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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.48 OF 2015
WITH
CIVIL APPLICATION NO.387 OF 2015

Akharam C. Kokarude, since deceased
through His L.Rs. - Shivaji A. Kokarude

...Appellant
...Ori. Deft.

V/s.

Gunga D. Patil, since deceased
through His L.Rs. - Savatri G. Patil & Ors.

...Respondents
...Ori. Plffs.

Mr.Drupad Patil for the Appellant.

Mr.S.S. Patwardhan for the Respondent Nos.1 to 4.

CORAM : R.D. DHANUKA, J.
DATE : 19TH DECEMBER, 2016.

P.C. :-

1. By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant) has impugned the judgment and decree dated 29th September, 2014 passed by the learned District Judge -3, Kolhapur, dismissing Regular Civil Appeal No.4 of 2010, filed by the appellant herein. In the said appeal, the appellant had impugned the judgment and decree passed by the learned trial Judge on 17th December, 2009, allowing Civil Suit No.59 of 2001, filed by the predecessors of the respondents herein (original

plaintiffs) *inter-alia* praying for possession of the suit land. Some of the relevant facts for the purpose of deciding this second appeal are as under :

2. The parties described in the judgment and decree are as per their original status before the learned trial Judge in the suit filed by the original plaintiff.

3. The suit property is described as plot No.9 (old Grampanchayat No.1184 New Grampanchayat No.181) admeasuring 25 foot x 40 foot situated at Navin Vasahat, Sarud taluka, Shahuwadi, District Kolhapur. It was the case of the original plaintiff that Additional Collector, Shahuwadi Division, Kolhapur had passed an order on 2nd April, 1990 and had allotted various plots to the residents of village Sarud on certain terms and conditions. According to the original plaintiff, the suit land was allotted to the original plaintiff by the Additional Collector. An agreement in that regard was signed in favour of the original plaintiff by the Government by allotting the said plot of land. It was however, the case of the original defendant that the said agreement did not disclose the description of the property and did not give any details regarding allotting the plot. According to the original defendant, the original plaintiff had played fraud upon the Revenue Authority and by using his political influence through his brother, who was Deputy Sarpanch of the village in the year 1991

had got his name recorded in the revenue record of the suit land. It was the case of the original defendant that he was all through out in continuous and exclusive possession of the suit land at least since 20 to 25 years prior to the original plaintiff filing the suit.

4. On 26th June, 2001, the original plaintiff filed Regular Civil Suit No.59 of 2001 in the Court of learned Civil Judge, Junior Division, Malkapur – Shahuwadi, *inter-alia* praying for perpetual injunction in respect of the suit land against the original defendant. In the said plaint, it was alleged by the original plaintiff that he was in possession of the suit land from the date of allotment, the original defendant was trying to encroach upon the suit land. The learned trial Judge appointed a Court Commissioner and found that the defendant was in possession of the suit land. The suit was resisted by the original defendant by filing a written statement on 24th July, 2001. It was the case of the original defendant that the original plaintiff was not concerned with the suit land and was fraudulently claiming interest over the suit land.

5. Some time in the year 2007, the original plaintiff applied for amendment of the plaint. It was alleged that the suit land was actually in possession of the original plaintiff, however, the original defendant was trying to claim possession thereof over the suit land on the basis of the report of the Court Commissioner. It was prayed in

the amended plaint that if the Court comes to the conclusion that the suit land was in possession of the original defendant, then possession of the suit land be handed over to the original plaintiff. The original defendant filed additional written statement on 24th April, 2007.

6. The learned trial Judge framed five issues. The original plaintiff examined himself and other witnesses. The original plaintiff as well as his witnesses were extensively cross-examined by the advocate representing the original defendant. The original defendant also examined himself and Mr.Mahadeo Yadav and Mr.Pandurang Khade to prove that the original defendant was in possession of the suit land from 1994.

7. On 17th December, 2009, the learned trial Judge passed a decree in the said Regular Civil Suit No.59 of 2001 and held that the original plaintiff had failed to establish his possession over the suit land and to establish that there was any obstruction at the hands of the original defendant. The learned trial Judge however, placed reliance on the agreement in favour of the original plaintiff and held that the original plaintiff was entitled to a decree for possession against the original defendant and for injunction. Being aggrieved by the said judgment and decree dated 17th December, 2009, the original defendant filed an appeal (Regular Civil Appeal No.4 of 2010)

in the District Court, Kolhapur.

8. Learned Ad-hoc District Judge – 3, Kolhapur formulated six points for determination and passed judgment and decree dated 21st September, 2014, thereby dismissing Regular Civil Appeal No.4 of 2010 filed by the original defendant. The original defendant has impugned the said judgment and decree dated 29th September, 2014 in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

9. Mr.Patil, learned counsel appearing for the original defendant invited my attention to unamended and amended plaint filed by the original plaintiff and also the averments made in the written statement and the additional written statement filed by the original defendant. He submits that in the original plaint, the original plaintiff had falsely contended that he was in possession of the suit land and had simpliciter prayed for perpetual injunction against the original defendant. He submits that admittedly the suit was filed on 26th June, 2001, whereas the amendment was carried out *inter-alia* praying for possession of the suit land only on 30th March, 2007. He submits that the original defendant was in possession of the suit land for last more than 20 years prior to the date of filing of the suit on 26th June, 2001. It is submitted that in the original plaint as well as in the amended plaint, it was not the case of the original plaintiff that he

was in possession of the suit land on 26th June, 2001 and was dispossessed by the original defendant between 2001 and 2007.

10. it is submitted that it was also not averred by the original plaintiff that there was any averment about the date and time since when the original defendant was in possession of the suit land. He submits that the suit filed by the original plaintiff was thus *ex-facie* barred by law of limitation. In support of this submission, learned counsel appearing for the original defendant placed reliance on the judgment of this Court in case of **Latabai Jeevanrao Bodhankar vs. Trimbakrao Shriramrao Deshpande & Ors., 2009 BCI 67** and in particular paragraph 16 thereof. It is submitted by the learned counsel that the original plaintiff had got his name recorded in the revenue record, by using his influence, his brother being Deputy Sarpanch during the relevant period. He submits that there was no cross-objection or cross appeal filed by the original plaintiff against the original defendant though there was a finding rendered by the learned trial Judge that the original plaintiff had failed to prove his possession in respect of the suit land. He submits that the first appellate Court however, has rendered a finding that the original plaintiff was in legal possession of the suit land.

11. It is submitted by the learned counsel that though the State Government was the owner of the property, the State Government

was not impleaded as a party defendant in the suit for possession. The suit itself was bad for non-joinder of necessary party.

12. It is submitted by the learned counsel for the original defendant that both the Courts below have interpreted the alleged agreement relied upon by the original plaintiff alleging the allotment of the suit land by the State Government in his favour. He submits that since the second appeal is arising out of the erroneous interpretation of the document, substantial question of law arises in this appeal on the basis of the interpretation of the document, which can be examine by this Court in this second appeal. In support of this submission, learned counsel for the original defendant placed reliance on the judgment of the Supreme Court in case of **Neelu Narayani & Ors. vs. Lakshmanan & Ors. (1999) 9 SCC 237** and in particular paragraph 3 thereof.

13. Mr.Patwardhan, learned counsel appearing for the legal heirs of the original plaintiff, who were brought on record before the first appellate Court in view of the demise of the original plaintiff, submits that the original plaintiff was allotted the suit land by the Government. He submits that the agreement in respect of the suit land was produced and proved by the original plaintiff by leading oral evidence before the learned trial Judge. He submits that the original defendant on the contrary had also made efforts to get the suit plot

from the Government under a scheme, however was not successful.

14. It is submitted by the learned counsel that in the cross-examination of the original plaintiff, the original defendant had put a suggestion that the original plaintiff had wrongly obtained the order from the Government for allotment of the suit land. He submits that suggestion to the original plaintiff by the original defendant in the cross-examination itself would indicate that it was an admitted position that the order of allotment of the suit land existed and the original plaintiff was thus the owner of the suit land.

15. It is submitted by the learned counsel that the allotment of land by the Officer under the provisions of the Maharashtra Land Revenue Code, 1966 was an act while performing official duty, which was admittedly not challenged by the original defendant under the provisions of section 247 of the Maharashtra Land Revenue Code, 1966. He submits that no suit came to be filed by the original defendant claiming any independent right in respect of the suit land. He submits that no counter claim claiming any right, title or interest in the suit land came to be filed by the original defendant.

16. Learned counsel for the legal heirs of the original plaintiff invited my attention to the findings and observations made by the first appellate Court. He submits that the first appellate Court has rightly summarized the case of the original defendant. The original

defendant had applied for regularization of unauthorized construction and had also claimed adverse possession against the original plaintiff. He submits that the fact that the original defendant had applied for regularization of unauthorized construction and had claimed adverse possession against the original plaintiff that itself indicates that the title of the original plaintiff in the suit land was admitted by the original defendant. He submits that the witness examined by the original defendant had admitted that no order was passed on the said application for regularization. The Circle Officer, who had made recommendation in favour of the original defendant for allotment of the particular plot of land, had no such authority to make any such recommendation.

17. It is submitted by the learned counsel for the legal heirs of the original plaintiff that two Courts below have decided the rights of the parties based on who was having better title than other party and have rendered a finding that the original defendant was an encroacher and had no right, title or possession whatsoever in nature in the suit land and holding that the original plaintiff was in legal possession of the suit land.

18. It is submitted by the learned counsel for the legal heirs of the original plaintiff that the original plaintiff was made a suggestion in the cross-examination that he had produced false document before

the State Government and had got the allotment letter itself would indicate that the suit land was allotted to the original plaintiff by the State Government. He submits that though the original defendant had demanded the allotment of the land from the Government, the fact remains that no order of allotment was made by the Government in favour of the original defendant.

19. Insofar as the issue of limitation raised by the learned counsel for the original defendant is concerned, it is submitted by the learned counsel for the legal heirs of the original plaintiff that no such issue was raised by the original defendant in the written statement or at any stage during the hearing of the suit or even before the first appellate Court. The learned trial Judge thus rightly did not frame any issue regarding limitation.

20. Learned counsel distinguished the judgment of this Court in case of **Latabai Jeevanrao Bodhankar** (supra) on the ground that the learned trial Judge has rightly rejected the plea of adverse possession raised by the original defendant and could not establish the date and the year since when he was claiming to be in possession which was adverse to the title of the original plaintiff.

21. Insofar as the submission of the learned counsel for the original defendant that substantial question of law arises in this second appeal in view of the two Courts having interpreted the

document is concerned, it is submitted by the learned counsel for the legal heirs of the original plaintiff that both the Courts have rendered a finding of fact that the agreement was entered into in favour of the original plaintiff by the Government based on the oral evidence led by the parties. Various questions asked by the learned counsel for the original defendant to the original plaintiff itself indicated that the title in respect of the suit land was not disputed by the original defendant and he was fully aware of the same. He submits that the judgment of the Supreme Court in case of **Neelu Narayani & Ors.** (supra) thus is clearly distinguishable in the facts of this case.

22. It is submitted by the learned counsel for the legal heirs of the original plaintiff that both the Courts have rendered various findings of fact after considering oral as well as documentary evidence and such finding of fact being 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.

23. Mr.Patil, learned counsel appearing for the original defendant in rejoinder submits that the learned counsel for the legal heirs of the original plaintiff has not addressed this Court as to when the original defendant had dispossessed the original plaintiff.

REASONS AND CONCLUSIONS :

24. A perusal of the unamended plaint indicates that initially it

was the case of the original defendant that he was in possession of the suit land since inception and was allotted the said suit land by the Government and the agreement was entered into between him and the Government. The Civil Court had appointed the Court Commissioner, who submitted a report stating that the original defendant was in possession of the suit land. The plaintiff accordingly amended the plaint on 30th March, 2007 and prayed that if the Court comes to the conclusion that the original defendant was in possession of the suit land, the decree for possession shall be granted in favour of the original plaintiff in respect of the suit land. The original defendant thereafter filed an additional written statement.

25. Learned trial Judge after considering the oral as well as documentary evidence rendered a finding that the original plaintiff had failed to prove his possession in respect of the suit land and that the original defendant had failed to prove the obstruction created by the original defendant in respect of the alleged possession of the original plaintiff. The learned trial Judge however, considered the agreement and other documents produced by the original plaintiff and held that the original plaintiff was entitled to possession of the suit land from the original defendant and also an injunction against the original defendant.

26. A perusal of the impugned judgment and decree passed

by the first appellate Court indicates that a finding is rendered that in the year 1991, an agreement took place between the original plaintiff and the Government which was marked as Exhibit – 50. The original plaintiff had constructed a house and cattle shed on the suit land in the year 1991 and his name was entered in the revenue record. The first appellate Court also considered the assessment extract (Exhibit – 51) on property No.1184, which was a barren land. The said extract is for the year 1993-1994 and was standing in the name of the original plaintiff. The first appellate Court also considered the document at Exhibit 52 i.e. assessment extract for the year 2000 to 2005 which revealed that it was standing in the name of the original plaintiff. Exhibit -53 which was the assessment extract revealed that House No.426 was standing in the name of the original plaintiff. City Survey No.792 (Exhibit – 54) was standing in the name of the father of the original plaintiff. The agreement was executed between the original plaintiff and the Government through Tahsildar, Shahuwadi.

27. The first appellate Court accordingly rejected the plea of the original defendant that with the influence of brother of the original plaintiff, the name of the original plaintiff was entered into the revenue record. It is held that the brother of the original plaintiff was Deputy Sarpanch in the year 1991, whereas the name of the original plaintiff was entered for the first time in the year 1993-1994 in Exhibit

– 51.

28. The first appellate Court has held that the then Circle Officer Mr.Pandurang Khade, who was examined by the original defendant in his evidence has stated that as per the order of the Sub Divisional Officer, he had made inspection of the plots at village Sarud and found that on plot no.9, there was a roof of the original defendant and he had made an encroachment over it. The first appellate Court held that the original plaintiff was the owner of the plot bearing No.9, whereas the original defendant was in possession of it by way of encroachment.

29. The first appellate Court has rendered a finding that the original defendant had not disclosed that he had done the encroachment on the suit plot and was not regularized nor produced any documentary evidence in support of the said plea. It is accordingly held that the original defendant had failed to prove by any documentary evidence his legal possession over the suit plot.

30. Insofar as the plea of adverse possession raised by the original defendant is concerned, it is held by the first appellate Court that the original plaintiff was legally in possession of the suit land. The original defendant had made encroachment on the suit land. The original defendant had failed to prove his adverse possession.

31. A perusal of the record clearly indicates that the original

defendant had made a suggestion to the original plaintiff in his cross-examination that the original plaintiff had unauthorizedly got his name entered in the revenue record and that he had got the plot of land allotted by filing false documents. It is thus clear beyond doubt that the original defendant had accepted the title of the original plaintiff in respect of the suit land allotted by the Government.

32. It is also not in dispute that the original defendant also had applied for allotment of the plot of land and was not successful in getting the suit plot of land allotted in his favour.

33. The original defendant has not stated before this Court that he had applied for regularization of the encroachment made by him on the suit plot and was not successful in getting the encroachment regularized. It clearly thus indicates that the original defendant had encroached upon the land of the original plaintiff and was not in legal possession of the suit land. In these circumstances, in my view the two Courts below have rightly passed the judgment and decree in favour of the original plaintiff for possession of the suit land and for injunction against the original defendant. Both the Courts below have considered the entire documentary as well as oral evidence led by both the parties and have rendered findings of fact which are concurrent and being not perverse, cannot be interfered with by this Court.

34. Insofar as the submission of the learned counsel for the original defendant that the original plaintiff had not furnished any details as to when the original defendant had dispossessed the original plaintiff which will have bearing on the issue of limitation is concerned, it is not in dispute that the original defendant did not raise any issue of limitation in the written statement and did not even urge this submission across the bar at any stage either before the learned trial Judge or before the first appellate Court. Both the courts below have rendered a finding of fact that possession of the original defendant was totally unauthorized and he was not in legal possession. There is thus no merits in this submission of the learned counsel for the original defendant.

35. Insofar as the judgment of this Court in case of **Latabai Jeevanrao Bodhankar** (supra) relied upon by the learned counsel for the original defendant is concerned on the issue of possession, this Court had observed that there was no satisfactory evidence. In this case both the Courts below have rendered a finding that possession of the original defendant was not legal possession and he had made an encroachment on the suit land. The judgment of this Court in case of **Latabai Jeevanrao Bodhankar** (supra) thus would not assist the case of the original defendant and is clearly distinguishable in the facts of this case.

36. Insofar as the submission of the learned counsel for the original defendant that since both the Courts have interpreted the terms of the agreement between the original plaintiff and the Government and such interpretation would raise substantial question of law in this second appeal is concerned, a perusal of the record indicates that both the Courts below have considered the oral as well as documentary evidence and more particularly the cross-examination of the original plaintiff by the original defendant making various suggestions to the witness and have rightly held that the ownership of the suit land of the original plaintiff was admitted by the original defendant. The finding rendered by the two Courts below is not based on the interpretation of the agreement simpliciter but have been rendered on the basis of oral as well as documentary evidence. In my view, the judgment of the Supreme Court in case of **Neelu Narayani & Ors.** (supra) thus would not assist the case of the original defendant and the said judgment is clearly distinguishable in the facts of this case.

37. In my view, there is no substantial question of law arises in this second appeal. The second appeal is devoid of merits.

38. I therefore, pass the following order :-

- a). Second Appeal No.48 of 2015 is dismissed.
- b). Mr.Patil, learned counsel appearing for the appellant seeks

continuation of the *ad-interim* protection granted by this Court for a period of eight weeks from today. On the oral application of the learned counsel for the appellant, *ad-interim* protection granted by this Court to continue for a period of eight weeks from today. It is however, made clear that the appellant shall not create any third party rights in respect of the suit property and shall not carry on any construction on the suit property during the aforesaid period of continuation of stay granted by this Court. If any Special Leave Petition is filed by the appellant, a copy of the papers and proceedings in the Special Leave Petition and notice of hearing shall be given to the respondents in advance.

c). In view of dismissal of Second Appeal No.48 of 2015, Civil Application No.387 of 2015 does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)