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*IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION**SECOND APPEAL NO.147 OF 1992*

1. Bandu Laxman Chandanshive,
Age: 46 years,
2. Bapu Laxman Chandanshive,
Age: 35 years,
3. Rama Laxman Chandanshive,
Age: 32 years,
4. Smt. Sonabai Laxman
Chandanshive, Age: 76 years,

All Occupation: Labourer,
R/o. Dhulgaon, Taluka
Tasgaon, District Sangli

..Appellants.

V/s.

1. Maruti Chandru Khande,
Age: 46 years, Agriculturist,
R/o. Dhulgaon, Taluka Tasgaon,
District Sangli .

2. State of Maharashtra ..Respondents.

Mr.Umesh Mankapure with Mr.R.A.Naik for the Appellants.

None for the Respondents.

Coram : N.M.Jamdar, J.

Date : 2 May 2017

ORAL JUDGMENT

Heard the learned counsel for the Appellants. None present for the Respondents.

2. By this Second Appeal, the Appellants-original Defendants have challenged the Judgments and Orders dated 28 January 1992 passed by the learned District Judge, Sangli in Regular Civil Appeal No.470/1986 and the Judgment and Order dated 26 September 1986 passed by the learned Civil Judge, Junior Division in Regular Civil Suit No.295/1980. By the impugned Judgments and Orders, the Appellants are restrained from disturbing the possession of the Respondent-Plaintiff over the suit property.

3. The suit property is an agricultural land bearing Regular Survey No.80 (Gat No.281 (B-1 and B-2)) admeasuring 9 H situated at village Dhargar, Taluka Tasgaon, District Sangli. A Regular Civil Suit was filed by the Respondent-Plaintiff seeking an order of injunction against the Appellants. According to the Respondent-Plaintiff, the Respondent-Plaintiff was in possession of 3/4 share jointly in the suit property. The Respondent was given this land by the State Government on 27 August 1962 by way of grant

pursuant to which the Respondent became owner of the property. Earlier a Regular Civil Suit No.135/1965 was filed by the Respondent and it was contended that pursuant to the decree passed in the suit was executed on 22 June 1976 possession of the suit land was taken. It was contended that since the Appellants were trying to interfere with the possession of the Respondent-Plaintiff, injunction was sought.

4. The Appellants filed their written statement and contended that the Collector had cancelled the earlier grant and the property was re-granted in favour of the Appellants on 29 May 1968 and *Kabulayat* was executed under section 27 of the Maharashtra Land Revenue Code, 1966 to the Appellants had been issued. Accordingly, it was contended that the Respondent-Plaintiff had no right in the suit property and they are not in possession of the same.

5. The learned Civil Judge, by the Judgment and Order dated 26 September 1986, held that the Respondent-Plaintiff had proved his title as well exclusive possession and decreed the suit, granting an order of injunction. In the appeal filed by the Appellants, the learned District Judge framed issues as to whether the Respondent-Plaintiff was in juridical possession of the suit land. The learned District Judge held that the Respondent-Plaintiff was not in juridical possession of the suit land. It was held that the Respondent-Plaintiff had no title to the suit property, however, since the Respondent-Plaintiff was in possession, injunction had to be

granted giving liberty to the Appellants to recover possession by following due process of law. The appeal was accordingly dismissed by the Judgment and Order dated 28 January 1992.

6. Thereafter, the Second Appeal was filed. The Second Appeal was admitted on 26 March 1992. The substantial questions of law were framed as under:-

- “(i) *Having held that the Plaintiff had no title and that his possession was unlawful, lower Appellate Court was wrong in law in confirming the order of permanent injunction as passed by the learned trial Judge. He ought to have dismissed the same particularly when the order of regrant was confirmed by the order of the Commissioner, Pune Division, Pune.*
- (ii) *Granting of fresh Kabulayats in favour of the Defendant automatically amounts to cancellation of the initial order in favour of the Plaintiff.*
- (iii) *Government is fully empowered to consider the case of cancellation and of granting fresh regrant order and the Kabulayat executed by the Defendant in favour of the Government is sufficient order to evidence possession of the Defendants.”*

7. The perusal of record indicates that by a civil

application, stay of execution of the impugned judgment and decree was sought and it was granted by order dated 26 March 1992. Thereafter, the Second Appeal has appeared on board on various occasions from the year 2011 onwards. Whenever the appeal appeared on board, none appeared on behalf of the Respondent. The appeal was dismissed for non prosecution and restored. The record indicates that notice was sent to the Respondent and the Respondent was served, yet none appeared on behalf of the Respondent. The order of injunction has remained stayed since the year 1992 and the Respondent has not chosen to appear in the appeal and prosecute the same, even though the matter is adjourned from time to time.

8. In view of the fact that the learned District Judge has held that the Respondent-Plaintiff is not in juridical possession of the suit property and he has no title to the suit land, and that there is no challenge to the said finding, one will have to proceed on the basis that the Respondent-Plaintiff does not have any title or ownership right in respect of the suit property. The questions of law framed in the Second Appeal are based on this position that is after holding that the possession of the Respondent was unlawful, whether the injunction should have been granted to the Respondent, also whether the finding that the Appellants are not in possession is only borne out by the record.

9. The learned counsel for the Appellants has drawn my

attention to the various document which are record such as Sanad, and also the evidence of the parties. It appears that initially the suit property was granted in favour of the Respondent on 27 August 1962. A suit was filed by the Respondent bearing Regular Civil Suit No.35/1955 which was decreed in favour of the Respondent-Plaintiff. The Appellants filed first appeal and the while the first appeal was pending, the grant was cancelled and the suit property was re-granted in favour of the Appellants on 21 May 1968. After this re-grant, the Appellants withdrew the first appeal specifically placing on record that withdrawal is sought in view of the re-grant and that the property is now given to the Appellants, it is not necessary to prosecute the appeal.

10. It is the case of the Respondent-Plaintiff that thereafter, the decree was executed in the year 1976 and possession was obtained. The fact that the first appeal was withdrawn in view of the subsequent grant of 1968 was within the full knowledge of the Respondent-Plaintiff yet when the present suit was filed, there was no reference to this fact. In the present suit, there is no reference to the re-grant of the year 1968 and withdrawal of the first appeal. The learned counsel for the Appellants is right in contending that in view of this position, substantial cloud was raised over the title of the Respondent-Plaintiff. A simplicitor suit for injunction without seeking any declaration in respect of the grant of 1968 was, therefore, itself not maintainable. In fact, the factum of withdrawal of the first

appeal and re-grant of 1968 have been suppressed by the Respondent-Plaintiff and this ground also should disentitle the Respondent for an equitable relief. Having held that the Respondent was not in juridical possession and his possession is unlawful, the learned District Judge has confirmed the order of injunction. This order has been passed by both the Courts without noticing the need to seek declaration and overlooking the gross suppression of facts by the Respondent-Plaintiff.

11. The question is whether the Respondent is in possession of the suit property. The issue cannot be held in favour of the Respondent in view of the material on record. It is held by the learned District Judge that the Appellants have failed to prove that pursuant to the re-grant of the year 1968, the Appellants were put in possession and, therefore, it will have to be presumed that the Respondent-Plaintiff continued to be in possession of the suit property pursuant to the grant of the year 1962. The learned District Judge has however not appreciated the re-grant as well as *Kabulayat* in its proper perspective which clearly indicate that the Appellants were put in possession. This factor is further confirmed by the execution of the *Kabulayat* under the provisions of the Maharashtra Land Revenue Code.

12. It is the case of the Respondent that he was put in possession pursuant to the execution of the decree. No material in

that regard was placed on record. The Appellants withdrew the first appeal in the year 1968 pursuant to the re-grant, which generally could not have been done unless the Appellants were put in possession. The factum of re-grant of the year 1968 is established, which the Respondent avoided to bring on record. There is no other evidence produced by the Respondent which shows his possession. Therefore, having held that the Respondent had no title to the suit property, the learned District failed to give effect to the terms of re-grant which clearly stated that the property has been granted to the Appellants.

13. In the facts of the present case, in absence of any other cogent evidence by the Respondent-Plaintiff, the learned District Judge could not have kept aside the re-grant and *Kabulyat*. Commissioner was appointed whose report also shows that there was no title of the Respondent in the suit property and the Respondent did not have any exclusive right of possession over the same. The conduct of the Respondent in the present appeal also confirms the position that the Respondent was never in possession of the suit property. From the year 1993, the order of injunction has been stayed and the Respondent has not appeared in the appeal to contest the same for a substantial period of time. Considering these facts, it will have to be held that the Appellants are in possession. Since the Respondent had absolutely no right in the suit property and that he is not in possession, he cannot be granted relief of injunction. There

is no cogent material placed on record that the Respondent is in possession of the suit property. Accordingly, the questions of law framed will have to be answered in favour of the Appellants and the Second Appeal deserves to be allowed and it is accordingly allowed.

14. The Judgment and Order passed by the learned Civil Judge, Junior Division in Regular Civil Suit No.295/1980 on 26 September 1986 and the Judgment and Order passed by the learned District Judge, Sangli in Regular Civil Appeal No.470/1986 on 28 January 1992 are hereby quashed and set aside. No order as to costs.

(N.M.Jamdar, J.)