

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 543 OF 2016
WITH
CIVIL APPLICATION NO. 1095 OF 2016
IN
SECOND APPEAL NO. 543 OF 2016**

Namdev Bhanuds Lokhande **...Appellant**

Versus

Changdeo Vishwanath Hatkar & Ors. **...Respondents**

Mr. Kamlesh P. Mali, for the Appellant.

Mr.Surel S. Shah, for the Respondent No. 1.

CORAM : R.D. DHANUKA, J.

DATE : 23rd November 2016

ORDER :

1. By this Appeal filed under Section 100 of the Code of Civil Procedure, 1908, the Appellant (original Defendant No. 1) has impugned the Judgment and Decree dated 27th

November 2015 passed by the learned Additional District Judge, Malshiras, dismissing the Regular Civil Appeal No. 191 of 2004 filed by the appellant by which the Appellant had impugned the Judgment and Decree dated 14th July 2000 passed by the learned Civil Judge, Junior Division, Malshiras, thereby decreeing the Regular Civil Suit No. 26 of 1991 filed by the Respondent No. 1 (original Plaintiff) *inter alia* praying for possession and for permanent injunction against the Defendants.

2. The agricultural land admeasuring 2 gunthe out of the land bearing Gat No. 102/2 having two rooms admeasuring 40 feet x 18 feet bearing GP House No. 740 of Village Mahalung was the subject matter of the Suit. It was the case of the Respondent No. 1 (Plaintiff) that the suit land is ancestral property and was possessed by him. It was his case that the Appellant (original Defendant No. 1) and his predecessor-in-title Vishwanath Shankar Hatkar was having friendly relations with the Plaintiff and therefore, the Plaintiff had permitted the Defendant No. 1 to occupy part of the suit premises. It was also the case of the Defendant No. 1 that his name was illegally

entered into Grampanchayat record. The Plaintiff had made a complaint to Grampanchayat for recording the name of the Defendant No. 1 in the Grampanchayat record illegally.

3. Plaintiff demanded possession of the suit land from the Defendant No. 1. The Defendant No. 1, however, refused to give possession of the suit land to the Plaintiff. The Plaintiff had issued a notice on 10th November 1990 and demanded possession of the suit land from the Defendant No. 1. It was the case of the Plaintiff that the Defendant No. 1 was granted permissive right in respect of the possession and occupation of the suit land and was liable to return the possession thereof to the Plaintiff when demanded. Since the Defendant No. 1 did not handover the possession of the suit land to the Plaintiff, the Plaintiff filed a Suit (Regular Civil Suit No. 26 of 1991) in the Court of learned Civil Judge, Junior Division, Malshiras *inter alia* praying for possession and for permanent injunction against the Defendant No. 1 and other Defendants. The Suit was resisted by the Defendant No. 1 and the Defendant No. 3. It was the case of the Defendant No. 1 that during the lifetime of the

father of the Plaintiff and after his death, the Defendant No. 1 had requested the Plaintiff to bring N.A. permission and to execute the Sale Deed after receiving the balance amount under writing dated 10th March 1980. Defendant No. 3 filed the Written Statement contending that he was not concerned with the dispute between Plaintiff and Defendant No. 1.

4. The learned Trial Judge framed 12 issues. The Plaintiff examined himself and Mr. Vasant Damu Ronge as witness. The Defendant No. 1 examined the original Defendant No. 2 as his witness and the stamp vendor Amir Hamja Haji Samsher Bhai. The learned Trial Judge passed the judgment and decree on 14th July 2000 thereby decreeing the said Suit filed by the Plaintiff and directing the Defendant No. 2 to handover the peaceful possession of the suit land to the Plaintiff and ordered a separate inquiry in respect of the mesne profits under Order XX Rule 12(c) of the Code of Civil Procedure, 1908.

5. Being aggrieved by the said judgment and decree dated 14th July 2000, the Defendant No. 1 preferred an Appeal (Regular Civil Appeal No. 191 of 2004) in the Court of District

Judge Malshiras who formulated four points for determination and after considering the oral and documentary evidence, confirmed the findings rendered by the learned Trial Judge and dismissed the Appeal filed by the Defendant No. 1. This judgment and decree passed by the learned Additional District Judge dated 27th November 2015 has impugned by the Defendant No. 1 in this Second Appeal.

6. Mr. Mali, the learned Counsel for the Defendant No. 1 invited my attention to the alleged writing dated 10th March 1980 and also the oral evidence of the Defendant No. 2, the Plaintiff, the oral evidence of the Gram Vikas Officer and also oral evidence of the scribe. It is submitted by the learned Counsel that the Plaintiff in his cross-examination has admitted signature on the said writing dated 10th March 1980. He submits that the Plaintiff or his predecessor-in-title did not comply with his obligations under the said writing dated 10th March 1980. The Defendant No. 1 has already filed the Suit for specific performance of the said writing dated 10th March 1980 sometime in the year 1999. He submits that though the Trial

Court has dismissed the said Suit filed by the Defendant No. 1, the Appeal filed by the Defendant No. 1 impugning the said judgment and decree in the said Suit for specific performance is pending.

7. It is submitted by the learned Counsel that the father of the Plaintiff had handed over possession of the suit land to the Defendant No. 1. In the year 1980 itself and since then, the Defendant No. 1 has been in possession of the suit land in part performance of the said writing dated 10th March 1980 under Section 53A of the Transfer of Property Act, 1882.

8. It is submitted by the learned Counsel for the Defendant No. 1 that scribe of the said writing dated 10th March 1980 also has deposed in his evidence that he had written the said document dated 10th March 1980 and was present when the said document was signed by the signatory to the said document and possession in respect of the suit land was handed over to the Defendant No. 1 to the father of the Plaintiff. He also placed reliance on the evidence led by Gram Vikas Officer who deposed that since 1980 the name of the Defendant

No. 1 was recorded in the Grampanchayat record but no objection in respect of the said entry was raised by the said Plaintiff. He submits that the findings rendered by the two Courts below being perverse can be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

9. Mr. Shah, the learned Counsel for the Plaintiff on the other hand, submits that the Defendant No. 1 could not prove the writing dated 10th March 1980. The Defendant No. 1 was found in illegal possession of the suit land. He submits that it was admitted by the Defendant No. 1 that till 1985, he was residing in the other property and thus, his case that he was put in possession under the said alleged writing dated 10th March 1980 on the date of execution of the said writing was proved to be false before the two Courts below.

10. It is submitted by the learned Counsel that though the Plaintiff had filed the Suit in the year 1991 *inter alia* praying for possession of the suit property, the Defendant No. 1 admittedly did not file any counterclaim in the said Suit *inter alia* praying for specific performance of alleged agreement dated

10th March 1980. He submits that in the event, even according to the Defendant No. 1, the Suit for specific performance came to be filed only in the year 1991, which is admittedly dismissed by the learned Trial Judge.

11. It is submitted by the learned Counsel for the Plaintiff that both the Courts below have rightly disbelieved the scribe and also other witnesses examined by the Defendant No. 1. He submits that the witness examined by the Plaintiff had proved about his ownership in respect of the Suit land and had also proved that he had permitted the Defendant No. 1 to reside in the suit property temporarily. He submits that the name of the Defendant No. 1 was illegally recorded in the Grampanchayat record. He submits that the findings rendered by the two Courts below are rendered after considering the oral and documentary evidence and being concurrent and being not perverse cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

12. A perusal of the evidence on record to which my attention was invited by the learned Counsel appearing for

the Defendant No. 1 and the Plaintiff indicates that the Defendant No. 1 had failed to prove any alleged right, title or interest in the suit land. It was not the case of the Defendant No. 1 that he was the owner in respect of the suit land. Though the Plaintiff had filed the Suit for possession in the year 1991, the Defendant No. 1 did not file any counter-claim in the said Suit *inter alia* praying for the specific performance of the alleged writing dated 10th March 1980. Plaintiff had raised objection before the Grampanchayat for recording the name of the Defendant No. 1 in the Grampanchayat record.

13. Be that as it may, merely because Defendant No. 1 got his name recorded in the Grampanchayat record, the said entry would not exclusively prove the alleged right, title and interest whatsoever in favour of the Defendant No. 1. The Trial Court after considering the oral evidence including the evidence of Gram Vikas Officer, rightly hold that the Plaintiff had proved that the Defendant No. 1 got his name recorded in the Grampanchayat record illegally.

14. In my view, the learned Trial Judge as well as

the first Appellate Court have rightly disbelieved the evidence led by the Defendant No. 1 and have rightly rendered the findings in favour of the Plaintiff.

15. The first Appellate Court had also independently rendered a finding that the Plaintiff had proved that the possession of the Defendant No. 1 and his father over the suit property was of permissive nature which was withdrawn. The first Appellate Court also rightly held that the Defendant No. 1 had failed to prove that he and his father were possessing the suit property on the basis of the agreement between Vishwanath Hatkar and Bhanudas Lokhande under the alleged writing dated 10th March 1980. It is held by the first appellate Court that during the lifetime of the said Vishwanath Hatkar, the Defendant No. 1 did not take any steps to get the Sale Deed executed in respect of the suit land.

16. The first Appellate Court has rendered a finding that in the year 1985, the Defendant No. 1 and his father came to reside in the suit property with permission of the father of the Plaintiff and not under the alleged writing dated 10th

March 1980.

17. In my view, the findings of the two Courts below are concurrent and being not perverse, cannot be interfered with by this Court in this Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908. No substantial question of law arises in this Appeal. I therefore, pass the following order:-

- (i) The Second Appeal is dismissed.
- (ii) In view of dismissal of this Second Appeal, the Civil Application No. 1095 of 2016 does not survive and is accordingly, dismissed.
- (iii) There shall be no order as to costs.

[R.D. DHANUKA, J.]