

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.113 OF 2024
WITH
INTERIM APPLICATION NO.1682 OF 2024
IN
SECOND APPEAL NO.113 OF 2024**

Rajiv Dadu Kamble

....Appellant/Applicant

V/S

Jayabai @ Bayabai Ganpati Kamble

....Respondents

Mr. Manoj Patil a/w Mr. Akash M. Murudkar *i/b* Mr. S.S. Borulkar *for the Appellant/Applicant.*

Mr. Suresh M. Kamble *for Respondents.*

CORAM: SANDEEP V. MARNE, J.

DATE : 8 MARCH 2024.

P.C.:

1 The Appellants have filed this Appeal challenging the judgment and decree dated 22 March 2022 passed by the District Judge-2,

Kolhapur dismissing the Regular Civil Appeal No.77 of 2018 and confirming the Decree dated 31 January 2018 passed by Civil Judge Junior Division, Gargoti in Regular Civil Suit No.43 of 2004. The Appellants had also filed Miscellaneous Civil Application No.73 of 2022 seeking review of the First Appellate Court's decree dated 22 March 2022. The Review Application is however rejected by the First Appellate Court by order dated 24 November 2023, which is also subject matter of challenge in the present Appeal.

2 Plaintiffs instituted Regular Civil Suit No.43 of 2004 against Appellants for seeking declaration that they are owners of the suit property as well as for a direction against Defendants for removal of the construction raised by them over the suit property. An order of injunction was also sought. Plaintiffs claim ownership in respect of the land admeasuring 5R in Gat No.833 at village Aakurde, Taluka Bhudargad, District Kolhapur, which was originally owned by Bharama Kamble who had son named Bhairu. The land devolved on to Bhairu's son Sadhu. Plaintiffs are the heirs of Sadhu Kamble. At the time of filing of the suit, apparently Sadhu Kamble was alive, but he was not impleaded as Plaintiff in the suit.

3 Defendants appeared in the suit and raised two inconsistent pleas. They claimed tenancy rights in respect of the suit property acquired by

their grandfather Laxman Krishna Kamble. Additionally, Defendants relied upon the alleged transaction of sale dated 7 June 1988, by which, according to Defendants, the suit property was sold by Sadhu Kamble to the father of the Defendant No.1. Defendants claimed that they constructed house on the suit property in the year 1997 in addition to construction of shed and toilet area. The Trial Court initially decreed the suit on 21 November 2007. Appellants filed Regular Civil Appeal No.99 of 2008 and the Principal District Judge, Kolhapur remanded the suit for fresh decision by order dated 25 January 2017. After remand, the Trial Court has proceeded to decree the suit on 31 January 2018 upholding the plea of ownership of the suit property by Plaintiffs. The Trial Court rejected the defence of tenancy as well as purchase of the suit property by them. The First Appellate Court has dismissed the Appeal filed by the Defendants/Appellants on 22 March 2022. The Application seeking review of First Appellate Court's decree is also rejected on 24 November 2023.

4 I have heard Mr. Manoj Patil, the learned Counsel appearing for the Appellant and Mr. Kamble, the learned Counsel appearing for the Respondents.

5. Mr. Patil would heavily rely upon the order passed by the Principal District Judge while remanding the suit on 25 January 2017.

He would submit that the District Judge had held that there was no cause of action for Plaintiffs to file the suit. That the real owner Sadhu Kamble was still alive at the time of filing of the suit. That the District Judge upheld the possession of the suit property by Defendants holding that the Plaintiffs' claim was totally false. He would take me through the evidence on record to demonstrate that the theory of Plaintiffs about construction of the house few days prior to filing of the suit was disproved by several admissions given by the Plaintiffs' witness that the house in the suit property was constructed in the year 1987. He would also rely upon evidence led by Sadhu Kamble, in which again, he admitted that the suit property, prior to construction of the house, was in possession of Defendants and their predecessors for cultivation. Mr. Patil would therefore submit that settled possession of Defendants over the suit property was clearly proved before the Trial Court and that therefore the Trial Court ought to have decreed the suit. That the suit was based on false cause of action and that the same was barred by limitation as Defendants' possession over the suit property for a period in excess of 12 years was proved.

6 I have considered the submissions canvassed by Mr. Patil. Defendants attempted to defend Plaintiffs' suit for declaration of title by raising a plea that they are the real owners of the suit property. They first raised claim of tenancy. Additionally, they also raised the claim of

purchase of property. The two pleas are clearly inconsistent. If Defendants were already protected tenants, there was no necessity for them to purchase the property in the year 1988. Be that as it may. In respect of their claim of tenancy, Defendants admittedly did not adopt any proceedings under the provisions of Maharashtra Tenancy and Agricultural Lands Act, 1948. Civil Court did not have jurisdiction to uphold their claim of protected tenancy. The claim of tenancy thus failed. So far as the claim about purchase of property is concerned, no evidence was led to prove such purchase transaction. Thus, the claim of the Defendants about ownership of the property is not proved in the suit. This being the position, Defendants' possession over the suit property would be without title.

7 On the contrary, Plaintiffs proved their ownership over the suit property. Thus Plaintiffs'suit was for recovery of possession from Defendants, who are not the owners. Plaintiffs sought recovery of the suit property by following due process of law.

8 Though Defendants'possession for some period is proved, such possession cannot defeat suit filed by owner seeking recovery thereof. Defendants did not set up a case of adverse possession. They never

claimed title in the suit property by prescription. Their possession was never adverse to the Plaintiffs. Therefore, the suit cannot be said to be barred by Article 65 of the Limitation Act. In this view of the matter, even if the findings recorded by the District Judge in the remand order dated 25 January 2017 about permissive use of the suit property by Defendants is to be accepted, I do not see any reason why owner's suit for recovery of possession can be defeated by a mere permissive user.

9 I am therefore of the view that the so-called settled possession of Defendants of the suit property, of which Plaintiffs are owners, would not entitle them to defeat the suit filed by Plaintiffs seeking a recovery of possession by following due process of law.

10 I therefore do not find any serious error in the view taken by the Trial Court and the First Appellate Court. No substantial question of law is involved in the present Appeal. The Second Appeal is accordingly **rejected.**

11 After the order was pronounced, Mr. Patil, the learned Counsel appearing for the Appellants would pray for stay of execution of the decree for a period of six weeks. The request is opposed by Mr. Kamble.

It appears that the decree of the Trial Court was not stayed during pendency of the Appeal before the First Appellate Court. Thus there is no stay on the decree of the Trial Court for the last six long years. Therefore, request for stay to execution of decree is rejected.

12 In view of the disposal of the Second Appeal, nothing survives in the Interim Application and the same is accordingly disposed of.

(SANDEEP V. MARNE, J.)