

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

SECOND APPEAL NO. 185 OF 2013
WITH
CIVIL APPLICATION NO. 2749 OF 2013
(for stay)

Nimba Fakira Suryawanshi,
Age : 63 years, occup. Agril.,
R/o Pimperkheda, Tq.Chalisgaon, .. Appellant/
Dist. Jalgaon Orig. Defendant

versus

Santosh Traders, Prop. and
Owner-Dilip Gulabchand Chhaged
Age : 34 years, occup. Business,
R/o Chalisgaon, Tq. Chalisgaon, .. Respondent/
Dist. Jalgaon Orig. Plaintiff

Mr. V. P. Raje, Advocate for appellant
Mr. Vijay B. Patil, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 23rd August, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the appellant and the learned counsel for the respondent.
2. Respondent is the original plaintiff in special civil suit no. 189 of 2004 before the court of 5th Joint Civil Judge, Senior Division, Jalgaon filed against appellant-original defendant for

recovery of amount. [Parties hereinafter are referred to by their original status in the suit]

3. Plaintiff is a proprietary firm carrying on business in the name and style Santosh Traders. Plaintiff had filed aforesaid special civil suit seeking recovery of Rs. 1,46,053/- from the defendant with interest at the rate of 18 per cent per annum from the date of suit till realization of the amount.

4. Defendant used to purchase seeds and / or fertilizers from the plaintiff's shop on credit and credit receipts used to be accordingly issued. Since the amount was not being paid for quite a long time, a notice had been issued by plaintiff on 13-01-2004 to the defendant claiming the amount with interest at the rate of 24 per cent per annum. Defendant in response, allegedly threatened the plaintiff with dire consequences and as such suit had been instituted.

5. Trial court had decreed the suit on 31-10-2007. Regular civil appeal therefrom bearing no. 270 of 2011 preferred by defendant had been dismissed on 21-06-2012.

6. Little advertence to the events in the interregnum may be pertinent. After the suit had been decreed, regular civil

appeal by defendant had not been preferred in time and application bearing miscellaneous civil application no. 196 of 2008 seeking condonation of delay in filing appeal had been rejected by the appellate court under order dated 01-12-2009 against which second appeal bearing no. 169 of 2010 had been preferred before this court and upon certain conditions, vide order dated 21-09-2010, said second appeal had been allowed, directing the defendant to deposit a sum of ₹ 75,000/- in the district court and out of the same, the plaintiff had been allowed to withdraw a sum of ₹ 40,000/- on furnishing solvent security. It is stated that the plaintiff could not furnish solvent security and consequently could not withdraw said amount. It was thereafter that regular appeal, as stated earlier, was dismissed under judgment and order dated 21-06-2012.

7. It further transpires that during pendency of present second appeal, under an order dated 13-03-2013, the defendant was directed to deposit a further sum of ₹ 50,000/- in this court and the same is stated to have been deposited.

8. Learned counsel for defendant contends that, factually speaking the defendant has not been literate enough and had

little understanding of court and its procedure and had not been able to appreciate consequences and the repercussion of non-adherence to the procedure and its requirements. He had not been properly instructed or informed about the same and thus, in a way, he suggests that fault may lie elsewhere, particularly that the counsel representing him ought to have given proper understanding to the defendant. However, the same did not happen and as such, the decree had been passed. He purports to submit that the business carried on by the plaintiff would be a joint family business of the plaintiff and his father. Plaintiff's father had dealings with defendant's son and some amount had been due from plaintiff's father to defendant's son and that was sought to be adjusted by set off and as such the plaintiff, according to learned counsel, could not lay any claim for recovery against defendant. All these aspects could not be brought effectively before the court for not receiving proper legal assistance and he thus requests to remand the matter for consideration, giving opportunity to the defendant.

9. Mr. V. B. Patil, learned advocate appearing on behalf of plaintiff, contends that what would be pertinent to consider at this stage of second appeal is that the two courts have

concurrently found substance in the claim of the plaintiff and that the claim had been backed by evidence. The findings in respect of claim are the findings of fact which would seldom be amenable to challenge in second appeal. Additionally, he submits that while the defendant had opportunity before the trial court, he had failed to adduce any evidence in support of his defence in the written statement. The evidence as adduced by parties has suffered appreciation twice, one at trial stage and the other at appellate. Further, even before this court, the defendant has not placed anything on record to lend credence to the contentions now being advanced. Said contentions were part and parcel of the pleadings as well as defence and since no credible evidence has been coming forth, the request now being made for remand of the matter in the absence any material showing that such evidence ever is possible. As such, it is a vacuous request and does not require consideration.

10. Learned counsel for the plaintiff refers to that the plaintiff has adduced substantial evidence bringing credibility to the claim which has been appreciated and accepted by the two courts. It is not the case of other side that appreciation is perverse or for that matter so bad or that the evidence as

has been led by the plaintiff is likely to be supplanted after remand.

11. Perusal of the judgments and decrees passed by the trial as well as appellate court would indicate, factual position which has remained un-shattered is that the plaintiff and defendant had dealings in respect of seeds and/or fertilizers. The defendant had been in arrears of certain amounts towards purchases made from the plaintiff. It is the contention of the defendant that this amount due to the plaintiff from the defendant was set off in respect of dealings which plaintiff's father had with defendant's son. It appears that the defendant, however, has not been able to adduce an iota of evidence in respect of such claim save pleadings in the written statement. The appellate court has in its judgment observed that the contentions as are now being advanced that the written statement had been prepared by the counsel is vacuous, for, he had been examined by the court. The court has also appreciated that the allegations by defendant against his own counsel are without any substance.

12. In the circumstances, while the business dealings and arrears have not been denied at all and in stead the same

have been sought to be set off towards contended claim of defendant's son against plaintiff's father without there being any evidence in that respect, it would not be a case wherein any substantial question of law can be said to be arising in the second appeal.

13. As such, the second appeal would not be tenable and the same stands dismissed.

14. In view of dismissal of second appeal, civil application no.2749 of 2013 seeking stay does not survive and stands accordingly disposed of.

SUNIL P. DESHMUKH,
JUDGE

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