



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.70/2025

APPELLANTS:

**(Org. Defendants
.....On R.A.)**

1. Smt. Jijabai wd/o Ganpat Pendor
Aged about 67 yrs. Occ: Household,

2. Raju s/o Ganpat Pendor,
Aged about 47 years, Occ: Labour,

3. Vilas s/o Ganpat Pendor,
Aged about 39 years, Occ: Labour,

Resp. No 1 to 3 Presently residing at
By-Pass Road, W.C.L.Magazine,
Near Hanuman Mandir, Chandrapur
Tah. Chandrapur, Dist. Chandrapur.

4. Smt. Shashikala wd/o Maroti Pendor,
aged about 68 years, Occu: Labour,

5. Ramesh s/o Maroti Pendor,
aged about 38 years, Occ: Labour,

6. Suresh s/o Maroti Pendor,
aged about 36 years, Occu: Labour,

7. Madhav s/o Undru Pendor,
aged about 58 years, Occ : Labour,

Resp. No. 4 to 7 residing Umari
Road, Tq. Kelapur, Dist. Yavatmal.

8. Udhav s/o Undru Pendor,
aged about 63 years,
Occu: Labour, R/o. Mul Road,
Indira Nagar, Near Ganpati Mandir,
Chandrapur, Dist. Chandrapur.

...VERSUS...

RESPONDENT: Subhash s/o Tanba Bhadikar,
Org. Plaintiff aged 63 yrs, Occu: Agriculturist &
.....On R.A. Service, R/o Umari, Tq. Kelapur, Dist. Yavatmal.

Address amended

Subhash S/o Tanba Bhadikar
Aged 63 yrs., Occu. Agriculturist & Service,
R/o New Kawsan, Saraf Nagar, Paithan,
Tq. Paithan, Dist. Aurangabad (Sambhaji Nagar)
431107.

(Amendment carried out as per Court's order
dated 21/03/2024)

WITH

CROSS-OBJECTION (XOB) NO.38/2026

APPELLANT : Subhash s/o Tanba Bhadikar,
(CROSS- Aged 63 yrs, Occupation : Agriculturist
OBJECTOR) residing at Kelapur, District – Yavatmal.

...VERSUS...

RESPONDENTS : 1. Smt. Jijabai wd/o Ganpat Pendor
Aged about 67 yrs. Occupation : Household,
2. Raju s/o Ganpat Pendor,
Aged about 47 years, Occupation: Labour,
3. Vilas s/o Ganpat Pendor,
Aged about 39 years, Occupation : Labour,

Applicant No.1 to 3 Presently residing at
By-Pass Road, W.C.L.Magazine,
Near Hanuman Mandir, Chandrapur
Tahsil Chandrapur, Dist. Chandrapur.

4. Smt. Shashikala wd/o Maroti Pendor,
aged about 68 years, Occupation : Labour,
5. Ramesh s/o Maroti Pendor,
aged about 38 years, Occupation: Labour,
6. Suresh s/o Maroti Pendor,
aged about 36 years, Occupation: Labour,
7. Madhav s/o Undru Pendor,
aged about 58 years, Occupation : Labour,

Applicant No. 4 to 7 residing at Umari
Road, Tq. Kelapur, Dist. Yavatmal.

8. Udhav s/o Undru Pendor,
aged about 63 years,
Occupation: Labour, residing at Mul Road,
Indira Nagar, Near Ganpati Mandir,
Chandrapur.

Mr. Shankar Borkute, Advocate for appellants in SA No.70/2025
Mr. R.D. Dhande, Advocate for respondent in SA No.70/2025
Mr. R.D. Dhande, Advocate for cross-objector in Cross-Objection No.38/2026
Mr. Shankar Borkute, Advocate for respondents in Cross-Objection No.38/2026

CORAM : ROHIT W. JOSHI, J.
DATE : 06/04/2026

ORAL JUDGMENT :

1. The present appeal challenges the judgment and decree dated 24/08/2018, passed by the Ad hoc District Judge – 1, Kelapur in Regular Civil Appeal No.11/2009, whereby the learned first Appellate Court has partly allowed the appeal by quashing and setting aside the judgment and decree dated 27/01/2009, passed by the Joint Civil

Judge, Junior Division, Pandharkawada (Kelapur) in Regular Civil Suit No.53/2005 and partly decreed the said civil suit.

2. The respondent, in the present appeal, is the original plaintiff, who had filed a suit for declaration of ownership over the suit property with a prayer for perpetual injunction that his possession over the suit property should not be disturbed by the appellants, who are the original defendants. The claim is made on the basis of Will dated 06/03/2002, executed by late Kisanabai Pendor in favour of respondent/plaintiff. The learned Trial Court dismissed the suit, holding that the land was allotted to the testator under the provisions of the Madhya Pradesh Land Revenue Code, 1959 (for short hereinafter referred to as "M.P. L.R.Code, 1959") and in view of bar under Section 165 (1) of the M.P.L.R.Code, 1959 the testator did not have any right to bequeath the property, as consequence of which, the plaintiff cannot claim ownership over the same. The learned Trial Court also recorded a finding that the plaintiff has also failed to prove possession over the suit property. The suit came to be dismissed accordingly. It needs to be stated that after both parties had led their evidence, the plaintiff has filed application for amendment of plaint, *inter alia* seeking to incorporate prayer for possession as an alternate prayer to the prayer for injunction. The plaintiff did not give up his prayer for perpetual injunction.

3. Aggrieved by the judgment and decree, dismissing his suit, the plaintiff filed first appeal being Regular First Appeal No.11/2009, which came to be partly allowed by the learned first Appellate Court. The learned first Appellate Court held that the Will is duly proved and accordingly, granted declaration of ownership with respect to suit property in favour of the plaintiff. However, the learned first Appellate Court concurred with the learned Trial Court to hold that since plaintiff was not in possession of the suit property, he was not entitled to relief of perpetual injunction.

4. The learned first Appellate Court has not dealt with the merits of amendment application, which was rejected by the learned Trial Court.

5. It is not in dispute that the land was allotted to the testator under the erstwhile M.P. L.R.Code and was held by her in Bhumiswami rights.

6. Although the parties have referred to Section 164 and 165 of the M.P.L.R.Code, 1959, the provisions of 1959 Code were never applicable to Vidarbha Region. The provisions of M.P.L.R.Code, 1954 were applicable to Vidarbha Region. The M.P.L.R. Code, 1954 was repealed by Section 326 (f) of the Maharashtra Land Revenue Code, 1966, which has come into force w.e.f. 30/12/1966. Chapter-XII of the M.P.L.R. Code, 1954 deals with “tenure-holders”. Section 145 of the

M.P.L.R. Code, 1954 provided for two categories of tenure-holders viz. 'Bhumiswami' and 'Bhumidhari'. Section 151 of the M.P.L.R. Code, 1954 provided that subject to his personal law, the interest of a tenure-holder would, upon his demise, pass on to his descendants by survivorship or by inheritance or by bequest. Thus, as per Section 151 of the M.P.L.R. Code, 1954 tenure-holders of land were authorized to bequeath the lands held by them either as 'Bhumiswami' or as 'Bhumidhari'.

7. It will also be appropriate to refer to Section 29 of the Maharashtra Land Revenue Code, 1966 (for short hereinafter referred to as "MLR Code, 1966"). Section 29 of the MLR Code, 1966 classifies persons holding land from the State in three categories i.e. Occupant Class-I, Occupant Class-II and Government lessees. Persons holding land in Bhumiswami rights, without restrictions on the right to transfer, are included in the category of Occupant Class-I. Likewise, a person holding land in perpetuity subject to restrictions on the right to transfer the land is included in the category of Occupant Class-II. There is no restriction under the MLR Code, 1966 for a person holding land as Occupant Class-I or Occupant Class-II to bequeath the same. Since the Will is executed on 06/03/2002 after commencement of the MLR Code, 1966 the provisions of the MLR Code, 1966 are applicable to the land in question.

8. As stated above, the parties are relying upon the provisions of the M.P.L.R. Code, 1959. Section 164 and 165 (1) of the M.P.L.R. Code, 1959, which are relied upon, read as under :-

“164. Subject to his personal law the interest of Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be.

165 (1). Subject to the other provisions of this section and the provision of section 168 a Bhumiswami may transfer [.....] any interest in his land.”

The words, *“otherwise than by will”* have been omitted from Section 165(1) by Section 3 (i) of the M.P Act 38 of 1961.

9. Perusal of Section 164 of the M.P.L.R.Code, 1959 will demonstrate that a person holding land in Bhumiswami right is entitled to bequeath the same. Section 164 of the M.P L.R.Code, 1959 provides that subject to personal law of the Bhumiswami concerned, on his death, the land devolves upon his legal heirs by inheritance, survivorship or bequest. The word “bequest” clearly indicates that testamentary dispossession of land held in Bhumiswami right is statutorily recognized. It will also be pertinent to state that Section 165 (1) of the M.P.L.R.Code, 1959 initially imposed a restriction on bequest of land held in Bhumiswami rights. However, the said provision is amended by deleting the words “otherwise than by will” from the said provision.

10. The contention of the learned Advocate for the appellants that the testator did not have right to bequeath the suit property is therefore liable to be rejected.

11. The other contention by the learned Advocate for the appellants/original defendants is that the suit filed by the plaintiff/respondent was not maintainable in the absence of prayer for possession. The learned Advocate by placing reliance on Section 34 of the Specific Relief Act, 1963 contends that suit simplicitor for declaration is not maintainable. He places reliance on the judgment of the Hon'ble Supreme Court in the case of *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By Lrs. And others*, reported in *(2008) 4 SCC 594* and the judgment in the case of *Vasantha (Dead) through legal representative Vs. Rajalakshmi Alias Rajam (Dead) through legal representatives*, reported in *(2024) 5 SCC 282*.

12. It is not in dispute that initially a prayer for perpetual injunction was made by the plaintiff, in addition to prayer for declaration. Although the plaintiff failed to establish his possession over the suit property, nonetheless the suit was not a suit simplicitor for declaration.

13. Bar under Section 34 of the Specific Relief Act applies only to a suit filed simplicitor for declaration, wherein the plaintiff omits or fails to seek appropriate consequential relief. In a given case, the

plaintiff, who seeks relief of declaration and consequential relief, may not be entitled to consequential relief sought in the plaint, however, in such cases the bar under Section 34 of the Specific Relief Act will not be attracted. The Hon'ble Supreme Court has, in the case of *Akkamma and others Vs. Vemavathi and others*, reported in *(2021) 18 SCC 371* has dealt with the said provision and has held that when a consequential prayer is incorporated in the plaint, the suit cannot be dismissed under Section 34 of the Specific Relief Act, considering it to be a suit simplicitor for declaration, although on merits, the plaintiff is not found to be entitled to the consequential relief.

14. As stated above, consequential relief for perpetual injunction was sought by the plaintiff in the present case. Apart from this, the plaintiff has also moved an application for amendment of plaint in order to incorporate prayer for possession. Although this application is rejected by the learned Trial Court, it needs to be stated that prayer for perpetual injunction was not given up by the plaintiff and relief of possession was sought in the alternative. The suit filed by plaintiff is therefore not hit by proviso to Section 34 of the Specific Relief Act. The suit is maintainable.

15. Second Appeal, therefore, does not give rise to any substantial question of law and is, therefore, liable to be dismissed. Second Appeal is accordingly dismissed with no order as to costs.

CROSS-OBJECTION (XOB) NO.38/2026

16. Vide order dated 16/03/2026, following substantial question of law was framed in the Cross-Objection :-

Whether the learned Trial Court has erred in rejecting application for amendment of plaint, by which the plaintiff sought to incorporate prayer for possession in the plaint ?

17. It is not in dispute that prior to filing of Cross-Objection, the cross-objector has filed a separate civil suit being Regular Civil Suit No.39/2019 for possession of the suit property. The plaintiff cannot take recourse to two remedies for the same relief. Cross-Objection is, therefore, dismissed.

18. It will be open for the cross-objector to prosecute Regular Civil Suit No.39/2019, filed for possession on its own merits, in accordance with law.

19. No order as to costs.

(ROHIT W. JOSHI, J.)