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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.261 OF 2016

Champabai Shantilal Gangawal
Since deceased through L.Rs.

APPELLANT

- 1-A. Kantilal s/o Shantilal Gangawal
Age - 81 years, Occ - Business,
R/o 13-1-2/2, Saipuri Colony,
Near Sairam Theatre, Malkanjgiri,
Secundarabad, Hyderabad (Andhra Pradesh)
- 1-B. Mahendrakumar s/o Shantilal Gangwal
Age - 63 years, Occ - Business,
R/o Flat No.5, Geetanjali, Edanbag,
Ramkot, Hyderabad (Andhra Pradesh)
- 1-C. Mahavir s/o Shantilal Gangawal,
Age - 61 years, Occ - Business & Agriculture
R/o Bajarpeth, Kannad, Taluka - Kannad
District - Aurangabad
- 1-D. Santoshkumar s/o Shantilal Gangwal
Age - 57 years, Occ - Business and Agriculture
R/o Flat No.8, Samyak Plaza,
Cannaught Place, CIDCO,
Aurangabad
- 1-E. Sau Sushilabai Khushalchand Pahade,
Age - 73 years, Occ - Household
R/o Chipati Road, Near Jain Mandir
Malegaon, District - Dhule
- 1-F. Sau Shakuntalabai Prakashchandra Pahade,
Age-71 years, Occ - Household
R/o Bombay Galli, Amalner,
District - Jalgaon

RESPONDENTS

1. Narayan s/o Sarjerao Dahatonde,
Age – 53 years, Occ – Agriculture.
R/o Kheda, Taluka – Kannad,
District – Aurangabad
2. Ramdas s/o Sarjerao Dahatonde,
Since died through L.Rs.
 - 2-A Alkabai Ramdas Dahatonde,
Age – 55 years, Occ – Agriculture
R/o Kheda, Taluka – Kannad,
District – Aurangabad
 - 2-B Vinod s/o Ramdas Dahatonde,
Age – 31 years, Occ – Agriculture
R/o Kheda, Taluka – Kannad,
District – Aurangabad
 - 2-C Mohan s/o Ramdas Dahatonde,
Age – 26 years, Occ – Agriculture
R/o Kheda, Taluka – Kannad
District – Aurangabad
 - 2-D Ganesh s/o Ramdas Dahatonde,
Age – 23 years, Occ – Agriculture
R/o Kheda, Taluka - Kannad
District – Aurangabad

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Mr. Ajit D. Kasliwal, Advocate for the appellant
Mr. P. F. Patni, Advocate for respondents

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 8th SEPTEMBER, 2016

ORAL JUDGMENT :

1. This second appeal is at the instance of plaintiff in regular

civil suit No.103 of 2006 before Civil Judge, Junior Division, Kannad. The suit had been instituted seeking injunction in respect of an area of land admeasuring 6 Acre 12 Are situated in Gut No.87 of village Kheda in Kannad Taluka, described and shown in the plaint.

2. After hearing learned advocates for the parties, undisputed situation emerges that predecessor of the appellants – legal heirs of original plaintiff had been owner of entire Gut No.87 admeasuring about 36 Acre and 38 Are. The owner had alienated an area of 12 Acre and 10 Are land to the predecessor in title of the defendants and from the remaining land, thereafter, had further alienated an area of 18 Acre, 16 Are to one Renurao Sheku. As such, the plaintiff had retained ownership of 6 Acre, 12 Are land in said Gut No.87.

3. It further transpires after hearing that since disturbance / some obstruction to possession over said land owned by the plaintiff had been perceived, an application had been lodged by the original plaintiff for measurement of Gut No.87 in 2005. Measurement accordingly had been carried out in presence of the plaintiff as well as the defendants, somewhere in February, 2006.

4. Subsequently, in the month of June, 2006, the plaintiff alleged that the defendants had caused disturbance to her cultivation over an area of land admeasuring 6 Acre, 12 Are on 20th June, 2006. As such, the suit ensued and accordingly had been lodged on 29th June, 2006.

5. After written statement had been filed by the defendants, pointing out that there had been measurement caused at the instance of the plaintiff and that said event had been kept away from the court, corresponding amendment had been got caused to the plaint in the year 2008. The plaintiff had claimed simplicitor injunction in respect of land admeasuring 6 Acre, 12 Are.

6. As the proceedings went on, the trial court framed issues with regard to claim of ownership in respect of 6 Acre, 12 Are land by the plaintiff, about disturbance by the defendants to her claimed possession over said land and about entitlement of the plaintiff for injunction and answered all of them against the plaintiff in negative holding that the plaintiff has not been able to prove ownership of claimed land of 6 Acre, 12 Are, nor disturbance by the defendants could be proved by the plaintiff and the plaintiff would not be entitled to injunction *inter-alia*

holding that the plaintiff has not come to the court with clean hands keeping away information about measurement at her instance. While the trial court appreciated that after the alienations had been made twice, question that may crop up is about whether the land as has been described by four boundaries would be 6 Acre, 12 Are? The trial court found that the measurement upon the application by the plaintiff had been caused in the presence of the plaintiff and further that the measurement applied for under the application and four boundaries thereunder and the ones given by the plaintiff in the plaint would not match and there are discrepancies in the same, while the description of the suit property in the application for measurement and that in the plaint is expected to be similar. Further the trial court has considered that since there is no reference to the measurement having been carried out upon the application of the plaintiff according to which measurement having taken place in February, 2006 and measurement showing the plaintiff to be in possession of 6 Acre, 3 Are land, this particular aspect has been kept away by the plaintiff from the court and thus, this may tantamount to that the plaintiff has not come to the court with clean hands. Further the court found that the date of disturbance to alleged possession over the suit

property given in the plaint appears to be imaginary in order to suit the purpose having regard to the background of the measurement been carried out. Thus the court appreciated and found that the plaintiff is not entitled to the reliefs claimed. The suit as such, was dismissed.

7. In Regular Civil Appeal No.107 of 2013, the appellate court has observed thus -

“8. Now it is to be considered whether plaintiffs are in possession of entire suit land. So far ownership and possession is concerned, PW1 Mahaveer Shantilal Gangawal has specifically stated the plaintiffs are in possession of suit land i.e. 6 Acres 12 R land. Further, he stated the defendants were making interference in suit land therefore suit came to be filed against them. Though witness stated so, but, considering measurement of suit land carried out by plaintiffs, prior to filing of suit, shows that the plaintiffs were unaware as to how much actual land was in their possession. Prior to filing of suit on 17.06.2005 they made an application before DILR, Kannad for the measurement of suit land and the suit land was measured on 16.02.2006, prior to four months of filing of suit. It is to be noted plaintiffs were present at the time of measurement of suit land. After measurement of suit land the cadastral surveyor DW 2 Raghunath Sardar Chavan, prepared map Exh.104. During measurement he found plaintiffs were in possession of only 2 H 43 R land i.e. 6 Acres 3 R land. Further he found 12 R land out of suit land was acquired by Kheda-Hatnoor road. It needless to say at the time of measurement DW 2 found the plaintiffs were in possession of only 6 Acres 3 R land and not 6 Acres 12 R land. So far remaining 9 R land is concerned, it will find that above 9 R land is not in possession of plaintiffs. On this point the document at Exh.92 is material. The

document at Exh.92 is the proposal made by police station Kannad for taking action against defendant no.1 under section 107 of the Cr.P.C. The Kannad police initiated the action against defendant no.1 on the basis of application made by Mahaveer Shantilal Gangawal (Plaintiff No.1-C). As per above report it seems plaintiff no.1-C had alleged that they were not in possession of 9 R land. Further it seems some allegations were made against defendants about interference in the suit land. Though the plaintiffs have not produced copy of application presented before Kannad police station, but report made by Kannad police station on the basis of this application is suggesting that plaintiffs were not in possession of 9 R land. The advocate for plaintiffs (appellant) vehemently submitted that in case it is held that plaintiffs are not in possession of 12 R land then it should be the case of defendants that they are in possession of the same. According to him non claiming of rights by defendants is itself sufficient that plaintiffs are in possession of the entire 6 Acres 12 R land. Though the plaintiffs / appellants advocate submitted so, but, with due respect I am not inclined to accept the same. Simply defendants failed to claim the right over 12 R land does not mean that ipso facto the plaintiffs are in possession of 12 R land. It may be fact that there would be encroachment over the suit land from the adjoining owners from remaining three sides. Consequently this conclusion cannot be drawn up. In this case the defendants have specifically claimed that 12 R land of suit land is occupied by Kheda – Hatnoor road and this fact is supported by the evidence of cadastral surveyor (DW-2). This fact is itself sufficient that plaintiffs are unaware as to how much actual land is in their possession and on the contrary it find probable contention of the defendants that the plaintiffs are making interference in their land.

9. *It is to be noted DW 2 has categorically stated the plaintiffs are not in possession of 12 R land then certainly inference can be drawn up that there is no interference by the defendants. The advocate for defendants / appellant vehemently argued that cadastral surveyor had*

measured the land by taking assistance of village map, therefore, according to him the map prepared by surveyor at Exh.104 has no meaning. Again with due respect I am to state that his submissions is not acceptable. It is to be noted the suit land was measured by DW 2 at the instance of plaintiffs. Further, plaintiffs were present at the time of measurement. Needless to say at the time of measurement the boundaries of suit land must have been shown by the plaintiffs. In fact it was the duty of plaintiffs to make aware the defendants about measurement, when they were getting the measurement of suit land. So at this juncture measurement cannot be faulted only because village map was not with DW-2."

8. The appellate court further went on to consider that injunction is a relief in equity and one who seeks equity must come to the court with clean hands. This does not appear to be case in the present matter, therefore, the appeal also has been dismissed.

9. Learned advocate Mr. A. D. Kasliwal appearing for the plaintiff-appellants vehemently contends that though both the courts have dismissed the suit, yet the courts have fallen oblivious of that it cannot be disputed that the plaintiff is entitled to retain possession of land having area 6 Acre, 12 Are of Gut No.87. Nor there is dispute about areas under the alienations to the defendants and other persons. In the circumstances, it clearly emerges that the plaintiff is owner of 6 Acre, 12 Are land from Gut No.87. He further contends that while there had been

some activity and disturbance to her possession over 6 Acre, 12 Are land, in order to be assured about her possession being over ownership area, she thought it appropriate to apply for measurement and accordingly had applied somewhere in 2005. Measurement had been carried out in February, 2006 in the presence of parties, however, subsequently, there had been disturbance and grave situation had arisen impelling immediate rushing action to the court seeking injunction and as such, unsuspecting plaintiff had lodged the suit around end of June 2006, in the exigent situation seeking injunction in respect of land owned by her. The plaintiff, who is a lady, having limited literacy level, it escaped her attention and as such, resulted in skipping reference to the measurement having been carried out. He further goes on to contend that even if it is deemed that there is measurement, it is not the case nor it can be said that while the suit had been instituted, knowledge of outcome of the measurement can be attributed to the plaintiff. It is thus, in the circumstances, the plaint came to be filed, however, upon pointing out the same in the written statement, necessary corrective action had indeed been taken making reference to the same by causing amendment to the plaint. He contends that, however, the situation appears to have been improperly

appreciated, rather misread by the courts observing that this may tantamount suppression resulting into disinclination of the courts in passing an order of injunction in favour of the plaintiff. He submits that such a consideration appears to have been overwhelmed with the courts as would emerge from the observations as are occurring in the judgments of the two courts hitherto. He thus, urges this court to alleviate effect of observations about suppression and thus dis-entitling the plaintiff from granting relief in equity like injunction. He submits that, there are quite a few attenuating circumstances – the plaintiff had been an age old lady, who subsequently died during pendency of the suit, she had limited knowledge and literacy level and as such, the ado being made about non disclosure of the measurement in the plaint at the initial stage, should not overwhelm to an extent, which would be subversive to the cause. He thus, earnestly pleads to take a lenient view in the matter and expunge the scathing observations of suppression of facts being attributed to a lady.

10. Next leg of submissions of Mr. Kasliwal is that since the area in Gut No.87 being undisputed and the areas of alienations also not having been disputed, it clearly emerges that the plaintiff is owner of 6 Acre, 12 Are land in Gut No.87. This

position is indisputable. Even evidence as is coming forth through defendants does not particularly dispute the plaintiff's entitlement to ownership of 6 Acre, 12 *Are* land in Gut No.87. Albeit, it is their case that the plaintiff is not in possession of 6 Acre, 12 *Are* land as sought to be claimed by the plaintiff. He submits that the revenue record also supports claim of ownership of plaintiff over 6 Acre, 12 *Are* land in Gut No.87. In the face of such a situation, the finding rendered by the court of first instance about plaintiff having failed to establish ownership according to him is not in keeping with the facts and as such, is unsustainable. He submits that in the face of aforesaid situation, the appellate court has rightly adjudged that the plaintiff would be owner of 6 Acre, 12 *Are* land, however, has got overwhelmed by other circumstances alleged against the plaintiff and has rendered the finding holding the plaintiff not to be entitled for grant of injunction claimed under the suit. He submits that when there is no dispute about the plaintiff being owner of 6 Acre, 12 *Are* land in Gut No.87, the plaintiff is entitled to issue of injunction. He further contends that as a matter of fact, the situation can be resolved conveniently by appointing a court commissioner like Taluka Inspector of Land Records for measurement of entire land including the adjoining lands in Gut

No.87. He thus, urges for indulgence into his submissions and grant request for re-measurement of land through Taluka Inspector of Land Records, since according to him, dispute narrows down to demarcation of suit land. For said purpose, he refers to and relies on a judgment in the case of “*Haryana Waqf Board V/s Shanti Sarup and Others*” reported in 2008 (8) SCC 671. He relies on head note of the citation, which reads thus -

“Code of Civil Procedure, 1908 – Order 26 Rule 9 – Civil Law – Second Appeal – Summary dismissal of appeal vis-a-vis Appointment of Court Commission – Suit for declaration and injunction by Wakf Board – Demarcation of suit land – Appointment of Local Commissioner qua investigation and demarcation of suit land – Only controversy between parties was demarcation of suit land, so far, land of respondent / defendant was adjacent to suit land – Application for demarcation, held to has been wrongly rejected – High Court, held not justified in ignoring these aspects – Impugned order set aside – Second appeal restored, so to be decided afresh – Appeal allowed”

11. He further contends that the finding by the trial court about the plaintiff having not been able to establish by evidence, disturbance to her possession is untenable, for, the plaintiff has indeed given cause of action and had referred to that the defendants were claiming east-west strip of land of 24 to 25 feet. The trial court found the date to be imaginary on the background of measurement having not been disclosed is highly

improper and untenable. He submits that the appellate court has not dealt with this particular aspect of the matter and has rendered the decision. Thus, according to him, the same is also liable to be faulted with.

12. On the other hand, Mr. P. F. Patni, learned advocate appearing for the defendants-respondents contends that the evidence as has emerged on record would show that the suit would not be allowed against the defendants at all, for, the evidence, to quite a long extent shows, it is northern boundary of plaintiff's claimed possession over 6 Acre, 12 Are land, which appears to be in dispute as would be revealed by measurement caused at the instance of the plaintiff herself. In such a case, the suit itself could not be maintained against the defendants who are purchasers from plaintiff's vendee. He further submits that it is not the case of the plaintiff that the defendants have encroached over the land. The evidence shows that the defendants are absolutely not concerned with the plaintiff's claimed area of 6 Acre, 12 Are land. In such a case, request for measurement being made now in the suit filed simplicitor for injunction would not be able to be sustained. He contends that it is not the suit for possession by the plaintiff.

13. He further goes on to contend that while two courts have appreciated the evidence independently twice and had found that the plaintiff is not entitled to the reliefs alleging disturbance. Such findings at the second appellate stage, when the circumstances do not warrant, is not called for. He contends that it emerges on evidence that the plaintiff had kept away vital information from the court *viz.*, measurement having been carried out at her instance and that the plaintiff having found to be in possession of area less than the area claimed under the ownership. Adjudication having taken place twice, and plaintiff having been found to be not entitled to the relief in equity, the same may not be disturbed in the second appeal, where appeal would be available only on substantial question of law.

14. In the present case, according to him, none of the questions as are appearing in the memorandum of appeal can be said to be a substantial question of law. He submits that non framing of specific points while appellate court had framed specific point with respect to ownership and possession over 6 Acre, 12 Are land cannot be said to be non-conformation with the requirement of Order XXXI, Rule 31 of the Civil Procedure Code. As a matter of fact, it takes within its fold all the points and issues as were considered by the trial court. He further

submits that the evidence discloses that although submission is that the knowledge of outcome of measurement cannot be attributed to the plaintiff, the evidence as is given would show that the plaintiff has faltered while giving explanation of non reference to the measurement in the original plaint. He, therefore, submits that the submissions in this respect appear to be besides the factual position and should not be given any regard to.

15. He relies on a judgment in the case of “*Sujanbai Haribhau Kakde and Others V/s Motiram Gopal Saraf and Another*” reported in 1980 *Mh.L.J.* 578 putting emphasis on the observations appearing in paragraph No.15 reading thus -

“15. There is, however, much substance in the last contention urged by Mr. Kherdekar. In the plaint, itself, non-applicant No.1 admitted that the applicants were residing in the cattle shed in the field. Averment for the same effect has been made in the application for temporary injunction also. It would thus appear that all along it has been the case of non-applicant No.1 that though the applicants were not in possession of the suit lands, they were occupying the cattle shed situated therein. It was because of this that while granting the ex-parte temporary injunction, the trial Court had to put the condition that non-applicant No.1 would not oust applicant No.1 from the residential hut in which she was residing. However, at the time of confirming the temporary ex-parte injunction, the trial Court deleted the condition that non-applicant No.1 would not oust applicant No.1 from the residential hut, in which she was residing.

The trial Court observed that it would not be proper that applicant No.1 with her children should live in the cattle shed or hut in the suit fields and hence according to it the direction which had been given earlier was not necessary. Now the learned Judge, who passed this order lost sight of the fact that even according to non-applicant No.1, the applicants were occupying the cattle shed or hut in the suit land and they could not be evicted therefrom without due course of law. If, as admitted by non-applicant No.1, they were in possession of the cattle shed, the effect of granting the temporary injunction would be to oust them from the same even though the suit is not for possession of the hut. As already seen, the suit is only for injunction and if it is found that the applicants are in possession of a part of the suit property, the temporary injunction could not be used to deprive them of that possession. Probably the learned Judge was under the impression that non-applicant No.1 would not be able to retain the possession of the field if the applicants are allowed to stay in the hut. That cannot be reason for ousting them from possession under the guise of temporary injunction. In my opinion therefore, the learned trial Judge was not right in deleting the condition and it appears that the appellate Judge has also not applied his mind to this aspect of the case. The order passed by the Courts below will have to be modified in so far as the cattle shed or hut is concerned.”

16. He thus submits that the two courts have rightly adjudged the situation and the second appeal is liable to be dismissed.

17. While arguments are being so advanced on behalf of the parties, it does appear that the ultimate decision rendered by the courts dismissing the suit may not be liable to be faulted with for more than one reason. In the first place, the suit has been instituted for simplicitor injunction based on a cause of action

which is contentedly having been arisen in June, 2006 upon claimed disturbance over the claimed possession of suit property admeasuring 6 Acres, 12 *Are*, yet evidence – the statement by the plaintiff as is given for disturbance of possession of 6 Acre, 12 *Are* does not find any reinforcing corroboration. Whereas, the contention that sufficient evidence is made available before the court about plaintiff's possession over 6 Acre, 12 *Are* land would not be sustainable for there appears to be measurement carried out by the Taluka Inspector of Land Records upon an application by the plaintiff and in the same it emerges that the plaintiff would be in possession of 6 Acres, 3 *Are* land as the Taluka Inspector of Land Records observes that the northern side appears to have been consumed by a road. Secondly, it has to be noted that it is not the case of the plaintiff that the defendants have caused encroachment over the suit property. The case is now being sought to be developed into a case for measurement without an allegation of encroachment by the defendants. Having regard to these aspects, the plaintiff has not been in a position to show by any credible material that she is in possession of 6 Acre, 12 *Are* land as sought to be owned by her in Gut No.87, in the face of measurement as is appearing and placed on record. Albeit, it is being contended on behalf of the

plaintiff that said measurement having regard to evidence as is emerging from the cross examination of the Taluka Inspector of Land Records would not be reliable and the measurement so done by him cannot be said to be authentic and according to rules and record. Even it is assumed to be so, as far as defendants are concerned, it would not be case which can be said to have been proved that it is the defendants who have caused disturbance or encroachment over the suit land. Nor it is the case of the plaintiff that the defendants are in possession of more land in Gut No.87 than the land alienated to them by the vendee of the plaintiff. In the face of such situation, it cannot be said that injunction would issue against the defendants. Thus, this part of the decision by the appellate as well as trial courts would not require any interference.

18. However, so far as observations with regard to suppression of facts are concerned, regard will have to be given to the circumstances, which were contendedly prevailing while the suit was instituted and having regard to that, original plaintiff been an age old lady, the situation will have to be viewed little broadly. It will have to be considered that in the aging process, person is affected by many inabilities and may be in the exigency and/or may be for want of proper knowledge of legal

proceedings, reference could not be made to the measurement which had been referred to by the defendants and later on deficiency as was alleged to be occurring had been removed and had been made good by causing amendment to the plaint. This particular aspect, courts hitherto appear to be oblivious of. It is further to be taken into account that keeping away such information ultimately was unlikely to benefit anyone and as such, the miss appears to be more out of inadvertence rather than deliberation. It will further have to be appreciated that evidence is not given by the original plaintiff and it is by her legal heir. So non-reference to this aspect in his cross-examination by him may not be said to be directly relate to the plaintiff while she had instituted the suit.

19. As such, I deem it appropriate that the ultimate decision by the two courts may not be liable to be disturbed. However, observations with regard to suppression of facts as are occurring would be presumptive by nature rather than objective.

20. In the circumstances, the second appeal is dismissed as aforesaid. Dismissal of the second appeal, however, would not preclude the plaintiffs from taking any action with regard to area of their claimed ownership.

21. In view of disposal of second appeal, civil application No.4195 of 2016 does not survive and stands disposed of accordingly.

[SUNIL P. DESHMUKH, J.]

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