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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 816 OF 2024
WITH
INTERIM APPLICATION NO. 15943 OF 2024
IN
SECOND APPEAL NO. 816 OF 2024**

Hirabai Swarupchand Kankariya

.....Appellant

Vs.

Nandkumar Kundanmal Bedmutha and ors

.....Respondents

Mr. Aniruddha A. Garge with Kashyap Bhalerao with Ms. Manali Garge
for the appellant

Mr. Drupad Patil i/b Mr. Suyash Sule for respondent no. 1

CORAM : GAURI GODSE, J.

DATE : 3rd JANUARY 2025

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ORDER:

1. Heard learned counsels for the parties. This second appeal is preferred by defendant no. 1 to challenge the judgment and decree passed by the first Appellate Court directing defendant no. 1 to hand over possession of the suit property by accepting the amount of Rs. 3,60,000/- paid by defendant no. 1 to the plaintiff.

2. Learned counsel for the appellant submits that the plaintiff has

relied upon leave and licence agreement executed in favour of defendant no. 1. He further submits that the original document was not produced before the Court and the plaintiff failed to prove the execution of the agreement. He further submits that even if defendant no. 1 failed to step into witness box, the burden to prove execution of the agreement would still remain upon the plaintiff as the plaintiff has relied upon the leave and licence agreement.

3. Learned counsel for the appellant further points out that the operative part of the impugned judgments that directs the defendant no. 1 to pay compensation for an amount of Rs. 10,000/-. He submits that in the absence of any prayer for compensation, the first Appellate Court has erred in passing directions for payment of compensation. Learned counsel for the appellant further submits that the directions issued in the operative part of the impugned judgment amounts to executing the decree passed by the Court, which is beyond the jurisdiction of the Court. Learned counsel for the appellant therefore submits that the second appeal would require consideration as the aforesaid grounds raise substantial questions of law.

4. Learned counsel for the original plaintiff supports the impugned

decree. He submits that the suit is filed based on the title of the plaintiff. He submits that the plaintiff's title is not in dispute. He further submits that irrespective of the leave and licence agreement, defendant no. 2 has no valid source of title to retain the possession. He submits that the first Appellate Court has rightly considered the source of possession of defendant no. 1 to be only the leave and licence agreement which is not disputed by defendant no. 1. Learned counsel for the plaintiff therefore submits the grounds raised on behalf of the appellant would not require any consideration by this Court. With reference to the directions for payment of compensation, learned counsel for the plaintiff on instructions submits that the plaintiff would not press for the amount of compensation as directed by the impugned judgment and decree.

5. I have considered rival submissions of the parties. The title of the plaintiff is not disputed by defendant no. 1. Except for leave and licence agreement in favour of defendant no. 1, no source of possession or any title is pleaded by defendant no. 1. He does not dispute the execution of the leave and licence agreement as pleaded by the plaintiff. A perusal of the reasons recorded by both the Courts indicate that defendant no. 1 has raised contentions to oppose the

prayer for possession by referring to the internal dispute between defendant nos. 2 and 3 and the plaintiff, who are the co-owners of the suit property. There is no dispute that defendant no. 1 failed to step into witness box and lead any evidence to indicate his right to remain in possession of the suit property. In view of the admitted fact of the execution of the leave and licence agreement in favour of defendant no. 1, I do not see any substance in the arguments raised on behalf of the appellant regarding the burden of proof of execution of the agreement. Even otherwise, except for the leave and licence agreement, defendant no. 1 does not claim any right, title or interest in the suit property to retain possession of the suit property.

6. Thus, in view of these admitted facts, no fault can be found in the reasons recorded by the first Appellate Court directing defendant no. 1 to hand over possession of the suit property to the plaintiff. In view of the admitted fact of the title of the plaintiff and in the absence of any right, title or interest of defendant no. 1, the possession of defendant no. 1 is rightly held to be unlawful.

7. I do not find any substance in the arguments raised on behalf of the appellant that the directions in the operative part of the impugned

judgment regarding appointment of Court Commissioner for compliance of the decree for possession would amount to directions issued beyond the jurisdiction of the first Appellate Court. Once there is decree passed for handing over possession, the first Appellate Court was well within its powers and jurisdiction to issue directions regarding appointment of Court Commissioner for compliance of the directions. The directions regarding payment of compensation is not pressed by the plaintiff. Hence, none of the grounds raised on behalf of the appellant would require any consideration by this Court. I do not find any illegality or perversity in the reasons recorded by the first Appellate Court.

8. The second appeal does not raise any substantial question of law. Hence, the second appeal is dismissed.

9. In view of the dismissal of the second appeal, Interim Application No. 15943 of 2024 is disposed of as infructuous.

10. At this stage, learned counsel for the appellant seeks stay to the execution of the impugned decree.

11. Learned counsel for the plaintiff submits that in the event this

Court intends to grant any stay, the same may be granted subject to appellant filing usual undertaking in this Court and making payment of the entire arrears towards electricity consumption and municipal dues.

12. Since the decree is for handing over possession, the same shall remain stayed for a period of eight weeks subject to the appellant filing an undertaking in this Court stating that the appellant shall hand over possession of the suit property, subject to any favourable order passed by the Hon'ble Apex Court. The undertaking shall state that the appellant alone is occupying the suit property and she shall not create any third party interest or part with possession of the suit property. The undertaking shall also state that the appellant shall make the payment of the entire arrears towards electricity consumption and municipal dues.

13. Necessary undertaking to be filed within one week.

[GAURI GODSE, J.]