

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

CIVIL REVISION APPLICATION NO. 47 OF 2015

LAXMAN MAHIPATRAO KULKARNI
VERSUS
RAOSAHEB RANGNATH DESHMUKH AND ANOTHER

...
Advocate for Applicant : Mr. Amol R. Joshi
h/f. Mr. Devang R. Deshmukh

CORAM : R.M. JOSHI, J.
DATE : 19th April, 2023

PER COURT :

1. Heard learned counsel for the applicant.
2. None for the respondents, though served. The affidavit-in-reply filed to the application, however, is taken into consideration.
3. Learned counsel for the applicant states that an objection was raised under Order VII Rule 11 read with Section 9-A of the Code of Civil Procedure, regarding the tenability of the suit. Accordingly, preliminary issue was framed and impugned order was passed on 01.12.2014. He contended that the Trial Court though has recorded the finding that the suit for declaration that plaintiff is owner of the suit property is not tenable since beyond limitation but held that that suit is maintainable as the relief of injunction is sought. He

contends that once it is held that the suit for declaration is not maintainable then the suit for simplicitor injunction cannot sustain.

4. As regards exercise of the jurisdiction under Order VII Rule 11 of the Code of Civil Procedure, it is settled law that for the purpose of deciding the application for rejection of plaint what would be relevant is only the averments in the plaint and supporting documents filed along with plaint. The written statement of the defendants or even contents of the application under Order VII Rule 11 of CPC, could not be taken into account for the purpose of said decision. Similarly, Trial Court must ascertain as to whether the reading of the plaint as a whole indicates it to be manifestly vexatious or meritless for non disclosure of case of action or that it is an outcome of clever drafting to maintain hopelessly time bar suit and if it appear so, plaint deserves to be rejected.

5. In the instant case, pleadings in plaint shows that suit property is an open plot of land being Gat No. 344 (Old Survey No. 243) admeasuring 10 H 8 R. Original owner was father of plaintiff. It is stated that to satisfy vices he decided to sell properties of joint family. It is also claimed that there was compromise arrived at between father and mother of plaintiff in RCS No. 179/1971 and suit

land was given to share of plaintiff. It is stated that father of plaintiff has executed sale deed being No. 358/1977 in respect of 8 Acre land (suit land) in favour of defendant no. 2. It is further averred that on the basis of said sale deed defendants have not obtained possession of suit land. It is further stated that mother of plaintiff had filed suit being RCS No. 175/1977 challenging sale deed but said suit was dismissed for want of prosecution on 09/12/1980. It is claimed thereafter that plaintiff has possession over suit land and as defendants obstructed same, suit is filed for declaration that plaintiff is owner of suit land and injunction is also sought restraining defendants from interfering in possession of plaintiff over suit land.

6. Learned Trial Court on application filed by defendants under Order VII Rule 11 of CPC, framed preliminary issue and the same was decided by passing impugned order. After considering the pleadings in plaint, it is held that suit is in respect of injunction against act of defendant which is continuing one and provides different cause of action to plaintiff depending upon acts of defendant. On the point of cause of action for the declaration, Trial Court took into account pleadings to record finding that suit claims about deduction is barred by limitation.

7. Pertinently, the plaintiff has not challenged the finding recorded by the Trial Court about the suit for declaration being barred by limitation. This Court, therefore, is not required to consider the said issue for want of challenge thereto. Once it is held that the suit for declaration is not tenable, the suit remains for injunction simplicitor.

8. With regard to the maintainability of the suit for prohibitory injunction simplicitor relating to immovable property Hon'ble Apex Court in case of *Anathula Sudhakar Versus P. Buchi Reddy (Dead) by LRs and others*, **(2008) 4 SCC 594**, has held that :

“The position in regard to suits for prohibitory injunction relating to immovable property, is an under :

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a 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.

A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown.

(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). 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.”

9. The said judgment of the Hon’ble Apex Court clearly shows that where a cloud is raised over the plaintiff’s title the suit for injunction simplicitor would not be tenable. In case, the suit for simplicitor injunction is concerned only with possession the issue of title will not be directly and substantially in issue but in cases where

de jure possession has to be established on the basis of title of property, as in the case of vacant site the issue of title may be directly and substantially arise for consideration as without a finding thereon it will not be possible to decide the issue of possession.

10. In the present case though the plaintiff has filed suit for declaration that he is owner of the suit property which is an agricultural land admeasuring 10 Hectar 8 Are from Gat No. 344 (Old Survey No. 243) and injunction restraining the defendants from interfering into his possession over the same but the learned Trial Court has recorded the finding to the effect that the suit claim about the declaration is barred by limitation. There is no challenge to the said finding by plaintiff. Considering the averments in the plaint there is a sale deed executed by the father of plaintiff in favour of defendant no. 2 in respect of suit property which is agricultural land and is a part of Gat No. 344, there is no dispute about there-being a title document of the suit property in favour of defendant. It is alleged that though the sale deed was executed, the possession of the suit property was never handed over to the defendants. In the light of these pleadings of the plaintiff an issue would arise for the determination of the Court as to whether the defendants are in *de jure* possession of the suit land as it is

a vacant site and the issue of title is directly and substantially shall arise for consideration. Without recording any findings thereon, it would not be possible to decide the issue of possession and subsequent injunction as sought by the plaintiff.

11. In the light of aforesaid judgment, the present suit remains only for injunction with averments of the plaintiff that there is sale deed executed in favour of defendant in respect of the suit land. In such circumstances, the Trial Court without recording findings about the title of defendant cannot decide the issue of possession and injunction. Thus, the suit simplicitor for injunction without challenge to the title of defendant over the suit land cannot be maintained.

12. Learned Trial Court has failed to consider the said aspect and has proceeded on the footing that since the plaintiff seeks possession over the suit land, he has right to file suit for injunction against the defendant restraining him from interfering in the possession thereof. Such findings are not tenable particularly in view of the pleadings in the plaint where the title of the defendant over the suit land is sought to be challenged, which is based on registered sale deed. As the plaintiff has lost the right to challenge the said sale deed and also that the suit has become time barred for seeking declaration of

title in respect of the suit land, the suit for simplicitor injunction even on the basis of possession would not be tenable.

13. Learned Trial Court in the aforesaid circumstances ought to have held that the suit is not maintainable and the primary issue ought to have been answered in favour of the defendant. For the aforesaid reason, the impugned order cannot sustain.

14. In the result following order : -

- (i) Application stands allowed.
- (ii) Impugned order dated 01/12/2014 is set aside.
- (iii) Application Exh. 32 filed in RCS No. 118 of 2007 is allowed.
- (vi) Complaint in RCS No. 118 of 2007 stands rejected.

[R.M. JOSHI, J.]