

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 115 OF 2014

Abhiman Narayan Chendge ..Appellant

Vs

Manik Namdeo Aware .. Respondent

Mr. Samir A. Kumbhakoni, Advocate for Appellant.

CORAM : R.G.KETKAR,J.

DATE : 15/04/2015

PC:

1. Heard Mr. Samir Kumbhakoni, learned counsel for the appellant at length.
2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908, original defendant no.1 has challenged the Judgment and decree dated 4.9.2009 passed by the learned Civil Judge, Jr. Dn., Mohol in Regular Civil Suit No.189 of 2001 as also the Judgment and decree dated 31.7.2013 passed by the learned District Judge-1, Solapur in Civil appeal No.238 of 2009. By these orders, the Courts below partly decreed the suit instituted by the respondent, hereinafter referred to as 'plaintiff' and restrained the appellant, hereinafter referred to as 'defendant no.1', from obstructing the peaceful possession of the plaintiff in an open area admeasuring 66' x 15', as more particularly described in the Plaint without following due

process of law.

3. In support of this Appeal, Mr.Kumbhakoni submitted that the plaintiff instituted suit for declaration of ownership as also for perpetual injunction restraining the defendants from obstructing his peaceful possession over the suit property. The learned trial Judge partly decreed the suit. The learned trial Judge held that the plaintiff did not establish his title. He, however, came to the conclusion that the plaintiff is in possession of the suit property. Aggrieved by that decision defendant no.1 preferred appeal. The plaintiff did not challenge refusal of declaration of his ownership. The learned District Judge dismissed the Appeal. He submitted that in fact the Courts below committed serious error in holding that the plaintiff is in possession of the suit property. He invited my attention to cross examination of the plaintiff and submitted that the plaintiff clearly admitted that he is not in possession of the suit property. Perusal of the cross examination of the plaintiff shows that the plaintiff deposed that except documents produced on record, he has no other documentary evidence to prove that the suit property is owned by him and that he is in possession. It, however, does not mean that the plaintiff admitted that he is not in possession of the suit property. The learned trial Judge has considered this aspect in

paragraph 19 of the Judgment. The learned trial Judge also considered the Court Commissioner's report along with hand sketch map placed at Exh. 22 The learned trial Judge also noted that defendant no.1 was present at the time of commission. The Power of Attorney Holder of defendant no.1 admitted in the cross examination that the Court commissioner has prepared report as per the factual position. Defendant no.1 also did not challenge the commission report.

4. The Trial Court, after considering the material on record, held that the plaintiff is in possession and partly decreed the suit restraining defendant no.1 from obstructing peaceful possession of the plaintiff without following due process of law.

5. Learned District Judge has considered question of possession in paragraph 17. The learned District Judge noted that there is oath against oath of both parties and except bare oral evidence there is no evidence showing which party is in actual possession. In such a situation, report and map of the Court Commissioner (Ex.22) is material. After considering the report of the Court Commissioner, the learned District Judge concurred with the view of the trial Court. The learned District Judge also recorded that defendant no.1 also did not adduce any plausible evidence to prove the possession since

1986.

6. After considering the material on record, the only question that arises in this Second Appeal is as to whether the plaintiff is in possession of the suit property. In my opinion, the Courts below, after appreciating the evidence on record, have concurrently held that the plaintiff is in possession. The said finding is finding of fact arrived at after appreciating the evidence on record. No question of law, much less substantial question of law, arises in this appeal. Hence, Second Appeal is dismissed.

(R.G.KETKAR, J.)