

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 521 OF 2015
AND
CIVIL APPLICATION NO. 12179 OF 2015

Pandurang S/o Hari Mule,
Age 42 years, Occu.: Agri.,
R/o Pravara Sangam,
Tq. Newasa, Dist. Ahmednagar

.. APPELLANT
(Orig. Deft.)

VS.

1. Bhanudas S/o Rabhaji Chavan,
Age 56 years, Occu.: Agri.,
2. Indumati Bhanudas Chavan,
Age 51 years, Occu.: Agri.,

Both R/o Pravara Sangam,
Tq. Newasa, Dist. Ahmednagar

.. RESPONDENTS

Mr. N.D. Sonavane, Advocate for the appellant
Mr. R.B. Temak, Advocate for respondent no.1
Respondent no.2 served – absent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 06/02/2017

ORAL JUDGMENT :

1. Heard learned counsel for the parties for quite some time.
2. This second appeal is by defendant taking exception to judgment and decree of injunction dated 30/10/2004 as prayed for by present respondents/plaintiffs in regular civil suit no.226 of 2001

in respect of suit land against him and confirmed by the appellate court in regular civil appeal no.29 of 2014 decided on 18/12/2014.

3. Facts relevant to be considered in the present matter are original defendant has parted with and sold suit land under registered sale deeds dated 26/11/1997 and 07/03/1998 to plaintiffs/respondents. Both the sale deeds unequivocally contain recital of delivery of possession to the vendees by the vendor. Revenue record accordingly had taken place showing plaintiffs/respondents, to be the owners in possession.

4. Disputes started in the year 2001 while the plaintiffs alleged obstruction at the hands of defendant and aforesaid suit for injunction ensued which had been decreed by trial court under its judgment and decree dated 30/10/2004.

5. The trial court had framed issues, as to whether plaintiffs prove their legal possession over suit land, whether there was obstruction by the defendant and whether the plaintiffs are entitled to injunction and other issues had been in respect of whether defendant could prove the sale transactions were executed by way of security.

6. Plaintiffs had adduced evidence of documents in the form

of sale deeds and revenue record. Plaintiff no.1 had given oral evidence of himself and other witnesses. The defendant along with himself, had adduced evidence of two other witnesses.

7. Trial court had considered sale deeds to be duly proved and the same were testified by witnesses. The trial court had discussed the evidence on behalf of the defendant and appreciated that there is no substance in contention of the defendant having regard to the evidence as adduced by defendant which did not support the contention that the transaction being of security.

8. The trial court has considered that the sale deeds depict the defendant having parted with possession of the suit property and plaintiffs claim to be in possession accordingly and same being supported by revenue record in the form of 7/12 extracts which were produced before the court and has discussed and considered the evidence in respect of the same, given by the respondent/plaintiffs. It has considered that oral evidence by defendant, is not worth of credence.

9. The trial court also considered the case sought to be advanced on behalf of the defendant about there being admission by the plaintiffs, to be not in possession its context and efficacy and considered that the possession as contended would be required to be

considered. The trial court, as such, adjudged that the plaintiffs were in legal possession of the property on the date of the suit whereas defendant failed to establish its case as sought to be pleaded and under the circumstances, considered that the decree of injunction would issue against the defendant.

10. Appellate court concurred with the aforesaid findings of the trial court and thought it appropriate not to elaborately reiterate the same.

11. Mr. Sonavane, learned counsel appearing for the defendant vehemently submits that while there is admission by the plaintiffs not being in possession of the suit property, not being there for over three years prior to the date of evidence, injunction would not issue against the defendant when plaintiffs were not in possession while giving evidence.

12. In support of his contention that an injunction would not issue against the defendant in such a case, he purports to rely on a decision of this court in the case of *Krishna Hari Vaingankar (since deceased) represented by legal heirs and others Vs. Tukaram Bhiva Vaingankar (since deceased) through LRs. and others* reported in 2011 (5) Bom. C.R. 92. With reference to paragraph no.24 of the same, he submits that while there is admission by the plaintiff, about him being not in possession

of the property, injunction would not issue.

13. From perusal of judgment, it surfaces that the trial court had dismissed the suit for injunction of the plaintiff whereas the appellate court had reversed the decree of trial court granting the suit of the plaintiffs. It appears that the decision has been rendered in the peculiar facts and circumstances involved in the same which have been elaborately discussed in the judgment. It may not be out of place to reproduce paragraphs no.24 and 25 from the same hereunder;

“24. The lower appellate Court went into the issue of title and possession of the suit property and held that title and possession was with plaintiff. In my view the lower Appellate Court ought not have gone into the issue of title since the suit was for simpliciter for permanent injunction based on possession. The lower Appellate Court placed heavy reliance upon the record of right in form I and XIV Exh. PW 1/A in which name of the plaintiff appears. No doubt in terms of section 105 of the Land Revenue Code survey records have presumptive value but this presumption is rebuttable. As stated above, the plaintiff in his examination-in-chief itself admitted that he was not in possession of the entire suit property. This being the position entry in the record of right would not advance the case of the plaintiff. The lower Appellate Court therefore, was not justified in placing reliance upon the record of right Exh. PW 1/A to hold that he was in exclusive possession of the suit property. In so far as communication dated 16.10.1985 Exh. DW 1/D relied upon by the defendants is concerned, perusal of the same discloses, that plaintiff complained to the Mamlatdar that though he had cashew plantation in the land bearing No.5 belonging to the Government, Mr. Krishna

Hari Vaigankar defendant No.1 was looking after the plantation forcibly. On his asking his share in it he came to beat him and not paying rent for last 10 years and forcibly enjoying the plantation. The lower Appellate Court held that it cannot be used in evidence as an admission firstly on the ground that plaintiff was not confronted with the said document. The second ground on which the Appellate Court held that the document could not advance the case of the defendant was that since the plaintiff had taken a stand that the plaintiff himself was uneducated and it was written by the person who was half educated and not as per his say, the burden was on the respondent to prove that the same was written as per his instruction since plaintiff had put his thumb impression. In my opinion the lower Appellate Court has clearly erred in not placing reliance upon the said document to support the case of the defendants in as much as plaintiff in his plaint has stated that he was uneducated and it was drafted by Raya Desai of Pernem who was half educated and was not correctly drafted as per his instructions in view of this stand taken by the plaintiff. The burden was on the plaintiff to prove that the contents were not as per his instructions by leading evidence in support thereof. Plaintiff having not led any cogent evidence in this regard (except his own statement) in my opinion defendants were justified in placing reliance upon the same in support of their case that the plaintiff was not in possession of the cashew portion of the suit property on the date of filing of the application. In my opinion, reliance placed by Mr. Lotlikar upon the judgment of Udham Singh (supra) does not advance the case of the plaintiff. In the said case it has been held that person making admission should be confronted with his statement and given an opportunity to explain the same and what weight should be given to an admission would depend upon whether it is clear, unambiguous and relevant. In the present case the plaintiff himself made a reference to the said document and claimed that it was not as per his instructions and except for his bare statement there is nothing on record to hold that although

plaintiff was uneducated and affixed his thumb impression on the said letter, the communication was not written as per his instructions. In the case of Seth Ramdayal Jat (supra) the Apex Court held that the question as to whether the explanation offered by the appellant that he was wrongly advised by his Counsel is accepted or not is the realm of appreciation. The said judgment also does not advance the case of the plaintiff.

25. In view of above, what emerges is that the plaintiff on the date he deposed and the date of passing of the decree was not in exclusive possession of the suit property. This being the position, the lower Appellate Court was not justified in reversing the finding of the trial Court that the plaintiff had not proved exclusive possession of the suit property and interfering with the decree of the trial Court dismissing the suit for permanent injunction.”

Even in said judgment, the Hon'ble judge has observed in paragraph no.21 as under;

“21. The trial Court upon appreciation of the evidence led by the parties held that plaintiff had failed to prove that he was in possession of the suit property. To prove the possession of the suit property plaintiff examined himself and his brother in law Sudan Kalangutkar. The plaintiff Tukaram in his examination-in-chief stated that the suit property consisted of cashew trees and other miscellaneous trees and a part of the suit property consisted of paddy portion. He claimed that he was in possession of the suit property but thereafter he stated as under I cultivated the paddy field in the year 1986 but in the following year defendants cultivated the suit paddy field and also harvested the same. In the third year neither the plaintiff nor the defendants cultivated the paddy field. At present the paddy field is lying fallow. I did not cultivate the paddy

field although there is an order of the Court because defendants are not allowing me to enter the suit paddy field. In his further examination-in-chief the plaintiff stated as under prior to institution of the suit I was enjoying the cashew trees however, after the suit defendant No.1 is enjoying the same.”

14. Learned counsel Mr. Sonavane, in the course of his submissions, has also adverted to the suit cannot be said to have been properly filed as institution of the suit itself had been defective. The suit had been instituted in respect of two different lands and further plaintiff no.2 had not given power to institute suit to plaintiff no.1, albeit, plaintiffs no.1 and 2 are husband and wife. He submits that the lacunae are purportedly sought to be removed only after the defendant had questioned tenability of the suit in the circumstances.

15. Countering aforesaid submissions, learned counsel for the plaintiffs/respondents Mr. Temak contends that pleas being sought to be advanced in the present second appeal for consideration, are friable ones. He submits that the whole tenor of the evidence will have to be looked into and stray statements contented to be admission given by the plaintiff in his cross-examination would not unsettle the case substantiated by evidence on record. He submits that the stray statements would not alter the decision in view of evidence in favour of the plaintiffs.

16. He submits that even otherwise what would be relevant to be considered, is the possession on the date of the suit. So far as possession is concerned, it has more than sufficiently come on record that on the date of institution of the suit, the plaintiffs had been in settled possession thereof and even thereafter.

17. He further refers to that the revenue record shows plaintiffs to be in possession of the suit property. He submits that while this being so, there is overbearing record depicting possession of the plaintiffs and even otherwise the so-called admissions which are sought to be used against the plaintiffs is nothing but making a mountain out of molehill. Nowhere the plaintiff had stated that on the date of the suit, he was not in settled possession of the property. The evidence was being led for position as obtaining on the date of the suit. He submits that while fuss is being made about the so-called admissions, evidence, however, would show that so called error creeping in the cross-examination would not be able to sway over the claim made by the plaintiffs about the possession on the date of the suit and dislodge the case for injunction.

18. In support of his submissions, he cites the judgment of this court in the case of *Maroti S/o Jairam Kadam and others Vs. Mahadu S/o Govind Kadam and others* reported in 2010 (10) LJSOFT 145 : 2010 (4)

MAH.L.J. 990, whereunder it appears to have been considered that the person in settled possession as on the date of the suit can be evicted only by due process of law.

19. He further refers to decision of Supreme Court in the case of *Mahant Ram Khilawan Das Vs. State of Madhya Pradesh (2008) 11 S.C.C. 613*, to emphasize that stray statement being contended as admission would not outweigh the other contemporaneous evidence. For the same, he refers to and relies on the observations of the Supreme Court in paragraph no.8 thereunder, which read thus:-

*“8. It is well settled that in second appeal, the High Court should not substitute the findings of the courts below with its own findings unless there is total absence of the consideration of the material evidence. (See Kondiba Dagadu Kadam V. Savitribai Sopan Gujar) That apart, a perusal of the impugned judgment of the High Court would show that practically, the High Court had reversed the findings of the first appellate court only on the alleged admission of the appellant to the extent that his name did not find mention in the relevant record-of-rights in respect of the suit lands. **In our view, as noted herein earlier, even if such an admission was made by the appellant, then also no inference could be drawn that the appellant had no title to the suit lands when, admittedly, the appellant had substantiated his plaint case by production of enough material – documentary and oral on record before the courts.** It is also well settled that the entries in the record-of-rights only raise a presumption that the person whose name is entered in the record-of-rights is in possession of the suit lands but the same can be rebutted by adduction of evidence – documentary or oral on record.”*

20. Learned counsel Mr. Temak refers to and relies on yet another decision in the case of *Vatsala Wd/o. Bhikaji Kale Vs. Divisional Railway Manager (Works), Central Railway, Nagpur and others* reported in 2014

(6) *LJSOFT 56 : 2014 (4) MAH.L.J. 864*, whereunder, according to him, it has been considered that stray admission is of little consequence, having regard to the evidence led. For the said purpose, he relies on paragraph no.13 thereunder, reading thus :-

“13. The ruling cited with reference to Section 53A of the Transfer of Property Act in respect of right of the proposed transferee claiming that his possession ought not to be disturbed cannot be attracted in this case as licensee is always deemed to be a licensee. It is not open for a licensee to set up title in himself or any other person once license is revoked by the licensor. It is the duty of the licensee to hand over possession or surrender possession of the property occupied by him as a licensee and seek his remedy separately if, according to him, he has acquired title to the property qua the licensor. Licensor is always entitled to proceed for recovery of possession when licensee fails to deliver possession of the property in question after termination of the licence. Only in exceptional cases wherein licensee may have claimed merger of his title with licensor's title, his possession may be protected.

*It is not the case here as the licensee here cannot have right to claim possession to the Railways premises. Merely because the original plaintiff had occupied 10 x 8 ft. portion of plot no.8 or adjacent to it, it cannot be inferred that the act was done acting upon the licence with the Railway Administration or within permissible terms of licence. **Protection, as claimed by the appellant, therefore, cannot be available to him merely on the basis of stray admission here or there in the Written Statement filed by the Railway Administration.** Having considered the evidence led, the trial Court as well as the first Appellate Court by concurrent findings of facts decided to return the amount deposited by the original plaintiff along with interest. The original licensee (original plaintiff) expired during pendency of this proceedings. Under these circumstances, considering that the right of Second Appeal is neither natural nor inherent, but is a substantive statutory right regulated by law and when conclusion by both the Courts below appear in conformity with the legal position as to leave and license discussed above, I do not see any reason to consider the admission in the Written Statement so as to overturn the findings of facts recorded by both the Courts below in the facts and circumstances of the case in favour of legal heirs of licensee expired long back. Hence, I do not find any merit in the appeal. The appeal is, therefore, dismissed. No order as to costs.”*

21. Having heard learned counsel as aforesaid, it is an undisputed position that the registered sale deeds contain recital of delivery of possession to the vendees by the defendant and subsequent to the same, the change in respect of title to the property and possession being noted in the revenue record continued to be so thereafter. The defendant has taken a defence about transaction being different from the one depicted, has not been brought forth convincingly before the courts hitherto.

22. In the face of documentary and other contemporaneous evidence, version the one, as is sought to be made use as admission on behalf of the defendant would not have any efficacy. Besides, the appreciation by the courts hitherto is on the basis of the evidence, as has been led and has been placed on record.

23. Although it is being claimed by the defendant that an injunction would not issue in such cases wherein there is admission by the plaintiff about him being not in possession, relying on the citation referred to hereinbefore, it does not appear to be the citation would carry forward the purpose for which it has been sought.

24. On facts and circumstances, it appears that the present case is wide apart and it does not appear to be a case where an

analogy can be drawn from the judgment cited *viz*; case of *Krishna Hari Vaingankar* (supra) relied on, on behalf of the appellant.

25. In the present matter having regard to the facts and circumstances of the matter and evidence on record as adduced, it appears to be a pointer to that the plaintiff had been in possession. Defendant has not been in a position to show that he had been in possession of suit property after the sale deed had been executed.

26. The so called admission, if any, would not inure any benefit to the defendant. The tenor of the evidence given by the plaintiffs has been adjudged by the trial court and the statement which is purported to be used against the plaintiffs has been appreciated. The trial court is the proper court which would be in a better position to appreciate the purport underlying the statement made during the cross-examination. The tenor of the cross-examination appreciated by the courts, does not appear to be improper, in the background. Efficacy of whole of examination could not be negated by a stray statement as sought to be appreciated by appellant. Preponderance of the circumstances puts in lot of credibility and substance in the case of the plaintiffs. The documentary record supports his case.

27. In the circumstances, it is not a case wherein it can be said that the question, as is sought to be posed by learned counsel for the defendant can be said to substantially arise for consideration. Second appeal is thus not being entertained and stands dismissed.

28. It is further made clear that the observations made hereinbefore in this order, are for decision in the second appeal, and shall not influence the other proceedings, if any, between the parties.

29. Consequently, civil application no.12179 of 2015 seeking stay to the impugned judgment and decree, also stands disposed of.

[SUNIL P. DESHMUKH]
JUDGE

arp/