



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.32 OF 1999

Smt. Nabi W/o. Davji Gavit,
Age: 50 Years, Occu: Agril.,
R/o: Sonkhadke, Post Kolde,
Tq. Navapur, Dist. Nandurbar.

... **APPELLANT**
(Original Plaintiff)

VERSUS

1. Janya S/o. Tetya Mavachi,
(Deceased through L.Rs.)

1/A. Shantibai W/o. Janya Mavachi,
Age: 60 Years, Occu: Household,
R/o: Sonkhadke, Post Kolde,
Tq. Navapur, Dist. Nandurbar.

1/B. Naktibai W/o. Abhishek Gavit,
Age: 32 Years, Occu: Household,
R/o: Pimpran, Post Patibedki,
(Karanji Bk.), Tq. Navapur,
District Nandurbar.

2. Moghya S/o. Tetya Mavachi,
Age: 53 Years, Occu: Agril.,
R/o: Sonkhadke, Post Kolde,
Tq. Navapur, Dist. Nandurbar. ...

RESPONDENTS
(Orig. Defendants)

...
Advocate for Appellant : Mr. N. L. Jadhav.
Advocate for Respondent No.2 : Mr. P. P. Mandlik.
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CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 12.09.2025

PRONOUNCED ON : 18.09.2025

JUDGMENT

1. Heard both sides.
2. Second appeal is emanating from concurrent findings of facts in dismissing appellant's suit for injunction. Appeal was admitted on following substantial questions of law vide order dated 15.02.2001.
 - (i) When there is a decree for specific performance of contract in favour of the plaintiff/appellant whether the First Appellate Court was right in ignoring the said decree by keeping the finding reserved ?
 - (ii) What is the effect of the decree passed in R.C.S. No.4 of 1993 on the present suit ?
 - (iii) The plaintiff who was initially not entitled for property, if during the pendency of the suit becomes entitled for the said property, whether his suit for injunction has to be rejected.
3. Appellant is original plaintiff who claims to be in possession of land Gut No.115/A situated at Sonkhadaki,

Tahsil Navapur, District Nandurbar. It was belonging to Hurji. He was having three wives. Plaintiff claims to be a granddaughter of his first wife. The second wife was issue less. His third wife Vestibai survived. It is contended that plaintiff was looking after her mother Nendadibai and Vestibai. She was cultivating the suit land. A mutation entry No.10 was effected on 05.11.1977. The respondents are alleged to have obstructed her possession with an intention to grab the land. Hence, the suit was filed.

4. Respondents contested the suit and denied entitlement of the plaintiff as well as her possession over the suit land. The relationship also denied. They claimed to be nephews of Hurji. It is contended that as Hurji was not having any male issue and his daughter Nendadibai was already married. They were cultivating suit land with Hurji till his death and thereafter also. Vestibai was residing at her daughter's place.

5. Parties adduced oral evidence. Trial Court dismissed the suit holding that plaintiff was not in possession. Interestingly, plaintiff's mother Nendadibai who was witness of the respondents/defendants deposed against the claim of the

plaintiff, whose version was relied upon. The theory that plaintiff was looking after Nendadibai and Vestibai was discarded. The suit was dismissed on 31.01.1987.

6. Being aggrieved, plaintiff preferred Regular Civil Appeal No.177 of 1990 (Old Civil Appeal No.40 of 1987). Plaintiff amended plaint during pendency of appeal in pursuance of order dated 15.07.1997 below Exh.32. The subsequent developments were brought on record. It was additionally pleaded that on 11.02.1991 Vestibai executed agreement in favour of plaintiff and her husband as she was in need of money. Plaintiff filed Regular Civil Suit No.4 of 1993 for specific performance of contract and it was decreed. In pursuance of the subsequent developments, additional issue was framed by the Lower Appellate Court.

7. Lower Appellate Court considering material on record as well as subsequent events dismissed appeal vide judgment dated 28.07.1998.

8. Learned counsel Mr. Jadhav appearing for appellant submits that when amendment to the plaint was allowed and thereafter additional issue was framed, it was necessary to

permit plaintiff to adduce evidence and for that purpose to remand the matter to the Trial Court. But, no opportunity was given. He would submit that having secured decree of specific performance of contract in Regular Civil Suit No.4 of 1993, not only possession but the title of the plaintiff has been confirmed. It is submitted that the material on record is not properly appreciated by the Lower Appellate Court. It is submitted that inability of the plaintiff to prove her relationship with Vestibai does not disentitle her to protect her possession.

9. Learned counsel further submitted that when there was a partition in between Hurji and defendant's father Tetya, there was no question of joint cultivation of the suit land. Learned counsel refers to Order 41 Rule 24 to 28 to buttress that Appellate Court was obliged to take into account the subsequent events either by itself or by remitting the matter to the Trial Court. Reliance is placed on the judgment of ***Ram Kumar Barnwal Vs. Ram Lakhan ; 2007 (5) Supreme 53*** and ***Smt. Sarladevi Wd/o Kundanlal Vs. Shailesh S/o Gourishankar Namdeo and others ; 1996 (3) Bom.C.R. 537.***

10. Per contra, learned counsel Mr. Mandlik submits that there are concurrent findings of facts recorded by Courts below after appreciating material on record which need no interference. It is submitted that no tangible material was placed on record in the Trial Court to show that plaintiff was having any title or possession. It is vehemently submitted that the additional issue was specifically answered by assigning reasons. It is contended that attempt was being made by the plaintiff in the Trial Court itself for giving evidence of Vestibai by making application Exh.59 but it was rejected and became final.

11. It is submitted that no endeavour was made by the plaintiff to lead additional evidence or to refer the matter to the Trial Court. It is further contended that in the absence of any prayer for declaration a suit simplicitor for injunction was not tenable. It is further submitted that plaintiff's mother deposed against her. She did not even examine Vestibai.

12. I have considered rival submissions of the parties. Plaintiff examined herself and Davji. Defendants examined defendant No.1 Janya and Nendadibai. In the Trial Court

application Exh.59 was filed by the plaintiff seeking permission to place on record affidavit of examination-in-chief of Vestibai, but it was rejected. The order was not challenged during pendency of the suit or appeal also. Plaintiff's mother Nendadibai appeared as a witness of the defendants and supported their case. She denied plaintiff's possession.

13. In Lower Appellate Court, plaintiff brought on record subsequent developments of a decree dated 16.04.1993 passed in her favour in Regular Civil Suit No.4 of 1993. Her application Exh.32 was allowed. Following additional issue was framed ;

“Does plaintiff prove that in view of decree of specific performance, passed by learned Civil Judge Junior Division, Navapur in Regular Civil Suit No.4 of 1993, she (plaintiff) became the owner of the suit land and continued her previous possession over the same?”

In paragraph No.10 of the judgment, Lower Appellate Court considered the additional issue and held against her.

14. The subsequent events were permitted to be brought on record by Lower Appellate Court. The amendment to the plaint was allowed at the appellate stage and effect of decree passed

in Special Civil Suit No.4 of 1993 was considered. It was decree of specific performance of contract directing the plaintiff to deposit Rs.3,000/- and the sale deed was to be executed after securing permission from the Collector through Court Commissioner. It was suit filed by plaintiff and her husband against Vestibai. In her written statement, it is stated that her husband Hurji acquired suit land in partition. After his death, she became owner. She does not admit relationship with Nabi, rather she says she is absolute owner.

15. It's a matter of record that plaintiff did not examine Vestibai. Though her application to lead evidence of Vestibai was rejected, no attempt was made to get the said order set aside from the Appellate Court or High Court. Her own mother Nendadibai deposed against her and appeared as defendant's witness. It is very surprising that her own mother was not supporting her case. In these peculiar circumstances, the best possible evidence for the plaintiff has not come before the Court and the best possible evidence did not corroborate her case that she is residing with her mother Nendadibai and Vestibai.

16. The Trial Court has rightly drawn inference from this situation against the plaintiff. Pertinently her mother categorically deposed that land was not transferred to plaintiff. It is further deposed that Vestibai is not residing with her but residing at her daughter's place who was begotten from wedlock of Vestibai's first marriage. It is surprising that Nendadibai even did not accept the plaintiff as her daughter.

17. The Trial Court found that plaintiff's deposition and case is not trustworthy considering various circumstances. Her mother Nendadibai deposed against her and flatly stated that she was also not residing with plaintiff. Her statement before Mamlatdar Exh.55 and her deposition before Court are inconsistent. It is recorded that she is unable to tell her grandfather's name as well as her father's name. The Trial Court has rightly drawn conclusion that plaintiff is not trustworthy and her relationship with Nendadibai and Vestibai is not established. The findings are rightly confirmed by Lower Appellate Court.

18. Plaintiff has come up with a theory that suit land was transferred to her but no document is produced on record to

show the transfer. Merely reliance is placed on mutation entry No.10. The mutation entry is not sufficient to prove her lawful possession. She is unable to establish as to how she is inducted in the suit land. Although revenue record from 1977-78 to 1979-80 shows name of the plaintiff, the revenue record produced after 1986-87 onwards supports the defendants' case and show their possession. In such a situation defendant's case appears to be more probable than the plaintiff's.

19. After decision of the Trial Court, RCS.No.4 of 1993 was filed by the plaintiff and her husband for specific performance of contract. The suit was not contested on merits because defendants in that suit namely Vestibai admitted the plaintiff's case. Decree passed in the suit and written statement of Vestibai are on record. Perusal of the written statement of Vestibai does not show her relationship with plaintiff. Rather it shows that after death of Hurji, Vestibai became absolute owner which is against the status of plaintiff. Under these circumstances, the decree passed in the suit disclosing possession of plaintiff over the suit land creates doubt.

20. The written statement filed by Vestibai in RCS No.4 of

1993 is very clinching and there is every reason to infer that it is after thought move to file suit for specific performance of contract and to get it decreed by way of admission or compromise. Considering overall conduct of the plaintiff, I am of the considered view that she is neither in possession of the suit land nor holds any title.

21. Plaintiff has filed suit for injunction simplicitor. In the written statement, the relationship and her title are disputed by the defendants. Despite that no efforts are made to claim relief of declaration. It was necessary for plaintiff when her title was doubted to claim relief of declaration. Learned counsel for respondents is right in contending that such a suit for injunction is not sufficient and tenable.

22. Both sides relied on provisions of Order 41 Rule 23 to 28. It is not that in every case, when subsequent events are brought on record and additional material is placed, the matter is required to be remanded to the Trial Court. Following provision is relevant.

“24. Where evidence on record sufficient Appellate Court may determine case finally.—Where the evidence upon

the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.”

It would depend on facts and circumstances of each case as to whether to remand the matter to the Trial Court or not.

23. The Appellate Court has jurisdiction under Order 41 Rule 27 to allow additional evidence or the documents. After receiving the additional evidence, the following mode is prescribed.

“28. Mode of taking additional evidence.—Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

24. It is the discretion of the Appellate Court either to consider additional evidence or to direct the Trial Court to record the evidence. In the present case, it was necessary for the plaintiff to request the Lower Appellate Court to remand

the matter for recording evidence. She is estopped from contending that the Appellant Court should have suo-motu remanded matter to the Trial Court. Submissions made in that regard by learned counsel Mr. Jadahv cannot be approved.

25. Learned counsel for the appellant relied upon *Ram Kumar Barnwal*. The propositions laid down by the Supreme Court in the judgment are not disputed. The Court has power to look into the subsequent events and mould reliefs accordingly to shorten the litigation. In the present matter, the Appellate Court took into consideration the subsequent events. Therefore, it cannot be said that the approach of the Lower Appellate Court is against the ratio laid down by Supreme Court.

26. Further reliance is placed on the judgment of *Sarladevi*. It is tried to be submitted by referring to paragraph No.41 that a person in possession is entitled to protect the same against the defendant who has no better title. The proposition cannot be disputed but case is distinguishable on facts. It has been recorded by both Courts below that plaintiff is not trustworthy and put up a false case. She has failed to prove her title as

well as possession. Hence, this judgment does not help the plaintiff.

27. There are concurrent findings of facts recorded by both Courts below. The substantial questions of law framed by this Court needs to be answered in the following manner :

Q.(i) When there is a decree for specific performance of contract in favour of the plaintiff/appellant whether the First Appellate Court was right in ignoring the said decree by keeping the finding reserved ?

Ans. The Lower Appellate Court has rightly discarded the decree of specific performance of contract by assigning reasons.

Q.(ii) What is the effect of the decree passed in R.C.S. No.4 of 1993 on the present suit ?

Ans. The decree in RCS No.4 of 1993 is inconsequential and does not enure to the benefit of the plaintiff.

Q.(iii) The plaintiff who was initially not entitled for

property, if during the pendency of the suit becomes entitled for the said property, whether his suit for injunction has to be rejected.

Ans. The plaintiff is unable to prove her possession despite decree passed in RCS.No.4 of 1993. Her title is also doubtful.

28. Second appeal dismissed.

29. No order as to costs.

(SHAILESH P. BRAHME, J.)

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30. After pronouncement of judgment, learned counsel for the appellant prays for continuation of interim injunction, which is in operation till today.

31. Learned counsel for the respondents opposes the request.

32. It transpires that injunction is in operation not only in

second appeal, but during the pendency of matter before the Trial Court as well as lower Appellate Court. Appellant desires to approach the Apex Court. It would be in the interest of justice to continue the interim injunction for further period of four (04) weeks from today. It shall stand vacated thereafter without reference to this Court.

(SHAILESH P. BRAHME, J.)

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