

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**10 SECOND APPEAL NO.175 OF 2019
WITH
CA/3937/2019 IN SA/175/2019**

Dattatray Vishwanath Vallamshetwar and others

... Versus ...

Bhagwan Vishwanath Vallamshetwar and another

...

Mr. S.V. Chandole, Advocate for the appellants

...

CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 18th MARCH, 2019

PER COURT :

1 Present appeal has been filed by the original defendants, challenging the judgment and decree passed in Regular Civil Appeal No.96 of 2010 by learned District Judge -4, Nanded, dated 14.12.2018; whereby their appeal came to be dismissed. In the said appeal they had challenged the order passed in Regular Darkhast No.10 of 1997 by Civil Judge Junior Division, Hadgaon dated 07.10.2010.

2 Present respondents were the applicants before the learned Executing Court, who had filed an application at Exh.119 for fixation of

mesne profit. Those applicants were the plaintiffs in Regular Civil Suit No. 32 of 1993 and present appellants were the defendants. The said suit was filed for declaration of ownership and possession over agricultural land admeasuring 12 H, 36 R from Gat No.103. In the said suit, plaintiffs had filed application for temporary injunction at Ex.5. It came to be rejected. Defendants had also filed application for temporary injunction at Ex.70 and it came to be allowed. Plaintiffs were then restrained from disturbing the possession of the defendants till the final decision of the suit. The suit of the plaintiffs was decreed. It was contended in the application that plaintiffs, who were the owners were restrained due to the operation of the order of the Court, could not enjoy the property. They had contended that defendants have taken yield from the suit land during the pendency of the suit and received income to the tune of Rs.51,000/- in 1993-94, Rs.65,000/- in 1994-1995 and Rs.75,000 in 1995-1996. Hence, they claimed mesne profit.

3 Respondents to the application (present appellants) resisted the application, by filing say. It was not disputed that temporary injunction order was passed in the suit on their application. However, they contended that they were in possession of the suit land and therefore, the said application was allowed. Plaintiff was not entitled to get mesne profits. They have denied that they have received income from suit land.

4 Learned Executing Court allowed the parties to lead evidence. After hearing both sides and perusing the evidence, it has allowed the application partly. Respondents therein, were directed to pay amount of Rs.90,000/- in all together with interest @ 6% per annum from the date of petition till actual realization of entire amount, as mense profits for 1993 to 1996.

5 Both the parties had preferred appeal. Present appellants had filed Regular Civil Appeal No.96 of 2010 and present respondents had filed Regular Civil Appeal No.98 of 2010. Both the appeals were heard together and by common judgment and decree, they have been dismissed by the learned First Appellate Court on 14.12.2018. Hence, this second appeal.

6 Heard learned Advocate Mr. S.V. Chandole for appellants. After taking into consideration the judgments of both the Courts below and the submissions made, it is not even necessary to issue notice to the other side. Unless, the present appellants show 'substantial question of law', the appeal cannot be entertained under Section 100 of Code of Civil Procedure, 1908.

7 The present respondents had filed the said application under Section 144 of Code of Civil Procedure. It will not be out of place to mention here that even initially, when the application/petition itself was filed and

notice was issued to them by passing order below Ex.1, it was challenged before this Court in Civil Revision Application No. 1054 of 1998 on the ground of maintainability. It was dismissed by this Court on 04.07.2003. Present appellants had not challenged the said order before any higher forum. Therefore, as regards maintainability of the application under Section 144 read with Section 151 of Code of Civil Procedure, the decision has become final. It was held that the petition was maintainable. Under such circumstance, what was remaining is the calculation of mesne profits on the basis of evidence adduced. Present appellant could not have raised the point of maintainability of the application again before the learned Executing Court.

8 In the said order passed by this Court it was clearly held that since the plaintiff was kept away from the enjoyment of the suit property, due to the temporary injunction; though they were entitled to, they are entitled to get mesne profits. Finally, the plaintiffs in the suit were held to be the owners of the property. That means, they had a right to hold the property. Hence, as per the provisions of Section 144 of the Code of Civil procedure, the loss sustained by plaintiffs will have to be made good. The said decision by this Court in Civil Revision is binding on the present appellants. Since the said decision has become final, it cannot be agitated in this Second Appeal

also. Learned Executing Court has therefore, rightly proceeded to determine the mesne profits.

9 Quantum of mesne profits fixed by the learned Executing Court cannot be questioned here, as it would a question of fact. It will not be 'substantial question of law'. Hence, this Second Appeal is disposed of as '**Not Admitted**'. Pending civil application also stands disposed of accordingly.

(Smt. Vibha Kankanwadi, J.)

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