

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 78 OF 2019
WITH
CIVIL APPLICATION NO. 1342 OF 2018
IN
SECOND APPEAL NO. 78 OF 2019**

Dr. Sou. Hemlata Rajkumar Kothari ... Appellant/Applicant

V/s.

Shri Annasaheb Ramchandra Kore ... Respondent

Mr. Prajakt M. Arjunwadkar for the appellant/applicant.

Mr. Sandesh Patil I.by Ms. Anusha Pravin Amin for the respondent.

CORAM : SMT. SADHANA S. JADHAV, J

DATED : 27th JANUARY 2020.

PC. :

1. Heard the respective parties.
2. The appellant herein happens to be the original plaintiff in Regular Civil Suit No. 106 of 2006. The suit was filed for perpetual injunction before the 2nd Joint Civil Judge Junior Division, Miraj.
3. The respondent herein had filed a counter claim seeking possession of the properties on the ground that the appellant herein had agreed to purchase a portion of the land bearing City Survey No. 6304/4(A)1, 6304/4(A)2 and 6304/4(A)3.
4. The date of the agreement was 19/09/1988 for a consideration of Rs. 40,000/-. The defendant had accepted the said

amount. The period for fulfilling the agreement was extended by a period of 10 years. In these circumstances the original defendant had filed counter-claim in Regular Civil Suit No. 106 of 2006 seeking possession of the suit property. It is pertinent to note that the Court of 2nd Joint Civil Judge Junior Division, Miraj by judgment and order dated 17th September 2012 had decreed the counter claim with costs and had directed the defendant to deposit an amount of Rs.70,000/- within a month. The Court had further observed that the plaintiff had admitted that his possession is permissive and plaintiff has only filed a suit for perpetual injunction, which was barred under section 41(h) of the Specific Relief Act. Section 41 (h) of the Specific Relief Act, 1963 reads as under:-

“(h).... when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust”.

5. In view of the said legal provision the Court had dismissed the suit. It was also observed that after depositing the amount of Rs. 70,000/- the defendant would be entitled to obtain possession from plaintiff after the plaintiff pays the taxes, telephone bills and electricity bill of the suit house till handing over the possession and the arrears would be deducted from the amount of Rs. 70,000/-. The plaintiff (appellant) being aggrieved by the dismissal of the suit preferred Regular Civil Appeal No. 572 of 2012 before the District Judge at Sangli. It is pertinent to note that the plaintiff had not challenged the decree passed in favour of the original defendant by allowing his counter claim. The second appeal is directed against the judgment and order passed by the District Judge, Sangli in Regular Civil Appeal No.

572 of 2012 vide judgment and order dated 6th February 2018. Hence, the judgment and order, allowing the counter-claim would attain finality.

6. The substantial questions of law which would fall for determination are as follows :-

“Whether on the ground that the Respondent has sought counter claim the Courts below ought to have accepted the case of injunction and ought to have granted the relief in favour of the Appellant”.

“Whether the Courts below ought to have appreciated that the Respondent was not entitled to file counter claim in respect of the land which was not even allotted to his possession”.

“Whether the Courts below ought to have appreciated that the simplicitor suit for injunction Defendant cannot file counter claim and Defendant ought to have invoked an independent proceeding for the relief of possession”.

7. The learned counsel for the respondent has placed reliance upon the judgment of Apex Court in the case of ***Ejaz Ahmed Aslam v/s. Mohammad Azim Ahmed*** reported in 2018 SCC Online Del 12284, wherein the Hon’ble Apex Court has held thus:-

*“I am of the opinion that a separate appeal was required to be filed against the decree allowing the counter-claim and am supported in this view by **Rajni Rani v. Khairati Lal**, (2015) 2 SCC 682 holding, (i) a counter-claim preferred by the defendant in a suit is*

*in the nature of a cross-suit and has an independent status; and, (ii) the Court is required to pronounce a final judgment in the same suit, both on the original claim and also on the counter-claim. Reference may also be made to **Deepak Mitra v. United Bank of India, 2012 SCC Online All 2255, Yellappa v. Hussainsab Fakrusab Angadi, 2014 SCC Onlie Kar 12546, Satnam Singh v. Mohan Singh, 2016 SCC Online HP 2813, Jethu Singh v. Board of Revenue and Darayas Bamanshah Medhora v. Nariman Bamansha Medhora, AIR 2002 Guj. 166**".*

8. In the facts of the case, the substantial questions of law as framed by the appellant would not arise and deserve no consideration in view of the judgment of the Apex Court as well the fact that the decree passed in favour of the defendant was never challenged and all that was challenged in First Appeal was the dismissal of the suit seeking perpetual injunction.

9. In view of this the second appeal being sans merits deserves to be dismissed with no costs. The Civil Application is accordingly disposed of.

(SMT. SADHANA S. JADHAV, J)