

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

**APPEAL FROM ORDER NO.55 OF 2016  
WITH  
CIVIL APPLICATION NO.12310/2016**

1) Ramdas Shankarrao Dhumal  
Age: 62 Yrs., occu. Agril.  
R/o 1736, Near Deep Bunglow,  
Model Colony, Pune.  
AND  
At post Mamdapur,  
Tq. Rahata, Dist. Ahmednagar.

2) Aruna Ramdas Dhumal,  
Age: 57 Yrs., occu. Agril.  
R/o 1736, Near Deep Bunglow,  
Model Colony, Pune.  
AND  
At post Mamdapur,  
Tq. Rahata, Dist. Ahmednagar.

= **APPELLANTS**

**VERSUS**

1) Ajay Shankarrao Dhumal  
Age: 56 Yrs., occu. Business,  
R/o Goregaon (E)  
Mumbai.

2) Surekha Ajay Dhumal  
Age: 52 Yrs., occu. Business,  
R/o Goregaon (E)  
Mumbai.

Through General Power of Attorney  
Holder – Gajanan Shankarrao Dhumal,  
R/o Kolhar (Bk.), Tq.Rahata,  
Dist.Ahmednagar.

= **RESPONDENTS**

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Mr. PM Shah, Sr.Counsel for Appellants;

Mr. GG Deshpande, Advocate for Respondents.

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**CORAM : P.R.BORA, J.**

**DATE OF RESERVING JUDGMENT: 22<sup>nd</sup> NOVEMBER, 2016**

**DATE OF PRONOUNCING JUDGMENT: 23<sup>rd</sup> DECEMBER, 2016**

**JUDGMENT:**

1) The order passed by District Judge-2, Kopargaoon below Exhibit-5 in Regular Civil Appeal No.40/2016 on 4<sup>th</sup> August, 2016 is challenged in the present appeal. The parties to the present appeal are referred to by their original status in the civil suit.

2) Facts, in brief are thus, - Plaintiffs have filed the aforesaid appeal challenging the Judgment and order passed by Joint Civil Judge, Junior Division, Rahata on 21<sup>st</sup> April, 2016 in Regular Civil Suit No.131/2013. The plaintiffs had filed the aforesaid suit seeking perpetual injunction against the defendants, restraining them from disturbing possession of the plaintiffs over the suit properties.

. In the aforesaid civil suit, the plaintiffs had also prayed for interim

injunction. The said application was rejected by the trial court. The plaintiffs preferred Misc. Civil Appeal No.2/2015 against the said order before the District Court. The District Court allowed the said appeal and granted interim injunction in favour of the plaintiffs thereby restraining the defendants from obstructing the possession of the plaintiffs over the suit properties till decision of the said suit. The order passed by the District court was challenged by the defendants before this Court by filing writ petition No. 659/2015. This court, however, did not cause any interference in the order passed by the District Court.

. Thereafter, the suit was proceeded further and after having assessed the oral as well as documentary evidence brought on record before it, the learned trial court, vide its judgment delivered on 21<sup>st</sup> April, 2016, dismissed the said suit. Aggrieved by, the plaintiffs have filed the aforesaid Regular Civil Appeal in the district court at Kopergaon. In appeal, the

plaintiffs filed an application seeking interim injunction thereby restraining the defendants from disturbing their alleged possession over the suit properties till decision of the appeal. The application was strongly resisted by the defendants. The learned District Judge however has allowed the said application vide order dated 4<sup>th</sup> August, 2016. The defendants have preferred the present Appeal against the said Order.

3) Shri P.M.Shah, learned Sr.Counsel appearing for the appellants, assailed the impugned order on various grounds. The learned Sr.Counsel submitted that in spite of a clear finding recorded by the learned trial court after a full-fledged trial that the plaintiffs could not prove their exclusive possession over the suit properties, drawing some erroneous inferences the District Court has granted the interim injunction vide the impugned order.

4) The learned Sr.Counsel further submitted

that (I) non production of original will (ii) absence of necessary pleadings as about the will and more particularly that it was the last will executed by deceased Shankarrao and it was duly attested by two witnesses (iii) absence of required pleadings as about M.E.No.3760 and M.e.No. 5037 (iv) abstention of plaintiffs from entering the witness box and avoidance of cross-examination by the defendants (v) examination of power of attorney holder on the witness who cannot be a witness on behalf of the plaintiffs (vi) admissions given by the Power of attorney holder that he has no personal knowledge of the facts stated in the suit plaint and also about the will of deceased Shankarrao and the mutation entries; (vii) failure to prove that possession was obstructed by the defendants are the aspects which have been proved fatal for the case of the plaintiffs leading to the dismissal of the suit by the trial court. In such circumstance, according to the learned Sr.Counsel, there was no case for granting temporary injunction in favour

of the plaintiffs

5) The learned Sr.Counsel further submitted that the continuance of injunction order during the pendency of the suit is no justification to continue the injunction when the trial court has held that not the plaintiff but the defendants are in possession of the property.

6) Shri G.S.Deshpande, learned Counsel appearing for the respondents – plaintiffs supported the impugned order. The learned Counsel submitted that the execution of the Will by deceased Shankarrao Dhumal was not a fact in dispute and as such, there was no need of placing on record the said Will. The learned Counsel further submitted that the revenue entries, which have come on record, pertaining to the suit lands clearly establish that the plaintiffs were in exclusive possession of the suit properties.

. The learned Counsel further submitted that even in his evidence, appellant – deft.no.1

has admitted the fact that the suit properties were owned and possessed by the plaintiffs. The learned Counsel further submitted that the lower appellate court has rightly considered the relevant aspects in the matter and has protected the interest of the plaintiffs till decision of the appeal. The learned Counsel, therefore, prayed for dismissal of the appeal.

7) I have carefully considered the submissions made by the learned Sr. Counsel appearing for the appellants and learned Counsel appearing for the respondents. I have also perused the impugned judgment and the other material placed on record.

8) On perusal of the impugned order, it is apparently revealed that while assessing the evidence adduced before the Trial court, the first appellate court, instead of weighing the merit in the case of the plaintiffs, has preferred to find weaknesses in the defences

raised by the defendants. Overall import of the impugned order appears to be that since the defendants have failed in establishing that the suit properties are not in exclusive possession of the plaintiffs, prima face case is with the plaintiffs that they are holding possession of suit lands and they are cultivating the same through their power of attorney holder.

9) The primary burden was undoubtedly on the plaintiffs to prove acquisition of absolute title, ownership and possession vis-a-vis the suit properties on the strength of the Will referred in para 1 of the plaint and the complete exclusion of the defendants there from on the basis of the said Will. The plaintiffs were also under an obligation to prove that their alleged possession over the suit properties was obstructed by the defendants.

10) After the full-fledged trial of the suit, the trial court has recorded a clear

finding that the plaintiffs have failed in establishing their possession over the suit properties and that their alleged possession was obstructed by the defendants. Consequently, the suit has been dismissed by the trial court on that ground. When the original Court, after the trial has recorded the findings, as above and dismissed the suit on that ground, *prima facie* it was not a fit case for ordering the temporary injunction by the first appellate court during pendency of the appeal.

11) It is the matter of record that the interim relief was operating in favour of the plaintiffs during the pendency of the suit and while granting such relief in favour of the plaintiffs, the District court and while confirming the said order, the High court, have held the *prima facie* case in favour of the plaintiffs. It has to be however borne in mind that thereafter the evidence was adduced in the matter by the parties to the lis and after

complete hearing, the trial court has dismissed the suit on merits. It need not be stated that the considerations for grant of temporary injunction in first appeal preferred against the dismissal of the suit on merits, cannot be the same as while granting the temporary injunction in the said suit at the initial stage, obviously for the reason that, not only the entire material i.e. oral and documentary evidence adduced in the suit, but also the judgment of the trial court becomes available to the first appellate court while considering and deciding the temporary injunction application in the appeal. Ordinarily, where the original court after trial records a finding that the plaintiffs have failed in proving their possession over the suit properties and the suit is dismissed on that ground, unless some patent illegality or manifest error is noticed in the observations made or finding recorded by the trial court, it would not be a fit case for granting temporary injunction by the appellate court during pendency of the appeal.

12) I have carefully perused the judgment and order passed by the trial court in RCS No.131/2013. The trial court has dismissed the suit for the following reasons, -

a) That, the plaintiffs did not enter into the witness box and faced the cross-examination;

b) That, the power of attorney holder, who testified before the trial court for and on behalf of the plaintiffs, did not have personal knowledge about the Will allegedly executed by deceased Shankarrao Dhumal and also about the other facts stated in the suit plaint;

c) That, the plaintiffs have failed in explaining the relevance of mutation entry No. 5027;

d) That, the plaintiffs have not placed on record the order passed by the Tahsildar on the basis of which mutation entry No. 5037 is made;

e) That, mutation entry No. 3760 does not refer to one of the suit lands, i.e. Gut No. 18;

f) That the mutation entries, which are much crucial and the plaintiffs must have brought the same on record to clarify the situation, were not brought on record by the plaintiffs and the plaintiffs did not utter a single word about the said mutation entries either in the pleadings or in the evidence;

g) That, the plaintiffs did not produce on record the land revenue receipts pertaining to the suit lands

and on the contrary, the same are produced by the defendants;

h) That, the plaintiffs failed in bringing on record the evidence to prove that their alleged possession over the suit properties was obstructed by the defendants;

i) That, the defendants though did not have any onus to prove, still have brought on record sufficient evidence to show their possession over the suit properties;

13) Prima facie, I do not see any infirmity in the reasons assigned by the trial court while dismissing the suit. As was submitted by Shri P.M.Shah, learned Sr. Counsel appearing for the appellants "Whether the plaintiffs prove acquisition of title, ownership and possession

vis-a-vis the suit properties on the strength of the Will referred in para 1 of the plaint and the complete exclusion of the defendants there from on the basis of the said Will" was the point directly and substantially at issue in the suit. Admittedly, the plaintiffs did not place on record the copy of the Will though production of the same was specifically sought for by the defendants. Even if it is assumed that the execution of the Will was admitted by the defendants in the pleadings in RCS No.314/2011, as submitted by the learned Sr. Counsel, still burden was on the plaintiffs to prove that the Will so referred was the last will of deceased Shankarrao and that it was attested by two witnesses as mandated by Section 63(c) of Indian Succession Act, 1925 read with section 3 of the Transfer of Property Act. The validity of the Will cannot be presumed on the basis of the pleadings in different proceedings.

14) In the suit plaint only two documents

are referred; the will allegedly executed by deceased Shankarrao Dhumal and the Mutation Entry No.5027. Document of Will was admittedly not filed by the plaintiffs along with the plaint or even thereafter during the trial of the suit. M.E.No.5027, though seems to have been filed, it has no bearing on the subject matter of the suit. Said Mutation pertains to reduction in the amount of land revenue assessment. As has been observed by the trial court, copy of M.E.No.3760 which throws some light on the aspect of Will executed by deceased Shankarrao, was placed on record by the defendants. In the said Mutation Entry, however, there is no reference to Gat No.18 i.e. suit property described in para 1 (b) of the suit plaint. In Mutation Entry No.5037 and in R.C.S.No.314 of 2011 also there is no reference to said Gat No.18. The plaintiffs have thus not brought on record any document to uphold their contention that they have acquired title to said Gat No.18 on the strength of the alleged Will allegedly executed by deceased Shankarrao Dhumal.

The first appellate court has completely ignored this aspect while passing the impugned order.

. Moreover M.E.No.3760 indicates the bequest jointly in favour of plaintiff No.1 and Defendant No.1. There is no pleading that after the said mutation entry dt.20/02/1984, referring to the alleged Will, subsequently there was a division or partition. Further, there are no particulars as to how and why in addition to plaintiff no.1 and defendant no.1 the mutation is effected with reference to plaintiff no.2 and defendant no.2. Plaintiffs have also not disclosed whether any such settlement had arrived at between them and defendant M.E.No.5037, which has been relied upon by the first appellate court does not contain any such information. This mutation does not say about the extinguishment of title of the defendant. It is confined to the alleged Wahiwat. The said mutation is effected on the basis of order dated 10.06.1987 passed by Tahsildar. However, the said order is not filed on record. Even otherwise as has been argued by

the learned Senior Counsel mere entries in revenue record cannot make or unmake title to the properties.

15) As has been noted by the trial court it was sought to be contended before it on behalf of the plaintiffs that M.E.No.5037 is a partition between plaintiffs and defendants. The Learned Trial Court, however did not accept the said contention observing that there was no factual foundation and also evidence therefor. The trial court has specifically observed that the suit plaint is totally silent about both the mutation entries, M.E.No.3760 and M.E.No.5037. I see no infirmity in the observations so made and the finding recorded by the Trial Court. The defendants were expected to meet the case, only as was pleaded in the plaint and no amount of evidence could be looked into in the absence of pleadings.

16) The Trial Court has declined to consider

and rely upon the evidence of P.W.1 Sayaji and has recorded reasons therefor in paras 12 to 17 of its Judgment. The trial court has particularly observed that evidence of P.W.1 Sayaji does not show his personal knowledge about the facts and circumstance in the case and his evidence is just narration of certain facts, which came to his knowledge from the plaintiffs or the defendants.

17) As held by the Hon'ble Privy council in the case of Sardar Gurubaksh Singh Vs. Gurudial Singh reported in 1927 Bom.L.R.1392, -

"It is bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case"

The Hon'ble Apex court in the case of Vidyadhar Vs. Manikrao and Anr. - (1993) 3 SCC 573 has held that,

" when a party to the suit does not appear in the witness box and states his own case on oath and does not

offer himself to be cross-examined by the other side a presumption would arise that the case set up by him is not correct."

18) The Trial Court has observed that the relief of perpetual injunction is a remedy in *personam* and such remedy requires the aggrieved person to come and depose in the court. The trial court has also observed that the plaintiffs have not provided any reason for not appearing in person before the court for giving evidence in the matter.

19) The Hon'ble Apex court in the case of Janki Vashdeo Bhajwani and another Vs. Indusind Bank Ltd. And Ors. - 2005 (1) Mh.L.J. 1170, has observed that,

"A general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in a witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

20) It is further significant to note that the plaintiffs executed the power of attorney in favour of Sayaji on 27<sup>th</sup> March, 2015, i.e. after about two years of filing of the suit by them. The suit is admittedly filed on 28<sup>th</sup> February, 2013. In the suit plaint, it is not the case of the plaintiffs that the suit properties are being cultivated for and on behalf of them by Sayaji Prataprao Deshmukh. As has come on record through evidence of PW 1 – Sayaji, he came at Mamdapur for the purpose of looking after the suit properties in January 2015. In the suit, it is the contention of the plaintiffs that their possession over the suit properties was obstructed by the defendants on 8<sup>th</sup> December, 2012. In the suit plaint, it is specifically contended that on 8<sup>th</sup> February, 2012, the defendants threatened the labourers engaged by them and obstructed their possession. Considering the facts, as aforesaid, it is evident that PW 1 – Sayaji was not having any

personal knowledge of the aforesaid facts nor at the relevant time he was cultivating the subject lands. In the circumstances, in order to prove the contentions raised in the plaint either of the plaintiffs must have entered the witness box to depose the necessary facts. Since none of the plaintiffs appeared in the witness box and stated his own case on oath and did not offer himself/herself to be cross-examined, presumption would arise that the case set up by him was not correct. The Trial court has made such observations and I do not find that the trial court has committed any error in making such observations and in drawing such inference.

21) While considering the aforesaid aspect, learned first appellate court has observed that the Trial Court has given undue importance to the fact that plaintiffs intentionally withdrawn from entering into the witness box. The first appellate court has also observed that the power of attorney holder examined by the plaintiffs has

specifically stated that plaintiffs are not cultivating the suit lands but he himself is cultivating the suit lands for plaintiffs as plaintiffs are residing at Mumbai and it is for that reason the plaintiffs examined the power of attorney holder. After making such observations the Appellate Court has recorded a finding that therefore prima facie observations made by the learned Civil Judge rejecting the evidence of power of attorney holder are not correct.

22) Observation made as above and the view so taken by the first appellate court is apparently unsustainable since, it is contrary to the evidence on record. As noted earlier the power of attorney holder himself has stated in his cross-examination that he started looking after the suit lands since January 2015. As has been specifically deposed by the power of attorney holder, he came to village Mamdapur in January 2015. The First Appellate Court has also failed in appreciating that in his cross-

examination power of attorney holder has clearly stated that he has taken information about the suit from the plaintiffs and has no personal knowledge about the facts therein. The power of attorney holder has further admitted that he has no personal knowledge about the execution of Will by deceased Shankarrao and is also not personally aware of the revenue entries made in respect of the suit lands. In the aforesaid circumstances, prima facie it does not appear to me that the trial Court has committed any error in rejecting the evidence of the power of attorney holder.

23) If the evidence of power of attorney holder is kept out of consideration, there remains no evidence on behalf of the plaintiffs to substantiate the contentions raised in the suit plaint that the suit properties were in their exclusive possession at the timing of filing the suit and that the alleged possession was attempted to be obstructed by the defendants.

24) The observations made by the first appellate court in para 11 of the impugned order also cannot be subscribed. Mutation Entry No.3760 dated 28.02.1984 refers to the Will. However, this Mutation Entry is not refereed in the plaint. As alleged by the defendants the plaintiffs have intentionally suppressed the said Mutation Entry. Mutation Entry No.5037 is made on the basis of order passed by Tahasildar bearing No.Dand-2/349/87 dated 10.06.1987. However, this basic order has not been made available to the Court for scrutiny. The aforesaid mutation is purported to be made on the basis of Vahivat. There is no pleading even about this mutation in the plaint. As noted by me herein above, there is no pleading that after making of mutation entry no.3760 referring to the will, subsequently there was a division or partition. Though there is some reference as about the Vatni Patra amongst the plaintiffs and the defendants, there is no pleading as about the said Vatni Patra also. As was rightly submitted by the learned senior

counsel the defendants were expected to meet only the case as was pleaded in the plaint and no amount of evidence could be looked into in the absence of pleadings. All the aforesaid aspects are considered by the trial Court and I reiterate that after full-fledged trial the trial court has recorded the finding that the plaintiffs have failed in establishing there exclusive possession over the suit properties.

25) It further appears to me that the inferences drawn by the first appellate court on the basis of averments in R.C.S.No.314 of 2011 are also incorrect. The averments in the said suit, at the most can be used to *prima facie* hold that the will was executed by deceased Shankarrao Dhumal and some properties were bequeathed by him in favour of the plaintiffs and the defendants. However, merely on the basis of the averments in the said suit, no such inference can be drawn that the plaintiffs are in exclusive possession of the suit properties. Moreover, Gat No.10 and

Gat No.17 were only the subject lands in RCS No.314 of 2011 and there is no reference to other two suit lands,i.e. Gat No.18 and Gat No.33.

26) Averments in para 37 of the evidence affidavit of Defendant No.1 to the effect that plaintiffs had executed power of attorney in his favour, authorising him to look after the suit lands, have also been misconstrued by the first appellate court. Firstly, such is not the case of the plaintiffs pleaded in the suit plaint and secondly, if said contention is to be relied upon, it, in fact, negates the case of the plaintiffs that they are in possession of the suit properties. To accept the contention of defendant No.1 that plaintiffs had executed power of attorney in his favour authorizing him to look after the suit lands would mean that deft.No.1 is in de facto possession of the suit lands and then plaintiffs had no reason to make any grievance that their possession over the suit properties is being attempted to be disturbed by the defendants

27) In the further discussion also, the learned first appellate court has harped upon the faults in the defence raised by the defendants. Defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff, but primary burden was on the plaintiffs to prove that they are in exclusive possession of the suit properties. After having considered the material on record, it is difficult to concur with the findings recorded by the first appellate court while passing the impugned order. Plaintiffs – appellants have failed to make out any prima facie case so as to continue the injunction order till decision of the appeal. In the result, the following order, -

**ORDER**

- i) The appeal is allowed;
- ii) Order dated 4.8.2016 passed below Exhibit-5 in Regular Civil Appeal No.40/2016 is set aside. Consequently,

the application at Exhibit-5 stands rejected;

iii) No order as to costs. Pending Civil Application, if any, stands disposed of.

sd/-  
**( P . R . B O R A )**  
**JUDGE**

bdv/

fldr 25.11.2016