

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

SECOND APPEAL NO.486 OF 2017

Kashinath Kisan Nimkar
And ors.

... Appellants

-vs-

Sayyad Nisaruddin Naziruddin Kazi
And ors.

... Respondents.

Shri U. J. Deshpande, Advocate for appellants.
Shri P. A. Markandeywar, Advocate for respondents.

CORAM : A.S.CHANDURKAR, J.
DATE : June 20, 2018

P.C.

The learned counsel for the parties have been heard on the following substantial question of law :

“ Whether the plea as regards adverse possession raised by the appellants in their written statement to the counter-claim for possession has been decided after considering the entire material on record ?

2. The appellants are the original plaintiffs who had filed suit for declaration that they had become owners of agricultural land bearing old Survey No.48/3,4 and 5 by virtue of being in possession adversely as against the defendants. In the plaint it was pleaded that since the year 1966-67 the plaintiffs enjoyed possession openly and continuously to the knowledge of

the father of the defendants. The defendants in their written statement denied the case as pleaded and filed a counter-claim seeking possession of the suit property on the basis of title. Reply was filed on behalf of the plaintiffs to the said counter-claim contending that the defendants were never in possession of the property at any point of time and that the plaintiffs had become owners by way of adverse possession.

3. The trial Court after considering the evidence on record dismissed the suit as filed on the ground that the relief of declaration of having acquired title by way of adverse possession could not be claimed. The counter-claim was allowed and the decree for possession was passed in favour of the defendants. The appellate Court confirmed that decree. Being aggrieved the plaintiffs have filed the present appeal.

4. It is submitted by the learned counsel for the appellants that there was sufficient material on record to indicate that the plaintiffs had become owners by way of adverse possession. A plea in that regard was raised in the written statement to the counter-claim filed by the original defendants and same was required to be considered in the light of evidence on record. It was submitted that the possession of the plaintiffs since the year 1966-67 has been duly proved and for said purpose the learned counsel referred to the pleadings as well as deposition of witnesses. The suit having being filed in

the year 2008, the plaintiffs' continuous and uninterrupted possession had been proved. It was then submitted that the relief of perpetual injunction as sought by the defendants to the counter-claim could not have been so prayed for especially as the plaintiffs were already in possession. This aspect was not considered by both the Courts.

5. The learned counsel for the respondents supported the impugned judgment. He submitted that the ingredients for establishing title on the basis of adverse possession had not been satisfied inasmuch as the plaintiffs had not admitted the defendants were the owners of the suit property. Even if it is assumed that the plaintiffs were in possession since 1966-67 that by itself would not perfect their title. The relief of possession having been sought by way of counter-claim the same was rightly granted by the Courts.

6. I have heard the learned counsel for the parties at length and I have perused the evidence placed on record. Perusal of evidence of the plaintiffs and the cross-examination indicates that the plaintiff No.1 was not aware about the name of the original owner. He denied the ownership of Salimuddin and thereafter his son Naziruddin. It is on that basis that the appellate Court observed that the necessary requirements to constitute perfection of title by way of adverse possession had not been proved. The plaintiffs were not aware as to who was the owner of the suit property.

Reliance in that regard was rightly placed on the decision in *Maria Margarida Sequeria Fernandes vs. Erasmo Jack De Sequeria (2012) 5 SCC 370*. On perusal of the cross-examination of the plaintiffs, said aspect becomes clear and therefore even if the plaintiffs were in possession from 1966 and onwards, in absence of acceptance of title of the original owner they cannot claim to have perfected their title by way of adverse possession.

7. In the counter-claim the defendants had made a specific prayer for grant of possession and had pleaded that they were in possession till 30/04/2008. For said purposes they had relied upon the orders passed in revenue proceedings. As the relief of possession had been sought by the defendants in the counter-claim, the question of seeking perpetual injunction loses significance. The prayer for possession having been made in counter-claim, same has been rightly granted by both the Courts.

8. In view of aforesaid the substantial question of law as framed is answered by holding that the plea raised by the plaintiffs in their written statement to the counter-claim has been decided after considering the entire evidence on record. No interference is therefore called for in the impugned judgment. The Second Appeal is dismissed with no order as to costs.

JUDGE