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

**SECOND APPEAL NO.711 OF 2019
WITH
CIVIL APPLICATION NO.559 OF 2019**

Ashok Maruti Gophne
Through POA Pradeep Raheja & Ors. ... Appellants
V/s.
Ulhas Baban Kawade & Ors. ... Respondents

Mr. Sanjiv Sawant with Mr.Abhishek Matkar i/b Mr.Malhar Bageshwar
i/b Mr.Abhishek Deshmukh for the Appellants/Applicants.
Mr. Mukund Pise for Respondent Nos.1 to 6.

CORAM : S. M. MODAK, J.

DATED : 25TH AUGUST 2022.

JUDGMENT :

1. Heard learned Advocate for the Appellants/Plaintiffs and learned Advocate for the Respondents-Defendants.
2. In suit filed by the Plaintiffs for declaration and permanent injunction, the Defendants took preliminary objection about jurisdiction as contemplated under section 9A of the Code of Civil Procedure. That objection was upheld by the trial Court as per order dated 28th September 2011. The said order was challenged by the Plaintiffs before the First Appellate Court. However, the First Appellate Court as per the judgment dated 19th June 2017 refused to interfere in the order passed by the trial Court.
3. By way of this Second Appeal there is challenge to these judgments. When jurisdiction objection was decided by the trial

Court, the parties have not adduced oral evidence but only relied upon the pleadings and documents.

4. During arguments learned Advocate Shri Sawant for the Appellants submitted that there are two reliefs sought in the plaint.

One is for declaration that the entry in inquiry register of the Town Planning Authority dated 4/03/1995 in respect of the area of 9.27 Are be declared as illegal, arbitrary and liable to be set aside

and

second relief sought is for permanent injunction against the Defendants from disturbing possession of the Plaintiffs over the suit property.

5. During arguments learned Advocate Shri Sawant submitted that now the Appellants did not want to challenge the findings recorded by both the Courts below that the suit is not maintainable in view expressed provision of section 149 of the Maharashtra Regional Two Planning Act (MRTP Act). He submitted that both the Courts below ought not to have dismissed the suit in its entirety but ought to have continued suit so far as prayer for permanent injunction is concerned.

6. In view of that he submitted that he is restricting his argument so far as dismissing the suit in its entirety. According to him even though jurisdiction objection was upheld both the Courts below ought to have continued the suit for permanent injunction. In view of this submission, by consent it is decided to hear this Second Appeal finally.

7. Shri Sawant submitted that question No.(d), (e), (l) and (n) are relevant substantial questions of law. I have read it. Whereas learned

Advocate for the Respondents submitted that simplicitor suit for injunction is not maintainable and he relied upon few judgments. To counter that arguments learned Advocate Shri Sawant submitted that said objection was not taken before the Courts below and hence cannot be taken. He also relied upon few judgments. I will deal with these judgments relied upon by both sides while answering the substantial questions of law.

8. Hence, Admit the Second Appeal on the following substantial questions of law :

“Whether the trial Court as well as the First Appellate Court committed wrong in dismissing the suit in its entirety (that is to say even for permanent injunction) while upholding jurisdiction objection taken as per the provisions of section 149 of the MRTP Act” ?.

What order ?

“(D) Whether the learned District Court has seriously erred by not even considering the fact that the prayer for permanent injunction is the principal relief in the suit filed by the Appellants, which relief can only be granted by a Civil Court “?

(E) That it ought to have been appreciated by the learned District Judge that the application preferred by the Defendant No.3 under section 9A of the CPC ought not to have been entertained for the reason that the Civil Court is having jurisdiction to grant permanent injunction as sought by the

Appellants in Regular Civil Suit No.508 of 2010.

(L) Whether the learned trial Court erred in passing an order thereby coming to the conclusion that under section 149 of the MRTTP Act, the suit is not maintainable, particularly when prayer (a) of the plaint is with respect to seeking permanent injunction which will have to be considered only by the Civil Court ?

(N) Whether both the courts below have seriously erred in not appreciating the fact that the suit was primarily filed for protecting the possessory rights of the appellants/plaintiffs vis-a-vis the suit property, their possession being continuous and unabated since decades ?”

9. With assistance of both learned Advocates, I have perused averments in the plaint and also Application filed under section 9-A of the Code of Civil Procedure and reply thereto. The material averments are as follows :-

- (a) The Plaintiff intends to challenge the entry in enquiry register of the Town Plannig Authority dated 4th March 1955. It is in respect of 9.27 Are out of property though property as described in para 1 of the plaint as Survey No.24 Hissa No.10/4/1 i.e. S.No.24/10 P & S. No.24, Hissa No.10/5 and corresponding CTS No.103, 104, 105 and 106.
- (b) The Plaintiffs claim that it is their ancestral property (para 2)
- (c) The Plaintiffs claim that they have constructed house on 27.6

sq. mtrs. in the suit property and there are two additional structures.

- (d) The Plaintiffs claim that they continued to be in possession of the land and structure since 1950-51.
- (e) The Plaintiffs claim that after passing of ULC Act, 1976 they were holding 1000 sq. mtrs. of land and hence submitted ceiling returns. However, it is held by ULC Authorities that they were not holding excess vacant land. In the year 1955 the Town Planning scheme was implemented in the area of Ghorpadi Village, Pune and there was revision of the numbers and new city survey numbers were given.
- (f) If B-Form of 4th March 1955 as per inquiry register the officers have reduced holding of 9.27 Are belonging to the Plaintiffs and recorded the same in name of one Baban Sahadu Kawade forming new CTS No.103.
- (g) The Plaintiffs claims that inquiry was not conducted and statements were not recorded. The Plaintiff has given all these details in paras 11 to 14 of the plaint.
- (h) The Plaintiff apprehends that the Defendants were trying to alienate or trying to create third party interest in the suit property and in pursuance of that third parties have visited the suit property on or about December 2009 and started making inquiry about actual possession.
- (i) In para 16 the Plaintiff has averred about the continuous cause of action.

10. On this background the Plaintiffs have sought for declaration about the entry in inquiry register and also sought for permanent

injunction.

11. On the basis of these averments and after appearance, the Defendants thought it fit to file Application under section **9-A** of the Code of Civil Procedure. The Defendants have placed reliance on the provisions of section **73** and section **149** of the MRTP Act. Town Planning Act. According to the Defendants there is provision of filing of an Appeal under section **73** of the MRTP Act and as per section **149** of the said Act any order passed by the Authorities cannot be challenged before the Civil Court.

12. In reply filed by the Plaintiffs they have averred that there is apprehension of disturbing vacant and peaceful possession over the suit property and there is apprehension that the property will be transferred in name of the Defendants by the Town Planning Scheme.

Scope of questions raised.

13. The trial Court upheld objection on the basis of express bar created as per section 149 of the MRTP Act. The First Appellate Court has upheld those findings and dismissed the Appeal.

14. I have perused the judgments given by both the Courts below. The First Appellate Court has also taken note of exceptional remedy under section **71** of the MRTP Act available to the Plaintiffs. During oral arguments it is made clear that the Plaintiffs are not challenging those findings and even it is submitted that the Plaintiffs may resort to remedy available as per relevant provisions of law. Even it is submitted on behalf of the Respondents that they have exhausted that remedy and in fact there Appeal is also dismissed. It is not for this Court to make any comment whether that remedy is fully exhausted

and what is outcome of that remedy. The record will speak for itself.

In view of contention raised during the argument that those findings by the Civil Court about jurisdiction are not challenged, this Court is not supposed to make comment on that point. So only issue remains is whether both the courts below were justified in dismissing the suit so far as prayer for permanent injunction is concerned.

Objection taken for the first time.

15. Learned Advocate for the Respondents submitted that simplicitor suit for permanent injunction is not maintainable. According to learned Advocate Shri Sawant this objection was not taken before the Courts below and hence cannot be taken. In support of that he relied upon judgment of the Supreme Court in case of ***Deepak Tandan and Anr. vs Rajesh Kumar Gupta*** reported ***in 2019 (5) SCC 537***. In that matter the Hon'ble Supreme Court was dealing with correctness of decision given by the High Court of Allahabad. In that matter the trial was conducted on full-fledged basis and it was not on the basis of taking up preliminary objection. Learned Advocate Shri Sawant invited my attention to the observations in paragraph 21 of the said judgment. There cannot be any dispute about this proposition of law. The objection which was not taken before the trial Court or the First Appellate Court, such plea cannot be raised for the first time in the High Court.

16. However, it is material to note why the Respondents took this objection. This objection is taken before this Court for simple reason that the Appellants during oral argument submitted that they want to restrict to the prayer for permanent injunction. So this Court feels that

objection can certainly be taken before this Court. When the jurisdiction objection was taken, the Defendants have restricted their prayer on the basis of provisions of section 149 of the MRTTP Act and it was taken prior to filing written statement. Hence this Court feels that such objection can certainly be taken before this Court.

Simplicitor suit for permanent injunction.

17. To buttress his submission about non maintainability of simplicitor suit for permanent injunction, learned Advocate for the Respondent relied upon following two judgments : --

(i) ***T.V. Ramakrishna Reddy v M. Mallapa & Anr.*** reported in ***AIR Online 221 SC 698***

(ii) ***Jharkhand State Housing Board v. Didar Singh*** reported in ***AIR Online 2018 SC 720***.

18. I have read these two judgments. It is true that it is observed in these two judgments that simplicitor suit for permanent injunction is not maintainable under section 38 of the Specific Relief Act. In those judgments there was challenge to title claimed by the Plaintiffs. On the basis of these facts it has been observed that unless and until the Plaintiffs seeks declaration as to title, suit for permanent injunction simplicitor is not maintainable. In the judgment delivered by Hon'ble Supreme Court in case of ***T.V. Ramakrishna Reddy*** (supra). The observations made by the Hon'ble Supreme Court in earlier judgment in case of ***Anathula Sudhakar v. P. Buchi Reddy*** reported in ***(2008) 4 SCC 594*** was also referred in para 9. The same judgment is relied upon on behalf of the Appellants.

19. It is true that Hon'ble Supreme Court in case of **Anathula Sudhakar** (supra) has laid down various contingencies wherein the Plaintiff can ask for different kind of reliefs. That's to say when he can simply ask for injunction and when he has to ask for declaration along with injunction. They are summarized in para 17 of the said judgment.

20. After reading all three judgments there is one factual aspect which was not involved in all above referred judgment. That's to say in those judgments just like the present suit in question, the Defendants have not objected to the jurisdiction of the Civil Court. In present case there is relief of declaration as well as permanent injunction. As stated above the relief of declaration cannot be sought from the Civil Court. Such contingency has not arisen in above three referred judgments. So we have to consider the observations in above referred judgements on this factual observations. Be that it may, still the observations made therein are certainly useful while deciding the controversy.

Provisions of Specific Relief Act

21. When the provisions of the said Act are perused, we may find that relief of permanent injunction is governed as per provisions of **Section 38** of the Specific Relief Act. It nowhere says that relief of simplicitor permanent injunction cannot be asked for. Whereas **Section 34** of the Specific Relief Act which says about declaration and provides in which contingency further relief has to be sought and in which contingency it need not be sought. Even though **Section 38** does not contain such provisions, one can understand that it is

interpretation (non maintainability of simplicitor suit for permanent)given by the Hon'ble Supreme Court in various judgments.

22. On this background when I read observations in paragraph 17 of **Anathula Sudhakar** (supra) it is certainly useful for our guidance as stated above. The relief of permanent injunction (simplicitor without asking for releif of declaration in certain contingencies) cannot be inquired into by the Civil Court. Learned advocate Shri Sawant also relied upon the observations in case of **Nagpur Municipal Corporation & Anr. vs. Shivdatt and Sons reported in 2020 (5) Mh.L.J. 708**. There were two suit involved. One was regular civil suit for releif of declaration challenging the notice and injunction against Ngpur Muncipal Corporation (sanctioned map was produced thereby showing that the tenanted premises falls within the marginal space)and another was filed before the Court of Small Causes, Nagpur simplicitor for permanent injunction against the landlord and Corporation was made a party. There are averment in small causes suit about the notice issued by the Corporation and how the landlord has not followed the provisions of Section 16(1)(c) about recovery of possession of the Maharashtra Rent Control Act. There was jurisdiction objection. It was not accepted and it is observed in para no. 23 that “ an inquiry about the action of Corporation was incidental to the main enquiry regarding the protection available to the tenant under the provisions of Rent Control Act.

23. On the basis of facts of this case narated above, this Court is of opinion that certainly suit for permanent injunction is maintainable.

In fact this point was not raised by either of party before both the Courts below and hence there was no occasion before both the Courts below to make observation. Still this Court is of opinion that both the Courts below have overlooked the prayer for permanent injunction made in plaint and in view of that the matter needs to be remanded to the trial Court. Because how a party can be denied right to agitate his grievances unless he has been given an opportunity to plead and prove his case. It is true that after remand the question may arise before the Civil Court as to whether they can conduct enquiry about grievance made by the Plaintiffs about that entry.

Scope of inquiry after remand.

24. It is true that in certain suits, certain issues are principal issues whereas certain issues are ancillary issues. When the Civil Court is not going to enquire into grievance of declaration as to the entry, certainly it can be said that contention raised by the Plaintiffs about that entry cannot be said to be principal issue. It can be said to be ancillary issue for deciding relief of permanent injunction. The observations in case of M/S. Shivdutt Sons are certainly useful and relevant.

25. It is contended on behalf of the Respondents that inquiry was conducted in the year 1950-51. It is not disputed by the Appellants. It is submitted that the suit for permanent injunction will be beyond limitation. It cannot be answered by this Court. Ultimately, the Respondents are not entitled to take that plea when they have not filed written statement. They are liberty to take plea in written

statement to be filed. Both the Court below have committed wrong in dismissing the suit for permanent injunction. It requires interference. In view of above, **substantial question of law is answered in the AFFIRMATIVE** and following order is passed :-

ORDER

- (a) The Second Appeal is allowed. The order dated 19th June 2017 in Regular Civil Appeal No.706 of 2011 by the District Judge, Pune and the order dated 28th September 2011 passed by the Civil Judge, Junior Division, Pune in RCS No.508 of 2010 are set aside.
- (b) In the light of above observations the suit is remanded back for fresh inquiry before the trial Court.
- (c) Both parties are directed to appear before the trial Court on 22nd September 2022.
- (d) The Respondents are at liberty to file written statement within a period of one month from today.
- (e) After filing of the written statement, the trial Court is directed to frame issue within 15 days.
- (f) The Plaintiffs are directed to complete their evidence within a period of six months from settlement of issues.
- (g) The Defendants are directed to complete their evidence within six months from above date.
- (h) Both parties are directed to co-operate the trial Court in adhering to said time limit in view of fact that the suit is of the year 2010.

- (i) The trial Court is at liberty to regulate conduct of the party who is indulging in dilatory tactics by imposing heavy costs.
- (j) Parties are at liberty to produce additional documents.

26. In view of above Second Appeal is disposed of accordingly.
Pending applications if any are also disposed of.

(S. M. MODAK, J.)