ask for both the reliefs, it cannot be said that there is a lacuna. However, in those suits wherein there is prayer for simpliciter injunction, question arises. It is also true that the person may be in possession in different capacities, one is as an exclusive owner, second is as a licensee and third is a co-owner etc. In such a contingency, when defendant does not

deny the possession of the plaintiff but only denies in what capacity the plaintiff is holding the possession and additionally he claims title in himself, this Court is required to consider who is having better title because the issue of possession is connected to issue of title and in fact issue of possession also depends upon issue of title. So in such a contingency, the issue of title plays a predominant role. In such situation, this Court is faced with a difficulty. That is to say to decide the issue of possession on complicated facts without there being a relief of declaration of title being asked for. Furthermore, question also arises what will be the binding effect of finding given as to title (which is an ancillary issue) in a subsequent proceedings between the same parties. That is why in order to avoid such complications, the Courts have interpreted the law in a such manner that parties not asking for relief of declaration and compelling the Court to decide the issue of possession (based on issue of title), will not get a discretionary relief of perpetual injunction.

20. In fact, the law laid down in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L.Rs and others* (*supra*) has been further elaborated by the Hon'ble Supreme Court in case of *Jharkhand State Housing Board Vs. Didar Singh and Anr.* reported in *(2019) 17 SCC 692*. Therein, the Hon'ble Supreme Court has gone further and tried to analyse the bonafide dispute about the title raised on behalf of the defendant. The dispute may be bonafide or it may not be bonafide i.e. frivolous. It has been held that only when the dispute as to title raised by the defendant is bonafide one, then only there can be an insistence for seeking a relief as to declaration of title. In that case, there were rival claims. The plaintiff sought to protect the possession of the land on the basis of title which was explained by the plaintiff. As against this, defendant Housing Board contended that property was acquired. It was considered as a bonafide dispute and hence it was held that simpliciter suit for injunction is not maintainable.

21. In a recent case decided by the Hon'ble Supreme Court in the case of *T.V. Ramakrishna Reddy Vs. M. Mallappa and others* in *Civil Appeal No.5577 of 2021 (Arising out of*

Special Leave Petition (C) No.10621 of 2020 similar issue has arisen before the Hon'ble Supreme Court. The observations made in case of *Jharkhand State Housing Board Vs. Didar Singh and Anr.* (*supra*) as referred above were also considered. The simpliciter suit for injunction was held not maintainable in view of genuine dispute as to title raised by the defendant in written statement.

Facts of the case

22. When we apply the ratio laid down in above mentioned cases to the facts before us, we may find that there are two versions. One is claim as to ownership made by the plaintiff over the suit land and claim as to possession as an owner. When we see the source of title pleaded by the plaintiff, we may find that he has narrated two events.

a) One is about giving of land by Govinda to his father Shrawan in the year 1978.

b) And second is giving of land by Shrawan to his son plaintiff in the year 1992.

23. On the other hand, the defendant has given different version. He has disputed both the claims of plaintiff. Whereas, according to him, his father Govinda at the time of death has left 0.59 R of suit land and both the brothers i.e. defendant and Shrawan partitioned said land and 0.30 R came to his share that is how he has claimed that he is in possession. In such circumstances, this Court is bound to consider whose claim prevailed over whose claim.

24. For conducting an inquiry, this Court is required to go into the issue whether claim is supported by document and whether document requires registration or not. The First Appellate Court has accepted the case of plaintiff and had given a go bye to absence of document created by Govinda in favour of plaintiff's father Shrawan. Furthermore, go bye is also given to production of original deed of partition in between Shrawan and his son plaintiff. At the same time, while appreciating the evidence adduced by the defendant same yardstick was not applied. The First Appellate Court has laid emphasis on lacuna in defendant's case in producing a document about partition in between himself and his brother

i.e. plaintiff's father Shrawan. There is a reason to believe that the First Appellate Court has applied different standards of appreciation of evidence. This is not warranted.

25. It is also clear that considering the nature of claims made by both the parties against each others, the issue of possession cannot be decided without conducting an inquiry as to issue of title. This can be done only when issue of title is decided. Unfortunately, the Trial Court has understood this aspect and that is why has taken a note of the settled principle of law that declaration ought to have been asked for (paragraph no.7). However, the First Appellate Court by applying different yardsticks for different persons had reversed the findings of the Trial Court. Even the First Appellate Court went to the extent of criticizing the Trial Court by labelling 'the queries' as unnecessary queries (paragraph no.10). This Court feels that the approach of the Trial Court cannot be said to be a judicious approach. This Court holds that the plaintiff ought to have prayed for declaration of title along with relief of permanent injunction. For the above reasons, the findings given by the First

Appellate Court cannot be sustained in the eyes of law and they need to be set aside. Certainly they are perverse.

26. **In view of the above, substantial question no.1 is answered in the affirmative.** The findings given by the First Appellate Court are set aside. Appeal needs to be allowed. Hence the following order:

ORDER

- i) The appeal is allowed.
- ii) The judgment dated 04/02/2005 passed by the Ad-hoc Additional District Judge, Washim in Regular Civil Appeal No. 37/2000 is set aside.

JUDGE

R.S. Sahare