

SGA

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

**SECOND APPEAL NO.641 OF 2022
AND
CIVIL APPLICATION NO. 12340 OF 2022
IN
SECOND APPEAL NO. 641 OF 2022
WITH
SECOND APPEAL NO. 640 OF 2022
AND
CIVIL APPLICATION NO. 12339 OF 2022
IN
SECOND APPEAL NO. 640 OF 2022
WITH
SECOND APPEAL NO. 6 OF 2021
AND
CIVIL APPLICATION NO. 470 OF 2021
IN
SECOND APPEAL NO.6 OF 2021
WITH
SECOND APPEAL NO. 88 OF 2021
AND
CIVIL APPLICATION NO. 470 OF 2021
IN
SECOND APPEAL NO. 88 OF 2021**

Onkar Shravan Phutke (Died)
Through L.Rs.
1-A) Ashok alias Sudhakar Onkar Phukte
and others ... Appellants

Versus

Smt. Hirabai Vishawanath Jangam
(Died)
Yogesh Vishwanath Jangam
and others ... Respondents

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Mr.S.B. Yawalkar - Advocate for Appellant in SA Nos.641 of 2022, 640 of 2022 and for respondent nos.1-A to 1-G in SA No.6 of 2021 and SA No.88 of 2021

Mr.N.C. Swami – Advocate for respondent nos.2 to 5 in SA No.641, 640 of 2022 and for respondent no.2 in SA No.6 of 2021 and SA No.88 of 2021

Mr.S.S. Gangakhedkar – Advocate for respondent nos.6-A to 6-F in SA No.641 of 2022, 640 of 2022 and for appellants in SA No.6 of 2021 and SA No.88 of 2021 .

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CORAM : GAURI GODSE, J.

DATE : 10th January, 2023

PER COURT :

1. Appellants in Second Appeal No.641 of 2022 and Second Appeal No.640 of 2022 are the original plaintiffs. Second Appeal No.6 of 2021 and Second Appeal No.88 of 2021 are filed by original defendant no.6. The plaintiff - Onkar Phutke filed a suit for declaration of his right on the ground of adverse possession and in the alternative had prayed for specific performance of an agreement, which was executed in his favour by Annapurnabai. Defendant nos.2 to 6 are claiming to be heirs and legal representatives of deceased Annapurnabai. In the suit counter claim was filed by defendant nos.2 to 5 for possession on the ground that they are the heirs and legal representatives of

Annapurnabai. By judgment and decree dated 28th January, 2010, the learned Civil Judge, Junior Division, Soyegaon dismissed the suit as well as counter claim. Hence plaintiff filed Regular Civil Appeal No. 92 of 2010. Defendant nos.2 to 5 filed Regular Civil Appeal No.96 of 2010 against dismissal of their counter claim. It appears that being aggrieved by the certain findings in the judgment of the trial Court, defendant no.6 filed Regular Civil Appeal No.83 of 2010. By common judgment dated 4th August, 2018, learned District Judge-7, Aurangabad decided all the three appeals. Regular Civil Appeal No.96 of 2010 preferred by defendant nos.2 to 5 is allowed by the learned District Judge and Regular Civil Appeal No.83 of 2010 and Regular Civil Appeal No.92 of 2010 filed by the plaintiff and defendant no.6 are dismissed. By the decree passed by the first appellate court the findings recorded by the trial Court on the issue nos.3 to 10 are set aside and defendant nos.2 to 5 are held entitled to get possession of the suit property from the plaintiff. Thus, the plaintiff is directed to hand over the possession to defendant nos.1 to 5. By the same judgment, the counter claim made by defendant nos.2 to 5 was thus decreed.

2. Being aggrieved by the dismissal of the appeal filed by the plaintiff, he has filed Second Appeal No.640 of 2022. The plaintiff has filed separate Second Appeal No.641 of 2022 challenging the judgment and decree passed for allowing the counter claim of defendant nos.2 to 5. Defendant no.6 has filed Second Appeal No.6 of 2022 challenging the judgment and decree passed by the appellate Court in Regular Civil Appeal No.96 of 2010, which was filed by defendant nos.2 to 5 and Second Appeal No.88 of 2021 is filed for challenging the dismissal of the Regular Civil Appeal No.83 of 2010, which was filed by defendant no.6.
3. Learned counsel appearing for the plaintiff has submitted that he filed suit for declaration of title on the ground of adverse possession and alternative he had prayed for specific performance of the agreement. He submits that inter-se there is dispute with respect to which of the defendant is heir and legal representatives of the original owner Annapurnabai. He submits that considering the main relief sought in the suit it was necessary to decide the suit with respect to his claim for adverse possession, however, the suit was mainly decided on the ground

of his alternative prayer of specific performance and in view of the findings given on the specific performance, his claim for adverse possession was also dismissed. He submits that thus, there is substantial questions of law that arises in the second appeals. Hence the appeals be admitted.

4. I have perused the judgments of both the Courts. In my view, all second appeals are required to be admitted on the following substantial questions of law :-

“(i) Whether or not the possession of the proposed purchaser under the agreement of sale becomes adverse in the event sale deed is not executed and the remedy of specific performance becomes time barred ?”

(ii) When the documents like Gift Deed, Authority Letter claimed by the respondents no.2 to 5 are not admissible in evidence and are not proved, whether the First Appellate Court ought to have dismissed the Regular Civil Appeal No.96 of 2010?

(iii) When the respondents have failed to establish their heirship or succession with Annapurnabai Nago and the trial court has recorded finding to that effect, whether the First Appellate Court

erred in reversing the findings of the trial court without there being any substantial evidence to that effect ?

5. Office remarks show that the record and proceeding is already received.
6. Printing dispensed with.
7. Learned counsel appearing waives for respective respondents.
8. Appellants to file common private paper book in all the second appeals, containing judgments of both the courts, memo of first appeals, pleadings, notes of evidence and exhibited documents within a period of one year.

Civil Application No.12340 of 2022 in Second Appeal No.641 of 2022 and Civil Application No. 12339 of 2022 in Second Appeal No. 640 of 2022 :

Both civil applications are filed by the original plaintiff for seeking stay of the judgment and decree for possession. Second Appeals are already admitted. Hence, it is necessary to stay execution of the decree for possession. If the decree is not stayed, the same will render the Second Appeals to be infructuous. Hence, during pendency of the Second Appeals, there will be interim stay in terms of prayer clause 'b', which reads thus :-

“b. Stay the Effect, Operation, Implementation and Execution of the Judgment and Decree dated 04.08.2018 passed in Regular Civil Appeal No.96 of 2010 till the final decision of the present second appeal”

2. Civil applications are disposed of.

Civil Application No. 470 of 2021 in Second Appeal No. 6 of 2021

1. This civil application is filed for seeking stay of clause no.1 of the operative part of the common judgment and order dated 4th August, 2018 passed in Regular Civil Appeal No. 96 of 2010. The second appeal is admitted. Hence, during pendency of the second appeal, there will be interim stay in terms of prayer clause “B”, which reads thus :

“B) Pending hearing and final disposal of the Second Appeal, the effect, operation and implementation of the impugned Common Judgment and Decree dated 04.08.2018 passed by the District Judge-7, Aurangabad in Regular Civil Appeal No.96/2010, to the extent of clause No.1 of the operative part, may kindly be stayed.”

2. Civil application is disposed of.

**[GAURI GODSE]
JUDGE**