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

APPEAL FROM ORDER NO.36 OF 2018

Mahadeo s/o Damodhar Gahudale ... APPELLANT

VERSUS

Laxman s/o Mahadeo Gahudale & ors. ... RESPONDENTS

.....
Shri A.S. More, Advocate for appellant
Shri S.B. Choudhari, Advocate for respondents No.2 to 5
.....

CORAM: R.G. AVACHAT, J.

DATED : 7th OCTOBER, 2019

ORDER

. The challenge in this Appeal from Order is to the order dated 27.12.2017, passed by the District Judge-1, Osmanabad in Civil Appeal, being Regular Civil Appeal No.69/2017. The impugned order passed by learned District Judge-1 reads as under :-

1. Appeal is allowed.
2. The impugned judgment and decree in R.C.S. No.185/2010 passed on 16.03.2017 by the learned 3rd Joint Civil Judge, Senior

Division, Osmanabad is set aside and remanded back to the trial Court.

3. The application Exh.13 for additional evidence moved by appellant/ plaintiffs is allowed.
4. The Trial Court is directed to expeditiously decide the suit after fullest opportunity to the parties who are at liberty to alter the pleadings if any, without influencing observation in the judgment.
5. The parties shall appear before the Trial Court on 20.1.2018

.....
.....”

2. This appeal has been preferred by the original defendant No.1 in the suit. The plaintiffs/ respondents No.2 to 5 herein filed the suit, being Regular Civil Suit No.69/2017 initially for the relief of perpetual injunction. Pending the suit, the plaint was amended with an introduction of a prayer for possession of the suit property. The subject matter of the suit is a Plot (No.12), particularly described in para No.1 of the plaint. Respondents No.2 to 5/ plaintiffs claim possession thereof, on the ground that, pending the suit the appellant/ defendant No.1 encroached upon the suit plot by dispossessing them.

3. The trial Court dismissed the suit on the ground that the respondents/ plaintiffs claimed possession of the suit plot on the ground of dispossession. According to the trial Court, the suit was governed by Article 64 of the Limitation Act. The trial Court found the respondents/ plaintiffs to have failed to make out a case of their possession over the suit plot and alleged dispossession pending the suit. The suit, therefore, came to be dismissed. The respondents No.2 to 5/ original plaintiffs preferred the appeal. They moved an application (Exh.30) for production of additional evidence. It was an application moved under Order XLI Rule 27 of the Code of Civil Procedure. The appellate Court was pleased to allow the said application and, therefore, passed the impugned order remanding the suit to the trial Court for deciding afresh.

4. Learned counsel for the appellant would submit that, the issue of title was not framed by the trial Court. The suit for injunction cannot be converted into suit for possession. According to learned counsel, the appellate Court ought not to have allowed the appeal remanding the suit to the trial Court.

5. I have perused the pleadings, also read the

judgment dated 16.3.2017, passed by the trial Court, dismissing the suit (No.185/2010). I have also perused the impugned judgment and order.

6. The respondents No.2 to 5/ plaintiffs claimed their title to the plot (No.12), particularly described in para No.1 of the plaint. It was their case that the suit plot was purchased by their father way back in December 1980 for consideration of Rs.1000/-. The original sale deed was on record. The sale deed being 30 year old document, the trial Court marked it Exhibit. The record indicates that, the respondents/ plaintiffs moved an application for issuance of witness summons before the trial Court. The said application was moved with a view to prove the sale deed of the suit plot. The trial Court even allowed the said application. The record indicates that, the witness summons could not be issued. The respondents/ plaintiffs were under impression that since the sale deed was marked Exhibit, it would be read in evidence, being 30 year old document.

7. The trial Court dismissed the suit on the ground of the respondents' failure to prove to have been

dispossessed from the suit plot. The trial Court appears to have read the sale deed in evidence. It, however, found the appellant/ defendant to have been in possession of the suit property under the agreement of sale. It needs no mention that agreement for sale does not confer any right, title and interest. The trial Court expected the respondents/ plaintiffs to lead some evidence in proof of having been put in possession of the suit plot by its owner – Damu Gahudale. The same indicates that, in view of the trial Court, the sale deed was not proved.

8. The appellate Court too was of the view that the sale deed has not been proved. I may not agree with the observations made by the trial Court and the appellate Court as well. The sale deed is 30 year old document. It was produced by the respondents/ plaintiffs. The sale deed was executed in favour of father of the respondents/ plaintiffs. As such, the sale deed was produced from proper custody. The trial Court has even exhibited the sale deed. Both the courts below ought to have read it in evidence.

9. Be that as it may, the plaint averments undoubtedly indicate that the respondents/ plaintiffs claim possession of the

suit plot on the basis of the title. The suit initially filed for perpetual injunction was converted into suit for possession. The same is permissible in order to avoid multiplicity of proceedings. The appellate Court, which has set aside the trial Court's decree and remanded the suit, could have very well retained the appeal with itself, with a direction to the trial Court to allow the parties to lead evidence as regards title to the suit plot and return the findings on the issue of title. By passing the impugned order, the first appellate Court pushed the suit to the square one. The suit dates back to 2010. With a view to avoid delay, I propose to set aside the impugned judgment and order and deal with the appeal in terms of Order XLI Rule 25 of the Code of Civil Procedure.

10. In view of the above, the Appeal from Order is allowed in terms of the following order :-

ORDER

- (i) The appeal from order is allowed.
- (ii) The impugned judgment and order 27.12.2017 is hereby set aside.
- (iii) The appeal is retained with the appellate Court.

- (iv) The following issue is framed :-

“Do the plaintiffs prove their title
to the suit plot ?”
- (v) The said issue is referred to the trial Court, from whose decree the appeal was preferred.
- (vi) The trial Court is directed to take the additional evidence, if any, to be adduced by the parties in proof of the issue and in rebuttal thereof.
- (vii) The trial Court shall try the said issue and shall return the evidence to the appellate Court together with its findings thereon and reasons therefor, within a period of eight from the date of receipt of the record and proceedings from the first appellate Court.
- (viii) The parties against whom the finding on the issue may be recorded, would be at liberty to take exception thereto in the very appeal.
- (ix) On receipt of the findings on the issue, the appellate Court shall deal with the appeal on its own merits.

(R.G. AVACHAT)
JUDGE

fmp/-