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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.473 OF 2015

WITH
CIVIL APPLICATION NO.1006 OF 2015
IN
SECOND APPEAL NO.473 OF 2015

Parvatibai Tanu Shivgan,)
since deceased (on 6th January, 2015))
Through her heirs & legal representatives)

1(a) Sou.Ratnaprabha Shantaram Parbote))
Age 51 years, Occ : Agriculturist /)
Household,R/o At Post Kasheli)
Post Sathare Bomb,)
District Ratnagiri.)

1(b) Prabhakar Tanu Shivgan,)
Age 55 years, Occ : Service)
R/o Wadala Katrak Road,)
Kashabe Sangh – 2, Wadala Market)
Mumbai – 400 032.)

1(c) Arun Tanu Shivgan)
Age 44 years, Occ : Agriculturist,)

1(d) Pramod Tanu Shivgan,)
Age 41 years, Occ : Agriculturist)
Nos.1(c) & 1(d) R/o Nanji,)
Tal. & District : Ratnagiri.)

1(e) Sarita Sadanand Gawde)
Age Adult, Occ : Household)
R/o, Wadala Hatrak Road)
Kashbe Sangh – 2, Wadala Market)
Mumbai – 400 032.)

...Appellants

....Versus....

Shri Dhondu Sakharam Gurav	)	
Age 55 years, Occ : Service,	)	
R/o. At Post Nanji, Guravwadi,	)	
District : Ratnagiri.	)	...Respondent

Mr.Surel Shah for the Appellants.

Mr.Vaibhav Ugle for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 30TH AUGUST, 2016
PRONOUNCED ON : 7TH SEPTEMBER, 2016

JUDGMENT :-

1. By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original plaintiffs) have impugned the order and judgment dated 17th November, 2014 passed by the learned Principal District Judge, Ratnagiri, dismissing Regular Civil Appeal No.39 of 2009 filed by the appellants, by which the appellants have impugned the rejection of part of the relief by the learned trial Judge in the suit for perpetual injunction or in the alternate for possession of the part of the suit property filed by the appellants is concerned.
2. For the sake of convenience, the parties described in this judgment are described as they were described in the proceedings before the learned trial Judge.
3. By consent of parties, the second appeal was heard finally

at the admission stage by formulating substantial question of law on 30th August, 2016. Some of the relevant facts for the purpose of deciding this second appeal are as under :

4. The area of 33 acres out of the suit property bearing Gat No.1026 admeasuring 1-H 52-R known as “Bhokar” situated at village Khanu, Taluka and District Ratnagiri is the subject matter of this appeal. The suit property bearing Gat No.1026 was purchased by the husband of the plaintiff no.1 Tanu Babu Shivgan, father of the plaintiff no.2 and the defendant nos.2 to 5, who had purchased the suit property from Govind Dhondabarao Salvi and Ramchandra Dhondabarao Salvi under a registered sale deed dated 25th November, 1971.

5. It was the case of the plaintiffs that the predecessor in title of the suit property Tanu Babu Shivgan planted Alphonso mango plants and developed Alphonso mango garden on the said plot which were bearing fruits. Some time in the year 2001- 2002, the defendant no.2 behind the back of the said Tanu Babu Shivgan entered his name in the cultivation column of mutation record without giving any notice to the plaintiffs. Residential Nayab Tehsildar, Ratnagiri allowed the said application filed by the defendant no.1. The plaintiffs preferred an appeal before the Sub-Divisional Officer, Ratnagiri, who by his order dated 4th November, 2013 was pleased to set aside the

order passed by the Residential Nayab Tehsildar, Ratnagiri and directed to strike off the name of the defendant no.1 entered in the cultivation column of the revenue record to the extent of 33-R. The defendant no.1 preferred R.T.S. Appeal No.9 of 2004 before the Additional Collector. The Additional Collector allowed the said appeal filed by the respondent no.1 and restored the order passed by the Residential Nayab Tehsildar, Ratnagiri by setting aside the order passed by the Sub-Divisional Officer, Ratnagiri. It was the case of the plaintiffs that the said order passed by the Additional Collector was void and illegal, as the same was passed without conducting any proper enquiry as to the actual cultivation contemplated under the provisions of the Maharashtra Land Revenue Code.

6. It was the case of the plaintiffs that the plaintiffs apprehend interference with their possession over the suit property by the defendant no.1. The plaintiffs accordingly filed a suit (Regular Civil Suit No.145 of 2005) on 27th April, 2005 *inter-alia* praying for injunction against the defendant no.1 from disturbing their possession over the entire property and in the alternative in case it was found that the defendant was in possession of the portion of the larger property, the defendant no.1 shall be directed by a mandatory order and injunction to hand over possession of their portion of larger property to the plaintiffs. The defendant no.1 appeared and contested

the said suit on various grounds. The defendant no.1 in the written statement did not dispute the title of the plaintiffs in respect of the suit property.

7. Learned Second Joint Civil Judge, Junior Division, Ratnagiri framed six issues. Both the parties led oral as well as documentary evidence before the learned trial Judge. By a judgment and decree dated 3rd February, 2009, the learned Second Joint Civil Judge, Junior Division, Ratnagiri was pleased to pass a partial decree in the said suit and granted an injunction against the defendant no.1 from disturbing the possession of the plaintiffs except 33-R of land out of the larger Gat No.1026. The defendant no.1 claimed to be in possession of the said 33-R of land out of the larger Gat No.1026.

8. Being aggrieved by the said judgment and decree date 3rd February, 2009, passed by the learned trial Judge, the plaintiffs impugned part of the said order which was in respect of 33-R of land is concerned by filing an appeal (Regular Civil Appeal No.39 of 2009) before the learned Principal District Judge, Ratnagiri. By an order and judgment dated 17th November, 2014, passed by the learned Principal District Judge, Ratnagiri, the said Regular Civil Appeal No.39 of 2009 filed by the plaintiffs came to be dismissed. Being aggrieved by the said order and judgment dated 17th November, 2014 passed by the learned Principal District Judge, Ratnagiri, the plaintiffs

have filed this second appeal under section 100 of the Code of Civil Procedure, 1908.

9. This Court has formulated the following substantial questions of law :-

- (i). Whether in view of the findings of Courts below that the appellants are owners of the suit property and that the respondent no.1 is in permissive possession of the suit property. Could both the Courts below have refused to alternate relief sought by the appellants for recovery of possession of the suit property ?
- (ii). Whether in view of categorical finding of the Courts below that the respondent no.1 was in permissive possession of the suit property could the Courts below have refused to grant prayer for possession of the suit property especially after categorically holding that the respondent no.1 has not pleaded any adverse possession ?
- (iii). Whether the Appellate Court was justified in holding that the appellants have not filed appropriate suit without appreciating the fact that the appellants had in fact sought possession of the suit property from the respondents ?
- (iv). Whether the appellate Court could have refused to grant decree for possession on the ground that detailed description of the suit land sought to be recovered from the respondent no.1 has not been given in the plaint without appreciating the fact that

owner is in possession of the respondent no.1 to the extent of 33 Ares has not been disputed by any of the parties to the litigation and thus property being identifiable could have been handed over to the appellants ?”

10. Mr.Shah, learned counsel appearing for the plaintiffs invited my attention to the copy of the plaint, oral evidence led by the parties and the findings rendered by the learned trial Judge. He submits that the learned trial Judge erroneously rejected the relief of injunction as well as possession insofar as the portion of the land admeasuring 33-R out of the larger property is concerned. He submits that though the defendant no.1 had neither claimed title nor claimed adverse possession and had admitted the title of the plaintiffs in the said portion of the suit property, the learned trial Judge refused to grant relief of injunction and in the alternate for possession in respect of the said portion of the larger property.

11. Learned counsel for the plaintiffs invited my attention to the findings recorded by the appellate Court and would submit that though the appellate Court has rendered the finding that the defendant no.1 was in permissive possession of 33-R i.e. portion of the suit land and had neither pleaded nor proved adverse possession in respect of the said portion of the suit property, the appellate Court has dismissed the appeal filed by the plaintiffs. He submits that since

the defendant no.1 had failed to prove any right, title or interest of any nature whatsoever in the said portion of 33-R and title of the plaintiffs was undisputed, the learned trial Judge ought to have passed a decree for possession in respect of 33-R against the defendant no.1.

12. It is submitted by the learned counsel that the defendant no.1 came to be in possession of 33-R out of the larger property and thus he was fully aware of the reliefs claimed by the plaintiffs against him and thus two Courts below could not have refused to grant relief for handing over possession of the said property to the plaintiffs on the ground that the property in possession of the defendant no.1 was not properly described in the plaint.

13. Learned counsel for the plaintiffs placed reliance on the judgment of the Supreme Court in case of **Maria Margarida Sequeria Fernandes & Ors. vs. Erasmo Jack de Sequeria (Dead) through L.Rs., 2012(4) Bom.C.R. 75** and in particular paragraphs 81 and 101. He submits that since the two Courts below have rendered a finding of fact that the defendant no.1 was though in possession of the property had neither claimed any title in respect of the suit property nor had claimed adverse possession, the Courts ought not to have granted any protection to the defendant. Paragraph 101 of the judgment of the Supreme Court in case of **Maria Margarida Sequeria Fernandes & Ors.** (supra) reads under :-

“101. Principles of law which emerge in this case are crystallized as under :-

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.
2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.
5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession.”

14. Learned counsel for the defendant no.1 on the other hand submits that the findings recorded by the two Courts below in favour of the defendant no.1 are not perverse and being concurrent findings of fact, cannot be interfered with by this Court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908. He submits that the plaintiffs had prayed for possession as and by way of alternate relief and thus the learned trial Judge was justified in refusing to grant alternate relief also in the facts and circumstances of this case.

15. It is submitted by the learned counsel that his client has been in established possession for last several decades and had planted Alphonso mango trees on the suit plot and if any decree of possession is granted by this Court at this stage, his client would be seriously prejudiced.

16. A perusal of the order passed by the two Courts below and also the records produced by the learned counsel for the plaintiffs clearly indicates that it was not the plea of the defendant no.1 that he had claimed any ownership or tenancy rights in respect of the suit property. He had also not claimed adverse possession in respect of the suit property. His case was that he had been in possession of the suit property for last several decades and had planted various Alphonso mango trees on the suit plot and thus cannot be dispossessed by the plaintiffs.

17. A perusal of the impugned judgment and decree passed by the learned trial Judge and by the appellate Court clearly indicates that both the Courts have rendered a finding of fact that during the cross examination of the defendant no.1, he had admitted that neither he was in possession of 33-R portion of the suit land as a tenant nor he claimed adverse possession over the said portion of the suit land. The finding is also rendered that the defendant no.1 was in permissive possession of the said 33-R portion of the suit land. It is

held by both the Courts below that the plaintiffs had proved their title in respect of the suit property, whereas the defendant no.1 had failed to plead and prove adverse possession of the suit property. It is not in dispute that the defendant no.1 has not challenged various findings of fact recorded by the two Courts below by filing any cross-objection in this Court. Various findings of fact rendered aforesaid have thus attained finality and are binding on the defendant no.1.

18. The Supreme Court in case of **Maria Margarida Sequeria Fernandes & Ors.** (supra) has held that merely because the person is allowed to stay in the premises gratuitously, even by long possession of years or decades such person would not acquire any right, title or interest to the said property. It is held that such person can never acquire interest in the property irrespective of his long possession and was to give possession forthwith on demand by the owner of the suit property. It is held that the Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant. Such persons holds property of the principal only on behalf of the principal and does not acquire any right, title or interest of any nature whatsoever in the suit property.

19. In my view, the conclusion drawn by two Courts below is contrary to the clear finding that possession of the defendant no.1

was permissive possession and no right, title or interest of any nature whatsoever was either claimed or proved by the defendant no.1 in the suit property and is contrary to the principles laid down by the Supreme Court in case of **Maria Margarida Sequeria Fernandes & Ors.** (supra).

20. In my view, since the defendant no.1 had not claimed any right, title or interest of any nature whatsoever in the suit property, including adverse possession in respect of the suit property or tenancy and his possession having been found as permissive possession, the Courts below ought to have directed him to hand over possession of the suit land to the plaintiffs, who were admittedly the owners of the suit land. The Courts below could not have protected the defendant no.1 merely on the basis of his permissive possession though it was for substantial period. The period of possession of a person without any right, title or interest which was not adverse to the interest of the owner, could not be protected by two Courts below.

21. In my view, the judgments of two Courts below being contrary to law and inconsistent with the findings recorded by two Courts below, deserves to be set aside. The judgment of the Supreme Court in case of **Maria Margarida Sequeria Fernandes & Ors.** (supra) squarely applies to the facts of this case. I am

respectfully bound by the said judgment.

22. Insofar as substantial questions of law (i) to (iv) are concerned, the same are answered in negative.

23. I therefore, pass the following order :-

a). The impugned order and judgment dated 17th November, 2014 passed by the learned Principal District Judge, Ratnagiri is set aside. Regular Civil Appeal No.39 of 2009 is allowed.

b). The judgment and decree dated 3rd February, 2009 passed by the learned trial Judge insofar as rejection of prayer for possession of 33-R of land is concerned, is set aside. Regular Civil Suit No.145 of 2005 is decreed, as prayed.

c). No order as to costs.

d). In view of disposal of the second appeal, Civil Application No.1006 of 2015 does not survive and is accordingly disposed of.

(R.D. DHANUKA, J.)