

SPChauhan

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

SECOND APPEAL NO. 641 OF 2019
WITH
CIVIL APPLICATION NO. 11293 OF 2016
IN
SECOND APPEAL NO. 641 OF 2019
WITH
SECOND APPEAL NO. 642 OF 2019
WITH
CIVIL APPLICATION NO. 11295 OF 2016
IN
SECOND APPEAL NO. 642 OF 2019

Ahilyabai Ajinath Shinde

... Appellant

Versus

Kundlik Rama Akre

... Respondent

....

Mr. H.V. Tungar – Advocate for Appellant

Mr. K.R. Doke – Advocate for Respondent

....

CORAM : GAURI GODSE, J.

DATE : 17th February, 2023

PER COURT :

1. Both the Second Appeals are preferred by the original defendant for challenging the common judgment and order dated 6th January 2016 passed by the learned District Judge – 1, Bhoom, in Regular Civil Appeal Nos. 149 of 2014 and 150 of 2014

arising out of a common judgment and order dated 13th October, 2010, passed by the learned Civil Judge Junior Division, Bhoom, in counter claim of Regular Civil Suit No. 156 of 1997 and Regular Civil Suit No. 277 of 2001. Earlier Regular Civil Suit No. 156 of 1997 was filed by the respondent for declaration of ownership and for injunction protecting possession over the suit property. The suit property is a land bearing Survey No. 378/B. The said suit which was filed on 24th June, 1997, was allowed to be withdrawn on 06th February, 2001, by granting liberty to file a fresh suit. The case of the respondent for the purpose of filing the fresh suit was that during the pendency of the earlier suit there was encroachment made by the appellant and, therefore, the earlier suit was withdrawn seeking leave to file fresh suit for possession. The suit filed by respondent is on the basis of title of the suit property. The appellant had filed counter claim in the earlier Regular Civil Suit No. 156 of 1997, praying for specific performance of an oral agreement. It was the case of the appellant that she was put in possession of the suit property pursuant to the oral agreement and, therefore, she filed counter claim for specific performance of the oral agreement. Though the Regular Civil Suit No. 156 of 1997 was

withdrawn, the counter claim was proceeded and tried along with the fresh suit bearing RCS No. 277 of 2001 which was filed for possession of the suit property.

2. Separate evidence was recorded in the counter claim of the appellant as well as in the fresh suit that was filed by the respondent. The counter claim of the appellant as well as the suit of the respondent was disposed of by a common judgment and order dated 13th October, 2010. The counter claim of the appellant was dismissed and the Regular Civil Suit No. 277 of 2001 filed by the respondent was decreed and the appellant was directed to deliver the possession of the suit property as described in the suit being Regular Civil Suit No. 277 of 2001.
3. Being aggrieved and dissatisfied by the common judgment and order passed by the trial Court, the appellant preferred two separate Civil Appeals. By common judgment and order dated 06th January, 2016, both the Regular Civil Appeals preferred by the appellant were dismissed. Hence, the present separate Second Appeals are filed. Second Appeal No. 641 of 2019 is arising out of Regular Civil Appeal No. 149 of 2014 which arises out of the counter claim filed in Regular Civil Suit No. 156 of 1997. Second Appeal No. 642 of 2019 arises out of

Regular Civil Appeal No. 150 of 2014 which arises out of the decree for possession passed in Regular Civil Suit No. 277 of 2001.

4. Learned counsel appearing for the appellant submitted that the earlier suit was withdrawn by the respondent with liberty to file a fresh suit with respect to the same suit property, however, in the fresh suit that was filed the description of the property was changed. Learned counsel further submitted that since the fresh suit was filed on a specific case that the appellant had encroached on the suit property, respondent was under obligation to specifically plead boundaries with respect to the alleged encroachment. However, the boundaries which were specified on page no. 5 of the earlier suit and the boundaries that were described in the fresh suit were completely different.
5. Learned Advocate further submitted that in the counter claim that was filed by the appellant the boundaries of the property in possession of the appellant were specifically described. It was the specific case of the appellant that she was put in possession, pursuant to the oral agreement. Learned counsel for the appellant further submitted that paragraph no. 3 of the written statement very specifically shows that the boundaries as

described by the respondent was disputed by pointing out the actual boundaries with respect to the area in possession of the appellant. It was the specific case of the appellant that there was a concluded contract between the parties which was an oral contract and pursuant to that the appellant was put in possession of the suit property as specifically pleaded in the counter claim.

6. Learned Advocate for the appellant further submitted that there is no order for clubbing both the suits together. The learned Advocate submitted that the record shows that separate evidence was recorded with respect to the counter claim of the appellant and the suit of the respondents. Learned Advocate further submitted that the evidence was recorded after 15 years of the date of filing of the suit and, therefore, if any variances were noticed in the evidence of the appellant as well as the witnesses, the same should have been ignored. In support of this submission, the learned Advocate relied upon the decision in the case of ***Tukaram Laxman Karale Vs. Baba Govind Sase and another***¹.

7. Learned Advocate further submitted that the findings recorded by the Trial Court in paragraph no. 16 of the judgment shows the inability of the witnesses to give specifications and/or

¹ 2009 (5) ALL MR 899

particular details with respect to the transactions. The learned Advocate for the appellant submitted that the minor variances in the evidence of the witnesses should have been ignored on the ground that the oral evidence was recorded after 15 years of the date of filing of the suit. Learned Advocate further submitted the trial Court ought not to have relied upon the certified copies of the criminal proceedings that were produced on record by the respondent with respect to a criminal complaint that was filed by the appellant. He submitted that the certified copies which were produced on record are not controverted by showing the same to the appellant at the time of her cross examination and since she was never controverted on the said documents, the same were not admissible in evidence and that the same could not have been relied upon by the Trial Court. In support of this submission the learned Advocate relied upon the decision of this Court in the case of *Legal Representatives of Manohar Vs. Vishweshwar Tiikaram Giripunje*². He, therefore, submitted that all the aforesaid facts would show that substantial question of law arises in the Second Appeal and hence, the Second Appeal requires to be admitted.

8. Learned Advocate for the respondent submitted that though the theory of encroachment was not accepted by the Trial Court, the fact cannot be ignored that the appellant had pleaded that she was in possession only pursuant to the oral agreement that was pleaded by her in the counter claim. He thus submitted that once appellant failed to prove that there was any concluded contract as pleaded by her, she had no right to retain the possession. He, therefore, submitted that though finding with respect to encroachment was recorded against the respondent by the Trial Court, the first appellate Court accepted the case of encroachment as pleaded by the respondent. Thus, the respondent was entitled to a decree for possession on the ground that the appellant had failed to prove that she was put in possession pursuant to an oral agreement. In support of his submissions, the learned Advocate for respondent has relied upon the decision of the Hon'ble Supreme Court in the case of ***Revanasiddayya Vs. Gangamma alias Shashikala and another***³. Thus, the learned advocate for the respondent submitted that there was no merit in the submission made on behalf of the appellant. There was no question of law involved

³ AIR 2017 Supreme Court 5682

in the second appeals and thus the same were liable to be dismissed.

9. I have considered the submissions made on behalf of both the parties. I have perused the record of the Second Appeal as well as the private paper book containing pleadings and evidence. Perusal of the plaint in Regular Civil Suit No. 156 of 1997 filed by the respondent shows that the suit property is specifically described in the schedule annexed to the plaint. The said suit was filed for declaration of ownership and injunction restraining the appellant from obstructing possession of the respondent over the suit property. The appellant appeared in the said suit and filed written statement denying the suit claim as well as filed counter claim praying for specific performance of the oral agreement. Thus, the respondent in the counter claim contended that by way of oral agreement the respondent had agreed to sell the suit property to the appellant for a consideration of Rs. 20,000/- and at the time of oral agreement possession of the suit property was handed over to the appellant.
10. The respondent filed an application to withdraw the said suit with liberty to file fresh suit. The said application was allowed and pursuant to the liberty granted to the respondent he filed a

fresh suit being Regular Civil Suit No. 277 of 2001. Respondent contended in the said suit that during the pendency of the earlier suit the appellant carried out encroachment on the suit property and claimed to be in possession of the suit property. Hence, the respondent had withdrawn the earlier suit and filed a fresh suit for seeking a decree of possession of the suit property as specifically described in red color in the map annexed to the plaint. The appellant filed a written statement and denied the suit claim. The counter claim of the appellant in the earlier suit as well as the fresh suit filed by the respondent were tried together. The trial Court decided the counter claim as well as the fresh suit of the respondent by a common judgment. The trial Court framed separate issues in the counter claim and the fresh suit that was filed by the respondent. Both the parties led separate evidence. However, both parties had filed pursis for relying upon the separate evidence in both the proceedings for decision of the counter claim as well as the fresh suit together. Thus, by examining the evidence in both the proceedings the trial Court rejected the counter claim filed by the appellant for specific performance of the oral agreement in respect of the suit property. By the common judgment the fresh suit filed by the

respondent was decreed and the appellant was directed to hand over possession of the suit property to the respondent.

11. The trial Court disbelieved the case of the appellant with respect to the execution of the oral agreement. On appreciation of the oral as well as documentary evidence the trial Court came to the conclusion that the appellant was unable to prove her case with respect to the oral agreement. Thus, the trial Court held that the appellant had admitted the ownership of the respondent over the suit property and that she had also admitted the description of the suit property. The trial Court held that the appellant failed to plead and prove the terms and conditions of the oral agreement. Thus, once the title of the respondent was admitted by the appellant and she failing to prove the execution of the oral agreement the appellant was not entitled to continue with the possession of the suit property.
12. The trial Court had framed an issue as to whether the appellant had encroached upon the suit property. The trial Court has answered the issue in the negative, however after consideration of the evidence on record, had arrived at a finding that on failure of the appellant to prove her case of oral agreement, she was not entitled to retain the possession of the suit property. Thus, the

trial Court concluded that the respondent was entitled for a decree of possession as claimed by him in the fresh suit.

13. Perusal of the judgment of the first appellant Court shows that the learned District Judge has re-examined the entire evidence on record and confirmed the finding of the trial Court. The first appellate Court has held that the appellant failed to prove the terms and conditions as well as the mode of payment. With respect to pleading of execution of oral agreement in favour of the appellant, the first appellate Court also held that the appellant failed to prove that she was put in possession of the suit property on the basis of oral agreement as pleaded by her. Thus, the first appellate Court concluded that as appellant failed to prove the oral agreement pursuant to which she claimed to be in possession of the suit property, the appellant had no right to retain the possession of the suit property. Thus, the first appellate Court held that possession of the appellant over the suit property was not a lawful possession. The first appellate Court thus confirmed the decree of possession passed by the trial Court on the ground that the title of the respondent was not disputed and the appellant having failed to prove her case of

oral agreement, the respondent was entitled for a decree of possession.

14. Perusal of the counter claim shows that the appellant has not pleaded any particulars with respect to the terms and conditions of the oral agreement. The pleading as well the evidence did not support the case of the appellant. There is nothing on record to show that there was any concluded contract in favour of the appellant. Except for raising a plea that prior to 7 years the respondent had agreed to sell the suit property to the appellant and that she was put in possession of the suit property, no particulars are pleaded with respect to the theory of the oral agreement. Once there were no particulars pleaded with respect to any concluded contract in favour of the appellant, both the Courts have rightly refused to grant specific performance as claimed by the appellant. The source of being in lawful possession is only on the basis of the oral agreement as pleaded in the counter claim. The title of the respondent is admitted by the appellant. Once the case of oral agreement is disbelieved and the title of the respondent is admitted, appellant cannot be said to be in lawful possession of the suit property. Both the Courts have on appreciation of evidence recorded finding of

facts with respect to the case of execution of the oral agreement as well as possession of the appellant over the suit property. All the submissions made on behalf of the appellant are based on facts. I do not find that the Second Appeal raises any substantial question of law.

15. The decision of this Court in the case of ***Tukaram Laxman Karale*** relied upon by the learned Advocate for the appellant is of no assistance to the facts of the present case. Perusal of the said decision shows that the issue was with respect to specific performance on the basis of a document which was produced on record. Thus, in view of the documentary evidence on record it was held that the credibility of testimony, oral or circumstantial would depend on judicial examination of the totality and not isolated scrutinies. Thus, in the facts of the case involved it was observed that some inconsistencies or variances in evidence of witness with respect to some extent can be ignored, if inconsistencies or discrepancies go to the root of the matter. Thus, on examining the oral as well as documentary evidence on record, the said observations are made by this Court. So far as the present case is concerned, the appellant has come out with a case only on the basis of oral agreement. Perusal of the plaint

shows that the appellant has not pleaded any particulars with respect to the terms and conditions of the oral agreement. Hence, even otherwise in absence of any particulars pleaded by the appellant with respect to any concluded contract coupled with the variances and discrepancies in the oral evidence led on behalf of the appellant is sufficient to disbelieve the case of the appellant. Thus, discrepancies in the oral evidence is not the only ground to disbelieve the case of the appellant. Thus, the said decision relied upon by the learned Advocate for the Applicant is of no assistance to the appellant.

16. In so far as the decision of this court in the case of ***Legal Representatives of Manohar*** relied upon by the learned Advocate for the appellant is concerned the same is not applicable to the facts of the present case. The said decision was relied upon by the learned Advocate for the appellant in support of his submission that the copies of the criminal complaint relied upon by the respondent ought not to have been held against the appellant as certified copies of the complaint was not a public document and hence contents of the same would require proof. The reasonings given by both the Courts for holding that the appellant failed to prove the execution of oral

agreement in her favour and that there was no other right claimed by the appellant to remain in possession of the suit property, is not only on basis of the copies of certified copies of complaint.

17. In view of failure on the part of the appellant to prove any right to retain possession of the suit property, both the Courts have rightly held against the appellant and passed a decree for handing over of possession of the suit property to the respondent. Hence, the decision of this Court in the case of ***Legal Representatives of Manohar*** is of no assistance to the submissions made on behalf of the appellant.
18. There is no merit in the submissions made on behalf of the appellant. I do not find any illegality or perversity in the findings recorded by both the Courts. Thus, for the reasons stated above, I do not find that the Second Appeal raises any substantial question of law. Both the Second Appeals are dismissed.
19. At this stage, learned counsel for the appellant requested for extension of interim relief that was already granted. Learned counsel for the respondent opposed the said request on the ground that both the Courts below have recorded findings in

favour of the respondent, hence there will be serious prejudice to the rights of the respondent if order of the stay is extended. Considering the nature of the decree and facts of the case, interim order granted on 23rd August, 2022, to continue for a period of 12 weeks from today.

[GAURI GODSE, J.]