

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

SECOND APPEAL NO.17 OF 2023

- . Kamrunbi Shaikh Nasir,
Age: 57 yrs, Occu: Labourer,
R/o. Near Mariyam Madarsa,
Garib Nawaz Colony, Shahada,
Tq. Shahada, Dist: Nandurbar .. Appellant
(Orig. Defendant No.1)

Versus

1. Shafiyoddin Amanoddin Munshi,
Age: 52 yrs, Occu: Service,
R/o. Garib Nawaz Colony, Shahada,
Tq. Shahada, Dist: Nandubar
2. Ashpakali Mazaharali,
Age: 59 yrs, Occu: Land Developer,
R/o. As above Shahada, Tq. Shahada,
Dist: Nandurbar
3. Gulab Ahmed Shaikh Bashir
(Died) .. Respondents
(Resp. No.1 Orig. Pltff.)
(Resp. Nos.2 & 3 Orig. Deft.)

...

Advocate for Appellant:
Mr. Ajinkya A. Joshi h/f. Mr. S. V. Natu
Advocate for Respondent No.1:
Mr. Suniket A. Kulkarni

...

**CORAM: ARUN R. PEDNEKER, J.
Date: 18.08.2023**

ORDER:

1. Heard Mr. Ajinkya A. Joshi holding for
Mr. S. V. Natu, learned counsel for the appellant

and Mr. Suniket A. Kulkarni, learned counsel for respondent no.1.

2. The present second appeal is filed challenging the judgment and decree dated 27.03.2017, passed the District Judge – 1, Shahada in Civil Appeal No.8 of 2014 dismissing the appeal filed by the appellant against the judgment of the trial court whereby the trial court decreed the suit of the respondent / plaintiff and dismissed the counter claim filed by the applicant.

3. The brief facts leading to filing of the present second appeal can be summarized as under:

A. The plaintiff filed a suit for injunction contending therein that he is the owner and in possession of the half portion of land towards eastern side of plot no.15 admeasuring 82.5 square meter, situated at Mauje Shahada (as described in para no.2 of the plaint). He purchased the same by way of sale deed dated 11.11.2009 from Mr. Altaf Shabbir Mansuri, and on the same day he was

put in possession of the suit property. On 22.09.2010, while the plaintiff was going to the suit plot for cleaning the same, the defendants quarreled and threatened him and created obstruction to his peaceful possession of the suit plot. The defendants were trying to encroach upon the suit plot and to take its possession. Thus, the plaintiff was constrained to file the suit praying for injunction restraining the defendants from creating any obstruction to his peaceful possession of the suit plot.

B. The defendants filed written statement and counter claim. They denied the contentions made by the plaintiff and averred that the suit plot was purchased by one Kalpana Narayan Chaudhary in the month of September 1984. Thereafter, in January 1985, one Ashfakali Mazharali had forcibly taken possession of the same and he was continuously and openly in possession of the suit plot for about 12 years and became it's

owner by adverse possession. He became the owner of the suit plot by adverse possession in January 1995. Thereafter, on 09.04.1997 the said Mazhar Ali Asfak sold the suit plot to defendant no.1 for consideration of Rs.22,000/- out of which she paid Rs.15,000/- to him and later on paid the remaining amount of Rs.7,000/-. The defendants contended that they are the owner and possessor of the suit plot. Since then the defendants are the owners and possessor of the suit plot. The plaintiff and his predecessor in title were never in possession of the suit plot and the sale deeds executed in their favour are false and illegal. Thereafter, defendant no.1 has constructed small house on the suit plot and since 1997 she is residing there and is in possession of the same.

C. The defendants by way of a counter claim contended that the plaintiff has no concern with the suit plot and they are the owners and possessor of the same. They also

prayed for declaration that the sale deed executed in favour of the plaintiff is illegal and false and the plaintiff be restrained from creating any obstruction of their peaceful possession by way of injunction and also prayed for dismissal of the suit.

D. The plaintiff by filing written statement to the counter claim denied the contentions of the defendants. The alleged sale deed in favour of defendant no.1 is false and Ashpak Ali Mazhar Ali had never become the owner of the suit plot by way of adverse possession.

E. On the basis of the rival pleadings of the parties, learned trial court framed issues as under:

अ. क्र.	मुद्दे	निष्कर्ष
१	वाद मिळकतीवरील वादी त्याचा कायदेशीर मालकी हक्क सिद्ध करतो काय ?	होकारार्थी
२	वाद मिळकतीवरील त्याचा तो ताबा सिद्ध करतो काय	होकारार्थी

	?	
३	प्रतिवादी त्यांच्या प्रतीदाव्याद्वारे असे सिद्ध करतात काय कि, अशफाकली माझरअली जो विरुद्ध कब्जाने वाद मिळकतीचा मालक होता, त्याचायकडून प्रतिवादी क्र.१ ने वाद मिळकत खरेदी केल्याने ती प्रतीमागणीने वाद मिळकतीची कायदेशीर मालक झालेली आहे ?	नकारार्थी
४	वाद मिळकतीवरील त्यांचा ताबा प्रतिवादी सिद्ध करतात काय ?	नकारार्थी
५	निरंतर मनाई हुकूम मिळण्यास कोण पात्र आहे ?	वादी
६	प्रतिवादी हे त्यांच्या प्रतीदाव्यात केलेली मागणी केलेल्या घोषणेस पात्र आहेत काय ?	नकारार्थी
७	अंतिम आदेश व हुकूमनामा ?	अंतिम आदेशाप्रमाणे

The English translation of the same reads as under:

Sr. No.	Points	Conclusion
1	Whether the plaintiff proves his legal ownership of the suit plot ?	Affirmative
2.	Does he proves his possession of the of the suit plot?	Affirmative
3	Do the defendants prove by their counterclaim that Ashfaq Ali Mazhar Ali, who was the suit owner by adverse possession, that by the purchase of the suit plot by defendant 1 from him she has become the legal owner of the suit plot by counterclaim?	Negative
4	Whether the defendants prove their possession on the suit	Negative

	plot?	
5	Who is eligible for a continuing injunction?	Plaintiff
6	Whether the defendants are eligible for the demands made by them in their counterclaim?	Negative
7.	Final Order and Decree?	As per the Final Order

F. The trial court after hearing the parties and considering the evidence on record decreed the suit and dismissed the counter claim.

G. The appellant challenged the order passed by the trial court before the appellate court. The appellate court framed points for determination and finding thereon are as under:

Sr. No.	POINTS	FINDINGS
1.	Does the plaintiff prove that, he is the owner and in possession of the suit plot ?	In the affirmative
2.	Do the defendants prove that, the defendant No.1 is the owner and in possession of the suit plot ?	In the Negative
3.	Whether plaintiff is entitled for the decree as prayed ?	In the affirmative

4.	Whether defendants are entitled for the decree as prayed ?	In the Negative
5.	Whether interference by this court is warranted in the impugned judgment and decree ?	In the Negative
6.	What order?	As per final order

H. The appellate court held that the plaintiff is the owner and is in possession of the suit plot. The defendant is not the owner and possessor of the suit plot. Before the appellate court it was noticed that the appellant no.2 - Gulab Ahmed Shaikh Bashir died and the appeal filed by him stood abated.

I. The appellate court on consideration of the material evidence that the plaintiff had title by virtue of sale deed, however, the defendant claims title to the property on the basis of an agreement to sale from a person Ashpakali Mazaharali, who was allegedly in adverse possession of the suit property. However, to prove the said fact of adverse possession, Ashpakali Mazaharali was

not examined nor any document of sale deed is executed by him in their favour. There is no evidence, when the said possession of the Ashpakali Mazaharali became adverse to the owners. Thus, the appellate court held that it is difficult to accept the story and the defence put-forth by the defendants in respect of their title. On the contrary, the documentary evidence on record has clearly established and proved that the plaintiff is the owner and possessor of the suit plot. The appellate court on considering the material on record had found that the evidence adduced by the plaintiff is the best evidence in comparison to the defendants.

J. The appellate court then proceeded to points no.3 and 4 and held that the defendants are obstructing the possession of the plaintiff over the suit plot and, as such, confirmed the decree of injunction passed by the trial court.

4. In the present second appeal filed against the judgment of the appellate court, the learned counsel submits that when there is a cloud on the title of the plaintiff, a suit simpliciter for injunction is not maintainable and he relied on the judgment passed by the Hon'ble Supreme Court in the case of Jharkhand State Housing Board Vs. Didar Singh and another, (2019) 17 SCC 692.

5. Having considered the submissions the issue that arise for consideration is, whether a suit simpliciter for injunction would be maintainable without a declaration of title or, alternatively, whether the trial court can decide the issue of title without their being a relief of declaration in a suit simpliciter for injunction. The law is discussed in the following cases by the Hon'ble Supreme Court:

In the case of Jharkhand State Housing Board Vs. Didar Singh and another (supra), at paragraph no.11, the Hon'ble Supreme Court has held as under:

"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."

6. In the case of Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs & Ors., 2008 AIR (SC) 2033, the Hon'ble Supreme Court at paragraphs no.14, 15 and 17(b) has held as under:

"14. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court

may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

15. *There is some confusion as to in what circumstances the question of title will be directly and substantially in issue, and in what circumstances the question of title will be collaterally and incidentally in issue, in a suit for injunction simpliciter. In Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari – AIR 1965 Mad. 355, the Madras High Court considered an appeal arising from a suit for possession and injunction. The defendant contended that the plaintiff had filed an earlier suit for injunction which was dismissed, and therefore the plaintiff was precluded from agitating the issue of title in the subsequent suit, being barred by the principle of res judicata. It was held that the earlier suit was only for an injunction (to protect the standing crop on the land) and the averments in the plaint did not give rise to any question*

necessitating denial of plaintiffs title by the defendant; and as the earlier suit was concerned only with a possessory right and not title, the subsequent suit was not barred. There are several decisions taking a similar view that in a suit for injunction, the question of title does not arise or would arise only incidentally or collaterally, and therefore a subsequent suit for declaration of title would not be barred. On the other hand, in Sulochana Amma v. Narayanan Nair, 1994 (2) SCC 14, this Court observed that a finding as to title given in an earlier injunction suit, can operate as res judicata in a subsequent suit for declaration of title. This was on the premises that in some suits for injunction where a finding on possession solely depended upon a finding on the issue of title, it could be said that the issue of title directly and substantially arose for consideration; and when the same issue regarding title is put in issue, in a subsequent title suit between the parties, the decision in the earlier suit for injunction may operate as res judicata. This Court observed:

“Shri Sukumaran further contended that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting

injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in subsequent suit the decree in the injunction suit equally operates as res judicata."

This was reiterated in Annaimuthu Thevar v. Alagammal – 2005 (6) SCC 202.

16. ...

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) ...

(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) ...

(d) ...

"

7. Applying the law laid down above to the instant case, in a suit for injunction counter claim is also filed by the defendants for the declaration that the sale deed in favour of the plaintiff be declared void and that the defendants are the owners of the suit property. The trial court and the appellate court has thus examined the issue of title in view of the counter claim set-up by the defendants and has not granted injunction merely on the basis of possession. The title of the plaintiff and the defendants is put in issue has been examined by both the courts. Injunction is claimed by the plaintiff against the defendants on the basis of title and possession. The counter claim is based on title derived through the person holding the suit property in adverse possession against the alleged owner of the suit property. The defendants have lost the counter-claim of declaration of title to the suit property and the plaintiff has established his title to the suit property and in view of the law laid down in the case of Anathula Sudhakar

(supra), in a suit simpliciter for injunction the issue of title can be collaterally and incidentally put in issue. In the instant case, the issue of title is examined and decided in favour of the plaintiff and against the defendants. No substantial question of law arises for consideration.

8. The Second Appeal is dismissed. The pending Civil application No.9396 of 2018 stands disposed of.

[ARUN R. PEDNEKER, J.]

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