

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1728 OF 2014

Ramdas Rupla Wagh (died)

through L.R.s.

1A) Smt. Vithabai Ramdas Wagh

Age : 75 years, Occ : Agriculturist

1B) Shri. Bhausahab Ramdas Wagh

Age : 48 years, Occ : Agriculturist

1C) Shri. Avinash Ramdas Wagh

Age : 36 years, Occ : Agriculturist

All R/o : Khalane, Tq. Malegaon,

District-Nashik.

....Petitioners

(Orig. Opponents)

: V E R S U S :

1) Mohd. Ayyub Mohd. Bashir

Age : 52 years, Occ : Business,

R/o : S.No. 132, Zhopda No.6,

Golden Nagar, Malegaon,

Tq. Malegaon, District-Nashik.

2. Mohd. Farooque Mohd. Ayub

Age : 28 years, Occ : Business

R/o. S.No.132, Zhopda No.6,

Golden Nagar, Malegaon,

Tq. Malegaon, District-Nashik.

3) Anna Tanna Pagare,
Died, Through legal heirs,
Smt. Shantabai Chiman Diware,
Age : 79 years, Occ : Household,
R/o : Dahiwal, Tq. Malegaon
District- Nashik.

4) Kadubai Dayaram Kedare,
Age : 41 years, Occ : Agriculture,
R/o : Dahiwal, Tq. Malegaon,
District-Nashik.

5) Sau. Chayabai Vinayak Bachhav,
Age : 46 years, Occ : Household
R/o : Malhandgaon, Tq. Malegaon,
District-Nashik.

6) Sau. Jayabai Madhukar Nikam,
Age : 43 years, Occ : Household,
R/o : Londha Nagar, Bhau Wasti,
Dabhadi, Tq. Malegaon
District-Nashik.

7) Sau. Alka Ramesh Nikam
Age : 40 years, Occ : Household,
R/o : Narayan Masterchi Chawl,

Chital Road, Dhule,

Tq. and District- Dhule

....Respondents

ALONGWITH
SECOND APPEAL NO. 516 OF 2014

Ramdas Rupla Wagh (died)
through L.R.s.

1A) Smt. Vithabai Ramdas Wagh
Age : 75 years, Occ : Agriculturist

1B) Shri. Bhausaheb Ramdas Wagh
Age : 48 years, Occ : Agriculturist

1C) Shri. Avinash Ramdas Wagh
Age : 36 years, Occ : Agriculturist
All R/o : Khalane, Tq. Malegaon,
District-Nashik

....Appellants
(Orig. Opponents)

V/s.

1) Mohd. Ayyub Mohd. Bashir
Age : 52 years, Occ : Business,
R/o : S.No. 132, Zhopda No.6,
Golden Nagar, Malegaon,

Tq. Malegaon, District-Nashik.

2. Mohd. Farooque Mohd. Ayub
Age : 28 years, Occ : Business
R/o. S.No.132, Zhopda No.6,
Golden Nagar, Malegaon,
Tq. Malegaon, District-Nashik.

3) Sau. Chayabai Vinayak Bachhav,
Age : 46 years, Occ : Household
R/o : Malhangaon, Tq. Malegaon,
District-Nashik.

4) Sau. Jayabai Madhukar Nikam,
Age : 43 years, Occ : Household,
R/o : Londha Nagar, Bhau Wasti,
Dabhadi, Tq. Malegaon
District-Nashik.

5) Sau. Alka Ramesh Nikam
Age : 40 years, Occ : Household,
R/o : Narayan Masterchi Chawl,
Chital Road, Dhule,
Tq. and District- Dhule **Respondents**

Mr. R.B. Raghuvanshi i/by. Ms. Rutuja Ambekar,

Advocate for the petitioners.

Mr. N.R. Bubna, Advocate for respondents no.1 and 2.

CORAM : SANDEEP K. SHINDE, J.

RESERVED ON : 5TH JULY, 2019.

PRONOUNCED ON : 13th August, 2019.

ORAL JUDGEMENT :

1. Rule. Rule is made returnable forthwith. Respondents waive service.

2. Heard finally with the consent of the parties at the admission stage.

3. The petitioners are challenging legality and validity of order dated 6th August, 2013 passed by the Learned IInd Joint Civil Judge Junior Division, Malegaon passed below Exhibit-

5 in Regular Civil Suit No. 356 of 2012 and order dated 7th January, 2014 passed by the Ad-Hoc District Judge-2, Malegaon in Civil Misc. Appeal No. 24 of 2013.

FACTS :

4. Vedubai T. Pagare sold the land, Revisional Survey No. 27/2 corresponding (new Gat No. 96) (hereinafter called "the suit property") to Ramdas R. Wagh by executing a registered sale-deed on 2nd January, 1957. Her son, Anna T. Pagare was minor at the relevant point of time, who after attaining majority in the year 1965, instituted the suit almost 37 years after the execution of the sale-deed for specific performance of agreement of re-conveyance dated 2nd January, 1957. It is Anna's case that, the sale-deed dated 2nd January, 1957 was a conditional sale-deed whereunder the

vendors had reserved a right to seek re-conveyance of the suit land upon certain terms and conditions. Be that as it may, Regular Civil Suit No. 310 of 1994 instituted by Anna was decreed *ex-parte* on 25th March, 1986. The learned trial judge thus directed the defendant, Ramdas Wagh to execute the deed of re-conveyance. Aggrieved by the *ex-parte* decree, Ramdas Wagh preferred an Appeal against the *ex-parte* decree alongwith an application for condonation of delay. Pending Appeal, the executing Court executed the decree and resultantly possession of the suit land was handed over to Shantabai Dharave, sister of Ramdas Wagh. It appears, Shantabai transferred the suit land to her daughter, Kadubai and inturn Kadubai sold the suit land to, Mohd. Ayyub Mohd. Bashir and Mohd. Farooque Mohd. Ayyub (respondents no.1 and 2) by registered sale-deed executed on 24th June, 2002.

5. It appears from the record that, an Appeal was preferred by Ramdas Wagh being Regular Civil Appeal No.117 of 2002 against the *ex-parte* decree and the same was allowed by the Appellate Court on 10th June, 2004, whereby the *ex-parte* decree was set aside and the parties were relegated to the trial Court.

6. Thus, the Regular Civil Suit No. 310 of 1994 was taken up for trial wherein Ramdas Wagh had filed a counter claim and sought possession of the suit land which was handed over to Anna Pagare pursuant to the decree dated 25th March, 1986 passed against Ramdas Wagh. On 30th June, 2007 the trial Court dismissed the suit instituted by Anna Pagare and allowed counter claim of Ramdas Wagh. That as such, the trial Court directed respondents no.1 and 2 to handover possession of the suit land to Ramdas

Wagh.

7. That during the pendency of these proceedings, the suit land was sold by the heirs of Ramdas to the respondents no.1 and 2 on 24th June, 2002 and therefore respondents no.1 and 2 herein preferred an Appeal being Regular Civil Appeal No. 60 of 2007 against the decree dated 30th June, 2007 passed in Regular Civil Suit No. 310 of 1984. Pending Appeal, the decree in Regular Civil Suit No 310 of 2007 (in the cross-objections in the counter-claim) was executed and resultantly possession of the suit land was handed over to Ramdas Wagh. On 10th December, 2007, however, Regular Civil Appeal No. 60 of 2007 preferred by respondents no.1 and 2 herein was allowed on 28th February, 2011 whereby Ramdas Wagh was directed to handover possession to respondents no.1 and 2 herein.

8. The legal representatives of Ramdas thus filed Second Appeal No. 281 of 2011 before this Court challenging order dated 28th February, 2011 which came to be dismissed on 23rd February, 2012. It may be stated that, as on the date of dismissal of the Appeal, the legal heirs of Ramdas were not in possession of the suit land. This Court, however, while dismissing the Appeal by order dated 23rd February, 2012 has observed in para-12 thus :

"In the event, appellant (Ramdas through his heirs) chooses to file independent proceedings for possession, the observations made in the instant year would not come in the way of the appellant and the said proceedings, needless to say, would be tried on merits and in accordance with law."

9. Thus, in view of the observations made by this Court as reproduced hereinabove; the

heirs of Ramdas instituted Regular Civil Suit No. 356 of 2012 seeking a declaration of their title to the suit land in view of the sale-deed dated 2nd January, 1957 and are also seeking a decree of perpetual injunction restraining respondents no.1 and 2 from disturbing their possession in the suit land and/or creating third party interest therein. In the prayer clause (c), the petitioner's-plaintiff also sought stay to the execution of the decree passed in Appeal No.60 of 2007. Pending suit, an application for the interim relief sought therein was rejected by the trial Court on 6th August, 2013. The petitioners-plaintiffs carried this order in Civil Misc. Appeal No. 24 of 2013 which was partly allowed on 7th January, 2014 whereby respondents no.1 and 2 were directed not to create third party interest in the suit land but refused to stay the execution of the decree

passed in Regular Civil Appeal No.60 of 2007.

10. It is the order dated 7th January, 2014 passed in Civil Misc. Appeal No.24 of 2013 which is under challenge in this petition.

11. It may be stated that, after dismissal of the Second Appeal preferred by the legal representatives of Ramdas, the respondents no.1 and 2 had filed an application being Civil Misc. Application No.9 of 2013 under Section 144 of the Civil Procedure Code for restoration of possession. This application was allowed and restitution was granted vide order dated 06th August, 2013. Aggrieved by the order of restoration, the heirs of Ramdas preferred Appeal No.85 of 2013. However, the Appellate Court dismissed the Appeal on 7th January, 2014 against which the petitioners herein had

preferred Writ Petition No. 1729 of 2014. Having found that the Writ Petition was not maintainable, that leave of the Court was sought for converting writ petition into Second Appeal. Leave has been granted and thus the order and decree passed in Appeal No. 85 of 2013 by the First Appellate court is under challenge in Second Appeal No.516 of 2014.

12. In view of the administrative order, Writ Petition and the Second Appeal were directed to be placed before the Court taking up the Writ Petition and in view thereof, the Writ Petition and the Second Appeal are taken up for hearing.

13. I have perused the order dated 7th January, 2014 passed in Regular Civil Appeal No. 85 of 2013. This Appeal arises out of the

proceedings instituted by the respondents under Section 144 of the CPC.

14. In terms of Section 144 of the CPC, if any decree or order of the Court is varied or reversed, in any appeal, revision or other proceedings or is set aside or is modified in any suit instituted for the purpose, the Court which passed the decree or order, shall on application of any party entitled to any benefit by way of restitution or otherwise, caused such restitution to be made and place the parties in the same position which they would have occupied but for such decree or order.

. The doctrine of restitution implies that where a party derives benefit by virtue of a decree or order which was later set aside or modified, has to surrender the said benefit derived by him. The underlying principle is that

on the date when the restitution application was filed the decree which was executed was reversed or modified and, therefore, status quo ante has to be restored as no litigant should suffer on account of a wrong order passed by Court. In order that this section may apply, three conditions are necessary to be satisfied-

(1) the restitution sought must be in respect of the decree or order which had been varied or reversed.

(2) the party applying for restitution must be entitled to a benefit under a reversing decree or order; and

(3) the relief claimed must be properly consequential on the reversal or variation of the decree or order.

15. In the case at hand, in the Regular Civil Appeal No. 60 of 2007, the Appellate Court set aside the decree in counter claim in Regular Civil Suit No. 310 of 1984 and ordered the father of the appellants to restore the possession of the suit land to the respondents no.1 and 2 (original defendants no.3 and 4). The judgment and decree in the Regular Civil Appeal No. 60 of 2007 has been confirmed in the Second Appeal by this Court. It may also be stated, the decree passed in the Regular Civil Appeal No.60 of 2007 is holding the field and has attained the finality and in view of this fact, both the Courts correctly declined to protect the possession of the petitioners-appellants during the pendency of the suit instituted by them being Suit No. 356 of 2012. Thus, the Second Appeal does not give rise to any substantial question of law.

16. So far as order dated 7th January, 2014 passed in the Civil Misc. Appeal No. 24 of 2013 is concerned, which is impugned in the Writ Petition, no interference is called for, for the simple reason that, once the order under Section 144 is upheld by this Court in Second Appeal No. 516 of 2014, obviously the possession of the petitioner cannot be protected and therefore the Writ Petition fails and is dismissed. Admittedly, the petitioners are in possession of the suit land. However, since we have declined to interfere in the orders passed in the restitution proceedings, petitioners /appellants are directed to handover possession of the suit land to the respondents, Mohd. Bashir and Mohd. Farooque within four weeks from today.

. It is, however, made clear that, since the petitioners' suit, being Regular Civil Suit No. 356 of 2012 is pending, as matter of propriety,

the defendants in the suit, shall not create third party rights during the pendency of the suit.

17. Upon consideration of the facts of the case, in the interest of justice, the trial Court is requested to conclude the proceedings in Regular Civil Suit No. 356 of 2012 on/or before 31st March, 2020.

18. The petition and the Second Appeal are accordingly dismissed with no order as to costs.

(SANDEEP K. SHINDE, J)