

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 9872 OF 2014

Rakesh s/o. Sudhakar Neve,
Age 36 years, Occu. Agriculture,
R/o. Ringangaon, Tq. Erandol,
Dist. Jalgaon.

....Petitioner.

Versus

Tarabai d/o. Tikamdas Neve,
Age 63 years, Occu. Household,
R/o. 412/20, Nehrunagar,
Pachora Road, Jalgaon,
Tq. Dist. Jalgaon.

....Respondent.

Mr. C.V Dharurkar, Advocate for petitioner.

Mr. M.V. Bhamre h/f. Mr. V.B. Patil, Advocate for respondent.

CORAM : T.V. NALAWADE, J.

DATED : 22nd December, 2016.

ORAL JUDGMENT :

1) Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2) Present proceeding is filed to challenge the order made on Exh. 14 in R.C.S. No.49/2011, which is pending in the Court of Civil Judge, Junior Division, Erandol. The application was filed by the defendant under the provision of section 9A of the Civil Procedure Code and prayer was made to frame the issue of maintainability of the suit as preliminary issue. The Trial Court has held that such issue is necessary and order is accordingly

made. The suit is filed for relief of declaration that plaintiff has become the owner due to adverse possession. Further, reliefs are claimed to prevent the defendant from alienating the property and to prevent the defendant from disturbing the possession of the plaintiff over suit property. In the beginning, in plaint plaintiff has contended that he came in possession under oral agreement of sale and under that agreement some amount was also paid as consideration, but for some or other reason the sale deeds could not be executed. It is the case of plaintiff that he came in possession in the year 1977-78 and so, he has become the owner due adverse possession. The suit came to be filed in the year 2011.

3. The aforesaid pleading shows that plaintiff has come up with alternative case in respect of possession. The learned counsel for respondent placed reliance on the case of Apex Court reported as **2014 (4) Mh.L.J. 74 [Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Ors.]**. In that case, the Apex Court has laid down that the suit for declaration that the plaintiff has become owner due to adverse possession is not tenable and such relief cannot be granted by the Civil Court. However, in the same suit the relief of injunction was given to the plaintiff which was one more relief claimed.

4. In the present matter also aforesaid three reliefs are claimed by the plaintiff. He may not get the relief of declaration that he has become owner due to adverse possession, but he can be allowed to prove his case for getting relief of permanent injunction. On that point, the learned counsel for petitioner placed reliance on the case reported as **AIR 2004 BOM 378 [Sadashiv Chander Bhagare Vs. Eknath Pandharinath Nangude]**. It is true that when a party comes in possession under agreement of sale, he can seek relief of injunction by using provision of section 53-A of Transfer of Property Act. In that case also this Court in the case cited supra held that the point whether he was ready and willing to perform his part of contract needs to be ascertained only after exhaustive trial of the issues for decision the suit can be decided but not on preliminary issue framed in the present matter. This issue will be there for trial, but the suit cannot be disposed of on the basis of this issue only.

5. In the result, the petition is allowed. The order made by the Trial Court to make the aforesaid said issue as preliminary issue is set aside, though the issue may remain for final decision of this suit. In the aforesaid terms, rule is made absolute.

[T.V. NALAWADE, J.]

ssc/