

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.333 OF 1995

Aminabee W/o Turabuddin
(Died through L.Rs.)

- 1-A. Shaikh Maheboob Turabuddin
Age 55 yrs., Occu. Agri.,
R/o Pendgaon Tq. and Dist. Beed.
- 1-B. Shaikh Baba Turabuddin (Died)
Through his Legal Heirs
- 1-B(i) Shaikh Kalima w/o Shaikh Baba,
Age: 52 Years, Occu: Housewife,
R/o. Nalvandi Road, Mauli Nagar Beed
- 1-B(ii) Shaikh Hakim s/o Babamiya,
Age: 25 Years, Occu: Agril,
R/o. C/o. Shaikh Babamiya, Ganghi Nagar,
Behind Padmini Hospital, Beed
- 1-B(iii) Shaikh Mosin s/o Babamiya
Age: 24 Years, Occu: Agril.,
R/o. Nalvandi Road, Beed
- 1-B(iv) Reshma Jafar Sayyad,
Age: 32 Years, Occu: Housewife,
R/o Sadafulewasti, Jamkhed, Ahemadnagar
- 1-13(v) Pathan Shabu Ismaial
Age: 33 Years, Occu: Housewife,
R/o. Nalvandi Road, Mauli Nagar Beed
- 1-B(vi) Ayesha Baba Shaikh,
Age: 27 Years, Occu: Housewife,
R/o. as above
- 1-B(vii) Taslim Ajim shaikh
Age: 25 Years, Occu: Housewife,
R/o. as above
- 1-C. Shaikh Mustafa Turabuddin
Age 40 yrs., Occu. driver

R/o as above.

1-D. Shaikh Abdul Turabuddin
Age 38 yrs., Occu. and
R/o as above.

1-E. Shamim Khurshad
Age 50 yrs., Occu. Household,
R/o Hatola Tq. and Dist. Osmanabad.

1-F. Khatija Anis
Age 42 yrs., Occu. Agri.,
R/o Gadi Tq. Georai Dist. Beed.

1-G. Jahurabee Khalil
Age 35 yrs., Occu. Household,
R/o Hatola Tq. and Dist. Osmanabad. ..Appellants

VERSUS

1) Shriraj Ahmed Ali s/o Safadar Ali,
Age : 45 years, Occu. Agriculture,
R/o. Beed (Deshmukh Galli, Farshi),
Tq. & District Beed.

2) Amanat Ali Sujat Ali died L.R'S

(2.i) Faim Amanat Ali Deshmukh

2.ii) Hamid Amanat Ali Deshmukh

2.iii) Sujat Amanat Ali Deshmukh

2.iv) Mohammad Amanat Ali Deshmukh

2.v) Farad Bee Siraj Deshmukh

All adults, Occ. Business & H.H
r/o Old Bazar, Deshmukh Galli, Beed
District Beed.

..Respondents

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Mrs. Sushma T. Jadhav h/f Mr. D.N. Suryawanshi, Advocate for
Appellants.

Mr. M.M. Patil (Beedkar), Advocate for Respondent Nos.1 & 2 (iii) to
(v).

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CORAM : S.G. CHAPALGAONKAR, J.

RESERVED ON : MARCH 19, 2025

PRONOUNCED ON : MAY 09, 2025

JUDGMENT :

1. The appellant/original plaintiff impugns judgment and decree dated 11.01.1995 passed by District Judge, Beed in Regular Civil Appeal No.111 of 1993, thereby upholding judgment and decree dated 15.04.1993 passed by Joint Civil Judge, Junior Division, Beed in Regular Civil Suit No.462 of 1988, thereby dismissing suit of plaintiff/appellant seeking decree of perpetual injunction against respondents/defendants.

2. The plaintiff instituted Regular Civil Suit No.462 of 1988 contending that she inherited suit property from her mother. She has constructed farmhouse and residing along with her children. She managed agricultural operation by hiring labour. Defendant no.1 is influential person and local MLA. He managed to get mutation in cultivation column of suit land behind her back. In the year 1987, she came to know about illegal mutation; hence, issued notice to defendant no.1 to which he failed to reply. On 17.10.1988, defendants obstructed her possession on the basis of illegal entry in mutation record. Therefore, suit is filed seeking decree of perpetual injunction.

3. The defendants refuted plaintiff's claim contending that Hasmatbee, who is mother of plaintiff was the original owner. She agreed to sell suit property to defendant no.1 vide agreement to sell dated 10.06.1960. On 19.04.1967, she executed sale deed in favour of Dilawar Baig for or on behalf of Safadar Ali. Dilawar Baig is nephew of Safadar Ali. Hence, Safadar Ali brought him to Beed along with his parents for taking care of land. According to defendants, Safadar Ali purchased the said land in the name of Dilawar Baig as benami purchaser. Accordingly, his name was recorded in mutation. After death of Dilawar Baig, his legal heirs has instituted Regular Civil Suit No.25 of 1971 against defendant no.1 for declaration of title. The said suit was dismissed. Similarly, one Husratbee and others had also raised claim over suit property in Regular Civil Suit No.18 of 1981, which came to be dismissed on 24.11.1986. According to defendant, alternatively, he perfected title by way of adverse possession.

4. The Trial Court framed issues, recorded evidence of parties and after evaluation of evidence concluded that plaintiff failed to prove her title and possession over suit property, so also, failed to prove any obstruction by defendants as alleged. Eventually, dismissed the suit. Aggrieved plaintiff filed appeal before learned District Judge, who concurrent with finding of Trial Court on all points and maintained the decree of dismissal of suit. It appears that cross

objection was filed on behalf of defendants. However, same is not considered being barred by limitation.

5. Aggrieved plaintiff filed this second appeal. It was placed for admission before this Court on 02.02.1996 and has been admitted by passing following order :

“Heard counsel.

There involves substantial question of law on both appreciation of evidence and interpretation of law, relating to Sec.4(1) of Benami Transaction (Prohibition) Act. The findings recorded by the courts below are contrary to Supreme Court judgment reported in 1995 SCW 1422.

Admit.

Notice.

Shri Naik waives service for respondent no.1.”

6. Second appeal was then placed under the caption ‘final hearing’ before this Court on 24.02.2025. It was pointed out by learned advocate appearing for respondents that while admitting second appeal, specific substantial question of law is not framed. Therefore, learned advocate appearing for appellants sought accommodation to file specifically framed substantial questions of law. Accordingly, liberty was granted to him. He passed on a pursis and proposed three specifically framed substantial questions of law, which reads thus :

“1. Whether both the courts below ought to have considered that the alleged sale-deed dated 19/4/67 was acted upon and whether

late Dilawar Baig or his son or late Sabdar Ali tried to get record their names in revenue record?

2. Whether in absence of production of original sale-deed which is alleged to be in the custody of defendants, without any reason can rely upon the copy of sale-deed and that too when plaintiff has specifically denied ?

3. Whether the defendants can claim ownership and possession of the suit property considering the provisions of sec 4(ii) of Benami Transactions (Prohibition) Act 1988?"

7. Learned advocates appearing for respective parties advanced their submissions on the question of law as indicated in order of admission as well as proposed questions of law placed on record by way of pursis.

8. Mrs. Sushma, learned advocate appearing for appellants vehemently submits that defendants relied upon sale deed dated 19.04.1967. However, it was never acted upon. Further, original sale deed was not placed on record. The certified copy of sale deed is admitted in evidence without following due process of law. Even otherwise, as per pleading of defendants, it was benami transaction in the name of Dilawar Baig and could not have been admitted in view of Section 4(i) of The Benami Transactions (Prohibition) Act, 1988. She would further submit that defendant cannot claim his ownership and possession on the basis of so-called sale deed dated 19.04.1967 in view of bar under Section 4(ii) of Benami Transactions (Prohibition) Act, 1988.

9. Per contra, Mr. M.M. Patil (Beedkar), learned advocate appearing for respondents submits that plaintiff instituted simpliciter suit for perpetual injunction without claiming declaration of ownership. He submits that it was obligatory on the part of plaintiff to prove her possession by leading cogent evidence. Further, when plaintiff claims to have acquired title in the suit property through her mother, and when defendants have put up specific case that mother of plaintiff has alienated suit property vide sale deed dated 19.04.1967 in the name of Dilawar Baig, it was necessary for her to seek declaration of her ownership. According to Mr. Patil, suit simpliciter for perpetual injunction would not be maintainable in the facts of present case. In support of his contentions, he relied upon observations of Hon'ble Supreme Court in case of ***T.V. Ramakrishna Reddy Vs. M. Mallappa and Another***¹ and ***Anathula Sudhakar Vs P. Buchi Reddy***². Mr. Patil would further submit that both Courts have correctly recorded finding of fact that plaintiff could not establish possession over suit property. Such findings of fact is based on appreciation of evidence, hence, not susceptible to be interfered in second appeal.

10. Having considered submissions advanced, it can be observed that plaintiff claims her title and possession contending that she has inherited suit property from her mother Hasmatbee w/o

1 (2021) 13 SCC 135

2 (2008) 4 SCC 594

Jamaloddin and since then, she is enjoying property as owner and possessor. Per contra, defendant no.1 claims that his father Safadar Ali purchased the suit property from Hasmatbee under registered sale deed dated 19.04.1967. The sale deed was benami in the name of Dilawar Baig i.e. nephew of Safadar Ali. Dilawar Baig was cultivating land on behalf of Safadar Ali and as such, refuses title and possession of plaintiff over suit property.

11. It can be observed that copy of sale deed dated 19.04.1967 is placed on record at Exhibit-110. It is a registered sale deed. One Sk. Mujahit (DW-2), a clerk from the office of Sub-Registrar, Beed was examined as witness by defendants. He proved the contents of documents from relevant register. Pertinently, the plaintiff herself is witness on said documents. The plaintiff has not disputed defendants contention that her mother executed sale deed dated 19.04.1967. The learned District Judge observed that in view of provisions of Section 52(c) of Registration Act, copy of sale deed is maintained by office of Registrar and as such, it is public document, certified copy of which can be issued under Section 57 of the Act by the Competent Authority. In this background, certainly there is sufficient material bringing cloud of doubt as to the title of plaintiff. At this stage, reference to observations of Hon'ble Supreme Court in case of **Anathula Sudhakar** (supra) are relevant, which read thus :

"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). 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 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 the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

12. In light of aforesaid exposition of law, when defendants have brought sufficient material creating doubt as to title of plaintiff, it was for her to seek declaration of ownership. The suit simpliciter for perpetual injunction in background of aforesaid facts was certainly not maintainable. Although plaintiff was aware of sale deed executed by her mother in favour of Safadar Ali, no relief was claimed by her against same.

13. Although, it is contended on behalf of plaintiff that aforesaid sale deed was not acted upon and name of Hasmatbee continued in the record of rights and thereafter, her name has been substituted under Mutation Entry No.337, it is difficult to accept that plaintiff holds title to suit property. The continuation of mutation entries is only for fiscal purpose and cannot stand as evidence of title. When plaintiff has not disputed execution of sale deed dated 19.04.1967 by Hasmatbee in favour of Dilawar Baig under registered

document, the continuation of mutation entry in the name of Hasmatbee or the plaintiff cannot be construed as evidence of title in favour of plaintiff.

14. So far as the issue of possession is concerned, the plaintiff relied upon oral evidence of witnesses. The record indicates that from 1968 to 1991, 7/12 extract shows name of Safadar Ali. The oral evidence relied by plaintiff, which is inconsistent with mutation entries is not accepted by the Courts below for good reasons. The plaintiff claims that she used to cultivate land through Sk. Anis (PW-4), learned District Judge observed that plaintiff has not recorded evidence consistent with her pleadings. The learned District Judge observed that evidence of plaintiff on the point of cultivation is not safe and sound, whereas, the revenue record consistently shows possession of Safadar Ali. On this count also, both Courts recorded concurrent finding that plaintiff could not prove her possession on suit property.

15. Although, it is contended on behalf of plaintiff that Section 4 of Benami Transactions (Prohibition) Act bars to raise claim or defence based on benami transaction, it can be observed that sale deed is executed in the year 1967 i.e. prior to commencement of 1988 Act. The provisions contained therein would not be retrospectively applied to the transactions effected prior to 21 years of commencement of Act. Particularly in light of observations of Hon'ble

Supreme Court in the case of ***Gurdev Kaur and Ors Vs. Kaki and Ors***³

in para 69, which read thus :

“69. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100, C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble."

16. Therefore, this Court is of the view that plaintiff cannot raise plea relying upon Section 4 of Act of 1988. In light of aforesaid observations, no fault can be found in concurrent judgments and decrees passed by the Courts,

17. In that view of matter, second appeal stands dismissed.

(S.G. CHAPALGAONKAR, J.)