Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.918 OF 2016
WITH
CIVIL APPLICATION NO.1900 OF 2016
IN
SECOND APPEAL NO.918 OF 2016

1. Vishnu Bapu Patil
(Deceased Thr. Lrs)

1[I] Smt. Laxmi Vishnu Patil
Age : 48 yrs., Occ : Household,

1[II] Shri. Bapuso Vishnu Patil
Age 35 yrs, Occ :

1[III] Shri. Bajirao Vishnu Patil
Age 35 yrs, Occ :

1[IV] Shri. Pradip Vishnu Patil
Power of Attorney Holder-
Shri. Shankar Bapu Patil
Age : 50 yrs., Occ : Agri.
All R/o. Aitavade Khurd, Tal. Walwa,
District- Sangli. ...Appellants/ Applicants

Versus

1. Tukaram Yashwant Patil
(Deceased Thr. his LRs)

1/A) Smt. Parvati Tukaram Patil
Age-65 years, Occu :

1/B) Shri. Krishna Tukaram Patil
Age-30 years, Occu Resp. No. 1/A & 1/B
both R/o Aitwade- Kurd, Tal. Walwa, Dist. Sangli.

1/C) Vaishali Manik Patil,
Age- 41 yrs., Occu : Household,
R/o. Bawachi, Tal. Walwa, Dist. Sangli

1/D) Nandatai Tanaji Patil,
Age -32 yrs., Occu : Household,
R/o Nagthane, Tal, Walwa, Dist. Sangli.

1/E) Shobhatai Arjan Patil,
Age-30 yrs., Occu : Household, R/o
Junekhed, Tal. Walwa, Dist. Sangli.

1/F) Archana Rahul Patil,
Age-24 yrs., Occu : Household, R/o
Rethare- Harnaksh, Tal. Walwa, Dist. Sangli

2. Dnyandeo Yashwant Patil
Age-66 yrs., Occu : Aggri.,
R/o. Aitwade- Khurd, Tal. Walwa, Dist. Sangli

3. Namdeo Yashwant Patil
(Deceased Thr. his LRs)

3(a). Shri. Abhijit Namdeo Patil
Age- 35 yrs., Occu : Aggri.,

3(b). Shri. Ajinkya Namdeo Patil
Age- 35 yrs., Occu : Aggri.,
Both R/o. At post Aitwade- Khurd,
Tal- Walwa, Dist- Sangli.

4. Hari Balaso Patil
(through Guardian)
Balaso Yashwant Patil
(Deceased Thr. his LRs)

4a) Shri. Haridas Balaso Patil
Age-22 yrs. Occu: Agri.

4b) Smt. Kalpana Balasaheb Patil
Age-55 yrs. Occu: Household
Both R/o Aitwade Khurd, Tal. Walwa
Dist. Sangli

4c) Miss. Rani Sandip Patil
Age-24 yrs. Occu: Household
R/o. Tasgaon, Tal. Hatkalngale, Dist-Kolhapur. ...Respondents

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Adv. V. S. Talkute i/b S. R. Ghanavat for the Appellants/Applicants

Adv. Bhushan Walimbe a/w Tanvi Phatak i/b Sachin Hande for Respondent Nos. 1B, 2 and 3.

CORAM : SHARMILA U. DESHMUKH, J.
DATE : MARCH 5, 2024

JUDGMENT :

1. Vide order dated 15th January, 2024, the present Second Appeal was admitted by this Court. Being dissatisfied by the common judgment dated 2nd December, 2015 passed by the Appellate Court in Regular Civil Appeal No. 19/2011 dismissing the Appeal thereby confirming the Judgment dated 25th November, 2010 passed by the Trial Court in Regular Civil Suit No. 67 of 1999, the original Defendants are before this Court.

2. The facts of the case are that RCS No. 67 of 1999 was filed by the Plaintiffs for redemption of the mortgage executed vide mortgage deed dated 6th November, 1982 and for perpetual injunction restraining the Defendant Nos. 1 to 4 from disturbing the peaceful possession of the Plaintiffs over the suit property. The prayers in the plaint are reproduced hereinbelow:

अ. प्रतिवादी नं. १ यांनी दि. ०६.११.१९८२ रोजीचे गहाण स्वरूपी दस्ताची रक्कम रु. ८,०००/— (रुपये आठ हजार फक्त) घेवून

सदरचा दावा ''ब'' मिळकत बाबतचा दस्त उलट करून गहाण फेड होउन करून द्यावा असा हुकुम करणेत यावा.

ब. प्रतिवादी नं. १ यांनी सदरचा दस्त गहाण फेड करून न दिलेस कोर्ट कमिशनर यांची नेमणूक करून दस्त गाहण फेड करून देणेत यावा.

क. प्रतिवादी नं. १ ते ४ यांनी दावा ''ब'' मिळकतीचा दांडगाव्याने कब्जा घेवू नये व वादीचे शांततामय कब्जा वहिवाटीस स्वत: अगर इतर कोणाही मार्फत हरकत करून पिके घेणेस अडथळा करू नये अशी निरंतर ताकीद प्रतिवादी क्र. १ ते ४ यांना देणत यावी.

ड. जरुर तर दावा दुरुस्तीस परवानगी असावी.

इ. या दाव्याचा खर्च प्रतिवादीकडून मिळावा.

ई. इतर न्यायाचे हुकुम वादीचे वतीने व्हावेत.

3. It was the specific case of the Plaintiffs that though the suit property 1B was mortgaged vide registered mortgage deed dated 6th November, 1982, the possession was not handed over to the Defendant No. 1 and there is no record of the handing over of the possession in the village records. It was pleaded that the Mutation Entry No. 1902 was cancelled as against which no appeal was preferred by the Defendant No. 1. It was contended that though the mortgage money had to be paid within period of 10 years, in the year 1990, the Plaintiff's father expired and the money could not be tendered within stipulated period of 10 years.

4. The suit came to be resisted by the Defendants claiming that the possession of the suit property was handed over to the Defendants under an agreement for sale and for seeking specific performance of agreement

for sale, RCS No. 75/1999 was filed by the Defendants.

5. The parties went to trial and the Trial Court vide judgment dated 25th November, 2010 partly decreed the suit. The Trial Court held that the Defendants have established their possession over the suit property pursuant to the mortgage deed and that till redemption of mortgage, it cannot be said that the Plaintiff is in possession of the property. As such, the Trial Court rejected the relief of injunction and partly decreed the suit directing the Defendant No. 1 to accept the mortgage money of Rs. 8,000/ and to execute the re-conveyance deed within period of 2 months and to hand over possession of the suit property. As against this the Appeal filed before Appellate Court being RCA No. 20 of 2011 came to be dismissed upholding the judgment of the Trial Court.

6. Vide order dated 15th January, 2024, the Appeal was admitted on the following substantial questions of law:

i) Whether the Trial Court was justified in granting decree for possession of the mortgaged property especially when the Respondent-Plaintiff has specifically pleaded that the possession of the property was not handed over at the time of execution of the document styled as mortgage by conditional sale and had neither pleaded nor prayed for decree of possession?

ii) Whether the Trial Court was justified in granting decree for possession while directing redemption of mortgage without here being any pleading and prayer

to that effect ?

iii) Whether the relief of decree of possession was an ancillary relief which could be granted by the Trial Court without any prayer to that effect being sought by the Respondent Plaintiff ?

7. Heard Mr. Talkute, learned counsel for the Appellants and Mr. Walimbe, learned counsel for the Respondents.

8. Learned Counsel appearing for the Appellants has taken this Court through the averments and the prayers in the plaint. He would submit that the suit was filed for redemption of mortgage and there was no relief sought for recovery of possession. He would submit that it was the specific case of the Plaintiffs that they were in possession of the property. According to him, in the absence of any prayer seeking relief of recovery of possession, the Trial Court erred in granting the relief of possession. In support, he relies upon the decision of Apex Court in case of ***Bachhaj Nahar vs. Nilima Mandal & Anr. [(2008) 17 SCC 491].***

9. *Per Contra,* learned Counsel for the Respondent would submit that the relief of recovery of possession was an incidental relief which could be granted even in the absence of any prayer in the plaint. Without prejudice, he would submit that as the Trial Court had permitted redemption of mortgage, an independent suit for recovery of possession may be permitted to be filed. In support, he relies upon the decision of

Lotu Bandu Sonavane vs Punadlik Nimba Koli 1985 Mh.L.J. 359.

10. Considered the submissions and perused the records.

11. Admittedly, in the suit seeking redemption of mortgage there was no prayer seeking recovery of possession. The same was for the reason that it was the specific case of the Plaintiffs that the suit property was in their possession which case they have failed to establish. Section 60 of Transfer of Property Act, 1882 entitles the mortgagor to redeem the mortgage and require the mortgagee to deliver the possession of the mortgaged property and to re-transfer the mortgaged property to him. In the instant case, there is no relief of recovery of possession sought and the question arising is whether the Trial Court was justified in granting the decree for possession in the absence of any pleading and prayer to that effect and whether the relief of possession is an incidental relief which can be granted without seeking the said relief. As stated above, the suit under Section 60 of Transfer of Property Act, is a suit for right to redeem which should seek the three reliefs stated in the said section. In suit for redemption apart from the prayer which forms part of enforcement of right to redeem, it was necessary to seek the relief of recovery of possession. The Apex Court in the case of ***Bachhaj Nahar vs. Nilima Mandal & Anr. [(2008) 17 SCC 491]*** had held in paragraph 22 and 23 as under :

22. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer.

23 It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh. the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily

depends on the pleadings, prayer, court fee paid, evidence let in, etc.

12. In the present case, upon perusal of the mortgage deed, it is evident that the possession of the property was handed over to the Defendants. As there was no prayer for recovery of possession, in the teeth of the findings of the Trial Court that the Defendants have established their possession over the suit property, without any relief of possession being sought, the Trial Court erred in directing the possession to be handed over. The specific relief of redemption of mortgage was rightly granted by the Trial Court. The decision of ***Lotu Bandu Sonavane vs Punadlik Nimba Koli*** *(supra)* was rendered in proceedings seeking specific performance of the contract and was considering the provisions of Section 22 of the Specific Relief Act, 1962. The said decision is clearly inapplicable to the facts of the present case.

13. Having regard to the discussion above, in the suit filed under Section 60 of Transfer of Property Act, 1882 apart from the prayers which forms part of enforcement of right to redeem, specific relief of possession or for return of title deeds or for re-transfer of the mortgaged property was required to be sought depending upon the nature of mortgage. The trial Court was thus not justified in granting the decree for possession while directing the redemption of mortgage without a specific

prayer to that effect being sought in the plaint. The decree for possession cannot be stated to be an ancillary relief which naturally flows from allowing the suit for redemption of mortgage. As held by the Apex Court in ***Bachhaj Nahar*** (supra), the relief is to be granted only with reference to the prayer made in the pleadings. That being so, the Trial Court committed an error in law granting the relief of possession without the relief being claimed. The substantial questions of law are answered accordingly.

14. In view of the above, the Appeal succeeds.

15. It is open for the Plaintiff to file a suit for recovery of possession if so maintainable in law.

16. All rights and contentions of the both the parties to that extent are kept open. As the substantial question of law has been answered in favour of the Appellant, the impugned judgment dated 2nd December, 2015 to the extent of directing handing over of possession to the Plaintiffs is set aside without disturbing the findings on the redemption of mortgage.

17. Considering that the suit for redemption of mortgage was of the year 1999 which had reached this Court and has been decided in the year 2024, if the suit for recovery of possession is filed by the Plaintiff, the Trial Court is requested to give priority to the said suit and decided the

same expeditiously.

18. In view of the above, the Civil Application does not survives for consideration and the same is disposed of.

(SHARMILA U. DESHMUKH, J.)

Signed by: Harish V. Chaudhari
Designation: PA To Honourable Judge
Date: 11/03/2024 13:15:18