



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13298 OF 2023

WITH

WRIT PETITION NO. 13299 OF 2023

1. Bandu Sahadu Kulange

Age: 67 years, Occu. Agriculture,
R/o. Shivprasad, Near Lalit Library,
Shivneri Marg, Station Road, Ahmednagar.

2. Saraswati Vishwanth Kulange,

Age 68 years, Occu. Household,
R/o. Shivprasad, Near Lalit Library,
Shivneri Marg, Station Road, Ahmednagar.

3. Virendra Vishwanth Kulange,

Age: 49 years, Occu. Business,
R/o. Shivprasad, Near Lalit Library,
Shivneri Marg, Station Road, Ahmednagar.

...PETITIONERS

VERSUS

1. Ramchandra @ Rameshbhau Bhingardive

Age: 40 years, Occu. Labor,
R/o. Room No.5, Veershruti,
At Post, Wanwadi Bazar, Tq. & Dist. Pune.

2. Subhash Gangaram Zine,

Age: 56 years, Occu. Agril & Business,
R/o. Maniknagar, Ahmednagar,
Tq. Ahmednagar, Dist. Ahmednagar.

3. Rukmini Gulabrao Karale,

Age: 58 years, Occu. Agril & Household,
R/o. In front of ZP High School,
Ahmednagar, Tq. & Dist. Ahmednagar.

4. Balasaheb Pandharinath Shelke,

Age 47 Years, Occu. Agril & Business,
r/o. In front of ZP High Court, Ahmednagar,
Tq & Dist. Ahmednagar.

5. Suresh Punjaji Waghaskar,

Age 77 Years, Occu: Agril & Business,
R/o. Wadarwadi, Bhingar,
Tq. & Dist. Ahmednagar.

6. Suchitra Umesh Zagde,

Age 49 Years, Occu: Household,
R/o. Flat No.903, C Building,
Golden Petal, Dodhane Nagar, Near
Tree High School, Pune Dist. Pune.

7. Sangeeta Jitendra Jadhav

Age 53 Years, Occu. Household
R/o. Flat No.8 Natraj Apartment,
Giraja Housing Society, Daund Road,
Pune Dist. Pune.

8. Rohini Shivprasad Tilekar,

Age 51 years, Occu. Household,
R/o. Matoshri Bangla, near new bus stand.
Suraj Nagar, Akluj, Tq. Malshiras, Dist. Solapur.

...RESPONDENTS

Mr. G. K. Naik Thigle Advocate for the petitioners.

Mr. R. K. Ashtekar Advocate for Respondent No.1.

Mr. S. V. Natu, Advocate for Respondent Nos. 2 to 5.

Respondent No. 6 to 8 are served.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 4th FEBRUARY 2025
PRONOUNCED ON : 24th FEBRUARY 2025

ORDER :-

1. Heard the learned Advocates for the parties.
2. This petition is filed by original defendant Nos.1 and 2 challenging an order passed by the learned Civil Judge, Senior Division, Ahmednagar dated 3rd July 2023 on an application below Exh. 86 in RCS No. 501 of 2013 whereby the application under Section 10 of Code of Civil Procedure, 1908 (for short "CPC") for stay of the suit, came to be rejected. The respondent No.1 is the original plaintiff. The other respondents are the original defendants.
3. The facts giving rise to Writ Petition No.13298 of 2023, in short, are that the respondent No.1-plaintiff filed a suit against these petitioners for possession of the suit land. Mandatory injunction is prayed seeking direction not to sell and dispose of the land and from creating third party interest. It is the case of the plaintiff that he was

adopted by one Shantabai Bhau Bhingardive and Bhau Eknath Bhingardive, who are no more and thus, he got a right in the suit property. Shantabai and Bhau were the original owners of the land. The defendant Nos.1 and 2 earlier cultivating the land of Shantabai Bhingardive. Because of such relationship, the defendants got agreement to sale executed on 5th November 1985 and thereafter, had filed a suit for specific performance against Shantabai. The said suit was dismissed. However, the appeal bearing RCS No.568 of 2012 filed by the present petitioners came to be allowed. The another Appeal No.570 of 2012 filed by the other defendants came to be allowed. The plaintiff however, was not a party to the suit and to the said appeal. Now, it is reported that, the Second Appeal No.399 of 2020 filed at the instance of present petitioner and the same is pending before this Court at pre-admission stage.

4. On this background, the present petitioners filed an application under Section 10 of the C.P.C. praying for stay of the suit. It is the case that the suit property and the subject matter of the earlier suit and the

present suit are one and the same. The issue in both these suit is directly or substantially is the same. The outcome of the Second Appeal would affect the proceeding of the present suit and thus the prayer for stay of the suit was made. The learned trial Court did not accept this case and rejected the application. Hence, the petitioners are before this Court.

5. So far as Writ Petition No.13299 of 2023 is concerned, the suit was filed for possession by Respondent Nos.1 to 4 against the present petitioners seeking possession of the land which was allegedly in illegal possession of the petitioners. The cause of action is alleged to be sale-deed executed by the applicants and Respondent No.3 and 4 dated 13th November 2006. Since subject matter of both the writ petitions is same, this Court is deciding these petitions together. These petitioners in the said suit filed an application under Section 10 of CPC stating that the subject matter of the suit which is pending in the Second Appeal arising out of Special Civil Suit No.68 of 2004. The said application came to be rejected and thus, this petition is filed.

6. Mr.Naik-Thigle, the learned Advocate for the petitioners vehemently argued that, Regular Civil Suit No.501 of 2013 was for

recovery of possession from the present defendant Nos.1 and 2. If the prayers in the present suit are seen, the same is also for possession of the suit land. Therefore, it is necessary to stay the suit. He submits that there is averments about Special Civil Suit No.68 of 2004 and of the agreements to sale in the plaint itself. He submits that issue No.4 in RCS No. 501/2013 would show that the issue involved is the similar/same.

7. Mr. Ashtekar, the learned Advocate appearing for Respondent No.1 submits that the earlier suit was necessarily for the specific performance. The possession is sought for by way of grant of decree for specific performance whereas, the present suit is for possession on the basis of title and is not barred. The principle for stay of the suit are that whether the judgment in the earlier suit would operate as *res-judicata* in the subsequent suit. Applying this test, he submits that the trial Court has rightly rejected the application. He relied on the judgment in the case of ***Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor***.¹ He invites attention of the Court to the issue framed in both the suits.

1 (2013) 4 SCC 333

8. Learned Advocate Mr.Natu appearing for Respondent Nos.2 to 5 submits that though the suit property is the same in both the suits, the issues involved are totally different. The earlier suit was for specific performance of the agreement and the same is dismissed. Even the appeal is dismissed. Though the second appeal is pending since 2018, it is not admitted. If, at all, the second appeal is allowed, the petitioners would get a specific performance of an agreement. The present suit is a suit only for recovery of possession and there is no issue of specific performance etc. So long as, the second appeal is only pending for admission and is not admitted, it cannot be said that the proceeding is pending. He submits that both the petitions deserve to be dismissed.

9. From looking at the pleadings in the present suit, it is seen that the suit is for possession of the suit property and for injunction against the defendant from causing interference in the suit property. It was pleaded that, by taking disadvantage of illiteracy of deceased-mother of the plaintiff, the deed was got executed by the present petitioners. Looking to the prayers, no relief is claimed in respect of alleged agreement to sale which was subject matter of RCS No.501 of 2013. Looking at the

prayers in RCS No.501 of 2013, this Court finds that it is only based on the agreement to sale where the prayer is necessary for specific performance of an agreement. The first issue was in respect of execution of agreement to sale dated 28th May 1990. The second issue was about payment of earnest money. Further issue shows that, it was in respect of breach of contract to perform part of contract. Thereafter, the issue was as to whether the defendants therein were *bonafide* purchaser of the suit land and willingness of the plaintiff to perform their part of contract. Whereas in the present suit, there is no issue as regards the specific performance or the execution of agreement. Though in paragraph No.5 of the plaint in the present suit, there is reference to the agreement to sale, it is only that it was bogus and by obtaining the signature of the mother of the plaintiff. The cause of action is shown to be a judgment in Special Civil Suit No. 68 of 2004 when the plaintiff asked for the possession.

10. Considering the judgment in the case of ***Gupte Cardiac Care Centre and Hospital Vs. Olympic Pharma Care (P) Ltd.***², the Hon'ble

2 (2004) 6 SCC 756

Apex Court held that, the consideration for exercise of power under Section 10 depends upon the facts and circumstances of the case. It is held that the object is to avoid the possibility of conflicting decrees and duplication of evidence. This is keeping in view, to save time and energy of the Courts and the parties. On the fact of that case, it was found that the later suit was in respect of issue which was directly and substantially in issues in the previously instituted in the civil suit. The judgment in the case of *Smt. Padmabai w/o. Bhaurao Patil Vs. Shaikh Shahadulla Sk. Abdulla & Anr.*³ This Court in the said judgment had considered the judgment in the case of *Gupte Cardiac Care Centre and Hospital* (supra).

11. In the case previously instituted suit was for specific performance of the contract based on *sauda pavti*. The respondent in that writ petition had filed subsequent suit where the prayer was made for cancellation of the said *sauda pavti*. In such facts, the Court held that the issue is mainly and substantially the same i.e. *sauda pavti* and therefore allowed the application under Section 10 to avoid multiplicity

3 2010(6) ALL MR 785

of application. It was held that the order was rightly passed stating the suit to avoid multiplicity of application.

12. In the case of ***Maharashtra State Co-operative Marketing Federation Ltd. Vs. Indian Bank Bombay***⁴, the Division Bench of this Court held that Section 10 is applicable even to the summary suit filed under special procedure laid down in Order 37. It is also held that it is no reason to not apply Section 10. This Court finds that the judgment relied upon by the petitioner has no applicability in the facts of the present case.

13. In the case of ***Aspi Jal (supra)***, three suits were filed on different causes of action. In view of the fact that, causes of action were different, the Hon'ble Apex Court held that, there has to be same cause of action and same subject matter and relief also should be the same. It is only in such cases, Section 10 would have an application. In the case of ***Shivdas Gavhane Vs. Revindra Sudhakar Ghadge*** passed by this court in Writ Petition 12651 of 2016. In this case, second suit was filed on almost similar pleadings. It is considered that Section 10 has the application

4 [1996 (2) Mh.L.J. 925]

where case is made out. That if earlier decision would operate as *res-judicata* in the subsequent suit, in that case, Section 10 needs to be invoked.

14. Considering all these questions, the judgment in this Court has to see in the present matter as to whether a case is made out that the findings recorded in the earlier suit whether would operate as *res-judicata*. The answer is clearly no. There is no issue decided in Special Civil Suit No. 68 of 2004 showing that the same can be said to have been directly and substantially involved in the preset suit. This Court finds the judgment of this Court in the case of ***Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor*** (supra) relied upon by the learned Advocate for the respondents is clearly applicable here.

15. Considering all above, this Court find that no case is made out to allow the writ petitions. No interference is called for in the impugned order passed by the trial Court. Both the writ petitions deserve to be dismissed. Hence, the following order:-

ORDER

- (i) Both Writ Petitions stand dismissed.
- (ii) No order as to costs.
- (iii) Civil Applications, if any, also stand disposed off.

[KISHORE C. SANT, J.]

1. At this stage, the learned Advocate for the petitioners seeks continuation of the liberty granted to the petitioners during the pendency of writ petitions.

2. Mr.Ashtekar, the learned Advocate for the respondent vehemently submits that, in fact, there is no any interim relief granted. The liberty was only to mention before the trial Court and to seek adjournment on that count. No interim relief was, as such, granted by this Court.

3. In view of the same, the learned trial Court shall not pass any effective order for three weeks from today.

[KISHORE C. SANT, J.]