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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1771 OF 2011

IN

SUIT NO.187 OF 2010

WITH

NOTICE OF MOTION NO.239 OF 2013

IN

SUIT NO.187 OF 2010

Jagjit Estates And Development Co. Pvt. Ltd. ...Plaintiff

vs

Runawal Developers Pvt. Ltd. And Anr. ...Defendants.

.....

Mr. Sanjay Jain, a/w. Ms. Kainazz Munjee, i/b. S. Mahomedbhai & Co., for
thhe Plaintiff.

Mr. Zal Andhayarujina, a/w. Ms. Ankita Singhanian, i/b. Kanga & Co., for
the Defendants.

....

CORAM : S.C. GUPTE, J.

DATED : NOVEMBER, 17, 2015

P.C. :

. These are two notices of motion taken out in the present suit, which is a suit for declaration of title by adverse possession and a permanent injunction on the basis of such title. Notice of Motion No.1771 of 2011 seeks a temporary injunction against the Defendants restraining them from obstructing the Plaintiff's peaceful use and occupation of the suit property or development of the suit property by the Plaintiff. The second notice of motion, namely, Notice of Motion No.239 of 2013, seeks a decree on admission under Order XII, Rule 6 of the Code of Civil Procedure in

terms of prayer clauses (a) and (b) of the plaint.

2. The suit property consists of a piece and parcel of a land admeasuring 1395.39 sq. meters or thereabout. The suit property is a part of a larger plot of land bearing Survey No.41, CTS No.620 (part) of village Oshiwara, Taluka Andheri in the Registration District and Sub district of Mumbai City and Mumbai Suburban. By and under an agreement of development dated 9 December 1985, executed by one Jagdish Kaur Chugh and Others (described as owners) and the Plaintiff (described as developer), the Plaintiff agreed to develop and purchase through their nominees after such development immovable property admeasuring about 2335.93 sq. meters or thereabouts forming part and parcel of a larger plot of land bearing Survey No.41, CTS No.620 (part) of village Oshiwara Andheri in the Mumbai Suburban District. The Plaintiff claims to have been put in possession of this property by the owners on 6 January 1992. It is the Plaintiff's case that, at the same time, the Plaintiff also entered the suit property and has since been in exclusive use and possession of the suit property, which is adjacent to the property agreed to be developed by the Plaintiff under the agreement of development referred to above. It is the Plaintiff's case that this possession of the Plaintiff has been open, continuous and uninterrupted and to the knowledge of the Defendants. Accordingly, on and from 5 January 2004, the Plaintiff claims to have become owner of the suit property, having acquired title by adverse possession. The Plaintiff, accordingly, seeks a declaration of its ownership of the suit property by adverse possession and, on that basis, seeks a permanent injunction against the Defendants restraining them from interfering with or obstructing the Plaintiff's use and occupation as well as development of the suit property.

3. Notice of Motion No.1771 of 2011 is taken out, as noted above, for a temporary injunction in terms of the permanent injunction sought in the present suit. Notice of Motion No.249 of 2010, on the other hand, seeks a decree on admission on the ground that the Defendants having first submitted a plan and proposal to the Municipal Corporation of Greater Mumbai in the year 2009 for development of the suit property, claiming possession/development rights over the same and thereafter, i.e. subsequent to the Plaintiff filing the present suit, having amended the sanctioned plan for the proposed building on the larger property on the basis that the suit property forms part of the same, there is an admission on the part of the Defendants that the suit property belongs to the Plaintiff.

4. The suit property, as noted above, forms part of a larger property, which admeasures about 22350 sq. yards, bearing Survey No.41, CTS 620 (part), Block L of village Oshiwara, Taluka Andheri (Mumbai) (the larger property). The plan of this larger property, which is annexed as **Exhibit-"B"** to this plaint, shows the entire CTS No. 620 (part). The plan shows a strip of land on the west of this property depicted partly in green and partly in yellow. This plot, according to the Plaintiff, forms a separate piece or parcel of land admeasuring 2335.93 sq. meters, which is conveyed by the Plaintiff's predecessor-in-title to the Plaintiff. The Plaintiff claims ownership rights in respect of this particular land(hereinafter for short referred to as "the Plaintiff's property"). The yellow portion of this plot is the portion of the Plaintiff's property, which is below a nalla running through CTS No.620 (part). The nalla running through this plot is otherwise depicted in blue colour. The area of the plot between the Plaintiff's property and the nalla is depicted in brown colour. This area admeasures 1395.39 sq. meters and is the suit property forming part of the

present dispute. The rest of the property, which is depicted in white on the plan, is admittedly the Defendants' property. This property is said to admeasure about 17690.82 sq. meters. The entire of the larger property itself originally formed part of a still larger property of about 723 Acres owned by Byramjee Jeejeebhoy Pvt. Ltd, which was agreed to be sold by Byramjee Jeejeebhoy to the partnership firm of New Swastik and New Swastik Lands Development Corporation. By an indenture of conveyance dated 8 September 1967, between Byramjee Jeejeebhoy (as the vendor), New Swastik Lands (as a confirming party) and Seth Nanji Sojpal and three others (as purchasers), the larger property, i.e. CTS No.620 (part) admeasuring 22350 sq. yds. was sold and conveyed unto Seth Nanji Sojpal and 3 others. It appears that Seth Nanji Sojpal subsequently transferred and assigned $\frac{1}{2}$ of the $\frac{1}{4}$ th undivided share of Seth Nanji Sojpal in favour of one Jagdish Kaur, who is the predecessor-in-title of the Plaintiff. The Defendants, on the other hand, claimed title to the balance property forming part of the larger property, i.e. CTS No.620 (part), through a conveyance dated 8 April 2009 from the successors-in-interest of Seth Nanji Sojpal and 3 others, the owners of the larger property, in respect of an area admeasuring 17690.20 sq. meters. The Defendants also claim to have become entitled to a portion of their property admeasuring about 3687 sq. meters under a consent decree between the Defendants on the one hand and the legal representatives and successors-in-interest of Seth Nanji Sojpal and the 3 other owners. It is the Defendants' case (and it is not seriously contested by the Plaintiff) that the suit property forms part of the property conveyed to the Defendants under these two documents, namely, the conveyance of 8 April 2009 and the consent decree of 23 March 2009.

5. On these facts, it is the case of the Plaintiff that, when the

Plaintiff was put in possession of the property admeasuring 2335.93 sq. meters by its predecessor-in-title, namely, the said Jagdish Kaur, the Plaintiff claims to have assumed possession not only of that property, but also the suit property, which is adjacent to it but which has access through the former property. It is the Plaintiff's case that this possession has been continuous and uninterrupted as well as hostile to, and to the knowledge of, all the Defendants. It is this case of the Plaintiff, which needs to be dealt with *prima facie* in the present Notice of Motion.

6. In the first place, it is doubtful whether a suit simplicitor for a declaration of ownership by adverse possession is maintainable. The Supreme Court in the case of **Gurudwara Sahib vs. Gram Panchayat Village Sirthala**¹ held that even if the plaintiff is found to be in adverse possession, he cannot seek a declaration to the effect that such adverse possession has matured into ownership and that only if proceedings are filed against the plaintiff, who claims to be in adverse possession, and he is arraigned as a defendant he can use his adverse possession as a shield/defence. Learned Counsel for the Plaintiff points out that there are several judgments, including prior judgments of the Supreme Court, which have taken a contrary view and that the decision of the Supreme Court in **Gurudwara Sahib's** case is *per incurium*. Since we are only at an interim stage, we need not decide this issue finally. Suffice it to say that there is a clearly arguable case supported by a Supreme Court judgment on the part of the Defendants that a suit simplicitor by declaration of title by adverse possession is not maintainable and no interim relief can be claimed in such suit simply on the basis of such title.

¹ (2014) 1 SCC 669

7. The Plaintiff alternatively claims that in the face of its rights, the Plaintiff has also applied for a permanent injunction restraining the Defendants from interfering with the Plaintiff's possession. The plaint in the present suit indicates that there is no apprehension voiced by the Plaintiff of interference by the Defendants with the Plaintiff's possession or occupation of the suit property. In fact, the relief of permanent injunction claimed by the Plaintiff is simply on the footing that the Plaintiff being in settled use and occupation uninterruptedly of the suit property claiming it adversely to the Defendants, the Plaintiff is entitled to a declaration of ownership by adverse possession and that, in the premises, the Defendants cannot claim any right to the suit property or any part thereof and are liable to be restrained by a permanent injunction from in any manner directly or indirectly interfering with the Plaintiff's use and occupation of the suit property. Even as regards the Plaintiff's case of the Defendants having filed a plan or proposal for developing the suit property, it is the Plaintiff's own stand now that the Defendants have given up such proposal. The Plaintiff in fact seeks a decree on admission against the Defendants on that basis. In other words, there is neither apprehension on the part of the Plaintiff that the Defendants are, in any way, interfering with the Plaintiff's so called peaceful possession of the suit property or are, in any way, proposing to develop the suit property. If that is so, the Plaintiff cannot be said to have a *prima facie* case for grant of any injunctive reliefs against the Defendants on the basis of the Defendants' attempt to interfere with the Plaintiff's rights.

8. That the Plaintiff does not apprehend any such attempt on the part of the Defendants is fortified by the fact that, despite filing the suit in the year 2011, the Plaintiff has not taken any steps so far to obtain ad-

interim relief in the matter.

9. Even on the merits of the case, namely, the assertion that the Plaintiff has been in uninterrupted and continuous possession of the suit property, which is openly hostile to the Defendants, the Plaintiff has no *prima facie* case. The Plaintiff has come to the Court on the basis of a development agreement. This development agreement is of 9 December 1985. The development agreement shows that, on the basis of this development agreement, the Plaintiff simply had the licence to enter upon the property, namely, 2395 sq. meters, which was to be developed by it. It is not very certain if the Plaintiff was put in possession of 2335.93 sq. meters at any particular time, by its predecessor-in-title. But even if it were to be assumed that it was so put in possession, there is nothing to indicate that the Plaintiff's possession of the suit property, which is claimed to be adjacent to this piece or parcel of land admeasuring 2335.93 sq. meters, was actually an open, uninterrupted and exclusive possession of the Plaintiff, which possession was notorious and hostile to the true owners, for a period exceeding 12 years. The legal position in this behalf is too well settled and is noted by the Supreme Court in the case of **L.N. Aswathama vs. P. Prakash**² :

17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without *animus possidendi*. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the

² (2009) 13 SCC 229

former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence..(Vide P. Periasami v. P. Periathambi³, Md. Mohammad Ali v. Jagdish Kalita⁴ and P.T. Munichikkanna Reddy v. Revamma⁵.)

The crucial fact, which the plaintiff has to establish in all cases of adverse possession, is that the possession was with *animus possidendi*, that is to say, a conscious endeavour on the part of the Plaintiff to assert possession of the property to the knowledge of the true owner as hostile to the latter. The very agreement, on which the Plaintiff bases his case of possession of the suit property along with the possession of 2335.93 sq. meters, shows that what was agreed to be developed by the Plaintiff under this agreement, was 1/8th share of the larger land, bearing Survey No.41 CTS No.620 (part), admeasuring 18687 sq. meters or thereabouts. The agreement itself says that this 1/8th share in the property, which belonged to the owner, was not presently ascertained; that a good amount of this share had gone in the nalla; and that the owners shall ensure that their 1/8th share would be ascertained and properly located. In other words, the very document, on which the Plaintiff relies, shows that the land admeasuring 2335.93 sq. meters, agreed to be developed by the Plaintiff under this agreement, was by no means clearly identified or ascertained. If that is so, the plaintiff's so called possession of the land admeasuring 2335.93 sq. mtrs. itself appears to be of an unascertained and unidentified area. If ever, whilst assuming the possession of that area, the plaintiff came in possession of other adjacent land which formed part of the suit property, such possession can only be described as tentative and pending ascertainment and identification of the plaintiff's property and not possession with any deliberate intent to

3 (1995) 6 SCC 523

4 (2004) 1 SCC 271

5 (2007) 6 SCC 59

assert a hostile possession to the knowledge of the true owners of the suit property. The agreement, thus, undermines the very basis of the Plaintiff's claim that the Plaintiff was in hostile possession of the suit property to the knowledge of the true owner of the property and with an animus to assert such hostile possession.

10. The circumstances and documents relied upon by the Plaintiff in support of his case of such adverse possession also do not take the Plaintiff's case any further. There are four circumstances referred to by the Plaintiff in support of his case for adverse possession. The first circumstance is that the suit property has access only through the Plaintiff's property of 2335.93 sq. meters. This is neither here nor there. The suit property clearly has access from the road and, in any event, the fact that the land or has access only from the plaintiff's property, does not show that it is actually in an open, uninterrupted and continuous possession of the Plaintiff, which is hostile to the true owner. The second circumstance relied upon by the Plaintiff is his having constructed a wall. Again this circumstance is not, in any way, determinative of Plaintiff's adverse possession of the suit property. The fact of the matter is that the entire larger property was owned jointly by the predecessors-in-title of both the Plaintiff as well as the Defendants; and that the document relied upon by the Plaintiff, as noted above, itself indicates that 2335.93 sq. meters, agreed to be developed by the Plaintiff, was not clearly identified and ascertained. Considering the fact that the agreement requires the Plaintiff, as developer, to work towards putting a fencing or compound wall to the property admeasuring 2335.93 sq. meters, at its own costs and expenses coupled with the fact that this property was not clearly identified and ascertained, if the Plaintiff has constructed a wall through the entire length of not only

2335.93 sq. meters but also the further adjacent portion forming part of the suit property, that is not *per se* determinative of the Plaintiff having asserted a hostile possession to the knowledge of the true owners and with an animus to so assert his possession. The third circumstance relied upon by the Plaintiff is its having engaged security services for protection of the property. The fact that the Plaintiff, as a developer of the property, engaged security does not show that the security was engaged merely to protect his possession of the disputed property, namely, the suit property. The Plaintiff was clearly engaged to develop 2335.93 sq. meters of the property, which was unascertained and unidentified, and towards protecting his interest in the property if he employs security, *prima facie* such security is engaged for protection of 2335.93 sq. meters and certainly not the suit property, which is adjacent to it. Ditto for the Plaintiff holding electricity bills. There is nothing in the bills to indicate that these bills were in respect of the use of the electricity made by the Plaintiff in the suit property. Even if the electricity bills were to so indicate, in the facts noted above, that is not determinative of the Plaintiff's hostile, notorious or adverse possession.

11. On the other hand, the documents relied upon by the Defendants indicate that, as far back as in 1997-1998, the larger property, namely, CTS No.620 (part), was itself not correctly measured and plotted at site. There is an order of the City Civil Court, Bombay, dated 25 June 1998, passed in the suit filed by the Defendants' predecessor-in-title, which shows that the entire location and boundary of CTS No.620(part), was not fully ascertained till the City Civil Court ordered the City Survey Authorities to fix the boundaries by carrying out the survey. This survey was carried out sometime in 1998 and, thereafter, there was some certainty, at least at the

prima facie stage, as noted by the City Civil Court, about the identity of the property and its boundaries. This shows two things: (i) the exact boundaries and area of CTS No.620 (part) were not ascertained till 1998, (ii) in the survey exercise carried out by the survey authorities, there is neither a mention of any claim by the Plaintiff to the possession of the suit property, which forms part of CTS No.620 (part) or of any contention taken either by the Plaintiff or its predecessor-in-title, the said Jagdish Kaur, in respect of the possession of the suit property.

12. In sum, there is no *prima facie* case of the Plaintiff having asserted at any time open, adverse and hostile title to, a possession of, the suit property to the knowledge of the true owners, namely, the Defendants.

13. As already noted above, there is no case of the Defendants having invaded or threatened to invade any right of the Plaintiff either to possess or to occupy the property.

14. In the premises, the Plaintiff has not made out any case for grant of interim reliefs. The Notice of Motion is, accordingly, dismissed. There shall be no order as to costs.

15. The second Motion, namely, Notice of Motion No.239 of 2013, for a decree on admission, is devoid of any merit. The fact that the Defendants having earlier proposed development of the suit property, subsequently gave up such proposal, does not amount to any admission on the part of the Defendants either that they are not the owners or in possession of the suit property, or that the Plaintiff is in possession of the

same. That Motion is also, accordingly, dismissed. There shall be no order as to costs.

(S.C. GUPTE, J.)