

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

SECOND APPEAL NO. 571 OF 2010

Shalik S/o. Rambhau Gaikwad,
Age-57 years, Occu-Ex-Servicemen,
R/o. Bharaj (Bk), Tq. Jafrabad,
Dist. Jalna
At present resides at
Ekta nagar, Jatwada Road, Harsul,
Aurangabad

**...APPELLANT
[Ori. plaintiff]**

VERSUS

1. Sumanbai W/o. Bhaskar Gaikwad, **...RESPONDENTS**
Age-37 years, Occu-Agri & Household, **[Ori. Defts. 2 & 3]**
R/o. Bharaj (Bk), Tq. Jafrabad,
Dist. Jalna
2. Gram Panchayat Mauji,
Through Sarpanch,
Bharaj (Bk), Tq. Jafrabad,
Dist. Jalna

Mr. P. C. Mayure, Advocate for the appellant
Mr. Jitendra Patil, Advocate h/f Mr. P. R. Katneshwarkar, Advocate
for the respondent No. 1

CORAM : S. M. GAVHANE, J.

RESERVED ON : 20-01-2020

PRONOUNCED ON : 26-02-2020

JUDGMENT :

. This appeal is directed against the judgment and order dated 22-06-2010 passed by the Principal District Judge, Jalna in RCA No. 248 of 2008 thereby allowing the said appeal with costs

and setting aside the judgment and decree passed by Joint Civil Judge, Junior Division, Jafrabad on 18-10-2008 in RCS No. 71 of 2007 and dismissing the said suit. The appellant is original plaintiff, respondents are original defendant Nos. 2 and 3. Parties are hereinafter referred to as per their original position before the trial court in the suit.

2. Facts leading to this appeal, in short are that the plaintiff filed aforesaid suit on 31-08-2007 against the defendants for perpetual injunction to restrain them from making encroachment over suit plot No. 28 within four boundaries i.e. to the East- Plot of Tejrao S/o. Rambhau, to the West-Plot of Daulatrao Chautmal, to the South-Land of Bodke and to the North-Public Road, situated at village Bharaj (Bk), Tq. Jafrabad, Dist. Jalna described in the plaint contending that plaintiff is a Ex-military personnel. In 1972, Government had given to him the suit plot under Kabala. On the basis of said Kabala, said suit plot has been recorded in the name of plaintiff in the city survey record. Though the area of suit plot is mentioned as 100 Sq. Fts. in the Kabala, in fact 33 x 33 fts area has been handed over to the plaintiff under panchanama dated 09-09-1972. In 1988, plaintiff constructed basement over the suit plot and raised tin shed on the plot. As son of the plaintiff is in private employment at Aurangabad plaintiff is residing alongwith his son at Aurangabad. As the plaintiff is residing at Aurangabad defendant No. 2 is trying to encroach upon the suit plot and therefore, suit was filed.

3. Plaintiff withdrawn suit against defendant No. 1. Defendant No. 3 did not appear though served with summons and thus suit proceeded ex-parte against defendant No. 3.

4. Defendant No. 2 resisted the suit by filing written statement (Exh.15). She denied all the contentions and allegations made by the plaintiff. According to defendant No. 2 under scheme of providing the plots to the landless labourers, the government had given suit plot to her father-in-law namely Bhimrao S/o. Rambhau Gaikwad under the possession receipt dated 09-09-1972 and since then said Bhimrao had been in the possession of the suit plot till his death and after his death defendant No. 2 alongwith her husband and her mother-in-law are in possession of the suit plot. By taking disadvantage of illiteracy of said Bhimrao, plaintiff got his name entered into Kabala in the year 1975 and in fact in the year 1972 after receiving the possession of the suit plot her father-in-law constructed basement on the suit pot and raised the tin shed and since then her father-in-law alongwith his family members had been residing there till his death and after his death defendant No. 2 alongwith her husband and mother-in-law is residing in the suit plot. She contended that plaintiff was never in possession of the suit plot and thus claimed to dismiss the suit.

5. The trial court framed necessary issues arising out of pleadings and particularly framed issue No. 1 as to whether plaintiff is owner and in possession of the suit plot?, issue No. 2- whether defendant No. 2 is trying to encroach upon the suit plot? and issue

No. 3- whether the plaintiff is entitled to relief claimed? and after considering the evidence adduced by the parties, the trial court decreed the suit and issued perpetual injunction restraining defendant No. 2 from causing encroachment over the suit plot by judgment and decree dated 18-10-2008. Aggrieved by the said decree defendant No. 2 filed appeal bearing RCA No. 248 of 2008. The appellate court held that the plaintiff failed to prove his lawful possession over the suit plot, that the plaintiff further failed to prove obstruction at the hands of defendant No. 2 and accordingly the said appeal came to be allowed and decree under challenge came to be set aside and suit was dismissed by the judgment and order dated 22-06-2010. Therefore, this appeal by the original plaintiff.

6. This second appeal was admitted as per order dated 27-07-2011 for the substantial question of law "whether the finding recorded by the learned District Judge that the appellant is not in possession is perverse?".

7. I have heard Mr. P. C. Mayure, learned counsel for the plaintiff and Mr. Jitendra Patil h/f Mr. P. R. Katneshwarkar, learned counsel for defendant No. 2/respondent No. 1 and with their assistance I have perused the evidence adduced by the parties and so also, I have gone through the judgments of both the courts below.

8. Considering the substantial question of law referred to

above and the relief of perpetual injunction claimed by the plaintiff against the defendants particularly against defendant No. 2 the only aspect which is required to be proved by the plaintiff is his lawful possession over the suit plot on the date of suit. Plaintiff has come with the specific case that the suit plot was allotted to him as Ex-military personnel in 1972 under kabala and since then he claims possession over the suit plot. Plaintiff has not produced document to show that in 1972 suit plot was allotted to him by the Government as Ex-military personnel. Exh. 4/1 Maharashtra Government Certificate/ Sanad dated 30-06-1980 which is not proved shows that the plaintiff has been allotted 123.7 sq. mts. Plot in Gavthan. Area of this plot does not tally with the suit plot on which right is claimed by the plaintiff. So also, it does not show that said plot was allotted in 1972 being Ex-military personnel. Therefore, this document does not support the case of the plaintiff of lawful possession over the suit plot since 1972.

9. Second document relied upon by the plaintiff to prove his possession over the suit plot is possession receipt-cum-panchanama [exh.41] dated 09-09-1972. This document shows that possession of the suit plot was given to Bhimrao Rambhau Gaikwad brother of the plaintiff who is father-in-law of defendant No. 2, on behalf of the plaintiff on 09-09-1972. It does not refer to Kabala or Sanad on the basis of which suit plot was allotted to plaintiff as per case of the plaintiff. It also does not refer to the fact that suit plot was allotted to the plaintiff being an Ex-military personnel. On the contrary, it shows that it was given in possession

of Bhimrao Gaikwad and it was allotted under the category of homeless and landless persons. Thus, when as per this document possession of the suit plot was given to the brother of the plaintiff and not to the plaintiff, it cannot be said that plaintiff was actually put in possession of the suit plot. It is not the case of the plaintiff that suit plot was handed over on his behalf to Bhimrao. On the contrary, it is the case of the plaintiff that the Government had handed over suit plot to him under panchanama dated 09-09-1972. Plaintiff in his cross-examination admitted that on 09-09-1972 his brother had taken possession of the suit plot. Witness No. 2 for the plaintiff who is panch to the possession receipt/panchanama exh.41 also admitted that the plaintiff was not present at the time of said panchanama and deceased Bhimrao was present at that time. This witness stated that the plaintiff joined military service and he retired 4 to 5 years back. Evidence of this witness was recorded on 06-03-2008. Plaintiff is in possession of the suit plot since 1972, as he was allotted suit plot as Ex.Military personnel. The evidence of this witness shows that plaintiff retired in 2003 or 2004, if he was retired in 2003 or 2004, it is not acceptable that the suit plot was allotted to plaintiff as Ex-military personnel in 1972 and he was in possession thereof since 1972. Witness No. 3 for the plaintiff has also admitted that Bhimrao was given the possession of the suit plot. Thus, above referred evidence is not sufficient to infer that the plaintiff was in possession of the suit plot on the date of suit as he was allotted suit plot and possession thereof in 1972.

10. On the contrary, evidence of defendant No. 2 who is

daughter-in-law of Bhimrao Gaikwad shows that the plaintiff was never in possession of the suit plot. Suit plot had been in the possession of her father-in-law Bhimrao since last 35 to 40 years. After his death suit plot has been in her possession and possession of her husband. Her evidence shows that plaintiff has filed false suit as suit plot is in his name. She also stated that she has objection of entry in the name of plaintiff of the suit plot. On perusal of the judgment of the appellate court, the appellate court has considered the evidence adduced by the plaintiff and on proper appreciation of the evidence concluded that plaintiff has failed to prove his possession over the suit plot which is material issue in the suit for perpetual injunction and therefore, it has rightly reversed the findings of the trial court and held that the plaintiff has not proved his possession over the suit plot and further rightly held that plaintiff is not entitled to perpetual injunction and rightly set aside the decree for perpetual injunction passed by the trial court allowing the appeal. Therefore, substantial question of law referred earlier is answered in negative and in favour of the defendants. Thus, finding recorded by the appellate court that appellant is not in possession of the suit plot cannot be said to be perverse. Therefore, there is no reason to interfere with the impugned judgment and order passed by the appellate court. Therefore, appeal is liable to be dismissed and accordingly the same is dismissed. No order as to costs.

(8)

sa571.10

11. In view of the dismissal of the appeal, the civil application No. 12337 of 2010 for staying impugned judgment and order does not survive and stands disposed of.

[S. M. GAVHANE, J.]

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