

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.282 OF 2016

WITH

CIVIL APPLICATION NO.537 OF 2016

IN

SECOND APPEAL NO.282 OF 2016

AND

SECOND APPEAL NO.597 OF 2016

WITH

CIVIL APPLICATION NO.1196 OF 2016

IN

SECOND APPEAL NO.597 OF 2016

...

Mohan Joseph Collier (deceased Thr. Lrs.) ...Appellants

Versus

Treza Charli Horner (deceased Thr. Lrs.) ...Respondents

Mr. Ashutosh M. Kulkarni for the Appellant.

CORAM : A. A. SAYED, J.

DATE : 21 NOVEMBER, 2017

P. C.:

1. The above Second Appeals are filed by the Appellants impugning the common judgment and order dated 05.08.2015

passed by the District Judge-1, Solapur in R.C.A. Nos.195 and 208 of 2000 arising out of the common judgment and order dated 01.04.2000 passed by the Joint Civil Judge, Senior Division, Solapur in R.C.S. Nos.775 of 1982 and 206 of 1986, whereby the R.C.S. No.775 of 1982 filed by Mohan (since deceased) against Treza (since deceased) and Kamal (deleted during the pendency of the proceedings), claiming to be a tenant and seeking perpetual injunction restraining them from creating obstruction to his use of the suit property was dismissed and the R.C.S. No.206 of 1986, against Mohan (since deceased) and others for possession of the suit property was partly decreed. The Appellants are the heirs & legal representatives of Mohan and Respondents Nos.1A to 1H are the heirs and legal legal representatives of Treza.

2. The subject matter of the Second Appeals is land admeasuring 3 acre 5 guntha situated on the East side in the South-North direction out of Gat No.75 (Old Gat No.285) situated at Mouje Hotgi Station, Taluka South Solapur, District

Solapur. The entire Gat No.75 of Mouje, Hotgi Station, admeasuring 5H-46R originally belonged to one Mr. D. W. Collier. After his death, a dispute arose between the first wife of Mr. Collier, Grace & the foster son of the Mr. Collier, Mohan, who is the Plaintiff (Plaintiff in RCS No.775 of 1982) **on the one hand** and Anusayabai (since deceased) who was the second wife of Mr. Collier, Treza & Kamal (Plaintiffs in RCS No.206 of 1986) who are the daughters of Anusayabai, **on the other hand**. Grace, therefore, had filed Civil Suit being RCS No.41 of 1969 which came to be settled by the parties and a compromise decree was passed in the said RCS No.41 of 1969.

3. Under the compromise decree dated 11.02.1972 in the said RCS No.41/1969, 3 acres 5 gunthas land was allotted to Grace, 3 acres 5 gunthas was allotted to Treza, 3 acres 5 gunthas land was allotted to Kamal and 4 acres 5 gunthas land came to the share of Mohan. The dispute in the present Appeals is now confined to the land admeasuring 3 acres 5 gunthas which came to the share of Treza upon entering into the compromise deed dated 11.2.1972. (Kamal had settled the

dispute with Mohan during the pendency of the suit.)

4. RCS No.775 of 1982 was filed by Mohan for perpetual injunction. It was contended by him that the land belonging to Treza was given to him as tenant and he was cultivating the land as tenant and Treza was causing obstruction to his possession. Treza filed suit bearing R.C.S. No.206 of 1986 on the basis of the compromise decree in RCS No.41/1969.

5. The aforesaid suits were filed after Mohan had started asserting that he was the tenant of the lands which came to the share of Treza and Kamal and a dispute arose between them. The Tahsildar had initiated proceedings of 145 of CrPC against them. A tenancy Case No.37/82 was also initiated before the Tahsildar. The Tahsildar held that Mohan was not a tenant of the disputed land. The order was confirmed by the Maharashtra Revenue Tribunal. The Writ Petition filed by the Mohan also came to be dismissed by this Court. In the meanwhile the Collector, Solapur had handed over possession of the land to Mohan since in the enquiry under Section 145 of CrPC, Mohan was found to be in actual possession of the suit land. Therefore,

RCS No.206/86 was accordingly amended by Treza and recovery of possession was also sought from Mohan. During the pendency of the suit the share of Kamal was acquired by Mohan and dispute settled between them as indicated earlier and Kamal's name was deleted from the record.

6. The Trial Court recorded common evidence and passed common judgment and order dismissing R.C.S. No.775 of 1982 filed by the Mohan and partly decreed R.C.S. No.206 of 1986 filed by Treza (and her sister Kamal) and Mohan was directed to hand over the possession of the suit land to Treza.

7. The Trial Court observed that it was an admitted position that Mohan had pleaded in the Plaint in R.C.S. No.775 of 1982 that the suit land was in his possession as tenant. The tenancy issue was framed and was referred to the Tenancy Court. It was held that Mohan was not the tenant of the suit land and he was not entitled to retain possession of the land. The Trial Court referred to the compromise in R.C.S. No.41 of 1969, wherein it was agreed by the parties that the possession of the land would be handed over to the sharers.

8. The Trial Court noted that the issue of tenancy travelled up to this Court and this Court dismissed the Writ Petition 109 of 1985 thereby upholding the order in the Tenancy Appeal No.18 of 1983 and that the decision of the Maharashtra Revenue Tribunal dated 06.08.1984. Thus, the contention of the Mohan that he was a tenant was negated right up to this Court. The alternate plea of Mohan that he was in exclusive possession by adverse possession was also rejected and it was held that Mohan cannot claim adverse possession against co-owner. The Trial Court noted that for last 18 years Mohan was avoiding to admit the claim of Treza and took a false plea of tenancy. The Trial Court considered the conduct of Mohan and held that the relief of perpetual injunction cannot be granted to Mohan and that Mohan has not come to the Court with clean hands. In R.C.S. No.206 of 1986 of Treza, the Trial Court concluded that in view of the compromise decree dated 11.02.1972 there was severance of joint status and express unilateral and unequivocal intention to separate share between the parties that though the same was not shown in the revenue record, their shares were

separated on the basis of the compromise decree. The Trial Court noted that in Darkhast No.45 of 1980, Mohan had filed his say at Exh.12, wherein he has stated that as per the compromise deed, the parties had agreed to effect partition and they were cultivating their separate shares and there was a clear admission on the part of Mohan that the parties had effected partition and had agreed to handover possession of each sharer on 16-03-1972 and therefore Mohan was estopped from saying that the Treza would be entitled to obtain possession of his share only after filing Execution Application. The Trial Court held that the Special Darkhast No.35 of 2005 does not pertain to the suit property. The Trial Court accordingly dismissed R.C.S. No.775 of 1982 filed by Mohan and partly decreed R.C.S. No.206 of 1986 filed by Treza as indicated earlier.

9. Aggrieved by this common judgment and order of the Trial Court, Mohan had filed two Appeals being R.C.A. No.195 of 2000 and R.C.A. No.208 of 2000. The Lower Appellate Court had noted that Mohan as well as Treza both expired and their legal heirs were brought on record. Before the Lower Appellate

Court, the Respondent No.4-Faridabi Kamble had filed an Application contending that after passing of the impugned common judgment and order in the suits, she had purchased the suit land from Treza vide registered Sale Deed dated 12-05-2000 and sought for impleadment in the Appeal, which was allowed. The said order was challenged by Mohan in Writ Petition which was rejected and an additional issue was framed and the matter was remanded to the Trial Court to decide on the additional issue and it was held that suit land was transferred to Faridabi Kamble during the pendency of the suit.

10. After hearing the parties and after re-appreciating the evidence on record the Lower Appellate Court by its common judgment and order dated 05.08.2015 dismissed the two Appeals bearing R.C.A. No.195 of 2000 and R.C.A. No.208 of 2000, thereby confirming the order of Trial Court.

11. The lower Appellate Court has recorded that Mohan admitted in his cross-examination that separate and independent shares of the land as per compromise deed were made. The Appellate Court has also adverted to the written

statement and Special Darkhast No.45 of 1980 wherein Mohan had admitted that since in April 1972 the parties were possessing their respective land separately/independently and taking income independently which showed that each of them were cultivating and possessing the land separately. It is an admitted position that the dispute had arisen between the parties and proceedings under Section 145 of CrPC were filed and possession of the suit land was ultimately handed over by the Collector, Solapur to Mohan vide Panchanama dated 25.02.1986. Mohan was claiming to be in possession on the basis that he was a tenant. Treza had alleged that she was dispossessed by virtue of proceedings u/s 145 of CRPC and was not only seeking possession but also mesne profits, which prayer was granted to Treza. In these circumstances, it is not possible to accept the contention of the learned Counsel for the Appellant that Treza could not have filed a separate suit and ought to have moved in execution as a separate suit is barred under Section 47 of the Code of Civil Procedure. The contention of the learned Counsel for the Appellant that since suit land was

purchased by one Faridabi Kamble (who was impleaded as party Respondent during the pendency of the Appeals before the lower Appellate Court) the suit would be infructuous also cannot be accepted considering the principles of lis pendens as the said sale would always be subject to rights of the Appellants. Curiously, though the said Faridabi Kamble was a party Respondent in the Appeal before the lower Appellate Court, the Appellants have not made her a party Respondent in the present Appeals.

12. Considering the facts and circumstances of the case, in my view, there are not merits in the Second Appeals and no substantial questions of law arise in the Second Appeals. There are concurrent findings of facts by Trial Court as well as Lower Appellate Court. It is required to be noted that the Compromise Decree was passed as far back as on 11-02-1972. The Trial Court concluded that Mohan had raised a false plea of tenancy and observed that he had not come to Court with clean hands and that he had refused to handover possession of the suit land for more than 18 years (as on 01.01.2000 when the Trial Court

judgment and order was passed). 17 years more have elapsed since.

13. In the circumstances, the Second Appeals are dismissed. There shall be no order as to costs.

14. Civil Applications do not survive and to stand dismissed.

[A. A. SAYED, J.]