

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 531 OF 2015

WITH

CIVIL APPLICATION NO. 1395 OF 2012

Shri. Jaysing Bapu Gole and anr.

.....Appellants

V/s.

Balaram Bhiva Talekar,

Since deceased through his heirs

& legal representatives,

Shri. Govind Balaram Talekar & Ors.

....Respondents

Mr. Dilip Bodake, Advocate for the Appellants/Applicants.

Mr. S.M. Kamble, Advocate for Respondents no.2A to 2E.

Coram :- N.M. Jamdar, J.

Date :- 17 April 2017.

ORAL ORDER :-

This is a Second Appeal filed by the Defendants no.1 and 3. The respondent no.1, plaintiff filed Regular Civil Suit No. 30 of 1994 in the Court of Civil Judge Junior Division, Roha against the appellants. The suit was filed for a declaration that the sale-deed executed by defendants no.1 and 2 in favour of defendant no.3 on 6 June 1994 be declared as

illegal and for relief of permanent injunction. The learned Civil Judge by the judgment and order dated 1 April 2006 decreed the suit. The learned Civil Judge held that, the agreement for sale dated 29 April 1994 and the subsequent sale deed dated 6 June 1994 were not binding on the respondent plaintiffs' rights. The learned Civil Judge also granted an order of permanent injunction. Civil Appeal No. 112 of 2008 filed by defendants no.1 and 3 in the District Court, Mangaon was dismissed by the learned District Judge by order dated 29 September 2011.

2 Heard learned Counsel for the parties.

3 The learned Counsel for the appellant submitted that since the appellants were in possession, the respondent-plaintiff ought to have sought relief of possession and simplicitor suit for injunction was not maintainable. He relied on the observations of the learned District Judge in respect of permissive possession. This submission cannot be accepted. It is the case of the plaintiff that, though initially property was given to defendants no.1 and 2 and a house was constructed, nobody was staying there for the last 25 years and the suit house had become dilapidated. It was therefore the contention of the respondent-plaintiff that the appellants-defendants were not in possession of the suit property. Once this assertion was made in the plaint and thereafter in the evidence, it was for the appellants to demonstrate that the appellant continued to be in possession of the suit property. The Second Appeal is filed by both, defendant no.1 and defendant no.3. Defendants no.1 and 2 had no right in the property to be transferred by way of sale-deed to

defendant no.3. No right therefore accrued to defendant no.3. Though the learned Counsel for the appellant, has sought to rely upon a statement made by the respondent-plaintiff in the examination-in-chief, no cogent evidence is placed on record that the suit property was currently in use. The relief of injunction was therefore rightly granted as against defendant no.3.

4 The learned Counsel for the appellant then submitted that defendants no.1 and 2 were admittedly put in possession as licensee and their licenses is not terminated and therefore decree of injunction against them is not warranted. This submission cannot be accepted. Defendants no.1 and 2 merely adopted the written statement of defendant no.3. The defendant no.3 had categorically asserted that all rights were given to defendant no.3 by defendants no.1 and 2. No separate written statement or separate stand was taken that the defendants no.1 and 2 continued to be in possession and they were licensees. By adopting written statement of defendant no.3, it was accepted by them that they relinquished their control over the suit property in favour of defendant no.3. That the defendants no.1 and 3 were licensees and were entitled to contest the litigation independently was not urged in the Court below it was put forth as a plea of adverse possession. Both the Courts found that the plea of adverse possession could not be accepted.

5 Consequently, the defendants no.1, 2 and 3 have absolutely no right in the suit property. The finding of fact has been recorded that

they are not in possession. The finding of fact cannot be said to be perverse and it is a possible view to be taken on appreciation of evidence. No question of law arises. The Second Appeal is accordingly dismissed.

6 In view of dismissal of Second Appeal, Civil Application No. 1395 of 2012 taken out for stay does not survive. The same is accordingly disposed off.

N.M. Jamdar, J