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

**SECOND APPEAL NO.175 OF 2012
WITH
CIVIL APPLICATION NO.646 OF 2018
IN
SECOND APPEAL NO.175 OF 2012.**

Yasin Phattubhai Ghodke (deceased)
Through Legal heirs
Khajabai Banshibai Ghodake
and others ... Appellants.

V/s.

Dilip Rupchand Rathod and ors ... Respondents

ALONGWITH

**CROSS OBJECTION (ST)NO.27492 OF 2017
IN
SECOND APPEAL NO.175 OF 2012
WITH
CIVIL APPLICATION NO.9 OF OF 2018
IN
CROSS OBJECTION (ST)NO.27492 OF 2017**

Dilip Rupchand Rathod and ors .. Cross Objector.

In the matter between

Yaseen Phattubhai Ghodke (decd)
through Legal heirs ... Appellants

V/s

Dilip Rupchand Rathod and ors ... Respondents.

Mr. A. V. Anturkar, Senior Advocate, i/by Siddharth S. Deshpande, for the appellant.

Mr. Uday P. Warunjikar, for respondent Nos. 1 & 2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 7th AUGUST, 2018.

P.C. :

1] Heard learned Senior Counsel for the appellants and learned counsel for the respondents.

2] This Second Appeal is directed against the judgment and decree dated 4.7.2009, passed by Ad-hoc District Judge -2, Solapur in Regular Civil Appeal No.546 of 2000, which was preferred against the judgment and decree dated 8.3.1994, passed by Jt. Civil Judge Senior Division, Solapur in Special Civil Suit No.46 of 1989.

3] The said suit was filed by the respondents herein seeking specific performance of the agreement of sale dated 28.10.1987. As per agreement of sale, possession of the suit land was handed over to the respondents herein on the date of agreement itself. The trial Court has rejected the decree for specific performance of the agreement and granted refund of the earnest money with interest

thereon.

4] In the suit, the appellant herein has also filed Counter claim seeking possession of the suit land and some amount as compensation for continuing in possession of the suit land. The trial Court has granted Counter Claim to the extent of handing over the possession of the suit land. The appellate Court, however, has rejected the said prayer made in the Counter Claim as regards the possession, on two grounds. Firstly, that the Court Fee stamp is not paid on the Counter Claim and secondly the appellant has not entered into witness box to prove his counter claim.

5] As regards the first ground, even if the Court fee stamp is not paid along with Counter Claim, now it is well settled that the decree can be drawn subject to payment of Court fee. Therefore that ground cannot be upheld.

6] The second ground on which the Appellate Court has rejected the Counter Claim is that the appellant has not entered into witness box to give his evidence. In my considered opinion, it was not necessary for the appellant to enter into the witness box to give evidence, as admittedly it is under the very agreement of sale dated 29.10.1987, the possession was given to the respondent. Therefore, the appellant was not required to prove the said fact. Hence, if the main relief of specific performance of the agreement as sought by the

respondent, was rejected and only refund of the earnest money was granted, it follows that respondent cannot retain possession of the suit land and hence, the appellant becomes entitled to get possession of the suit property .

7] In above context, the submission of learned counsel for respondent is that the Counter Claim was not at all framed properly. Only vague averment is made in paragraph No.11 that the appellant is filing this Counter Claim by affixing Court fee Stamp of Rs.0.65 to the written statement. It is urged that the relevant procedure and rules as to how Counter Claim is required to be framed, are provided under Order VIII Rule 6A of the Code of Civil Procedure. However, the Counter Claim, in this case is not complying with those procedural rules. Therefore, the Appellate Court was justified in rejecting such Counter Claim.

8] In this respect also, in my considered opinion, law is fairly well settled that rules and procedure are directory in nature and hand- maiden of justice. Hence, when the trial Court has proceeded with the Counter Claim and after giving opportunities to both parties, has allowed such the Counter Claim for possession, then, in this Second Appeal, it would not be appropriate to accept the contention that the Counter Claim is not complying with the rules and the procedure qua, Order VIII, Rule 6A of Code of Civil Procedure. Otherwise also, the

appellate Court has not rejected the Counter Claim on this ground, but only on the above said two grounds .

9] The Second Appeal, is therefore, allowed to this limited extent and the decree passed by the Appellate Court rejecting the Counter Claim for possession is set aside. As a result, the order passed by trial Court allowing Counter Claim, for possession of the suit land is restored subject to appellants' paying requisite Court fee on the relief of possession claimed therein.

10] As regards the other relief claimed for compensation as mense profit during the period, respondent has continued in possession, in the absence of any evidence on record, to that effect, said relief is expressly rejected.

11] In view thereof, Cross Objection filed by respondent also stands dismissed.

12] In view of disposal of Second Appeal and Cross Objection, pending Civil Application, therein are also disposed off accordingly.

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[DR.SHALINI PHANSALKAR-JOSHI, J.]