

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Second Appeal No.671 of 2017

Smt. Kausalyabai Nilkanth Phutane (since dead) through Lrs -Prashant Shankarrao Phutane and
others

Vs.

Rama Dinba Dodke and others

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders

Shri A.S.Dhore, Advocate for appellants.
Shri Parijat Pande, Advocate for respondents 1 to 4.

CORAM : A.S.CHANDURKAR, J.
DATED : 26.09.2018

The appeal has been heard on the following substantial questions of law:

- (1) Whether the plaintiffs were entitled to challenge the order dated 26.07.2007 dismissing the suit in the appeal preferred by them challenging the judgment dated 23.09.2010 ?
- (2) Whether the plaintiffs were granted sufficient opportunity to lead evidence in the counter claim filed by the original defendants ?

The appellants are the legal representatives of the original plaintiff who had filed suit for possession of land alleged to be encroached by the defendants. It was their case that the defendants had committed encroachment on field Gat No. 253 that was owned by them. The defendants filed their written statement and also raised counter claim in which it was prayed that the encroachment said to be committed by the plaintiffs be removed and possession thereof be restored to the defendants. Before the trial Court, the plaintiffs failed to lead evidence in the suit and hence the trial Court on 26.07.2007 proceeded to pass order below

Exhibit-1 dismissing the suit in default. The counter claim was thereafter adjudicated and on 23.09.2010 the same was decreed. The original plaintiff was directed to hand over possession of 3 Hectares 18 R land to the defendant nos. 1 to 4. Being aggrieved, the original plaintiffs filed appeal and the appellate Court dismissed the same. Hence the present appeal.

Shri A.S.Dhore, learned counsel for the appellants submitted that as the trial Court passed necessary decree as to the dismissal of the suit dated 26.07.2007 only on 23.09.2010, it was open for the plaintiffs to have agitated the issue as regards the wrongful dismissal of the suit. He submitted that the appellate Court failed to consider the challenge as raised to the dismissal of the suit. It was submitted that since only on 23.09.2010 the order of dismissal of the suit was passed, that challenge ought to have been considered. It was then submitted that the plaintiffs were not granted sufficient opportunity to lead evidence in the counter claim that was filed by the defendants. As no opportunity was granted, great prejudice was caused to the original plaintiff and the same resulted in allowing the counter claim. It was thus submitted that the impugned judgments were liable to be set aside and a fresh adjudication of the suit ought to be directed.

Shri Parijat Pande, learned counsel for the respondent nos. 1 to 4 supported impugned judgments. It was submitted that though the trial Court passed the relevant order below Exhibit 1 on 26.07.2007, the plaintiffs took no steps to challenge the same. The suit in fact was dismissed on that date and culmination of the proceedings only on 23.09.2010 would not give a cause to the plaintiffs to challenge the same by filing an appeal. It was then submitted that despite sufficient opportunity, the plaintiffs failed to lead any evidence in the counter claim. In fact, they had chosen not

to lead evidence though sufficient opportunity was available. It was thus submitted that the plaintiffs are not entitled for any relief.

I have heard learned counsel for the parties. The records indicate that on 26.07.2007 in view of the continuous absence of the plaintiff the trial Court passed an order dismissing the suit for want of plaintiff's evidence. Though this order was made on 26.07.2007, the same was not immediately challenged. The plaintiffs participated in the counter claim filed by the defendants and waited till 23.09.2010 when the counter claim was decided. It has been found that though the plaintiffs had filed application below Exhibit 51 for restoration of the suit, that application was not pursued and it was given up. The appellate Court has noted this fact and has therefore declined permission to the plaintiff to raise that aspect in the appeal. It is found that the appellate Court was justified in not permitting the original plaintiff to challenge this aspect. Substantial question of law no.1 is answered by holding that the plaintiffs were not entitled to challenge the order dated 26.07.2007 in the appeal that was preferred from the judgment dated 23.09.2010.

As regards opportunity to lead evidence in the counter claim, it has been found that sufficient opportunity was available to the plaintiffs to lead evidence. Though affidavit in lieu of evidence was filed on record, no permission was sought to lead further evidence. Though it is submitted by the learned counsel for the appellants that the matter could have been fixed for leading evidence, the record, as noticed by the appellate Court in para 36 of its judgment, indicates that despite sufficient opportunity, the plaintiffs were not interested in leading the evidence. These observations having been made on the basis of the record of the case and the same cannot be said to be perverse. The second

substantial question of law is answered by holding that despite due opportunity, the plaintiffs failed to lead evidence.

In view of aforesaid discussion, I find no reason to interfere with the findings recorded by the Courts below. The second appeal is, therefore, dismissed. No costs.

JUDGE

Andurkar