

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.509 OF 2015
WITH
CIVIL APPLICATION NO. 4928 OF 2016
IN
CIVIL APPLICATION NO. 12053 OF 2015
WITH
SECOND APPEAL NO. 510 OF 2015
WITH
CIVIL APPLICATION NO.12053 OF 2015
IN
SECOND APPEAL NO. 509 OF 2015

Navnath Sitaram Halnawar

... Appellant

Versus

Shivdas Rama Ingale
(Since deceased) Through L.Rs.
Ramesh Shivdas Ingale and others

... Respondents

...

Mr. Shrikant M Kawade - Advocate for Appellant
Mrs. C.S. Deshmukh, Advocate for respondent nos.1 to 3 and 5 to 7

....

CORAM : GAURI GODSE, J.

DATE : 15th February, 2023

PER COURT :

1. The Second Appeal No. 509 of 2015 is filed by the original defendant challenging the judgment and decree passed by the First Appellate Court thereby allowing the suit filed by the respondent-plaintiff directing appellant to hand over the

possession of the suit property to the plaintiff. There were two separate suits filed by both the parties and there was common judgment of both courts. Hence the parties are referred to by their names.

2. Present appellant Navnath filed Regular Civil Suit No. 69 of 2005 praying for declaration of title by way of adverse possession and injunction for protecting his possession. Respondent – Shivdas filed Regular Civil Suit No.87 of 2005 for declaration that he is in exclusive possession of the suit property on the basis of title and for possession of the suit property, by way of amendment as he was dispossessed during pendency of the suit.
3. Learned Civil Judge, Junior Division, Jamkhed partly allowed Regular Civil Suit No. 69 of 2005 filed by Navnath and the present respondent i.e. Shivdas was restrained from obstructing possession of Navnath over the suit property till he is evicted by due procedure of law. Regular Civil Suit No. 87 of 2005 filed by Shivdas was dismissed by the trial Court.
4. Being aggrieved and dissatisfied by the judgment and decree passed in both the suits, Shivdas preferred two separate appeals.

Regular Civil Appeal No.371 of 2010 was preferred for challenging the judgment and decree passed in suit filed by the present appellant i.e. Navnath. Regular Civil Appeal No.372 of 2010 was preferred for challenging dismissal of the suit that was filed by Shivdas.

5. Both Regular Civil Appeals were decided by common judgment dated 21st July, 2015 passed by the learned Principal District Judge, Ahmednagar. Learned District Court allowed both the Civil Appeals and dismissed the Cross Objection that was filed by Navnath. The First Appellate Court decreed the suit filed by Shivdas and directed Navnath to hand over the vacant and peaceful possession of suit property. Hence, Navnath has preferred the Second Appeal No. 509 of 2015 arising out of the judgment and decree passed in Regular Civil Appeal No.372 of 2010 and Regular Civil Suit No. 87 of 2005. Second Appeal No. 510 of 2015 is arising out of Regular Civil Appeal No. 371 of 2010 as well as Regular Civil Suit No. 69 of 2005, which is dismissed by district court.
6. Learned counsel appearing for appellant (Navnath) submitted that the First Appellate Court has committed error in grossly

mis-appreciating the evidence on record. He submitted that at least two witnesses were examined on behalf of Navnath to show that he was in continuous possession of the suit property. He, therefore, submitted that question of law arises in Second Appeal as there is gross mis-appreciation of oral evidence on record. He, therefore, submitted that it is necessary to admit Second Appeal on the said question of law.

7. Learned counsel for the appellant further submitted that the suit filed by him for declaration of title by adverse possession was dismissed by holding that such suit for seeking relief of declaration is not maintainable, and that, such claim for adverse possession can be made only by way of defence and suit can not be filed for declaration. He submitted that, the said question of law arises in Second Appeal as in view of sections 9 and 9-A of the Code of Civil Procedure, 1908 ("CPC"), the Civil Court is under obligation to decide whatever the suit is filed before the Civil Court. He further submitted that if the issue of maintainability had arisen, it was obligatory on the part of Civil Court to frame the issue under section 9 of CPC and try the same, however, no such procedure as contemplated under

section 9 of CPC has been adopted by both the Courts. Hence, he submitted that this is the question of law, which is required to be considered in the Second Appeal.

8. He also submitted that written statement that was filed by Navnath in suit filed by Shivdas contained similar pleadings and even if it is held that if the suit filed on the ground of adverse possession was not maintainable, both the Courts ought to have considered these pleadings in the written statement, which were raised by way of defence for opposing grant of decree for possession.
9. Learned counsel for the appellant has also sought to argue that respondent – Shivdas was not the sole owner of the suit property and it has come on record that Tukaram is one of the joint owner of the suit property. Hence, it was necessary for the Trial Court to have dismissed the said suit for non-joining of co-sharers as party defendants to the suit.
10. I have perused the proceedings of both the Second Appeals and I have considered the submissions made. First Appellate Court has examined minutely all oral evidence that was produced by present appellant – Navnath in support of his case with respect

to his long standing possession. In the judgment, the First Appellate Court from para no.20 has dealt with the admissions given by Navnath that he is not aware of the original owner/real owner of the suit property. In cross-examination, appellant – Navnath also admitted that since there was no claim made on ownership, there is no reason for denying the title. Appellant – Navnath has failed to make out any case with respect to his title over to the suit property for protecting the title by way of adverse possession. The appellant even has refused to state as to the adverse possession is being claimed against which owner. For the purpose of granting decree for possession on the ground of adverse possession, it is necessary that there was specific pleadings as to since when and what manner the appellant was in possession and that possession was adverse to the title of the true owner. In absence of any such pleadings and supporting evidence, the First Appellate Court has rightly refused to grant relief as claimed by the appellant on the ground of adverse possession. Perusal of the judgment passed and reasoning given by the First Appellate Court shows that after examining the entire oral evidence as well as documentary evidence on record,

the First Appellate Court, which is last fact finding Court, has held that the appellant has failed to prove his theory of adverse possession.

11. There is no dispute with respect to the title of the respondent – plaintiff – Shivdas as the appellant is claiming relief on the ground of adverse possession. Once there is a finding recorded with respect to the title of the respondent and the appellant when failed to prove his theory of adverse possession, I do not see any reason as to why the decree for possession as prayed by the respondent could not have been decreed.
12. With respect to submissions regarding non-joinder of necessary parties is concerned, perusal of both the judgments do not show that any such specific issue was argued and framed before the Trial Court. The judgment and decree of the trial Court as well as the judgment of the First Appellate Court do not show that any such specific contention was raised. Hence, for the first time, in Second Appeal, there was no question of entertaining a ground as to the co-owners required to be joined as necessary parties to the suit. Even otherwise, the ownership of respondent

– Shivdas is not disputed, hence Shivdas being owner of the suit property was entitled for decree for possession.

13. In my view, the submissions that are made on behalf of the appellant regarding dismissal of his suit as not maintainable is concerned, the said argument is contrary to the findings recorded. The suit of Navnath is not dismissed on the ground that it is not maintainable. The suit of Navnath is dismissed on merits. The first Appellate Court has rightly decreed the suit of Shivdas holding him as owner. There is no merit in the submissions made on behalf of appellant. No substantial question of law is involved in both the Second Appeals. Hence the Second Appeals are dismissed.

14. In view of the dismissal of the Second Appeals, pending Civil Application No. 12053 of 2015 is disposed of as infructuous.

Civil Application No. 4928 of 2016

15. This application is preferred by Shivdas-decree holder in Regular Civil Suit No. 87 of 2005. Civil Application is filed for withdrawal of amount of Rs.1,50,000/- that was deposited in the Court of Civil Judge, Junior Division, Jamkhed pursuant to the

order dated 21st September, 2015 that was passed in both the Second Appeals. By order dated 21st September, 2015, this Court had granted stay to the decree for possession subject to condition of depositing an amount of Rs.1,50,000/- by the appellant in the Trial Court. Since the said amount was directed to be deposited by way of condition for grant of stay, it is necessary to pass an order of withdrawal of the same in view of the dismissal of the Second Appeals.

16. Learned counsel for the appellant Navnath submitted that since the amount is deposited by Navnath as a condition for grant of stay and now Second Appeals are dismissed, the appellant is entitled to withdraw the same.
17. It is well established law that when an amount is deposited by way of condition for grant of stay, the withdrawal of that amount may be permitted depending upon the result of the main proceedings. In view of dismissal of the Second Appeals, I see no reason in not allowing the respondent – decree holder to withdraw the amount that was deposited by the appellant by way of a condition for grant of stay to the execution of the decree for possession in favour of the respondent. The respondent was

deprived of the fruits of the decree in view of the interim order of stay. Now the Second Appeals are dismissed on merit. Hence the amount that was deposited by the appellant in the Trial Court is allowed to be withdrawn by the respondent Shivdas as prayed in Civil Application No.4928 of 2016. Civil Application No. 4928 of 2016 is allowed in above terms.

[GAURI GODSE, J.]