



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.258/2016

1. Abdul Hamid Abdul Majid,
Aged about 56 years, R/o Talabpura,
Jalgaon Jamod, Tq. Jalgaon Jamod,
District Buldhana.

2. Dr. Agakhan Rehemman Patel,
Aged about 80 years,

3. Shamim Nikhat W/o Agakhan,
aged about 74 years,
Both resident of Malkapur,
Madar Tekdi, Parpeth,
District Buldhana.

Appellants.

Versus

Amar Chahus Mubarak Chahus
Aged about 71 years, in R/o Talabpura,
Jalgaon Jamod, Tq. Jalgaon Jamod,
District Buldhana.

Respondent.

Mr. Masood Shareef, Advocate along with Mr. Mr.A.J. Mirza and Mr. S.I.Jagirdar,
Advocates for the appellants.

Mr. A.A.Sawal, Advocate for the respondent.

CORAM : ROHIT W.JOSHI, J.
DATE : SEPTEMBER 8, 2025.

ORAL JUDGMENT

1. The present respondent had filed a suit for specific performance of contract being Special Civil Suit No.55 of 2005. The said suit came to be dismissed and the decree for dismissal of suit for specific performance is confirmed up to this Court vide judgment and decree dated 11th September, 2017 passed in Second Appeal No.108/2016. It is admitted that the said judgment is not challenged any further. It is the case of the respondent in the said suit for specific performance that the suit property was owned by the defendant no.3-Original defendant no.2. Perusal of the plaint averments will further indicate that, according to the plaintiff, the suit property was sold by defendant no.2 to the defendant no.3, who is present appellant no.1 vide sale deed dated 13.05.2005. The sale deed was executed by the defendant no.2 acting through her husband, who is also her constituted attorney. In such circumstances, the defendant no.3 also filed a counter claim for possession against the plaintiff. The said counter claim was supported by the defendant nos.1 and 2 who are the vendor and power of attorney holder of the vendor. The learned Trial Court has dismissed the suit for specific performance, as mentioned above. However, the counter claim for possession was also dismissed on the ground that the defendant no.3 had failed to establish his title over the suit property. The learned Trial Court has observed that the power of attorney on the basis of which the sale deed was executed in favour of the defendant no.3 as also the sale deed were neither produced on record nor proved. The appeal preferred by the defendant no.3 was also dismissed for the same reason.
2. The present appeal came to be admitted on 11th September, 2017 by framing the following substantial question of law:

“In the light of the pleadings of the plaintiff with regard to execution of sale-deed dated 13th May, 2005 by the defendant no.1, whether the counter-claim was liable to be dismissed?”

3. Mr. Masood Shareef, learned Advocate for the appellant, contends that the plaintiff had filed suit for specific performance of contract against the defendant nos.1 to 3 claiming that the defendant no.2 was the owner of the suit property. It is also stated in the plaint that the defendant no.2 had sold the suit property to the defendant no.3 vide sale deed dated 13.05.2005. He, therefore, contends that the plaintiff cannot dispute the title of the defendant no.3 and rather the title is in terms admitted by the plaintiff going by plaint averments themselves. He further contends that since the suit for specific performance of contract was dismissed, the plaintiff does not have any right to oppose the prayer for possession in the counter claim filed by defendant no.3 since the defendant nos.1 and 2 support the case of the defendant no.3.

4. Per contra, Mr. Aniket Sawal, learned Advocate for the respondents strenuously opposes the contention stating that in order to succeed in a suit for possession, the plaintiff must prove his title and unless the title is proved, decree for possession cannot be passed.

5. It is undisputed that the suit property was owned by the defendant no.2. The plaintiff claims to have entered into an agreement of sale with the defendant no.2. It is expressly stated in the plaint that the defendant no.2 is the owner of the suit property. The fact that the defendant no.2 has executed sale deed in favour of the defendant no.3, through her husband and constituted attorney is mentioned in the plaint itself. The defendant nos.2 and defendant no.1 i.e. owner and her husband have supported the case of the defendant no.3, who has purchased the property from them. It is thus clear

that the ownership of the defendant no.2 is not in dispute and the defendant no.2 does not dispute the ownership of defendant no.3.

6. In view of the fact that the plaintiff's suit for specific performance of contract is dismissed all throughout did not have any right to oppose the counter claim for possession.

7. It is well settled that a plaintiff, who proves ownership over the immovable property, is entitled for decree for possession unless the defendant can make out a better title or demonstrate that the suit is barred by limitation. None of these contingencies are established. Rather the title of vendor of the defendant no.3 is expressly admitted and the said vendor is supporting the case of the defendant no.3.

8. In view of the above, decree for possession needs to be granted in favour of the defendant no.3/counter claimant. The substantial question of law is, therefore, is answered in favour of the appellant. The judgment and decree dated 1/8/2009 passed by the Civil Judge (Sr.Dn.) Khamgaon in Special Civil Suit No.55/2005 and the judgment and decree dated 3.11.2015 passed by District Judge-2, Khamgaon, District Buldhana in Regular Civil Appeal No. 75/2009 are quashed and set aside. The counter claim filed by the appellant no.1 i.e. defendant no.3 in Special Civil Suit No.55/2005 decided by learned Civil Judge, Senior Division, Khamgaon is decreed by directing the respondent-plaintiff to deliver the possession of the suit property to the appellant-defendant no.3. Parties to bear their own costs. Decree be drawn accordingly.

Civil Application No.928/2024

9. The said Civil Application is filed seeking leave to produce additional evidence with respect to the General Power of Attorney dated 29.3.2025 executed by the defendant no.2 in favour of defendant no.1 and sale deed

dated 13.5.2005 executed by defendant no.2 acting through defendant no.1 as duly constituted attorney in favour of defendant no.3.

10. In view of the reasons recorded above, the counter claim is required to be decreed even in the absence of the said documents. Civil application stands dismissed.

(ROHIT W. JOSHI, J.)

Mukund Ambulkar