



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

WRIT PETITION NO.4246 OF 2023

Sau. Dewangi Deepak Ture Patil
Age 42 years, Occ. Housewife,
R/o Plot No.20, Devgiri N-7,C-2,
CIDCO, Aurangabad, Dist. Aurangabad.

...Petitioner

VERSUS

1. Vijay s/o Shyamrao Korde,
Age 46 years, Occu.Govt.Servant,
R/o N-12-C-65, Vivekanand Nagar,
In front of Rose Garden,
Aurangabad, Dist. Aurangabad.

2. Sau. Vandana Vijay Korde,
Age 42 years, Occu.Household,
R/o N-12-C-65, Vivekanand Nagar,
Aurangabad, Dist.Aurangabad.

...Respondents

...

APPEARANCE :

Advocate for the Petitioner : Mr. Vijay B. Patil

Advocate for Respondents: Ms. Harsha R. Lomte h/f Ms. V. D.Salunke

...

CORAM : ARUN R. PEDNEKER, J.

Dated : August 14, 2024

JUDGMENT :-

1. Rule. Rule made returnable. With consent of the parties, heard finally.

2. By the present petition, the petitioner challenges the order passed below Exhibit 15 in Special Civil Suit No. 49/2022, dated 11/01/2023, by the Joint Civil Judge, Senior Division, Aurangabad, staying the suit or its hearing until the decision of the previously instituted Special Civil Suit No. 167/2021, pending before the Civil Judge, Senior Division, Jalna, in the

exercise of powers under Section 10 of the Code of Civil Procedure.

3. The brief facts of the petition are as follows:

The petitioner and respondent No.1 are sister and brother. Respondent No.1 has filed Special Civil Suit No.167/2021 before the Civil Judge, Senior Division, Jalna, for partition and separate possession for his 1/5th share in the suit properties. The suit properties are mentioned in Clause (A) as agricultural lands and in Clause (B) as household properties. In the instant case, we are concerned with Clause (B) (2), which pertains to a house located at Aurangabad, from HUDCO N-12 No. A 98/65. In the said Special Civil Suit No. 167/2021, the petitioner has also sought a declaration that the registered gift deed bearing R.No. 2634/2021, executed by defendant No. 1 in favour of defendant No. 3, is void. However, for our purposes, no declaration has been sought regarding the assignment made by the petitioner's father in favour of the petitioner concerning the house property at Aurangabad, from HUDCO No. 12, No. A 98/65 as mentioned in Clause (B) (2) . The petitioner, being a defendant in the said Suit No. 167/2021, appeared along with the other defendants and filed their written statement, denying the contentions therein.

4. The present petitioner subsequently filed Special Civil Suit No.

49/2022 before the Civil Judge, Senior Division, Aurangabad, for the recovery of possession of the suit property, i.e., the first floor two BHK and ground floor shop constructed on Plot No. C-65, admeasuring 91.40 square meters, with a built-up area of 30.21 square meters, situated at N-12, (2nd Scheme, A-96 type), CIDCO, Aurangabad. The plaintiff further claims that by way of a registered assignment deed, vide Day Book No. 1131/2021, dated 03/02/2021, she purchased the suit property from her father, Shyamrao Namdeorao Korde. It is stated that the father of the plaintiff and defendant No. 1, who are residing separately, has retired from government service and is an elderly person. Due to the lack of other income sources, he needed funds for his day-to-day and medical expenses. Consequently, he decided to sell his self-acquired property. He sold this property to his daughter, the plaintiff, by way of a registered assignment deed, vide Day Book No. 1131/2021, dated 03/02/2021, for a consideration amount of Rs. 6,00,000/-, and also handed over possession of the said property to the plaintiff. In pursuance of the deed of assignment, the plaintiff obtained legal possession of the said property and had her name recorded in the CIDCO Office, Aurangabad. The CIDCO office also issued a transfer order in the plaintiff's name, vide No. CIDCO/ADMM/AEO/AUR/2021/452, dated 01/03/2021. After the deed of assignment, the defendants requested the plaintiff to permit them to reside in the suit property first floor 2

BHK and to use the ground floor shop temporarily while they arranged alternative house. Due to the familial relationship between the plaintiff and the defendants, the plaintiff allowed them to use the first floor 2 BHK, including one shop on the ground floor. Consequently, the defendants have been residing there with the plaintiff's prior permission, while the remaining portion of the building is in the plaintiff's possession, and she is using it.

5. The plaintiff stated in the plaint that she requires the suit premises for her personal use and residence. Consequently, on 25/12/2021, the plaintiff requested the defendants to vacate the premises. However, the defendants refused to comply. As a result, the plaintiff filed a Civil Suit No.49/2022 for recovery of possession on 15/10/2022 before Civil Judge, Senior Division, Aurangabad. In the said suit, the defendants filed an application Exhibit 15, seeking a stay of the proceedings under Section 10 of the Code of Civil Procedure.

6. Exhibit 15 contends that the plaintiff's father was not authorized to execute the assignment deed for the suit property in favour of the plaintiff. Defendant No. 1 claims to have an undivided share in the suit property, specifically in the construction on the plot allotted by CIDCO in the name of Shyamrao Korde (father of plaintiff and defendant No.1).

Therefore, the plaintiff's father had no legal right to transfer the property exclusively to the plaintiff. Consequently, the plaintiff is not entitled to obtain possession of the suit property as stated in the plaint. It is further averred that defendant No. 1 has filed Special Civil Suit No. 167/2021 for partition against all legal heirs, claiming a 1/5th share in the suit property, which includes the sale deed of several agricultural lands and household properties. The subject matter of Special Civil Suit No. 167/2021, pending before the Civil Judge, Senior Division, Jalna, is identical to that of Special Civil Suit No. 49/2022, which is pending before the Civil Court at Aurangabad. The parties involved in both suits are the same i.e. the present plaintiff and defendant No. 1. Therefore, Special Civil Suit No. 167/2021 filed by defendant No. 1 was instituted prior to the present Special Civil Suit No. 49/2022. The subsequently instituted suit should be stayed pending the decision of the previously instituted suit before the Civil Judge, Senior Division, Jalna. The issue to be determined in both suits concerns the nature of the suit property, specifically whether it is joint Hindu family property and whether defendant No. 1 can establish that he holds an undivided 1/5th share in the suit property. The issues in Special Civil Suit No. 167/2021, pending before the Civil Judge, Senior Division, Jalna, have not yet been framed. In contrast, issues in the present suit have been framed, as noted below Exhibit 14. However, the present suit does not include the issue

regarding the nature of the property, specifically, whether it constitutes joint family property of the family members of Shyamrao Korde, including the present plaintiff and defendant No. 1 and whether defendant No. 1 holds an undivided 1/5th share in the suit property. Therefore, an application for framing additional issues has been submitted. It is further contended that unless the common issues are resolved by the Civil Judge, Senior Division, Jalna, in Special Civil Suit No. 167/2021, Special Civil Suit No. 49/2022, being the subsequently instituted suit, cannot be decided.

7. Considering the application made, the Civil Court held that the suit is filed by the plaintiff against the defendants No.1 and 2 for recovery of possession of first floor and shop constructed on plot No.C-65, N-12, CIDCO Aurangabad and the suit is filed in the year 2021. On perusal of the record it appears that the defendants filed certified copy of Special Civil Suit No.167/2021 and admittedly the said suit is filed in the year 2021. The present suit is subsequent suit and Special Civil Suit No.167/2021 is an earlier suit. The plaintiff and defendant No. 1 in the present suit are also the plaintiff and defendant No. 4 in Special Civil Suit No. 167/2021, which was filed by the defendant No.1 in the Jalna Court. That suit seeks the partition of various properties, including the property involved in the present suit. According to Section 10 of the

Code of Civil Procedure, no court shall proceed with the trial of a suit if the matter in issue is directly or substantially the same as in a previously instituted suit between the same parties or parties under whom they claim, and which is pending in the same or any other court in India with jurisdiction to grant the relief claimed. Since the matter in the present suit is directly and substantially in issue in the previously instituted suit between the plaintiff and the defendant, the application is allowed, and the suit is stayed.

8. Challenging the order of the Trial Court passed below Exhibit 15, the present petition is filed. The petitioner contends that the Trial Court failed to properly consider the provisions and principles of Section 10 of the Code of Civil Procedure. Counsel for the petitioner, **Mr. Vijay B. Patil**, for the petitioner contends that in Special Civil Suit No. 167/2021, it is specifically pleaded that the property in question was allotted by CIDCO and purchased by defendant No. 1 with a HUDCO loan of Rs. 13,214/- in the year 1978. The plot was originally allotted to the father of the petitioner by CIDCO. The petitioner/plaintiff has purchased the property through a registered deed of assignment, and CIDCO has also transferred the suit plot in favour of the plaintiff. The present suit seeks only the recovery of possession of the suit property based on the deed of assignment. The issues in both suits are entirely

different. The respondent/ defendants No.1 and 2 are merely a licensee of the suit property. The claim in the present suit is based on the deed of assignment and the license granted to the respondent to occupy the property until alternate accommodation is found. The plaintiff claimed absolute ownership in the subsequent suit and the suit property is situated at Aurangabad. It is further stated the defendant No. 2 in the present suit is not a party to the partition suit. The titles of the two suits are not identical. It is further submitted that, in a suit for partition, if the plaintiff ultimately becomes entitled to a 1/5th share, that share would still be executed. The present suit, however, concerns only the recovery of possession of the property from the defendant by the plaintiff..

9. Per contra, learned Counsel **Ms. Harsha R. Lomate** holding for Mr. V. D. Salunke for respondents submits that although the nature of the suits and their prayers differ, both suits concern the same property. Therefore, it is argued that both courts cannot separately adjudicate the claims to the same property. The purpose of Section 10 of the Code of Civil Procedure is to prevent the multiplicity of proceedings and to avoid conflicting judgments from different courts. Consequently, the suit that was filed first in time should be given precedence over the later-filed suit. It is further contended that if it is determined that the plaintiff holds a 1/5th share in the suit property, including the present property,

then any subsequent assignment of the property by way of a gift deed or any other deed shall be nullified.

10. Considering the rival submissions, it is essential to note that Section 10 of the Code of Civil Procedure provides for staying a suit. The learned Counsel for the petitioner has relied on the decision in the case of **British India Corporation Limited vs. Rashtraco Freight Carriers, reported in 1996 (4) SCC 748**. The Hon'ble Supreme Court, in this case, has held as follows in paragraph 5 : -

“(5) Section 10 of Civil Procedure code envisages that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. It is seen that the claim of the respondent in the suit No.612/1994 is for the recovery of the alleged dues said to be payable by the appellant-Corporation while the suit of the appellant is for recovery of the goods lawfully entrusted to and unlawfully detained by the respondent. The causes of action are entirely different. There is no common issue directly or substantially in issue in both the suits. The High Court, therefore, committed gross error of law in staying the later suit.”

11. This Court, in the case of **Minguel Francis DCosta vs. Sultan Gulamali Karim Chhatriwala and Others, reported in 1999 (2) Mh.L.J. 473**, at paragraph 4, held that to apply Section 10 of the Code of Civil Procedure, four conditions must be satisfied : -

- “1. the issue must be common in both the suits;*
- 2. the previously instituted suit should be in the same Court in which the subsequent suit is filed. If it is in different Court, the Court where earlier suit is pending must have jurisdiction to grant reliefs claimed in the subsequent suit;*
- 3. both the suits must be between the same parties;*
- 4. such parties must be litigating in both the suits under the same title;”*

If any of the above conditions are not met, Section 10 of the Code of Civil Procedure will not apply.

12. This Court, in case of **Maria Monica Rodrigues vs. Elvino Dias and Others, reported in 2021 (4) All M.R. 738**, at paragraph 10, observed as follows : -

- “10. From the perusal of the pleadings in previous suit, it is apparent that the Respondent No.4 has sought for several reliefs primarily based upon his claim of title to the suit premises. In contrast, in the present suit the issue of title is quite irrelevant because this is a suit under Section 6 of*

the Specific Relief Act where the only issue is whether the Petitioner was dispossessed without his consent of immovable property otherwise than in due course of law. Section 6(4) of the Specific Relief Act makes it clear that nothing in this section bar any person from suing to establish his title to such property and to recover possession thereof. This means that even if the Petitioner was to succeed in the suit under Section 6 of the Specific Relief Act, the superior title holder can always recover the possession from the Petitioner by establishing his title."

13. Applying the principles established in the above cited judgments, to the fact of this case, it is clear that in the present case, the suit is for recovery of possession of suit property owned by the plaintiff under the deed of assignment and transfer of the suit property by CIDCO to plaintiff. Also the license granted to the defendants to occupy the suit premises by the plaintiff being revoked by the plaintiff the defendant failed to vacate the suit premises.

If it is ultimately determined in the plaintiff's suit for partition i.e. Special Civil Suit No. 167/2021 filed at Jalna, entitles him to a 1/5th share of the suit property, he would be entitled to claim possession of his share from the suit property. The findings in the present suit qua the entitlement of plaintiff for recovery of possession of suit premises on the basis of deed of assignment and transfer of the suit property to

the plaintiff by CIDCO and revocation of license by the plaintiff to occupy the suit premises will not operate as res-judicata to the suit of partition filed by the defendant No.1 at Jalna. The issue of title is not substantially in question in the present suit No.49/2022, and the parties involved are not identical. Defendant No.2 is not a party in earlier suit and relief of recovery of possession cannot be claimed against the defendant No.2 in the earlier suit. The present Civil Suit No.49/22 is filed against defendants No. 1 and 2, where defendant No. 1 is a party to the earlier suit, but defendant No. 2 is not. The possession is claimed from defendants No. 1 and 2, and the issues involved, are not identical to those in the earlier suit.

14. Since the subsequent suit only relates to the claim of possession based on revocation of license granted to the defendant to occupy the suit property and the plaintiff being the owner of the suit property deriving her title from the deed of assignment and transfer by CIDCO in favour of the petitioner, both suits can proceed simultaneously. The impugned order passed by the Court below is set aside. The parties are directed to proceed with Special Civil Suit No. 49/2022.

Rule is made absolute in above terms.

(ARUN R. PEDNEKER, J.)

vj gawade/-.