

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

**SECOND APPEAL NO.462 OF 2015
WITH
CIVIL APPLICATION NOS.759 OF 2018**

Smt Bhagirathibai Shankar Kadam & Ors.

... Appellants

V/s.

Shri Ramnath Sakharam Shelke & Ors.

... Respondents

**WITH
SECOND APPEAL NOS.525, 429, 630 AND 459 OF 2015
WITH
CIVIL APPLICATION NOS.760, 761, 762 AND 763 OF 2018
(For bringing legal heirs on record)
WITH
CIVIL APPLICATION NOS.1138, 944, 1371 AND 986 OF 2015
(For stay)**

Mr.Milind M. Sathaye, Senior advocate for the Appellants in SA 462/2015 and 525/2015 and for the Respondent No.8C in SA 429 /2015.

Mr.Girish R. Agrawal for the appellants in SA 429/2015 and 459/2015 and 630/2015 and for the Respondent Nos.1 and 2 in SA 462/2015 and for the Respondent Nos.4 and 5 in SA 525/2015.

Mr. Sanjaykumar P. Khairnar for the Respondent Nos.6 and 7 in SA 462/2015 and for the Respondent No.10 in SA 429/2015 and for the Respondent Nos.4 and 5 in SA No.459/2015 and for the Respondent No.8 in SA No.630/2015.

Mr. Dushyant S. Pagare for the Respondent Nos.2A to 2D in all the Second Appeals.

**CORAM : A.M.DHAVAL, J.
DATE : 19th OCTOBER, 2018.**

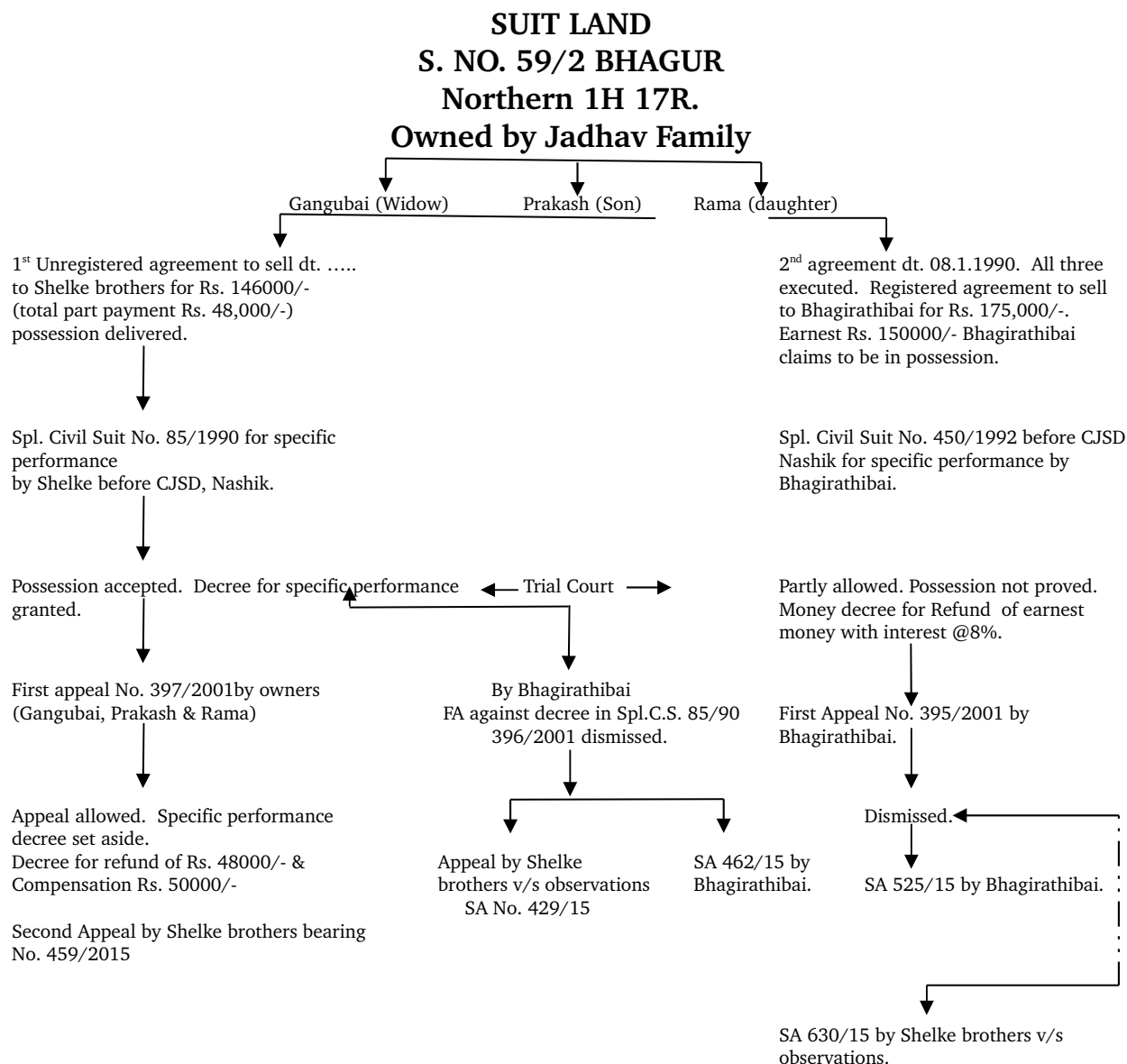
ORAL JUDGMENT:-

. These five appeals involve common question of law and fact. There are common parties and common subject matters. The original suits were tried

together and the appeals were also tried together. Hence, by consent of the parties these appeals are heard together.

2. For easy reference some basic material facts are recorded. The subject matter of the suit is Northern 1H 17R portion from S. No.59/2 of agricultural land situated at Mouje Bhagur. It is not in dispute that Gangubai Jadhav, her son Prakash and her daughter Rama inherited the suit property from their common ancestor.

3. By unregistered agreement to sell Gangubai and Prakash approached to Ramnath Shelke and Sanjay Shelke (hereinafter referred to as “Shelke brothers”) to sell the suit property for Rs.1,46,000/-. At the time of execution of agreement and subsequent thereto part consideration of Rs.48,000/- was paid and Shelke brothers were put in possession of the suit property. Within short time thereafter on 8/1/1990 Gangubai, Prakash and Rama executed registered agreement to sell the suit property to Bhagirathibai for Rs.1,75,000/-. Amount of Rs.1,50,000 was paid and Bhagirathibai claimed that possession was also delivered. In view of two agreements in respect of one and the same property, the parties approached the Civil Court. The factual situation and filing of appeals and decisions therein can be properly explained by way of chart as below.



4 The parties were heard together and by common judgment learned District Judge, Nashik dismissed the Civil Appeal Nos. 395/2001 and 396/2001 and by separate judgment delivered on the same day allowed Civil Appeal No.397/2001 of Gangubai, Prakash and Rama, set aside the judgment specific performance in favour of Shelke Family and granted decree for refund of Rs.48,000/- and compensation of Rs.50,000/-. Aggrieved by this judgment the present appeals are filed.

5. Shelke Family has filed SA No.429/2015 against the judgment in Civil Appeal No.396/2001. Though in that matter, decree is in favour of Shelke Family they were aggrieved by the observations made therein. Bhagirathibai has filed Second Appeal No.462 /2015 against the dismissal of Civil Appeal No.395/2001. Against the judgment and decree of dismissal of Special Civil Suit No.450/1992, Bhagirathibai has preferred Second Appeal No.525/2015. Shelke brothers has challenged the judgment and decree in Civil Appeal No. 397/2001 whereby the appeal of Gangubai was allowed and decree in favour of Shelke Family for specific performance was set aside. Shelke brothers have filed Second Appeal No.630/2015 challenging the dismissal of Civil Appeal No.395/2001 filed by Bhagirathibai though decree is not against Shelke brothers, it is challenged in view of findings and observations made in the judgment.

6. Heard the learned advocates.

7. As per the arguments registered agreement to sell in favour of Bhagirathibai by Gangubai, Prakash and Rama was not at all challenged and the said agreement was subsequent to the unregistered agreement in favour of Shelke brothers.

8. Both the Trial Court and the First Appellate Court held that possession of the suit land is with Shelke brothers. Mr. Agrawal and Mr. Sathaye have argued that the learned First Appellate Court while delivering common judgment has made several mistakes. There are contradictory findings with regard to possession in paragraph No.48 it has been recorded that Bhagirathibai was in possession of the suit property and Shelke brothers failed to prove their possession but in paragraph No.50 it is recorded that Shelke brother were in possession.

9. Besides, Mr.Sathaye, learned advocate argued that when the suit for specific performance filed by Shelke brothers was dismissed, the suit for specific performance filed by Bhagirathibai ought to have been decreed as there was no opposition by Gangubai, Prakash and Rama for the grant of specific performance to Bhagirathibai. Therefore, dismissal of both the suits for specific performance was contrary to the pleadings of the parties and the stand taken by all the parties. It is also submitted that no separate issues were framed by the trial court in the separate suits. Learned First Appellate Court also did not frame separate points for determination as contemplated under Order 41 Rule 31. It is argued that the judgment of the First Appellate Court is not understandable at many places. The words plaintiff and the defendant are used without reference to which suit they are referred to. It is also argued that the decree for specific performance granted in favour of Shelke brothers was challenged by Bhagirathibai as well as by Rama and Gangubai. Civil Appeal No.396/2001 of Bhagirathi was dismissed and the decree for specific performance was confirmed but in Appeal filed by Gangubai and Rama RCA No.397/2001 was allowed and decree of specific performance was set aside. These findings are contrary to each other.

10. Besides the learned First Appellate Court framed points for determination not required to be framed and which constrained Shelke brothers to file two Second Appeal Nos.429/2015 and 630/2015.

11. The sum and substance of their arguments is that the First Appellate Court has not performed the duties as expected under law and there is no proper adjudication of the dispute between the parties on the aforesaid judgments. Learned advocates submitted that the judgment and decree passed by the First Appellate Court in all the three appeals deserve to be set aside and the matter should be remanded for fresh hearing and fresh decision.

12. After hearing the parties, I find that the decree is passed in Civil Appeal 396/2001 is not against Shelke brothers and therefore Second Appeal No.429/2015 filed by them is not maintainable. There cannot be appeal against mere observations or findings when the substantive relief claimed is declined and the decree has not adversely affected the parties. Similarly, Second Appeal No.630/2015 filed by Shelke brothers against the judgment and decree dismissing the claim of Bhagirathibai in First Appeal No.395/2001 is also not maintainable because the decree does not affect the rights of Shelke brothers. However, it must be clarified that points of determination in both these appeals with regard to the right for specific performance and their readiness and willingness were unnecessary. Whatever observations are made by the First Appellate Court will not bind Shelke brothers as the decree passed in these appeals are not against them. With these clarifications Second Appeal Nos. 429/2015 and 630/2015 are dismissed as not maintainable.

13. In respect of Second Appeal No.459/2015 filed by the Shelke brothers allowing the Civil Appeal No.397/2001 filed by Gangubai, Second Appeal No.462/2015 filed by Bhagirathibai against dismissal of Civil Appeal No.396/2001 thereby confirmation of judgment and decree in Special Civil Suit No.85/1990 and Second Appeal No.525/2015 filed by Bhagirathibai against dismissal of her Civil Appeal No.395/2001, the following common substantial question of law is framed:

“Whether the First Appellate Court erred in not following proper procedure and in recording contradictory findings and deciding irrelevant issues in different appeals ?”

14. By consent the matter is immediately taken up for final hearing.

15. On hearing learned advocates, I find substance in the argument of learned advocates that in the judgments passed by the learned First Appellate Court in Civil Appeal Nos.395/2001, 396/2001 and 397/2001, the learned First Appellate Court has committed several mistakes and gave contrary findings and framed issues not required in the said appeals and given findings thereon.

16. Though the appeals involved common question and common subject matter, the learned First Appellate Court ought to have recorded separate points for determination and ought to have decided them separately. This has not been done. Since both the suits were filed by different parties, the word the plaintiff or the defendant ought to have been used with specific reference to each suit. The judgment is completely unclear and not understandable. It is also noticed that the learned Additional District Judge unnecessarily framed issues with regard to rights of Shelke brothers in appeals filed by Bhagirathibai.

17. Learned Additional District Judge has recorded contrary findings with regard to possession. In paragraph No.48 it is recorded that Bhagirathibai was in possession of the suit property whereas in paragraph No.50 it is recorded that the Shelke brothers were in possession of the suit property. It is also seen that points framed by the learned Judge do not tally with the final findings. I find that learned Advocates has rightly contended that there are contradictory findings recorded in the judgment and decree passed in Special Civil Suit No.85/1990 filed by Gangubai and in Special Civil Suit No.450/1992 filed by Bhagirathibai. In appeal filed by Bhagirathibai, the decree is confirmed whereas in another suit filed by Gangubai the judgment and decree has been set aside. Further as far as

Special Civil Suit No.450/1992 is concerned when specific performance was refused to Shelke brothers by allowing the appeal filed by Gangubai, there are no sound reasons given why appeal filed by Bhagirathibai was not allowed. Learned District Judge ignored the material fact that the claim made by Bhagirathibai was not challenged by Gangubai, Prakash and Rama.

18. It is also found that learned Additional District Judge recorded incorrect observations with regard to absence of pleadings. Both the learned advocates have shown that they have specifically pleaded about readiness and willingness of their clients in their respective suits but first appellate court wrongly observed that there are no such pleadings. Learned advocate for the appellant pointed out that there is a wrong observation that the suit filed by Bhagirathibai was primarily for refund of money, in fact the pleadings disclose that it was for specific performance and only by way of alternative relief decree of refund of money was filed. I find that the learned Additional District Judge has not properly considered the well established legal principle in the matter of grant of relief of specific performance of contract or for grant of compensation and has not properly appreciated the pleadings and findings on record. In an attempt to deliver common judgment the learned Judge has committed a mess and the judgment is not properly adjudicating all the dispute between the parties. If there is no proper appreciation of evidence or when legal principles are not properly applied the same can be rectified in the appeal but when the judgment of the First Appellate Court shows many discrepancies and is not understandable, there are no specific findings recorded, there are contradictory findings and observations and ignorance of material pleadings and evidence, the judgments in the first appeal are not sustainable. Considering the facts and circumstances the substantial question of law

framed is answered in the affirmative. Hence, the order:

ORDER

- i) The Second Appeals are partly allowed.
- ii) The judgments and decrees passed in First Appeal No.395/2001 and 396/2001 delivered by the District Judge-I Nashik on 12/12/2004 are hereby set aside and all the matters are remanded to the First Appellate Court for fresh hearing;
- iii) The learned First Appellate Court shall hear all the parties again and shall frame separate points for determination in separate appeals and shall decide them separately;
- iv) The First Appellate Court is directed to dispose of all the appeals within a period of three months from the receipt of record and appearance of the parties;
- v) The Registrar Judicial is directed to send the record to the first Appellate Court as early as possible;
- vi) The parties are directed to remain present in the First Appellate Court on 13/11/2018;
- vii) All Civil Applications pending in the above referred appeals do not survive and the same stands disposed of;
- viii) The parties and the learned First Appellate Court shall act upon the copy downloaded from the website;
- ix) Needless to state that the First Appellate Court shall decide the

matters on their own merits without getting influenced by observations in these judgments;

x) The appellants shall be entitled to get full Court Fee refund as per Section 15 of the Maharashtra Court Fees Act;

xi) Appeals shall be re-admitted and shall be decided on the same numbers.

(A.M.DHAVAL, J.)