

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4774 OF 2021

Dr. Poonam @ Keshar Sandeep Zade,
Aged about 37 years, Occupation – Doctor,
R/o Plot No.3, Labhantanda, Old
Shukrawari, Nagpur – 09.

.... **PETITIONER**

VERSUS

Shri Sandeep s/o Shriram Zade,
Aged about 42 years, Occupation – Service,
R/o Plot No.42, Ramana Maroti Road,
Near Jyoti High School, Hanuman Nagar,
Nagpur.
Alternative Address :
C/o Dr. Kaduskar Pathology,
Niramay Hospital, Near Dinanath
School, Dhantoli, Nagpur.

.... **RESPONDENT**

Mr. R.S. Nagpure, Counsel for the petitioner,
Mr. R.T. Anthony, Counsel for the respondent.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 17-01-2022

DATE OF PRONOUNCEMENT OF THE JUDGMENT : 09-02-2022.

JUDGMENT :

The petitioner is the plaintiff in Regular Civil Suit 1040/2021, who instituted seeking a decree of declaration that the interference of the respondent/defendant in the plaintiff's possession over the suit

property is illegal and further seeking consequential mandatory and permanent injunction, and is aggrieved by the order dated 22-10-2021 rendered by the learned trial Judge whereby, while deciding an application under Order VII Rule 11 of the Code of Civil Procedure (Code) preferred by the defendant, the learned trial Judge directed the plaintiff to value the suit properly and to pay deficit court fees.

2. The learned trial Judge observes that the pleadings of the plaintiff, if read as a whole, would indicate that the suit is virtually a suit for declaration of ownership of the plaintiff with consequential relief of mandatory and permanent injunction. It is on such premise, that the plaintiff is directed to value the suit and to pay deficit court fees.

3. The plaintiff asserts, that the defendant-husband executed in her favour Gift-deed dated 20-5-2020 which was duly registered. The plaintiff asserts, that her marriage with the defendant ran into rough weather and the couple decided to obtain divorce by mutual consent subject to certain conditions, one of which was that the suit property shall be gifted in favour of the plaintiff. According to the plaintiff, while the proceedings to obtain divorce by mutual consent were pending, in September 2021 the defendant attempted to interfere

with her possession. The relevant pleadings read thus :

“15. Accordingly, in view of terms fixed between the plaintiff and defendant for getting mutual divorce, the defendant on 15-4-2020 issued a cheque bearing No.996969 of Rs.8100000/- (Eighty One Lac) to plaintiff out of his S.B.I. bank account No.36959403719, which was deposited by plaintiff in her account No.30292874233 and get it transfer. Thereafter, two Gift Deeds that is of residential house and suit property was executed in favour of plaintiff by defendant on 20th May, 2020 vide registered document No. NGP-4-2273/2020 and NGP-4-2273-2020 respectively, in all sense of mind and willing, without any coercion, pressure or threats, but purely as per decided terms between the parties but out of love affection which he has always claimed. All was done with view to offer a wife and daughter a security and stability in life any making them financially independence. Thereafter the plaintiff was put in actual possession of suit property and then plaintiff put her lock to the premises and then only the plaintiff and defendant jointly filed petition for mutual divorce under Section 13(B) of Hindu Marriage Act on 29-12-2020 before Family Court, Nagpur and then on first date that is on 11-1-2021 marriage counselling was done. The defendant participated in said counselling before marriage counselor and admitted, verified the contains of the petitions and made statement before counselor that he do not want live with plaintiff. However, since period of judicial separation was to be over, therefore, matter was kept pending for marriage counselor report.

16. However, meanwhile in month of September, 2021 something went wrong in the mind of the defendant. He most probably on instigation of second wife and her inmates have change the mind and he under their pressure and control, started attempting to interfere in the possessions of the plaintiff over the suit property, by erecting some additional structure and thereby tried to interfere in the possession of the plaintiff.

17. He on or about 20-9-2021 without any right and authority or without obtaining building sanction, started material modification in existing structure of the suit property and thereby ultimately tried to interfere in the possession of

plaintiff. It is respectfully submitted that once he gifted the suit property in favour of plaintiff by way of registered documents, all his right and authority over the suit property is come an end then and there only and he possess no authority to carry out any changes in the structure of the suit property without permission of new owner that is the plaintiff and without obtaining building sanction, whereas when he has specifically covenant in deed that, with all the benefits he has convey the title of the property to plaintiff and thereafter same is vested with plaintiff and he or any person on his behalf will have remain no right or claim thereon and beside this it was also covenant that he will not claim possession or cause interruption to the possession of plaintiff, that is donee. In such circumstance there is no right and authority vested with the defendant to cause any interference in the possession of the plaintiff by making any sort of construction.

18. It is respectfully submits that as per gift-deed the title and possession has been transferred to plaintiff and the plaintiff on that basis already have recorded her name in right of record, in such circumstance the defendant possessed no right to interfere in the possession of the plaintiff in any manner for title and possession already transfer without any reservation to plaintiff. Thus, action of the defendant to demolish parapet wall of the first floor and started construction work, for extending slab to construct porch by erecting R.C.C. pillars in front side is amount to interference in possession. Moreover, same is material alteration sanction from town planning authority is mandatory. In this scenario the alleged interference of the plaintiff is amounts to a trespassing and causing mischief with the property of plaintiff. Therefore, made him liable to be prosecuted for the same and to make good all the damage cause to the suit property.”

4. The plaintiff contended that the reliefs claimed in the suit are not susceptible to monetary valuation and that the relevant provisions of the Maharashtra Court Fees Act (Act) would be Section 6(iv)(j). In response to the suit summons, the defendant appeared and preferred

an application purportedly under Order VII Rule 11 of the Code.

The defendant contended thus :

“1. That the plaintiff had filed the instant suit against the defendant for claiming relief of declaration and permanent injunction. That it is the contention of the plaintiff that she is the owner of the suit property on the basis of gift deed executed by the defendant. That on the basis of gift deed the plaintiff is claiming to be in possession of the property and had sought injunction from interference of her possession.

2. That the defendant submits that he had already denied the execution and registration of gift deed out of free will and consent and had already filed civil suit for challenging the document which had been got executed by force and coercion.

3. That the defendant submits that the plaintiff had not complied with the provision of Order VII Rule 3 which is mandatory. The provision of Order VII Rule 3 makes is mandatory for the plaintiff to disclose as to how he/she values the suit. The plaint must contain a statement regarding valuation of suit for court fees and jurisdiction, perusal of the plaint would show that no such statement is made by the plaintiff in her plaint. The defendant further submits that though the plaintiff had claimed relief of declaration, the plaintiff had not claimed specifically the relief of ownership in order to avoid payment of court fees, thus the plaint of the plaintiff needs to be rejected for non-payment of proper court fee. That the defendant submits that by clever drafting the plaintiff is trying to avoid payment of proper court fees though the relief of the plaintiff cannot be granted unless the plaintiff pay proper court fees. The plaint of the plaintiff therefore needs to be rejected for non payment of proper court fees. The same is necessary in the interest of justice.”

5. The learned trial Judge allowed the application under Order VII Rule 11 of the Code reasoning thus :

“8. On perusal of the contents of the plaint and the prayers made by the plaintiff therein, it is seen that the relief of declaration of ownership of the plaintiff over the suit property is not sought by the plaintiff in expressed terms. But, the pleading of the plaintiff, if read as a whole, would indicate that the suit is virtually a suit for declaration of ownership of the plaintiff with consequential relief of mandatory and permanent injunction. Although, the relief of declaration of ownership is not sought in the plaint, but the plaintiff is seeking adjudication on that issue for the purpose of claiming mandatory and permanent injunction against the defendant.

9) The plaintiff sought declaration that the alleged interference of the defendant, in possession of plaintiff over the suit property is illegal, bad and unsustainable in law. But, without adjudication of the issue of ownership of the plaintiff over the suit property, such declaration cannot be granted.

10) The plaintiff is claiming ownership over the suit property on the basis of Gift Deed executed by the defendant in her favour. She is also claiming to be in possession of the suit property on the basis of said Gift Deed. Therefore, without adjudicating issue of ownership of the plaintiff over the suit property the relief of declaration, mandatory and permanent injunction sought by the plaintiff cannot be granted in her favour. Therefore, it is necessary for the plaintiff to value her suit accordingly and pay proper court fee.”

The learned trial Judge relied on the decision of this Court in ***Samrat Furniture, Nagpur and others v. Bhaurao Natthuji Mankar, 2001(3) Mh.L.J. 456.***

6. The learned Counsel for the plaintiff Mr. R.S. Nagpure would submit that the learned trial Judge committed an error in not

appreciating that since the plaintiff is the owner of the suit property by virtue of registered Gift-deed, it was not incumbent for her to seek declaration of ownership and that the learned trial Judge further erred in not restricting the consideration to the plaint averments.

7. In rebuttal, the learned Counsel for the defendant Mr. R.T. Anthony would reiterate the submission which found favour with the learned trial Judge and would rely on the decision in *Samrat Furniture, Nagpur and others v. Bhaurao Natthuji Mankar*.

8. In my considered view, the learned trial Judge clearly erred in directing the plaintiff to value the suit appropriately on the premise that the suit is virtually a suit for declaration of ownership qua the suit property. The learned trial Judge failed to appreciate that the plaintiff asserted ownership on the basis of registered Gift-deed and her claim rests on alleged interference by the defendant in her possession qua the suit property. At the stage of deciding the application under Order VII Rule 11 of the Code, there was no occasion for the learned trial Judge to hold that the suit is virtually a suit for declaration of ownership. While in the application under Order VII Rule 11 of the Code the defendant did submit that the Gift-deed is tainted with coercion and that the defendant has instituted a suit seeking such a declaration, at

the stage of deciding the application under Order VII Rule 11 of the Code there was no occasion for the learned trial Judge to hold that there is a serious cloud on the title and that a triable issue qua ownership arises.

9. It is well settled that where the plaintiff is in lawful and peaceful possession of a property, and such possession is interfered or threatened by the defendant, a suit for an injunction simplicitor will lie. Notably, the plaintiff asserted her possession, the defendant did not assert to the contrary, and in any event, at the stage of deciding the application under Order VII Rule 11 of the Code, the trial Court was obligated to restrict the consideration to a holistic reading of the plaint. The plaintiff may indeed have to claim a declaration of title, despite in possession, if the title to the property is in dispute or under a cloud or where the defendant asserts title and threatens dispossession. In *Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and others*, (2008) 4 SCC 594, the Hon'ble Supreme Court has summarized the legal position thus :

“21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, as suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a

cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(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). 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.

(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."

10. In a relatively recent decision in ***Jharkhand State Housing Board v. Didar Singh and another***, (2019) 17 SCC 692, the Hon'ble Supreme Court articulated thus :

“10. The issue that fall for our consideration is : “Whether the suit for permanent injunction is maintainable when the defendant disputes the title of the plaintiff ?”

11. It is well settled by catena of judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.”

11. In my considered view, the stage was not ripe for an adjudication on the nature of the suit. The plaintiff claims to be in possession on the basis of registered Gift-deed. While the consideration of Order VII Rule 11 of the Code must be restricted to the plaint averments, even if the stand of the defendant, as is discernible from the application under Order VII Rule 11 of the Code, is considered, the execution of the Gift- deed is not denied. The contention appears to be that the Gift-deed is tainted with coercion and a separate suit is instituted seeking such a declaration. Whether the title of the plaintiff is clouded by a *bona fide* and genuine dispute, can only be answered at a later stage. Earliest stage, in the factual matrix, would be the stage of

framing issues. If it appears to the learned trial Judge from the pleadings and the material on record that it is imperative to frame issue as regards title, the parties are at liberty to take appropriate steps. Notably, the decision in *Samrat Furniture, Nagpur and others v. Bhaurao Natthuji Mankar* on which the learned trial Judge heavily relies, was in the context of an issue framed qua the ownership of the suit property and the case of the plaintiff himself that such an issue is necessary and cannot be deleted. The said decision turns on facts, and is clearly misconstrued by the learned trial Judge.

12. The order impugned is unsustainable and is set aside.

13. The petition is allowed in terms of prayer clause (ii) which reads thus :

“(ii) Quash and set aside the order dated 22-10-2021, passed below Exhibit 14, in Regular Civil Suit No.1040/2021, by 3rd Joint Civil Judge (Junior Division), Nagpur.”

14. No order as to costs.