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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.830 OF 2015

WITH
CIVIL APPLICATION NO.1759 OF 2015
IN
SECOND APPEAL NO.830 OF 2015

Namdeo Mahadeo Patil	)	
Age about 67 years, Occupation	)	
Agriculture, Residing at Navekhed,	)	
Taluka Walwa, District Sangli	)	...Appellant
		..Ori.Defendant

....Versus....

- 1). Kasabai w/o Krishna @ Kisan Patil)
Age about 72 years, Occupation)
Agriculture & Household)
- 2). Nandini Krishna @ Kisan Patil)
After marriage :-)
Nandini Bhanudas Patil)
Age about 37 years, Occupation)
Household, Residing at Kavthe-Piran)
Taluka Miraj, District Sangli)
- 3). Minakshi Krishna @ Kisan Patil)
Age about 33 years, Occupation)
Agriculture & Household,)

Nos.1 and 3 are Residing at)
Navekhed, Taluka Walwa,)
District Sangli.)
- 4). Shrimati Shivaji Patil)
Age about 47 years, Occupation)
Agriculture & Household,)

Residing at Kapushed,	)	
Taluka Walwa, District Sangli	)	...Respondents
		...Ori.Plaintiffs

Mr.S.G. Deshmukh i/b Mr.Ramdas Shelke for the Appellant.

Mr.Bhushan Walimbe for the Respondent Nos.1 to 4.

CORAM : R.D. DHANUKA, J.
DATE : 19TH SEPTEMBER, 2016.

ORAL JUDGMENT :-

1. By this appeal filed under section 100 of the Code of Civil Procedure, 1908 the appellant (original defendant) has impugned the order and judgment dated 16th September, 2015, passed by the learned District Judge – II, Islampur, dismissing part of the appeal filed by the appellant herein by which the appellant had impugned the judgment and decree dated 22nd November, 2013, passed by the learned Joint Civil Judge, Junior Division, Islampur directing the appellant herein to hand over possession of the suit land to the respondents herein (original plaintiffs) within two months from the date of the said order and also restraining the appellant from causing obstruction and interference in the peaceful possession and enjoyment of the plaintiffs over the suit properties. No cross-objection has been filed by the respondents (original plaintiffs). The parties in this judgment are referred as they were referred to in the proceedings before the learned trial Judge. Some of the relevant facts for the purpose of deciding this second appeal are as under :

2. The suit properties is lands Gat no.781 admeasuring 0-H 17-R, Gat no.784 admeasuring 0-H 10-R, Pot Kharab 0-H 2-R, Gat no.1199 admeasuring 0-H 33-R, Gat no.1195 admeasuring 0-H 36-R, Gat no.1656 admeasuring 0-H 02-R, Gat no.1670/1 admeasuring 0-H

04-R, situated at District Sangli, Taluka Walva with the right to take water from the Water Irrigation Scheme and situated at village Junekhed, Taluka Walva, District Sangli and house bearing Gram Panchayat Property No.59. The suit properties were originally owned and possessed by Krishna Hari Patil, predecessor of the plaintiffs. The said Krishna Hari Patil was the husband of the plaintiff no.1 and was the father of the plaintiff nos.2 to 4. He died on 28th November, 1977.

3. It was the case of the plaintiffs that after the demise of said Krishna Hari Patil, the defendant who was looking after the said lands on behalf of the said Krishna Hari Patil got his name mutated in the suit properties vide mutation entry no.8209 in collusion with the Revenue Authorities. The defendant however, was never in possession of the suit properties.

4. It is the case of the plaintiffs that since in the year 1983, the defendant threatened the plaintiffs that he will steal the sugarcane crop cultivated in the suit land, the plaintiffs filed a civil suit (Regular Civil Suit No.441 of 1984) against the defendant for perpetual injunction. The learned trial Judge granted interim injunction in the said Regular Civil Suit No.441 of 1984 in favour of the plaintiffs. The defendant challenged the said order by filing Misc. Civil Application No.231 of 1989. The said Misc. Civil Application came to be dismissed on 16th January, 1992. The said Regular Civil Suit No.441 of 1984 was subsequently decided and disposed of on merits on 24th February, 1994. The learned trial Judge granted permanent injunction in the said suit against the defendant. The defendant herein filed an appeal (Regular Civil Appeal No.205 of 1994). By an order passed by

the first appellate Court, the said appeal filed by the defendant came to be allowed and the judgment and order of the learned trial Judge came to be reversed. The first appellate Court held that the plaintiffs were not in possession of the suit properties. The second appeal filed by the plaintiffs against the said order and judgment came to be dismissed by this Court.

5. It was the case of the plaintiffs that taking advantage of the decision in Regular Civil Appeal No.205 of 1994, passed by the first appellate Court, the defendant forcibly dispossessed the plaintiffs from the suit properties in the month of February, 1995. The plaintiffs accordingly filed a suit (Regular Civil Suit No.731 of 2000) against the defendant *inter-alia* praying for possession of the suit properties and for other reliefs.

6. The defendant filed a written statement in the said suit and contended that he had developed the suit lands. He disputed that the plaintiffs were ever in possession of the suit properties. It was the case of the defendant that during the life of the said Krishna Hari Patil, he had allowed the defendant to cultivate the suit lands as his representative and since then he was in possession of the suit lands. He disputed that he had taken possession of the suit lands from the plaintiffs in the month of February, 1995. The defendant also placed reliance on the Will alleged to have been executed by the said Krishna Hari Patil and also claimed adverse possession in respect of the suit properties.

7. The learned trial Judge framed about 15 issues. The plaintiffs examined four witnesses and produced various documents.

None of the plaintiffs did not enter the witness box. The defendant examined himself and two more witnesses.

8. By a judgment and decree dated 22nd November, 2013, the learned Joint Civil Judge, Junior Division, Islampur partly decreed the said suit filed by the plaintiffs and directed the defendant to hand over possession of the suit lands to the plaintiffs within two months from the date of the said suit and passed an order of injunction restraining him from causing obstruction and interference in the peaceful possession and enjoyment of the plaintiffs over the suit properties. The learned trial Judge directed an enquiry for *mesne-profits* under Order 20 Rule 12 of the Code of Civil Procedure, 1908. Being aggrieved by the said order and decree dated 22nd November, 2013, the defendant filed an appeal (Regular Civil Appeal No.9 of 2014) before the learned District Judge, Islampur. The plaintiffs did not file any cross-objection. By an order and judgment dated 16th September, 2015, the learned District Judge – II, Islampur partly allowed the said appeal filed by the defendant and has set aside part of the decree passed by the learned trial Judge i.e. the relief insofar as an injunction restraining the defendant from interfering with the peaceful possession and enjoyment of the plaintiffs over the suit properties is concerned. The first appellate Court did not set aside the decree insofar as handing over possession of the suit properties by the defendant to the plaintiffs is concerned.

9. Mr.Deshmukh, learned counsel appearing for the appellant invited my attention to an order passed by the first appellate Court in Regular Civil Appeal No.205 of 1994, which was filed by the defendant herein and more particularly paragraph 22, in which the

first appellate Court had rendered a finding that since prior to filing of the earlier suit filed by the plaintiffs, the defendant was in actual and physical possession and was enjoying the suit lands by cultivating the same. He submits that the said order passed by the first appellate Court rendering such finding had attained finality in view of the fact that this Court had dismissed the second appeal filed by the plaintiffs. He submits that the plaintiffs thus could not have alleged that the defendant had dispossessed the plaintiffs in the month of February, 1995.

10. It is submitted by the learned counsel for the defendant that since the first appellate Court in the appeal filed by the defendant had rendered a finding that the plaintiffs were not in possession of the suit properties since prior to filing of the said suit in the year 1984 for injunction, a suit for recovery of possession filed by the plaintiffs in the year 1996 was barred by law of limitation.

11. The next submission of the learned counsel for the defendant is that admittedly the plaintiffs did not enter the witness box to prove their case, including their plea of title and ownership in respect of the suit properties. He submits that the constituted attorney of the plaintiffs could have been examined only to prove the facts which were personally to the knowledge of the constituted attorney and thus his evidence could not have been considered as evidence on behalf of the plaintiffs. He submits that the evidence of the constituted attorney has been considered by the learned trial Judge as well as by the first appellate Court. He submits that the entire order passed by the learned trial Judge directing the defendant to hand over possession of the suit properties to the plaintiffs and

upheld by the first appellate Court is totally perverse and contrary to law.

12. Learned counsel for the defendant invited my attention to paragraph 39 of the order passed by the first appellate Court and would submit that the application for amendment to the plaint made by the plaintiffs was rejected by the learned trial Court. The plaintiffs had withdrawn their writ petition filed in this court on 29th October, 2013. He submits that the learned trial Judge thus could not have rendered any finding of title and ownership of the plaintiffs of the suit lands and the suit house, in the impugned judgment and decree.

13. Learned counsel submits that the plea of adverse possession taken by the defendant before the learned trial Judge was subsequently given up by the defendant.

14. Mr. Walimbe, learned counsel appearing for the respondents (original plaintiffs) invited my attention to various findings of fact recorded by the learned trial Judge as well as by the first appellate Court and would submit that since the findings of fact are not perverse, this Court cannot interfere with such findings of fact in this appeal filed under section 100 of the Code of Civil Procedure, 1908.

15. Insofar as the submission of the learned counsel for the defendant that the suit was barred by law of limitation or that the learned trial Judge could not have applied Article 65 in the facts and circumstances of this case is concerned, it is submitted that it was the case of the plaintiffs before the learned trial Judge that the defendant

had dispossessed them from the suit properties in the month of February, 1995 and the plaintiffs had thus filed a suit for recovery of possession within the time prescribed. The suit was already filed in the year 1996. He submits that the question of limitation is a mixed question of fact and law. The learned trial Judge has rightly considered the pleadings and the evidence and has rendered a finding of fact that the suit was filed within the time prescribed under the Limitation Act. He submits that the first appellate Court has independently considered this issue and has rejected the plea of limitation raised by the defendant.

16. Insofar as the submission of the learned counsel for the defendant that the application for amendment of the plaint by which the plaintiffs wanted to claim their title came to be rejected and the plaintiffs having withdrawn the writ petition, the learned trial Judge could not have determined the issue of title in the impugned judgment and decree is concerned, he submits that the learned trial Judge has rejected the application for amendment on the ground that the amendment was not necessitated. He submits that the title of the original owner and after the demise of the original owner, the title of the plaintiffs was not disputed by the defendant. He submits that the suit was not for determination of title but was for recovery of possession.

17. Insofar as the submission of the learned counsel for the defendant that the evidence of the constituted attorney could not have been considered as conclusive is concerned, it is submitted by the learned counsel for the plaintiffs that since there was no dispute in respect of the title and ownership of the plaintiffs in the suit

properties and since the defendant did not prove any right, title and interest of any nature whatsoever in the suit properties, none of the plaintiffs were required to enter into witness box to prove the title. The plaintiffs had still examined three witnesses. The learned trial Judge had rightly considered the documentary as well as oral evidence led by the plaintiffs and the same cannot be faulted with.

18. Learned counsel for the plaintiffs submits that the defendant could neither produce any alleged Will for consideration of the learned trial Court nor could prove his alleged adverse possession in respect of the suit properties. He submits that the plea of the defendant for adverse possession itself was contrary to his plea that the suit properties were bequeathed under the alleged Will by the predecessor of the plaintiffs. The case of the defendant was that he was in permissive possession of the suit properties granted by the predecessor of the plaintiffs for taking care of the suit properties. He submits that since the defendant had failed to prove any right, title or interest of any nature whatsoever in the suit properties, the learned trial Judge rightly passed a decree in favour of the plaintiffs and rightly directed the defendant to hand over peaceful, vacant and exclusive possession of the suit properties to the plaintiffs.

19. Learned counsel for the plaintiffs submits that the learned trial Judge as well as first appellate Court have dealt with the issue of power of attorney raised by the defendant in detail in the impugned orders passed by the two Courts below and have rendered a concurrent findings of fact which cannot be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908.

20. Mr.Deshmukh, learned counsel for the defendant reiterated his submission insofar as the issue of limitation and evidence of the constituted attorney of the plaintiffs led by the plaintiffs and submits that various substantial questions of law having arisen in this second appeal, the second appeal be decided in favour of the defendant.

REASONS AND CONCLUSIONS :

21. It is not in dispute that the plaintiffs had filed a suit (Regular Civil Suit No.441 of 1984) against the defendant *inter-alia* praying for perpetual injunction. The said suit was decreed in favour of the plaintiffs. The defendant had impugned the said decree by filing an appeal (Regular Civil Appeal No.205 of 1994) before the Additional District Judge, Sangli. There is no dispute that the said appeal filed by the defendant came to be allowed by an order and judgment 21st February, 1995. In the said judgment, the first appellate Court held that since prior to filing of the suit, the defendant was in actual and physical possession and was enjoying the suit lands by cultivating it. The second appeal against the said order and judgment delivered by the first appellate Court came to be dismissed.

22. It was the case of the plaintiffs that in the month of February, 1995, the defendant however, dispossessed the plaintiffs. The defendant had disputed the said averment made by the plaintiffs. The trial Court had framed specific issue as to whether the possession of the defendant over the suit properties was unauthorized and illegal. The trial Court also framed an issue as to whether the plaintiffs had proved that they were dispossessed from the suit properties in the year 1995-1996. The trial Court after considering the oral and documentary evidence has held that the

plaintiffs were dispossessed from the suit properties by the defendant in the year 1995-1996 and also held that the possession of the defendant over the suit properties was unauthorized and illegal. A perusal of the order and judgment rendered by the first appellate Court indicates that the first appellate Court also formulated seven points for determination. Insofar as the issue of possession is concerned, the appellate Court has rendered a finding that the plaintiffs had proved that they were dispossessed from the suit lands by the defendant in the month of February, 1995.

23. In my view, the finding rendered by the learned trial Judge that the defendant had dispossessed the plaintiffs in the month of February, 1995 is based on oral and documentary evidence led by the plaintiffs and the findings of the first appellate Court confirming the same is not perverse and thus this Court cannot interfere with such findings of fact in this appeal filed under section 100 of the Code of Civil Procedure, 1908.

24. Insofar as the the submission of the learned counsel for the defendant that the suit filed by the plaintiffs was barred by law of limitation is concerned, the learned trial Judge has framed the issue on limitation. The learned trial Judge has held that the learned Additional District & Sessions Judge had rendered a finding in the year 1995 in the earlier round of litigation between the parties that the plaintiff was not in possession of the suit property. The present suit had been filed by the plaintiffs in the year 2000. The learned trial Judge considered that as per the contentions of the defendant himself that he was inducted into possession of the suit property on the premise of consent or permission of the deceased Krishna Hari

Patil, which was later on continued on the basis of the Will executed by him in favour of the defendant. In the earlier suit filed by the plaintiffs, the defendant had not claimed that he was in possession over the suit land hostile to the knowledge of the real owner of the land. Such plea of adverse possession was taken by the defendant for the first time in the present suit. The learned trial Judge held that even if the possession of the defendant was accepted then also it was permissive possession and not constructive possession of the plaintiffs.

25. The learned trial Court held that as per the plaintiffs, the defendant claimed title on the basis of adverse possession in the month of February, 1995 and even if the suit is considered to have been filed on the basis of the pleadings of the earlier possession, and subsequent dispossession, then also the plaintiffs will get the benefit under section 14 of the Limitation Act. The learned trial Judge accordingly held that the suit filed by the plaintiffs was well within time.

26. A perusal of the order and judgment delivered by the appellate Court indicates that the appellate Court has considered the issue of limitation and has rendered a finding that the cause of action in respect of the suit land arose in February, 1995 after the decision of the appeal and in respect of the suit house arose in February, 1996. The appellate Court has rendered a finding that the plaintiffs were dispossessed by the defendant forcibly in February, 1995 and the suit was filed within time prescribed under the Limitation Act. In my view, the findings rendered by the two Courts below are concurrent findings of fact which are based on the documentary and

oral evidence led by both the parties and not being perverse thus cannot be interfered with by this Court under section 100 of the Code of Civil Procedure.

27. Insofar as the submission of the learned counsel for the defendant that the application for amendment of the plaint for claiming the ownership on the basis of the title was rejected by the learned trial Court and the writ petition filed by the plaintiffs was withdrawn, the learned trial Judge could not have decided the issue of title is concerned, a perusal of the record indicates that the defendant had not disputed the title of the plaintiffs in the suit property. The defendant had either claimed adverse possession or claimed possession on the basis of the alleged Will. It was also the case of the defendant that the defendant was cultivating the land under a permissive user and granted by the predecessor of the plaintiffs. In my view, since there was no dispute in respect of the title and ownership in the suit property of the plaintiffs or their predecessors, though the plaintiffs had withdrawn the writ petition, whether the learned trial Court could have adjudicated upon the title of the plaintiffs or not is of no significance.

28. Insofar as the submission of the learned counsel for the defendant that the plaintiffs themselves not having entered the witness box, the learned trial Court could not have relied upon the evidence led by the constituted attorney of the plaintiffs is concerned, in my view, since there was no dispute in respect of the title and the defendant having claimed adverse possession and claimed the alleged rights under the alleged Will, alleged to have been executed by the predecessor of the plaintiffs and since the defendant failed to

prove both these allegations before the learned trial Judge, the plaintiffs were not required to enter the witness box and to prove their case. Be that as it may, the plaintiffs have examined three witnesses in support of their case. There is thus no substance in this submission of the learned counsel for the defendant .

29. I therefore, pass the following order :-

a). Second Appeal No.830 of 2015 is dismissed.

b). In view of dismissal of the second appeal, Civil Application No.1759 of 2015 does not survive and is accordingly disposed of. No order as to costs.

(R.D. DHANUKA, J.)