

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

CIVIL REVISION APPLICATION NO. 450 OF 2016

Ratan Lalchand Parekh @ Marwadi & Ors.	...	Applicants
V/s.		
Namdev Vithoba Shendkar & Ors.	...	Respondents

- Mr.Venkatesh A. Shastry for the Applicants.
- Mr.Sachin S. Punde for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 21st FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the Applicants and the Respondents.

2] By this Civil Revision Application, filed under Section 115 of the Code of Civil Procedure, the Applicants are challenging the order dated 21st January, 2016 passed by 23rd Jt. Civil Judge Junior Division, Pune, below Exhibit-20 in Regular Civil Suit No.2126 of 2013.

3] The Application at Exhibit-20 was filed by the present Applicants for rejection of the plaint under Order-7 Rule-11(a) and (d) of C.P.C..

4] The Applicants are the original Defendant Nos.1 to 4 in the trial Court. The Respondents/Plaintiffs have filed a suit for declaration that they have become owners of the suit property by virtue of adverse possession and also for perpetual injunction restraining the Applicants from causing obstruction to their possession in the suit property.

5] According to learned counsel for the Applicants, the suit seeking a declaration of ownership on the basis of adverse possession cannot be tenable. It is barred by law, as declared by the Hon'ble Supreme Court in the case of *Gurudwara Sahib Vs. Gram Panchayat Village Sirthala & Anr., 2013 DGLS (Soft.) 544*, and therefore the suit seeking the relief of declaration cannot be maintainable. As regards the relief of injunction, it is submitted that the Applicants being admittedly the owners of the suit property, merely because they are selling the said property to some other person, in the absence of any overt act of alleged dispossession, there is no cause of action for seeking the relief of injunction and hence, on both these counts the plaint was liable to be rejected.

6] The trial Court has, however, after considering the submissions advanced at bar, held that there is no express provision

of law which bars the present suit and therefore, the suit was maintainable. The trial Court has accordingly dismissed the application filed by the Applicants for rejection of the plaint under Order-7 Rule-11(a) and (d) of C.P.C..

7] This order of the trial Court is supported by learned counsel for the Respondents/Plaintiffs for the reasons stated in the said order and also pointing out that there is definitely a cause of action for filing of the suit as the Applicants have already sold the suit property to Defendant Nos.5 and 6, who are now added in the suit and there is every likelihood of these Defendants causing obstruction to possession of the Respondents/Plaintiffs and further creating their own rights over the suit property.

8] Now, admittedly the suit is filed for declaration that the Respondents have become owners of the suit property by way of adverse possession. In support of the submission that such suit is barred by the law, learned counsel for the Applicants has relied upon the judgment of the Hon'ble Supreme Court in the above referred case of *Gurudwara Sahib*. The facts of the said judgment reveal that a declaratory suit with relief of prohibitory injunction was filed by the Plaintiff, which came to be dismissed on merits and thereafter, both the First and also Second Appeals came to be dismissed. In the Special

Leave Petition preferred by the Appellants against the said judgment, the Hon'ble Supreme Court was pleased to hold that the relief of declaration that the Plaintiff has become the owner of the suit property by adverse possession is rightly denied on the ground that the suit for such a prayer was not maintainable inasmuch as declaration to this effect on the basis of adverse possession cannot be sought. It was further held that the plea of adverse possession is available only as a defence to the Defendant, it can be used as a shield and not as a sword. It was accordingly held by the Hon'ble Supreme Court that Appellate Court in First Appeal and the High Court in Second Appeal were correct in holding that the suit was not maintainable as the plea of adverse possession cannot be used as a sword. However, it was held that the High Court was not justified in disturbing the relief of injunction which was sought by the Plaintiffs in the said suit restraining the Defendants from causing obstruction to their possession without due process of law.

9] Thus, the perusal of the judgment of the Hon'ble Supreme Court makes it clear that the claim of the Plaintiff in the said suit for declaration of ownership on the basis of adverse possession was held to be not maintainable, in view of the settled legal position that the plea of adverse possession can be used as a shield and not as a sword.

However, the Plaintiff's suit for injunction was held to be maintainable, in view of the apprehension of dispossession.

10] In the present case, it is true that there is no provision of statutory law, as such, which bars the jurisdiction of the Civil Court to entertain the suit, though actually what is essential to be seen while deciding the application filed under Order-7 Rule-11(d) of C.P.C. is whether the jurisdiction of the Civil Court is expressly barred to entertain such suit, which is not the present case. Even assuming that ultimately the Respondents/Plaintiffs may not succeed in the suit for getting the relief of declaration on the basis of the adverse possession, in that case also, it cannot be said that such suit is expressly barred by any provisions of law or the jurisdiction of the Civil Court to entertain such suit itself is expressly barred.

11] Even then, if it is accepted that, in view of the law laid down by the Hon'ble Supreme Court, in the above said judgment, such suit being not maintainable, the Plaintiffs may not get the relief of declaration of their ownership on the plea of adverse possession but then they have also filed a suit for injunction restraining the Applicants from causing obstruction to their possession and also from creating third party interest in the suit property.

12] In paragraph (15) of the plaint, in Clause (c), Plaintiffs/Respondents have sought the relief of injunction restraining the Applicants and other Defendants from causing obstruction to their possession. Whereas in Clause (e), they have sought the relief of injunction restraining the Applicants from creating third party rights in the suit property.

13] The submission of learned counsel for the Applicants is that the Applicants being the owners of the suit property, they are entitled to sell it to some third person and they are doing so in a lawful manner. There is no allegation in the plaint that either the Applicants or subsequent purchasers have in any way caused obstruction to possession of the Respondents or they have entered into the suit property. Hence, in this case, there is no semblance of the allegation of overt act causing disturbance in possession of the Respondents. Therefore, there is no cause of action for seeking the relief of perpetual injunction also.

14] In this respect, in my considered opinion, assuming that there is no such overt-act alleged on the part of the Applicants or other Defendants in the plaint about dispossession, the relief of injunction is also sought by the Respondents/Plaintiffs restraining the Applicants from creating third party interest in the suit property.

Now, admittedly, the Applicants are creating or have already created such third party interest in the suit property and therefore, it cannot be said that there is no cause of action for filing the suit at all. As observed by the Hon'ble Supreme Court, in the above referred judgment of *Gurudwara Sahib*, even if one cannot use the adverse possession as a sword, one can definitely use the same as a shield. As observed in the above said judgment, in paragraph (9), *"We make it clear that though the suit of the Appellant seeking relief of declaration has been dismissed, in case Respondents file suit for possession and/or ejectment of the Appellant, it would be open to the Appellant to plead in defence that the Appellant had become owner of property by adverse possession"*. Therefore, the interest of Respondents/Plaintiffs are very much there in the suit property and they are required to be protected, not only against the Applicants' act of creating third party interests but this very act of the Applicants creating third party interest being sufficient to cause reasonable apprehension in the mind of the Respondents that the Applicants and the subsequent purchasers may cause obstruction to their possession in the suit property, therefore the suit for perpetual injunction is very much tenable.

15] Moreover, as regards the plea of declaration on the basis of the adverse possession, as stated above, ultimately the Respondents may not succeed but that is not the plea on which the Civil Court can be said to have no jurisdiction to entertain the suit or its jurisdiction is expressly barred to entertain the suit so as to reject the plaint on that count.

16] The impugned order, therefore, passed by the trial Court being just, legal and correct; no interference is warranted therein. Hence, Civil Revision Application stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]