

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 347 OF 2016
AND
CIVIL APPLICATION NO. 6762 OF 2016

Sudhir Shadilal Mehra
Age : 70 years, Occu.: Business,
R/o. Mitra Mandal Colony,
Aurangabad

.. Appellant
(Orig. Plaintiff)
(Appellant in F.A.)

VS.

1. Ranvir Shadilal Mehra
Age : Major, Occu.: Business,

2. Manju Ranvir Mehra
Age : Major, Occu.: Business,

Both R/o. Art Emporium,
Ramgiri Complex,
Jalna Road, Aurangabad
Taluka & District Aurangabad

.. Respondents
(Orig. Def.No.1 & 2)
(Respondents in F.A.)

Mr. P.M. Shah, Sr. Advocate h/f Mr. S.P. Shah, Advocate for the
appellant

Mr. A.S. Bajaj, Advocate for the respondents

CORAM : SUNIL P. DESHMUKH, J.
DATE : 02-03-2017

ORAL JUDGMENT :

1. The appellant - plaintiff filed Regular Civil Suit No.382 of 2001 seeking perpetual injunction against present respondents - the defendants in respect of property admeasuring about 4 Acre

of gut no. 40 at Golwadi, referred to in the plaint. [Parties hereto are hereinafter referred by their status in aforesaid suit as plaintiffs and defendants.]

2. It is the case of the plaintiff that the plaintiff has become owner and possessor of the suit property under a family settlement, which initially was oral and subsequently reduced into writing on a stamp paper bearing No.4808 and executed by parties on 26-04-1991. Mutation entry no.244 has been duly sanctioned accordingly. Since 1993 onwards, the plaintiff has been duly paying revenue in respect of the property. Revenue entries also have taken place in favour of plaintiff. The position continues without any interruption. The plaintiff was given various no objection certificates, including by the defendants to transfer the land in favour of the plaintiff. The CIDCO authorities had prepared draft development plan, which was sanctioned by the Government. A portion of suit land under the same has been acquired. Award has been passed in the name of the plaintiff. The plaintiff has had a servants' quarter over suit land. The plaintiff has applied to provide for necessary amenities over suit land. However, the defendant no.1, who is real brother of the plaintiff and the defendant no.2, who is defendant no.1's wife, had changed mind and had instituted Regular Civil Suit No.629 of 2000 against the plaintiff. In their suit, the defendants tried to seek

interim relief, however, they did not succeed in their attempt. The plaintiff is in actual possession of suit property. The defendants are trying to cause obstruction in his peaceful possession over suit property and as such the suit seeking perpetual injunction against the defendants.

3. The defendants responded to summons and have submitted their written statement. The defendants have specifically denied that the family settlement as contended on stamp paper bearing No. 4808 dated 26-04-1991 has ever taken place. They have denied entries in revenue record and sanction to mutation entries. They also denied that the plaintiff was put in possession of suit property and had been enjoying the same without any interruption. It is contended that on the basis of bogus settlement deed, mutation was got sanctioned. The defendants have further contended that they have initiated criminal proceedings against the plaintiff bearing R.C.S. No. 644 of 2001. Rest of the contents of the plaint and contentions have also been denied in the written statement. In their additional written statement, the defendants have averred that they have purchased agricultural land admeasuring 4 Acres from Survey No. 23, now Gut No. 40, in Golwadi under a registered sale deed from one Gousiyabegum Rehmatulla. On the basis of the same, the defendants were put in actual possession of suit land and since

then have been cultivating the same. Mutation entry in accordance with the same had been taken and was effected in the name of defendants bearing No.198 in 1987. In paragraph no.10 of the written statement, it has been submitted that in 1993-94, for some business purpose, the defendants were required to shift to Mumbai and as such the land had remained uncultivated from 1993-94 upto 1997-98. Around 2000, with an intention to develop and introduce novel scientific methods and model irrigation techniques, they had been to Talathi in respect of compliances of certain formalities. At that time, they realized that some mutation had taken place behind their back. They contended that revenue record in favour of the plaintiff was behind their back and without hearing them and as such Regular Civil Suit No.629 of 2000 had been instituted seeking declaration that family settlement deed being null and void and injunction. The defendants as such claim to be in possession since the date of purchase and have alleged that disadvantage of their absence at Aurangabad has been taken by the plaintiff from 1993.

4. Alongwith the plaint, the plaintiff had also filed an application seeking temporary injunction. The same was granted under order dated 05-11-2001 directing to maintain *status quo* till the final disposal of the suit. It appears that there had been appeal against said order before district court, which had failed, so

was the case of writ petition at the instance of the defendants before High Court.

5. Issues came to be framed in the suit; whether plaintiff proves to be owner in possession of suit property; whether he proves disturbance to his possession; whether defendant proves deed of family settlement is illegal and false and whether the plaintiff is entitled to injunction.

6. Affidavits of examination-in-chief of the plaintiff and father of plaintiff Shadilal had been lodged. It appears that the Advocate who had been prosecuting the matter on behalf of the plaintiff had been replaced in June, 2012.

7. There had been no cross-examination order against the defendants, the same was set aside subject to payment of costs.

8. The plaintiff was cross-examined. The plaintiff, had filed evidence close *pursis* at exhibit – 56 (purportedly for the reason that Shadilal has become age old and said to be of 93 years age then) to the effect that he will not be examined.

9. Evidence of the defendants had been given. Witnesses on behalf of the defendants had not been cross-examined and the matter came to be decided under the judgment

and decree dated 20-6-2014. The suit came to be dismissed.

10. The trial court had taken note of exhibit 55 - evidence by plaintiff, *pursis* exhibit 56 - about Shadilal father of plaintiff not being produced before the court. Exhibit 69 - defendant no.1's evidence and evidence of Sanjay Mehra at exhibit 70 and one Mr. Jagdale at exhibit 71. At exhibit 72, photocopy of sale deed dated 14-03-1986 had been filed. Exhibit 74 - is report by handwriting expert.

11. The trial court has referred to evidence by the plaintiff about preparation of the deed of family settlement, stating that father Shadilal then had been present and the deed having been acted upon, the plaintiff having received the suit property in possession and him - the plaintiff having relinquished his share in flat no. 601 and shops no. 9 and 10 in Mumbai, in favour of defendant no. 1.

12. Trial court considered that since original of the deed of family settlement had not been produced, it cannot be said that suit property had been given to plaintiff. The court had adverted to the fact that plaintiff's name having figured in the revenue record, is an accepted position even by defendant though no revenue record has been produced. Trial court, however, further went on to consider that only for the reason that in the revenue

record, plaintiff's name appears, it would not be a case wherein it can be said that the plaintiff is owner of the suit property, relying on *1996(1) Mh.L.J. 209* and sections 148 and 150 of the Maharashtra Land Revenue Code, 1960.

13. Trial court appears to have considered that it was the case of defendant no. 1 and his witness that deed of family settlement is a bogus and forged document and the criminal proceedings in respect of the same had been pending bearing R.C.C. no. 644 of 2001. Learned judge has adverted to that evidence of the defendants refers to report by handwriting expert on deed of family settlement and the report placed at exhibit 74, supports the case of the defendants, trial court, as such, considered the evidence by the defendants to be more reliable. The trial court purported to consider that the family settlement deed is a fabricated document. Trial court's judgment refers to that there is secondary evidence about the sale deed and from the same, it was considered that the property was owned by Ranveer Mehra family trust.

14. Learned judge, further adverts to that Ganesh refers to defendants' possession over suit property till 2005, and thereafter, the land being fallow. It was considered, since no cross-examination of the witnesses on behalf of the defendants

had been taken despite ample opportunity, having regard to the evidence, the defendants appear to be the owners of the suit property and, as such, injunction would not issue against them. Thus, the suit was dismissed.

15. The plaintiff came in appeal bearing no. 146 of 2014 before district court, taking up contentions with a predominant request to remand the matter in order to enable the plaintiff to address the court on merits with opportunity to lead evidence, as according to appellant, whole conduct of the suit all through had been improper due to excessive reliance on and reposing confidence in the advocates of plaintiffs conducting the matter who had not properly guided and conducted the suit.

16. During pendency of regular civil appeal, the plaintiff moved an application exhibit 34 purporting the same to be pursuant to order XLI, rule 27 of code of civil procedure. Appeal and said application came to be decided by district judge – 3, Aurangabad on 11-04-2016 dismissing the appeal as well as rejecting application exhibit- 34.

17. Appellate judge has framed points for determination *viz*; whether plaintiff legally possesses suit land, whether the defendants obstructed plaintiff and is the plaintiff entitled to injunction and whether the order of trial court is correct.

18. Holding the plaintiff would not legally possess the suit land and in view of the same, the point with regard to obstruction by defendants has been held to be not surviving and answering the entitlement of plaintiff to injunction in the negative and thus confirmed the order passed by trial court.

19. Appellate court appears to have been alive to the request made under the appeal that the main relief sought in the appeal is to remand the matter pursuant to order XLI, rule 23-A of code of civil procedure. Learned judge has observed that issues were framed long before and, as such, the stage for production of original documents under order XIII of code of civil procedure which is supposed to be at or before the framing of issues, had been over. Affidavits of examination-in-chief of the plaintiff and that of his father had been filed. Thus, the court considered that the advocate who had been looking after the matter during all these events, his conduct is not complained of, while the subsequent advocate who had not been in picture then, a later advocate appearing on the scene is only being prosecuted.

20. For, negligence though being attributed to the advocate engaged by plaintiff to conduct his matter, it appears to be considered it would have to be borne in mind that proceedings have been initiated before Bar Council only against one lawyer

who had started appearing in June, 2012, while most of the relevant stages in the suit had been over by then and yet no action had been taken against said erstwhile lawyer.

21. In judgment and order dated 11-04-2016 under the caption 'reasons', while answering point no.1, learned appellate judge has dwelt on the request on behalf of the plaintiff for remand of the matter and had considered that having regard to the manner in which the matter had been conducted and the reasons for requesting remand do not inspire confidence.

22. Appellate court considered, the request made under exhibit – 34 application for production of evidence by plaintiff to be not answering the requirements under order XLI, rule 27(1). The learned appellate judge, particularly had considered that parties ordinarily are not allowed to produce additional evidence but under clause (a), however, the same would be possible if the court had refused to admit the document which ought to have been admitted or pursuant to clause (aa) the parties are in a position to establish despite due diligence, evidence could not be within the knowledge of the parties and after exercise of due diligence could not produce before the decree had been passed, production may be allowed, however, such a case is not there. Thus, the application was rejected.

23. Appellate court went on to consider that the trial court while deciding the temporary injunction application had relied on mutation entry bearing no.244 which according to the plaintiffs, had been effected on the basis of deed of family settlement dated 26-04-1991. Said document had never been before the court and, as such, the fate of the suit got decided.

24. Appellate court purported to consider that cross-examination of the defendants' witnesses had not been conducted and whether that has affected case of the plaintiff. Appellate court then considered that the trial court's observation with respect to non-production of original deed of family settlement dated 26-04-1991 in the proceedings has supplanted the case of the plaintiff.

25. Appellate court further considered that issues framed by trial court about deed of family settlement being not genuine and bogus was redundant and evidence in this regard by the defendant is of no effect and thus even after the witnesses of defendants are allowed to be cross-examined, it is hardly likely to change the fate of the suit.

26. Appellate court further considered that mutation entry no. 244 under exhibit – 41 recorded in favour of plaintiffs is on the basis of deed of family settlement dated 26-04-1991 and since the

said deed either in original or in the form of copy, is not produced, the court guessed that the document may not be in existence and, even if, it is assumed to be in existence that is a false and fabricated document and the plaintiff is trying to keep back the same.

27. According to the learned judge, reason given for non-production being not proper, and credible. The court, as such, considered entry no. 244 to be a manipulated one. The court further considered that on 09-04-1993, the entry is shown to be sanctioned but surprisingly, no notice before the entry is taken, was found to be issued and, thus, the court found the entry to be illegal.

28. Appellate court has further observed that the plaintiff filed as many as 97 original documents alongwith exhibit – 34 but surprisingly neither the original nor copy of deed of family settlement dated 26-04-1991 was produced in the bunch of documents and whatever is produced which may be original in nature is a purported deed of family settlement filed at exhibit – 46/7, is dated 21-05-1991 and not 26-04-1991. It was considered that plaintiff has not filed the document till today. Appellate court further observed that even photocopy of this document dated 26-04-1991 had not been filed in the trial court.

Appellate court adverted to that the list of documents at exhibit – 4 at the hearing of application of temporary injunction had been filed and, however, there were as many as 10 documents and there had been no copy of deed of family settlement dated 26-4-1991 and this fact is amply borne out from the observations in the order on interim temporary injunction application.

29. Eventually, the appeal came to be dismissed under the judgment and order dated 11-04-2016 along with rejection of application exhibit – 34. Plaintiff is thus before this court in second appeal.

30. The question substantially appears to arise;

In the facts and circumstances as have been appearing from the judgment and those are canvassed, whether it would be expedient to remand the matter to trial court by allowing production of documents, which has been refused by the appellate court rejecting application Exhibit-34, pursuant to Order XLI, Rule 27 of the Civil Procedure Code, for trial afresh ?

31. Heard learned senior advocate Mr. P.M. Shah appearing for Mr. S.P. Shah for the plaintiff and Mr. A.S. Bajaj, learned counsel appearing for the defendant.

32. Learned senior advocate, at the very outset puts in front the request to remand the matter and, submits that there are genuine reasons underlying the request. Hitherto, the old litigant has been suffering and has been harassed. He submits that plaintiff had better chance on merits, however, being not well versed in litigation, its procedure and nuances therein, him having been mis-guided by the advice given to him by his advocates who had been conducting the trial of the suit, evidence though available was prevented from being adduced.

33. In the circumstances, despite the voluminous record being available, as can be seen from the observations of the appellate court whereunder as many as 97 documents were observed to be available, however, were not presented to the court at the requisite stage. He submits that largely it would appear that most of the happenings of events are not being seriously disputed viz. purchase of property in 1986, the revenue record showing plaintiff's name since 1993, acquisition of portion of land by CIDCO, no objection being given to plaintiff by CIDCO, and various other documents as also institution of proceedings against plaintiffs by defendant bearing R.C.S. no. 629 of 2000 seeking declaration of ownership over suit property and injunction against the defendants along with declaration of deed of family settlement to be null and void and false and further that the

request under that suit by the defendant for temporary injunction against plaintiff having been rejected all through upto the high court and also about the interim relief being granted on application of plaintiff in present suit.

34. He submits that much ado is being made about the date of family settlement as appearing in the pleadings by the plaintiff and the date on the document, one sought to be submitted along with the application exhibit – 34. He purports to point out that there may be discrepancy in respect of date pleaded, yet the family settlement has been written on stamp paper bearing no. 4808. So far as that number is concerned, there is no discrepancy at all and, thus, according to him, original under exhibit – 34 was sought to be produced of said stamp paper bearing no.4808 may be bearing a little different date than the one referred to in the pleadings. He submits 26-4-1991 appears to be date of purchase of stamp. Learned counsel submits that such a miss, if at all is to have any bearing on the outcome of the litigation, will have to be decided by allowing opportunity to explain the discrepancy. The discrepancy has been noticed at the appellate stage, while that was not the reason which had weighed with the trial court. The trial court has rejected the claim of the plaintiff for non-production of the original deed of family settlement. In the circumstances, an opportunity is deserved by

the plaintiff to produce documents and also to account for the so-called variation occurring in respect of the date of family settlement.

35. He submits that, about the authenticity of the family settlement, dispute is being raised while it will have to be considered that when no original document had been before the trial court yet the trial court went on to hold the same to be not authentic. According to learned counsel, the finding given by the trial court is outlandish while the appellate court has considered the issue with regard to its authenticity had been redundant.

36. Furthermore, he contends, a substantive litigation had been initiated at the instance of the defendants being R.C.S. no.29 of 2000, seeking a declaration in respect of the very same family settlement deed. He submits that question with regard to the existence of deed of family settlement would not be in dispute, as such, its authenticity or otherwise will have to be decided in a proceeding proper therefor. He submits that, while it would emerge that indeed there is a deed of family settlement, and while there is sufficient material available, events taking place pursuant to family settlement deed, the courts hitherto appear to be not only digressed from so far as the claim of the present appellant-plaintiff being in possession, when suit is for injunction but also it

appears, the courts have been oblivious of.

37. He further submits that while the appellate court has referred to exhibit 4 and particularly mutation entry no. 244 being in favour of plaintiff, clearly pointing out that the plaintiff's possession over the suit property and the same had been subsisting on the date of the suit, nor there is any alteration or disturbance in said entry, this aspect ought to have taken into account while considering the request made under the suit. Instead, the appellate court appears to have went on to investigate its' efficacy suo-motu. According to him, appreciation by the appellate court is away from record and tends to be perverse. While the entry clearly shows the words, namely, “नो.ब.,उजर नाही”, meaning “नोटीस बजावली, उजर नाही” yet the appellate court went on to observe that notice about the entry being mooted, not been given to the other side and, therefore, the entry is not proper.

38. Learned counsel Mr. Shah, however, submits that in the face of so much material available, an opportunity legitimately should be given to the plaintiff to adduce proper evidence in support of his case and what ultimately matters is decision to be given on the facts, law and evidence.

39. He submits that while necessary explanation has been tendered, that had prevented production of material evidence before the court i.e. mis-guidance through the litigation before trial court, of the advocates and further that non production of material, did not give benefit to the plaintiff.

40. Learned counsel Mr. Shah submits that the suit is for injunction on the basis of possession not merely based on the document of family settlement and there is other sufficient material and documents available which would establish that the plaintiff had all along been in possession of the suit property since execution of deed of family settlement continuously without any interruption. If the plaintiff had really intended to keep back the document, he, in the circumstances, could have produced host of other documents which are referred to in the list alongwith application exhibit – 34. He further purports to contend that plaintiff being not well versed in litigation, rendered himself gullible in the process.

41. Next submission of Mr. Shah is rejection of application exhibit – 34 is highly improper and order therein fails to consider scope of rule 27 of order XLI and its underlying intention. He refers to the text of the rule, reading thus;

Production of additional evidence in Appellate Court—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

42. He submits that the order passed on exhibit – 34 dated 11-04-2016 shows that there is a gross error in rejecting application. The court got itself guided by that there was no due diligence and failed to consider that it is not a case falling under clause (a). Learned counsel refers to the other provisions as appearing (supra) and submits that had the court really felt that the documents are not necessary for decision in the matter, it should have given reasons as to why the said documents would not be necessary to decide appeal to pronounce the judgment. He submits that rule 27 is a general guideline, it does not take away power otherwise available with the court to allow a litigant to produce evidence at the appellate stage. The power is not only contained in rule 27 but substantive provision in the code empowers the courts to allow production of documents to do

complete justice. He submits that the application has been considered without reference to necessary aspects and consideration and particularly to the other clauses which would be relevant in the facts and circumstances of this case, while deciding the application. He therefore submits that the facts, circumstances and events entail an opportunity to the plaintiff to produce evidence in support of his case which had all along been available but could not be produced for the reasons which are genuine. The documents are available and had been sought to be produced before first appellate court. He thus urges the court to indulge into the request to allow appeal and remand the matter for re-trial from the stage of production of documents, letting renewed opportunity to the parties to adduce evidence.

43. Learned counsel Mr. Bajaj, however, finds it difficult to accede to the request made by learned senior advocate. He submits that the facts and circumstances would not warrant indulgence into such request. He submits that even otherwise the conduct of the plaintiff is so blatant and glaring and it is apparent that he wants to harass and vex the defendants and to make them yield to the illegitimate desire of the plaintiff.

44. His foremost submission is that there is no deed of family settlement entered into among the parties to the suit. He

submits that the so-called deed of family settlement which is being sought to be produced, is a bogus, forged, fabricated and false document. It is null and void. Learned counsel submits that, that is why the plaintiff had been shy off placing forth said document all along. Neither copy of document had been filed while the suit had been filed nor the original of the document had ever been placed at the proper stage.

45. According to learned counsel Mr. Bajaj, falsity of the claim of the plaintiff is ripped open by circumstances and the plaintiff is in quicksand of the false claims. He submits that all along till 2015, while the appeal had been lodged, and even thereafter, it was being claimed that the deed of family settlement being dated 26-04-1991 whereas no such document is ever sought to be produced on record at any point of time even alongwith exhibit – 34. He submits that the revenue record all along is with reference to the deed of family settlement dated 26-04-1991 and there is no deed of family settlement produced as pleaded by the plaintiff. He submits that even during the course of evidence, it had not been a case of the plaintiff that there had been a family settlement other than dated 26-04-1991.

46. He goes on to submit that since there is no family settlement as pleaded by the plaintiff, all the consequent record

viz; mutation entry no. 244 and the revenue record being maintained pursuant to the same, has no legs to stand on. Said record had no authenticity and/or efficacy and stands razed to the ground.

47. Learned counsel Mr. Bajaj contends that over and above, it has been held by the trial court that the deed of family settlement is a bogus document, and now since it has been so found, the appeal is devoid of any substance and deserves to be thrown out at the threshold.

48. He submits that the bad advice by the lawyer is a runaway plea of the plaintiff. He submits that the plaintiff continues making false claims as even in respect of the advices and conduct of trial by the lawyers concerned, a major portion of the trial had been during which the earlier lawyer had been holding power on behalf of the plaintiff, he is not being prosecuted by the plaintiff whereas the one who had subsequently come on record, is being prosecuted for bad advice. He submits that this evinces that the earlier lawyer is not being prosecuted for the truth would be exposed and that the plaintiff wanted to delay and lengthen the litigation and harass the defendants. He therefore submits that consideration by the appellate court that the reason, given for not producing relevant material before the court is

without any substance and devoid of veracity, is right and proper. He submits that the request as such, being made for the remand for letting an opportunity to the plaintiff to adduce evidence, is not legitimate. According to him, the defendants have suffered a lot in the process despite being owners of the property and, if the matter is now remanded for retrial as requested, it is the defendants, who would be put to sufferance.

49. Learned counsel Mr. Bajaj during the course of his arguments, submits that even otherwise the so-called deed of family settlement is inadmissible in evidence on host of counts, primarily is it without payment of proper stamp duty and it is not registered. The matter relates to the rights to immovable property. The claim of ownership based on such unregistered document is hardly possible in fact and in law. Learned counsel for the defendants submits that the property belongs to Ranvir Mehra Family Trust and, as such, the trustees hold the property in trust for minors. The trustees have no authority to exchange the property, as contended by the plaintiff. The deed of family settlement is not valid at all. Thus, according to learned counsel, even if, its production is allowed, it has no evidentiary value whatsoever.

50. During the course of his submissions, he refers to decision of this court in the case of *Balkrishna Dattatraya Butte and others Vs. Dattatraya Shankar Mohite and others* reported in 1998(2) ALL MR 740, in order to press into service a point that remand for asking would not be possible and that whenever order of remand is to be passed, a finding recorded by the courts would have to be examined and reversed in appeal and then remand, if considered necessary, may be ordered. He submits that appellate court had not found the matter fit for remand while that was the predominant request made before the first appellate court and that has been considered and negated by the appellate court, he therefore opposes the second appeal and requests to confirm the decisions of the two courts hitherto.

51. Learned counsel Mr. Bajaj draws attention to that authenticity of mutation entry no. 244 had not been accepted by the defendants and that the same had been challenged before the competent forum, however, the matter had not proceeded with since civil disputes had been pending among the parties.

52. Learned counsel Mr. Bajaj, purports to submit request to remand is delaying tactic and to avoid possible consequences flowing from the document turning out to be bogus.

53. Mr. Bajaj further submits that it has sufficiently emerged that the material sought to be produced under application exhibit – 34 had all along been available and yet had not been produced during the trial or while the decree had been passed by the trial court. As such, it is not a case at all which would fall for consideration letting production of documents pursuant to order XLI, rule 27. He submits that appellate court has rightly discarded the application giving right reasons. He therefore supports the decision of the appellate court.

54. Learned counsel for the appellant-plaintiff Mr. Shah, during the course of his arguments, had drawn attention to a decision of the supreme court in the case of *Maria Margarida Sequeira Fernandes and others Vs. Erasmo Jack De Sequeira (dead) through LRs.* reported in (2012) 5 Supreme court Cases 370. He particularly emphasised paragraphs no.32, 33, 38 and 41, reading thus;

“32. In this unfortunate litigation, the Court’s serious endeavour has to be to find out where in fact the truth lies.

33. The truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.

38. Certainly, the above is not true of the Indian judicial system. A Judge in the Indian system has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that “every trial is a voyage of

discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

41. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and Judges."

55. The defendants have instituted proceedings bearing regular civil suit no. 629 of 2000, seeking declaration that deed of family settlement to be null, void, fabricated, etc. and, declaration of ownership over the suit property and injunction.

56. Present litigation in this second appeal, is a subsequent litigation instituted by plaintiff for injunction against the defendants claiming to be in possession. He relates it to the deed of family settlement of 1991. Along with the same, to substantiate his claim of being in possession, he refers to the revenue record from mutation entry no. 244 onwards till the date of institution of suit in 2001 and several other documents.

57. The pleadings on behalf of defendants show their absence from Aurangabad since 1993 for a few years. During this period it appears that some developments in respect of the suit property have taken place. A portion of the same appears to have been acquired by CIDCO. CIDCO is stated to have interacted in respect of suit property with the plaintiff. The defendants contend that all these occurrences are behind their back keeping them in

dark and would not affect their rights to the suit property.

58. Since 2000 and 2001, the proceedings initiated by the defendants as well as by the plaintiff are being prosecuted. It appears that, the plaintiff, in his suit, has been able to secure some interim relief and attempt of defendants for temporary injunction, restraining the plaintiff, had not been successful in their suit.

59. It emerges that the plaintiff and defendants are at war over the property bearing survey no. 40 admeasuring 1 Hectare, 61 Are purchased in the name of Ranvir Mehra Family Trust in 1986. The plaintiff purports to stake claim to said property through a deed of family settlement claiming to depict exchange of properties between the brothers i.e. plaintiff and defendant no. 1. One brother stakes his claim to the suit property with reference to deed of family settlement whereas the other brother discards deed of family settlement. It appears that there has been some action, with reference to claimed deed of family settlement, mutation entry no. 244 is shown to be standing in the name of plaintiff from around 1993.

60. The courts hitherto appear to have been drifted away by conduct of proceedings and other circumstances and legality about ownership not getting established for want of production of

evidence. It also emerges that claim of plaintiff on merits could not be supported for non production of the documents with reference to which possession is claimed by the plaintiff.

61. Learned senior advocate for appellants, during course of submissions, has contended that observations of the appellate court, about mutation entry no. 244 having been taken without notice, are contrary to record, since the mutation entry does disclose words "नो. ब. उजर नाही." i.e. "नोटीस बजावली. उजर नाही." meaning '*notice served and there is no objection*'. The note appears to have missed attention of appellate court. As such, opportunity to explain this aspect and make submissions on that, has also been missed and lost out for parties. In the circumstances, consideration and observations of appellate court appear to be vulnerable.

62. Perusal of the judgment of trial court would show that what has weighed with the court is that plaintiff could not bring forth on record that he can be said to be the true owner, rather the evidence would show that the defendants are the true owners and, as such, injunction would not issue against the defendants; holding in the process that evidence by the plaintiff staking claim to the property as owner in possession is insufficient. Its perusal further depicts that trial court has not dwelt on that the plaintiff

had claimed to be in possession of suit property and appears to have confined its concern with its legitimacy. The trial court went on to decide about family settlement deed being false and fabricated, when neither a copy nor original of the same had been before the court. It is also not clear, as to how the trial court embarked upon testing the validity of the document of which the original had not been on record.

63. The plaintiff, in this appeal as well as in the appeal before the district court, has been placing forth reason for non-production of evidence, is improper advices being rendered by the advocates, in whom confidence had been reposed. The reasons given before the first appellate court and those being given before this court making request for remand, are the same. Even, it appears that, although the litigation i.e. R.C.S. no. 629 of 2000 and the present R.C.S. no. 392 of 2001 had been pending till 2007, not much progress had been made in the suits. Suit by the defendants appears to have been dismissed somewhere in 2007. Proceedings for its restoration and condonation of delay are pending.

64. While declining exhibit - 34, an application pursuant to Order XLI, Rule 27 of the Civil Procedure Code, the appellate court appears to have peeped into a document thereunder, which is

seen to be dated 21st May, 1991 and not dated 26th April, 1991 as claimed by the plaintiff. It is considered by the appellate court that the document as contended by plaintiff has not at all been placed on record and may not be in existence. This aspect appears to have been dealt with straightway in the judgment without letting any opportunity to the plaintiff to explain the same.

65. The appellate court thus appears to have peeped into the document which is sought to be produced under exhibit – 34 although exhibit – 34 is rejected.

66. Learned senior advocate has argued that 26th April, 1991 is the date of purchase of stamp paper which perhaps has been got referred to rather than the date of execution which is 21st May, 1991.

67. It is difficult to conceive that while no original had been on record before the trial court, while application for production has been rejected, whether any decision could be rendered about its existence.

68. So far as suits for injunction of nature prayed for as in present suit is concerned, what generally is germane to be considered is the possession of the party. It is apparent on perusal of judgments of the two courts hitherto that the courts

appear to be in oblivion of the claim of the plaintiffs about being in possession, which would be relevant to be considered in so far as injunction is concerned.

69. In the present matter, litigants are real brothers. There is a case pleaded by the plaintiff relating his possession over suit property and in support of the same, some material is being sought to be produced, which could not be placed on record for reasons as given.

70. It has been the case of the appellant that he had been possessed of evidence, however, under the improper professional guidance, the same could not be produced.

71. In respect of application exhibit – 34 along with appeal for production of evidence giving the same reasons as in appeal where predominant request is to remand the matter, it is as well considered by the appellate court that since only one lawyer is being prosecuted who only subsequently had come on the scene, it would not be proper to consider that there is any substance in the reason given for not producing evidence at appropriate stage despite being available.

72. Besides, it would not be out of place to refer to that appellate court has considered that document of deed of family

settlement as contended by plaintiff is not placed on record even under application exhibit – 34 and thus, the decision rendered by the trial court with respect to authenticity of the same, is redundant.

73. Further, appellate court although purported to refer to contentions with respect to non-production of evidence, yet appears to have considered, to quite some extent, that there is in existence a document *albeit* it is not consistent with pleading as there is variation in respect to its date in the pleadings and the one sought to be produced under exhibit – 34.

74. Further appellate court has dealt with the merits in one paragraph, observing, thus;

“ 16. Now I turn towards merit of this suit. The plaintiff has come with case that the suit property comes under his ownership on the basis of deed of family settlement dated 26.04.1991. The defendants specifically denied that such document has got effected as stated by the plaintiff. On perusal of the copy of mutation entry no.244 produced below list Exh.4/1 the suit property finds to be recorded against the name of the plaintiff on the basis of deed of family settlement dated 26.04.1991. As I have mentioned above the copy of said deed, either original or in form of copy is not produced by the plaintiff either in suit or even in appeal. So it infers that either this document may not be in existence or may be in existence but as it is false and fabricated, the plaintiff has deliberately trying to hide it. So the mutation entry no.244 seems to be

effected by manipulating the revenue officials. Because this fact also reflects on bare perusal of copy of mutation entry no.244. On perusal of the same in column of remarks of this document, on 09.04.1993 this entry shown to be sanctioned, but surprisingly no notice of objection etc., is found issued. As such, the mutation entry no.244 found to be illegally effected. Hence here it can not be said that the plaintiff legally possess the suit land. Hence I answer this issue in the negative.”

Appellate court, in the process appears to have missed out the note underneath, as contented and pointed out by learned senior advocate.

75. So far as possession on the date of suit is concerned, appellate court appears to have refused to give any credence to the evidence with respect to the same in the form of mutation entry no. 244 and the revenue record thereafter. Judgment of the appellate court as well falls short of the vital consideration in respect of suit for injunction in respect of the possession of the property in this matter, specially having regard to the relations of the parties and brother claiming to be in possession, with reference to some material. It is claimed by appellant, the record would not only lend credibility to claim of possession but also indeed would have established his case, however, the same has been discarded for the reasons which have weighed with the courts hitherto.

76. Approach of the courts, in the facts and circumstances of the case is rendered rather cursory, which is discernible from that trial court without document being on record has declared the same to be bogus and appellate court has missed out to appreciate note under the mutation entry No. 244 which is submitted to refer to notice and it is observed by appellate court the same to be without notice and thus not reliable and legal.

77. The appellate court appears to have cursorily rejected application Exhibit-34 referring only to Order XLI, Rule 27 clauses (a) and (aa) and has overlooked clause (b) of sub Rule 1, of the Civil Procedure Code, whereunder a document can be produced in order to enable the court to pronounce a judgment and the court for substantial cause may allow evidence and document to be produced. This aspect as well would be required to be taken into account.

78. In the circumstances, the veracity of the pleadings and contentions of the plaintiff would not stand properly tested, if he is prevented from adducing the material in support of his case.

79. Looking at the admitted relationship between the parties, it would be in the fitness of things and expedient, while it is being claimed that the documents being available, yet not being

produced under improper guidance, in order to have decision of the case on merits, that an opportunity be afforded to the parties to lead evidence and have trial afresh.

80. Remand may be expedient, since the documents were stated to be available, and, further that those could not be produced under the improper advice. It appears that evidence was being sought to be produced at the appellate stage, however, the same has been declined access getting baulked by that it is not earlier but only subsequent advocate is being prosecuted. However, there is discernible indication of that the appellant feels he had been wronged by improper advice and is reacting to the same. The circumstances, as such, may receive its due. For such a mistake, detention of contest on merits, would not be desirable.

81. Although reasons are given in the application as to under which circumstances, documents could not be produced and it is being submitted that the document being bogus and to keep the same away, some dilatory tactics have been adopted by the plaintiff, yet it is easily discernible that the defendants, in their own right, had initiated proceedings for declaration in respect of deed of family settlement. Proceedings on either side are pending. In the scenario, it appears to be a case wherein an opportunity needs to be given to the plaintiff, subject of course, to

certain conditions. Inconvenience caused to the other side in the process that may be compensable in the given facts and circumstances of the case, in terms of pecuniary measure.

82. The matter has been pending since 2001, as such, in the facts and circumstances of the case, it would be worthwhile and expedient and in the interest of the parties to allow exhibit – 34 and let the appellant produce documents and from that stage onwards trial of the suit be proceeded with and have a decision on merits in the suit with a direction for expeditious disposal of the litigation.

83. In the circumstances, taking overall view of the matter, it would be appropriate that the findings recorded by two courts hitherto so far as R.C.S. no. 382 of 2001 is concerned, would have to be disturbed in the interest of justice and for reconsideration of suit afresh as aforesaid, since decision in the suit is in the absence of material available and while it was sought to be produced, production had not been allowed.

84. One thing that needs allusion to is one civil revision application for temporary injunction at the instance of defendants had appeared before this court and this court had expressed that the proceedings between the brothers against each other be taken up before the same court.

85. Thus, the situation warrants second appeal should be allowed remitting the proceedings for retrial by allowing production of document and from that stage be carried forward in right earnest on the condition that plaintiff shall pay to the defendants, as and by way of costs Rs.1,50,000/- (Rs. One Lakh Fifty Thousand).

86. The substantial question of law framed stands answered in the affirmative. Accordingly, judgment and orders of trial court dated 20-06-2014 in regular civil suit no. 382 of 2001 and judgment and orders of appellate court dated 11-04-2016 in regular civil appeal no. 146 of 2014 and on exhibit – 34, stand set aside. The reasons which have weighed with this court for remand of the matter also so far as they are relevant, would hold good for granting civil application no. 6762 of 2016 and, as such, no separate reasons are recorded. Application exhibit – 34 stands granted.

87. Regular civil suit no. 382 of 2001 before trial court to proceed with from the stage subsequent to production of documents and the suit be decided within a period of eight (8) months from today. Parties are at liberty to adduce additional evidence. Aforesaid order is passed subject to payment of costs of Rs.1,50,000/- (Rs. One Lakh Fifty Thousand) which is a

condition precedent. Costs to be deposited before the trial court within a period of eight (8) weeks from today.

88. It is made clear that observations made in this appeal, however, are for the purpose of remand of the matter and shall not be deemed to be observations on merits in any way, as an opportunity is being given to the parties to address trial court on merits of the case.

89. Learned counsel Mr. Bajaj for the respondents, at this stage, requests that this order shall not take effect for atleast a period of ten (10) weeks from today since his clients are considering challenge to this order.

90. In view of aforesaid submission, effect and operation of this order shall remain stayed for a period of ten (10) weeks from today.

(SUNIL P. DESHMUKH),
JUDGE

arp/