



49-2023

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

APPEAL AGAINST ORDER NO. 49 OF 2023

(Vijaykumar s/o Sardarilal Soni Vs. Ajaykumar s/o Sardarilal Soni & Anr.)

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, Counsel for the appellant.

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CORAM : ANIL L. PANSARE, J.
APRIL 4, 2024.

Heard.

2] The appellant/original plaintiff filed a suit for declaration and permanent injunction. He sought a declaration that the will, executed by his father, is genuine. He further claimed to be in possession of the suit property. The trial Court, pending suit, granted temporary injunction. However, on merits, while dealing with the issue of possession, the trial Court found that the appellant failed to prove his possession over the suit property. The trial Court also found that the Will has been not proved. Accordingly, dismissed the suit.

3] The appellant carried the matter before the First Appellate Court in Regular Civil Appeal No. 84/2023. The appellant filed application under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, praying protection to his possession. The First Appellate Court has assigned following reasons for rejecting the application :

“9] I would like to note that the learned trial Court specifically framed the issue “whether the plaintiff proves that he is in peaceful possession of the suit property” and on appreciation of evidence the learned trial Court has held that the plaintiff could not prove his possession over the suit property and accordingly said issue has been answered in the negative.

10] When there is specific findings of the learned trial Court that the plaintiff is not in possession of the suit property it is not proper for this Court only on the basis of the documents now attached to the appeal memo to hold that the plaintiff is in possession of the suit property.

11) These documents can be appreciated while hearing on appeal in view of Order XLI, Rule 27 of the Code of Civil Procedure.

12] At this stage one fact is clear through the findings of the learned trial Court that the appellant is not in possession of the suit property then there is no prima facie case in his favour. If the injunction is not granted as sought for by him no irreparable loss will be caused to him and being so no balance of convenience tilts in his favour.”

4] Thus, there is a categorical finding that the appellant failed to prove that he was in peaceful possession of the suit property.

5] The appellant intends to rely upon certain documents to substantiate his claim of possession, the documents, however, were not part of the record before the trial Court. The First Appellate Court has, therefore, rightly held that these documents cannot be relied upon unless permission under Order 41 Rule 27 is obtained.

6] The learned Counsel for the appellant further failed to point out, from the evidence recorded before the trial Court, that the finding as regards

plaintiff's failure to prove that he was in peaceful possession, is perverse.

7] In view thereof, I do not find any error having been committed by the First Appellate Court in rejecting the application Exh.6.

8] The appeal is accordingly dismissed.

(ANIL L. PANSARE, J.)

Sumit