

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 4120 of 2022****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2022****In****R/FIRST APPEAL NO. 4120 of 2022**

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RAMJILAL MEVARAM GURJAR & ANR.**Versus****RAJPOOT SEVA SAMEETI & ORS.**

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Appearance:

MR CB DASTOOR(238) for the Appellant Nos. 1,2

DECEASED LITIGANT THROUGH LEGAL HEIRS/ REPRESENTATIVES for
the Defendant No. 5

DELETED for the Defendant No. 7

MR HEMANT B RAVAL(3491) for the Defendant No. 5.1

NOTICE SERVED BY DS for the Defendant Nos. 4,6,7.1,7.2

VASIM MANSURI(8824) for the Defendant Nos. 1,2,3

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CORAM: **HONOURABLE MS. JUSTICE NISHA M. THAKORE****Date : 10/10/2024****ORAL ORDER**

1. Heard Mr. Dastoor, learned advocate for the appellant and Mr. Gandhi, learned advocate who has appeared with Mr. Vasim Mansuri, learned advocate for the respondent nos.1 to 3.

2. Learned advocate for the appellant has submitted that the original defendant nos.1 and 2 – the appellants herein are in possession of the suit property admeasuring 400 sq. yards prior to the alleged purchase of the land admeasuring 3800 sq. yards including disputed 400 sq. yards by the original plaintiff. The reliance was placed on the plaint of the earlier

suits filed by the original defendant nos.1 and 2 being Civil Suit no.2989 of 1993 and Civil Suit no.4228 of 1993. It is the defence raised by the original defendant nos.1 and 2 that the original owner of the suit property viz. Abdul Ali Lokhandwala had handed over the possession of 400 sq. yards of the land and with his permission the constructions were made by the defendant nos.1 and 2. He has therefore submitted that the learned Judge committed serious error in holding the defendant nos.1 and 2 and thereby the defendant nos.4 and 5 being in illegal possession of the suit property. The attention of this Court was invited to the prayer sought for in the plaint in light of the pleadings. Learned advocate had further referred to the issues framed by the Court below. It was submitted that upon appreciation of the evidence brought on record, the learned Judge has in fact not believed the case of the plaintiff of having handed over the possession of the suit property to the defendant nos.1 and 2 on the basis of leave and licence since last three years. He had therefore, submitted that further directions issued by the Court below with regard to the *mesne* profit is without any basis. It was further submitted that in fact the Court below had no jurisdiction to examine the issue if the case of the plaintiff was to be believed that the defendant nos.1 and 2 had been put in possession on the basis of leave and licence agreement. Reliance was placed on the decisions of [1] *Mansukhlal Dhanraj Jain Vs. Eknath Vithal Ogale* reported in 1995 (2) SCC 665, [2] *Mahadev P. Kambekar (D) TR LRs Vs. Shree Krishna Woolen Mills Pvt. Ltd.*, reported in 2020(14) SCC 505 and [3] *Prabhudas Damodar Kotecha & Ors. Vs. Manhabala Jeram Damodar & Ors.* reported in 2013(15) SCC 358.

3. On the issue of the plaintiff being held to be the owner of the suit property, the learned advocate had submitted that only evidence brought on record before the Trial Court, were the true copies of the index of the respective registered sale deeds. The application at Exh.16 was preferred by the original defendant nos.1 and 2 objecting to such documents being admitted as evidence in absence of production of original power of attorney. According to the learned advocate, unfortunately the Court below while passing the order below Exhs.160 and 161 had instead of deciding such objection to the admission of the aforesaid documents, has dismissed such application with further observations that the contentions were left open for consideration at the time of final adjudication of the suit on merits. While referring to the copy of general Power of Attorney placed on record at page 65 of the paper-book, learned advocate had contended that the examination of the aforesaid documents does not indicate any mention to the property in dispute. He had therefore submitted that the learned Judge committed serious error in answering issue no.1 in favour of the original plaintiff thereby holding them as the owner of the suit property. Lastly, learned advocate had placed reliance upon the written statement filed before the trial Court at Exh.35 to point-out the actual case, pleaded by the defendant with regard to their right in the suit property.

4. He had therefore prayed that the appeal may be admitted and the impugned order passed by the Court below directing to hand over the possession as well as deposit the

mesne profit may be stayed.

5. Mr. Gandhi, learned advocate appearing with Mr. Mansuri, learned advocate for the original plaintiffs – respondents herein has objected to the aforesaid submissions made by the learned advocate for the appellant and has submitted that for the first time the appellants are trying to come-out with the case of adverse possession and are claiming ownership rights to the suit property looking to the tenor of the grounds raised in the appeal memo. Learned advocate had further submitted that sale deeds have not been challenged so far before any competent Court and neither the original owners has disputed to the aforesaid sale deeds. It was therefore submitted that the ownership rights have absolutely vested in the original plaintiffs and they being the rightful owner are entitled to recovery of possession of the suit property. While inviting attention of this Court to the findings and reasons assigned with regard to the defendant nos.1 and 2 to be in illegal possession of the suit property in absence of any documents conferring right on them and thereafter the transfer of such property in favour of the defendant nos.4 and 5, who are alleged to be in actual possession of the said shops, no error can be found with the approach of the Trial Court in determining the *mesne* profit for a meager amount of Rs.500/- per month. He had therefore submitted that before considering the case of the appellant, let the arrears of the aforesaid *mesne* profit amount with interest of 6% as directed by the Court below be directed to be deposited with this Court. Learned advocate had made an

attempt to refer to and rely upon the Jantri prevailing as on date to contend that in fact the plaintiffs would be entitled to the *mesne* profit as per the prevailing Jantri rates.

6. Having heard learned advocates for the respective parties and having perused the impugned judgment and award in light of the documents placed on record in the form of paper-book, *prima facie* this Court is of the view that looking to the contentions raised with regard to the ownership of the suit property, as well as, the claim of the possession of the suit property prior to the filing of the present suit, requires to be examine closely. The question also pose for consideration and as once the Court has arrived at a finding that the plaintiffs have failed to prove their case of the defendant nos.1 and 2 being put in possession on the basis of leave and licence agreement in absence of any documents being adduced and on the other hand, the plaintiffs having found in possession even prior to filing of the suit, whether the plaintiffs can be considered to be *bonafide* purchaser of the suit property. At one stage, the claim of adverse possession is raised on the basis of long continuous possession though the Trial Court has not believed the aforesaid defence of the defendant nos.1 and 2. However, Section 110 of the Evidence Act places the burden upon the person, who claims that the said person is not the owner especially when the question arises as to whether any person is owner of the property of which he shown to be in possession. The appeal requires consideration and hence, is ***admitted***.

Order in Civil Application :-

Considering the submissions made by the learned advocates for the respective parties and as the appeal being admitted, the impugned judgment and order passed by the Court below is stayed pending this appeal on a condition that the appellant is directed to deposit the arrears of *mesne* profit as directed by the Court below with interest @ 6% from the date of institution of the suit till today with the Registry of this Court within the period of ***six weeks from today***. It is further directed that the aforesaid amount hereafter shall be deposited between 1st day to 10th day of every calendar month with the registry of this Court, pending this appeal. Civil Application stands ***disposed*** of accordingly.

(NISHA M. THAKORE, J.)

AMAR RATHOD...