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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.587 OF 2016

Bakshusab Ismailsab Bedage & Others

APPELLANTS

VERSUS

Vidhyasagar Bhimrao Kalal & Others

RESPONDENTS

.....
Mr. V. D. Gunale, Advocate for appellant

.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 23rd SEPTEMBER, 2016

ORDER :

1. Heard learned advocate for the appellants.
2. The appellant is original plaintiff in regular civil suit No.280 of 2002 instituted seeking recovery of possession of immovable property referred to in the plaint. It is the case of the plaintiff-appellant that the suit property had been purchased by him in the name of his brother Mohamad Makbul in 1982 under a registered sale deed. Subsequently, there was partition amongst three brothers, the third one being Aziz and in the same, the plaintiff got western portion of said property, now bearing house No.1584 admeasuring 36.5 X 70 feet. Accordingly, gram *panchayat* record bears his name.

3. Said claim had been resisted by the defendants specifically denying that the plaintiff is owner of the suit property and contending that it is their ancestral property and further that the property has been entered in their names since their forefathers.

4. The suit proceeded. Issues came to be framed by the trial court *viz.*, whether the plaintiff proves his ownership over the suit property?, Do the defendants prove that they are exclusive owners and possessors? and whether the plaintiff proves that the defendants have caused encroachment? and answered first issue in the negative against the plaintiff, second in the affirmative in favour of the defendants and third in the negative against the plaintiff and thus finding that the plaintiff is not entitled to the relief sought in the plaint.

5. As such, the decision in the suit came to be challenged in Regular Civil Appeal No.96 of 2006 and the same came to be dismissed under order dated 26th October, 2015.

6. Learned advocate for the appellants vehemently submits that the courts ought to have considered that the plaintiff is at least in possession of a document of title, albeit, in favour of his brother and the fact which could not be disputed that the

plaintiff is the real purchaser and looking at the proximity of relationship and there being no rebuttal of this aspect in the evidence, both the courts have erred in finding that the plaintiff does not prove title to the suit property. He further submits that having regard to previous litigation between the defendants and his brother in whose name suit property had been purchased and the said suit being for perpetual injunction being not prosecuted and letting its dismissal in default, by preponderance of probabilities it ought to have been gauged by the courts that the defendants would not legitimately claim to be in possession. He further submits another facet of the matter, which according to him has not been properly appreciated, is that the suit is also based on dispossession. The properties stood in the name of plaintiff, till 1997 in gram *panchayat* record and the suit had been filed in 2002. In the circumstances, there was sufficient material available before the courts to adjudge that the plaintiff has substantially shown nexus to the property and the suit ought to have been decreed.

7. Perusal of the judgments, particularly, the one by the last fact finding court, i.e. appellate court, which had framed points for determination viz., whether the plaintiff proves that the suit property to be part and parcel of house property bearing

No.1584 and has answered the same in the negative appreciating that the suit property is claimed to have been purchased under a registered sale deed and in the claimed partition, it has not been shown as to what share has went to his brother in order to adjudge that in partition, the plaintiff derives title to the property. It has further been considered that the sale deed does not depict that the property is being purchased in co-ownership of the brothers. There is no cogent evidence on behalf of the plaintiff to show that the partition had been effected amongst brothers and the suit property had been allotted to the plaintiff's share. The court has further observed that neither there is pleadings nor documentary evidence in the form of mutation. So was the case with the witnesses of the plaintiff. Further, the appellate court has also examined evidence as had been adduced by the defendants and found substantial force in the same. The appellate court has further observed that while the plaintiff had claimed possession over the suit property till 1997, and encroachment by the defendants during 1997, there was no evidence to support said contention. No evidence had been placed on record on behalf of the plaintiff to show that he had been in possession till 1997, as such, finding little force in the submissions on behalf of the plaintiff that the defendants

have caused encroachment over the suit property, during period of operation of temporary injunction in the previous suit instituted against the brother of the plaintiff.

8. In the circumstances, the factual position glaringly emerges that the plaintiff has not been in a position to show either title or possession over the suit property. As such, findings recorded upon appreciation of evidence and record are seldom liable to be faulted with. Second appeal does not give rise to any substantial question of law and as such, the second appeal is devoid of any merits and stands dismissed.

[SUNIL P. DESHMUKH, J.]