

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 12651 OF 2016

Shivdas S/o Santram Gavhane
Age: 50 Years, Occu: Agriculture,
R/o: Takalgaon, Taluka: Georai,
District: Beed.

... Petitioners
(Original Defendant)

VERSUS

Revindra S/o Sudhakar Ghadge
Age: 41 Years, Occu: Agriculture
R/o: Jay Bhawani Karkhana Gadhi,
Taluka: Georai, District: Beed.

... Respondent
(Original Plaintiff)

...

Mr. Thigale Girish K. (Naik), Advocate for the Petitioner
Mr. Indani Madanlal S. and U.M. Indani, Advocate for the
Respondent

...

CORAM : V. K. JADHAV, J.
DATED : 13th NOVEMBER, 2019

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of the parties, heard finally at admission stage.
2. Being aggrieved by the order dated 18.07.2016 below Exhibit-12 passed by the learned 2nd Joint Civil Judge, Junior Division, Georai, in Regular Civil Suit No.367 of 2011, the petitioner - original defendant has filed the present writ petition.
3. The petitioner herein had instituted Special Civil Suit No.56 of 2008 for specific performance of contract and the

subject matter of the suit is an agricultural land Gut No.17 admeasuring 2 H. 28 R. (5 Acre 22 Gunthe) situated at village Belgudwadi, Taluka Georai, District Beed. The respondent herein is the owner of the said suit property. He had agreed to alienate the suit property in favour of the petitioner herein (plaintiff in Special Civil Suit No.56 of 2008) for consideration of Rs.6,35,000/-. The respondent herein (original defendant in Special Civil Suit No.56 of 2008) had accepted earnest amount of Rs.1,00,000/- and executed an agreement of sale in favour of the petitioner. The said agreement of sale was registered before Notary at Georai on 26.05.2005. Moreover, the possession of the suit property was also delivered to the petitioner on 24.06.2005. Further, the petitioner has also paid an amount of Rs.25000/- in cash to the respondent and the separate receipt came to be executed to that effect. There was encumbrance of loan of Bank of Maharashtra, Branch Gadi, Taluka Georai and Marathwada Gramin Bank, Branch Jategaon, Taluka Georai. The petitioner has paid certain amount towards the loan outstanding in the name of respondent and the petitioner has also paid certain amount towards the tax etc. as detailed in the plaint of the said suit. Though the petitioner was ready and willing to perform his part of contract, the respondent had not responded to the notice given by the petitioner and failed to execute the sale deed. The petitioner herein was therefore constrained to institute the said Special

Civil Suit No.56 of 2008 for specific performance of contract. It is precisely the defence of the respondent that the petitioner herein is indulged in the money lending business without licence and the matter pertains to the loan amount. It is also the defence of the respondent that the petitioner herein got executed an agreement to sale of the suit property by exercising undue pressure, force and threats to life. It has been specifically contended that the suit has been instituted with *malafide* intention to grab the suit property and in fact, the petitioner herein has not paid any amount, as alleged by him, to the respondent. On the basis of these pleadings, the parties went for trial and the learned Joint Civil Judge, Senior Division, Beed, by judgment and decree dated 18.04.2011, dismissed the suit. Being aggrieved by the same, the petitioner herein preferred Regular Civil Appeal No.159 of 2012 before the District Court. Though he had preferred First Appeal No.1978 of 2011 before this Court, during the pendency of appeal, due to enhancement of pecuniary jurisdiction, the same came to be transferred to the District Court at Beed and numbered as Regular Civil Appeal No. 159 of 2012. During pendency of the present writ petition, the District Judge-2, Beed, by judgment and order dated 22.02.2019, partly allowed the appeal and modified the decree under appeal to the extent of refund of earnest amount, however, confirmed the decree to the extent of dismissal of the suit seeking the relief of specific

performance of contract. Being aggrieved by the same, the petitioner herein has preferred the Second Appeal before this Court, which is pending.

4. Meanwhile, the respondent herein has instituted Regular Civil Suit No. 367 of 2011 for recovery of possession on the basis of earlier */is*. The petitioner - original defendant in Regular Civil Suit No. 367 of 2011 had filed an application Exhibit-12 under Section 10 of the Code of Civil Procedure, 1908, for staying the suit. The trial Court has rejected the said application by the impugned order dated 18.07.2016. Hence, this writ petition.

5. Learned counsel for the petitioner submits that the parties and subject matter in both the suits are same. Learned counsel submits that the object of Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. Learned counsel submits that the fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as *res-judicata* in the subsequent suit. Learned counsel submits that the object underlying Section 10 is to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. Learned counsel submits that in the previously instituted suit filed by the present petitioner bearing Special Civil Suit No. 56

of 2008 seeking the relief of specific performance of contract, the respondent herein, who is the original defendant in the said suit, has taken a specific plea that the agreement to sale came to be executed by him under pressure and threats given to him by the petitioner herein. In the said Special Civil Suit No. 56 of 2008, the trial Court has recorded the findings in the negative to issue nos.1 and 2 which dealt with the pleadings about exercising undue pressure and delivery of possession under force and threats raised by the present respondent. Learned counsel submits the respondent herein has instituted the said suit bearing Regular Civil Suit No.367 of 2011 with the same pleading and further, the cause of action for institution of the said suit is also shown as dismissal of the previously instituted suit bearing Special Civil Suit No.56 of 2008. Learned counsel submits that the present petitioner has strong hope of success in the pending second appeal before this Court and in case, if the second appeal is allowed and in consequence thereof, if the suit instituted for specific performance of contract is decreed, the said judgment would operate as *res-judicata* in the subsequently instituted suit. Learned Judge of the trial Court ought to have allowed the application Exhibit-12 filed under Section 10 of C.P.C.

6. The learned counsel for the petitioner in order to substantiate his contention has placed reliance on the following cases:

I) **Padmabai w/o Bhaurao Patil Vs. Shaikh Shahadulla Sk. Abdulla and Anr.** reported in **2010 (7) Mh. L.J.**

II) **Gupte Cardiac Care Centre and Hospital Vs. Olympic Pharma Care (P) Ltd.** reported in **(2004) 6 SCC 756**

III) **Maharashtra State Co-operative Marketing Federation Ltd.** reported in **1996 (2) Mh. L.J. 925**

7. Learned counsel for the respondent submits that the petitioner herein has lost the case before the trial Court so also in the first appeal before the District Court for the relief sought by way of Special Civil Suit No.56 of 2008. Learned counsel submits that the respondent is entitled for the decree of recovery of the possession in the suit instituted for recovery of the possession. It cannot be stayed for indefinite period till disposal of the Second Appeal which is pending before this Court. Learned counsel submits that in the event, if the present petitioner succeeds in his second appeal, pending before this Court, he may institute the suit for possession of the suit property. Learned counsel submits that the issue in both the suits are different. Learned counsel submits that the subject matter of Regular Civil Suit No.367 of 2011 is not directly and substantially in issue in a previously instituted suit bearing Special Civil Suit No. 56 of 2008 and as such, the provisions of Section 10 of the Civil Procedure Code are inapplicable. The learned judge of the trial Court has rightly rejected the application Exhibit 12. There is no substance in the writ petition. The writ petition is liable to be dismissed.

8. The learned counsel for the respondent in order to substantiate his contention has placed reliance on the following cases:

I) **British Indian Corporation Ltd. Vs. Rashtraco Freight Carriers** reported in **(1996) 4 SCC 748**

II) **Pukhraj D. Jain and Others Vs. G. Gopalakrishna** reported in **AIR 2004 SC 3504**

III) **National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara** reported in **AIR 2005 SC 242**

IV) **Sairabi Sayyad Abdul Aziz deceased through her L.Rs. and Others Vs. Abdul Rashid Abdul Majid** reported in **2002 (3) Bom. C.R. 139**

9. On perusal of the judgment and decree passed by the trial Court in a previously instituted suit bearing Special Civil Suit No.56 of 2008 between the same parties for the same subject matters, it appears that the respondent herein has resisted the said suit with almost similar pleadings. While disposing of the Special Civil Suit No. 56 of 2008, the trial Court recorded the findings in the negative to issue Nos. 1 and 2 and thereby held that the respondent herein failed to prove that the petitioner obtained agreement of sale from him by exercising undue pressure and further failed to prove that he delivered the possession under force and threats to his life given by the petitioner. On perusal the copy of plaint in Regular Civil Suit No.367 of 2011, instituted by the respondent for

recovery of possession of the said suit property against the petitioner, in Paragraph No. 3 of the plaint, the similar pleading raised about execution of agreement of sale under pressure and undue influence exercised by the petitioner herein. It is also pertinent to note that in Paragraph No.8 of the plaint, the cause of action for institution of the said suit is shown as dismissal of the Special Civil Suit No.56 of 2008. It has been specifically pleaded that due to dismissal of the suit bearing Special Civil Suit No.56 of 2008, the respondent herein is entitled for recovery of the possession. In view of the same, if the petitioner herein succeeds in the pending second appeal before this Court and if the instituted suit bearing Special Civil Suit No. 56 of 2008 is decreed for relief of specific performance of contract, the said judgment and decree would operate as *res-judicata* and as such, the respondent herein would not be entitled to seek the relief of recovery of possession in the suit bearing Regular Civil Suit No.367 of 2011. Furthermore, the continuation of second suit would possibly invite the conflicting decision. In view of the same, to avoid the multiplicity of litigation, it is necessary to stay the subsequently instituted suit bearing Regular Civil Suit No.367 of 2011.

10. In the case of **Padmabai w/o Bhaurao Patil Vs. Shaikh Shahadulla Sk. Abdulla and Anr.** reported in **2010 (7) Mh. L.J.**, relied upon by the learned counsel for the petitioner, this Court (Coram: S.S. Shinde, J.) in the identical

facts of the case in Paragraph No.7 has made the following observations:

“7. The trial court in para 4 has observed that the suit filed by the defendants i.e. Special Civil Suit No. 191 of 2007 for specific performance is relating to suit property relying on Sauda pavti. The defendants/present respondents have prayed for executing the sale deed in their favour by the court and in the suit filed by the petitioner who is original plaintiff, she has claimed cancellation of said Sauda pavti. Thus, the Sauda pavti is the main subject matter in both the suits and if the suit filed by the petitioner is allowed to be continued then definitely possibility of conflicting decisions cannot be ruled out. In such circumstances, to avoid multiplicity of the litigation, it is necessary to stay the suit which is filed subsequently by the petitioner. Therefore, what follows from para 4 of the impugned order is that the subject matter of both the suits is same. Though the learned counsel tried to contend that the prayer in the suit filed by the plaintiff is totally different, it appears that though the prayer clause "A" was there earlier, the same has been deleted afterwards. On going through the pleadings in the suit filed by the petitioner, the petitioner herself has stated that the subject matter of both the suits is same and both the parties are asking similar relief, therefore, I find that the trial court has taken possible view and therefore, I do not see any infirmity or perversity in the findings recorded by the trial court. No interference is called for in extra ordinary jurisdiction of this Court under [Article 227](#) of the Constitution of India. Hence, writ petition is dismissed. Rule discharged. Interim relief, if any, stands vacated. Civil application, if any, stands disposed of. There shall be no order as to costs.”

11. In the case of **Gupte Cardiac Care Centre and Hospital Vs. Olympic Pharma Care (P) Ltd.** reported in **(2004) 6 SCC 756**, relied upon by the learned counsel for the

petitioner, wherein the Supreme Court held that the object of Section 10 is also avoidance of possibility of conflicting decrees, duplication of evidence, saving time and energy of courts and parties.

12. In the case of **Maharashtra State Co-operative Marketing Federation Ltd.** reported in **1996 (2) Mh.L.J. 925**, the Division Bench of this Court has even held that Section 10 is applicable to the summary suits.

13. Learned counsel for the respondent has placed reliance the following cases wherein all cases the same principle is laid down about the applicability of Section 10 of the C.P.C. The fundamental test is considered as to whether on final decision being reached in the previous suit, such decision would operate as *res-judicata* in the subsequent suit. Only on the basis of title of the suit, it cannot be inferred that the matter in issue in the previously instituted suit is not directly and substantially in issue in the later suit.

14. In view of the same, in my considered opinion, the trial court has erred in rejecting the application Exhibit-12. In view of the discussion above, the application Exhibit-12 filed by the petitioner deserves to be allowed by setting aside the impugned order passed by the trial Court. Hence, the following order:

ORDER

- I. The writ petition is hereby allowed in terms of prayer clause 'B'.
- II. Rule made returnable in the above terms.
- III. The writ petition is accordingly disposed off.

(V. K. JADHAV, J.)

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