

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

921 SECOND APPEAL NO.137 OF 2021

Sukhdev Limbaji Shirsat

.. Appellant

Versus

Vitthal Baburao Gaikwad

.. Respondent

...

Mr. Narayan B. Narwade, Advocate for the Appellant

...

WITH

CIVIL APPLICATION NO.3417 OF 2021

....

CORAM : MANGESH S. PATIL, J.

DATE : 13-01-2022

PER COURT :

. Heard learned advocate Mr. Narwade for the appellant.

2. The appellant is the original defendant against whom the suit for possession of the suit property based on title being put forth by the respondent - plaintiff has been decreed and his appeal against the decree has been dismissed.

3. Learned advocate Mr. Narwade for the appellant would submit that in fact the original owner of the suit property had agreed to sell it to one Dattu Janardhan Wable by an agreement of sale dated 04-04-1989. The respondent had purchased it by a sale-deed executed on the very next day. The appellant has been in possession on the basis of that agreement since before 1977. The learned Advocate would further submit that the respondent had earlier filed R.C.S. No.152 of 2005 claiming possession of the selfsame suit property, but the suit was dismissed. Taking advantage of the fact that R.C.S. No.370 of 2007 filed by the present appellant seeking a declaration that the sale-deed in favour of the respondent was not binding on him, was dismissed that the respondent has filed a fresh suit for possession which was clearly barred by Order-9 Rule-9 of the Code of Civil Procedure (hereinafter referred to as the 'C.P.C.') for failure to seek any restoration of the earlier suit. Both the courts below have illegally refused to consider this legal aspect. The substantial question of law, therefore, arises for determination at the hands of this court and the appeal may be admitted.

4. I have carefully considered the submissions and perused the judgments of the two courts below. There is not much of a

dispute about the facts. The appellant specifically admitted about the respondent having purchased the suit property under a sale-deed dated 05-04-1989. There is also no dispute about the fact that the present appellant had filed R.C.S. No.370 of 2007 seeking a declaration that the sale-deed was null and void, however, it was dismissed and the dismissal has reached finality. The two courts below have rightly appreciated that there cannot be any dispute now as regards the title of the respondent over the suit property on the basis of the sale-deed dated 05-04-1989.

5. Though the respondent is admitting the appellant's possession over the suit property, by virtue of the aforementioned conclusion the logical and legal corollary would be that it is the respondent who would be holding the title of the suit property and entitle to claim possession.

6. The only ground that is now being put forth by the learned advocate for the appellant that filing of a separate suit instead of seeking restoration of the earlier suit bearing R.C.S. No.152 of 2005 is barred in view of the Order-9 Rule-9 of the C.P.C.

7. The appellate court in its judgment has specifically

observed that in fact the original suit was dismissed under Order-9 Rule-3 and not under Order-9 Rule-8 of the C.P.C. Conspicuously, Order-9 Rule-3 of the C.P.C. would be applicable where neither party appears and the suit is dismissed when it is called out for hearing, whereas under Order-9 Rule-8 it is only when the plaintiff does not appear and the suit is dismissed then only the situation would be governed by Order-9 Rule-9. Bar to a separate suit under Order-9 Rule-9 would apply only if the suit is dismissed under Rule-8, there is no such bar under Rule-4 when the suit is dismissed under Rule-3 and the separate suit is a remedy available to the plaintiff, however subject to the law of litigation. This is what has been precisely noticed and observed by the appellate court.

8. The appeal memo is conspicuously silent on this aspect and does not specifically make out the facts relevant for arriving at a conclusion as to if the dismissal of the earlier suit was under order-9 Rule-9.

9. In light of above, when there are concurrent findings of facts based on the aforementioned facts and circumstances, no substantial question of law arises.

10. The second appeal is dismissed.

11. In view of dismissal of the second appeal, nothing survives for consideration in the civil application and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE

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Gajanan