

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO. 4370 OF 2017
IN SECOND APPEAL NO. 260 OF 2017**

Manohar Bhikaji Bhandarkar

...Applicant

Versus

Shashikant Magan Bhandarkar (Died
through L.Rs.) & Ors.

...Respondents

.....

Mr. G. S. Rane, Advocate for Applicant.

Mr. R. M. Deshmukh, Advocate for Respondent No. 5, 7, 10
& 11.

.....

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17-01-2019.

ORAL ORDER :

01. Heard learned Advocate for appellants and learned Advocate Mr. Shah appearing for respondent No. 2d, 3d. Some of the respondents to this application are served and against some the application is abated. The name of respondent No. 1c is deleted. The execution proceedings are pending before the learned Civil Judge, Senior Division, Amalner and therefore, the present application is considered.

02. The original plaintiffs had filed the suit for

declaration and possession i.e. Special Civil Suit No. 58 of 1989 and it came to be partly decreed on 30th June 1999. Whereby the plaintiffs were declared as owners of the suit properties mentioned in the schedule A and B of the plaint. The defendants except defendant No. 1/1, 1/2A to 1/2D and 9C and 9E were directed to deliver the possession of the suit properties to the plaintiffs within 3 months. The matter was taken in appeal bearing No. R. C. A. No. 34 of 1999. It was partly allowed on 2.2.2012. The order and decree passed by the learned Civil Judge Senior Division, Amalner to the extent of declaration that the plaintiffs are owners of the suit properties mentioned in Schedule A and B of the plaint was set aside. However, the rest of the decree was maintained. The present appellant, who was the defendant No. 3 had filed the said appeal and now he intends to challenge the said decree by the learned District Judge, Amalner.

03. Taking into consideration the limited point for consideration of the present application for stay, the learned Advocate appearing for the appellants submitted that he is in possession. The Appellate Court has set aside the decree in respect of declaration and therefore, the question is whether then the plaintiff is entitled to seek possession. He also intends to raise the substantial

question of law in that respect as well as in respect of point of limitation as well as another fact to whether on the basis of the facts as well as the documents, it can be said that deceased Droupadabai mother of the plaintiffs, who had expired on 27.4.2017 had limited estate or had become absolute owner of the property is the point to be considered. Therefore, when substantial questions of law are raised, the possession of the defendant No. 3 deserves to be protected till the second appeal is decided.

04. Per contra, the learned Advocate Mr. Shah submitted that it was absolutely not necessary for the plaintiffs to seek declaration. For that purpose he relied on the decision in **Mrs. Indira Bhalchandra Gokhale (deceased by LRS) V/s Union of India and Anr., (AIR 1990 Bombay 98)**. He submitted that even if the appeal has been partly allowed setting aside the decree in respect of declaration of ownership of the plaintiffs over suit properties described in Schedule A and B, yet, it has no effect. He has also pointed out that the properties originally belong to Ramchandra. After Ramchandra's first wife Droupadabai expired, he had married to mother of the original plaintiffs and her name was also Droupadabai. There was oral partition which was in fact effected by the father of defendant No. 3 on 30th October 1951, however,

at the time of mutation entry which was later on taken on 13.12.1962, it was stated that it was given to Droupadabai for life time. Whether that will curtail her rights was the question and it has been answered by both the Courts below in favour of the plaintiffs stating that she had become the absolute owner of the suit properties. When such absolute finding was given, there was no question of declaration. Merely it was asked for and then rejection of the same will not affect the case of the plaintiff.

05. After hearing both the sides, it can be certainly said that arguable points are made out. What would be the effect of setting aside the decree of declaration by the Appellate Court is also required to be considered. No doubt, this Court in **(AIR 1990 Bombay 98)** under the given facts and circumstances, had come to the conclusion that it was not necessary for the plaintiff therein to claim declaration, however, what were the pleadings before the Trial Court in this case are also required to be considered in order to see whether there was any kind of cloud over the title claimed by the plaintiff or not. The suit was for possession. Under such circumstance, when substantial point is raised, definitely the decree deserves to be stayed. No doubt, the suit was very much old one. It was instituted in

1989. At the most after the completion of the service to all the parties (since many of the respondents have expired certain applications are pending in respect of bringing their legal representatives on record) are disposed of as per law. The matter can be expedited. Further fact is also then required to be considered as to whether the plaintiffs could not have been held to have any right share in the property. Taking into consideration the relationship and the facts of the case.

06. Hence, following order;

ORDER

(i) Application is hereby allowed.

(ii) The relief is granted in terms of prayer clause "A".

(iii) The liberty is given to the parties to move this Court after the other applications are disposed of and all the legal representatives are brought on record to get the matter expedited.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-