

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.378 OF 2014
WITH
CIVIL APPLICATION NO.886 OF 2014**

Dhansukh Haridas Nanda

.... Appellant
(Ori. Defendant)

Vs.

Mr. Gopalji Dungarshi Bhanushali

.... Respondent
(Ori. Plaintiff)

Mr. R.S. Apte, Senior Counsel i/by Mr. Ashutosh R. Gole, Advocate for the appellant.

Ms. Gauri Godse alongwith Mr. Rohit Joshi, Advocate for the Respondent.

Coram : Smt. R.P. SondurBaldota, J.

Date : 28th April, 2015.

PC :

1 This Second Appeal challenges the concurrent findings of facts by the courts below. The challenge is on the ground that the findings of the courts below are perverse, in as much as, the same are arrived at by ignoring the substantial documentary evidence produced by the appellant of his possession of the suit property i.e. the portion

admeasuring 3532.13 sq. mtrs. of Survey No.69/1/A. It is also the contention of the appellant that the courts below erred in shifting the burden of proving possession of the suit property on the appellant, who was the defendant to the suit filed by the respondent.

2 Briefly stated the facts leading to the present appeal are as follows:

By the Indenture of conveyance deed dtd. 17th July,1985, the respondent purchased the property at Survey No. 69/1/A from the erstwhile owners Girish Shamji Gala, Rashmi Popat and Ramprasad Trivedi. On purchase of the property, the name of the respondent was entered into the record of rights vide Mutation Entry No.985. At the instance of the appellant, by the unregistered agreement of lease of July, 1985, the respondent agreed to lease out the portion, admeasuring 5526 sq. mtrs. as described in paragraph 3 of the plaint and de-alienated in the map annexed to the plaint to him for a period of 15 years for the purpose of setting up a petrol pump. Since the relations between the parties were cordial, according to the respondent, it was agreed that the appellant shall pay the property taxes in respect of the property. After execution of the lease deed, the appellant carried out construction of the petrol pump on the portion of the land leased to him and started running the same. The petrol pump was closed down in June, 2006. The appellant however did not surrender vacant possession of the demised land. The respondent alleged that in September, 2007, the appellant tried to force his entry

into the remaining portion of the property i.e. the suit property. When the caretaker of the respondent informed him about the attempt of trespass, he made a complaint to Digbar police Station. But the police refused to take any action on the ground that the dispute was of civil nature. Therefore, the respondent filed Regular Civil Suit No.40 of 2008 for perpetual injunction to restrain the appellant from encroaching upon the suit property.

3 The appellant did not dispute the deed of conveyance in favour of the respondent and the lease deed in his own favour. He however claimed to be entitled to the entire property and also of being in possession of the entire property. According to the appellant, he had identified the entire land for purchase from the original owners, as under the Letter of Intent dtd.8th May, 1985 from Indian Oil Corporation for proposed retail outlet dealership at Shilphata, he was required to procure suitable plot of land either on ownership or on lease for a period of 15 years with further option of renewal for a minimum period of 5 years, within four months from the receipt of the letter. Since the land was under Green zone, only a farmer could purchase it. The respondent is a farmer and at the relevant time, was a good friend of the appellant. Father of the appellant was also a farmer. However, he was at Bhuj in the State of Gujarat and it was impossible for him to remain present at the time of conveyance. Therefore, it was mutually agreed that the property would be purchased in the name of the respondent and after obtaining

permission for its non-agricultural use, it would be conveyed to the appellant. He claims to have provided financial assistance to the respondent for purchase of the suit property and provided diesel to the vehicles of the respondent, the price of which was to be adjusted towards the sale consideration.

4 The appellant claimed that on 14th January, 1986, he got plans for the petrol pump sanctioned from Thane Municipal Corporation and set up petrol pump, storage tanks and sales office on the property. He also constructed four additional rooms behind the sales office. He constructed boundary wall around the entire property, constructed the water drainage, filled-up the land and asphalted the same. He put electric poles around the property, dug borewell, installed submersible water pump and planted trees. This development was allegedly carried out by the appellant outside the demised property. It was his further claim that he has been paying electricity charges for the borewell, rooms and the electric poles on the suit property. The appellant claimed to have received notice from the Tahsildar for non-agricultural use of the entire property and paid penalty of Rs.3274/- therefor.

5 The appellant also alleges forcible action at the hands of the respondent. He has however not initiated any proceedings against the respondent. He claims that, on getting permission for non-agricultural use the respondent was to convey the entire property to

him. The appellant paid the entire consideration for the land by supplying diesel to the vehicles of the respondent. But when in the month of March, 2007 he asked to the respondent to settle the accounts, the respondent got annoyed and tried to take forcible possession of the petrol pump. On 25th May, 2007 the Constituted Attorney of the respondent tried to remove articles from the petrol pump and the sales office. Therefore, the appellant lodged police complaint against her. Later, at the request of the husband of the Constituted Attorney, the appellant withdrew the complaint.

6 The respondent examined three witnesses in support of his case. They were his Constituted Attorney, P.W.1, Shivaji Thorat (P.W.2) and Ashok Joshi (P.W.3). The appellant examined himself (D.W.1), Suresh Nanda (D.W.2), Zakaria Ismail Sumra (D.W.3), Rajesh Yadav, (D.W.4) and Gopinath Gandhe (D.W.5). He produced documents of electricity bills, municipal tax bills, water bills etc.

7 Considering the limited scope of the suit, the only issue needed to be decided by the courts below was of possession of the suit property. Since the respondent is admittedly the owner of the suit property which is an open piece of land, he would be deemed to be in possession thereof until the appellant established his possession by some overt acts. Therefore the burden of proving the fact of possession was clearly upon the appellant.

8 The overt acts alleged by the appellant are of construction of four rooms, compound wall, installation of electric poles, and borewell with pump. He tried to establish his possession over the entire property through the evidence of D.W.3 and D.W.4 who claimed to be in possession of the four rooms situate on the suit land. The Courts below have disbelieved the claim in respect of the rooms in view of inspection reports of Thane Municipal Corporation. The Inspection Report records the respondent as the owner of the structure. The electricity bills, municipal tax bills, water bills and revenue tax bills produced by the appellant show that the same are in respect of the leased property. The compound wall constructed is also limited to the demised land. On the basis of such evidence, the Courts below have held that possession of the suit property is with the respondent and not with the appellant. There is nothing perverse about this finding, the same being completely supported by the evidence on record. The appeal is therefore dismissed.

9 With the dismissal of the appeal, Civil Application No. 886 of 2014 does not survive. The same is accordingly disposed off.

10 The learned Advocate appearing for the appellant requests for continuation of the ad-interim order dated 30th June, 2014 for a reasonable period to enable the appellant to challenge the order in the higher forum. The ad-interim order is extended for a period of 12 weeks from today i.e. till 21st July, 2015.

(Smt. R.P. SondurBaldota, J.)