

Wasim Iqbal Nachan and another Vs.	...	Appellants
Shafique Imamuddin Marumkar and others	...	Respondents

CORAM : R. G. KETKAR, J.
DATE : 19TH MARCH, 2015

Heard Ms Godse, learned Counsel for appellants at length.

3. In support of this Appeal, Ms Godse submitted that on 10.03.1989, respondent No.5 herein - Ms Rashida Khatun Babamiya Sayyad executed Power of Attorney in favour of appellant No.1 - Mr. Wasim Iqbal Nachan. On 11.06.1991, respondent No.5 executed agreement of sale in favour of appellant No.1. She fairly stated that the said agreement was however not produced on record. On 13.01.1994, respondents No.5 to 12 executed Power of Attorney in favour of the appellant No.1. On 17.01.1997, respondents No.5 to 12 executed sale deed in favour of appellant No.2 - Mr. Khudadad Ab Haq Patel in respect of Survey No.8/7 admeasuring 35

Ares and 5.1 Ares (inclusive of 0.2 Ares of Survey No.6/4). She submitted that respondents No.5 to 12 had originally instituted suit in the year 1992 for injunction simplicitor. During the pendency of the Suit, respondents No.5 to 12 executed the sale deed in favour of the appellant No.2 on 17.01.1997. Respondents No.5 to 12 gave Purshis for withdrawal of the Suit. It is at that stage, application was made for transposing respondents No.5 to 12 as defendants and also for adding the appellants as plaintiffs in the Suit.

4. Ms Godse submitted that the Courts below committed serious error in holding that appellants did not establish their possession. She invited my attention to paragraphs 18, 24 and 25 of the trial Court's judgment as also paragraphs 10 to 20 of the appellate Court's judgment. She submitted that though defendants No.1 to 4 claim title by way of adverse possession as also that they are in possession for last more than 70 years, defendant No.1 - Shafique I. Marumkar (witness of defendants No.1 to 4) admitted that he has no evidence to show his possession in respect of the suit properties for last 70 years. She further submitted that the learned trial Judge deleted issue No.6 namely issue relating to ownership which precluded the appellants / plaintiffs from establishing their title as also possession.

5. As noted earlier, the Suit is for injunction simplicitor. Respondents No.5 to 12 had instituted Suit on 28.08.1992. The moot question is whether on the date of the Suit either respondents No.5 to 12 or the present appellants – plaintiffs have established possession in respect of the suit properties. The learned trial Judge has considered this aspect in paragraphs 24 to 26 and recorded a categorical finding that plaintiffs No.1 and 2, namely, Wasim Iqbal Nachan and Khudadad Ab. Haq Patel are not in possession of the suit properties. As far as the appellate Court is concerned, the learned District Judge has considered this aspect from paragraph 10 onwards. The learned District Judge found that the appellants are claiming possession on the basis of agreement for sale dated

11.06.1991. However, that document was not produced by them. In paragraph 15, the learned District Judge considered the admission given by the plaintiff No.1 during the course of cross-examination. During the course of cross-examination, plaintiff No.1 admitted that he is not in possession of the suit properties and has further stated that he cannot state whether his son Khurram is in possession of the suit properties. After considering the evidence on record, the Courts below concurrently held that the plaintiffs have failed to establish their possession as on the date of the filing of the Suit. The Courts below accordingly dismissed the Suit.

6. The Courts below, after considering the evidence on record, have concurrently found that the plaintiffs have not established their possession on the date of filing of the Suit. The said findings are purely findings of fact after appreciating evidence on record. It cannot be said that the findings are perverse being based upon no evidence or that they are contrary to evidence on record. Merely because another view is possible on the basis of evidence, this Court will not exercise its jurisdiction under Section 100 C.P.C. In my opinion, Appeal does not raise any substantial question of law. Hence, the Second Appeal fails and the same is dismissed.

(R. G. KETKAR, J.)

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