



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 246 OF 2012

1. Sangram Raosaheb Gaikwad
Age – 38 years, Occupation – Business,
R/o Fule Nagar, Near Yashwant Vidyalaya,
Near Ganesh Mandir Ahmedpur,
Tq. Ahmedpur, Dist. Latur
 2. Rama S/o Ravan Bhagat,
Age 49 years, Occupation – Agri,
R/o. Chortangi near Court Premises,
Ahmedpur, Tq. Ahmedpur,
Dist. Latur
- ...Appellants

Versus

1. Shobha W/o Vishwambhar Dhade,
Age – 36 years, Occupation – Household,
R/o Hamne Galli, Ahmedpur,
Tq. Ahmedpur, Dist. Latur
 2. The State of Maharashtra
 3. The Tahsildar,
Ahmedpur, Tq. Ahmedpur,
Dist. Latur.
 4. The Taluka Inspector of Land Records,
Ahmedpur Taluka, Ahmedpur,
Dist. Latur
- ...Respondents

- Mr. M. M. Patil, Advocate for Appellants
- Mr. V. D. Salunke, Advocate for Respondent No.1
- Smt. A. S. Mantri, AGP for Respondent Nos. 2 to 4

CORAM : KISHORE C. SANT, J
RESERVED ON : JULY 24, 2024
PRONOUNCED ON : AUGUST 21, 2024

ORDER :

1. This Appeal is expedited by an order of the Hon'ble Supreme Court and, therefore, is taken up for hearing out of turn.

2. Original Defendants have approached this Court challenging judgment and order passed by the learned District Judge – 1, Ahmedpur in Regular Civil Appeal No. 195/2011 (Old RCA No. 77/2006). By way of impugned judgment and order, the learned Appellate Judge allowed the appeal and decreed the suit with cost declaring that the Plaintiff is owner and possessor of suit land gut no. 198/2 to the extent of 1H 20R and further granted injunction restraining defendant nos. 4 and 5 and persons from their community from causing obstruction and interference in the peaceful possession of the Plaintiff over the suit land.

3. The facts, in short, giving rise to the Appeal are as below:

Appellants are Original Defendant Nos. 4 & 5. Respondent No. 1 is Original Plaintiff. Respondent Nos. 2 to 4 are original Defendant Nos. 1 to 3. Defendant

No. 1 is State. Defendant No. 2 is Tahsildar, Ahmedpur & Defendant No. 3 is Taluka Inspector of Land Records. Plaintiff filed suit for perpetual injunction and declaration that the order of Tahsildar – Defendant No. 2 dated 28.08.2002 ordering measurement and the measurement done by Taluka Inspector of Land Record, Ahmedpur (for short 'TILR') – Defendant No. 3 be declared as null and void. She sought decree of perpetual injunction against Defendant Nos. 4 and 5 restraining them and persons from their community from causing obstruction and interference in peaceful possession of Plaintiff over the suit land. For the purpose of convenience, the parties are referred to as per their status in the suit.

4. It is the case of the Plaintiff that she is owner and possessor of suit land from land Gut No. 198/2 admeasuring 1H 20R. She became owner by purchasing said land from her father-in-law, namely, Ranba Narayan Dhade by executing a sale deed dated 15.11.1999. She has also received possession of the land. Entry in her name in the revenue record also got

sanctioned on 23.05.2000 vide mutation entry no. 2065 on the basis of the sale deed. Her name, therefore, also came to be recorded in the 7/12 extract. She cultivates the land personally.

5. It is alleged that Defendant Nos. 4 and 5 belong to Maratha community and have formed Kunabi Maratha Sangh at Ahmedpur. They are added as party in representative capacity being leaders of Maratha community from the village. Defendant Nos. 4 and 5 claim that the land belonging to the Plaintiff is used as funeral ground by persons of their community & are not allowing her to cultivate the land. The land exclusively owned by the Plaintiff. Tahsildar, Defendant No. 2, had no authority to direct TILR, Defendant No. 3, to measure the land. The order dated 28.08.2002 is bad and illegal. Measurement carried out by the TILR is without authority. She, therefore, prayed for declaration that Tahsildar's order dated 28.08.2002 and measurement report both are null and void.

6. It is the case of Defendant Nos. 1 to 3 that

there is entry in the revenue record showing that suit land is used as graveyard/funeral ground. Plaintiff has no right over the suit property. It is the case of the Defendant Nos. 4 & 5 that since long the suit land is used for funeral purposes by villagers, however, the Plaintiff has put up fencing on the said land. In earlier sale deed in respect of other portion of said gut number, there are entries wherein it is clearly mentioned that there is funeral ground. The father-in-law by excluding this land, sold other portion of Gut No. 198/2 to two different persons prior to present sale deed. Since Plaintiff is the only legal heir of father-in-law, there was no reason to execute sale deed, however, just to deprive the persons of village, the said sale deed is executed. Defendants relied upon sale deed executed by father-in-law of the Plaintiff predecessor in title in favour of one Noorjah Sk. Mohd dated 08.01.1997 in respect of another portion from gut number. In the said sale deed it is clearly mentioned that the land is sold to Noorjah by excluding land used for funeral ground/graveyard.

7. Learned trial Judge framed the issues and tried the suit. It is held that the Plaintiff failed to prove that she is exclusive owner of the suit land. She further failed to prove that order of Tahsildar dated 28.08.2002 regarding suit land is null and void. Further, it is held that measurement of TILR is correct. Ultimately, it is held that Plaintiff is not entitled for the reliefs of declaration and injunction. The trial Court held on the basis of evidence that in the earlier sale deed there is already a mention that the suit land is a funeral ground. There are long standing entries since 1955 showing the land as funeral ground continuously. It is held that since 1967 there is entry of Smashan Bhumi in the other rights column of the said land and the said continued up to year 2005-2006 in the 7/12 extract. Further finding was recorded on the basis of Court Commissioner's Report. From the revenue record from Nazari Map it is shown as funeral ground. Earlier sale deed in respect of remaining portion of the said land from gut number one in favour of Noorjaha dated 08.11.1997, there is clear recital that there is Smashan Bhumi on the other portion of the

land. Learned Trial Court held that the order is dated 28.08.2002 passed by following due procedure and dismissed the suit with cost.

8. Learned District Judge held that the Plaintiff established that she has become owner and possessor by virtue of sale deed dated 15.11.1999. It is held that the Defendants failed to establish that suit land 1H 20R is reserved for graveyard (funeral ground). It is held that Plaintiff is entitled to the relief of declaration and injunction as sought for and allowed the Appeal granting declaration and injunction.

9. On this, Original Defendant Nos. 4 and 5 have approached this Court by way of present Second Appeal.

10. This Court while admitting Appeal framed the substantial questions of law by order dated 26.03.2014 as below:

(i) Whether the Courts below, particularly the First Appellate Court has jurisdiction to grant relief of injunction against the community of defendant nos. 4 and 5, when the procedure given under Order 1, Rule 7 of the Civil Procedure Code, was not followed?

(ii) Whether the First Appellate Court has committed an error in granting an injunction, which was not claimed in the Plaintiff?

11. This Court after hearing Appeal formulated additional substantial questions of law by order dated 20.12.2014 as below:

(i) Whether the impugned judgment is vitiate for non consideration of the fact that, the revenue record right from the period prior to the date of enactment of the Maharashtra land Revenue Code, 1966, record existence of the funeral ground in the suit land are continued un-objected u/s 159 of the Maharashtra Land Revenue Code, 1966? Whether in such circumstances, any injunction can be granted in favour of the plaintiff under the provisions of the Specific Relief Act, more particularly, in view of the provisions of Sec.41(g) and (i) of the Specific Relief Act, 1963?

(ii) In view of the fact that, the relief for declaration of ownership and being possessor of the suit land is not sought in RCS No.2 of 2003, whether grant of the same is legally sustainable?

(iii) Whether the impugned judgment and decree is vitiated by the vice of perversity as the material fact as to admitted use of the suit land as funeral ground admitted by the vendor of the plaintiff, who is no less than her father

in law, is ignored in spite of the fact that, the said admission is a voluntary admission recorded in a registered transaction in the nature of sale deed dated 8th January, 1997 whereby he has sold the land in sy.No. 198 except the land under use as a funeral ground?

Thus, this Court now has to answer five substantial questions of law. Question No. (ii) in both the order is practically same.

12. Mr. Milind Patil, learned Advocate for the Appellant, vehemently argued that though Defendant Nos. 4 and 5 are shown to represent community, no order under Order I, Rule 8 was passed. Though application was filed, no order was passed by the trial Court on the said application. So far as relief of declaration granted by the Appellate Court of ownership of the land, he submits that the said relief was not prayed in the plaint at all and thus, granting such relief is beyond jurisdiction of the Appellate Court. So far as revenue entries are concerned, he submits that entries are there showing that the land is used for funeral purposes even for the period prior to coming into force

of Maharashtra Land Revenue Code, 1966 (for short 'MLRC') and there is no objection raised under Section 159 of the MLRC and in these circumstances, no injunction could have been granted in favour of Plaintiff in view of Section 41(g) and (i) of Specific Relief Act, 1963 (for short 'the Act'). The declaration of ownership is totally beyond pleadings and, therefore, such relief could not have been granted. He further argued that the finding recorded by the learned Appellate Court is perverse. In support of his submissions, he relied upon following judgments:

1. Anathula Sudhakar vs. P. Buchi Reddy (Dead) by L.Rs and Others, 2008 AIR (SC) 2033
2. Ramchander Sauda and Anr vs. Union of India and Ors, 1999 SCC 9 105
3. Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur vs. Smt. Chhoti and Anr, 1990 AIR SC 396.

13. As against this, Mr. Salunke, learned Advocate for the Plaintiff, vehemently opposed the Appeal. He submits that from the record it is clear that an application to sue Defendant Nos. 4 and 5 in representative capacity is filed by the Plaintiff. It

was for the Court to consider the application and pass necessary order. The suit is rightly filed against Defendant Nos. 4 & 5 in representative capacity. He submits that in the sale deed there is clear recital that vendor is the owner and possessor of the suit land. The revenue record also shows that vendor of Plaintiff is the owner of the entire land in the gut number. Though he has sold some portion to different purchasers in the past, recitals therein are not binding upon the Plaintiff. Plaintiff's relief is not against entire Maratha community, but only against Defendants and persons from families whose names are given in the plaint. In the written statement of the Tahsildar there is no case is made out to show that land is Government land & unless it is Government land, it cannot be used for the purpose of funeral of the villagers. Filing of application under Order I, Rule 8 is sufficient compliance of the rule. There is no objection raised to file such application in the written statement of any of the defendants. The Appellate Court has rightly considered that there is no funeral ground in existence. He submits that learned

Appellate Court has rightly considered that suit land is never shown as reserved for the purpose of funeral ground. The mutation entries though long standing, are taken without any order. Defendants have not produced on record as on what basis those mutation entries were taken. There is no declaration or injunction by the competent Authority declaring the land to be funeral ground. When the land is private, it cannot be used for any purpose unless it is acquired or declared as such. There is sufficient evidence on record brought by the Plaintiff showing that she is exclusive owner and possessor of the suit land. Trial Court had dismissed the suit on technical ground. He submits that if at all Court comes to conclusion that the order is passed without passing any order on application under Order I, Rule 8, in that case matter needs to be remanded for fresh trial. In support of his submissions, he relied upon a judgment in the case of Thakur Sukhpal Singh vs. Thakur Kalyan Singh, 1963 AIR (SC) 146.

14. In rebuttal, learned Advocate for the Appellant argued that the Court has traveled beyond

prayers in the plaint and granted relief. There is bar of Order II, Rule 2 CPC where Plaintiff is required to pray all the reliefs.

15. On this, this Court needs to proceed to see whether the learned Appellate Court has rightly passed judgment and decree in the light of substantial questions of law already framed by this Court and whether the findings recorded by the learned Appellate Court is perverse and without jurisdiction. Further, whether the Appellate Court has jurisdiction to grant relief which is not prayed by the Plaintiff before the trial Court.

16. So far as grant of declaration of ownership is concerned, it is seen from the record it is not prayed in the suit. In the suit the prayer as regards declaration is only in respect of Tahsildar's order dated 28.08.2002 and the measurement done by TILR dated 30.10.2002 and not as to ownership of the Plaintiff over the suit land. Thus, clause 4 of the operative order by the learned Appellate Court is without any prayer. This Court thus answers question no. 1 in

affirmative that Court has erred in granting relief not prayed for in the plaint.

17. Further point for consideration is about whether the Court has jurisdiction to grant relief against community of Defendant Nos. 4 and 5 without following procedure under Order I, Rule 8 of CPC. Order I, Rule 8 of CPC permits to join two or more Defendants when is in doubt whom to sue. Relevant part for the purpose of this judgment of Rule 8 of order I reads as under:

8. One person may sue or defend on behalf of all in same interest

- (1) Where there are numerous persons having the same interest in one suit,--*
 - (a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;*
 - (b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.*
- (2) The Court shall, in every case where a permission or direction is given under*

sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) xxx

(4) xxx

(5) xxx

(6) xxx

Explanation.--For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.

From the reading of the rule it is clear that the persons can sue or be sued in representative capacity with the permission of the Court in view of clause A of sub-rule (1). In clause B the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the

benefit of, all persons so interested. Further the Court may permit the notices be issued of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct. In the present case, it is clear that no steps were taken with regard to compliance of this rule by the Plaintiff.

18. Further submission needs to be considered in view of Section 41(g) of the Specific Relief Act. Section 41(g) of the Act provides that injunction cannot be granted where continuing breach which the Plaintiff has acquiesced. From the evidence i.e., earlier sale deed, vendor of the Plaintiff has acquiesced the right of people and has not objected since 1960 – 1961, the purchaser Plaintiff cannot now object the same. It is trite that no person can pass a better title than what he himself has. Acquiescence is clearly apparent in the sale deed executed in favour of Noorjah which is prior to the execution of sale deed in

favour of Plaintiff. By way of sale deed except the suit land other portion of the land from the gut number was already sold, as there was funeral ground in the suit land and, therefore, that portion was not sold by the vendor. So far as power of Section 41(h) of the Specific Relief Act is concerned, it is submitted that the Plaintiff has sought declaration in respect of the revenue entries and the measurement by TILR. For the said relief a proper course was to approach the revenue authorities under MLRC and, therefore, the suit was barred.

19. So far as entries in the revenue record from 1960 – 1961 are concerned, this Court finds that the third question also needs to be answered in favour of Appellant.

20. So far as the question about perversity, this Court finds that material fact admitted about use of suit land as funeral ground by the vendor of the Plaintiff is ignored by the learned Appellate Court. Finding in respect of this is clearly against record. This Court has to answer the question in favour of

Appellant.

21. In case of Anathula Sudhakar (supra) the Hon'ble Supreme Court considered position with regard to suit for prohibitory injunction relating to immovable property. It is held that the finding on title cannot be recorded in suit for injunction unless there are necessary pleadings and appropriate issue regarding the title is framed. For our purpose, paragraph 17 of the said judgment is reproduced herein below:

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

(a) Where a cloud is raised over 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 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 (supra)]. 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. (Emphasis supplied)

(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 straight-forward, 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 plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

Thus, in view of clause 'c' it is clear that no relief could have been granted as there was no question involved in the suit as to title of the Plaintiff.

22. In case of Kalyan Singh (supra) the Hon'ble Supreme Court has dealt with the question of Order I, Rule 8 CPC holding that it is mandatory. For our purposes paragraphs 13 and 14 are reproduced herein below:

13. Counsel for the appellant, however,

relied upon statements from judgments in the previous suit in support of his contention that it was representative suit on behalf of the Darjee community. Ex. A-2 is the judgment of the trial court. It begins with a sentence: "This is a representative suit by the plaintiffs Kalyan Singh and Suraj Narayan on behalf of the Panchayat Darjian for recovery of possession of the baghichi." But this statement may not help counsel for the appellant, since the suit was said to be on behalf of the 'Panchayat Darjian' and not Darjee community. Ex.A-4 is the High Court judgment in the second appeal arising out of that suit. There the High Court has stated: "That the suit was brought by Kalyan Singh and another against Banwarilal by the representatives of Darjee community." Here again we do not find much support to the appellant. The suit might have been instituted by representatives of the Darjee community, but that by itself was not sufficient to constitute the suit as a representative suit. For a representative suit, the court's permission under Order 1, Rule 8 of the CPC is mandatory. One does not know whether any such permission was obtained. The pleading in that suit or the order obtained under Order 1, Rule 8 has not been produced. There is no other evidence to support the contention of either of the parties. In the absence of necessary material the conclusion one way or the other as to the nature of the previous suit will not be justified.

14. But that does not mean that the plaintiff could succeed ignoring the judgment and decree in the suit against Banwarilal. It must be stated that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachments therefrom. Such a suit need comply with the requirements of Order 1, Rule 8. The suit against Banwarilal even if it was not a representative suit on behalf of the Darjee community would be a suit of this category. Kalyan Singh and another claimed that the baghichi was their community property and Banwarilal was a trespasser. They brought the suit to recover possession from Banwarilal. The suit was decreed. The rival title claimed by Banwarilal by adverse possession was negatived. So long as that decree operates it would be futile to decree the present suit. The observation of the High Court that the present suit is a fruitless exercise could, therefore, be sustained on this ground if not for the reasons stated.

This Court thus holds that the suit is not maintainable against Defendant Nos. 4 and 5 in representative capacity for want of order by the Court allowing Defendants in the suit in representative capacity.

23. In the case of Mohd. Hashim Ajmullah Khan vs. Vasiullah Nasibullah Khan and Ors, 2014 (1) Bom.C.R. 383, this Court considered that when the issue before the Court was about actual physical possession and in that suit the Court decided the question of ownership instead of issue of possession. It is held that the learned Trial Court has committed a mistake.

24. In the case of Bapurao Eknath Kakde and Anr vs. Sampat Sakharam Kirtak (Died) and Anr, Second Appeal No. 977 of 2006, this Court dealt with the provisions of Section 41(j) of the Specific Relief Act and held that person who is not interested in the property, is not entitled to relief of injunction. It was held in view of recording of fact by both the Courts that Defendant in that case was in possession of the property and was cultivating the land. Considering this position, this Court hold that suit property is used as funeral ground.

25. Dealing with the submissions of Respondent/Plaintiff that Tahsildar i.e. Defendant No. 2 has not claimed the land to be a Government land or a

funeral ground. As already discussed, it was not a case where the issue of ownership was in question in the suit. Mere filing of application under Order I, Rule 8 CPC can never be considered as sufficient compliance of the said provision. Merely because there is no objection in the written statement and in the trial, is not sufficient to hold that Court has impliedly granted such a permission. Hon'ble Supreme Court in the case of Thakur Sukhpal Singh (supra) has considered the effect of Order XLI, Rule 31 CPC to the effect that the Appellate Court has to consider only grounds raised in the Appeal. This Court finds that the said judgment is not applicable for the purpose of deciding this Appeal.

26. Reliance by the Plaintiff only on the sale deed executed in her favour will not help her as predecessor in title himself in earlier sale deed has mentioned existence of funeral ground. This Court has already discussed this point in foregoing paragraph. Absence of reservation or notification by the concerned authority is not material when it is positively shown that land was used as funeral ground since prior to

coming into force of the MLRC. The ground that Tahsildar has no authority to declare suit land as funeral ground is also not material in view of above fact. In any case, it is not a case of the Defendants that the suit land is declared as funeral ground by any notification or by way of reservation. A simple case of Defendants is that the fact is acquiesced by the vendor and the land is used as such since prior to 1960 without interruption.

27. Plaintiff has examined her neighbour in support of her case. However, view of overwhelming evidence that the land is used as funeral ground continuously, evidence of neighbour will not come to any help to the Plaintiff.

28. The last submission that for deciding the issue, matter needs to be remanded. In this submission also this Court finds that there is no sufficient force in view of other findings already recorded by this Court. Both the Courts have considered all the aspects involved in the matter. No case is made out for remanding the matter. The remand is sought only for the

purpose of deciding application under Order I, Rule 8.

29. In view of above facts and discussion, this Court finds that even remand is not necessary.

30. In view of above discussion, Appeal deserves to be allowed. Hence, Second Appeal is allowed with cost. Impugned judgment and order dated 14.07.2011 passed in RCA No. 195/2011 by the learned District Judge, Ahmedpur is quashed and set aside. Suit stands dismissed.

31. Pending civil application, if any, stands disposed of.

(KISHORE C. SANT, J.)