

Pooja K.

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 266 OF 2019
WITH
CIVIL APPLICATION NO. 5541 OF 2019
IN
SECOND APPEAL NO. 266 OF 2019

Burhan Khan Karim Khan (died)
Thr LRs Rahimabi Burhan Khan and Ors. ... Appellants
Versus
Sanjay Rambhau Raut ... Respondent

...
Mr. A.P. Bhandari – Advocate for Appellants
Mr. M.R. Malpani h/f. Mr. A.B. Kale – Advocate for Respondent
....

CORAM : GAURI GODSE, J.
DATE : 1st February, 2023

PER COURT :

1. Heard.
2. The Second Appeal is admitted on the following substantial questions of law :
 - a. Whether the suit of the present appellants could have been dismissed by relying upon the findings recorded in Regular Civil Appeal No.305 of 2004 where the present appellants were neither party to the proceedings nor their predecessors were party to the said proceedings ?

- b. Whether the suit could have been dismissed by holding that the appellants were required to file a suit for declaration, as there was objection raised to the title which showed that there was a cloud over the title of the appellants, though there was a specific issue framed with respect to the rights of the parties and evidence was led with respect to the same ?
3. Mr. M.R. Malpani holding for Mr. A.B. Kale – learned counsel appearing for sole respondent waives service.
4. Call for record and proceedings.
5. Printing is dispensed with.
6. The appellants to file private paper book containing judgments of both the courts, first appeal memo, pleadings, notes of evidence and exhibited documents, within a period of one year from today.

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7. The Civil Application is filed for an order of injunction for protecting the possession of applicants over the suit property.
8. Learned counsel for respondent had filed a affidavit in reply.

9. Learned counsel for respondent submits that, there is concurrent findings that the present applicants were not found in possession, hence there is no reason for granting injunction at this stage in favour of the applicants.
10. It is not disputed that during the pendency of the appeal, order of injunction was operating in favour of the present applicants. There was also interim protection in favour of the present applicants during the pendency of Regular Civil Appeal No. 74 of 2018. The said order is placed on record of the present civil application. After Second Appeal is filed the same interim protection was continued in favour of the present applicants and the same is operating till date.
11. Though there is no specific findings with respect to possession of the present applicants over the suit property by both the courts, the fact cannot be ignored that neither there is any record in favour of present respondent which showed that respondent is in possession of suit property. However, the findings recorded with respect to the case of the present applicants on the point of description of the suit property is partly answered in favour of

present applicants by the trial court and same is confirmed by the first appellate court. In such circumstances, prima-facie case is made out in favour of the present applicants. Considering the findings recorded by both the courts and considering that during the pendency of the appeal, there was an order of injunction operating in favour of the applicants, there will be interim relief in term of prayer clause 'B', during the pendency of the Second Appeal, which reads as under :

“B) Pending hearing and final hearing of the present Second Appeal, the respondent, his servants, agents or any other persons claiming through the respondent, may kindly be restrained from interfering in possession of the Applicant over the property bearing CTS No.13918-B, i.e. 20750, more particularly described in para no.1 of the plaint in Regular Civil Suit No.577 of 2012.”

12. Mr. M.R. Malpani holding for Mr. A.B. Kale – learned counsel appearing for sole respondent waives service.
13. The Civil Application is disposed of in above terms.

[GAURI GODSE]
JUDGE