

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 361 OF 2020
WITH
INTERIM APPLICATION NO. 1914 OF 2019**

Shri. Ajit Lingaji Dharne ...Appellant
Versus
Shri. Vishnu Gopal Gawade & Ors. ...Respondents

**WITH
SECOND APPEAL NO. 369 OF 2020**

Shri. Ajit Lingaji Dharne ...Appellant
Versus
Shri. Vishnu Gopal Gawade ...Respondent

Mr. Vikram Walavalkar a/w. Mr. Virendrasinh V. Tapkir, i/b. Neha R.
Parte, for the Appellant.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 21st NOVEMBER 2022**

P.C. :

1. Heard Mr. Walavalkar, learned counsel for the Appellant.
He submits that there are three substantial questions of law arising in these Second Appeals. According to him, the suit filed by the Respondent is barred by limitation as Article 113 will apply to the suit filed by the Respondent and therefore, suit

Sonali

ought to have been filed in three years. He submitted that the Trial Court rightly held that suit is barred by limitation, however, the learned Appellate Court by applying Article 65 has come to the conclusion that suit is within limitation. He submitted that another substantial question of law is that the suit filed by the Plaintiff is hit by principles of constructive *res judicata* and will be covered by Explanation IV of Section 11 of Code of Civil Procedure. According to him, the third substantial question of law is that the Respondent has simplicitor filed suit for injunction and has not sought declaration of ownership and therefore, in such type of suit the Courts could not have examined the issue of title. To substantiate the said contention, he has relied on the decision of Supreme Court in ***Anathula Sudhakar vs. P. Buchi Reddy (Dead) By LRS. & Ors.***¹

2. The factual position on record show that the Appellant-Ajit Lingaji Dharne filed Regular Civil Suit No.19 of 2004 (renumbered as Regular Civil Suit No.18 of 2015) seeking simplicitor injunction. In the said suit, it is the claim of the Appellant that the suit property is their ancestral property, and therefore, his father-Lingaji Dharne and other co-shares

1 (2008) 4 SCC 594

Sonali

were the joint owners and possessors of the suit land. However, names of co-owners Laxman Luma Dharne and Suhas Luna Dharne were recorded in the record of rights. Taking advantage of said revenue entries said Laxman Dharne and Suhas Dharne illegally transferred suit land in favour of Respondent-Vishnu Gopal Gawade. It is significant to note that inspite of said contention the Appellant has not sought declaration of his ownership and filed suit simplicitor for perpetual injunction.

3. The Respondent - Vishnu Gopal Gawade filed Regular Civil Suit No.45 of 2015 (renumbered as Regular Civil Suit No. 68 of 2008). In the said suit, it is the contention of the Respondent that he is the owner of the suit property and recently Appellant has taken forcible possession and therefore, encroached the property. The Respondent has *inter alia* sought following relief in the plaint:

“अ) प्रतिवादी क्र. १ अनाधिकारे अतिक्रमण करून वादीच्या मालकीच्या दाव्यात नमूद “अ” मिळकतीत वादीच्या परवानगीशिवाय दाव्यात नमूद “ब” मिळकतीप्रमाणे केलेले बांधकाम व कुंपण काढून टाकून त्याखालील जमीनीचा म्हणजेच “अ” मिळकतीचा वादीला खुला कब्जा देण्याबाबत प्रतिवादी विरुद्ध हुकुमनामा करण्यात यावा.”

In the written statement filed in the suit filed by the Respondent, it is the contention of the Appellant that although it is the ancestral property of the Appellant only name of co-

Sonali

owners Laxman Luma Dharne and Suhas Luma Dharne were recorded in the record of rights and these persons illegally transferred the suit land in favour of the Respondent without knowledge of the Appellant.

4. It is significant to note that although the said contention is raised, even in the plaint filed by the Appellant, the Sale Deed executed in favour of the Respondent is not challenged. In any case, as the Respondent has specifically contended that he is the owner of the suit property and as the said contention has been denied by the Appellant, a specific issue is framed by the learned Trial Court in the suit filed by the Respondent to the effect that whether the Respondent proves that he has got ownership over the suit property and the said issue has been held in favour of the Respondent. However, as the learned Trial Court came to the conclusion in the suit filed by the Respondent that Article 113 will apply and therefore, on the ground that the suit was filed beyond period of three years, the suit was *inter alia* dismissed on the ground of limitation, although finding of ownership was recorded in favour of the Respondent.

5. In the suit filed by the Appellant, the learned Trial Court

Sonali

held that Appellant is in exclusive possession of the suit property, however, held that Appellant failed to prove his title over the suit property. The learned Trial Court, found that Respondent is illegally obstructing the possession of the Appellant and, therefore, granted injunction in favour of the Appellant.

6. Thus, in the suit filed by the Respondent, the learned Trial Court has specifically held that the Respondent has established his ownership and in the suit filed by the Appellant it has been held that the Appellant failed to prove the ownership. It is significant to note that the Judgments and Decrees passed by the learned Trial Court are challenged by filing Regular Civil Appeal No.142 of 2015 and Regular Civil Appeal No.143 of 2015 by the present Respondent as far as the findings and reliefs adverse to him. It is further significant to note that the present Appellant has not challenged the adverse finding regarding ownership before the learned Lower Appellate Court. Mr Walavalkar, the learned counsel appearing for the Appellant fairly stated that Appellant has not challenged the said finding either by way of filing separate

Sonali

Appeals or cross-objection in the Appeals filed by the Respondent. Thus, it is clear that the Appellant has accepted the findings regarding ownership of the Respondent.

7. The Appellate Court came to the conclusion that Article 65 of the Limitation Act will apply and therefore, limitation will be of 12 years and consequently allowed both the Appeals and passed decree of possession. As far as the contention regarding limitation raised by Mr. Walavalkar, it is to be seen that the suit filed by the Respondent was for possession of immovable property based on title, therefore, Article 65 will squarely applicable to the suit filed by the Respondent. The learned Trial Court has applied Article 113. However, the same is residuary Article and will apply when no period of limitation as provided elsewhere in the Schedule. Since Article 65 applies to the said suit, there is no question of application of Article 113. As far as Article 65 is concerned, the period of limitation starts when the possession of the Defendant becomes adverse to the Plaintiff. It is admitted position that the Respondent has purchased the property from aforesaid two persons and in this background it is significant to note that in the suit filed by the

Sonali

Appellant, Sale Deed in favour of Respondent is not challenged and in the said suit filed in 2004, it is merely mentioned that name of Respondent is wrongly recorded to the record of right. Thus, starting point for filing suit within 12 years will be the date of filing said 2004 suit by the Appellant on 8th March 2004 or the illegal construction which the Appellant has constructed which is prior to 8 days from filing the suit filed by the Respondent, as per the contention raised by the Respondent. Therefore, the suit filed by the Respondent No. 1 in 2008 is perfectly within limitation. The dismissal of the suit filed by the Respondent by applying Article 113 is grave illegality committed by the learned Trial Court. Therefore, there is no substance in the contention of Mr. Walavalkar that the suit filed by the Respondent No. 1 is barred by law of limitation.

8. As far as contention that suit filed by the Respondent No.1 is hit by principles of *res judicata* or constructive *res judicata* is concerned, Mr. Walavalkar has relied on Explanation IV of Section 11 of C.P.C. The relevant portion of Section 11 of C.P.C. is reproduced hereinbelow for ready reference:

“11. Res judicata.—No Court shall try any suit or issue in which the **matter directly and**

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to a suit in question whether or not it was instituted prior thereto.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Thus, Section 11 of the Civil Procedure Code will apply to an earlier suit which has been heard and decided finally. In the present case, suit filed by the Appellant and suit filed by the Respondent No. 1 are tried together. Mr. Walavalkar states that common evidence is recorded in both the suits. Both the suits are decided by the learned Trial Court by the separate judgments and decrees on the same date. The Appeals filed by the Respondent challenging the said Judgment and Decree in the suit filed by the Appellant and in the suit filed by the Respondent No. 1 has been heard together and decided by a

Sonali

common judgment and decree. Thus, there is no substance in the third substantial question of law concerning *res judicata* as there is no former suit which has been decided as contemplated by Section 11 of the C.P.C.

9. As far as the third substantial question that as the Appellant has challenged the title of the Respondent, the Respondent ought to have sought declaration of his ownership, it is significant to note that in 2008 suit filed by the Respondent No. 1 specific contention raised to the effect that Respondent No. 1 is the owner of the suit property. The Appellant has denied the same and therefore, the issue has been framed regarding ownership of the Respondent. Both the parties have laid evidence and the learned Trial Court has specifically held that the Respondent No. 1 proved that he is the owner of the suit property. It is admitted position that the Appellant has not challenged the said finding and, therefore, the said finding has become final. Reliance of Mr. Walavalkar on the aforesaid decision of Supreme Court in ***Anathula Sudhakar*** (supra) is totally misconceived. In this case, the Appellant filed suit in 2004 by specifically contending that although they are the co-

Sonali

owners the names of only 2 co-owners were wrongly recorded in the record of rights from whom Respondent No. 1 purchased the suit property. Thus, in fact, the Appellant ought to have sought a declaration of his ownership. Mr. Walavalkar has relied on paragraph 21(c) of the said decision of the Supreme Court in *Anathula Sudhakar* (supra). The said paragraph is reproduced hereinbelow for ready reference:

“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 (supra)]. 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.”

10. However, it is also necessary to set out the paragraph 21(d) of the said decision, which reads as under:

“21.(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on

which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

11. In this case, the issue of ownership is specifically raised in the pleadings by both the parties, specific issue is raised, evidence is led and the same is answered by the learned Trial Court. It is also important to note that the finding of ownership recorded in favour of Respondent No.1 and against Appellant by the learned Trial Court is not challenged by the present Appellant in the learned Lower Appellate Court either by filing Appeal or Cross-Objection and therefore, the same had attained finality. Thus, the reliance of paragraph 21(c) of the decision of the Supreme Court does not advance the case of the Appellant.

Sonali

In fact, the said observations of the Supreme Court are against the Appellant.

12. Therefore, there is no substance in the three substantial questions of law argued by Mr. Walavalkar. Hence, Second Appeals are dismissed with no order as to costs. In view of the dismissal of the Second Appeals, Interim Application No.1914 of 2019 does not survive.

[MADHAV J. JAMDAR, J.]