

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.671 OF 2017
WITH
CIVIL APPLICATION NO.1281 OF 2017
IN
SECOND APPEAL NO.671 OF 2017**

Uttam Kashinath Ghoderao ... Appellant/Applicant
vs.
Smt. Shalabai wd/o Raoji Shinde & Ors. ... Respondents

Mr. Y.P. Deshmukh for the Appellant/Applicant.
Mr. Rahul Walvekar for the Respondents.

Coram : **A.A. Sayed, J.**
Date : 20 November 2017

ORDER:

1 This Second Appeal filed under section 100 of the Code of Civil Procedure challenges the judgment and order dated 22 March 2017 passed by the Principal District Judge, Kolhapur, dismissing the Regular Civil Appeal No.85 of 2010. The Regular Civil Appeal was filed by the Appellant/original Plaintiff challenging the judgment and decree dated 10 February 2010 passed by the Civil Judge Junior Division, Kolhapur in Regular Civil Suit No.583 of 2000, partly allowing the counter claim of the Respondent Nos.1 and 2/original Defendant Nos.1 and 2 and directing the Appellant/ original Plaintiff to hand over possession of the land admeasuring 8 x 11 feet as described in the counter claim to the Respondent No.2/original Defendant No.2.

2 A residential plot which forms part of final plot No.22 in the land R.S. No.486/A admeasuring 516 square meters originally belonged to one Shri Raoji Shinde (since deceased). The Defendant Nos.1 and 2 are the widow and the son of the deceased Shri Raoji Shinde. The Defendant No.3 is the Kolhapur Municipal Corporation, Kolhapur.

3 It was the case of the Plaintiff in the Plaint that the Defendant Nos.1 and 2 have unauthorizedly initiated construction on the plot. According to the Plaintiff, the premises admeasuring 15 x 20 square feet with a built up portion thereon, which admeasures 12 x 15 square feet on the plot was in his possession as a tenant and the Defendant Nos.1 and 2 were attempting to dispossess him. According to the Plaintiff, the Defendant Nos.1 and 2 claimed that the premises in possession of the Plaintiff, was located on the side margin of the plot. The Plaintiff had therefore, filed the suit restraining the Defendant Nos.1 and 2 from initiating any construction on the plot and obstructing the Plaintiff's possession.

4 The Defendant Nos.1 and 2 had filed their Written Statement to the suit. They had also filed counter claim seeking direction to the Plaintiff to remove the kiosk and hand over vacant possession of the site beneath the kiosk. The subject matter of the counter claim was

stated to be a kiosk admeasuring 8 x 11 square feet which was placed on the side margin of the plot No.1, which forms the part of final plot No.22 in the land R.S. No.486/A. It was the case of the Defendant Nos.1 and 2 that the Plaintiff had unauthorizedly placed the kiosk on the side margin of the plot. According to Defendant Nos.1 and 2 time and again the Plaintiff was requested to remove the kiosk and the Plaintiff was informed that the Development Control Rules do not permit the construction on the side margin of the plot. The Municipal Authorities had also asked the Plaintiff to remove the kiosk. The Defendant No.1 and 2, accordingly filed the Counter Claim to hand over the possession of the site beneath the kiosk after removing the same.

5 The suit was filed in March 2000 and the Defendant Nos.1 and 2 filed Counter Claim in September 2000. The Plaintiff did not file any Written Statement to the Counter Claim nor did he lead any evidence. The Trial Court had dismissed the suit of the Plaintiff on 9 December 2004 for want of prosecution. The Defendant Nos.1 and 2 thereafter led evidence in support of their Counter Claim. In the evidence it was stated that the Plaintiff had unauthorizedly placed the kiosk and started using it as a godown, was therefore, asked to remove the same immediately and the kiosk stood on the side margin of the plot. The Plaintiff did not remain present and there was no cross-examination of the Defendants and their witnesses. The Trial Court decreed the

Counter Claim in February 2010 after a period of 10 years. In these circumstances, the Counter Claim came to be decided ex-parte.

6 The trial Court in paragraph 13 and 14 of the judgment and order dated 10 February 2010 observed as follows:

“13 As I have already stated that the suit of plaintiff has dismissed, the case of plaintiff regarding tenancy right in the suit property came to an end. Therefore now it is much clear that the defendant's case that plaintiff has put a wooden block (khoka) in the suit property by force has to be believed. Plaintiff did not cross examine defendant No.2 or his witnesses. Therefore the evidence adduced by defendant No.2 has gone unchallenged.

14 Considering all these aspects I have come to the conclusion that defendant No.2 has proved that plaintiff has been in possession of the suit property illegally and unauthorisedly. Accordingly, I answer point No.1 in the affirmative.”

7 In paragraphs 3, 4, 10, 12, 13, 14, 16 and 17 of the impugned judgment and order dated 22 March 2017 of the first Appellate Court, it has been observed as follows:

“3. Before advertng to the case averred in the counter claim, it is necessary to have a look at plaint averments. Subject matter of the suit was the residential plot admeasuring 516 sq.mtrs. The plot originally belonged to Shri Raoji Shinde. Defendant Nos.1 and 2 are the widow and the son of deceased Raoji, respectively. Defendant No.3 is the Kolhapur Municipal Corporation. It was the case of the

Plaintiff that Defendant Nos.1 and 2 have unauthorizedly initiated construction on the suit plot. The premises admeasuring 15 x 20 sq.ft. with a built up portion thereon, which admeasures to 12 x 15 sq.ft. was stated to have been possessed by the Plaintiff as a tenant. It was also the case of the Plaintiff that Defendant Nos.1 and 2 claimed that the property possessed by the Plaintiff, is located on the side margin of the plot. By taking advantage of such false contention, Defendant Nos.1 and 2 were attempting to disposses the Plaintiff. The Plaintiff, therefore, filed the suit restraining the Defendant Nos.1 and 2 for initiating any construction on the plot and obstructing the Plaintiff's possession in the property possessed by him as a tenant.

4. Defendant Nos.1 and 2 filed their written statement to the suit. The defendants also filed counter claim seeking direction to the plaintiff to remove the kiosk and hand over vacant possession of the site beneath thereto. The subject matter of the counter claim is a kiosk admeasuring 8 x 11 ft. placed on the side margin of the plot No.1, which forms the part of final plot No.22 in the land R.S. No.486/A. It was the case of the defendants that the plaintiff unauthorizedly placed the kiosk on the side margin of the plot. The plaintiff was time and again requested to remove the kiosk. The plaintiff was also informed that no development control rules permit construction on the side margin of the plot. The Municipal Authorities had also asked the plaintiff to remove the kiosk. The plaintiff did not listen. Defendant No.1 and 2, therefore, filed the counter claim.

10. It is also in the evidence of defendant Ashok that since the kiosk stands on the side margin of the plot, neither he nor anyone else is authorized to make development/construction on the side margin of the plot. Permitting the kiosk to stand on

the side margin would nothing but to continue illegality perpetually. It is further in his evidence that the municipal authorities also paid visit to the site and asked for removal of the kiosk.

12 The record indicates that the plaintiff filed the suit in February 2000. Defendant No.1 and 2 immediately appeared in the suit. They filed their written statement. The defendants also filed their counter claim in October 2000. The plaintiff's suit was dismissed in 2004 for want of prosecution. Defendant Ashok filed his affidavit of evidence in January 2005. The suit came to be decided in February 2010. Within the period of ten years of the suit being before the Trial Court, the plaintiff neither filed his written statement to the counter claim nor has he cross examined the defendant and his witnesses. We are in the year 2017. The unchallenged testimony of defendants and their witnesses undoubtedly make out the case averred in the counter claim.

13 Shri M.S. Magdum, the learned advocate for the plaintiff would submit that had the plaintiff come into the possession of suit property overnight, the defendants would not have kept quiet. According to the learned advocate, the counter claim is silent to state in so many words as to when in fact the plaintiff made alleged encroachment. In view of the learned advocate, there was abundant evidence to suggest the plaintiff to have been in possession of the suit property as a tenant. The learned advocate requested the court to refer to the documents produced along with list Exh.3 in the Trial Court. It is reported that this documents were not traceable. Admittedly, none of the documents produced along with list Exh.3 had been admitted in evidence. Xerox copies of those documents have been tendered before this Court. It needs no mention that unless the documents are proved in accordance

with law, the same cannot be read in evidence. According to the learned advocate, some of the documents along with list Exh.3 were in the nature of public documents, such as correspondence made by the Nationalized Banks, Telephone Department, etc. The learned advocate meant to say that the plaintiff was put in possession of the suit property by the original owner, Raoji Shinde. With the consent of Raoji, the plaintiff obtained shop Act license and permissions from other public authorities, required for starting the business, in the kiosk on the suit plot.

14 There may be some substance in the submissions made by the learned advocate for the plaintiff that the kiosk must not have been brought on the suit plot overnight. Had it been so the plot owner, deceased Raoji could not have kept quiet. There may also be substance in the contention that the plaintiff put the kiosk with the consent of the landlord. There may also be on record a few documents to indicate the plaintiff to have been lawfully in possession of the kiosk and the land beneath the same. The fact however remains that the documents have not been duly proved. Those documents, therefore, cannot be looked into. The plaintiff did not lead oral evidence nor has he cross examined the defendant or his witnesses.

16 Before the Trial Court, defendant No.1 and 2 proved their case. The question is whether in order to do complete justice, matter deserves to be remanded to give the plaintiff full opportunity to meet the counter claim. In the factual backdrop, the answer is big NO. Over 17 years have passed on institution of the suit. The plaintiff was not diligent in pursuing his cause. It is the specific case of the defendants that the kiosk stands on the side margin of the plot. The defendant tendered in evidence the photographs (along with

list Exh.49/3 to 49/6 and along with list Exh.46/2 and 46/3). It is evident from this photographs that the kiosk really stands on the side margin of the plot. The learned advocate for the plaintiff cannot be heard to say whether the kiosk is on side margin, was not the matter directly and substantially in issue before the Trial Court. The learned advocate may do well to refer to the counter claim. The plaintiff had ample opportunity to produce before this Court any document from the office of Kolhapur Municipal Corporation, to indicate that the kiosk stands on the plot, which could very well be developed with the permission of Kolhapur Municipal Corporation. The plaintiff did not do so. The evidence on record undoubtedly indicate that the kiosk stands on the portion of the plot, which cannot be developed as per the Development Control Rules of the Kolhapur Municipal Corporation. Allowing the kiosk to continue at the site would nothing but giving the plaintiff premium in continuing illegality, which might have been committed by the plaintiff with the consent of landlord. No tenancy rights could be created in respect of the land on which no development is permissible.

17 In view of the above, this Court is not inclined to subscribe to the submissions made by the learned advocate for the plaintiff, to remand the suit with a view to give plaintiff opportunity to file his written statement and defend the counter claim. The points are, therefore, required to be answered accordingly. In the result, the appeal fails.”

8 As indicated earlier, the suit was filed by the Appellant/original Plaintiff in March 2000. The Respondents (original Defendant Nos.1 and 2) appeared in the suit and filed their written statement and their counter claim in October 2000. The Appellant/original Plaintiff did not

file his written statement to the counter claim nor did he lead evidence in his suit. Therefore, the trial Court dismissed the suit on 9 December 2014 for want of prosecution. The Respondents (original Defendant Nos.1 and 2) led evidence in support of their counter claim in January 2005. The Appellant (original Plaintiff) did not remain present to cross-examine the Respondents (original Defendants) and their witnesses. The trial Court ultimately partly decreed the counter claim on 10 February 2010, about ten years after the counter claim was preferred. In absence of the Written Statement to the Counter Claim and any cross-examination of the Respondent Nos.1 and 2/original Defendant Nos.1 and 2 and their witnesses the First Appellate Court held that the Respondent Nos.1 and 2/original Defendant Nos.1 and 2 had undoubtedly made out the case as averred in the counter claim.

9 It is seen that the Appellant/original Plaintiff has been negligent throughout as he did not file any Written Statement to the Counter-Claim nor did he remain present and cross-examine the Respondent Nos.1 and 2 and the witnesses and the First Appellate Court its discretion and did not deem it appropriate to remand back the matter to the trial Court. In absence of any Written Statement to the Counter-claim, and in absence of his cross-examination and on the basis of evidence of the Respondent Nos.1 and 2/original Defendant Nos.1 and 2 and their witnesses, the trial Court found that the Respondent Nos.1

and 2/original Defendant Nos.1 and 2 had proved their case and held that the Respondent No.2/original Defendant No.2 was entitled to recover the suit property as claimed in the counter claim.

10 In the Regular Civil Appeal No.85 of 2005 before the District Court, there is not a whisper by the Appellant/original Plaintiff why he had not filed his written statement to the Counter Claim nor is there any explanation why he failed to remain present. In the present Memo of Appeal in paragraph 6 it is specifically stated by the Appellant/original Plaintiff that he had filed an Application for restoration of his suit (Regular Civil Suit No.583 of 2000) on 7 April 2005 soon after dismissal of the suit for non-prosecution vide order dated 9 December 2004 and the same came to be rejected.

11 In these circumstances, no question of law, much less any substantial question of law, arises in the present Second Appeal. Hence, the Second Appeal is dismissed. There shall be no order as to costs.

12 The Civil Application does not survive and the same to stand disposed of.

(A.A. Sayed, J.)