

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.1049 OF 2017

Mr. Harishchandra R. Dingankar ..Appellant
Versus
Mr. Ramesh Govind Velunde ..Respondent

Mr. Sarthak Utangale i/by Utangale & Co., for the Appellant.
Mr. P. A. Sarwankar, for the Respondent.

CORAM : KISHORE C. SANT, J.

**RESERVED ON : 13th FEBRUARY, 2024
PRONOUNCED ON : 8th MARCH, 2024**

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1. A short question that arises as to whether the Court can frame issue of ownership, without prayer of declaration of the ownership and when the suit is filed only for injunction from interfering with the possession of the plaintiff without following due process of law. The original defendant is before this Court only to the extent of answering issue of ownership in favour of plaintiff without there being pleading and prayer in the suit.

2. Parties are referred to their original status in the suit.

The facts in short are that the plaintiff filed a suit stating that the plaintiff is owner of the hutment bearing No.92, admeasuring 12 X 18 feet, situated at Ekta Rahivashi Seva Sangh, Near Almeda Compound, Near Tata Power House, Nehru Nagar

Zopadpatti, Pratiksha Nagar, Hemant Manjarekar Marg, Sion Road, Sion Koliwada, Wadala (E), Mumbai – 400 022. In a survey done by Election Commission, it was recorded that the plaintiff is in possession. Even in the survey carried out by MHADA, his name appears in Annexure-II and room number was given as Room No.95. Later on, the same numbered as Room No.92. The plaintiff took the said hut on rent in the year 1993-94 from one Smt. Ratnamma earlier owner. Initially the suit premises was taken on rental basis with option to purchase the same within five years. In 1997, he was offered the said hut for consideration of Rs.90,000/-. Plaintiff initially agreed to pay sum of Rs.10,000/- towards part payment and to clear further balance consideration within one year. The Agreement for Sale came to be executed on 1st July, 1997 by accepting Rs.10,000/-. He paid entire consideration by 30th June, 1998. The original owner executed agreement in favour of the plaintiff stating that she has received entire consideration and has handed over possession to the plaintiff and she had no right over the suit premises. Thus, it is the case of the plaintiff that he is occupying the hut since 1997 and after purchasing the property he has taken electricity connection also. He has thereafter taken gas connection. He is paying maintenance charges to society, namely Ekta Rahiwashi Seva Sangh from time to time.

3. The work of redevelopment of the entire locality started under the Slum Rehabilitation Scheme. The redevelopment work was undertaken by one M/s. Ackruti City Consortium. The

representative of the said M/s. Ackruti City Consortium by visiting suit premises made inquiry about mother of the defendant, namely Smt. Kamalabai. It was informed by his wife that Smt. Kamalabai is not residing in the suit premises. On asking the purpose of the inquiry, the representative of the developer told her that he wanted to give cheque to said Smt. Kamalabai. The plaintiff therefore made further inquiry that the name of mother of the defendant is considered for the suit premises and she will be given room in the newly constructed building. It is further case that at the behest of defendant some local goons started threatening plaintiff and his wife. It is alleged that some Chawl Committee members prepared bogus documents in respect of the suit premises in the name of defendant or his mother and they are trying to show the rights over the suit premises by dispossessing plaintiff. The survey was conducted by the Deputy Collector, Dharavi Division where the defendant's mother is videographed by keeping the plaintiff and his wife away by force. Defendant's mother expired on 05.07.2011 and in order to accomplish his plan, there is apprehension in the mind of plaintiff that defendant may illegally dispossess the plaintiff. He thus filed suit for permanent injunction in the City Civil Court at Mumbai bearing SC Suit No.1473 of 2011.

4. Defendant/present Appellant appeared and resisted the suit. Trial Court framed the issues. One of the issues i.e. issue No.1 framed is as below :-

“1. Whether the plaintiff prove that he has been in possession of the suit premises as the owner ?”

This issue is answered in affirmative. The subsequent issues are also decided in affirmative and ultimately, the decree came to be passed of injunction.

5. As stated, the Appellant/original defendant has approached this Court with a limited grievance that while deciding the suit, the Court has also given finding about ownership in favour of the plaintiff. Learned advocate for the Appellant vehemently argued that the Trial Court has wrongly framed the issue of ownership without there being pleading and the prayer by the plaintiff. The Court has held that the plaintiff is owner only on the basis of the documents which only show his possession. There is no document like sale-deed conferring right of ownership in favour of the plaintiff. In a suit for injunction, there was no question of framing of issue as regards the ownership and answered the said issue in affirmative. He submits that this finding would operate *res-judicata* against the Appellant. He relies upon the judgment in the case of ***Anathula Sudhakar Vs. P. Buchi Reddy & Ors.*** reported in ***(2008) 4 SCC 594.***

6. Learned advocate for the Respondent/original plaintiff submits that the suit though was filed for simplicitor injunction, it was necessary to discuss and determine the nature of possession. In that view of the matter, the issue was framed about the ownership.

Though declaration was specifically not sought of the ownership, still the Court has rightly gone into that issue. He submits that there are documents on record, like receipt of payment of consideration amount, electricity connection, gas connection etc., the Trial Court has therefore rightly framed the issue. After the issue was framed, it was for the defendant to lead evidence. The defendant has not led sufficient evidence to prove his ownership. He thus supports the judgment.

7. This Court has gone through the plaint and the prayers in the plaint. It is seen that there is no prayer of declaration of ownership. The suit is filed simplicitor for injunction. For the purpose of valuation also, the suit is valued only as per the suit for injunction and not on the value of suit premises. This clearly shows that the relief sought was only of injunction. The question is therefore, whether the Court was right in framing the issue of ownership and to answer the said in affirmative. As is seen, there was no sufficient pleading to claim the ownership and for the Court to frame the issue of ownership. The Hon'ble Apex Court in the judgment in the case of ***Anathula Sudhakar (cited supra)***, has considered the question of general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief. Paragraphs 13 and 13.1 to 13.3 read as under :-

“13. The general principles as to when a mere suit for

permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simplicitor will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simplicitor, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

8. For the purpose of decision of the present Appeal, as seen, the Court has to consider paragraph 13.3. Here is clearly a case that plaintiff does not have clear title. The apprehension of the defendant that though decree of declaration of injunction is granted, however, the finding that plaintiff is owner would be

considered as *res-judicata* and defendant would not be able to prove his ownership in subsequent proceedings. In paragraph 18 of the above judgment, it is considered that the findings as to title given in earlier injunction suit can operate as *res-judicata* in a subsequent suit for declaration of title. In view of this, this Court finds that the apprehension of the defendant is well founded that if the finding on the issue of ownership is not set-aside, he would be deprived of establishing his right in future. It would also operate as *res-judicata*, if the defendant files suit for declaration of ownership.

9. In view of above discussion, this Court is clearly of the opinion that the finding on issue No.1 recorded by the learned City Civil Judge needs to be set-aside without disturbing the decree. Hence, the following order :-

- i) The First Appeal stands allowed.
- ii) The finding recorded by the learned Trial Judge on issue No.1 is hereby set-aside.
- iii) The operative part of the decree is however maintained.

10. The First Appeal stands disposed of.

11. Pending Interim Application, if any, stands disposed of.

[KISHORE C. SANT, J.]