

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO.614 OF 1994**

Shri Dhanpal Jinappa Hagare

...Appellant
(Ori. Defendant)

vs.

Kallappa Bhalchandra Hagare & Ors.

...Respondents
(Heirs of Orig.
Plaintiff)

....

Mr. T.S. Ingale, i/b. G.M. Savagave, for the Appellant.

Mr. S.V. Sadavarte, for Respondent Nos. 1-A to 1-E.

.....

CORAM : S.C. GUPTE, J.

DATED : 12 JANUARY 2017

P.C. :

. Heard learned Counsel for the parties.

2. This Second Appeal impugns an order passed by the District Court at Kolhapur on an appeal challenging dismissal of the Respondent's suit. The Respondent claimed to be in joint possession of the suit property along with the Appellant and prayed for a perpetual injunction on the basis of such possession. The Respondent's suit, initially dismissed by the Trial Court by a cogent and well reasoned order dated 31 December 1988, was decreed by the first Appellate Court. That order is challenged by the Appellant in the present appeal.

3. The subject matter of the suit is an agricultural land

admeasuring 4 Acres and 9 R in Original Revision Survey No.27/1 of Mouje Gourwad and now situated in Gat No.170 of Mouje Gourwad ("the suit land"). Initially, the Plaintiff's father, one Bhalchandra Sakharam Hagare, was a tenant of this land. After his demise, on 7 December 1947, the Defendant's father, one Jinappa Sakharam Hagare, became the tenant. The suit land continued to be in the name of Jinappa in the revenue records until the death of Jinappa in 1968. Thereafter, the suit land has been shown in the name of the Defendant as a tenant thereof. The tenancy is under an annual lease in respect of the suit land. It is the Plaintiff's case that his grandfather, one Sakharam, had three sons, namely, (i) Bhau, who died issueless in the year 1982, (ii) Bhalchandra, the Plaintiff's father, who died on 7 December 1947, and (iii) Jinappa, the Defendant's father, who died in 1968. The Plaintiff went to the Court in his suit, namely, Regular Civil Suit No.81 of 1985, with a specific case that the Plaintiff's father, Bhalchandra, had obtained lease of the suit land for the benefit of the joint family; that Bhalchandra continued to cultivate the land as a member of the joint family till his death on 7 December 1947; that after Bhalchandra's death, his brother Jinappa's name was mutated in the revenue record as a member of the joint family; and that the Plaintiff always continued to be in joint possession of the property cultivating the same with Jinappa till the year 1968 and, thereafter, with Dhanpal, the Defendant, till the date of the suit. What is pertinent to note is that the Plaintiff's suit is not on title, but expressly on his possession of the suit property as of the date of the suit, and based on such prior possession, he claimed to be protected from any interference with his possession by the Defendant.

4. The Trial Court, after an extensive analysis of the evidence placed before it, both oral and documentary, observed that though the suit land always stood in the name of the Defendant's father during his lifetime and, thereafter, in the name of the Defendant and there were voluminous documents to show that it was the Defendant and his father, who were paying land assessment of the suit land, there was material on record to show that the Plaintiff had possession of a portion of the suit land from the year 1972-73 till 1981-82. The Trial Court, however, came to the conclusion that there was no material whatsoever from the year 1981-82 onwards showing the Plaintiff's possession of the suit land. In other words, there was absolutely no evidence to show that the Plaintiff was in possession and enjoyment of the suit land on the date of the suit. The Trial Court expressly rejected the contention of the Plaintiff that once he showed possession of the suit land till 1981-82, it was for the Defendant to show that the Plaintiff was either dispossessed or had no possession as of the date of the suit. The question before the Trial Court, as noted by it, was, whether injunction could be granted to a person, who failed to prove his possession on the date of the suit. The Trial Court rightly held that the machinery of the Court cannot be used by filing a suit for injunction for effectively claiming recovery of a possession, which has either been lost or not with the plaintiff as at the date of the suit. The Trial Court, thereafter, reflected on the probabilities of the Plaintiff's case in respect of the alleged joint possession. It noted that the Plaintiff's case all along had been that the suit land was for the benefit of the joint family and cultivated by his father on behalf of the joint family, but that there was no evidence to that effect. Likewise, there was no evidence of the Defendant's father Jinappa continuing in

possession of the suit land for the benefit of the joint family. The tenancy in the name of the Defendant's father Jinappa clearly appeared to be in his individual capacity. The Trial Court particularly noted that had the case been otherwise, the eldest brother, Bhau, would also have claimed joint possession and enjoyment of the property but that there was absolutely no evidence to that effect. Thus, the Trial Court found no merit in the Plaintiff's contention that the tenancy was held first by Bhalchandra and later by Jinappa and, thereafter, by the Defendant for and on behalf of the joint family. As mentioned above, as far as physical joint possession of the property is concerned, the Trial Court only found material between 1972-73 and 1981-82 and that there was nothing on record to show that the Plaintiff was in possession of the property after 1981-82 and, particularly, as at the date of the suit.

5. These comprehensive findings of the Trial Court, well reasoned and based on sound assessment of evidence as they are, are reversed with by the first Appellate Court without finding any material or evidence to support such reversal. The Appeal Court has gone through several documents, which, according to it, showed the Plaintiff's possession. These documents, which are referred to in paragraphs 19 to 27 of the impugned order and judgment of the Appeal Court, are all dated upto 1981-82. These are the very documents, which were considered by the Trial Court to find that there was material to show that the Plaintiff was in possession of a portion of the suit property till the year 1981-82. Learned Counsel for the Respondent could not show a single document relating to the period thereafter, that is to say, the period between 1981-82 and the date of the suit, which was filed on 9

July 1985, to claim that the Plaintiff had thereafter continued to be, or was, in possession of the suit land as at the date of the suit. The first Appellate Court found the evidence on record to be sufficient to conclude that the Plaintiff was in joint possession of the suit land along with the Defendant simply on the plea that once it was held that the Plaintiff was in possession along with the Defendant at any point of time, then unless the contrary was proved, the possession of the Plaintiff ought to be presumed to have continued along with the Defendant till the date of the suit. The first Appellate Court noted that there was no evidence on record nor was it the case of the Defendant that the Plaintiff was dispossessed from the suit land anytime after 1982.

6. This reasoning clearly suffers from a serious error of law. A party, who files a suit simply on the basis of his possession, must, at all events, prove his possession as at the date of the suit. It is no good for him to show possession as of an anterior date and then fall back on his opponent's failure to prove his dispossession thereafter. That would be a strange approach as far as the plea of possession and its proof are concerned. Where an injunction is claimed on the basis of peaceful possession as on the date of the suit, the onus to prove such peaceful possession as at the date of the suit, is clearly on Plaintiff. That onus cannot be discharged by showing possession as of an anterior date, and expecting the defendant to prove dispossession or loss of possession. I must hasten to add a caveat here. What I mean by 'proving possession as at the date of the suit' is not that the possession must be actually shown at the very date of the suit, in the sense of tendering a proof of actual possession as at the very date. Proof tendered as of an earlier date would

do, but that date must be in reasonable proximity of the date of the suit. What is reasonable may of course be a matter of individual assessment by the Court, and it may not be possible to draw any generally applicable artificial line in this behalf. But then there may be cases where the proximity may be absolutely reasonable and cases where it may be said to be fairly reasonable. A proof tendered of actual possession, say, about ten years before the suit can, for example, be certainly said to be unacceptable for showing possession at the date of the suit, whereas proof of actual possession, say, a couple of months before the filing of the suit may unquestionably be accepted. In reality, the line may have to be drawn somewhere in-between. In the present case, the proof tendered is of more than three years prior to the filing of the suit. That certainly cannot be called proof of possession at a reasonably proximate earlier point of time so as to qualify as proof of possession as at the date of the suit.

7. The substantial question of law, on which this appeal was *inter alia* admitted by this Court, namely, whether in a suit, which is simplicitor for injunction based on prior possession, what is required to be seen and considered is possession of the property on the date of the filing of the suit, needs to be answered accordingly. Granting of such injunction on the basis of possession shown as of an anterior date, which is not reasonably proximate to the date of the suit, is contrary to well established principles of law relating to grant of injunction in a suit for perpetual injunction based on prior possession.

8. The impugned order and judgment of the first Appellate

Court, accordingly, cannot be sustained. The Second Appeal is, therefore, allowed and the impugned judgment and order of the learned District Judge is set aside. There shall, in the circumstances of the case, no order as to costs.

9. On the application of learned Counsel for the Respondent, the injunction operating in favour of the Respondent, is continued for a period of six weeks from today.

(S.C. GUPTE, J.)