

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

**SECOND APPEAL NO.521 OF 2019**

Subhash Kondiba More died through his LR's

1-a) Gangubai wd/o Subhash More,  
Age : 59 Years, Occ. Household

1-b) Dattatraya s/o Subhash More,  
Age : 39 Years, Occ. Driver,

Applicants No.1-a & 1-b  
Are Resident of 203, B-Wing, Shantikunj Apt,  
Adarsh Nagar, Malang Road,  
Kalyan (East.)

1-c) Nanda W/o Babaji Chaudhari,  
Age : 35 Years, Occ. Household,  
R/o. Flat No. 301, Gayatri Dham,  
Maji Wada, Thane.

1-d) Sanjay Subhash More,  
Age : 33 Years, Occ. Driver,  
R/o. 203, B-Wing, Shantikunj Apt.,  
Adarsh Nagar, Malang Road,  
Kalyan-(East)

.. APPELLANTS

**VERSUS**

1. Dadabhau Champaji Rokade,  
Died through LR.s.

1-a) Yashodabai Dadabhau Rokade,  
Age : 66 Years, Occ. Nil,  
R/o. Wadzire, Tq. Parner,  
Dist. Ahmednagar

1-b) Bapu Dadabhau Rokade,  
Age : 46 Years, Occ. Agriculture  
R/o. Wadzire, Tq. Parner,  
District Ahmednagar

1-C) Subhash Dadabhau Rokade,  
Age : 44 Years, Occ. Service,  
R/o. Wadzire Tq. Parner,  
District Ahmednagar  
At present Bajaj Auto Ltd.,  
Waluj MIDC Area, Aurangabad.

1-d) Sunita Pandharinath Jadhav,  
Age : 36 Years, Occ. Nil  
R/o. Wadzire ( Jadhav Wadi)  
Tq. Parner, District Ahmednagar.

..RESPONDENTS

Mr. Shrikrishan S. Shinde, Advocate for Appellant;  
Mr. S. P. Koli, Advocate for respondent Nos. 1/a to 1d

**CORAM : S. G. MEHARE, J.**

**DATE : 25.09.2023**

**PER COURT :**

1. Heard the learned counsel for the appellants and the learned counsel for the respondents.
2. The parties are close in relation. The appellant had a case that a sale deed dated 1 April 2020 was without consideration. However, no possession of the suit land was delivered to the respondent. Thereafter, a suit for declaration and injunction was filed. The learned trial Court recorded the finding with regard to issue No.4 that it was not the sale deed in the eye of the law as consideration was not paid; however, in view of the proviso to Section 34 of the Specific Relief Act, the present appellant had to claim possession. These are the findings recorded in

answer to issue No.4. The learned trial Court dismissed the suit by observing that the plaintiffs/ present appellants failed to prove the possession over the suit land on the date of the suit. The Appellate Court also recorded a similar finding and dismissed the appeal.

3. The learned counsel for the appellants would submit that where the specific relief was not sought, the Court, in the exercise of power under Order XLI, Rule 33 of the Code of Civil Procedure, may mould a relief and make justice to the erring party, particularly the rustic party to the suit. In view of the nature of the dispute, the Court should have passed the decree for possession. To substantiate his claim, he relied upon the case of *M/s. Supreme General Fils Exchange Ltd Vs. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others AIR 1975 Supreme Court 18*.

4. The learned counsel for the appellants has submitted the following substantial questions of law;

- (i) Whether the findings of both courts below denying the relief of declaration on the ground that the consequential relief of possession is not prayed?
- (ii) When the fraud on the part of the defendant is pleaded and on the basis of that, the relief of declaration is prayed, and the appellant succeeded to prove that, by playing fraud, the

defendant got executed the sale deed Exh.21 without parting consideration, then in view of the principle that 'fraud vitiates everything' whether appellate Court failed to pass the decree of declaration and possession using the powers under Order 41, Rule 33 of Code of Civil Procedure?

5. Per contra, the learned counsel for the respondents would submit that since there was no evidence of having possession of the plaintiff/appellant over the suit land, the suit was correctly dismissed. There were two concurrent findings against the plaintiffs. The suit was filed under the Specific Relief Act. Unless the prayer is specifically made, the Court cannot grant the relief which is not sought. The case does not fall under Order XLI Rule 33 of the Code of Civil Procedure.

6. In the case of *Lankeswar Malakar v R. Deka* 2006 13 SCC 570. Hon'ble Supreme Court held that in order to be a substantial question of law, the test is whether it is of general public importance or, whether it directly or substantially affects the right of the parties or whether the question is still open i.e. it is not finally settled by the Supreme Court, Federal Court or Privy Council.

7. Order XLI, Rule 33 of the Code of Civil Procedure confers the power to the Court of Appeal under this provision to pass any decree and make any order which ought to have been passed or made and to

pass or make such further or other decree or order as the case may require and such power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, who may or may not have filed any appeal or objection.

8. The Hon'ble Supreme Court, in the case of ***Chaudhary Sahu v State of Bihar, AIR 1982 SC 98***, has explained the object of Order 41, Rule 33 of the Code of Civil Procedure thus;

“The object of this rule is to avoid contradictory and inconsistent decisions on the same question in the same suit. As the power under this rule in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower Court is rendered necessary in order to adjust the right of the parties according to the justie, equity and good conscience.”

9. The Bombay High Court in the case of ***Joao Salvador Jesus Vs. Fatima Electra J. D/Silva (2004) Vol 106 (3) Bom LR 878*** has held that granting of relief not prayed for is one thing, and moulding of relief is quite another. Reliefs not sought cannot always be granted on the principle that reliefs can be moulded.

10. As discussed above, the plaintiff had a specific case that the possession was not delivered to the respondent, and he was in possession, and the defendant had a case that he was in possession of the suit land in pursuance of the so-called sale deed. The plaintiff did not claim for the possession even in the alternate. He had a remedy available to pray for the possession if the sale deed was declared null and void for no consideration. Since the suit was based upon the possession based on title, there was no question of praying for the possession. It is trite there is no provision on inherent power that authorizes the courts to grant relief i.e. explicitly not prayed for by the petitioner.

11. The learned counsel for the appellant has argued that he pleaded that the fraud had been played with him, and on that basis, the relief of declaration was prayed, and he has proved that fraud was played with him. However, the record does not reveal that he had a specific plea of fraud, nor were there findings of the Court about the fraud. The plea of fraud has to be specifically pleaded in the plaint. The appellant's suit was simple that the respondent got the sale deed executed without consideration. It appears that it was a case of deferred consideration for which the remedy to recover the

consideration was available to the plaintiff. He also failed to prove his possession over the suit land.

12. Since pleading of fraud was missing, the argument of the learned counsel for the applicant that fraud vitiates everything, and under those circumstances, the relief of possession under Order XVI Rule 33 of the Civil Procedure Code ought to have been granted is unfounded.

13. Considering the facts of the case, the learned trial Court and the first appellate Court have correctly framed the issues. Therefore, there are no grounds to mould or grant the relief of possession under Order XLI, Rule 33 of the Code of Civil Procedure. Both the courts have dealt with all the issues involved in the suit. Hence, by the impugned judgment and decree, it cannot be said that his substantial right of the appellant has been directly and substantially affected. No substantial question of law was involved in this case, as argued by the learned counsel for the appellant. Hence, the following order.

### **ORDER**

- I) The appeal stands dismissed at the admission stage.
- II) No orders as to costs.

**( S. G. MEHARE )**  
**JUDGE**