

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

APPEAL FROM ORDER NO. 96 OF 2016

KHAMAR ALI SHAH MEHMOOD ALI SHAH
VERSUS
GENDMAL BHIKULAL BANTHIYA

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Advocate for Petitioner : Mr. S. S. Kazi.

Advocate for Respondent : Mr. Arvind S. Deshmukh.

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CORAM : **V. K. JADHAV, J.**

DATE : 30th January, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order dated 5th October, 2016 passed by District Judge-3, Parbhani below Exhibit – 5 in Regular Civil Appeal No.85 of 2016, the original Respondent before the lower Appellate Court preferred this appeal.

3 Brief facts giving rise to the present appeal from order are as follows:

- i. The Respondent / Plaintiff had instituted Regular Civil Suit No.269 of 2003 for decree of perpetual injunction in respect of the suit land Survey No.635/2 situated at Parbhani against the

Appellant/Defendant and one Naser Ali Shah. However, the said Naser Ali Shah died during the pendency of the appeal before the lower Appellate Court and in view of the pursis Exhibit – 20 filed before the lower Appellate Court, his name came to be deleted from the array of Respondents. Similarly, one Vinod Talreja also instituted Regular Civil Suit No.127 of 2007 against the present Appellant for decree of perpetual injunction. The parties to the suit led their oral and documentary evidence in support of their rival contentions. The learned Civil Judge Senior Division, Parbhani vide its common judgment and decree dated 8th July, 2016, dismissed both the suits i.e. Regular Civil Suit No.269 of 2003 instituted by the present Respondent and another Regular Civil Suit No.127 of 2007 preferred by said Vinod Talreja.

- ii. Being aggrieved by the same, the Respondent herein / original Plaintiff preferred Regular Civil Appeal No.85 of 2016 and also filed an application

Exhibit – 5 for issuance of temporary injunction to protect his possession over the suit property till the disposal of the appeal. The learned District Judge-3, Parbhani vide its impugned judgment and order dated 5th October, 2016 allowed the application Exhibit – 5 and thereby restrained temporarily the present Appellant / original Defendant from causing obstruction and interference with the possession of the Respondent herein / Plaintiff over the suit property till the disposal of the appeal. Being aggrieved by the same, this appeal is preferred.

4 The learned counsel for Appellant / original Defendant submits that the Respondent / Plaintiff has utterly failed to prove his possession over the suit property. The learned counsel submits that the Respondent / Plaintiff has failed to prove the exact location of the suit property and thus, the suit property could not be identified. The learned counsel submits that even though there is no permission to use the suit land as a non-agricultural land, the sale-deed in respect of a plot out of the land Survey No.635/2 is produced on record and thus, the learned Judge of the Trial Court

has observed the same in its right context and dismissed the suit of the Respondent / Plaintiff in to to. The learned counsel submits that the Respondent / Plaintiff has not stepped into the witness box and his general power of attorney was examined before the Trial Court. The said general power of attorney has no personal knowledge about the transaction and also the location of the suit property. The learned counsel submits that so far as Witness No.2 examined by the Respondent / Plaintiff is concerned, the Trial Court has unequivocally observed that the evidence of this witness is not helpful to resolve the dispute. The lower Appellate Court has not considered the observations made by the Trial Court and allowed the application Exhibit – 5 without any basis. The learned counsel submits that it was pointed out to the Trial Court that the suit land was acquired by the Government way back and thus, there is no question of protecting the possession of the Respondent / Plaintiff over the suit land. However, the lower Appellate Court has not considered the oral and documentary evidence on record and also the observations made by the Trial Court in this regard.

5 The learned counsel for Respondent / original Plaintiff submits that the lower Appellate Court has considered the

documents placed on record before the Trial Court during the course of trial and on perusal of documents of construction permission Exhibit – 137 issued in favour of the Respondent / Plaintiff by Municipal Council, Parbhani in the year 2002, observed that it supports the contention of the Respondent / Plaintiff so far as his possession over the disputed property is concerned. The learned counsel submits that the suit was instituted way back in the year 2003 and the order of temporary injunction passed in favour of the Respondent / Plaintiff remained in force till the disposal of the suit by the Trial Court. There is enough evidence on record and the same has been considered by the learned District Judge and accordingly observed that the Respondent / Plaintiff has proved *prima-facie* case and possession in respect of the suit property.

6 In view of the above rival submissions and since the substantive appeal is pending before the lower Appellate Court, it would not be desirable to go into the merits of the case at this stage. However, it appears that the Respondent's / Plaintiff's possession over the suit property remained protected after the institution of the suit and order of temporary injunction remained in force till the disposal of suit. The lower Appellate Court has considered the

documents placed before the Trial Court and also given weightage to the fact that Respondent's / Plaintiff's possession was protected by issuance of the order of temporary injunction during pendency of suit. In view of the above, by giving direction for expedite disposal of the pending appeal, this appeal against the order can be disposed of. Hence, the following order:

ORDER

- I. The appeal from order, is hereby dismissed with the following directions:
 - a) The learned District Judge-3, Parbhani shall dispose of the pending appeal being Regular Civil Appeal No.85 of 2016, as expeditiously as possible and preferably within a period of six months from the date of this order.
 - b) The lower Appellate Court shall dispensed with the paper-book and the Appellant before the lower Appellate Court shall prepare the private paper-book within two

months from the date of this order and place
it before the lower Appellate Court.

II. The appeal from order is accordingly disposed of.

III. Pending civil application stands disposed of.

[V. K. JADHAV, J.]

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