

SHANKAR POPAT GAIDHANI

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v.

HIRMANI UMAJI MORE (DEAD) BY LRS. AND ORS.

FEBRUARY 14, 2003

[S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

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*Land Laws and Agricultural Tenancy: Bombay Tenancy and Agricultural Lands Act, 1948; Ss. 29(3A), 64, 70(b), 80, 85 and 88A:*

*Agreement of sale of agricultural land by the owner and receipt of part payment in consideration thereof from Vendee—Owner avoiding execution of sale deed—Trial Court issued directions to execute—On appeal by owner, High Court directed delivery of possession of suit land to Vendee—On appeal by the tenant in possession of the disputed land—Held: since Vendee neither preferred an appeal nor filed cross objection in appeal, and the disputed land was in possession of agricultural tenant, High Court committed an error in granting relief in favour of the Vendee purporting to modify relief in the appeal—Hence part of the Judgment directing delivery of possession in favour of Vendee set aside—Direction issued—Civil Procedure Code, 1908; Order 41; Rule 33 and Order 41; Rule 22—Practice and Procedure.*

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Appellant was an agricultural tenant in the disputed land/property of defendant No.1 in a suit filed before the Civil Court. Earlier, defendant No.1 entered into an agreement with the plaintiff and in consideration thereof received part payment as well. However, he avoided execution of sale deed in respect of the disputed land/property in favour of plaintiff, who later on filed a suit for specific performance of the agreement to sell off disputed land. Trial Court decreed the suit in favour of the plaintiff. Defendant No.1 preferred an appeal which was dismissed by the High Court directing delivery of possession of the suit land by defendant No.1/legal heirs to the plaintiff. The present appeal has been filed by the aggrieved agricultural tenant in possession of the suit lands.

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It was contended for the appellant that the Civil Court had no jurisdiction to determine any issue concerning agricultural tenancies; and that since Trial Court did not pass decree for possession in favour of plaintiff, High Court committed an error by directing delivery of

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**A** possession of the disputed land in favour of plaintiff.

Partly allowing the appeal, the Court

**B** HELD: 1.1. The plaintiff did not question the judgment and decree passed by the Trial Court. Evidently, the Court did not grant a decree for recovery of possession so far as the suit land is concerned. In that view of the matter, the High Court committed a serious error in granting relief in favour of the plaintiff in an appeal filed by Defendant No.1 purporting to modify relief particularly in view of the fact that amongst others, the appellant claimed himself to be in physical possession of the lands in question. The appellant indisputably was not a party to the said agreement for sale. [1193-F, G]

**D** 1.2 The High Court also could not have exercised its jurisdiction in issuing the direction for recovery of possession even under Order 41, Rule 33 of the Code of Civil Procedure inasmuch the said provision could not be invoked by one respondent as against another as therefor it was obligatory on the part of the plaintiff to file a cross objection in terms of Order 41, Rule 22 of the Code of Civil Procedure and give notice in relation thereto to the parties who claimed independent possession over the suit land. Hence part of the judgment under appeal whereby possession has been directed to be delivered in favour of the plaintiff is set aside. It is clarified that the judgment of the trial Court is not being interfered with. [1193-H; 1194-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2283 of 1998.

**F** From the Judgment and Order dated 14.12.1990 of the Mumbai High Court in F.A.No. 640 of 1979.

A.S. Bhasme and Shivaprabhu S. Hiremath, for the Appellant.

V.B. Joshi and K.K. Gupta (NP) for the Respondent.

**G** In-person (NP) for the Respondent No. 6.

The Judgment of the Court was delivered by

**H** S.B. SINHA, J. This appeal arises out of a judgment and decree dated 14.12.1990 passed by the Bombay High Court in First Appeal No.640 of 1979 affirming a judgment and decree passed by the Court of Civil Judge,

Senior Division at Nashik in Special Civil Suit No.57 of 1974.

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The appellant herein is said to be an agricultural tenant and in occupation of the property in question admeasuring 4 acres, 16 gunthas being Gut No.189 (Survey Nos.23/2 and 23/3) situated at Village Palse in the District of Nashik. The said property admittedly belonged to Original Defendant No. 1 (since deceased). On or about 2.7.1970, an agreement of sale was executed by him in favour of Defendant No.7, Ganu Mahadu Gayakhe. The said agreement was cancelled. Defendant No.1 thereafter agreed to sell the suit land to the Defendant No.8. The said agreement was also cancelled by Original Defendant No.1 and the amount of advance taken by him was repaid. He then entered into another agreement with the plaintiff in respect of the suit land, the consideration whereof was fixed at Rs. 20,000. By way of earnest money, a sum of Rs. 10,000 was paid by the plaintiff to Defendant No.1. At the relevant time, Original Defendant No.1 had taken a loan from the Land Mortgage Bank on the security of the suit land. From the amount he received from the plaintiff, Original Defendant No.1 repaid his earlier loans. He thereafter allegedly received a sum of Rs. 6,000 from the plaintiff.

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The co-sharers of the Original Defendant No. 1 by a notice to the plaintiff raised a contention that the said property is a joint family property and thus the said Defendant was not the sole owner thereof.

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The appellant herein, claiming himself to be a tenant in the said lands also sought to get his name entered in the revenue records. The Original Defendant No.1, however, at the instance of the plaintiff, requested the revenue authorities not to enter the name of the appellant herein in the revenue records.

The Original Defendant No.1, however, avoided to execute the sale-deed in favour of the plaintiff. He filed a suit for specific performance of the agreement to sell as also for a direction upon Respondent No.7 to cause delivery of possession to him and a decree for perpetual injunction against Defendant No.8 (Appellant herein) as also against Defendant Nos. 3 to 6 thereof as they had claimed interest in the property. The appellant herein in his written statement, inter alia, contended that as he had been cultivating the suit land since last five years as a tenant, Defendant Nos.1 to 5 and 7 had no concern with the possession of land and as he was a tenant in possession, the Civil Court had no jurisdiction to investigate into the rights of the tenant. On the pleadings of the parties the learned Trial Court framed as many as 16 issues including :

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A “(9) Does defendant No. 7 prove that he is the tenant in the suit property described in para 1 of the plaint ?

(9A) Whether the contentions for defendant Nos. 7 and 8 as regards tenancy are bona fide contentions necessitating the reference ?

B (10) Does defendant No. 8 prove that he is the tenant in the suit property described in para 1 of the plaint ?

(11) Whether the specific performance of the sale agreement can be granted in view of the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 ?”

C The learned trial court decreed the suit directing :

“(a) The Defendant No. 1 do execute sale deed of the suit property in favour of the plaintiff on the latter’s making payment of Rs. 4,000 in accordance with the terms and the conditions of the agreement Exhibit 130.

D (b) The Defendant Nos. 1 to 6 are hereby permanently restrained by mandatory injunction from getting the names of the Defendant Nos. 2 to 6 entered to the suit land by way of final entries.

E (c) The Defendant Nos. 1 and 8 are hereby restrained permanently by mandatory injunction from getting the final entry of the name of the Defendant No. 8 to the suit land in the R.R. as tenant.

(d) The Defendant Nos. 2 to 6 are hereby directed by permanent injunction to get pencil entries of their names to the suit land in the R.R. cancelled.

F (e) The Defendant No. 8 is hereby directed by mandatory injunction to get pencil entry of his name in the R.R. to suit land cancelled.

(f) The Defendant Nos. 1 to 6 and 8 do pay the costs of this suit to the Plaintiff and bear their own.”

G The plaintiff did not challenge the said judgment and decree either by filing an appeal or by preferring any cross objection. Original Defendant No.1 alone preferred an appeal against the said judgment and decree.

The High Court while dismissing the appeal directed :

H “Consequently, the Appeal must be dismissed. We find that the decree

passed in Clauses (b), (c), (d) and (f) is proper and must be confirmed. A  
 We clarify that the decree in terms of clause (a) of the Order passed  
 by the trial Court shall be construed as directing delivery of possession  
 of the suit land by the heirs and legal representatives of Appellant-  
 original Defendant No.1 to the Plaintiff by way of specific performance  
 of the agreement as prayed for by the plaintiff in addition to executing B  
 the Sale Deed in accordance with the terms and conditions of the  
 Agreement (Exhibit 130), as ordered by the trial Court."

Mr. Bhasme, learned counsel appearing on behalf of the appellant, has  
 raised two short contentions in support of the appeal. The learned counsel  
 would contend that having regard to the provisions contained in Sections C  
 29(3A) , 64, 70(b), 80, 85 and 85A of the Bombay Tenancy and Agricultural  
 Lands Act, 1948, the Civil Court had no jurisdiction to determine any question  
 relating to agricultural tenancies. Mr. Bhasme would urge that the appellant  
 herein has not preferred any appeal against the grant of decree for specific  
 performance being against the Original Defendant No.1 having regard to the D  
 fact that no decree for possession was passed by the learned Trial Judge and,  
 thus, the High Court must be said to have committed an error in issuing the  
 impugned directions.

Although there appears to be some substance in the contentions raised  
 by Mr. Bhasme, we are of the opinion that this Court need not go thereinto. E  
 From the judgment under appeal, it appears that the appellant herein was not  
 represented before the High Court. Presumably because no decree for delivery  
 of possession in respect of the suit property was passed, the appellant chose  
 not to contest the appeal, as he might have been advised that he could raise  
 his contentions in a proceedings which may be initiated by the plaintiff for  
 recovery of possession of the suit land after a deed of sale is executed in his F  
 favour by the Original Defendant No.1.

The plaintiff, as noticed hereinbefore, did not question the judgment  
 and decree passed by the Trial Court. Evidently, the Court did not grant a  
 decree for recovery of possession so far as the suit land is concerned. In that  
 view of the matter, the High Court, in our opinion, committed a serious error G  
 in granting a relief in favour of the plaintiff in an appeal filed by Defendant  
 No.1, purporting to modify Relief (a), as aforementioned; particularly in  
 view of the fact that amongst others, the Appellant claimed himself to be in  
 physical possession of the lands in question. The Appellant, indisputably was  
 not a party to the said agreement for sale. H

**A** The High Court also could not have exercised its jurisdiction in issuing the said direction even under Order 41 Rule 33 of the Code of Civil Procedure inasmuch as the said provision could not be invoked by one respondent as against another as; therefor it was obligatory on the part of the plaintiff to file a cross objection in terms of Order 41, Rule 22 of the Code of Civil Procedure and give notice in relation thereto to the parties who claimed independent possession over the suit land.

**B**

We are, therefore, of the opinion that part of the judgment under appeal whereby possession has been directed to be delivered in favour of the plaintiff may be set aside. We, however, make it clear that the judgment of the trial court is not being interfered with. The appeal is allowed to the aforementioned extent. However, there shall be no order as to costs.

**C**

S.K.S.

Appeal allowed.