

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 400 OF 2023****WITH****INTERIM APPLICATION NO. 2145 OF 2023**

1. Sudesh Sharad Redij

2. Kamlesh Sharad Redij, since deceased
through legal heirs.

2A. Smt. Krutika Kamlesh Redij

2B. Prathamesh Kamlesh Redij

2C. Siyani Kamlesh Redij

} Appellants

V/s.

1. Sunil Shankar Redij

2. Sanatan Shankar Redij

3. Santosh Shankar Redij

4. Manisha Sunil Khedekar

5. Sadhana Arvind Shetye

} Respondents

Mr. Raju Suryawanshi, for the Appellant.

Mr. Satyajeet Rajeshirke, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Reserved on : 8 April 2024.

Pronounced on : 16 April 2024.

JUDGMENT :

1) By this Appeal, Appellants have challenged the Judgment and Decree dated 2 May 2017 passed by the Ad-Hoc District Judge-I, Ratnagiri in Civil Appeal No. 155/2012. The first Appellate Court has dismissed the Appeal filed by Appellants and has confirmed the Decree dated 21 July 2012 passed by the Civil Judge Senior Division, Ratnagiri in Regular Civil Suit No.55/2004. The Trial Court while decreeing the suit, has enjoined the Appellants/Defendants from obstructing Plaintiff's possession in respect of the suit property without following due process of law.

2) Briefly stated, facts of the case are that Municipal House No. 1981 at City Survey No. 2432 within the limits of Ratnagiri Municipal Council and bearing Survey No.479, Hissa No.8 admeasuring 1.5 Ares at Village-Zadgoan together with Shop situated on ground floor therein named 'Sadhana Stores' is the subject matter of the suit. Plaintiff/Respondent No.1 contended in his suit that Shop 'Sadhana Stores' was being run initially by his father - Shankar Gajanan Redij and thereafter Plaintiff started operating the Shop. He further pleaded in the plaint that, Shankar Gajanan Redij, Sharad Gajanan Redij and Ramesh Gajanan Redij were brothers who had partitioned the properties amongst themselves. As per that partition, the Municipal House came to the share of Sharad Gajanan Redij. Since Shankar Gajanan Redij was operating Sadhana Stores, he started paying rent of Rs.300/- to Sharad Gajanan Redij. It was also pleaded that entire land belongs to Shankar Gajanan Redij and after the death of Shankar, the land is owned by the Plaintiff and his brother. It was further pleaded that after the death of

grandfather, Gajanan on 8 November 1976, the property was mutated in the name of the Plaintiff-Sunil Redij. That Shankar Gajanan Redij gave one shop to Sharad in lieu of payment of rent where Sharad started operating Grocery Shop. From 1978, rent of Rs.300/- payable in respect of Sadhana Stores was discontinued and this is how Plaintiff became full owner in respect of Sadhana Stores.

3) Plaintiff further pleaded that on 18 August 1997, an incident of fire took place in Sadhana Stores and other Shops, in which Plaintiff suffered loss of Rs.9,03,000/-. That Plaintiff was demoralized on account of loss caused to him. At that time, his uncle Sharad Gajanan Redij was alive and he took disadvantage of Plaintiff's position and made an application to the Municipal Council on 19 August 1997 for carrying out repairs to roof and other parts of the suit property on Plaintiff's behalf. That he inserted his own name alongwith Plaintiff in the municipal records. That by taking disadvantage of the permission issued, he constructed a wall within the shop and attempted to create two portions therein. Plaintiff had permitted neighbour, Shri. Gangan to use shop temporarily, who vacated the same after repair of his own shop. However, Defendant Nos.1 and 2 started claiming rights in the suit shop. On this cause of action, Plaintiff instituted Regular Civil Suit No. 55 of 2004 against his cousin brothers, Sudesh Sharad Redij and Kamlesh Sharad Redij (Appellants herein). He also impleaded his brothers - Sanatan and Shankar as well as his sisters, as Defendant Nos.3 to 6 in the suit. Plaintiff claimed injunction against Defendant No. 1 from interfering with Plaintiff's possession of the Municipal House No. 1981/Sadhana Stores.

4) Defendant Nos. 1 and 2 appeared in the suit and filed Written Statement contesting the averments in the claim. Based on pleadings, the Trial Court framed following issues:

- (i) *Whether Plaintiff proves that he is in possession of the suit property?*
- (ii) *Whether Plaintiff proves that Defendants are disturbing his possession of the suit property?*
- (iii) *Whether Plaintiff is entitled to permanent injunction as prayed for?*
- (iv) *What Order and Decree?*

5) Plaintiff examined himself as witness. Defendant Nos. 1 and 2 also filed their individual Affidavits of Evidence. It appears that Plaintiff's suit against Defendant No.6 was dismissed. Defendant Nos.3 to 5 did not contest the suit by filing their Written Statements. During pendency of the suit, Defendant No.2-Kamlesh Shankar Redij expired and therefore his legal heirs were brought on record.

6) After considering the evidence on record, the Trial Court proceeded to decree the Suit on 21 July 2012 holding that despite repairs of the Shop, Plaintiff continued to be in possession and had never handed over possession of any portion of the shop to Defendant Nos.1 and 2. The Trial Court further held that even if Plaintiff is held to be tenant of Defendant Nos. 1 and 2, he cannot be evicted without following due process of law. Plaintiff was thus held to be in possession of the suit shop and therefore the Trial Court proceeded to grant permanent injunction against all Defendants from disturbing Plaintiff's possession of suit shop without following the due process of law.

7) Aggrieved by the decree of the Trial Court, Defendant Nos.1 and 2 filed Civil Appeal No. 155/2012 before the District Judge, Ratnagiri. The Appeal has however been dismissed by the first Appellate Court by Judgment and Decree dated 2 May 2017. Appellants, who are original Defendant Nos.1 and 2, have filed the present Appeal challenging the decrees of the Trial Court and the first Appellate Court. It appears that during pendency of the Appeal, the decree of the Trial Court has been executed and by panchanama dated 11 January 2018, the locks put on half portion of the shop were broken and Shri. Barde claiming to be the tenant of Defendant Nos.1 and 2, removed his belongings therefrom. It appears that Plaintiff now possess both portions of the suit shop named Sadhana Stores.

8) By Order dated 8 April 2024, this Court admitted the Appeal by framing following substantial questions of law :

(i) Whether the suit filed by the Plaintiff seeking injunction simplicitor was maintainable without seeking the relief of declaration of ownership in the light of specific assertion in para-3 of the plaint that he has become owner of the suit property ?

(ii) Whether the Plaintiff was entitled to the relief of injunction when the Plaintiff admitted during the course of cross-examination that half portion of the suit property was in possession of the Defendants ?

(iii) Whether the suit seeking simplicitor injunction can be entertained if the Trial Court finds that portion of the suit property is in possession of the Defendant ?

9) Mr. Suryawanshi, the learned counsel appearing for Appellants would submit that the suit filed by Plaintiff was not maintainable and ought to have been dismissed on account of its faulty

frame. That Plaintiff filed suit seeking injunction simplicitor without seeking declaration of title. That Plaint specifically contained an averment that Plaintiff has become owner of the suit property. However, no declaration of ownership was sought in the suit. Relying on the judgment of the Apex Court in **Anathula Sudhakar V/s. P. Buchi Reddy (Dead) By Lrs. & Ors.**¹, Mr. Suryawanshi would contend that the suit seeking injunction simplicitor in the light of contest over title was not maintainable. Alternatively, relying on the same judgment, Mr. Suryawanshi would contend that it was incumbent for the Plaintiff to prove that he was in lawful possession of the suit property on the date of filing of the suit. That there is specific admission in the evidence of the Plaintiff that half portion of the suit shop was in possession of the Defendants. That when the Plaintiff specifically admitted that he was not in possession of half portion of the suit shop, he ought to have filed suit for recovery of possession from Defendant Nos. 1 and 2. Mr. Suryawanshi would submit that the Trial and the first Appellate Court have completely glossed over this vital aspect and have proceeded to entertain and decree the suit filed by Plaintiff for injunction simplicitor.

10) Mr. Suryawanshi would then submit that the findings recorded by the Trial and the first Appellate Court about possession of the entire suit property by Plaintiff are perverse. He would submit that admission given by the Plaintiff in his cross-examination that half portion of the suit shop was possessed by the Defendants is the best piece of evidence which could not have been ignored by both the Courts. That Plaintiff failed to prove that he possessed the entire suit shop. That

¹ (2008)4 SCC 594

therefore there was no question of granting injunction in Plaintiff's favour.

11) Mr. Suryawanshi would take me through various documents filed alongwith Interim Application No. 2145 of 2023 to demonstrate that possession of half portion of the suit shop was actually recovered in execution from the tenants of Defendant Nos.1 and 2 by breaking open the locks. That, thus the Plaintiff has actually recovered possession of the suit shop under the guise of executing the order of injunction granted in his favour by the Trial Court. Mr. Suryawanshi would therefore pray for setting aside the Decrees of the Trial and the first Appellate Court.

12) *Per-contra*, Mr. Rajeshirke the learned counsel appearing for Respondent No.1/Original Plaintiff would submit that the concurrent findings recorded by the Trial and the first Appellate Court do not warrant any interference in exercise of jurisdiction by this Court under Section 100 of the Code of Civil Procedure. That possession of the entire suit shop by the Plaintiff is a finding of fact, which is concurrently recorded by both the Courts below by appreciating the evidence on record. That there is no perversity in the findings recorded by the Trial and the first Appellate Court. He would submit that possession of the entire suit shop by the Plaintiff prior to the incident of fire in the year 1997 is not disputed by Defendant Nos.1 and 2. That Plaintiff's case before the Trial Court was that Defendant Nos.1 and 2 were taking disadvantage of repairs carried out by their father to the Municipal House and were attempting to put a wall between the Shop. That disturbance

caused to the possession of the Plaintiff in respect of the entire suit shop was the cause of action for the Plaintiff to file the suit. That as on the date of filing of the suit, Defendant Nos.1 and 2/their father had not taken possession of any portion of the suit shop. As a matter of fact, as on the date of filing of the suit, both the portions of the suit shop were empty and vacant and none of the parties had actually started using the same. That during pendency of the suit, Defendant Nos.1 and 2 never occupied the shop and the same remained locked. That in his cross-examination, Defendant No.2 admitted that two portions were created in the suit shop after the incident of fire and that one portion was in Plaintiff's possession and the second portion was vacant. That there is specific admission by Defendant No.2 in the evidence that second portion of the shop was vacant. That therefore there was no necessity of Plaintiff seeking relief of recovery of possession from Defendant Nos.1 and 2. The suit for injunction simplicitor was perfectly maintainable and has rightly been decreed by the Trial Court.

13) So far as execution of the Decree is concerned, Mr. Rajeshirke would submit that Shri. Barde was shown to have been inducted as a tenant by Defendant Nos.1 and 2 sometime in the year 2015 i.e. after the decree of the suit on 21 July 2012. That even Shri. Barde did not operate any shop from the portion which was claimed to have been possessed by Defendant Nos. 1 and 2 and that on the day of execution of the decree, half portion of the shop was found to be locked and the locks were required to be broken. That breaking open of the locks was done to remove obstruction to Plaintiff's possession as per the provisions of Order 21 Rule 32(5) of the Code. That merely because obstruction was

removed while executing the Decree, it cannot be said that the obstructionist or Defendant Nos. 1 to 5 were in possession of half portion of the shop. He would pray for dismissal of the Appeal.

14) Rival contentions of the parties now fall for my consideration.

15) Plaintiff's suit seeking injunction simplicitor had to be premised on his claim of possession of the entire suit shop or the Municipal House No. 1981. Perusal of the plaint would indicate that there was some confusion in respect of the exact premises for which Plaintiff sought injunction. Court Commissioner's report culled out in para-25 of Trial Court's judgment would indicate that the Municipal House, in which Sadhana Stores was located, consists of ground floor, mezzanine floor and first floor. Whether the suit was filed for the entire Municipal House consisting of ground floor, mezzanine floor and first floor or whether it was restricted to Sadhana Stores located on the ground floor is something which is difficult to comprehend. The prayer in the plaint would indicate that Plaintiff sought injunction in respect of possession of Municipal House No. 1981, as well as Sadhana Stores. Be that as it may. One aspect, which however, needs to be taken note of is about prayer clause (a) in the plaint. In prayer clause (a), Plaintiff sought injunction only against Defendant No.1 though Defendant Nos. 2 to 6 were also impleaded in the suit. While injunction was sought only against Defendant No.1, the Trial Court has granted injunction against all the Defendants. The Trial Court appears to have glossed over the fact that injunction was sought by the Plaintiffs only against Defendant No.1. Though injunction was sought only against Defendant No.1, pleadings in

para-4 of the Plaint would indicate that both Defendant Nos.1 and 2 had asserted rights in respect of the suit property. That though both the Defendants were asserting rights in respect of the suit property, why injunction is sought only against Defendant No.1 is something which is not explained and which has been totally ignored by both Trial as well as the first Appellate Court. The suit framed by the Plaintiff in this regard appears to be faulty.

16) Turning to the issue of correctness of order of injunction granted by the Trial Court in Plaintiff's favour, relief of injunction was premised on assertion by Plaintiff that in his capacities as owner as well as possessor of the suit property. In para-3 of the plaint, Plaintiff specifically asserted that he has become owner in respect of the entire Municipal House in which Sadhana Stores is located. Though Plaintiff asserted that he become owner in respect of the Municipal House, he did not seek any declaration about ownership. This assertion of the Plaintiff was disputed by Defendant Nos.1 and 2, who claimed that the relationship between Defendant Nos.1 and 2 and the Plaintiff was that of landlords and tenant. Thus since Plaintiff's claim for injunction was premised on ownership and possession, it was necessary for the Plaintiff to seek declaration in respect of the ownership of the suit property. This is not a case where Plaintiff admitted ownership of the suit property by Defendant Nos. 1 and 2 and claimed his own lawful possession for seeking injunction against Defendant Nos.1 and 2. He claimed injunction by asserting that he was the owner in respect of the Municipal House. There was contest to his claim by Defendant Nos.1 and 2 who claimed themselves to be the owners. In the light of this position, it was incumbent for the Plaintiff to

seek a declaration of ownership and he could not have filed suit for injunction simplicitor.

17) The next aspect is about possession. Plaintiff did not make a specific assertion in the plaint that he was in possession of the suit property as on the date of filing of the suit. His averments in para-4 of the Plaint are vague where he contended that father of Defendant Nos. 1 and 2 made application to the Municipal Council on 19 August 1997 for carrying out repairs of Municipal House and inserted his own name in municipal records alongwith Plaintiff. Plaintiff further pleaded that taking disadvantage of such permission, father of Defendant Nos.1 and 2 constructed temporary wall in original shop admeasuring 50 ft x 30 ft and attempted to create two portions in the shop. That neighbour, Shri. Gangan was permitted to temporarily occupy the shop to keep his articles, who vacated the same after construction of his own shop. However, Defendant Nos. 1 and 2 asserted rights in the suit shop stating that they wanted to start the shop therein and this is how Plaintiff filed suit for restraining Defendant No.1 from obstructing his possession in respect of Sadhana Stores. Para-4 of the Plaint reads thus:-

४ तारीख १८।०८।१९९७ रोजी साधना स्टोअर्स व इतर दुकानात आकास्मिकरित्या आग लागली व वादीचे सुमारे रु. ९,०३,००० /- (रुपये नऊ लाख तीन हजार मात्र) नुकसान झाले आहे व त्यावेळी दुरुस्तीमुळे वादी हा पूर्णपणे हताश होऊन मानसिकदृष्ट्या खचून गेला होता. त्यावेळी इतर व्यापारी व नातेवाईक यांनी मदतीचे उद्देशाने पुढे येऊन मदत केली. त्यावेळी वादीचे चुलते शरद गजानन रेडीज हे हयात होते. त्यांनी वादीचे असहाय्यतेचा फायदा घेऊन वादीकरिता नगरपरिषदेकडे छप्पर दुरुस्तीसाठी व डागडुजीसाठी परवानगी मागितली व त्यासाठी तारीख १९।०८।१९९७ रोजी अर्जही केला. त्यात वादी बरोबर आपलेही नांव घातले व वादीस मिळालेले परवानगीचा गैरफायदा घेऊन मुळ दुकान ५० x ३० फुटामध्ये एक भिंत तात्पुरते स्वरूपाची घातली व दुकानाचे दोन भाग करण्याचा प्रयत्न केला व त्यामध्ये वादीचे शेजारी श्री. गांगण यांना तात्पुरत्या स्वरूपात त्यांचे दुकानाचे बांधकाम

होईपर्यंत तो वापरण्यास परवानगी दिली आहे. गांगण यांनी आपले बांधकाम झालेवर सामानसुमार नेले असून वादीची जागा खाली करून दिली आहे. परंतु वादीचे चुलत भाऊ प्रतिवादी नं. १ व २ यांनी वादीचे भोगवट्यास अडथळा होईल, त्रास होईल अशी भाषा करून सदर जागा मला पाहीजे, मि दुकान टाकणार आहे अशी, भाईगिरी व दादागिरीची भाषा दिनांक १५/०२/२००४ रोजी वापरली व त्यावेळी प्रतिवादीचा कावेबाजपणा वादीचे लक्षात आला व वादीस प्रतिवादी नं. १ याने मुळ इमला साधना स्टोअर्सना वादीचे मालकी व भोगवट्यास हरकत होईल असे कोणतेही कृत्य स्वतः अगर इतरांमार्फत करवू नये, म्हणून त्यास कायमची ताकीद होणेसाठी वादी हा दावा करीत आहे.

18) Thus, there is no specific averment in the plaint that Plaintiff lawfully possessed the entire suit shop as on the date of filing of the suit. On the contrary, Plaint suggests that a wall, separating the shop in two portions was already constructed therein at the time of filing of the Suit. The exact date of construction of wall is not disclosed by Plaintiff. However, it appears that the application for seeking permission of the Municipal Council was made on 19 August 1997 whereas the suit was filed in February 2004. It therefore appears that the suit shop was already divided into two parts at the time of filing of the suit. In the light of this position, it was incumbent for Plaintiff to specifically aver in the plaint that he possessed both the portions of the suit shop lawfully at the time of filing of the Suit. However, there is no averment to that effect in the Plaint.

19) To make things worse for the Plaintiff, he gave an admission in his cross-examination that the suit shop was divided into two parts and that one portion was in his possession and that the second portion was in the possession of the Defendants. In this regard, para-5 of the cross-examination of the Plaintiff reads thus :

5. हे म्हणणे खरे आहे की सध्या सदर इम ल्याचे दोन भाग झाले असून त्यापैकी एक भाग माझे ताब्यात आणि एक भाग प्रतिवादीच्या ताब्यात आहे. हे म्हणणे खरे आहे की, माझे ताब्यात असलेल्या भागातील तळमजला, पहिला मजला आणि पोटमाळा माझे ताब्यात आहे. हे म्हणणे खरे आहे की, दुकानाला आग लागणेपूर्वीचा माझा व्यवसाय आणि आताचा व्यवसाय एकच आहे.

20) Thus, Plaintiff specifically admitted before the Trial Court that he was not possessing half portion of the shop. Absence of averment in the plaint about possession of both portions of the shop coupled with specific admission in the cross-examination that the said half portion was in Defendant's possession, clearly disentitled Plaintiff from seeking injunction against Defendant Nos. 1 and 2 atleast *qua* half portion of the shop.

21) In this regard, reliance by Mr. Suryawanshi on the judgment of the Apex Court in *Anathula Sudhakar* (supra) is apposite. The Apex Court has held in para-15 of the judgment as under :

“15. In a suit for permanent injunction to restrain the defendant from interfering with plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally.”

22) The Apex Court has summarised the position with regard to the suits for prohibitory injunction relating to immovable properties in para-21 of the judgment as under :

21. 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 on 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 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.

(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.

23) Thus it was necessary for Plaintiff to aver in his Complaint and prove before the Trial Court that he was in possession of both the portions of the suit shop as on the date of filing of the suit. Far from doing so, Plaintiff actually admitted during the course of his cross-examination that half portion of the suit shop was in possession of Defendant Nos.1 and 2. Once this position is admitted, what Plaintiff ought to have filed is suit seeking recovery of possession of half portion of shop from Defendant Nos. 1 and 2.

24) There is yet another factor which shows that Plaintiff did not possess both portions of the suit shop. When the decree was put in execution, Plaintiff filed application before the executing court on 12 July 2017 contending that Defendant No.1 had installed a lock on shutter of half portion of the suit shop and that he was obstructing Plaintiff from entering in the said half portion. Plaintiff therefore prayed that the locks on the shutter be removed. The Executing Court passed Order dated 4 January 2018 directing the Special Bailiff to break open the suit property, i.e. half portion of the Municipal House No.1981 which was locked by the judgment debtor and directed that vacant possession of the half portion be given to the decree holder. It appears that in pursuance of the Order dated 4 January 2018, the Special Bailiff broke open the locks put on the shutter of half portions of the suit shop. The Bailiff also discovered that Shri. Nitin Purshottam Barde had kept his articles in the said half portion of the suit shop. It is the contention of Defendant Nos. 1 and 2 that Shri. Nitin Purshottam Barde is their tenant. This aspect is

recorded in the panchanama dated 9 January 2018, where Shri. Nitin Purshottam Barde is described by the Bailiff to be tenant of Defendant Nos.1 and 2. This is how possession of half portion of the suit shop was actually recovered from Defendant Nos. 1 and 2 by removal of their tenant by the Bailiff appointed by the Court. It thus clearly appears that the Decree of injunction has been used by the Plaintiff for the purpose of securing possession of half portion of the suit shop, which was admittedly not in possession.

25) The issue that arises for consideration is whether the Trial Court could have entertained and decreed Plaintiff's suit for injunction simplicitor once it was proved that he did not possess half portion of the suit shop. The answer, to my mind ,appears to be in the negative. If Plaintiff had lost possession of half portion of the suit shop, the correct remedy for him was to seek recovery of possession by seeking prayer to that effect. By seeking innocuous order of injunction, Plaintiff cannot seek recovery of possession by a sidewind.

26) The Trial and the first Appellate Court have erred in holding that merely because the Plaintiff was in possession of the entire suit shop prior to the incident of fire, he was entitled to seek the relief of injunction, despite loss of half portion of the suit shop. The Trial and the first Appellate Court ought to have noticed that possession of the Plaintiff in respect of the entire shop was prior to the incident of fire which took place on 18 August 1997. As against this, the suit was filed by the Plaintiff on 27 February 2004. It was erroneous on the part of the Trial and the first Appellate Court to presume that position which

existed on 18 August 1997 must have continued seven years later on 27 February 2004 as well.

27) Both, Trial and the first Appellate Court have held that Defendant Nos.1 and 2 did not lawfully obtain possession of half portion of the premises from the Plaintiff. In my view, while deciding the suit for injunction simplicitor, the manner of obtaining possession by Defendants becomes irrelevant. Prohibitory injunction can be granted only if Plaintiff pleads and proves that he possessed suit property on the date filing of the Suit. Therefore, it was incumbent for Plaintiff to plead and prove that he continued to be in possession of both portions of the suit shop as on the date of filing of the suit. The moment he avers or admits that Defendants unlawfully obtained possession from him, the correct relief which was required to be sought by him was to seek decree for possession. Mere unlawful procurement of possession of half portion of the suit shop by Defendant Nos.1 and 2 does not mean that possession lost by Plaintiff can be restored indirectly by granting prohibitory injunction. The manner in which possession is obtained by Defendant Nos.1 and 2 may be relevant for the purpose of deciding Plaintiff's entitlement to seek recovery of possession or entitlement of Defendant Nos.1 and 2 to retain the possession. However, so far as injunction is concerned, the manner of securing possession by Defendant Nos.1 and 2 becomes wholly irrelevant.

28) In my view, the Trial Court has committed a manifest error in entertaining and decreeing Plaintiff's suit for injunction simplicitor despite it being established that he had lost possession of half portion of

suit shop. The faulty decree passed by the Trial Court is executed by the Special Bailiff by actually recovering possession of half portion from Defendant Nos. 1 and 2. Reliance by Mr. Rajeshirke on provisions of Order XXI Rule 32(5) does not cut any ice. The provisions reads thus:

32. Decree for specific performance for restitution of conjugal rights, or for an injunction.- (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it he decree may be enforced the case of decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed in a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force month ,if the judgment debtor has not obeyed the decree and the decree holder has applied to have attached property sold, such property may be sold; and out of the proceeds the court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

Explanation.—For the removal of doubts, it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunction.

Since passing of decree for prohibitory injunction after loss of possession is itself erroneous, provisions of Order XXI Rule 32(5) cannot be used to

recover possession by breaking open locks put by Defendant Nos. 1 and 2 and by ejecting their tenant.

29) The questions of law framed are accordingly answered as under :

- (i) In the light of contest between the parties on the issue of ownership, it was incumbent for Plaintiff to seek relief of declaration of ownership while seeking decree for prohibitory injunction. Alternatively Plaintiff could have admitted that Defendant Nos. 1 and 2 are landlords and that he was in lawful possession of both portions in the suit shop and then claim relief of prohibitory injunction. In the light of absence of relief for declaration of ownership as well as absence of pleading about lawful possession of both portions of suit shop, suit for prohibitory injunction simplicitor was not maintainable.
- (ii) Plaintiff was not entitled to seek the relief of injunction once he admitted that half portion of the suit property was in possession of Defendant Nos.1 and 2.
- (iii) Suit seeking injunction simplicitor could not be entertained by the Trial Court after it was established that some portion of the suit property is in possession of the Defendants.

30) After having answered the questions of law as above, I find the decree of the Trial and the first Appellate Court to be indefensible. The Appeal accordingly succeeds. The decree dated 21 July 2012 passed by the Civil Judge Senior Division, Ratnagiri in Regular Civil Suit No.

55/2004 and decree dated 2 May 2017 passed by the Ad-hoc District Judge-1, Ratnagiri in Civil Appeal No.155 of 2012 are set aside. Possession of half portion of the suit shop obtained by Plaintiff from Defendants No. 1 and 2 towards execution of the decree shall stand restored to them. Plaintiff shall however be at liberty to adopt necessary remedies for recovery of possession of half portion of the suit shop from Defendant Nos. 1 and 2, which proceedings shall be decided on its own merits without being influenced by observations in the present judgment.

31) With the above directions, the Appeal is **allowed**. There shall be no order as to costs. In view of disposal of the Second Appeal, nothing survives in the Interim Application and the same of also stands disposed of.

SANDEEP V. MARNE, J.