

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

**Second Appeal No.301 of 2015
With
Civil Application No.7646 of 2015
With
Second Appeal Stamp No.8382 of 2015**

Prabhu S/o Sharnappa Sajjanshetti. .. **Appellant.**

Versus

Sumanbai w/o Shrirang Patil.
And Another.

.. **Respondents.**

Shri. Subhash S. Chillarge, Advocate, for appellant in
Second Appeal No.301 of 2015.

Shri. V.D. Gunale, Advocate, for appellant in Second
Appeal Stamp No.8382 of 2015.

CORAM: T.V. NALAWADE, J.

DATE : 14th OCTOBER 2015

ORDER:

1) Both the appeals are filed against the judgment and decree of Regular Civil Appeal No.52/2004 which was pending in the Court of the District Judge, Udgir. The District Judge has partly allowed the appeal filed by Sow. Sumanbai Patil. In the two suits (one filed by Sow. Sumanbai and the other filed by Prabhu Sharnappa),

the trial Court had given common judgment and had held that Prabhu was the owner and he was in possession of the suit property. The First Appellate Court set aside this finding in one appeal filed by Sumanbai and held that Sumanbai was in possession. However the finding of the trial Court that Prabhu Sharnappa is owner of the suit property is not disturbed by the First Appellate Court. In view of this position, both sides have come in appeal. Second Appeal No.301/2015 is filed by Prabhu and the other appeal is filed by Sow. Sumanbai.

2) Regular Civil Suit No.122/1994 was filed by Sow. Sumanbai for relief of declaration and injunction and for similar relief Regular Civil Suit No.146/1994 was filed by Prabhu. The property involved is a plot bearing No.65 which is part and parcel of Survey No.116.

3) Prabhu contended that the suit property was sold by Pundlik, the person in whose name the property was standing to one Janabai under registered sale deed dated 27-4-1983 and from Janabai Prabhu purchased this property under sale deed dated 13-12-1984. He contended

that from the date of the sale deed he has been in possession.

4) Sow. Sumanbai contended that the suit property was sold to her by Shriram Phulari, son of aforesaid Pundlik under registered sale deed dated 4-7-1990 and since the date of the sale deed she has been in possession of the suit property.

5) It is not disputed that the suit property was standing in the name of Pundlik when the sale deed was executed in favour of Janabai. But on the date of the sale deed executed by Shriram the property was not standing in his name. Sow. Sumanbai wanted to prove that there was partition between Pundlik and Shriram and the property had come to the share of Shriram. There is no record whatsoever and Sow. Sumanbai failed to prove such case by giving convincing evidence. Both the Courts below have held against Sow. Sumanbai on this point and it is a finding of fact. Thus the sale deed was executed in favour of Janabai by Pundlik in the past and from Janabai Prabhu purchased the suit property. This sale deed was

never challenged by Shriram on any ground and so the Courts have not committed error in holding that Prabhu has become owner of the property. In view of this nature of material and the circumstances it is not possible to admit the appeal. There is nothing on the basis of which substantial question of law can be formulated in Second Appeal Stamp No.8352/2015. So, the appeal stands dismissed.

6) In Second Appeal No.301/2015 learned counsel for the appellant submitted that though the two suits bearing RCS Nos.122/1994 and 146/1994 were decided by the trial Court by common judgment, as two suits were filed by two different parties like Sow. Sumanbai and Prabhu and they were claiming separate rights against each other and as separate decrees were prepared in both the suits, it was necessary for Sow. Sumanbai to file two separate appeals against the two decrees. He submitted that in Regular Civil Appeal 52/2004 only certified copy of decree made in Regular Civil Suit No.122/1994 was produced so one can go with presumption that decision of Regular Civil Suit No.122/1994 was challenged by Sow.

Sumanbai. He submitted that when relief of declaration and injunction was given in Regular Civil Suit No.146/1994 in favour of Prabhu it was necessary for Sow. Sumanbai to challenge that decision also and as the decision was not challenged, the provision of Section 11 of the Civil Procedure Code would have come in the way of Sow. Sumanbai to claim any relief against the decision of Regular Civil Suit No.122 of 1994.

7) On the aforesaid point the learned counsel for Prabhu has placed reliance on some reported cases like **(1) AIR 1993 SC 1202 (1) (Premier Tyres Limited v Kerala State Road Transport Corporation; (2) AIR 1997 SC 3760 (Ram Prakash v. Charan Kaur); (3) AIR 2002 Gujarat 166, (Darayas Bamanshah Medhora v Nariman Bamansha Medhora); (4) AIR 2001 Karnataka 205 (Mallamma v. Muninanamma)** and also recent case of this Court reported as **2015 (2) Mh.L.J. 93 (Kamlabai Suresh Khadse v. Tukaram Rajaram Ingole).**

8) Learned counsel for Prabhu submitted that the appeal filed by Sow. Sumanbai was itself not tenable in

view of the interpretation of the relevant provision, provision of section 11 of the CPC made by the Apex Court and other High Courts. He drew attention of this Court to the reasoning given by the First Appellate Court for entertaining such appeal. It appears that from one commentary of one book written by one author some passages were picked up by the First Appellate Court and on that basis the First Appellate Court held that when there was consolidation of two suits and the two suits were decided by common judgment, it was not necessary to file two separate appeals. Learned counsel then produced a case in which some observations were made by Madhya Pradesh High Court in the case reported as **AIR 1982 MP 147 (Saraswatbai v. Durga Sahai)**. The aforesaid author had quoted some observations made by Madras High Court in this reported case. This Court has carefully gone through the facts of the reported case of Madhya Pradesh High Court. The facts were altogether different. In both the suits same party was the plaintiff but different reliefs were claimed. Though subject matter was not the same, the property was the same so there was consolidation and the two suits were decided by common

judgments. In view of that matter, some observations were made by the Madhya Pradesh High Court in that case. There were no observations in respect of the situation like present one where there were counter suits in respect of the same subject matter. Learned counsel for the appellant submitted that in view of these circumstances substantial questions of law need to be formulated and the appeal filed by Prabhu needs to be admitted. This Court sees force in the submissions made by learned counsel for Prabhu. Though factually it appears that Sow. Sumanbai is in possession and such finding is given by the First Appellate Court, the point raised by Prabhu needs consideration as it may go to the root of the matter.

9) In the result, Second Appeal No.301 of 2015 is admitted on following substantial questions of law :-

(I) Whether the First Appellate Court was correct in holding that there was no necessity of two separate appeals when there were two counter suits in respect of the same subject matter ?

(II Whether the First Appellate Court has committed error in giving importance to the assessment record, the report of the Court Commissioner and the oral evidence due to which the First Appellate Court has held that Sow. Sumanbai is in possession and due to that there is perversity in the judgment of the First Appellate Court ?

10) Notice after admission. It is waived by learned counsel for the respondent.

11) In view of the aforesaid facts and as the First Appellate Court has held that Sow. Sumanbai is in possession there is no question of giving stay of any kind due to which it can be presumed that Prabhu is in possession. However, Sow. Sumanbai or any persons through her is prevented from transferring the property and creating any kind of third party interests in the suit property. Civil Application No.7646/2015 stands disposed of in aforesaid terms.

Sd/-
(T.V. NALAWADE, J.)

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