

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

SECOND APPEAL NO. 877 OF 2017

Office Notes, Office Memoranda of Coram, Appearances, court's orders or directions and Prothonotary's orders	Court's or Judge's orders
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Mr. R. S. Alange for Appellants/Orig.Defendants.
Mr. Prasad P. Kulkarni for Respondent Nos. 1 & 2.

CORAM : K. K. TATED, J.
DATE : DECEMBER 11, 2017

P.C.:

1. Heard learned Counsel for parties.

2. By this Second Appeal the Appellants/Orig. Defendants are challenging the concurrent findings of fact recorded by the courts below.

3. In the present proceedings, the Respondents/Plaintiffs have filed Regular Civil Suit No. 626 of 2014 in the Court of 10th Joint Civil Judge, Junior Division, Solapur for perpetual injunction restraining the Defendants from obstructing their possession in respect of the Gut No. 52, admeasuring 5 H. 03 Ars. situated at village Kudal, Taluka South Solapur, District Solapur.

4. It was a case of Plaintiffs that Defendant No.1 had initially filed Regular Civil Suit No. 962 of 2005 on 2nd December, 2005 for partition and for getting his 1/3rd share in the suit land. The said suit was dismissed on 29th September, 2010.

5. It was the case of Plaintiffs that though the Defendants have no right, title and interest in respect of the suit property, they have started obstructing their possession. Hence, they have preferred the Regular Civil Suit No. 626 of 2014. The trial court after considering the evidence on record partly decreed the suit in favour of Plaintiffs by the Judgment and Decree dated 21st December, 2016. Operative part of the order reads thus :

“ORDER

1. *Plaintiffs suit is partly decreed.*
2. *Defendant No.1 is restrained to cause obstruction to plaintiffs possession over the suit land perpetually.*
3. *Counter claim is dismissed.*
4. *Parties to bear their own costs.*
5. *Decree be drawn accordingly.”*

6. Being aggrieved by the Judgment and Decree passed by the trial court, the Defendants have preferred Regular Civil Appeal No. 24 of 2017 before the learned District Court at Solapur.

7. It is to be noted that though the decree was passed only against Defendant No.1 – Malkarsiddh Madgonda Pujari, the Appeal was preferred by the other two Defendants also. The Appellate Court had specifically held in para no. 21 of the judgment that Defendant No.1 had sold his portion of the property as soon as the Regular Civil Suit No. 962 of 2005 was decided. Even the same fact is admitted by the Defendant No.1 in his cross-examination dated 29th February, 2016 [*photo copy of paper book in Regular Civil Appeal No. 24 of 2017 filed by the Defendants is taken on record*]. Bare reading of para no.21 of the Judgment of the Appellate Court shows that Defendant No.1 was not in possession of the suit property at all.

8. Though the Decree of injunction was passed by both the courts below against the Defendant No.1 only, Second Appeal is preferred by all the Defendants jointly.

9. The learned Counsel Mr. Alange for Appellants/Orig. Defendants submits that both the courts below have failed to appreciate that the suit filed by the Defendants for partition was dismissed for default and against that order, Writ Petition is pending before this Court. He submits that both the courts below failed to consider the fact that even the Plaintiffs themselves have accepted that the suit property was joint family property of the

Plaintiffs and the Defendants. He submits that both the Court below have failed to consider the deposition given by the Plaintiffs in Regular Civil Suit No. 962 of 2005 in which the Plaintiffs have specifically admitted the possession of the Defendant No.1 also. He submits that by the impugned decree both the Courts below have confirmed the perpetual injunction order in respect of the entire suit property which is contrary to law. Hence, the Judgment and Decree passed by both the Courts below is required to be set aside.

10. On the other hand, the learned Counsel Mr. Kulkarni appearing on behalf of Respondents/Plaintiffs had vehemently opposed the Second Appeal. He submits that admittedly the Second Appeal is not maintainable on behalf of Defendant Nos. 2 and 3. There is no perpetual injunction order against Defendant Nos. 2 and 3 in spite of that they have preferred the Regular Civil Appeal No. 24 of 2017 before the District Court and also the Second Appeal before this Court. On this ground itself, the Second Appeal is required to be rejected.

11. The learned Counsel appearing on behalf of Respondents/Plaintiffs submits that both the Courts below have specifically recorded in the impugned Judgment on the basis of Defendant No.1's deposition that as soon as the Regular Civil

Suit No. 962 of 2005 was stand rejected, he sold his property to third party. As the property was sold by the Defendant No.1, there is no question of filing the Second Appeal challenging the concurrent facts recorded by both the Courts below. Hence, the Second Appeal is required to be dismissed with costs.

12. I have heard both the sides at length.

13. I have gone through the copy of the plaint and evidence as placed on record by the learned Counsel for Defendants by way of Paper book in Regular Civil Appeal No. 24 of 2017. It is to be noted that in the present proceedings, the trial court by the impugned Judgment and decree dated 21st December, 2016 restrained the Defendant No.1 only from obstructing the plaintiffs' possession over the suit property. There was no injunction against the Defendant Nos. 2 and 3 at all. Apart from that, Defendant No.1 had already created third party right, title and interest in respect of his share of the suit property, and therefore, as on today he is not in possession at all. In spite of that, Defendant No.1 along with other two Defendants had filed Regular Civil appeal No. 24 of 2017 before the Appellate Court. Even the Appellate Court in para no. 21 of the impugned Judgment held that Defendant No.1 had already sold the portion of the land of his share. When the

Defendant No.1 is not holding any property and/or any share in the suit property as on today, there is no question of entertaining the present Second Appeal.

14. Though the Second Appeal is filed by the Defendant Nos. 2 and 3 also, same is not maintainable, because there is no order of injunction passed by the trial court or Appellate Court against them. Hence, the Second Appeal is dismissed.

(K.K.TATED, J.)