

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

Second Appeal No. 3 of 2013

* Ramesh S/o. Bhaulal Lahire,
Age 50 years,
Occupation : Hotel Business,
R/o Nageshwarwadi,
Aurangabad. **.. Appellant.**

Versus

- 1) Laxmibai W/o Dattatraya Lahire
Age 65 years,
Occupation : Household,
R/o Near Bhaji Mandi,
Taluka Paithan,
District Aurangabad.
- 2) The Municipal Corporation
Aurangabad
Through its Commissioner
At Aurangabad. **.. Respondents.**

Shri. Mujtaba Gulam Mustafa, Advocate, for appellant.

Shri. P.R. Katneshwarkar, Advocate, holding for Shri.
Nitin T. Tribhuwan, Advocate, for respondent No.1.

Respondent No.2 - formal party

With

Second Appeal No. 4 of 2013

* Ramesh S/o. Bhaulal Lahire,
Age 50 years,
Occupation : Hotel Business,
R/o Nageshwarwadi,
Aurangabad.

.. Appellant.

Versus

1) Laxmibai W/o Dattatraya Lahire
Age 65 years,
Occupation : Household,
R/o Near Bhaji Mandi,
Taluka Paithan,
District Aurangabad.

2) The Municipal Corporation
Aurangabad
Through its Commissioner
At Aurangabad.

.. Respondents.

Shri. Mujtaba Gulam Mustafa, Advocate, for appellant.

Shri. P.R. Katneshwarkar, Advocate, holding for Shri.
Nitin T. Tribhuwan, Advocate, for respondent No.1.

CORAM: T.V. NALAWADE, J.

DATE : 6th MAY 2016

JUDGMENT:

1) Second Appeal No.3/2013 is filed against the judgment and decree of Regular Civil Appeal No.232/2004 which was pending in the District Court Aurangabad. Second Appeal No.4/2013 is filed against the judgment

and decree of Regular Civil Appeal No.462/2012 which was also pending in the District Court Aurangabad. Both the appeals were filed against the judgment and decree of Special Civil Suit No.620/1996 which was pending in the Court of the Civil Judge Senior Division Aurangabad. The suit filed by the present appellant for the relief of declaration, injunction and damages was dismissed by the trial Court. Counter claim filed by present respondent No.1 Laxmibai was also dismissed by the trial Court. Both the sides had filed aforesaid first appeals in the District Court. The appeal filed by Laxmibai is allowed by the District Court and the relief of perpetual injunction is given in her favour. Both the sides are heard.

2) The suit was filed in respect property bearing Survey No.85/1 which, according to the plaintiff, is given House No.4-14-91 in the record of the Municipal Corporation. It is the case of the plaintiff that he is owner of the suit property and he is in possession of the suit property.

3) It is the case of the plaintiff that in respect of Survey No.85 there was litigation between one Anwarulla and his sister Amina Begum. It is contended that after the decision of the said suit, execution proceeding was filed by Amina Begum and in that execution proceeding, the father of the plaintiff had taken objection to the execution. It is contended that the entire survey number was in possession of his father and the father was cultivating the property. On some portion the plaintiff had made construction for residential purpose. It is contended that his father was tenant in possession. The plaintiff had produced hand sketch map along with the plaint to show the location of the disputed property. It is the case of the plaintiff that in the execution proceeding Amina Begum could not get possession of the disputed portion.

4) It is the case of the plaintiff that in the year 1988 he made some construction and he started running one hotel in the suit property. It is contended that he has obtained licence for running such hotel.

5) It is the case of the plaintiff that defendant Laxmibai is his aunt on paternal side but she has no concerned whatsoever with the suit property. It is contended that husband of Laxmibai is a doctor and he is influential person. It is contended that on 14-11-1996 by joining hands with the officers of the Municipal Corporation, defendant No.1-Laxmibai pulled down the construction of the plaintiff which was present over the suit property.

6) It is the case of the plaintiff that Laxmibai obtained one Non Agricultural order in respect of the suit property but this N.A. order is not binding on him. It is his case that Laxmibai is claiming ownership over the suit property on the basis of sale deed and she is causing obstruction to the possession and so the cause of action has taken place for the suit. The plaintiff had claimed relief of declaration that he is owner of Survey No.85/1 which is given CTS No.4641. It is the case of the plaintiff that House No.4-14-91 is entered in the record of the Municipal Corporation as number of property bears CTS 4641. As the structure of the plaintiff was pulled down

by defendant No.2, Municipal Corporation, he had claimed compensation of Rs.1.5 lakh from the Corporation.

7) Both, Laxmibai and the Municipal Corporation contested the suit by filing separate written statements. It is the case of Laxmibai, defendant No.1 that she has purchased some portion of Survey No.85 from Amina Begum under registered sale deed dated 3-9-1975. In the written statement Laxmibai has given description of the property purchased from Amina Begum including the boundaries of the portion. It is her case that the possession was handed over by Amina Begum and since then she is enjoying the property as owner. It is the case of Laxmibai that after the purchase, she had fixed two name boards on the purchased portion but by blackening the boards the plaintiff is trying to create obstruction to the possession.

8) It is the case of the defendant No.1 that in the municipal record her name came to be entered as owner and as the person in possession and such entry was made after following due procedure on 31-6-1976. It is her case

that her name was mutated in the city survey record also after following the procedure and these changes were never challenged by the plaintiff. It is her case that she had obtained Non Agricultural use permission from the authority and she has paid the charges for the same. It is her case that in the year 1983 she had applied for construction permission to the local body and such permission was granted to her and the commencement certificate was also issued in her favour. It is her case that by spending Rs.50,000/- she had made construction of wall of length of 135 feet, height of 10 feet and width of 13 inches. It is her case that she had started making construction of the building and for the basement and she had taken piles for making construction and caps on piles and for that she had spent amount of Rs.one lakh.

9) It is the case of the defendant No.1 Laxmibai that she was making construction for creation of shopping complex and lodging & boarding. It is contended that when the construction was going on, her husband became seriously ill and she was required to shift him to Pune for operation and then the construction was stopped.

10) The defendant No.1 denied that the plaintiff is her relative. It is her case that the plaintiff is trying to misuse the circumstance that husband of the defendant is not in a position to take action and she is a lady. It is her case that by creating false record the plaintiff is trying to grab her property. It is her case that the plaintiff is trying to trespass on her property and so her possession needs to be protected by issuing order of injunction. For that she had filed counter claim.

11) Defendant No.2, Municipal Corporation contended that when its officers came to know that the plaintiff was making construction illegally, they followed the procedure by issuing notice under section 478(2) of the Bombay Provincial Municipal Corporations Act and then they pulled down the illegal construction. It is the case of the Corporation that the plaintiff had refused to accept the notice but he was present on the spot when the action was taken. Panchanama was also made on 14-11-1996. It is the case of the Corporation that statutory notice as required under section 487 of the aforesaid Act was not issued against the Corporation and so the suit is

not tenable.

12) On the basis of the aforesaid pleadings, issues were framed. Both the sides gave evidence. The trial Court had dismissed the suit by holding that the plaintiff was not in possession and he was not the owner. The trial Court had dismissed the counter claim by holding that no court fees was paid on the counter claim. However, it was also held that the defendant No.1 failed to prove her possession as she was residing at Paithan.

13) The first appellate Court considered the circumstance like application was filed for permission to deposit Court fees by the defendant No.1 in the trial Court and the court fees was also deposited. No order was made by the trial Court on that application when the trial Court gave the aforesaid finding. The first appellate Court considered the circumstance that there was no construction of the plaintiff over the suit property on the date of the suit. The first appellate Court considered some vital admissions given by the plaintiff and some record which is in favour of the defendant No.1. In view of the

record and the admissions, the first appellate Court has held that the defendant No.1 is the owner of the property. The circumstance that in previous litigation objection was taken by the father of the plaintiff and it was rejected on merit is considered by the first appellate Court and relief of injunction is given in favour of the defendant No.1 of the present suit.

14) This Court admitted the appeals on 20-2-2013 on the following substantial question of law :-

"Whether the Courts below erred and recorded perverse finding that the Appellant-Plaintiff is not in settled possession ?"

15) From the pleadings in the plaint and the hand sketch map annexed to the plaint, it can be said that the plaintiff wanted to prove that he is owner of entire area of Survey No.85/1. In the plaint he contended that his father was tenant of entire area of Survey No.85. There was no specific pleading as to when and who had put his father in possession. There was no specific pleading as to how his

father or the plaintiff had become the owner of the suit property. If his father was initially tenant, there is nothing with the plaintiff to prove his title over the suit property. Learned counsel for the plaintiff submitted that at least injunction can be given in favour of the plaintiff as he had made construction over the suit property, he was running a hotel and his possession was settled possession.

16) It is not disputed that in the execution proceeding filed by Amina Begum for getting possession of one-third portion of Survey No.85, Bhaulal, father of the plaintiff, had raised objection and that objection was rejected on merit and that decision given by the Civil Court has become final. There is record, which is discussed at appropriate place, showing that on the basis of the decree, name of Amina Begum was entered in the revenue record and she was also shown in possession of the area which was allotted to her in the partition suit. The same area is sold by Amina Begum to defendant No.1. Name of defendant No.1 is also shown in the assessment record as the person in possession and her name was mutated in the city survey record on the basis of the sale

deed executed in her favour by Amina Begum. In view of these circumstances, burden was heavy on the plaintiff to prove that he was in settled possession of the entire area of Survey No.85/1 to which separate city survey number is given.

17) Only during oral evidence, the plaintiff came with a case that Anwarulla had given Survey No.85 in possession of the father of the plaintiff for cultivation purpose. There is no record of that nature also with the plaintiff. On the other hand there is decision of the civil Court by which such objection taken by the father of the plaintiff was rejected.

18) The plaintiff has admitted in the cross examination that Amina Begum had one-third share in Survey No.85. He has admitted that the suit was decreed and Survey No.85 was divided and area of 753 square meter was allotted to the share of Amina Begum. Though he tried to avoid to admit that possession of one-third portion of the survey was given to Amina Begum in execution proceeding, there is record like assessment

record and city survey record in that regard. He admitted that area of 753 square meters was allotted to the share of Amina Begum and this area was given No.4641/1 in city survey record.

19) The plaintiff has not disputed that there is *pacca* construction like construction of wall and construction of piles with caps on the suit property. In the evidence plaintiff had opportunity to explain the construction. No particulars could be given by the plaintiff as to who made the construction for him and as to who had prepared the plan for the same. Admittedly, the plaintiff had never obtained permission of local body for making construction on the suit property. He also admits that he had never applied to the authority for conversion of the land to non agricultural purpose.

20) The plaintiff has tried to rely on the following record :-

(i) House tax receipt in respect of House No.4-14-91 issued in July 1994. This receipt shows that it was issued in favour of Shivilal, brother of the plaintiff. This Exhibit

130, assessment receipt, cannot help the plaintiff to prove that he is owner. On the other hand it can be said that other heirs of Bhaulal ought to have joined with the plaintiff to claim relief of declaration of ownership.

(ii) Property Card of city survey No.4641. This document shows that entire area of city survey No.4641 was 2912 square meters and then area of 753 square meters was reduced from this area. There is mention on this document showing that in view of the decision of Regular Civil suit No.51/56 filed by Amina Begum this area was allotted to her share. Names of legal representatives of Bhaulal like plaintiff, Shivilal, Prakash, Pandurang and others were also entered in this document.

(iii) Notice given by the Corporation dated 8-11-1996 (Exhibit 160). This record shows that on city survey No.4641/1 temporary construction like shed was put up by the plaintiff and the Corporation had taken action in that regard.

21) The plaintiff has examined one witness to show that he was running a hotel in the past on the suit property. This evidence can be of no help. There was no such construction and it cannot be said that the plaintiff was in settled possession. Further, the assessment record is in favour of Shivlal and not in favour of the plaintiff. It cannot be said that it was the area in possession of the plaintiff. The plaintiff obtained licence for his hotel that too in the year 1994. This Court holds that this record cannot be used in the present matter as that record shows that it was in respect of city survey No.4641 for which different house number is given by the local body.

22) The defendant No.1 had given evidence in rebuttal and she has given evidence for cause of action in respect of her counter claim. She has examined one Ashok Kumar, Consulting Engineer to prove that the architect / engineer was appointed to prepare the plan of construction. Evidence is given by this witness that he prepared the design of piles and caps. The plan prepared by this witness is proved at Exhibit 180. One witness Bansaram Wade, meson, is examined by the defendant

No.1 to prove that he had made construction of wall of 155 feet in length, 10 to 11 feet in height and width of 13 inches. There is also voluminous record created in the Corporation about construction permission and in view of that record there is no reason to discard the evidence of these two witnesses of the defendant No.1. The Courts below have believed these witnesses.

23) In support of her claim Laxmibai, defendant No.1 has relied on the following record :-

(i) Sale deed executed by Amina Begum on 3-9-1975, Exhibit 184. Description of the portion which was belonging to Amina Begum in the past, which was handed over to defendant No.1, is given in the sale deed and the same portion is mentioned in the written statement by the defendant No.1.

(ii) Exhibit 185, assessment record of local body of house No.2-6-75/2 in the name of defendant No.1 Laxmibai.

(iii) Assessment record at Exhibit 186 which was in favour of Amina Begum dated 4-11-1971. This record shows that two Chalta numbers 74/1 and 74/2 were given to this property.

(iv) Property Card of city survey No.4641/1 at Exhibit 187. It was prepared in the year 1982 and the name of Laxmibai, defendant No.1 was entered on the basis of sale deed.

(v) Construction plan dated 19-7-1983 approved by the town planning authority of the local body in favour of Laxmibai.

(vi) Public notice published in news paper by Laxmibai before purchasing the suit property, Exhibit 189.

(vii) N.A. order dated 21-12-1995 issued in favour of defendant No.1 and it is in respect of area of 753 square meters.

(viii) Exhibit 193 record of construction permission of the year 1983 like application, permission given by the Municipal Corporation.

(ix) Exhibit 196 copy of complaint given against the adjacent owner by Laxmibai in the year 1985 that he was causing nuisance.

24) The aforesaid voluminous record is consistent with the case of defendant No.1. It shows that she was in possession and the plaintiff was trying to grab the property by making trespass on it. The trial Court gave finding that defendant No.1 was residing at Paithan along with her family. But that does not mean that she was not in possession of the suit property. Some record was confronted with the plaintiff but the plaintiff has given evasive answers in that regard. It is already observed that for the relief of declaration suit ought to have been filed by all the successors of Bhaulal if it was the property received from Bhaulal. The opportunity was lost by defendant No.1 to prove the correspondence which was between Shivilal and the husband of the defendant No.1.

This record could have thrown more light on the nature of relationship between the two families. It is clear that Shivilal has kept himself away from the Court and the appellant wants to grab the property by creating such litigation.

25) The discussion made above shows that only with a view to grab the property of the defendant No.1, plaintiff did some illegal act. In view of the above discussion it is difficult to accept the contention that the plaintiff was in settled possession. This Court holds that the relief of injunction also could not have been given in favour of the plaintiff.

26) The learned counsel for the appellant, plaintiff has placed reliance on following reported cases :-

- (1) **2011 (6) ALL MR 681 (Krishna Hari Vaingankar v. Tukaram Bhiva Vaingankar).**
- (2) **2010 (6) ALL MR 852 (Maroti Jairam Kadam v. Mahadu Govind Kadam).**
- (3) **2011 (2) Mah L R 431 (SC) (Mrutunjoy Sett v. Jadunath Basak).**

- (4) **2014 (1) ALL MR 41 (Azeem Jagania v. Behram Tejani).**
- (5) **AIR 2004 SC 4609 (Rame Gowda v. M. Varadappa Naidu).**
- (6) **2012 (5) ALL MR 462 (SC) (Union of India v. Ibrahim Uddin).**
- (7) **AIR 1975 SC 1674 (Puran Singh v. The State of Punjab).**

The facts and circumstance of each and every case are always different.

27) In view of the above, this Court holds that no error is committed by the first appellate Court in giving relief of injunction in favour of the defendant No.1 and refusing the relief in favour of the plaintiff.

28) In the result, both the appeals stand dismissed. Learned counsel for the appellant seeks continuation of the stay to the injunction decree. It is refused.

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

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