

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.441 OF 2016

Munna s/o Kawdu Wankhede,

Aged about 49 years,

Occ. Business, R/o Plot No.90,

In front of Satta Dhamma Budhha Vihare,

Lashkaribagh, Nagpur.

... Appellant

-vs-

Charandas s/o Tulsiram Mendhe,

Aged 71 years, Occ. Private

R/o Plot No.818, Vaishali Nagar,

Nagpur, Tah. And Dist. Nagpur.

... Respondent.

Shri S. D. Khati, Advocate for appellant.

Shri N. Vyawahare, Advocate for respondent.

CORAM : A.S.CHANDURKAR, J.

DATE : September 22, 2017

P.C.

The original defendant in a suit for possession filed by the respondent has filed the present second appeal.

It is the case of the respondent that in the suit property which is a house admeasuring about 1500 sq. ft., the appellant had allegedly encroached an area admeasuring 100 sq. ft. along with varandah of 70 ft. in the year 2004. The plaintiff claimed to be the owner of the suit property on the basis of Will executed on 23/03/1993 by one

Sayatrabai and having the sole rights in that regard sought possession of the suit property after evicting the defendant.

According to the defendant, the owners of the suit property were two brothers Murlidhar and Liladhar. They had inducted the defendant's father as a tenant and rent was being paid to them. Though the defendant was in settled possession, the suit seeking his eviction came to be filed.

2. The trial Court after considering the evidence on record came to the conclusion that the plaintiff was the owner of the suit property and that the defendant was in possession of portion of the suit property. The encroachment by the defendant was not duly proved. It further held that in view of earlier adjudication in R.C.S.No.1741 of 1988 it was clear that the plaintiff's predecessor had title over the suit property. It disbelieved the documents filed by the defendant and held that he had come in possession prior to the year 2004. On that basis the suit was decreed. The appellate Court partly differed with some of the findings recorded by the trial Court but maintained the decree for possession.

3. Shri S. D. Khati, learned counsel for the appellant submitted that as it was the case of the plaintiff that he has been forcibly

dispossessed in the year 2004, the suit for possession ought to have been filed within period of six months as required by Section 6 of the Specific Relief Act, 1963. The suit was filed in the year 2010. He further submitted that though the trial Court held that no encroachment was committed by the defendant and had held that the defendant was in possession since prior to 2004, the appellate Court without considering this aspect maintained the decree for possession. He submitted that as per the lease granted, the defendant was entitled to continue in possession.

4. Shri N. A. Vyawahgare, learned counsel for the respondent supported the impugned judgment. He submitted that the suit as filed was on the basis of title and hence it was not necessary to file a suit under Section 6 of the Specific Relief Act, 1963 for restoration of possession. The probate obtained on the basis of Will executed by the erstwhile owner indicated the plaintiff's title. The defendant in his evidence had denied existence of lease agreement either by the father or by himself with Liladhar and Murlidhar. He therefore submitted that the suit was rightly decreed in favour of the plaintiff.

5. I have heard the learned counsel for the parties at length and perused the material placed on record. It is not in dispute that the

predecessor of the plaintiff had filed R.C.S. No.1741 of 1988 in which the two brothers Murlidhar and Liladhar were defendant Nos.3 and 4. Though the issue of title was not directly involved in that suit the possession of Sayatrabai, the aunt of the plaintiff was established. Said Sayatrabai subsequently executed a Will in favour of the plaintiff and probate for the same was granted in his favour. On the other hand, the defendant claimed to be the tenant of Murlidhar and Liladhar. However in his cross examination at Exhibit-35 the defendant admitted that there was no tenancy agreement between Murlidhar and Liladhar and his father. In this backdrop therefore it has been rightly found that the defendant had no legal right to occupy the suit premises. Moreover, filing of suit for recovery of possession based on title was always permissible.

6. The first appellate Court after re-appreciating the evidence found that the defendant did not file any document to indicate his right prior to the year 1990. It accepted the case of the plaintiff that encroachment was committed in the year 2004. Hence the suit filed on the basis of title was rightly decreed.

7. I therefore find that the appeal does not give rise to any substantial question of law. The same is therefore dismissed with

no order as to costs.

At this stage, learned counsel for the appellant prays that the interim order passed in the appeal be continued for a period of four weeks.

The execution of the decree for possession is stayed for a period of four weeks after which the respondent would be free to execute the same in accordance with law.

JUDGE