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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (ST) NO.7874 OF 2018
WITH
CIVIL APPLICATION NO.583 OF 2018
IN
SECOND APPEAL (ST) NO.7874 OF 2018**

Shoukatali Jainuddin Soudagar ... Applicant.

V/s.

Mirasaheb Jainuddin Soudagar
(decd)
Through Legal heirs ... Respondent

Mr. R. D. Soni, a/w Mr. V.R. Kasale, for the appellant.
Mr. Kuldeep Nikam, for respondent No.1A to 1F.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 27th JUNE, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondent.
- 2] Admit
- 3] With the consent of the learned counsels for both the parties, the appeal is taken up for final hearing at the stage of admission.
- 4] This appeal takes an exception to the judgment and

decree dated 27th December, 2017, passed by the District Judge 6, Santli, in Regular Civil Appeal No.83 of 2016, thereby dismissing the same and confirming the judgment and decree dated 22 January, 2016, passed by the 2nd Joint Civil Judge Junior Division, Miraj in R.C.S.No.115 of 2012.

5] The said suit was filed by the respondent for getting possession of the suit premises, bearing City Survey No.4637, situated at Miraj, on the count that he is the owner of the suit property. He was residing at Sangli and his Rabia mother used to reside in the suit property. In order to meet his mother, the appellant, who is younger brother of the respondent, used to visit the suit property. After the death of their mother Rabia in the year 2006, the appellant had issued notice to respondent, claiming title over the suit property and therefore, the respondent was constrained to file this suit for possession of the suit property.

6] This suit came to be resisted by the appellant-defendant contending inter alia that he is the real owner of the suit property. He has purchased the same in the name of his brother, that is the respondent. He is also in exclusive possession of the suit property since 1982 and hence the suit filed by the respondent, therefore, in the year 2012 is barred by limitation.

7] On the basis of these rival pleadings, the trial Court framed necessary issues for its consideration and on the basis of various admissions given by the appellant in his cross-examination, admitting that the consideration for purchase of the suit property was advanced by the respondent; further admitting that as on today also, the suit property stands in the name of his brother that is respondent and he is paying the Municipal Taxes and other outgoings, the trial Court decreed the suit in toto. The appellate Court has also confirmed the said finding of fact and dismissed the appeal.

8] While challenging this concurrent finding of fact recorded by the trial Court and confirmed by the appellate Court, the submission of learned counsel for the appellant is that, though in the written statement filed by appellant, specific pleading was raised that the suit is barred by limitation, no issue to that effect was framed by the trial Court and therefore, the appellant has filed an Application under Order 6 Rule 17 of the Code of Civil Procedure, before the first Appellate Court, for amendment of the written statement and to bring on record various documents and also filed separate application for framing of the issue relating to the limitation. However, both these applications were considered by the Appellate Court, in the judgment and not earlier. As regards application for amendment it was held that, pleading is necessary only in respect of facts and not in respect

of documents. Therefore, there is no necessity of allowing application for amendment. The appellant has filed an application seeking production of these documents like Municipal Tax bills, water bills etc. The appellate Court has, however, refused to consider this additional documentary evidence, also on the count that it was produced at belated stage and should have been produced in the trial Court itself.

9] The submission of learned counsel for appellant, therefore is that this approach adopted by the appellate Court of rejecting requisite amendment in the written statement was not correct especially in the light of the judgment of the Apex Court, in the case of **Ishwardas -vs- The State of Madhya Pradesh and ors, [AIR 1979 SC 551]**; wherein it has been held that the amendment in the written statement can be allowed even at the appellate stage to enable the parties to raise new plea.

10] Reliance is also placed on another judgment of the Apex Court in the case of **Baldev Singh and ors -vs- Manohar Singh and anr [2006 (5) Mh.L.J.635]**, wherein it has been held that though the amendments in the plaint and amendments in written statement are necessarily governed by the same principle, the approach of the Court while allowing amendment in written statement should be liberal and the same rigour which applies in cases of amendment in

the plaint need not be applied, while deciding the amendment in the written statement.

11] Here in the case, according to learned counsel for the appellant, therefore, the appellate court should have allowed the amendment in the written statement in order to bring on record the fact that the Municipal taxes etc were paid by the appellant. Accordingly, the relevant issue of limitation should have been framed. The Appellate Court should itself have decided that issue or should have remanded the matter to trial Court to decide the same.

12] However, in my considered opinion this contention also is devoid of any merit because, in the first place, the trial Court, though has not specifically framed issue of limitation, as it was not contended in the written statement that the suit is barred by limitation, the trial Court has considered how the suit cannot be said to be barred by limitation. In this respect the trial Court has considered the fact that in the plaint in paragraph No.10, specifically cause of action is given, as and when the notice was issued by the appellant claiming ownership over the suit property and this notice was issued on 8.9.2006. It was also specifically held that the cause of action arose when this notice was issued and ownership over the suit premises was claimed, hostile to the title of the respondent, for the first time by this notice. Therefore, the trial Court has considered that

since receipt of this notice in the year 2006, the suit is filed within six years, that is in the year 2012 and therefore, it is within the limitation. Assuming that the trial Court has not expressly stated so, the facts of the case are very clear to that effect. Moreover, the issue of limitation would have assumed significance, if the appellant has claimed in the written statement any title, by way of adverse possession.

13] The appellant has not at all raised the plea of adverse possession in the entire written statement. On this aspect, since beginning it is his case that as he has advanced consideration amount for the purchase of the suit property, he is the owner thereof. By his own admission in the cross examination, he has damaged his case by stating that, the consideration was advanced by respondent and respondent is the owner of the suit property. Therefore, for the first time he has claimed some right over the suit property, which was hostile to the right of the respondent, in the notice issued by him on 8.9.2006. The cause of action, therefore, arose on that day. Even assuming that, prior to the said notice also he was in possession, that possession cannot in any way be hostile or adverse possession. It is admitted position that till the year 2006, the mother of the appellant and respondent was very much residing in the suit property. As stated by respondent also, in order to look after the mother, the

appellant was visiting the suit premises. Therefore, he was not in any way in the exclusive or hostile possession of the suit property. Therefore, whatever documentary evidence which appellant wanted to produce on record namely the municipal tax receipts etc., at the most as observed by the Appellate Court, these documents could have proved his possession, but not in any way his adverse or hostile possession so as to hold that the suit is in any way barred by limitation.

14] Both the trial court and the appellate Court have, thus, after considering the entire evidence on record held that the appellant has failed to prove that the suit is barred by limitation or appellant has become owner by way of adverse possession.

15] In such situation, the judgment and decree passed by the trial Court and confirmed by the Appellate Court does not call for any interference in the Second Appeal. This Appeal, therefore, stands dismissed.

16] In view of dismissal of appeal, Civil Application No.583 of 2018, becomes infructuous and therefore, stands disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]