

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

911 SECOND APPEAL NO. 219 OF 2016
WITH CA/14961/2015 IN SA/219/2016

THE MUNICIPAL COUNCIL UDGIR THRO. ITS
PRESIDENT,UDGIRAND ANOTHER
VERSUS
CHANDRAPAL PARBATRAO PATIL AND OTHERS

...
Advocate for Appellants : P.M. Shah, Sr. Counsel i/b. Barde P.V.
Advocate for Respondents 1, 3 & 4 : R.F. Totla
Advocate for Respondents 2A to 2E : Ram S. Shinde
...

CORAM : T.V. NALAWADE, J.
DATED : 27th July, 2016.

ORDER :

1. The appeal is filed by defendant of Regular Civil Suit No. 304/1982, which was pending in the Court of Civil Judge, Junior Division, Udgir, District Latur. The suit was filed by present respondents, original plaintiffs for relief of possession of encroached portion and the suit was dismissed by the Trial Court. The First Appellate Court, District Judge, Udgir has set aside the decision of Trial Court in Regular Civil Appeal No. 195/2001 (Old No. 122/1999) and the decree of possession is given in favour of plaintiffs. Both the sides are heard.

2. The suit was filed in respect of open space which is given revenue Survey No. 296/2, admeasuring 37 Gunta and situated at Udgir. In the suit, boundaries of this portion are

given. During pendency of suit, the initial number shown in the plaint was changed and the boundaries were also amended by the plaintiffs. As the suit is filed in respect of entire portion of Survey No. 296/2 (which is also described as 296/B), there is no need to mention and discuss the boundaries.

3. It is the case of plaintiffs that the suit property was purchased by them under registered sale deed in the year 1969 from its owners Madhukar Patil and Vasant Patil. It is contended that the possession of the property which was open space was given to the plaintiffs by the vendors on the date of the sale deed.

4. It is the case of plaintiffs that the cause of action took place for the suit on 30.12.1982. When the employees of defendant Local Body, from Municipal Council started digging foundation in the suit property for making construction of commercial complex. It is contended that plaintiffs had taken objection to the act of council, but no heed was paid and the construction was continued. It is contended that the activity was noticed on 30.12.1982 and so, the suit was filed immediately, on 31.12.1982. During the pendency of suit, the construction of the complex was completed and so, amendment was made in the plaint and in prayer clause, in place of initial relief of injunction,

the relief of possession was claimed.

5. The defendant Local Body contested the suit by filing written statement. The Local Body contended that the plaintiffs are not owners of the property which is covered by the commercial complex of the defendant. It denied that plaintiffs were ever in possession. The defendant admitted that the disputed space is adjacent to the post office as described by the plaintiffs, but it denied correctness of the other boundaries given in the plaint. The defendant contended that from the description given in the plaint, the property cannot be identified and on that ground, the suit is not tenable.

6. The defendant contended that the vendors of plaintiffs were not owners of the disputed property. It is contended that in collusion with the revenue authorities, false record is created by the plaintiffs of giving survey number mentioned in the suit. The defendant admitted that on the date mentioned by plaintiffs, there was activity of digging foundation and by amendment, it admitted that construction was completed.

7. It is the case of defendant that it has been in possession of the disputed property for more than 70 years. It

contended that during this period construction of one bridge was made on this property and construction of some latrines was also made. It is also contended that construction of one canal is made for passing of drain water by the Local Body and this way, it has been in possession. It is contended that as it is adverse possession, due to continuous possession of Local Body for about 70 years, owners have lost their right in the property.

8. Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Trial Court held that the vendors of plaintiffs were owners of the property described in the plaint and also shown in the sale deed and the title had passed in favour of plaintiffs. The Trial Court had further held that the space over which the construction of shopping complex was made by the defendant is part of Survey No. 296/B (296/2) which was purchased by plaintiffs. However, the Trial Court held that on the date of the suit, plaintiffs were not in possession. The Trial Court had held that there was cause of action for suit, but the boundaries are not correctly described in the plaint and the property cannot be identified from the description of the property given in the plaint. The Trial Court had, however, held that the Local Body failed to prove its ownership due to adverse possession.

9. From the reasoning given by the Trial Court, it can be said that due to finding that the suit property is not correctly described in plaint and the description is not sufficient to identify the suit property, the suit was dismissed by the Trial Court. The District Court has held that the property is part of Survey No. 296/2 and there is evidence of Cadastral Surveyor and map prepared by him and this record is sufficient to identify the property of plaintiffs. It was submitted by the learned Senior Counsel for appellants that the District Judge has referred reasoning given by the Trial Court in the past in a judgment which is set aside and this single circumstance is sufficient to set aside the decision given by the District Judge. This submission is not acceptable as the findings and the decision of the appeal is not based only on the judgment which is set aside and the material is independently considered and appreciated by the District Court. The District Court has observed that only on some portion there is encroachment and only in respect of that portion shown in the map at Exh. 123 prepared by the Cadastral Surveyor decree of possession is given. Due to this decree, the Municipal Council will be losing some portion of the commercial complex constructed by it.

10. The learned Senior Counsel for the appellant submitted that the Trial Court had correctly dismissed the suit as

plaintiffs were not certain about the description of the property and they had committed mistake not only in giving correct number, but also in giving correct boundaries of the property. He submitted that due to this confusion even sale deed was got corrected by plaintiffs from original vendors, but after correction of the sale deed, the property mentioned in the corrected sale deed was not mentioned in the suit and on this ground also, the suit is liable to be dismissed.

11. The learned Senior Counsel submitted that the District Court has not considered from close quarters the material discussed by the Trial Court and the reasoning given by the Trial Court by which suit was dismissed and so, the decision of the District Court needs to be set aside. It was submitted that necessary points were also not formulated and so, the substantial questions of law can be formulated for admission of the appeal on aforesaid points.

12. The nature of pleadings and the material which is considered by the Courts below show that the Trial Court had reached to the conclusion that Survey No. 296/2 (296/B) is purchased by plaintiffs. The Trial Court had further held that the defendant had failed to prove that it has become owner due to adverse possession. As some property was acquired from Survey

No. 296 in the past from the same vendors and on the acquired property, there are offices and structures of Government like post office, civil hospital etc., this Court had made some orders and had given opportunity to the appellant, Local Body to produce that record. This Court had expressed that the possibility that the portion on which construction is made was also acquired can be considered on the basis of that record. Two times matter was adjourned for giving opportunity to produce the relevant record, but the record was not produced. As only because it is Local Body and it is noticed by the Courts that Local Bodies are not properly represented and there is no record with the appellant, defendant that Survey No. 296/2 was belonging to Government or the Local Body, this opportunity was given. The Local Body could have produced the record to show that the disputed property is not part and parcel of Survey No. 296/2, but no such record is available and on the other hand, there is the record and evidence of Cadastral Surveyor in support of case of plaintiffs.

13. Digamber, one of the plaintiffs has given evidence which is as per the pleadings in the plaint. He has given evidence that Survey No. 296 was owned by the vendors of plaintiffs and after acquisition of some portion for post office, Government Hospital etc. some portion was left with vendors

from Survey No. 296 and from that portion, property admeasuring 37 Gunta was sold by the vendors to plaintiffs in the year 1969. He has given evidence that the sale deed was corrected in the year 1984 as in the sale deed property was described as 269/B/3, but there is no revenue record to show that property was bearing No. 296/B/3 and so the property which was remaining with the vendors was Survey No. 296/B. The correction is made to mention the property sold as 296/B/1 i.e. part of 296/B. 7/12 extract of this land is produced and it shows that 37 Gunta portion from 296/B is purchased by plaintiffs.

14. Madhukar Patil, one vendor has given similar evidence in support of the case of plaintiffs. His evidence and the record show that the family of vendors was owner of entire Survey No. 296 in the past and after acquisition of some portion, some property was remaining with them. The property acquired was given number as 296/A (296/1). The property which remained with vendors was given Survey No. 296/B (296/2). He has given evidence that the portion which was adjacent to the post office, to the west of the post office and Civil Hospital was sold to plaintiffs. He has given evidence that the remaining portion of Survey No. 296 which remained with vendors after acquisition was not under cultivation as it was surrounded by populated area and so, it was lying vacant and barren. He has

given evidence that on the date of sale, possession of the property sold was given to the plaintiffs.

15. This Court has carefully gone through the boundaries of the property purchased by the plaintiffs in the sale deed of 1969. From the description, it can be said that atleast there are 3 fixed points like to the east post office, to the north Municipality road and to the west Nanded-Bidar road. The northern boundary was corrected in the correction deed to mention that boundary as Vidyavardhani road and District Bank. This evidence is sufficient to infer that as portion of 296/B was sold to plaintiffs, the said portion was given number as 296/B/1 admeasuring 37 Gunta.

16. The plaintiffs have examined one Ausekar, Cadestral Surveyor in support of their case. He made measurement, as per the order made by the Court, as Court Commissioner. First the Surveyor made measurement of entire Survey No. 296. He has given evidence that Survey No. 296 is divided in to three divisions like Survey No. 296/1 which contains Nanded-Bidar road and post office. His evidence shows that some portion of the disputed commercial complex is constructed in the property acquired for post office. His evidence shows that after the aforesaid acquisition area of 1 Acre 4 Gunta was remaining with

the vendors from Survey No. 296. This portion is marked in Exh. 123 as 'M, N, O, P, Q'. From this portion, the specific portion of encroachment is marked as 'E, D, F, C'. This portion covers some portion of commercial complex constructed by the Municipality.

17. The Chief Officer of Municipality is examined to give evidence in rebuttal. His evidence is mainly on the procedure which Local Body is required to follow before making such construction and the procedure which was actually followed. He has given evidence that on the basis of development map prepared by the Local Body, further steps were taken on the presumption that the property belongs to Municipality. He has given evidence that initially a small bridge was constructed, some latrines were constructed, drainage pipeline were also laid in this property. On the basis of these circumstances, he has stated in evidence that this property belongs to Local Body, Municipality.

18. There is old and new revenue record starting from the year 1954-55. This record shows that Survey No. 296 was a private property, the property of vendors of plaintiffs. This record does not show that Government or Local Body had any concern with this property. There is circumstance that the Government was required to acquire some portion of Survey No. 296 (296/1)

from the vendors and this circumstance also leads to inference that the Government or Local Body was not owner of Survey No. 296. In the year 1955, 37 Gunta of Survey No. 296/B was shown to be owned by vendors of plaintiffs and this record is at Exhs. 100 to 102. There is Shetwar Patrak of the year 1350 Fasli (1940 A.D.) and it shows that Hanmant, the predecessor in title of vendors was occupant of entire Survey No. 296.

19. In view of the aforesaid record and particularly, the evidence of Cadastral Surveyor, there was no other alternative before the Courts below than to hold that the Local Body has made construction in the property of others and the evidence on the record is sufficient to prove that some portion is constructed in the property purchased by plaintiffs. Admittedly, the construction was started on the date mentioned in the plaint by the Local Body and in view of this circumstance, it was not possible for the Local Body to prove that it had become owner due to adverse possession. Due to construction of small bridge over brooklet or construction of some latrines, it cannot be said that the Local Body had taken possession of entire portion and it has been in possession for more than period prescribed to acquire the ownership due to adverse possession. Further, no evidence is given to show as to when those constructions were made.

20. The aforesaid discussion shows that the Trial Court had committed error in holding that the property was not identified. The District Court has not committed that error and no other decision was possible. As the original vendors have admitted that disputed property was sold to plaintiffs, the plaintiffs were entitled to get the decree of possession.

21. The aforesaid findings of the District Court are findings on facts. This Court holds that no substantial question of law as such is involved in the matter. In the result, the appeal stands dismissed. Civil Application is disposed of.

[T.V. NALAWADE, J.]

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