

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.317 OF 1995

1. Yamunabai Kashinath Hole,
Aged about 54 years,
Occ. : Business of Milk and household
R/o Malwadi, Hadapsar,
Pune 411 013.

2. Kashinath Balaji Hole,
Aged about 64 years,
Occ. Pensioner,
Residing at Malwadi, Hadapsar,
Pune 411 013.

.... Appellants

Vs.

Shamsuddin Abbas Pathan,
Aged about 42 years, Occ. Service,
Resident of Satavwadi, Hadapsar,
Pune 411 013.

.... Respondent

Mr. K.P. Shah a/w Mr. Akshay Chikhale i/by P.B. Shah for the
Appellants.

None for the Respondent.

Coram : N.M. Jamdar, J.

Date : 3 May 2017

Oral Judgment :

This Second Appeal is filed by the original defendant challenging the concurrent judgments of the learned Civil Judge, Junior Division, Pune and the learned District Judge, Pune, wherein the suit filed by the Respondent-Plaintiff was decreed and the appeal filed by the Appellants was dismissed.

2 The Respondent filed a Suit bearing No. 1327 of 1927 of 1985 for a declaration of ownership and seeking possession of the suit property, which was part of the property No. 13/3B/2/2B/2 situated at Hadapsar, Taluka Haveli, District Pune. According to the Respondent, the Appellant encroached upon part of the property of the Respondent-Plaintiff and constructed certain structures. According to the Respondent, the Appellants filed a Suit No. 270 of 1983 for malafide intentions and inspite of directions to the Appellants to remove the structures, the Appellants did not do so. The Appellants filed the written statement and contested the suit. The learned Civil Judge, Junior Division framed issues as regards title of the Respondent-Plaintiff and on the aspect of possession of the Appellants. The learned Civil Judge held that the Respondent was the owner of the suit property and the Appellants were directed to handover the encroached portion by the judgment and order dated 29 October 1991. Appeal No. 589 of 1991 was filed by the Appellants in the District Court,

Pune. The learned District Judge after hearing both the sides, dismissed the Appeal by the judgment and order 5 April 1995.

3 The appeal was admitted on 21 June 1995 on the substantial questions of law (a) and (c). These questions relate to the aspect of *res judicata* and report of the Court Commissioner.

4 The learned counsel for the Appellants raised contentions regarding three aspects. Firstly the aspect of *res judicata*, secondly the aspect of measurement carried out and thirdly of adverse possession.

5 As far as the submission based on principles of *res judicata* is concerned, it is based on the earlier suit i.e. Regular Civil Suit No. 270 of 1983 filed by the Appellants. This submission cannot be accepted as principles of *res judicata* are not attracted in the facts of the present case. The earlier suit was filed for simplicitor injunction. The learned Civil Judge, who tried the earlier suit had observed that there is no material on record to give a finding that the Appellant is the owner of the suit land. The present suit is filed is based on a title. Therefore the decision given in a suit for injunction, in which the title of the property was not decided cannot operate as *res judicata* to a suit based on title. As far as the ownership of the Respondent is concerned, the sale-deed duly executed at Exhibit 66 is on record and therefore, the finding of ownership of the Respondent cannot be disturbed.

6 On the aspect of appointment of the Commissioner and measurement, the learned counsel for the Appellant submitted that the Appellant was not present and communication to that effect was sent and the measurement is not by an expert. The certain statement made in the earlier suit were sought to be relied upon. These submissions also cannot be accepted. The learned District Judge has taken a note that there is no pleading or suggestion given in the evidence that the Appellants could not remain present at the time of commission because of death in the family, as sought to be urged. The Appellants also never made any complaint to the superior authority that the measurement was not done properly. In these circumstances, the Court accepted the report of the Court Commissioner. The learned District Judge also noted that the cross-examination of the Surveyor was only on minor technical points. In the earlier suit, there was no Court Commissioner appointed and in the present suit the Surveyor from the office of District Land Records has been appointed and he has duly submitted his report. In the present case, the issue of encroachment has squarely arisen and has been decided by duly appointing an expert Court commissioner and this finding cannot be set aside relying on observations in the earlier suit.

7 As far as the claim of adverse possession is concerned, it was sought to be contended by the learned counsel for the Appellants

that the Appellants have constructed certain structures and are carrying out dairy business, sixteen years prior to institution of the suit with full knowledge of the Respondent. However, as rightly held by the learned District Judge that being in possession alone will not amount to adverse possession unless hostile title is claimed. In the present case, the Appellant has claimed that the suit land belongs to the Appellants and therefore it cannot be said that the Appellant is claiming adverse possession because for putting forth such theory by the party, the party must first admit that it is unauthorised possession.

8 Therefore, the view taken by both the Courts that the Respondent proved his title to the suit property, that the Appellants have encroached upon the suit property is correct and requires no interference. In the circumstances, the question of law framed will have to be answered against the Appellant. The Second Appeal is accordingly dismissed. No order as to costs.

9 At this stage, the learned counsel for the Appellants seeks continuation of the interim relief. The interim relief is continued for period of eight weeks from the date of the judgment is uploaded on the website of the Court.

(N.M. Jamdar, J.)