

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 512 OF 2018****ALONGWITH****CIVIL APPLICATION NO. 1182 OF 2018****IN****SECOND APPEAL NO. 512 OF 2018****Jaywant Dattopant Patil & Ors.****..... Appellants****VERSUS****Menaka Madhav Naik****Since deceased by her LR.****Mrs.Jyotsna Mohammad Ali Trainer & Ors. Respondents****ALONGWITH****CIVIL APPLICATION NO. 695 OF 2019****IN****SECOND APPEAL NO. 512 OF 2018****Menaka Madhav Naik****Since deceased by her LR.****Mrs.Jyotsna Mohammad Ali Trainer & Ors. Applicants****IN THE MATTER BETWEEN****Jaywant Dattopant Patil & Ors.****..... Appellants****VERSUS****Menaka Madhav Naik****Since deceased by her LR.****Mrs.Jyotsna Mohammad Ali & Ors. Respondents**

Mr. R.S.Apte, Senior Advocate, i/b. Ms.Shriya Gune for the Appellant in Second Appeal and of the Applicant in CAS/1182/2018.

Mr.S.M.Kelkar a/w. Mr.Mahendra Agavekar for the Respondent nos. 1 and 2 in Second Appeal and for the Applicant in CAS/695/2019.

CORAM : R.D. DHANUKA, J.**DATE : 22nd AUGUST, 2019**

P.C.

By this second appeal filed under section 100 of the Code of Civil Procedure, the appellants (original defendant nos. 3 to 6) have impugned the judgment and decree dated 12th July, 2018 passed by the learned District Judge, Pune dismissing Regular Civil Appeal No.553 of 2016 filed by the appellants arising out of the judgment and decree dated 2nd April, 2013 passed by the learned trial judge thereby directing the appellants to handover the possession of the suit property to the respondent nos. 1 and 2 (original plaintiffs) within three months from the date of the said decree passed by the trial court.

2. The respondent nos. 1 and 2 had filed a suit for mandatory injunction and declaration before the learned Civil Judge, Senior Division, 5th Additional Judge, Small Causes Court. It was the case of the original plaintiff that the original plaintiff no.1 is the owner of one of the plot of the suit property. The plaintiff no.1 was allotted the said property in partition as far back as on 17th December, 1955. The second part of the suit property was bequeathed in favour of the plaintiff no.1. The plaintiff no.1 had executed a Will in respect of one part of the suit property in favour of the plaintiff no.2.

3. The original defendant nos. 1 and 2 were the sisters of the husband of the plaintiff no.1. Insofar as defendant nos. 3 to 6 are concerned, they are claiming through Ms.Shanta Patil Who was one of the sister of Mr.Madhav Naik who was the husband of the plaintiff no.1.

4. It was the case of the plaintiff that since the plaintiff no.1 did not have any issue, the husband of the plaintiff no.1 permitted the defendant nos. 3 to 6 to take care of the plaintiff no.1 as caretakers.

5. On the other hand, it was the case of the defendant nos. 3 to 6 that Mr.Madhav Naik had spent certain amount on construction of the building on the suit plot and as a result thereof, the said Mr.Madhav Naik, became owner of the structures constructed on the suit premises and after his death, his three sisters became owners of the said structures.

6. The suit was resisted by the defendants. The plaintiffs examined the witnesses. Insofar as defendant nos. 3 to 6 are concerned, they have examined defendant no.5 as a witness. The learned trial judge framed eight issues. After considering the oral and documentary evidence led by the parties, the learned trial judge held that the plaintiffs had proved their exclusive title in the suit property and are entitled for possession of the suit property. The defendant nos. 1 and 2 did not have any right to introduce defendant nos. 3 to 6 in the property. The plaintiff no.2 had also proved his exclusive possession in the suit property.

7. Being aggrieved by the said judgment and decree dated 2nd April,2013 rendered by the learned trial judge, the respondent nos. 3 to 6 filed Regular Civil Appeal No.553 of 2016 before the learned District Judge, Pune. The other defendants did not file any appeal against the said judgment and decree rendered by the trial court.

8. The appellate court formulated seven points for determination and after considering the oral and documentary evidence of the parties, independently rendered various findings of fact and dismissed the appeal filed by the defendant nos. 3 to 6.

9. Mr.Apte, learned senior counsel for the appellants tendered compilation of the pleadings and the documents and the evidence led by the plaintiff no.2 and defendant no.5. He submits that in the cross examination of the plaintiff no.2, it was clearly admitted that the defendant nos. 3 to 6 were staying in the suit premises since 1983 and that Mr.Madhav Naik had contributed certain amount to carry out construction of the building on the suit property. He submits that the possession of the defendant nos. 5 and 6 was specifically admitted in the cross examination of the plaintiff no.2.

10. Learned senior counsel submits that since the defendant nos. 3 to 6 were staying in the building in their own right, they could not have been declared as trespassers by the two courts below. He submits that since the crucial part of the evidence is not considered by the appellate court, the findings rendered by the two courts below being perverse, have to be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

11. Mr.Kelkar, learned counsel for the respondent nos. 1 and 2 (original plaintiffs) on the other hand invited my attention to the written statement filed by the defendant nos. 3 to 6 before the learned

trial judge and would submit that the arguments advanced by the learned senior counsel for the defendant nos.3 to 6 before this court are contrary to the stand taken by them before the learned trial court.

12. It is submitted by the learned counsel that there were admissions on the part of the defendant nos. 3 to 6 in the said written statement and also in the evidence about the ownership of the original plaintiff no.1 and thereafter the plaintiff no.2 by virtue of deed of partition. He submits that by executing a Will by the original plaintiff no.1 in favour of the plaintiff no.2 which was probated by the probate court, the part of the property was transferred in favour of the plaintiff no.2.

13. It is submitted by the learned counsel that the respondent nos. 3 to 6 who are claiming through Ms.Shanta were allowed to assist the plaintiff no.1 who did not have any issue. The said stay of the defendant nos. 3 to 6 if any in the suit premises was as a caretaker and permissive user and came to an end after demise of the husband of the plaintiff no.1.

14. Insofar as submission of Mr.Apte, learned senior counsel for the defendant nos. 3 to 6 that the said Mr.Madhav Naik had contributed amount for carrying out construction of the building on the suit plot is concerned, it is submitted that no such case was either pleaded or proved before the two courts below. It is submitted by the learned counsel that the findings being concurrent findings and being not perverse, cannot be interfered with by this court in this second appeal filed under section 100 of the Code of Civil Procedure.

15. A perusal of the record clearly indicates that the original plaintiffs had filed a suit for mandatory injunction and declaration. In the written statement filed by the defendant nos. 3 to 6, it was not their case that they became owner of the suit property in any manner whatsoever. The arguments advanced by the learned senior counsel for the defendant nos. 3 to 6 before this court in my view are contrary to the stand taken by them in their written statement and also in their evidence led before the trial court.

16. After considering the oral and documentary evidence led by the parties, the learned trial court rightly rendered a finding that the plaintiffs had proved their exclusive right in the suit property in view of the deed of partition and also thereafter in view of the Will executed by the original plaintiff no.1 in favour of the plaintiff no.2 which was admittedly probated. On the other hand, respondent nos. 3 to 6 could not prove their alleged title in respect of the suit property.

17. It is an admitted position that respondent nos. 3 to 6 did not file any counter claim or separate suit for claiming any independent right in any portion of the suit property till date.

18. A perusal of the findings rendered by the appellate court clearly indicates that the appellate court after considering the evidence independently has held that in respect of plot no.35B, by virtue of partition, the plaintiff no.1 had become owner.

19. The learned appellate court had rightly rendered a finding that the defendant no.3 could not substantiate the contention that any amount was contributed by the defendant no.3 or by Mr.Madhav Naik. The appellate court after considering the cross examination of the defendant no.5 who was examined as a sole witness by defendant nos. 3 to 6 rightly held that those defendants failed to substantiate that any construction of the house was carried out by the husband of the plaintiff no.1 or any contribution was made by him.

20. Insofar as plaintiff no.2 is concerned, she has purchased the property from plaintiff no.1. The burden was on the plaintiff nos. 3 to 6 to prove that the sale deed executed by the plaintiff no.1 in favour of the plaintiff no.2 was fabricated and was conditional sale deed. The appellate court rightly held that the defendant nos. 3 to 6 could not produce any title deed in respect of the building constructed on the suit property.

21. Insofar as the submission of Mr.Apte, learned senior counsel for the defendant nos. 3 to 6 that various admissions in the cross examination of the witnesses examined by the plaintiffs have not been considered by the appellate court is concerned, a perusal of the order passed by the appellate court clearly indicates that the appellate court has applied its mind independently on the evidence made by both the parties and after considering the over all evidence has rightly rendered a finding that the defendant nos. 3 to 6 failed to prove any title in the suit property and also that Mr.Madhav Naik had contributed any amount for construction of the building in the suit property.

22. The findings of the two court below being concurrent and being not perverse do not warrant any interference in the second appeal filed by the defendant nos. 3 to 6. In my view, no substantial question of law arises in this second appeal. Second appeal is devoid of merit and is accordingly dismissed. In view of the dismissal of the second appeal, both the Civil Applications do not survive and are accordingly dismissed.

23. At this stage, Mr.Apte, learned senior counsel for the defendant nos. 3 to 6 seeks continuation of the *ad-interim* protection granted by this court to enable his client to approach the Hon'ble Supreme Court.

24. Since defendant nos. 3 to 6 are not inclined to give any undertaking that they would vacate if they don't succeed in the Hon'ble Supreme Court and handover the vacant possession to the original plaintiffs and considering the conduct of the defendant nos. 3 to 6 and the concurrent findings of the two courts below, I am not inclined to continue the *ad-interim* protection granted by this court. Application for continuation of *ad-interim* order is accordingly rejected.

[R.D.DHANUKA, J.]