

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

SECOND APPEAL NO. 170 OF 2018
WITH CA/2997/2018 IN SA/170/2018

SD. IBRAHIM SD. TURABALI DIED
LRS SD. HAFIJABEE AND OTHERS
VERSUS
RAFIYODEEN SYDODEEN AND ANOTHER

...
Advocate for Appellants : Mr. G.R. Syed
Advocate for Respondents : Mr. Sk. M.G. Mustafa
...

CORAM : R.M. JOSHI, J.
DATE : 16th March, 2023

PER COURT :

1. Heard.
2. This appeal takes exception to the judgment and order passed by the District Judge-1, Gangakhed, in Regular Civil Appeal No. 35 of 2015, by which, the judgment and decree passed in Regular Civil Suit No. 121 of 2008, passed by Civil Judge Junior Division, Palam, Tq. Palam, Dist. Parbhani, was confirmed.
3. Appellants are original plaintiffs, who had filed suit for declaration that mutation entry no. 1737 is not binding on them and that they are owner and entitled for possession of Survey No.62/A admeasuring 1 H 27 R. It is the contention of the

plaintiffs that the suit property was self acquired property of Turabali, father of plaintiff. He had two sons and two daughters. It is further contention of the plaintiffs that prior to 1940, father of plaintiffs had purchased the said property and since then, they are owner and occupier of the same. It is alleged that deceased Dhulhanbee and defendants had no concern with suit property but without issuing any notice to the plaintiffs or their father and in collusion with the Revenue Officer, illegally recorded names of Dulhanbee and Sardar Ali in Revenue record against the suit property. It is further contended that on the basis of mutation entry, defendants have not acquired any right or title in the suit property. It is further alleged that on 31st July, 2006, defendants have forcibly dispossessed plaintiffs from the suit property. On these averments, the suit was filed.

4. Defendants filed their written statement, denying the contentions of the plaintiffs. However, the relationship between the parties is not disputed. It is specifically contended that plaintiffs are neither owners nor in possession of the suit property. Alternatively, it is claimed that defendants are in the possession of the suit property and by adverse possession, they have perfected their title.

5. Before learned Trial Court, parties led evidence and by passing judgment and decree dated 26th August, 2015, Regular Civil Suit No. 121 of 2008 was dismissed. Since, the plaintiffs have filed suit for declaration and restoration of possession, the initial burden was on the plaintiffs to prove their title in respect of suit property. There is no dispute about the fact that no document of title was produced by the plaintiffs before the trial Court. The plaintiffs have only relied upon the previous proceedings between the parties. Though it is claimed by plaintiff that the original sale deed is destroyed in the fire as during agitations Sub-Registrar and Revenue office was burnt, but no evidence is produced to prove this fact.
6. Learned counsel for the appellants submits that the Trial Court has committed an error in not considering the written statement filed by the defendants, wherein, the previous proceedings were admitted, on the basis of which suit of plaintiff ought to have been decreed. It is also contended that since the defendants have claimed title by way of adverse possession, they have admitted plaintiffs' title or ownership over the suit property.
7. This is Second Appeal and the appellants need to show that both

Courts below have failed to consider any evidence available on record and have wrongly considered the material placed before them. There is a finding recorded by the learned Trial Court that the documents which were sought to be produced on record i.e. exhibit 50, 51 and 69 were not concerned with the suit property. Similarly, perusal of the written statement and in particular paragraph no. 7 of the written statement gives no unequivocal admission by the defendants in respect of the case of the plaintiffs right, title or interest over of the suit property. On the contrary, it is specifically pleaded therein that the previous disputes were never included the suit property.

8. The learned Trial Court, therefore, has rightly appreciated the said documentary evidence on record and finding is drawn against plaintiffs. As far as the contention of the plaintiffs about they being dispossessed in the year 2006 is concerned, the same has been declined by the learned Trial Court after considering the documentary evidence filed on record. There is specific finding recorded by the Trial Court that there is no evidence to show that the plaintiffs were in possession of the suit property.
9. Merely because the defendants have alternatively claimed the

adverse possession over the suit property, the plaintiffs have not been dispensed with from proving their case for the title in suit property before the Trial Court. It is pertinent to note that Trial Court has not accepted the said contention of defendants for the reason that in written statement the ownership of plaintiff over suit property is specifically denied.

10. Plaintiffs have neither produced title document i.e. sale deed nor led evidence to show that the sale deed is destroyed in the fire at Sub-Registrar Office. No attempt is made to lead secondary evidence to prove existence of sale deed. The plaintiffs thus, have failed to substantiate his case of title and ownership as well as possession over the suit property.
11. It is settled law that in order to exercise jurisdiction under Section 100 of the Code of Civil Procedure, there must involve substantial question of law which includes even non consideration or wrong consideration of material evidence on record. Concurrent findings recorded by both Courts below, do not show any perversity. Learned Trial Court as well as first appellate Court have appreciated evidence on record in proper

perspective and elaborate findings are recorded holding that the plaintiffs have failed to prove their right, title and possession over the suit property. In considered view of this Court, this case does not involve any substantial question of law.

12. In the result, this Second Appeal is dismissed. No order as to costs.

13. All pending Civil Applications stand disposed of.

[R.M. JOSHI, J.]

SPChauhan