

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**Second Appeal No. 176 of 2013
With
Civil Application No.2635 of 2013
With
Civil Application No.8638 of 2013**

Baswanappa s/o Limbanappa Pathankar
And Another. **.. Appellants.**

Versus

Ramkishan s/o Shankarrao Madane
And Another. **.. Respondents.**

Shri. R.N. Dhorde, Senior Counsel, instructed by Shri.
G.N. Patil, Advocate, for appellants.

Shri. V.D. Salunke, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 21 JUNE 2016

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil Suit No.60/1994 which was pending in the Court of the Civil Judge Senior Division Latur and also against the judgment and decree of Regular Civil Appeal No.53/2009 which was pending in

the Court of the Principal District Judge Latur. The suit filed by the present respondent No.1 for relief of possession on the basis of title was decided in his favour by the trial Court and this decision is confirmed by the first appellate Court. Both the sides are heard.

2) The suit was filed in respect of 5 gunthas portion of survey No.47 situated at Khadgaon, Tahsil and District Latur. Boundaries of the portion of 5 gunthas were given in the plaint and hand sketch map of this portion was also annexed to the plaint. It is the case of the plaintiff that one Shaikh Nizamoddin was owner of entire Survey No.47 which was admeasuring 2 acres 35 gunthas. It is the case of the plaintiff that some portion of this land was acquired by MIDC and some portion was sold by Shaikh Nizamoddin in the year 1976. It is contended by the plaintiff that the suit portion remained with Shaikh Nizamoddin. It is contended that in the year 1979 Shaikh Nizamoddin got measured this portion through DILR. It is contended that Shaikh Nizamoddin had agreed to sell the suit property to the plaintiff under agreement dated 28-12-1984. It is contended that by sale deed dated 15-9-

1989 for the consideration of Rs.54,500/- Shaikh Nizamoddin sold the suit property to the plaintiff. It is the case of the plaintiff that under agreement of sale he was put in possession of the suit property and he continued the possession under sale deed. It is his case that the defendant Nos.1 and 2 who are husband and wife have no concern at all with the suit property.

3) It is the case of the plaintiff that he had made construction of tin shed of 40×50 ft and he had given it on lease basis to defendant No.3 Yadav Shetty for running hotel. It is contended that till 21-9-1989 defendant Yadav was in possession and after that defendant Nos.1 and 2 illegally took possession of the suit property. It is the case of the plaintiff that defendant Nos.1 and 2 are owners of Plot No. B-1 situated in MIDC and it is in the vicinity of the suit plot. It is contended that the suit property was never acquired and it was never with the MIDC.

4) Regular Civil Suit No.643/1989 was filed by Yadav Shetty against defendant Nos.1 and 2 and plaintiff for relief of injunction but the said suit was dismissed. In

that suit it was held that defendant Nos.1 and 2 had appointed Shetty as the manager to run the hotel and he was not lessee. The point of ownership was not involved in that suit in view of the nature of relief which was claimed by Shetty against present respondent Nos.1 and 2.

5) Defendant Nos.1 and 2 filed written statement and contested the matter. They admitted that the suit property was part and parcel of Survey No.47. They have not disputed the boundaries given of the suit plot in the plaint. They have also not disputed that originally Shaikh Nizamoddin was the owner of the entire survey No.47 and he was in possession of entire survey No.47. It is not disputed by them that some portion of this survey was acquired by the MIDC and some portion was sold by Shaikh Nizamoddin to third party. It is contended that when Shaikh Nizamoddin sold the property to third party, nothing was left with him in Survey No.47. It is contended that Shaikh Nizamoddin was not in possession of the suit property since 1975-76. They denied that Shaikh Nizamoddin had got measured the property in the year

1978 and he had executed documents like document of agreement and document of sale in favour of the plaintiff in the years 1984 and 1989. They contended that ownership of Shaikh Nizamoddin is extinguished as he was not in possession since 1975-76 and since then they have been continuously in the possession of the suit property. They contended that their plot from MIDC bearing No. B-1 is situated towards northern side of suit property. They also referred to the previous Regular Civil Suit No. 643/1989 which was filed by Shetty against them. They contended that in the said suit also they had denied the title of the plaintiff over the suit property.

6) It is the case of the defendants, present appellants that in the year 1976 they had applied to the village panchayat to take note of their possession over the suit property. It is contended that the village panchayat had made panchanama of the construction. They contended that they started hotel in this construction in the year 1980. They contended that they had appointed one Eknath as manager and due to dispute with Eknath police case was filed and panchanama was prepared by police

in the year 1982. They contended that the village panchayat had recovered property tax from them and they have been continuously in possession for more than 17 to 18 years. They contended that they have become owner due to adverse possession.

7) Issues were framed on the basis of the aforesaid pleadings. Both the sides gave evidence. Both the Courts have held that present appellants, defendant Nos.1 and 2 have failed to prove the ownership due to adverse possession though they are in possession.

8) Burden was heavy on the defendant Nos.1 and 2 to prove the ingredients of ownership due to adverse possession. Both the Courts have considered the evidence, both oral and documentary given by both the sides and they have given concurrent findings against the present appellants.

9) Oral evidence of both the sides is as per their pleadings in the plaint and the written statement. There is record of RTS proceeding which was started for

mutation in the year 1990 at Exhibit 77. There is registered sale deed in favour of the plaintiff from Shaikh Nizamoddin who was admittedly owner of this property. In view of these circumstances in the RTS proceeding plaintiff succeeded and got his name entered in the revenue record as owner. This proceeding was contested by present appellants. Copy of the judgment delivered in RCS No.643/1989 which is already referred, is on the record. In that case defendant No.3 Shetty had contended that he was tenant of the present plaintiff. This contention was not accepted but the contention of the present appellants that Shetty was their manager was accepted and the suit was dismissed. Issue of ownership was however not involved in the matter and so said decision cannot help the present appellants in the present matter which is filed for possession on the basis of title.

10) Present appellants had examined one witness from MIDC and in his evidence correspondence made by this appellant with the MIDC is proved at Exhibit 144. This document shows that on 6-6-1990 present appellants had requested MIDC to acquire the suit property from the

owner and to give it to them. Thus in the year 1990 also they were not disputing the ownership of Shaikh Nizamoddin.

11) There is record of allotment of Plot No. B-1 which was made in the year 1977 in favour of the present appellants. Only on the basis of this circumstance and other circumstances that this plot is situated adjacent to the suit property, inference is not possible that after 1975 they made encroachment over the suit property and they took its possession.

12) The present appellants relied on some correspondence made with village panchayat in the year 1979. This is regarding so called temporary construction made by present appellants in the suit property. Admittedly they had never applied for construction permission over this property at any time. They had contended that they were running hotel but they have no record like licence obtained to run the hotel. The first record with them is the tax receipt of the year 1989 but this receipt was also issued only due to correspondence

made by the present appellants and as they had expressed willingness to pay the tax.

13) As against the aforesaid record and circumstances there is registered sale deed in favour of the plaintiff of 1989. Dispute also started between the parties in the same year. There is record to show that the local body had objected to the construction of wall made by the plaintiff in the year 1992. The suit property is 5 gunthas, big portion when the so called construction of tin shed was small one. This circumstance is against the case of the defendant Nos.1 and 2 that they have been continuously in possessions. In view of the aforesaid circumstances there was no other alternative before the Courts below than to give decision in favour of the plaintiff. No substantial question of law as such is involved in the matter. In the result, the appeal stands dismissed. Civil applications are disposed of. Interim relief, if any, is vacated.

Sd/-
(T.V. NALAWADE, J.)

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