



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**939 SECOND APPEAL NO. 131 OF 2018
(WITH CIVIL APPLICATION NO. 1570 OF 2018)**

Chandrakant S/o Abarao Garad
Age : 53 years, Occu : Agril.,
R/o Kapil Nagar, Latur,
Tq. & Dist. Latur.

..APPELLANT

-VERSUS-

Shobha w/o Hanmanth Kamble
Age : 53 years, Occu : Household,
R/o More Nagar, Kanheri Road,
Latur, Tq. & Dist.Latur.

..RESPONDENT

...
Advocate for Appellant : Mr. Shinde Manoj D.
Advocate for Respondent : Mr. More P.P.

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CORAM : ROHIT W. JOSHI, J.
Dated : 5th MARCH, 2025

ORAL JUDGMENT :-

1. The original defendant, who has suffered concurrent decrees in a suit for possession filed by the respondent, has filed the present Second Appeal. The suit property is open plot bearing plot No.7/B situated in Survey No.37 at Latur, admeasuring 2000 Sq. Ft. The respondent, who is original plaintiff has purchased the suit plot from vendor namely Vishwanath Abarao Garad, brother of the

defendant, which property fallen to the share of vendor of the plaintiff pursuant to a decree for partition and separate possession passed in Special Civil Suit No.56/2010. The vendor of the plaintiff thus became owner of the suit property by virtue of said decree of partition passed in his favour.

2. Having registered the suit property, vide sale deed dated 24.05.2005, the plaintiff had initially filed a suit for perpetual injunction against the defendant/appellant, being Regular Civil Suit No.297/2009 seeking a decree for perpetual injunction that her lawful possession over the suit property should not be disturbed. The said suit came to be dismissed vide judgment and decree dated 14.12.2011 passed by the Civil Judge, Junior Division, Latur. The learned Court has held that the defendant was in possession of the suit property and that the plaintiff had failed to prove her possession over the same pursuant to the sale deed dated 24.05.2005 executed in her favour. After dismissal of the said suit, the present respondent/plaintiff has filed Suit for possession, being Regular Civil Suit No.39/2012. Possession is sought on the basis of the ownership. The plaintiff has made

averments in the plaint that she was dispossessed from the suit plot forcibly on 17.12.2011 after hearing earlier suit for perpetual injunction bearing Regular Civil Suit No.297/2009 was dismissed. The learned trial Court after framing issues and recording evidence was pleased to pass a decree for possession in favour of the respondent/plaintiff on the ground that she was true and lawful owner of the suit property on the basis of the sale deed executed in her favour. It will be pertinent to mention that the plaintiff had also sought a decree of perpetual injunction, which was refused by the learned trial Court.

3. Aggrieved by the decree for possession passed, defendant/appellant filed First Appeal, being Regular Civil Appeal No.200/2014. The said appeal came to be dismissed by the learned District Judge-5, Latur, vide judgment and decree dated 13th July, 2017.

4. The original defendant has preferred the present second appeal challenging these concurrent decrees of possession. The learned counsel for the appellant has raised

three principal contentions namely; the second suit was hit by principles of *res judicata*, which are now statutorily recognized by Section 11 of the Code of Civil Procedure subsequent suit was not maintainable in view of bar under Order II Rule 2, and that finding with respect to dispossession was reversed by the learned First Appellate Court although the respondent did not file a cross objection under Order XLI Rule 21 of the Code of Civil Procedure.

5. The subsequent suit out of which the present second appeal arises is suit for possession based on title. The plaintiff is claiming ownership over the suit property on the basis of sale deed executed in her favour. In a suit for possession based on ownership, the decree for possession has to be necessarily passed in favour of the plaintiff, if the plaintiff succeeds in proving his title/ownership. Once ownership is proved, defence available to the defendant is that the suit is barred by limitation or in other words the defendant has perfected his title over the suit property by adverse possession. Since the plaintiff has undisputedly purchased the properties from the true and lawful owner and has proved his

sale deed, ownership of the plaintiff over suit property cannot be disputed. The learned counsel for the appellant has also not challenged the ownership. In that view of the matter, in my considered opinion, decree for possession should necessarily follow in favour of the plaintiff.

6. The first suit was a suit for perpetual injunction in which a prayer was made that the plaintiff should not be dispossessed from the suit property. The core issue in the suit for injunction is possession and not title for ownership. Whereas, the suit for possession, the principal issue to be adjudicated is ownership and not possession. In that view of the matter, the judgment delivered in the earlier suit will not operate as res judicata in a subsequent suit for possession based on title/ownership. The contention of the learned counsel for the appellant in this regard is therefore liable to be rejected.

7. Other contention raised is that suit is barred by Order II and Rule 2 of the Code of Civil Procedure. In my considered opinion, the said contention also deserves

rejection. The cause of action in a suit for perpetual injunction is a threat to the possession of plaintiff over the property. Whereas cause of action in a suit for possession based on title or ownership is ownership over the property coupled with refusal on the part of the defendant to hand over the possession or act of defendant in occupying the property without any right or permission of the owner. Therefore, cause of action in suit for possession based on ownership/title and suit for injunction will be different. Since cause of action in both the suits are different, the subsequent suit for possession will not be hit by Order II Rule 2 of the Code of Civil Procedure.

8. As regards the findings of the learned trial Court with respect to dispossession being reversed by the learned First Appellate Court in the absence of any cross-objection being filed by the respondent, I find that the said contentions are also misconceived.

9. Admittedly, the plaintiff in whose favour decree for possession was passed was not assailing the decree

requesting to grant perpetual injunction. The plaintiff was only questioning the findings. When successful plaintiff or defendant assails adverse finding before the Appellate Court without challenging any part of the decree, it is not necessary to file any cross objection under Order XLI Rule 22. Opening words of Order XLI Rule 22 are very clear and explicit in this regard. Order XLI Rule 22 states that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but also state that the findings against him on any issue should have been in his favour. Therefore, when the respondent in appeal does not question any decree passed against him, he is not required to file a cross objection. He can assail the findings without filing cross objection. It is only when a respondent intends to question any part of decree, which is passed against him, he is required to file cross-objection. The words cross objection are followed by the words, 'to the decree, which he could have taken by way of appeal'. The words 'to the decree' further clarify the legal position. Since the respondent/plaintiff has not challenged refusal of decree of perpetual injunction, in my considered opinion, it was not necessary for him to file a

cross-objection as contemplated under Order XLI Rule 22.

10. In my considered opinion, even if there is no clarity with respect to date of alleged dispossession still decree for possession must be passed in favour of the plaintiff, since the plaintiff has undisputedly proved the ownership over the suit property on the basis of sale deed.

11. In that view of the matter, no substantial questions of law arise for consideration in the present second appeal. The Second Appeal is dismissed with no orders as to cost.

12. Civil Application No.1570 of 2018 is disposed of.

(ROHIT W. JOSHI, J)