

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8909 OF 2017

- | | | | |
|----|-------------------------------------|---|-------------------------------|
| 1. | Vishal Bhagwan Chandanshive |] | |
| | Age 48 years, Occu. Rikshaw Driver |] | |
| | |] | |
| 2. | Ilahi Bandu Barudwale |] | |
| | Age 60 years, Occu. Business, |] | |
| | |] | |
| | Both R/o. Near New Railway Station, |] | |
| | Tapkire Mala, Sangli, |] | |
| | Tal. Miraj, District-Sangli. |] | <u>... Petitioners</u> |

Versus

Sangli Miraj and Kupwad City	]	
Municipal Corporation, Sangli.	]	<u>... Respondent</u>

- Mr.Umesh R. Mankapure for the Petitioners.
- Mr.G.H. Keluskar for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 31st JANUARY, 2018.

ORAL JUDGMENT :

1] Rule. Rule made returnable forthwith. Heard finally with consent of learned counsels for both the parties.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are invoking the writ jurisdiction of this Court, for challenging the concurrent finding of the fact, arrived at by the Court of 2nd Jt. Civil Judge Senior Division, Sangli and the District Judge-5, Sangli, vide order dated 14th December 2015 and 6th July 2017, passed below Exhibit-5 in Regular Civil Suit No.432 of 2015 and Miscellaneous Civil Appeal No.211 of 2015, respectively.

3] The Application below Exhibit-5 in Regular Civil Suit No.432 of 2015 was filed by the present Petitioners contending *inter-alia* that their predecessor Bhagwan Bhau Chandanshive and 42 other persons had purchased the suit property from Shri Ganpati Panchayatan Sansthan, Sangli on 11th September 1975 by registered sale-deed and since then, they are in possession of the suit property. It was submitted by them that on 18th November 2015, the Respondent Municipal Corporation had started construction of drainage (Nallah) over the suit property through its Contractor and therefore, the Petitioners were constrained to file a suit for injunction, restraining the Respondent from causing obstruction to their peaceful possession in the suit property as owners thereof.

4] The Application for interim injunction was filed along with the suit, which came to be resisted by the Respondent contending

inter-alia that in the earlier suit, filed by one Mr.Vilas Maruti Katkar & Others, the matter reached upto this Court and in Second Appeal No.111 of 1986, by the order dated 1st July 2004, this Court has held that the Petitioners herein had failed to prove their title over the suit property. It was also held that the Petitioners had even failed to prove the ownership of their predecessor i.e. Shri Ganpati Panchayatan Sansthan, Sangli over the suit property.

5] The trial Court accepted this contention raised by the Respondent and after relying upon the judgment of this Court in Second Appeal No. 111 of 1986 held that as the Petitioners have failed to prove their title over the suit property, in the earlier suit, therefore there is bar of *res-judicata* to the present suit. It was further held that, in view of the Government Resolution dated 15th November 1988, handing over the suit property to the Respondent/the Municipal Council for development, the Petitioners have no *prima-facie* case to get the relief of interim injunction.

6] This finding of the trial Court was confirmed by the Appellate Court, in the Miscellaneous Civil Appeal No.211 of 2015, on the same grounds which were upheld by the trial Court.

7] While challenging this concurrent finding of the fact

recorded by both the Courts below, the submission of learned counsel for the Petitioners is that both the Courts below, have not properly considered the judgment of this Court in Second Appeal No.111 of 1986 and hence, there is perversity in the sense of not considering the factual aspects of the case properly and especially the judgment of this Court. Therefore, according to him, though the finding of fact recorded by both the Courts below is concurrent, this Court should interfere in the said finding of fact.

8] Per contra, learned counsel for the Respondent has supported the judgment and order of both the Courts below by submitting that the said finding is arrived at, on proper appreciation of material on record and therefore, in the writ jurisdiction, this Court should be slow in interfering with the said finding.

9] The law is fairly well settled that in the discretion exercised by the trial Court in granting or rejecting the order of interim injunction, the higher Court should be slow in interfering with the same especially when said finding is confirmed by the Appellate Court, except when some perversity is pointed out, in the said findings of fact.

10] In the instant case, therefore, one has to see whether the

Courts below have properly considered the judgment of this Court in Second Appeal No. 111 of 1986.

11] The said appeal was preferred by one Mr.Vilas Maruti Katkar and others against the judgment and order of the District Court in the First Appeal. The said suit was filed by them in respect of the very same suit property, against the present Petitioners, seeking the relief of injunction, claiming to be in possession thereof. The suit came to be dismissed and thereafter, the appeal was preferred. The First Appellate Court framed one additional issue for its consideration, which was as to, "Whether the Respondents/Defendants (present Petitioners) proved that they have become the owners of the land?" The First Appellate Court answered that issue in affirmative and held that the Respondents (present Petitioners) were owners of that strip of land and accordingly, allowed the appeal partly.

12] In the Second Appeal preferred by the Plaintiffs of that suit by Mr.Vilas Maruti Katkar & Others, this Court held that, such issue about the ownership of the Respondents (present Petitioners) over the land was not at all framed by the trial Court. Hence, it was not proper on the part of the First Appellate Court to frame such issue and answer the same in affirmative. It was specifically observed in paragraph No.7, as follows:

“The Appellate Court relying upon the Sale Deed dated 10th September 1975 has come to the conclusion that the Respondents have become owners of the entire strip of land between the suit plots and the Kupwad Road. It is pertinent to note that the trial Court has not framed any issue on the title or ownership of the Respondents. The point for determination on this aspect is framed by the Appellate Court without there being any specific issue framed by the trial Court. It is pertinent to note that in the Written Statement filed by the Respondents, the Sale Deed dated 10th September 1975 is not relied upon. In fact there is no reference to the said Sale Deed in the Written Statement. There is no averment made by the Respondents in the Written Statement claiming ownership.. Though the Sale Deed had been exhibited by the trial Court, it is obvious that the execution of the said document was not proved by examining any witness. The Respondent No.1 examined on behalf the Respondents for the first time in his deposition referred to the Sale Deed. In the deposition the said witness Bhagwan Bhau Chandanshive, who is Respondent No.1 stated that the Rajasaheb (King) had agreed to sell the property as the Respondents were very poor. He stated that the Manager of Ganpati Panchayati Sansthan signed the said sale deed on behalf of the Ruler. However, on perusal of the sale deed, it does not show that the sale deed has been executed by the Manager of the Ganpati Panchayati Sansthan on behalf of the ex-Ruler of Sangli. There is absolutely nothing on record to show that Shri Ganpati

Panchayati Sansthan, Sangli was the owner of the strip of land which according to the Respondents is in their possession. The signatory to the said document namely the Manager of the said Sansthan is not examined. The Respondents have also not examined any person who was either present at the time of execution of the sale deed and who is in position to identify the signature of the said executant. Even assuming that the sale deed has been legally proved, the Appellate Court could not have come to the conclusion that the Respondents have become owners of the land in question, as there was no evidence on record to show that Shri Ganpati Panchayati Sansthan Sangli was the owner of the land. In fact the case of the Respondent No.1 in the deposition is that the Manager of Sansthan had executed the document on behalf of the ex-Ruler. Therefore, taking the finding of the Appellate Court as it is, the Appellate Court could not have come to the conclusion that the Respondents have established their ownership. Even the trial Court had not framed any issue as regards the ownership of the Respondents. Still the Appellate Court framed the said point for consideration. In my opinion, the finding on the said point as recorded by the Appellate Court is perverse, as there is no legal evidence on record to show that the vendors of the Respondents had any title in respect of the land in question. Therefore, the said finding recorded by the Appellate Court on point No.2 will have to be set-aside.” (emphasis supplied)

13] Thus, this Court has categorically held in the Second Appeal that, as the trial Court has not framed any issue as regards the ownership of the Respondents (the Petitioners herein) over the said strip of land and still the Appellate Court had framed the said issue for consideration, hence the finding on the said point, as recorded by the Appellate Court is perverse. Moreover, there was no legal evidence on record to show that the vendors of the Respondents therein, had any title in respect of the land in question. Therefore, the finding recorded by the Appellate Court on the said issue was set-aside.

14] Now, the question necessarily arising for consideration is, whether this finding of fact recorded by this Court in Second Appeal will operate as *res-judicata* for the present suit? Now, the provisions of Section 11 of Code of Civil Procedure which deal with the principle of *res-judicata* clearly provide that, “the matter needs to be directly and substantially in issue” in earlier suit and subsequent suit, then only, if any finding is arrived at on such issue in the first suit, it will operate as *res-judicata*, in the second suit, provided both the suits are between the same parties.

15] In the instant case, admittedly, the Respondent herein and even Shri Ganpati Panchayati Sansthan Sangli was not party to the earlier suit. Therefore, one of the essential condition is not satisfied to

invoke the principle of *res-judicata*.

16] Secondly, the issue relating to ownership of the present Petitioners over the strip of land was not “directly and substantially in issue” in the earlier suit, because neither there was any pleading, nor the evidence was laid to that effect, specifically to prove the ownership, nor the trial Court has framed any issue to that effect. Only the Appellate Court has framed such issue and gave some finding, and this Court found that such finding cannot be sustained, as the said issue was not before the trial Court for consideration.

17] It may be true that, while setting aside the said finding, this Court has also taken note of the fact that there is no legal evidence on record to show that the vendors of the present Petitioners had any title in respect of the land in-question. The reason why no evidence was adduced by the Petitioners about the title of their vendor was that the issue relating to the ownership of the Petitioners was not in question and issue to that effect was also not framed. Naturally, the Petitioners were not expected to lead evidence, to prove their ownership. There was no counter claim also filed by the present Petitioners in that suit. It was a suit simpliciter for injunction.

18] In such situation, as the Appellate Court has committed an

error in framing the issue relating to the ownership of the Respondents therein (Petitioners herein) over the suit plot, this Court has corrected that error and set-aside that finding mainly and mostly on the ground that such issue was not raised for consideration as the suit was simpliciter for injunction. Thus, the issue relating to the ownership of the present Petitioners over the strip of land was not at all “directly and substantially” for consideration in the earlier proceedings. In view thereof, the incidental finding given to the issue relating to the ownership of the Petitioners over the strip of land, cannot operate as *res-judicata*; especially when the parties to this suit are also not the same parties to the previous suit.

19] However, the judgment of this Court in the Second Appeal in earlier suit can definitely be relied upon in this suit, as regards the possession aspect because it was directly and substantially in issue in the earlier suit and it is directly and substantially in issue in this suit also. In paragraph No.8 of the judgment of this Court in Second Appeal, it was observed as follows:

“The case of the Appellants is that the Kupwad Road touches the northern boundary of the suit plots. The Courts below have recorded a finding of fact that Kupwad Road does not touch northern boundary of the suit plot. The Appellate Court has relied upon the map at Exh.107

which is a lay out plan and has come to the conclusion that there is a strip of land which is occupied by some of the Respondents in between the northern boundary of the suit plot and the Kupwad Road. There is no authentic evidence placed on record to show that the Kupwad Road touches the northern side boundary of the suit plots. One of the Appellants who stepped into the witness box stated that when he saw the suit plot for the first time, he noticed that there is a distance (space) between the existing Kupwad Road and the plots proposed to be purchased by him. He stated that he never enquired as to who was the owner of the strip of land. All that he stated is that his vendor gave him to understand that the space will be used for the Kupwad Road. This evidence on oath given by one of the Appellants clearly establishes that even the Appellants were aware that there was a strip of land in between the existing Kupwad Road and the northern boundary of the plots. Reliance placed on the extract of the sanctioned development plan (revised) of the Municipal Council is totally misplaced. The learned Counsel for the Appellants pointed out the width of the said road is 100 feet. However, the said submission of the learned Counsel for the appellants cannot be accepted for the simple reason that in the plaint and as well in the deposition one of the Plaintiffs clearly stated that the width of the existing road is 60 feet and it is proposed to be converted into a road having 100 feet width. At this stage it is necessary to refer to the documents produced along with the application for additional evidence. If the said documents are perused it is

very clear that the same are not helpful to the Appellants. At the highest the said documents will establish that the State Government has transferred Kupwad Road to Sangli Municipal Council. The documents at page 24 annexed to the said Civil Application indicate that the boundaries of the said road are not yet fixed and the survey was required to be carried out through the District Inspector of Land Records. Even assuming that the Appellants are entitled to adduce additional evidence the documents which are sought to be produced along with the Civil Application will not improve the case of the Appellants. In the circumstances, there is no reason to find fault with the findings of fact recorded by the Courts below that the Appellants have failed to establish that the existing Kupwad Road touches the northern boundary of the suit plots. In spite of this position, the Appellate Court has passed a decree by which access is made available from the suit plot for approaching the existing Kupwad Road. This part of the decree is not challenged by the Respondents.”

20] Thus, it was held that the contention raised by the Appellants therein that width of the said road is about 100 ft. was not accepted. It was also held that there is no authenticate evidence placed on record to show that Kupwad road touches the northern boundary of the suit plot. It was further held that evidence on oath given by one of the Appellants therein clearly establishes that even

the Appellants were aware that there was a strip of land in between the existing Kupwad road and northern boundary of the plot.

21] The reliance placed on the sanctioned development plan of the Municipal Council was also held to be totally misplaced and thereafter, referring to the documents produced on record, it was held that, at the most, these documents will establish that the State Government has transferred Kupwad road to the Sangli Municipal Council. However, the boundaries of the said road are yet not fixed. It was also held that these documents will not prove the case of the Appellants therein and hence there was no reason to find fault with the finding of fact recorded by the Courts below that the Appellants have failed to establish that the existing Kupwad road touches to northern boundary of the suit plot. Accordingly, it was further held in paragraph No.9 that, “it will have to be held that the Appellants therein are having no case for getting the relief of injunction” and therefore, the finding of the trial Court of dismissal of the suit was confirmed.

22] Thus, while dismissing the Second Appeal, this Court has not accepted the case of the Appellants therein that they are in possession of the said land.

23] In such situation, when there is a clear finding recorded that the road of Municipal Council is not 100 ft. but 60 ft. and there is an open space in between and admittedly the Appellants in that suit were not held to be in possession thereof, then it necessarily follows that it is the Petitioners who are in possession of the said strip of land. If it is so, then it follows that their possession needs to be protected, which was tried to be disturbed on the basis of the judgment of this Court in Second Appeal. To this limited extent, therefore, both the trial Court and the Appellate Court should have allowed the application for interim injunction filed by the Petitioners at Exhibit-5, thereby restraining the Respondent from causing obstruction to the possession of the Petitioners, without following due process of law. If ultimately the Respondent is proved to be the owner of the suit property, then definitely Respondent has right to dispossess the Petitioners but till that issue is decided or till the Respondent follows the due procedure, the Petitioners cannot be disturbed or dispossessed from their settled possession.

24] The impugned orders, therefore, passed by the trial Court and the Appellate Court are accordingly quashed and set-aside.

25] Writ Petition is allowed.

26] As a result, the application at Exhibit-5 before the trial Court is also allowed and the Respondent is restrained from causing obstruction to the Petitioners' possession in the suit plot without due process of law.

27] Rule made absolute in above terms.

28] At this stage, learned counsel for the Respondent submits that as the construction of the Municipal Council road is obstructed on account of the *pendency* of this suit, hearing of the suit be expedited. The request being reasonable, the trial Court is directed to decide the suit as expeditiously as possible and preferably within six months from the receipt of this order.

[DR.SHALINI PHANSALKAR-JOSHI, J.]