

Sequeira

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

*SECOND APPEAL NO. 583 OF 2014.
Along with
Civil Application No. 1411 of 2014.*

Shri Vitthal Mhasku Mandhare	... Appellant / Applicant.
V/s.	
Shri Vilas Manilal Parekh & anr.	... Respondents.

Mr.P.S.Dani -senior advocate a/w Mr.Jaydeep Deo, for the Appellant / Applicant.

Mr.S.M.Gorwadkar-senior advocate a/w Mr.Anand Kulkarni, for Respondent Nos.3 to 9.

*Coram : N.M. Jamdar, J.
Wednesday 27 April, 2016.*

Oral Order :-

The Appellant challenges the Judgment and Decree passed by the Civil Judge, Senior Division - Pune and the Judgment and Order passed by the District Judge, Pune, decreeing the suit filed by the Respondent-Plaintiff directing the Appellant to hand over the vacant possession of the suit property to the Respondents and dismissal of the Appeal filed by the Appellant.

2. The Suit was filed by the Respondent-Plaintiff in respect of the property situated at Survey no.145/7/8/A, a piece of land admeasuring 12510 sq.ft. This strip of land is 30 ft. in width and 417 ft. in length. The Suit was filed on the basis of a Sale deed dated 8 July 1971. According to the Respondents-Plaintiffs the Sale deed was executed pursuant to the consent terms entered in the civil Suit was filed for specific performance of the Agreement. It was the contention of the Respondents that the Appellant encroached upon the property and carried out certain construction. After the measurement was carried out in the year 1999 which disclosed the encroachment, Suit was filed for removal of encroachment and for possession. The Suit was resisted by the Respondent-Appellant contending that the Sale deed dated 9 July 1971 was not to be acted upon. The property was only an access road meant for Shivshakti Cooperative Society, of which the Plaintiff was one of the promoters. It was contended that subsequently, the Housing Society also did not require the property. The Appellant was in possession of the property and in a Suit filed by the Appellant against the Pune Municipal Corporation, a finding has been rendered that structures are standing in the property since a long time. A theory of adverse possession was also pleaded.

3. Parties led their oral and documentary evidence. The learned Civil Judge, Pune after hearing both the sides concluded that the Respondent-Plaintiff are owners of the properties and the Appellant had encroached on suit land. The Suit filed by the Respondent-Plaintiff was not time barred and the Sale deed was not a nominal Sale deed. Accordingly, by

Judgment and Decree dated 5 November 2004, Suit was decreed. Appeal No.400 of 2005 filed by the Appellant in the District Court, Pune was dismissed, on 16 December 2013.

4. I have heard the learned counsel for the parties.

5. Mr.Dani, the learned senior advocate for the Appellant advanced two submissions. Firstly, that the Sale deed dated 8 July 1971 was not to be acted upon and it was executed only for the purpose of providing access to the property of Shiv Shakti Co-operative Housing Society. Secondly, he submitted that the Suit is not within limitation as the possession of the suit property pursuant to the Sale deed was not handed over to the Respondents and therefore, the Suit based on the Sale deed of the year 1971 instituted in the year 1999, was barred by limitation. He submitted that without rendering finding as to the possession, issue of limitation has been decided by both the Courts, which has caused clear error of law.

6. It is the contention of the Appellant that the Plaintiff was an Estate Agent and a promoter of Shivshakti Co-operative Housing Society and only to provide an approach road, the Sale deed was executed, and Shivshakti Society thereafter did not require the suit property. The circumstances in which the Sale deed 8 July 1971 was executed, will have to be noticed. An agreement for Sale was executed between the Appellant and the Plaintiff on 4 June 1965. A suit was filed by the Plaintiff for specific performance of the Agreement and it is pursuant to the

compromise in the said Suit that the Sale Deed was executed on 8 July 1971. There is absolutely no reference in the Sale deed about the approach road to be provided. Merely, because the property is a strip of land, straightaway the theory of approach road cannot be said to be proved. In the cross-examination, the Appellant has put questions to the Respondent-Plaintiff that when the Appellant sought re-conveyance of the property, the Respondent-Plaintiff refused. If this was the case of the Appellant and that the Society did not require the land, the Appellant would have made efforts. Admittedly, no efforts were made by the Appellant since 1971, and the theory put forth is only a defence to the action of the Respondent-Plaintiff based on title. Both the Courts have examined this conduct of the Appellant and has come to the conclusion that the Respondent-Plaintiff proved their title to the property.

7. The second question is regarding the possession and limitation. It is the assertion of the Appellant that the possession was never handed over to the Respondents. Copy of the Sale deed of 1971 is on record. Sale deed refers to compromise in the Suit and contains a specific averment that the suit property is handed over to the Respondent-Plaintiff, and the Appellant and any person claiming through them they have no right, title and interest left in the property. The Sale deed also contains a recital that, since possession is handed over, the parties can approach the authorities to get the necessary entries made. Pursuant to the Sale deed the Respondents have entered their names in the property extracts. The Respondents have also paid the taxes of the suit land.

8. Much is sought to be made by the Appellant of the order passed in Civil Suit No.50 of 1995 filed by the Appellant in the District Court, Pune wherein Appellant had challenged the notice issued by the Pune Municipal Corporation. This decision will be of no assistance to the Appellant in firstly this Suit the properties is referred to as Survey no.147/7/8/B which is not the suit property. This was corrected only after present dispute arose. The Appeal was allowed and the Respondent Corporation was restrained from demolishing the structure. Though it was upon the complaint of the Respondent-Plaintiff that Municipal Corporation issued the notice, the Respondent-Plaintiff were not parties to the suit or in the Appeal. The Respondent-Plaintiff had complained about the new construction being carried out by the Appellant in the year 1991. Since the Respondents were not party to these proceedings, their contention that new construction was being undertaken in the year 1991 cannot be defeated by findings in these proceedings. Apart from this position except by showing that some taxes were paid in respect of the unauthorised structure no other evidence is led by the Appellant to demonstrate their possession from 1971. In view of clear recital in the Sale deed firstly, it is not permissible to lead evidence contrary to the express averment in the deed, and even assuming it is so permissible, no cogent material is placed on record by the Appellant. Whether the Appellant was in possession is a question of fact and in view of the clear recital in the deed, it has been rightly answered against the Appellant.

9. That being the position, the finding that the Appellant encroached upon the suit property, which having been confirmed upon measurement

in the year 1999, Suit was instituted immediately thereafter and therefore it was within limitation, will have to be accepted. In the circumstances, the Suit which is based on title, and the title of the land being established, the decree that directs handing over possession of the suit land to its rightful owner, was correctly passed. None of the arguments advanced raise any question of law, much less substantial questions of law.

10. Second Appeal is dismissed. Civil Application stands disposed of.

11. The learned counsel for the Appellant seeks continuation of the ad-interim order for a period of twelve weeks. The ad-interim relief is continued for period of twelve weeks from today. The Appellant will not create third party rights or part with possession.

(N.M. Jamdar, J.)