

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

**SECOND APPEAL NO. 249 OF 1993
WITH
CIVIL APPLICATION NO. 1779 OF 2016**

Kadar Raju Shaikh
(since deceased through LRs.)

1a) Bhikam Kadar Shaikh & Ors.

...Appellants

vs.

Abbas Pirmohamad Shaikh & Ors.

...Respondents

Mr.Pramod N. Joshi for Appellants.

Mr.Sharad T. Bhosale i/b. Dilip Bodake for Respondent Nos.2 and 3.

CORAM : S.C. GUPTE, J.

DATE : 7 NOVEMBER 2019

ORAL JUDGMENT :

This second appeal challenges an appellate order passed by the District Court at Nashik allowing the appeal filed by the Respondents (original Defendants) and dismissing the suit filed by the Appellant (original Plaintiff), which was originally decreed by the trial court. The suit was essentially on the basis of an alleged settled possession of the Plaintiff; it sought to restrain the Defendants from interfering with, or causing any obstruction to, such possession. The substantial question of law, on which the appeal was admitted, is set out below:

“Where trial court has recorded finding of exclusive possession of Plaintiff, are entitlement to possession and actual possession different things?”

2 After the parties are heard, the question has been reframed as follows :

“Can a suit filed for protecting possession of immovable property based on settled exclusive possession be dismissed on the ground that the Plaintiff has failed to prove title to the suit property?”

3 The suit property consists of land bearing Gat No.443 situate at Adgaon, Taluka Chandwad. It admeasures about 6 H and 37 R. This land was admittedly a self-acquired property of one Hamid Husein, who had purchased, and was in cultivation of, the same. It was the case of the Plaintiff that at the age of 105 years, Hamid Husein expressed an intention to make a gift of the property to the Plaintiff and gave its physical possession to the Plaintiff, who accepted the same. It was submitted that thereafter, that is to say, after making of the oral gift, which was accepted by the Plaintiff, Hamid Husein applied to the Tahsildar, Chandwad for mutation of the suit property in the name of the Plaintiff in the revenue records. In accordance with this application, a mutation entry was effected in the name of the Plaintiff. Hamid Husein subsequently died, whereafter, the Plaintiff continued to be in exclusive possession and occupation of the suit property and was cultivating the same. It was the grievance of the Plaintiff that the Defendants, who had no concern with the suit property, were obstructing the Plaintiff and his labourers in cultivating crops in the suit property. Accordingly, the Plaintiff filed the present suit for a perpetual injunction against the Defendants restraining the latter from interfering with or obstructing the Plaintiff's possession of the suit property. By his judgment and decree dated 31 December 1987, the Civil Judge, Junior Division, Chandwad, decreed the suit granting the Plaintiff the perpetual injunction prayed for. On the Defendants' appeal before the District Court,

Nashik, this decree was set aside by the District Court and the suit was dismissed by the impugned order dated 30 July 1992. Being aggrieved, the Plaintiff has filed the present second appeal.

4 The trial court, in its judgment and decree, held the gift from Hamid Husein to the Plaintiff as proved. The court held that the suit property was a self-acquired property of Hamid Husein Shaikh and upon its gift, was exclusively owned and in possession of the Plaintiff and that the Defendants were unlawfully obstructing its peaceful possession of the Plaintiff. The Defendants' case was that the suit property was ancestral property of the Plaintiff, the Defendants and the deceased Hamid Husein Shaikh and was being jointly cultivated by the Defendants along with the Plaintiff, was not accepted by the trial court. The trial court, accordingly, held that the Plaintiff was entitled to a perpetual injunction restraining the Defendants from interfering with or obstructing his possession.

5 The lower appellate court, in its impugned judgment, agreed with the conclusion of the trial court that late Hamid Husein was the exclusive owner of the suit property. The court, however, held that the Plaintiff had failed to prove that the suit property was gifted by Hamid Husein to him and accordingly, the Plaintiff was not entitled to the injunction prayed for. The District Court did not find fault with the trial court's finding in favour of exclusive possession of the Plaintiff. What it held was that the only documentary evidence led by the Plaintiff in support of his case of an oral gift was the application made of Hamid Husein for mutation before the Tahsildar. The District Court accepted the Defendants' contention that this document was not enough to prove the oral gift. The court found that there was no mention in the application of

Hamid Husein having gifted the suit property or that mutation should, accordingly, be recorded in favour of the Plaintiff. The court was of the view that had this application been submitted in pursuance of an alleged gift, there would have been some reference to it in the application; the application, however, was totally silent about any such gift. Since, on this basis, the court came to the conclusion that the Plaintiff had not proved the alleged oral gift in his favour and, accordingly, could not prove his exclusive ownership of the suit property and since Plaintiff and the Defendants were both legal heirs of Hamid Husein, the property ought to devolve upon all of them as tenants in common. The court was, thus, of the view that if the Defendants were co-sharers or tenants-in-common along with the Plaintiff, the Plaintiff's possession could be presumed to be of all the other co-sharers, i.e. including the Defendants. The court, in other words, held that the Defendants were entitled to be in possession of the suit property along with the Plaintiff.

6 The fundamental fallacy in the impugned order is that the District Court has dismissed the Plaintiff's suit for protecting his possession without in any way having questioned the Plaintiff's exclusive possession of the suit property. If his exclusive possession was not debated/questioned, assuming without admitting that his exclusive ownership through the purported oral gift by Hamid Husein was not proved, unless the Defendants actually showed either their pre-existing physical possession or their entitlement to the suit property by succession, testamentary or intestate, the Plaintiff was entitled to the perpetual injunction sought by him. The District Court has not found the Defendants to be in actual possession of the suit property, and as for the so-called heirship of the Defendants and their succession to the suit property as legal heirs of deceased Hamid

Husein, there was hardly any material before the court to come to any such conclusion. The case of the Defendants in their written statement was not of intestate succession to the estate of Hamid Husein. Their case was that the property was an ancestral property of the Plaintiff, Defendants and deceased Hamid Husein. This case was, in terms, found to be untrue by the trial court and the lower appellate court has not only not questioned this conclusion of the trial court but, in fact, has come to a categorical conclusion that Hamid Husein was the exclusive owner of the suit property. There is absolutely nothing on record, either in the pleadings or in the evidence before the court, that the suit property, which belonged exclusively to Hamid Husein Shaikh, was inherited by the Defendants so as to entitle them to its possession jointly with the Plaintiff.

7 Learned Counsel for Respondent Nos.2 and 3 (original Defendant Nos.2 and 3) relies on the judgment of the Supreme Court in the case of **Maria Margarida Sequeira Fernandes vs. Erasmo Jack De Sequeira (Dead) through LRS.**¹ and submits that any plaintiff, who seeks protection of his possession, was duty-bound to make out his title to the suit property by furnishing details and particulars such as possession of title documents, how he came into possession of the suit property including the manner in which he claims to have obtained title to it, etc. In **Erasmo Jack De Sequeira**, the appellant/plaintiff before the court claimed to be the sole owner and in exclusive possession of the suit property. Her title to the suit property was never disputed by the respondent, Erasmo Jack De Sequeira. According to the appellant, the respondent, Erasmo Jack, had no right, title or interest in the suit property and was not in lawful possession thereof. The suit for injunction of Erasmo Jack under Section 6 of the Specific Relief

1 (2012) 5 SCC 370

Act was, accordingly, said to be misconceived. Erasmo Jack's suit was on the basis of permissive possession, which he wanted to be protected against the lawful owner. His case was that he could not be dispossessed otherwise than by due process of law. The Supreme Court was of the view that by due process what was meant was that nobody ought to be condemned unheard; it meant an opportunity to the defendant to file pleadings including written statement and documents before a court of law; and defend the claim. This due process was satisfied the moment rights of the parties were adjudicated upon by a competent court. In connection with the respondent's right to continue in possession of the suit property as its permissive user, the court enumerated certain illustrative details of what he was expected to prove. The ratio of the judgment does not indicate that in every case, where the plaintiff claims to be in settled previous possession of property claiming to protect it, he must prove either his title or his entitlement to be in possession. Ours is a case where the Plaintiff was undisputedly in settled possession of the suit property. It was his case that the owner of the suit property, being his self-acquired property, had put the Plaintiff in possession of the same after evincing intention to make an oral gift in his favour. In pursuance of such delivery of possession, the owner had even applied to the revenue authorities for effecting a mutation in respect of the suit property in favour of the Plaintiff. Ever since the death of the admitted owner of the suit property, the Plaintiff had, in the premises, been in settled physical possession, cultivating the same. He claimed to be entitled to protect his possession from any unauthorised person. On these facts, unless the Defendants show that they were actually in joint physical possession or had the right to be in such possession, the Plaintiff's suit for possession could not have been dismissed. As we have noted above, the Defendants' case was of ancestral property owned by the Plaintiff, the Defendants and

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the admitted owner of the suit property, namely, Hamid Husein Shaikh. Aside of this case, there was no other right claimed by the Defendants in respect of the suit property. The Defendants' claim to be in physical possession of the suit property was neither accepted by the trial court nor by the first appellate court, and the only case of entitlement pleaded by the Defendants having also been found against them by both courts below, they had no case to resist the Plaintiff's claim for protecting his admitted possession of the suit property. The impugned order of the first appellate court, accordingly, deserves to be quashed and set aside.

8 Accordingly, the substantial question of law, re-framed as above, is answered in the negative, i.e. in favour of the Plaintiff, and the second appeal is allowed by quashing and setting aside the impugned judgment and decree dated 30 July 1992 passed by Second Additional District Judge, Nashik and restoring the judgment and decree passed by the court of Civil Judge, Junior Division, Chandwad on 31 December 1987. in favour of the Appellant herein.

9 In view of the disposal of the second appeal, the civil application does not survive and is disposed of.

Sanskriti
A. Thakur

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(S.C. GUPTE, J.)