



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.467 OF 2018
WITH
CIVIL APPLICATION NO.1058 OF 2018

1. Shri Sudhir Jotiram Abhang
Age: 45 years, Occu: Agriculture
R/o. Yede, Tal. Kadegaon
Dist: Sangli

2. Dinkar Ganpati Shinde
(Since deceased, through legal heirs)
2A. Gangubai Dinkar Shinde
Age: 80 years, Occu: Nil

2B. Sambhaji Dinkar Shinde
Age: 54 years, Occu: Nil

2C. Namdev Dinkar Shinde
Age: 54 years, Occu: Nil

2D. Hanmant Dinkar Shinde
Age: 48 years, Occu: Nil

2E. Suresh Dinkar Shinde
Age: 45 years, Occu: Nil

2F. Sitabai Shrirang Suryanvanshi
Age: 57, Occu: Nil
Respondents 2A-2F R/o Nevari,
Tal. Kadegaon, Dist: Sangli.

...Appellants/
Applicants

Versus

Shri Prakash Bapu Mayane,
Age: 67 years, Occu: Service

R/o. Yede, Tal. Kadegaon
Dist: Sangli

...Respondent.

Adv. Umesh R. Mankapure for the Appellant/Applicants.
Adv. S. P. Thorat for the Respondent.

Coram : Sharmila U. Deshmukh, J.
Reserved on : April 18, 2024.
Pronounced on : May 7, 2024.

JUDGMENT :

1. The Second Appeal is at the instance of the Plaintiff who was unsuccessful before the Appellate Court in Regular Civil Appeal No. 165 of 2011 preferred by the original Defendant No. 1 against the judgment and decree dated 15th April, 2011 passed by the Trial Court in Regular Civil Suit No. 240 of 2008 declaring the Plaintiff to be the owner of the property and restraining the Defendant No. 1 from causing any obstruction to the Plaintiff's possession of the suit property and dismissing the counter claim filed by the Defendants. By the impugned judgment, the Appellant Court reserved the findings of the Trial Court and dismissed the suit and decreed the counterclaim.

FACTUAL MATRIX :

Plaint:

2. Regular Civil Suit No. 292 of 2000 was filed by the Plaintiff seeking declaration of ownership in respect of suit property described as undivided portion admeasuring 2R out of land bearing Gat No. 42 admeasuring 72R and for injunction restraining Defendant No. 1 from interfering with the Plaintiff's peaceful possession. Gat No. 42 is the ancestral property of Defendant No. 2. In the year 1996, Defendant

No. 2 sold portion of land situated on eastern side of Gat No. 42 to Defendant No.1 who thereafter erected certain structures with consent of Defendant No. 2. By registered sale deed dated 9th October, 2000 executed for consideration of Rs. 20,000/-, the Defendant No. 2 sold to the Plaintiff 2R land east-west 33ft. and north-south 66ft. out of Gat No. 42 bounded on the eastern side by the property purchased by Defendant No. 1, on the southern side by house of Defendant No. 2, on the western side by Kadepur Puse-savali road and on the northern side by east-west access road and beyond the access road the property of Defendant No 2.

3. For the purpose of fencing his property, the Plaintiff made certain arrangement on 15th October, 2000 when the Defendant No. 2 caused obstruction to the work being carried out restraining the Plaintiff from carrying out the work of fencing. As such, the suit came to be filed.

WRITTEN STATEMENT OF DEFENDANT NO. 1 :

4. The Defendant No. 1 contended that by way of registered sale deed on 7th May, 1996, 2R land was sold by the Defendant No. 2 to the Defendant No. 1 for sale consideration of Rs. 37,000/-. The purchased property is situated at a distance of about 80ft. from centre of the Kadepur Puse-savali road as per the development regulations. After being put in possession, in the year 1997, the Defendant No. 1 has constructed five shops facing western side Kadepur Puse-savali road with the knowledge and consent of Defendant No. 2 and there is no other access road to approach the shops except from the western side from Kadepur Puse-savali road. The Defendant No. 2 in collusion with the Plaintiff has sold the space left open in the Defendant No. 1's sale

deed as road widening area to the Plaintiff by way of an illegal sale deed dated 9th October, 2000. It was contended that the Defendant No.1 in the year 1996 has relinquished his ownership right to use the 80ft. road widening area from centre of the road and thus the Defendant No. 2 had no right to execute the sale deed in favour of the Plaintiff in respect of the said property.

WRITTEN STATEMENT OF DEFENDANT NO. 2 :

5. The Defendant No. 2 contended that the Defendant No. 1 was allowed to use the way from remaining western side portion to approach the building constructed by Defendant No. 1. He admitted the sale deed dated 9th October, 2000 and that possession has been handed over to the Plaintiff. The Defendant No. 1 has no right in the 80ft. open space and there is no fencing by the Defendant No. 1 of his own property. The Defendant No. 2 has sold portion of his land to the Plaintiff after leaving distance of 47ft. from centre of the road.

COUNTERCLAIM :

6. By way of counterclaim, the Defendant No. 1 prayed for injunction restraining the Plaintiff from disturbing the peaceful possession of the Defendant No. 1 in the suit property being 80ft. road widening area from the centre of Kadepur Puse-savali road out of Gat No. 42.

COURT COMMISSIONER'S REPORT :

7. The Court Commissioner came to be appointed by the Trial Court for spot inspection. The map prepared by the Court Commissioner depicts the location of the Defendant No. 1's

construction. The report notes that there is no way to approach the Defendant No. 1's construction except from the western side.

FINDINGS OF THE TRIAL COURT :

8. The Trial Court noted that the Defendant No.1 has carried out construction in property forming subject matter of his sale deed. The Trial Court held that as the property purchased by the Defendant No. 1 was at a distance of 80ft. from the centre of the road, the Defendant No. 2 had right to sell the suit property to the Plaintiff. The Court Commissioner's report shows that the Plaintiff's property is separate from Defendant No. 1's property and both are in possession of their respective properties. The Trial Court noted the admission of the Defendant No. 1 about causing obstruction to the Plaintiff's possession. The Trial Court decreed the suit and rejected the counter claim.

FINDINGS OF APPELLATE COURT :

9. Appeal came to be filed by the Defendant No. 1 being Regular Civil Appeal No. 169 of 2000 before the District Court, Sangli. The Appellate Court framed and answered the points for determination as under:

Sr. No.	Points	Findings
1.	Whether the learned trial Court erred while holding that there is no disturbance to right of way of defendant No. 1 by act of purchasing suit land portion by the plaintiff from defendant No. 2?	In the affirmative.
2.	Whether the learned trial Court	

	erred in holding that defendant No. 1 has disturbed peaceful possession of the plaintiff over suit land portion?	In the affirmative.
3.	Whether the learned trial Court erred in decreeing suit and dismissing counter claim ?	In the affirmative.
4.	Whether interference of this Court is warranted?	In the affirmative.
5.	What order ?	As per final order.

10. The Appellate Court noted the recital in the sale deed of 7th May, 1996 that the Defendant No. 2 will not claim right of ownership over the western portion of the property and that he will not disturb the right of use of the Defendant No. 1. The Appellate Court considered the report of the Court Commissioner stating that there is no alternate way for Defendant No. 1 to approach his building except from the western open space. The Appellate Court held that the Defendant No. 2 has sold the suit land to the Plaintiff by committing breach of the terms and conditions mentioned in the sale deed executed with the Defendant No. 1. The Appellate Court held that the Plaintiff has failed to adduced any documentary evidence to show that there is approach way available to the Defendant No. 1 from northern side boundary to approach main road. The Appellate Court allowed the Appeal dismissing the Regular Civil Suit No. 248 of 2008 and decreed the counter claim of Defendant No. 1.

SUBSTANTIAL QUESTION OF LAW :

11. The Second Appeal came to be admitted by this Court on the

following substantial question of law wide order dated 18th June, 2018 :

"Whether the Appellate Court was right in decreeing the counter claim of the original defendant No. 1 without there being any challenge raised to the subsequent sale deed dated 9th October, 2000 at Exhibit 81 on the basis of which plaintiff claims to be in possession ?"

SUBMISSIONS :

12. Mr. Mankapure, learned counsel for the Appellant-original Plaintiff submits that considering the case of Defendant No. 1 that the suit property was agreed to be left open by Defendant No. 2 for his ingress and egress, counter claim simpliciter for injunction would not lie. He points out to the sale deed executed between the Defendant Nos. 1 and 2 and would submit that the property sold to the Defendant No. 1 is situated at distance of 80ft. from the center of Kadepur Pusesavali road. He submits that the area sold to the Defendant No. 1 is different from the area which is sold to the Plaintiff and the Plaintiff is therefore entitled to a declaration of ownership in respect of the suit land forming part of his sale deed. He submits that the ownership rights in respect of suit property being transferred to the Plaintiff, without challenging the sale deed of the year 2000, the Defendant No. 1 has no right to seek injunction. In support of his submission he relies upon the following decisions of the Apex Court :

- **Anathula Sudhkar vs. P. Buchi Reddy (dead) by Lrs. And Ors., [(2008) 4 SCC 594].**
- **T. V. Ramakrishna Reddy vs. M. Mallappa & Anr. [In Civil Appeal No. 5577 of 2021 (Supreme Court of India)].**

13. *Per contra*, Mr. Thorat, learned counsel for the Respondent-original Defendant would submit that it is not necessary to challenge the sale deed executed with the Plaintiff as by way of sale deed of the year 1996 the Defendant No. 2 had relinquished his right over the suit property. He would further point out to the findings of the Court Commissioner that the shops of the Defendant No. 1 are facing towards western side and there is no other approach way except from the western side. He submits that in view of the Court Commissioner's report, the Appellate Court has rightly allowed the counter claim. He would further point out that the suit property sold to the Plaintiff is within the road widening area and certificate has been obtained on 24th December, 2010 from the Executive Engineer Kadegaon and the notification dated 9th March, 2001 to that effect.

14. The reliance placed on the certificate of 24th December, 2010 or the notification of 9th March, 2001 to show that the Plaintiff's land is comprised in road widening area is opposed by Mr. Mankapure as the same is not part of record.

15. Mr. Thorat would further point out to the sale deed of the year 1996 executed between the Defendant Nos. 1 and 2 and submits that the recitals in the sale deed makes it evident, that the Defendant No. 2 has relinquished his ownership right in respect of the road widening area which is thereafter sold by Defendant No. 2 to the Plaintiff. He submit that in 1996, 2R land was sold for sum of Rs. 37,000/- whereas the Plaintiff has purchased the same area in the year 2000 at Rs. 20,000/- which shows the collusion between Defendant No. 2 and the Plaintiff only to cause harassment to the Defendant No.1. He submits that the right of way of the Defendant No. 1 will be obstructed if

injunction is not granted. In support of his submissions he relies upon the following decision.

- **Movva Butchamma vs. Movva Venkateswararao
And Ors. [AIR 1969 Andhra Pradesh 136].**

REASONS AND CONCLUSION :

16. It is not in dispute that the Defendant No. 2 is the owner of Gat No. 42 and by virtue of the sale deeds of the year 1996 and 2000, the Plaintiff and Defendant No.1 have purchased separate and distinct portions of Gat No. 42. The ownership rights of the Plaintiff is sought to be obstructed by the Defendant No. 1 contending that by virtue of the covenant contained in his sale deed dated 7th May, 1996, the Defendant No. 2 agreed not to exercise his ownership rights in respect of the open space on the western side of the property sold to the Defendant No. 2 which would obstruct the Defendant No. 2's ownership rights and right of vahiwat/use.

17. The Defendant No. 1 does not claim to be in actual possession of the suit property and what is claimed is easementary right of way, which according to him is secured by the covenant contained in his sale deed dated 7th October, 1995. The Defendant No. 1 claims breach of obligation existing in his favour and has sought injunction to prevent the breach of the said obligation. The Plaintiff on the other hand claims ownership right in the said open space which constitutes the subject matter of his sale deed dated 9th October, 2000. The counterclaim has been filed simpliciter for injunction under Section 38 of the Specific Relief Act which reads thus :

38. Perpetual inunction when granted. — (1) Subject to

the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the Plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely : —

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage accrued, for likely to be caused, by the invasion ;

(c) Where the invasion is such that compensation in money would not afford adequate relief ;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

18. The Apex Court in the case of **Anathula Sudhakar (supra)** has laid down general principles as to when a mere suit for permanent injunction of land can be filed and when it is necessary to file a suit for declaration and/or possession with injunction and has held in paragraph No. 21 as under :

“21. To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the 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 the 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*²). 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 straightforward, 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 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 the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

19. The decision of ***Anathula Sudhakar*** (supra) was noted by the

the Apex Court in case of ***T.V. Ramakrishna Reddy*** (supra). If the facts of the instant case is examined against the settled position of law, the counter claim is not a simple case of grant of injunction based on possession. The report of the Court Commissioner relied upon by Mr. Thorat states that there is no approach road to the Defendant No. 1's construction except through the open space. The claim of Defendant No.1 is easementary right over the suit property, the ownership rights whereof has been transferred to the Plaintiff under the sale deed dated 9th October, 2000. Thus rival claims have to be adjudicated before injunction can be granted as the grant of injunction will result in obstructing the Plaintiff's ownership rights in the suit property. The grant of injunction has to be preceeded by an inquiry into various issues as regards the relinquishment of right in the suit property by the Defendant No. 2, easementary right of the Defendant No. 1 and ownership rights by the Plaintiff. It was thus necessary for the Defendant No. 1 to seek appropriate declaration as regards his right over the suit property as also *qua* the sale deed dated 9th October, 2000. As the Plaintiff claims ownership rights under the sale deed dated 9th October, 2000, a cloud is raised over the Defendant No. 1's right of way by the Plaintiff and thus the counter claim simpliciter for injunction will not lie.

20. Reliance placed by Mr. Thorat on decision of Andhra Pradesh High Court in ***Movva Butchamma*** (supra) is misplaced as the issue involved in that case was right to use the public street and for removal of obstruction. In facts of that case, there was no issue of maintainability of the suit simpliciter for injunction considered and the facts are clearly distinguishable and inapplicable to the present case.

21. The substantial question of law is accordingly answered in favour of the Appellant. The counterclaim simpliciter for injunction is not maintainable in the absence of seeking appropriate declaration *qua* the Defendant No. 1's right in the suit property and the subsequent sale deed dated 9th October, 2000. Resultantly, the counter claim filed by the Defendant No. 1 stands dismissed.

22. In view of above, Civil/Interim Application if any, taken out herein does not survives for consideration and the same is disposed of.

23. At this stage request is made by learned counsel for the Respondent for extension of interim relief operating in his favour. The said request is opposed by learned counsel for the Appellant. As interim relief has been operating for considerable period, I am inclined to extend the same for a period of 8 weeks from the date of uploading of the order.

[Sharmila U. Deshmukh, J.]