

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

SECOND APPEAL NO. 110 OF 2021

(Shri Sarvesh S/o Shymal Nayak and others Vrs. Shri Shreelesh S/o Shymal Nayak)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Shri R.R.Vyas, Advocate and Shri Vikrant
Vishwarupe, Advocate for the appellants.
Shri G.M.Shitut, Advocate for the sole-respondent.

CORAM : ANIL S KILOR, J.
DATE : 25th OCTOBER, 2021.

The present appeal has been filed against the concurrent findings recorded by both the Courts below in a suit filed by the respondents (original plaintiff) for possession, declaration and permanent injunction vide judgment and decree dated 8th November, 2017 passed in Regular Civil Suit No. 2152 of 2012 (Old Spl.Civil Suit No.506 of 2010) by the learned 4th Joint Civil Judge, Junior Division, Nagpur and judgment and decree dated 18th February, 2021 passed by the learned District Judge, Nagpur in Regular Civil Appeal No. 55 of 2018, decreeing the suit.

2. The brief facts of the present case are as under (Parties are referred to as per the status before

the trial Court).

The plaintiff is a son of Shymal Nayak and Sushila Nayak. The plaintiff was represented by her mother as on the date of filing of the suit, the plaintiff was minor. The suit property is a shop Block No.7, admeasuring 147 square feet (13.65 sq.mtr) situated in building known as Kamala Nehru Marked constructed on Plot No.11-A and 11-B, Nagpur Circle No.2, Division No.1, Sheet No.165/2, City Survey No.134 at Sakardara, Nagpur.

3. The suit property was purchased by Shri Shymal Nayak by registered sale-deed dated 3rd January, 1990 as such it is claimed that the suit property was self acquired property of Shymal Nayak who consequently gifted the same to the plaintiff vide registered gift deed dated 9th April, 2007. Resultantly, the plaintiff become the absolute owner of the suit property.

4. It is the case of the plaintiff that Shymal Nayak had three sons from his first wife Jayashree. The defendants by taking advantage of ill health of Shymal Nayak, took forcible possession of the suit property on 6th August, 2009, against which a police complaint was lodged by the plaintiff's mother. However, no cognizance was taken by the police, therefore, the suit was filed.

5. The trial Court after considering the oral as well as documentary evidence and after considering the contentions raised by both the parties, decreed the suit in favour of the plaintiff and thereby declared the plaintiff as the owner of the suit property vide judgment and decree dated 8th November, 2017. The learned trial Court further granted mandatory injunction in favour of the plaintiff and thereby directed the defendants to hand over the possession of the suit property to the plaintiff within two months

6. The defendants aggrieved by the said judgment and decree preferred an appeal under Section 96 of the Code of Civil Procedure, which came to be dismissed vide judgment dated 18th February, 2021 passed in the said appeal. The present appeal is arising out of the dismissal of the Regular Civil Appeal No.55 of 2018 vide aforesaid judgment and decree dated 18th February, 2021.

7. I have heard the learned counsel for the respective parties.

8. Shri Vyas, learned counsel appearing for the defendants/appellants submits that both the Courts below have failed to consider the provision namely Order XVIII Rule 17 of the Code of Civil Procedure and thereby denied the opportunity to the

defendants to cross-examine the witnesses. It is further submitted that the compromise deed entered between the Shymal Nayak, plaintiff's mother, plaintiff and his sister, has not been taken into consideration by both the Courts below.

9. On the other hand Shri Shitut, learned counsel for the respondent submits that as far as the contention of the appellants as regards power of the Court under Order XVIII Rule 17 of the Code of Civil Procedure is concerned, the said provision is discretionary and therefore the both the Courts below have rightly decreed the suit in favour of the plaintiffs considering the facts and circumstances of the case and oral as well as documentary evidence and there is no error committed by both the Courts below.

10. It is further submitted that compromise decree on which the appellants are relied upon before this Court and documents titled as settlement deed, was neither filed before the trial Court nor it was exhibited and therefore this document cannot be read as evidence.

11. To consider the rival contentions of the parties, I have perused the record and gone through the necessary provisions.

12. Before proceeding further, at this juncture it is necessary to consider the provision Order XVIII Rule 17 of the Code of Civil Procedure which read thus

“17. Court may recall and examine witness

: The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.”

13. The language of the said provision is clear and I find substance in the submission of the learned counsel for the respondent Shri Shitut that the power to recall witness is discretionary and both the Courts below have rightly exercised their discretion in favour of the plaintiff in absence of any case made out by the defendants for recall and examination of witnesses. In this matter defendant has not offered any justifiable reason for not cross examining the plaintiff's witnesses and for seeking exercise of powers by the trial Court for recall of witness under Order XVIII Rule 17 of the Code of Civil Procedure. Moreover, it is a settled law that the power under the provisions of Order XVIII Rule 17 of the Code of Civil Procedure, is to be sparingly exercised and in appropriate cases and not as a general rule. In the circumstances, I do not find any merit in the first submission made by the appellants. Accordingly, the

same is rejected.

14. As far as the document i.e. compromise-deed at page no.47 of the record is concerned, there is no dispute that the said document was never produced before the trial Court and the same has not been exhibited. Therefore, the same cannot be read as evidence. Accordingly, the second contention is also rejected.

15. In the circumstances, I do not find any substantial question of law involved in the present appeal. Accordingly, the appeal is dismissed. No order as to costs.

JUDGE