

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.123 OF 2018

Sanjay Pandurang Edke

... Versus ...

Ranjana Ramkrushna Urmude

...

Mr. L.B. Palod, Advocate for the appellant

Mr. N.V. Gaware, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 09th APRIL, 2019

PRONOUNCED ON : 03rd MAY, 2019

ORDER :

1 Present appeal has been filed by original defendant challenging the concurrent findings, Judgment and Decree in Regular Civil Suit No.547/2011 by Civil Judge Senior Division, Ahmednagar dated 10.07.2015 and learned District Judge-2, Ahmednagar in Regular Civil Appeal No.265/2015 dated 03.03.2017, whereby the suit for recovery of possession with compensation came to be decreed against him. Present respondent-

original plaintiff had come with a case that House No.29/225 admeasuring 325 sq.ft. situated at Pipeline HUDCO was allotted to her by Maharashtra Housing and Area Development Authority (hereinafter referred to as "MHADA"). In fact, initially that property was allotted to one Lilabai Palve and due to economic condition said Lilabai had sold the suit property to plaintiff in 2009. An agreement had taken place between Lilabai and the plaintiff to that effect on 10.06.2009. Necessary transfer fee as well as stamp duty was paid by plaintiff at the office of MHADA and thereafter she became the owner of the suit property. It is stated that defendant has no right, title or interest over the suit property, however, since 05.12.2009 he is unauthorizedly occupying the suit property. Therefore, plaintiff had filed complaint with Tophkhana Police Station. Criminal case bearing R.C.C. No.302/2010 was filed, however, due to technical reasons defendant has been acquitted on 05.05.2011. It is stated that defendant is a trespasser and occupying the property since plaintiff is not residing in that area. Therefore, she has claimed possession and compensation @ Rs.2,000/- per month from 05.12.2009. She had also issued notice to defendant on 29.06.2011 but defendant has not given any positive reply.

in the plaint. Defendant contends that plaintiff has no right, title or interest over the suit property. According to the defendant, the property was allotted to one Kisan Kanade in 1993. He had handed over the possession of the same to defendant in 1996 at nominal rent. Thereafter, the suit property was purchased by Lilabai from Kisan Kanade. Lilabai filed complaint on 11.11.2006 against the defendant, but there was a compromise between Lilabai and defendant. An agreement to sell was entered into by Lilabai with defendant on 20.02.2009 and she had accepted amount of Rs.70,000/- in presence of witness Chandrakala Bhabad and Raju Satpute. However, Lilabai avoided to execute sale deed in favour of defendant. It was also contended that Lilabai as well as MHADA are the necessary party to the suit. Since he is in possession of the property since 1996 the transaction between Lilabai and plaintiff is bogus and illegal, not binding on him. He, therefore, prayed for dismissal of the suit.

3 Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. After hearing both sides and perusing the evidence on record the learned Trial Court had decreed the suit on 10.07.2015. Defendant was directed to hand over the possession of the suit property to plaintiff within two months from the date of

decree and he was also directed to pay compensation @ Rs.2,000/- per month from 05.12.2009 till actual delivery of the suit property to the plaintiff.

4 As aforesaid the original defendant filed R.C.S. No.265/2015 and on merits it is dismissed on 03.03.2017 by learned District Judge-2, Ahmednagar. Hence, present Second Appeal.

5 Heard learned Advocate Mr. L.B. Palod for the appellant and learned Advocate Mr. N.V. Gaware for the sole respondent.

6 It has been submitted on behalf of the appellant that both the learned Courts below have not considered the evidence as well as legal points involved in the matter properly. The property involved in this case was belonging to MHADA. That means, ownership was with MHADA and therefore MHADA was a necessary party to the suit. No right, title or interest could have got by plaintiff from MHADA and therefore, the Civil Court was not empowered to entertain the suit in view of bar under Section 71 of MHADA Act. The transaction between plaintiff and Lilabai was null and void as it was violation from regulation No.25 of MHADA. In fact, it was brought forward in breach of the terms in rule No.25 thereof and therefore, the point

answered by both the Courts below that, plaintiff is the lawful owner of the suit property, is a perverse finding. It was not considered by both the Courts below that defendant is a tenant in the suit property and therefore, substantial question of law involved in this case is in respect of ownership.

7 Per contra, the learned Advocate appearing for the respondent submitted that possession of the defendant is not referable in lawful title. The suit was based on title. Plaintiff has proved that though MHADA had allotted the suit house to Lilabai, Lilabai had sold it to plaintiff. Plaintiff has deposited the transfer fee as well as requisite charges to MHADA and therefore, as per the record with MHADA plaintiff is the owner in a sense proper legal allottee of the suit land and therefore, the possession should be given back to the plaintiff. There are concurrent findings given by both the Courts below that defendant has not proved his tenancy when he is coming with a case of tenancy, then he cannot be said to be the owner of the property. He never tried to get executed his agreement to sell and therefore, he cannot seek protection of his possession. The documents filed by defendant have not been believed by both the Courts below and when there is a concurrent findings, no substantial question of law can be said to be arising in this case.

8 At the outset, it can be seen that the written statement filed by the defendant does not make a contention that the suit is barred by non joinder of necessary parties as well as the jurisdiction of the Court is barred under Section 71 of the MHADA Act. Further, it is also to be noted that there is absolutely no averment in the written statement that in specific, plaintiff's transaction is in violation of regulation No.25 of MHADA Act. Important point to be noted is that as per the MHADA record, it appears that plaintiff is the owner of the property. She prayed requisite transfer fee and other charges. Plaintiff had examined witness from MHADA office and documents have been got produced from him at Exhs.33 to 45. Therefore, defendant now, cannot raise a point for non joinder of necessary parties, for the first time, in the Second Appeal. As per Order 1 Rule 13 of CPC, objection as to non joinder of party shall have to be taken at the earliest possible opportunity and in all cases, where issues are settled, at or before such settlement. The said rule further provides that unless the ground of objection has subsequently arisen and any such objection not so taken shall be deemed to have been waived. That means, when he had not taken the said objection at the earliest possible time, it will have to be presumed that he had waived that objection. Same is the case as regards bar of jurisdiction. Defendant himself had submitted to the jurisdiction of the Court without raising any such point

either before the Trial Court or before the First Appellate Court, then such point cannot be raised for the first time in the Second Appeal. It could have been brought on record through the witness examined by plaintiff from MHADA that how the transaction is in violation of regulation 25 of MHADA Act. But it appears that no such effort was made. The learned Advocate for the appellant has harped upon the admission by the plaintiff that she has not received possession of the suit property. A vague statement to that effect cannot be relied upon and unless it is got clarified as to how she has not received the possession coupled with a clear admission that defendant was already in possession we cannot appreciate the said admission. An admission can be explained and if that explanation is not extracted then it cannot be relied upon. In other words, the admission should unequivocal, material and relevant and not obtained by confusing the witness can be said to be binding on that party.

9 Defendant has come with a case that originally the property was allotted to Kanade, but Kanade had sold it to Lilabai. According to him, Kanade had inducted him in the suit property as tenant. There was no hurdle for him to examine Kanade. The documents which he has produced have been disbelieved by both the Courts and being the Appellate Court in Second

Appeal we cannot go in proof of those documents. If he still wants to rely on his statement as tenant, then he is accepting that somebody else is owner and for that purpose he should produce cogent evidence to support his contention. Defendant has thereafter come with the case that Lilabai had agreed to sell him the suit property by executing agreement on 20.02.2009. It is to be noted that he has not come with the case that in pursuant to the said agreement he has paid necessary charges to MHADA. When he has not completed the process as required under MHADA Act as well as did not take any legal step against Lilabai to get the specific purpose of the contract done and under such circumstance, if the property is sold by Lilabai to plaintiff and she has completed all the formalities and mandatory things as required under the Act, then defendant is not allowed to challenge the ownership of the plaintiff. Both the Courts have concurrently rightly held that plaintiff is the owner of the suit property and therefore, she has entitled to get the possession. No substantial question of law is arising in this case. Hence, the Second Appeal is disposed of as “**Not admitted**”.

(Smt. Vibha Kankanwadi, J.)