

R.C.A. No.163/2015
CNR No.MHWR010017802015
Govind Vs. Sanjay
Order below Exh.33

(1) Heard Adv. Shri. V.D. Gadkari for the appellant, Adv. Shri S.V. Joshi for respondent No.5 who has supported the appellant and Adv. Shri. A.A. Sadavarte for contesting respondent Nos.1 and 2 who are legal heirs of original plaintiff.

(2) Present appeal is pending against judgment and decree passed by the Trial Court whereby in Spl.C.S.No. 170/2008 decree for specific performance of agreement for sale dated 27.2.2007 has been passed against defendant Nos. 1 to 5. Defendant Nos. 1 and 2 purchased the suit property on 20.1.2000 from Ekata Housing Finance and Investment India Ltd. However, defendant No.2 relinquished his rights in the suit property in favour of defendant No.1 who is appellant in this appeal. The defendant No.1 on 18.8.2008 executed sale-deed in respect of the suit property in favour of defendant Nos. 3 to 5. Ekata Housing Finance and Investment India Ltd. filed R.C.S. No. 77/2006 against defendant Nos. 1 and 2 for declaration that the sale-deed dated 20.1.2000 in their favour executed by it is void. However, that suit and also first appeal are dismissed and now Second Appeal No. 324/2014 is pending before the Hon'ble High Court.

(3) The appellant (original defendant No.1) filed

present application under section 10 of C.P.C. to stay present appeal on the ground that Second Appeal No. 324/2014 filed by third party Ekata Housing Finance and Investment India Ltd. in respect of the same suit property arising out of decision in R.C.S. No.77/2006 is pending before the Hon'ble High Court. Therefore, the appellant requested to stay present appeal until disposal of Second Appeal No. 324/2014.

(4) Application is opposed by respondent Nos.1 and 2 on the ground that the dispute before this Court and before the Hon'ble High Court although pertains to the same suit property, but substantial issues involved in the present appeal are different than the issues involved in Second Appeal No. 324/2014.

(5) Ld. Adv. Shri Gadkari and Joshi submitted that present appellant and respondent No.3 Sudhir purchased suit property from Ekata Housing Finance, and respondent No.3 has executed release-deed in favour of the appellant. Therefore, now the appellant is the sole owner of the suit property. The respondent No.1 filed Spl.C.S. No 170/2008 against the original owner appellant and others for specific performance of contract for execution of the sale-deed on the basis of the agreement for sale, and the Trial Court decreed the suit.

(6) Ld. Adv. Shri Gadkari submitted that in case

Second Appeal No.324/2014 is allowed and suit filed by Ekata Housing Finance Ltd. is decreed then appellant Govind would be no more owner of the suit property and consequently the present decree would not survive, as present appellant and respondent No.3 cannot transfer the suit property to respondent Nos. 1 and 2. Therefore, he requested to grant stay to the present proceeding.

(7) On the other hand, Ld. Adv. Shri Sdavarte submitted that since substantial question that is about execution of the agreement for sale by the appellant and respondent No.3 in favour of original plaintiff Sanjay Shah, who is represented by his legal heirs respondent Nos. 1 and 2, and readiness and willingness of Sanjay Shah to perform his part of contract, are not questions involved in the second appeal, nor the questions which are involved in the second appeal are arising in this appeal. Therefore, he submits that section 10 of C.P.C. is not applicable.

(8) I have given anxious thought to the submissions made before me. In the present case, present appellant or any of the party never applied before the Trial Court for stay of present suit due to pendency of earlier civil suit R.C.S.No.77/2006 filed by Ekata Housing Finance and due to first appeal by it. Thus, present appellant allowed both the suits i.e. present Spl.C.S.No. 170/2008 and R.C.S. No. 77/2006

to tried and disposed off on their own merits. As such, when the appellant and none of the party at the time of trial of RCS No. 170/2008 applied for it's stay and allowed it's trial and disposal on merit, now present application filed under section 10 of C.P.C. is only with the view to prolong present appeal.

(9) Section 10 of C.P.C. prohibits trial of subsequent suit if the matter in issue involved in previously instituted suit between the same parties or between parties under whom they are anyone of them are litigating under same title, is also involved in subsequent suit. The section 10 mandatory which requires to stay the trial of subsequently filed suit in case the matter in issue involved in both the suits is directly and substantially same. In this case, the subsequent suit Spl.C.S.No. 170/2008 is already tried and decided on merit, and present appeal is pending against the decree passed in this subsequent suit. As such, when the subsequent suit is already tried and decided by the trial Court, there is no question of applying for stay of the appeal. Hon'ble Rajasthan High Court in **Munnial Vs. Sarvajeet** RLW 1983 Rajsthan 278 has taken the view that in case the trial of subsequently instituted suit is proceeded without any objection and same is terminated with delivery of the judgment and preparation of the decree, then section 10 of C.P.C. has no relevance as he only prohibits the trial of the suit and no further. It is held

that hearing of an appeal cannot be considered as a part of the trial of the suit. As such, section 10 of C.P.C. has no application to grant stay of this appeal.

(10) Further the second appeal is not filed by present appellant, but Ekata Housing Finance which is not party to present suit. Although, all the parties in this litigation are parties to the Second Appeal No. 324/2014, but the questions involved in that appeal are not relating to the agreement for sale between present parties and in respect of readiness and willingness of Sanjay Shah to get the sale-deed executed. No doubt, the subject matter in both the proceeding is same, but matters in issue are different. Therefore, also section 10 of C.P.C. is not applicable.

(11) Even otherwise, Second Appeal No. 324/2014 is already dismissed for default, but Misc. Civil Application No. 416/2019 for restoration of the second appeal is pending before the Hon'ble High Court. Thus, in strict sense even the second appeal is not pending before the Hon'ble High Court, but only application for restoration of the second appeal is pending.

(12) Therefore, there is no propriety to stay present first appeal. In case present appeal is decided, at the most the parties may get their second appeal which may arise out of present

proceeding decided alongwith the Second Appeal No. 324/2014 in case it is restored by the Hon'ble High Court. Even otherwise, the judgment and decree passed by the trial Court in case is maintained, it shall be subject to final out come of decision in Second Appeal No. 324/2014. Therefore, in my view there is no substance in present application, and I reject it. In the result, I pass following order.

Order

Application Exh.33 is rejected.

Date : 23.09.2022

(N. B. Shinde)
District Judge-2,
Wardha.

CERTIFICATE

I affirm that the contents of this P.D.F. file are same word to word, as per the assigned order.

*(Anil N. Nakhate)
Stenographer (Grade-1)*