

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.589 OF 2015
WITH
CIVIL APPLICATION NO.14239 OF 2015
WITH
CIVIL APPLICATION NO.15170 OF 2015

1) Dajisingh Dashingh Patil
Since deceased through L.Rs.

1) Pratapsingh Dagasingh Patil
since deceased through L.Rs.

...APPELLANTS

VERSUS

- 1) Ashok Pandharinath Patil,
- 2) Indubai W/o Kautik Patil,
- 3) Kokilabai W/o Gulabrao Patil,
- 4) Nirmala W/o Arvind Choudhari,
- 5) Nana Pandharinath Patil
since deceased through L.Rs.

...RESPONDENTS

...
Mr.V.J. Dixit Senior Advocate i/b. Mr.V.B. Garud for Appellants.
Mr.S.P. Brahme, Advocate for Respondent Nos.1, 5-A, 5-B,
7-A to 7-C.
Mr.S.H. Panchal Advocate for Respondent No.11 (Absent).
Mr.V.B. Patil Advocate for Respondent No.12 (Absent).
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CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 16th NOVEMBER 2021

DATE OF PRONOUNCING ORDER : 8th JUNE 2022

ORDER :

1. Present appellants are the original defendants, who want to challenge the Judgment and decree passed by the learned 2nd Joint Civil Judge, Junior Division, Bhusawal, District-Jalgaon on 5th July 2007 in Regular Civil Suit No.209 of 1989 confirmed by the Judgment and decree passed by the learned District Judge-1, Bhusawal, District-Jalgaon in Regular Civil Appeal No.82 of 2014 on 8th December 2014.

2. Heard learned Advocate for the appellants and learned Advocate for respective respondents.

3. The present respondents – original plaintiffs had filed the said Regular Civil Suit No.209 of 1989 for possession, declaration and mesne profit. The said suit came to be decreed by the learned trial Judge, by holding that the plaintiffs have proved title over the suit property. It was held that the plaintiffs

have failed to prove that defendants have obtained possession of the suit property by fraudulent means. It was held that the defendants have failed to prove that they have become the owners of the suit property by adverse possession. They have also failed to prove that their deceased father had purchased the suit property from the deceased father of the plaintiffs. It was held that the suit is within limitation. The learned First Appellate Court also held that the title over the suit property has been proved by the plaintiffs. So also it is held that the defendants have obtained the possession of the suit property without any legal documents.

4. The learned Senior Counsel Mr. Dixit instructed by learned Advocate Mr. Garud for the appellants vehemently submitted that both the Courts below have failed to consider the oral evidence as well as documentary evidence. The admissions have not been considered properly, in which the plaintiffs' witness has specifically admitted that when he was minor, at that time father of the defendants was in possession. Both the Courts failed to consider that there was an agreement to sell executed by Pandharinath Patil on 6th July 1959 in favour of father of the defendants. Dajising was put in possession of the said property

by Pandharinath since 1959-60 and after his demise the defendants are cultivating it. In the meantime, the scheme of Fragmentation and Consolidation was implemented in their village, as a result of which the sale deed remained to be executed. Thereafter Dajising had got that transaction regularized by paying penalty of Rs.59/-. Even Pandharinath as well as Dajising had approached the Tahsildar for sell of the property by giving application on 12th October 1966. In that proceeding the original agreement to sale was filed. The entries to the mutation were challenged, however, they are in favour of the defendants. The said agreement to sale could not be produced before the trial Court though the defendants had searched. But now, the original document is found in the old house which was totally collapsed but some bags and baggages which were kept by the grand father of the defendants got buried in the said mud and while removing the debris, on 17th September 2015 the said documents were found in old trunk / suitcase and therefore, Civil Application No.15170 of 2015 has been filed under Order XLI Rule 27 of the Code of Civil Procedure. Even if we keep that agreement to sell aside, the Courts below ought to have considered that since long the defendants are in possession of the suit property and the

plaintiffs had the knowledge about the fact that the defendants are using the said property as owner thereof. The point regarding ownership by adverse possession has not been considered by the First Appellate Court. The suit that was filed by the plaintiffs was barred under Articles 65 and 58 of the Indian Limitation Act. Though the point was agitated before the First Appellate Court, there is no determination of the point and answer to the same. Therefore, substantial questions of law are arising in this case, requiring the admission of the Second Appeal. He also prayed that by admitting the Second Appeal, the possession of the appellants be protected, by staying the Judgment and decree of both the Courts below.

5. Learned Advocate Mr. Brahme representing respondent Nos.1, 5-A, 5-B, 7-A to 7-C, vehemently submitted in support of the reasons those were assigned by both the Courts below while decreeing the suit and dismissing the appeal. He also submitted that no case is made out for allowing the production of the additional evidence. He submitted that the cause of action for filing the suit arose on 24th January 1981 when the notice was issued to the defendants and prior to that the plaintiffs had come to know that possession of the defendants is unauthorized. The

suit was filed on 21st June 1989 i.e. within the period of twelve years and therefore, the suit was well within limitation from the date of cause of action. Both the Courts below have considered the effect of all the necessary facts and law. The defendants have not denied that the suit property originally belongs to Pandharinath. They have not stated as to under which legal documents or of provisions of which Act / right, the defendants took possession. Even though opportunity was given, the original agreement to sale was not produced before the trial Court, nor there was any attempt to produce that document before the First Appellate Court. It is hard to believe that after such a long time, all of a sudden that document will be found in a suitcase, that too under the debris. At the most, it can be said that the possession of the defendants over the suit property was permissive in nature till 24th January 1981 as no action was taken against the defendants. But after the notice was issued, they were bound to vacate the premises. Both the Courts below have considered all the aspects and appreciated the oral as well as documentary evidence and therefore, there is no necessity to interfere in the decisions by the trial Court and First Appellate Court. No substantial questions of law are arising in this case requiring admission of the Second Appeal.

6. At the outset, at the stage of admission of the Second Appeal, it is required to be seen, as to whether substantial questions of law are arisen. In order to have this exercise, a detailed analysis of pleadings and evidence is not required, but a prima facie view is required to be considered. If we consider the plaint, then it can be seen that it does not say as to exactly since which date Dajising had taken possession of the suit property which is stated by the plaintiffs as fraudulent or unauthorized. Definitely, the law requires that such disclosure should be made by the person who claims possession. In other words, the person who claims possession, should disclose that he was dispossessed. As per the pleadings itself, Pandharinath i.e. father of the plaintiffs expired on 1st June 1967. According to the plaintiffs, at that time all of them were minor. They have not stated in the pleadings as to when each of them attained the age of majority. In spite of attaining the age of majority, why they had kept quiet for a long period was the expected explanation from the plaintiffs. So far as cause of action is concerned, it is stated that they came to know that the possession of the defendants is illegal and they had claimed possession from the defendants, which was refused. Thereafter the notice dated 24th

January 1981 was issued. Here also the things are kept in vague as to exactly when they came to know that the possession of the defendants is illegal and when they had, prior to 24th January 1981, asked the defendants to handover the possession of the suit property. With this kind of vague pleadings, it appears that the plaintiffs went for trial.

7. Per contra, the defendants had taken up a specific defence that their entry in the suit premises was through their deceased father by virtue of an agreement to sale dated 6th July 1959. They could not produce the said original document, but then they relied on the application before the Tahsildar dated 12th October 1966 filed by Pandharinath as well as Dajising to the Tahsildar for his permission to regularize the said transaction and thereafter, it is stated that they have got it regularized by payment of penalty of Rs.59/-. The oral evidence has been led by both the parties and it appears that certain vital admissions have been given. Now, it is required to be interpreted as to how those admissions would affect each others case. But that would be as a secondary part of law point.

8. Perusal of the Judgment by the First Appellate Court would show that it has not considered the point of limitation as well as no point and/or issue was framed by both the Court about proof of agreement to sale dated 6th July 1959 and its effect under Section 53-A of the Transfer of Property Act. When the plaintiffs had come with the case that neither the plaintiffs nor their father had inducted Dajising, then whether the trial Court was justified in arriving at a conclusion that possession of the defendants and their predecessor was permissive in nature till 24th January 1981. The consequential point would be regarding claim by the defendants, may be in the alternative, about becoming owner of the suit property by adverse possession. This point is also not taken by the learned First Appellate Court as a point for determination. There might be some observations here and there in respect of the same. Under such circumstance, definitely, case is made out to admit the Second Appeal. Merely because the Judgment and decree passed by the trial Court has been confirmed by the First Appellate Court will not lead to an inference that it does not create any substantial question of law under Section 100 of the Code of Civil Procedure and therefore the Second Appeal deserves to be admitted.

9. Accordingly, the Second Appeal is **admitted**.

10. Following are the substantial questions of law:-

“(1) Whether the defendants have proved their possession over the suit property referable to the agreement to sale dated 6th July 1959 and the defendants were entitled to protect the possession under Section 53-A of the Transfer of Property Act and thereafter, after regularization of the said transaction by payment of penalty they have become owners of the suit property?

(2) Whether, alternatively, the defendants have proved that they have become owner of the suit property by adverse possession?

(3) Whether the suit was within limitation?”

11. In view of the admission of the Second Appeal, Civil Application No.14239 of 2015, for stay to the impugned Judgments and decrees, stands allowed in terms of prayer clause “(B)”, till the final decision of the Second Appeal.

12. Turning towards Civil Application No.15170 of 2015, for production of documents, learned Advocate for the respondents

has relied on the decision in ***State of Gujarat and another vs. Mahendrakumar Parshottambhai Desai (Dead) by L.Rs., 2006 AIR (SC) 1864, Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148, Andisamy Chettiar vs. Subburaj Chettiar, 2016 AIR (SC) 79, Shrimant Shamrao Suryawanshi and another vs. Pralhad Bhairoba Suryawanshi and another, 2002 (Supp.2) Bom.C.R. 848,*** and submitted that in view of the ratio laid down in these authorities, defendants cannot be allowed to produce the impugned document. Learned counsel was mainly on the point that ample opportunity was available at both the stages of the proceedings to the defendants, to produced the documents but it was not utilized.

13. Per contra, learned Senior Counsel appearing for the appellants has relied on the decision in ***Jaipur Development Authority vs. Smt. Kailashwati Devi, AIR 1997 SC 3243,*** wherein it has been held that refusal in adducing additional evidence cannot be on the ground that the party has not adduced any evidence in the trial Court. Further, reliance has been placed on the decision in ***Iridium India Telecom Ltd. vs. Motorola Inc. and others, 2004(2) LJSOFT 14,*** in which

reliance was placed on ***K.J. Somayya vs. State of Bombay, AIR 1964 SC 1714***, wherein the Hon'ble Apex Court had observed that, "While it is the duty of a private party to a litigation to place all the relevant matters before the Court, a higher responsibility rests upon the Government not to withhold such documents from the Court." Further, it was considered that when parties were going on producing documents after documents and had the knowledge about the documents, then there is no hurdle in allowing the production of the documents. Learned Senior Counsel for the appellants has further placed reliance on the decision in ***Adil Jamshed Frenchman deceased by LR.s vs. Sardar Dastur School Trust and others, 2005(2) Mh.L.J. 5***, wherein it was held that two documents were produced and the third document between the landlord and the third party which could not have been produced as the tenant would not have had knowledge, then the statement about the document by the tenant that he could not produce it before the trial Court in spite of due diligence is probable and such defence can be accepted.

14. It is to be noted that the Hon'ble Apex Court in ***M/s. Eastern Equipment & Sales Ltd. vs. ING. Yash Kumar***

Khanna, AIR 2008, S.C. 2360, in Para-5 of the Judgment, held that:-

"5. We have heard learned counsel for the parties and after considering the facts and circumstances of the present case, we are of the view that in order to decide the pending appeal in which the application under Order 41 Rule 27 of the Code of Civil Procedure was filed ought to have been taken by the appellate Court along with the application for acceptance of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure. In that view of the matter and without going into the merits as to whether the application under Order 41 Rule 27 of the Code of Civil Procedure was rightly rejected by the Appellate Court as well as by the High Court, we set aside the order of the High Court as well as of the appellate Court rejecting the application under Order 41 Rule 27 of the Code of Civil Procedure and we direct that the appellate Court shall decide the pending appeal along with the application under Order 41 Rule 27 of the Code of Civil Procedure on merits within a period of three months from the date of supply of a copy of this order to the appellate court. The appeal is allowed to the extent indicated above. There will be no order as to costs. "

15. Thus, the Hon'ble Supreme Court, in the decision referred above, has held that the applications under Order XLI Rule 27 of the Code of Civil Procedure be decided along with the appeal.

16. In ***Sanjay Kumar Singh vs. the State of Jharkhand*** (Civil Appeal No. 1760 of 2022, decided on 10th March, 2022) the Hon'ble Apex Court had relied on decision in the case of ***A. Andisamy Chettiar v. A. Subburaj Chettiar, reported in (2015) 17 SCC 713***, wherein it was observed that, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

17. In view of this position, Civil Application No.15170 of 2015 will have to be decided along with the Second Appeal.

[SMT. VIBHA KANKANWADI , J.]