

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

**SECOND APPEAL NO. 1071 OF 2012
WITH
SECOND APPEAL NO. 1143 OF 2012
WITH
CIVIL APPLICATION NO. 2202 OF 2012
IN
SECOND APPEAL NO. 1143 OF 2012**

Rangrao Krishna Gawade & Ors. ... Appellants
V/s.
Shankar Dnyanu Karvekar
(Since deceased Through LRs.) & Ors. ... Respondents

- Mr.Bhushan A. Walimbe for the Appellants.
- Mr.R.P. Hake-Patil i/b. Mr.S.P. Kadam for Respondent Nos.2A and 2B.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 8th AUGUST, 2018.

P.C. :

1] Heard learned counsel for the Appellants and learned counsel for the Respondents.

2] These Second Appeals take an exception to the judgment and decree dated 04/08/2012 passed by the District Judge-1, Islampur, thereby dismissing Regular Civil Appeal No.75 of 2003,

which was preferred against the judgment and decree passed by the Joint Civil Judge, Junior Division, Islampur, in Regular Civil Suit No.151 of 1987, thereby dismissing both the suit and the Counter-claim.

3] By the impugned judgment, the Appellate Court has confirmed the dismissal of the suit by dismissing Regular Civil Appeal No.77 of 2003, however allowed the Regular Civil Appeal No.75 of 2003, which was preferred by the Respondents herein, against the rejection of the Counter-claim.

4] The said suit was filed by the Appellants herein simpliciter for injunction claiming to be in possession of the agricultural land bearing Gat No.953 admeasuring 1H. 27 R situated at Chikurde, Tal. Walwa, District Sangli. It was contended by them that, the said land was originally owned by one Shankar Joti Narasugade and it was bearing Survey No.120 and was locally known as 'Dale Narasugadeche Shet'. Shankar Joti Narasugade has sold out $\frac{1}{2}$ portion thereof an area of 1 Bigha 2 $\frac{1}{4}$ Pounds land to Appellants' predecessors-in-title, namely, Nana Santu and Dau Santu Gavade, by registered sale-deed dated 06/05/1938. On the same day Shankar Narasugade has sold out to Sakhoba Ingale remaining $\frac{1}{2}$ portion which was situated towards

northern side of the portion sold to the Appellants' predecessors-in-title. The portion which was sold to Sakhoba Ingale was mortgaged with one Rama Karvekar and Dnyanu Mirajkar. The Appellants' Predecessors-in-title paid the mortgage money and purchased said $\frac{1}{2}$ portion. Kisappa Nana Gavade was son of Nana Santu Gavade and Pandurang was son-in-law of Dadu Santu Gavade. Dadu Santu Gavade gifted his share to Pandurang Narvate and present Appellant No.1 and 6 purchased the said share of Pandurang Narvate on 15/03/1985 by registered sale-deed.

5] The suit land was thereafter converted into R.S. No.142. In the year 1965 due to Phalani, separate survey number was given to the suit land as Survey No.142/2D+3A and it was totally admeasuring 3 Acre 6 Gunthas. Both Kisappa Nana Gavade and Pandurang Dadu Naravate were owners of $\frac{1}{2}$ share each and their names were accordingly appearing in Survey No.142/2D+3A. According to the Appellants, therefore since the implementation of the consolidation scheme in the year 1969, the suit land was given Gat No.953 and it was admeasuring 1 H. 27 R. It was accordingly allotted to their share. As the Respondents caused obstruction to their possession, they were constrained to file this suit simpliciter for injunction.

6] This suit was resisted by the Respondents herein contending *inter-alia* that their father Dnyanu Bhau had purchased the area admeasuring 3 Biga 1/III pounds out of Survey No.121 from Tuka Bala and Aaku Vithu by virtue of registered sale-deed dated 30/04/1935. Their father has paid the mortgage money and took possession of the land which was in possession of Shidu Lathe. Hence, they are in possession of the said land to the extent of 4 Acre 10 Guntha and it was bearing Survey No.142/1+2+3A2. As Appellants are claiming their right over it and causing obstruction to their possession, the relief of injunction be granted in their favour restraining the Appellants from causing obstruction to their possession. Thus, they had also filed the Counter-claim for injunction.

7] On appreciation of evidence adduced before it, the trial Court was pleased to dismiss both the suit and the Counter-claim. Hence, the Appellants were constrained to file the Appeal bearing Regular Civil Appeal No.77 of 2003 and the Respondents have also filed the Appeal bearing Regular Civil Appeal No.75 of 2003 against the dismissal of the Counter-claim.

8] The Appellate Court has after re-appreciating the evidence on record confirmed the finding of the trial Court as to dismissal of the

suit, however reversed the finding of the trial Court, as regards the dismissal of the counter claim and restrained the Appellants herein from obstructing the Respondents' possession over 24 Guntha of land out of 1 Hectare 27 R land bearing Gat No.953 as according to the Appellate Court, the said area of 24 Guntha was found to be purchased by the Respondents herein.

9] This judgment of the Appellate Court is challenged in this Second Appeal by learned counsel for the Appellants by submitting that the Appellate Court has unnecessarily entered into the calculations of the area of the land in possession of the respective parties and while doing so, without any basis held that 1 Bigha would mean 34 Gunthas and on that basis committed an error in holding that the Appellants have failed to prove their lawful possession over 3 Acre 7 Gunthas land and thereby partly decreed the Counter-claim. Hence, according to learned counsel for the Appellants, interference is warranted in the impugned judgment of the Appellate Court.

10] Normally, when the finding of the fact is based on the appreciation of evidence and there is no substantial question of law raised as such, in the Second Appeal this Court would have restrained itself from interfering therein. Therefore, as regards the dismissal of

the Appellants' suit for injunction, in view of the concurrent finding of the fact recorded by both the Courts below, finding that the Appellants had failed to prove their possession over the area claimed by them, this Court is restraining itself from interfering therewith.

11] However, as regards the decree passed by the Appellate Court in respect of the counter claim, this Court finds that there is some substance in the submissions advanced by learned counsel for the Appellants. It is pertinent to note that the trial Court has not granted such Counter-claim, finding that even the Respondents had failed to prove their possession over the area claimed by them. However, the Appellate Court has done so and while doing so, the Appellate Court has granted the relief in respect of only some area out of the area claimed by the Respondents.

12] It is also worth to note that the Appellate Court itself was not sure about the measure to be used for the calculation, whether 1 Bigh is 3025 sq. yards or 7587.852525 sq. meters, as given in the Maharashtra Land Revenue Code, 1966, with the Rules by V.N. Kularni or whether it was equal to 34 Guntha, as stated in *Dandekar's Land Tenure Book*, which was referred in Regular Civil Appeal No.20 of 1968. Thus, if the Appellate Court was not sure as to which book to

be relied upon, the Appellate Court should not have entered into this arena of calculating the area of respective possession of the parties and then granting the relief of Counter-claim of the Respondents to the extent of 24 Gunthas. Therefore, to that extent definitely the judgment passed by the First Appellate Court cannot be said to be based on sound appreciation of evidence on record.

13] Hence, the Second Appeal No.1143 of 2012 is allowed and the judgment and decree of the Appellate Court as regards allowing the Counter-claim by allowing Regular Civil Appeal No.75 of 2003 is set-aside. The judgment and decree of the trial Court dismissing the Counter-claim is restored to its original file.

14] The Second Appeal No.1071 of 2012 challenging dismissal of the suit stands dismissed.

15] At this stage, learned counsel for the Appellants submits that during the pendency of these Appeals, there was interim protection, therefore stay may be granted to this order of dismissal of suit.

16] Learned counsel for the Respondents strongly resists the same and in my considered opinion, rightly so, as no case is made out to grant the stay. Hence, the said prayer is rejected.

17] In view of disposal of the Second Appeal No.1143 of 2012, nothing survives in the Civil Application No.2202 of 2012 and hence, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]