

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.397 OF 2021

AVINASH S/O ANANTRAO DHARMADHIKARI
VERSUS
PURSHOTTAM PANDURANG ANTAPURKAR AND ORS

.....
Advocate for Appellant : Mr. P. S. Mantri
Advocate for Respondents No.1A to 1E and 2A to 2C : Mr. P. B. Patil
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 21-10-2021.

ORDER :

1. Present appeal has been filed by the original defendant challenging the concurrent Judgment and decree. Present respondent/ original plaintiffs had filed Regular Civil Suit No.96 of 2006 before Civil Judge, Junior Division, Chalisgaon, District Jalgaon, for possession of the suit property. The said suit came to be decreed on 21-04-2017. Present appellant filed Regular Civil Appeal No.924 of 2017. The said appeal came to be dismissed by learned District Judge, Jalgaon on 31-07-2019. Hence, this second appeal.

2. Heard learned Advocate Mr. P. S. Mantri for appellant and learned Advocate Mr. P. B. Patil for respondents No.1A to 1E and 2A to 2C.

3. It has been vehemently submitted on behalf of the learned Advocate appearing for the appellant that both the Courts below have not appreciated the evidence properly. The finding arrived at by them is perverse. Both the Courts below have not considered that the defendant was claiming to be in possession of the property as tenant and, therefore, question of encroachment was irrelevant. Co-sharers were not party to the proceedings. In fact, the plaintiffs had admitted the relationship of landlord and tenant with them and Govinda Motiram Sonar, Fatte Mohammad Shahabuddin, Vithal Bhagoji Ubale, Sakharam Dinkar Jagtap who were earlier residing in Survey No.302 wherein the appellant was also residing. However, as regards the appellant is concerned, his status as tenant has been denied intentionally. Substantial questions of law are arising in this case requiring the admission of the second appeal.

4. Per contra, learned Advocate appearing for the respondents supported the reasons given by both the Courts below and submitted that no substantial questions of law as contemplated under Section 100 of the CPC is arising in this case.

5. It is to be noted that the plaintiffs had come with a case that

they are the owners of the suit property. The boundaries have been given as the entire plot was owned by the plaintiff and the persons whose names are reflected earlier, were the tenants. It has been contended that from those four persons, the plaintiffs have taken back the possession of plot No.18 by demolishing the tin-shed. Plaintiff No.1 is a handicapped person and plaintiff No.2 had suffered paralysis. Under such circumstances, they could not visit the premises for about two years. When plaintiff No.2 visited the property on 26-06-2005, he found that the defendant has illegally taken possession of the open land and had erected tin-shed. Apart from oral request, even the notice was issued on 15-04-2006, however, defendant gave reply on 18-05-2006 resulting in the suit.

6. Defendant denied all the contentions of the plaintiff and submitted that in fact one Somnath Pandurang Antapurkar is the owner of plot No.18, he should be made as party. He also contended that he has constructed tin-shed in 10 feet X 10 feet area and he is the old tenant of the plaintiff. He is giving nominal monthly rent of Rupee 1/-, but at that time old premises was thereafter handed over to the plaintiff. He was shifted to another place and then again plaintiff has come back to the suit premises.

He has not encroached upon any portion but his possession is in the capacity as tenant.

7. Both the Courts have discarded the defence of the defendant on the ground that he has failed to prove the tenancy.

8. The plaintiff has examined plaintiff No.2 and one witness to support his contention, whereas defendant has examined himself as well as one witness. There is no dispute as regards ownership of the plaintiff is concerned over the suit premises. No doubt the defendant is contending that there are co-owners to the suit property but when the suit is for the removal of encroachment or for possession from a trespasser then it is not necessary that all the co-owner should be party to the suit. It is not in dispute that the defendant has erected tin-shed in the suit land. In the cross examination of the plaintiff it had come on record that a notice was issued to the defendant asking him to remove the encroachment on 25-12-1999. Even if we consider this document as a document showing possession of defendant at that time, yet by his own pleadings he say that he was shifted from that place to another place. Both the Courts below have held that he could not prove this fact that he was shifted by the plaintiff to another place. Therefore,

as regards the said notice is concerned, defendant cannot say that he was tenant in the premises at that time because the said notice dated 25-12-1999 was not issued by a landlord to the tenant. It has also been admitted by the defendant that area admeasuring 400 square feet is in his possession. Now the onus would shifted on the defendant to prove his status or relationship with the said premises. He has not produced on record any such document which would show that his possession over the suit property is as tenant. He has not filed any document to show that he had paid rent in respect of that premises to the plaintiff. Under such circumstances, the view taken by both the Courts below is correct. Legal aspect involved in the case is correctly considered. No substantial question of law as contemplated under Section 100 of the CPC is arising in this case requiring admission of the second appeal. It deserves to be dismissed, accordingly it is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-