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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO.870 OF 2018 WITH
CIVIL APPLICATION NO.13536 OF 2018

1. Kifayat Begum @ Baba Begum w/o
Mohd. Sharee, Died, no L.Rs.
 2. Ahmed Mohiuddin s/o Gulam Jilani
Deshmukh, Died L.Rs.
Azmat Ahemad Mohinoddin Deshmukh
and others
- ...APPELLANTS

VERSUS

Nurbi w/o Awaz and others

...RESPONDENTS

.....

Shri S.V. Dixit, Advocate for appellants
Shri A.J. Bhat, Advocate for respondent No.1

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CORAM: A.M. DHAVALÉ, J.

DATED : 2nd November, 2018.

ORAL ORDER :

1. This is appeal by the defendants. Respondents No.1 to 3 had filed Regular Civil Suit No.63/1989 for recovery of suit land which is agricultural land of 25 acres 12 gunthas at Survey No.19, village Ekrukha, Taluka Partur, District Jalna. The plaintiffs had claimed that they were owners of the suit property, by virtue

of inheritance from Fatimabi, daughter of original owner Shaikh Abdulla. The defendants had no concern. Previously grandfather of defendants No.1 to 3 was lessee and after efflux of tenancy, he continued to be in possession. With these pleadings, the suit for possession and mesne profits was filed. The defendants resisted the suit. They admitted the previous ownership of Fatimabi, the common ancestor of the plaintiffs. They claimed that by virtue of agreement to sell of 1937, they have become owners. They have also stated that their names are appearing in Khasra Patrak for last 50 years and their possession was continuous and they have become owners by adverse possession. The suit was barred by limitation. The learned Civil Judge, Junior Division, Partur held that the agricultural lease came to an end in 1935 (1345 Fasli). The execution of Isar Pavti (agreement to sell) by Fatimabi in favour of grandfather of defendants No.1 to 3 was proved. The defendants' claim for ownership by adverse possession was accepted and it was held that the suit was barred by limitation.

2. The aggrieved plaintiffs preferred Regular Civil Appeal No.127/1996. The learned District Judge-3, Jalna (first appellate Court) allowed the appeal, set aside the judgment of trial Court and granted decree of vacant possession of the suit plot along with direction to hold enquiry under Order 20 rule 12 of the Code of Civil Procedure.

3. Heard Advocate Mr. S.V. Dixit for the appellants. He assails the judgment of first appellate Court and supports the judgment of the trial Court on the ground that the consistent entry of the names of defendants in Khasra Patrak for 40 to 50 years, total inaction by the plaintiffs even after death of Fatimabi in 1942 till filing of suit in 1989 and the execution of agreement to sell were sufficient to show that the defendants were entitled to ownership by adverse possession and in the alternative, they were also entitled to protect their possession under Section 53-A. He has produced the copies of plaint, written statement and the agreement to sell of 1937. He relied on the judgment in the case of **Mahadeo Patil Vs. Surjabai [1994 (2) Mh.L.J. 1145]** (Full Bench) and **Sadashiv Chander Bhamgare Vs. Eknath Pandharinath Nangude [2004(3) Mh.L.J. 1131]** (Full Bench). And also in the case of **Shrimant Shamrao Suryavanshi & anr. Vs. Pralhad Bhairoba Suryavanshi (Dead) by L.Rs. and others [2002 3 SCC 676]**

4. After carefully going through the plaint, I find that the plaintiffs have given all details of their title and the title has not been disputed. Admittedly, the grandfather of defendants was tenant, but the tenancy was terminated long back in 1935. As per the case of the defendants, the plaintiffs have entered into

agreement to sell in their favour in 1937 and they have made part payment and their possession is under the agreement to sell. In that case, it is a case of permissive possession. The plea of ownership by adverse possession and protection under Section 53-A under doctrine of part performance cannot go hand in hand. Those are contradictory to each other.

5. The defendants ought to have elected one of the two defences which they have not done. As far as doctrine of part performance is concerned, that has not been pleaded. Even if it is assumed that there was agreement to sell under which the defendants have been put in possession, still that is not sufficient for protection under the doctrine of part performance. Learned Advocate for the respondents submitted that the agreement to sell does not disclose that the grandfather of defendants was put in possession under the agreement to sell. Even if it is assumed to be true, still the defendants must have pleaded and proved readiness and willingness to perform their part of contract and they must have done some act in furtherance of the contract. The agreement took place in 1937 and the pleadings and evidence are conspicuously silent about the steps taken by the grandfather of defendants towards specific performance of the contract. In absence of readiness and willingness, protection under Section 53-A on doctrine of part performance cannot be

considered when there is inaction to obtain decree for specific performance for a period of 40 to 50 years. It is obvious that there is complete lack of readiness and willingness. Besides, there are no pleadings and evidence on this point. It is not the case of the defendants that they had attempted to obtain the sale deed, but Fatimabi or plaintiff was not ready to execute the sale deed. On the contrary, their contention is that they have become owners by virtue of Isar Pavti (agreement to sell). It is well settled that agreement to sell does not create any interest or transfer. It creates only right to claim execution of sale deed. Therefore, execution of agreement to sell cannot be a document of title. The entries in the Khasra Patrak even for number of years cannot be called as document of title.

6. The suit is governed by Article 65 as a suit based on title, in such suit, the defendant has to show some right to retain possession or to specifically claim adverse possession. There is no specific plea about adverse possession. On the contrary, the defence is of permissive possession under agreement to sell. There is no specific pleading or evidence as to when the permissive possession was converted into adverse possession. when there is no material to show that the possession of the defendants was adverse, the period of limitation does not start running. In view of these facts, I find that the learned trial Court

has committed glaring mistakes. He has in one breath accepted the case of adverse possession as well as part performance, which is not permissible at all. The mistakes are rightly rectified by the first appellate Court. There is no material to show that the defendants have any right to retain the possession or their possession has become adverse to the true owner. Even they cannot claim any right under the alleged agreement to sell. In the result, no substantial question of law is involved. Hence, the Second Appeal is dismissed in limine.

7. In view of dismissal of the Second Appeal, Civil Application No.13536/2018 is disposed of.

(A.M. DHAVALÉ)
JUDGE

fmp/