



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

44 SECOND APPEAL NO. 346 OF 2015
WITH
CIVIL APPLICATION NO. 8387 OF 2015
IN SA/346/2015

MANGAL HIRACHAND KALE AND ANOTHER
VERSUS
VISHNU MARUTI KALE

...

Advocate for Appellant : Mr. Jain Vishwajit R. (Kamboj).

Advocate for Respondent : Mr. V.D. Gunale

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CORAM : SHAILESH P BRAHME, J.
DATE : 23.09.2025

PER COURT :

Heard learned counsel for the appellants.

2. Second Appeal is emanating from concurrent findings of facts recorded by the Courts below in granting decree of declaration and possession in respect of plot No. 17 Survey No. 35 situated at Kasarshirsi Tq. Nilanga, Dist. Latur. The appellants are the original defendants.

3. Respondent had filed Regular Civil Suit No. 324/2011 for declaration and injunction contending that he was allotted suit plot vide Kabala executed on 28.06.1972 (Exh. 30). He is given in possession of the plot. His possession is obstructed by the appellants. It is contended that the appellants fraudulently mutated their names. A partition deed was got prepared by obtaining signatures of the respondent on a blank paper. It is further alleged that on 09.05.2011 he was dispossessed.

4. The appellants appeared before the Trial Court but did not file a written statement. Hence the suit proceeded without written statement. The respondent adduced his oral evidence as well as examined one more

witness Jindasab Abdulsab. After considering the material on record the suit was decreed vide judgment dated 19.01.2013.

5. Being aggrieved, appellants preferred Regular Civil Appeal No. 42/2013. It was dismissed vide judgment dated 16.10.2014. Against that present second appeal has been preferred.

6. The learned counsel for the appellants submits that no opportunity was given to the appellants to adduce evidence and both judgments are against principles of natural justice. It is submitted that the lawyer representing them were handed over relevant papers, who did not file written statement and did not apprise the appellants regarding status of the matter. For mistake attributable to the lawyer, the appellants may not be punished. It is vehemently submitted that the judgment and decree passed by the Trial Court is inconsistent in respect of relief of possession. It is further submitted that there are voluminous material with the appellants in the form of partition dated 24.04.2000, memorandum of understanding dated 28.05.2008, agreement dated 08.04.2011 to indicate that in a partition the suit plot was allotted to Dhondiram-appellant no. 2 and appellant no. 1 was permitted to occupy the same. It is submitted that due to the partition in the family, the respondent was having no right, title and interest in the suit plot. He was never in possession of the same. The learned counsel for the appellants vehemently submits that presently also the appellants are in possession of the suit plot and an opportunity needs to be extended by remanding the matter to the Trial Court, to be decided within stipulated period.

7. The learned counsel for the respondent Mr. Gunale supports both the judgments and decrees. It is contended that the appellants did not resort to the statutory remedies for getting the order of no written statement set aside. The appellants are estopped from contending that opportunity was not extended to them. Both the courts below have considered the material

placed on record and thereafter passed the impugned judgments, though there was no contest in the courts below.

8. I have considered the rival submissions of the parties. Admittedly, appellants were served with summons but did not file written statement. The respondent adduced oral evidence of two witnesses, produced Kabala (Exh. 30), and other documents of record of right, on the basis of which, the Trial Court pronounced the judgment in his favour granting relief of declaration and injunction. It is not a case that in the absence of the written statement, the Trial Court proceeded with the matter accepting the respondent's case as a gospel truth. I find that the Trial Court has adopted proper course in view of law laid down by the Supreme Court in the matter of **Gujarat Maritime Board Vs. G.C. Pandya;**(2015)12 SCC 403.

9. It is relevant to notice that after passing of order of no written statement by the Trial Court, the appellants were having statutory remedy to get the order set aside by filing appropriate application before the Trial Court. No recourse is taken to the statutory remedy. Even the order of 'no written statement' was not assailed by incorporating ground of objection in the lower Appellate Court. Under these circumstances, merely harping on a point that opportunity was not given and appellant no. 2 is lady and feeble would not be any help.

10. The learned counsel for the appellants strenuously referred to the partition deed dated 24.04.2000, memorandum of understanding dated 28.05.2008, agreement dated 08.04.2011 and the revenue record to buttress a point that there was partition and the suit plot was allotted to appellant No. 1. However, these documents are coming before the Court first the time in the second appeal. Neither any written statement was filed nor any evidence was led in the trial Court. Under these circumstances, it is not permissible for this Court to consider the factual aspect of the matter by way of defence taken by the appellants. I do not find any merit in the

submissions that the judgments passed by the Courts below are against principles of natural justice .

11. It is vehemently contended that the State Government is the necessary party. The suit was filed for declaration and possession. It's a case of the respondent that Kabala was executed at Exh. 30 on 28.06.1972 and he was handed over possession. It cannot be said that the respondent is the owner of the suit plot. The reference in the Trial Court's judgment regarding ownership of the respondent is misconceived or misnomer. The purport for filing the suit is to protect the possession. Therefore, there are no averments that the respondent has setup any title against State. As no relief is solicited against the State, I am of the considered view that the State Government is not necessary party and the suit is maintainable.

12. The learned counsel adverted my attention to the inconsistent findings recorded by the Trial Court. In paragraph no. 8 it is recorded that respondent proved his possession and as against that a decree of handing over of possession has been passed. The purport of the findings recorded by the Trial Court is that entitlement of the possession has been proved on the basis of Kabala. The consistent case of the respondent-plaintiff is that he was given possession on the basis of Kabala and thereafter he was dispossessed on 09.05.2011. Therefore, a stray observation in paragraph No. 8 of the judgment passed by the Trial Court would not change the complexion of the matter.

13. The learned counsel for the appellants has vehemently canvassed that a great prejudice is caused because the appellants are still in possession and their possession is protected by this Court. The appellant no. 1 is stated to be a lady and she is in possession of the property. Both the Courts below have recorded findings that the respondent is entitled to possession on the basis of Kabala (Exh. 30). No case was put up by the appellants showing their entitlement. The possession can be said to be unauthorized one.

14. The findings recorded by both Courts below cannot be faulted. I do not find any substantial question of law involved in the present appeal. I have no alternative than to dismiss the second appeal. The Second Appeal is dismissed. Pending Civil Application is disposed of.

15. The learned counsel for the appellants, after pronouncement of the judgment prays for extension of interim relief.

16. Learned counsel Mr. Gunale opposes the same contending that there is no interim relief as such in operation.

17. The order dated 23.06.2016 passed by the coordinate bench is not in the nature of granting interim protection to the possession. No stay as such has been granted to the execution of decree. The appellant has deposited Rs. 10,000/- in pursuance of order dated 23.06.2016 and showed his *bona fides*. Rightly or wrongly, the decree has not been executed yet. If the possession is protected because of some orders passed by this Court on previous occasion, I find it fit to grant protection to the possession for further four weeks in order to avail further remedies to the appellants. The execution of the decree in question shall not be proceeded with for further four weeks. After expiration of the said period, the protection granted today shall stand vacated without reference to the Court.

(SHAILESH P. BRAHME, J.)

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