

Sequeira

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

SECOND APPEAL NO. 732 OF 2017

Mr.Vithoba Joti Misal,
now deceased through heirs :

1-a. Dhondiba Vithoba Misal and others .. Appellants

Vs

Ms.Ashwini Prakash Ajari and others .. Respondents

Mr.G.N.Salunke i/b Mr.Naveen B.Khaire, for Appellants.

Coram : N.M.Jamdar, J.

Date : 15 January 2018.

Oral Order :

The Appellants have challenged the Judgment and Order passed by the learned District Judge Gadhinglaj, dated 28 July 2016 allowing the appeal filed by the Respondents.

2. The Respondents filed Regular Civil Suit No.59 of 1998 for possession of the suit property, which is a house property bearing No.222 situated at Mirajkar alley at Bhairewadi, taluka Ajara. According to the Respondent No.1-Plaintiff, the property was previously owned by her father whose name was also recorded in the revenue record. The Respondents-Plaintiff separately got their names entered into revenue record and therefore suit was filed for recovery

of possession. The Appellant filed written statement and contended that the property was initially mortgaged and the Appellant has acquired title by adverse possession, been in possession in the property since long. The learned Civil Judge partly answered the finding regarding the title of the Plaintiff in the affirmative. The learned Civil Judge did not accept the contention of the Appellant that the Appellant has any right in the suit property by way of adverse possession. The Civil Judge held that the Respondent-Plaintiff was not entitled to claim possession of the suit property and accordingly by Judgment and Order dated 21 January 2005 dismissed the suit. Thereafter Respondent filed Regular Civil Appeal No.10 of 2006 in the Court of District Judge, Gadhinglaj. The Appellant did not file any cross appeal or cross objection against the finding that the Appellant had not proved his case of adverse possession. The District Judge, after considering the material on record held that the Respondent has proved his title and the suit was not barred by law of limitation, decreed the Suit by Judgment and Order dated 28 July 2016.

3. In the present case, the District Judge concluded that the Appellant has no title to the suit property. As regarding the finding on the title nothing is shown as to how that is incorrect. The case of the Appellant centres around the plea of adverse possession. The learned counsel for the Appellant submitted that though it is correct that no appeal or cross objections were filed by Appellant, it is not

necessary and a Respondent can always challenge the finding given against a Respondent in an appeal filed by a Respondent. In this case, the Appellant had come up with a specific case of acquiring right in the suit property. In view of this position, an issue was framed in the trial Court and held against the Appellant. This was an independent stand taken by the Appellant and the Appellant should have filed cross-objections. Even assuming the learned counsel for the Appellant is right in his contention that it is not necessary to do so, it is not that the learned District Judge has not considered this aspect at all in absence of the cross-objections. Though the learned District Judge has observed that Appellant has not filed any cross-objection, thereafter there is a detailed discussion as regards adverse possession.

4. It is the contention of the learned counsel for the Appellant that the Appellant has established his case by way of adverse possession on account of institution of suit by him bearing No.6 of 1995 and the long standing possession of the Appellant since 1953 and that entries in revenue record are in their name.

5. Law is now settled that mere long standing possession, coupled with the revenue entries, is not enough to extinguish the title of a true owner. The hostile animus calculated to extinguish the title of the true owner with full knowledge of the owner is the foundation for a claim of adverse possession. The law laid down by the Supreme Court specifies strict criterion to establish adverse possession. The

Supreme Court has also opined that time has come now to review the law of adverse possession.

6. It was contended that the Appellant had filed a suit bearing No.6 of 1975 and from the date the hostile possession stands starts and consequently the limitation. In this suit the Appellant had also sought to assert his possession on the basis of possessing mortgage. The suit was dismissed for default and not pursued further. The learned counsel for the Appellant contended that once the Appellant had filed a suit on this basis, then nothing further is required to be shown, as such suit should be considered as starting point of a limitation.

7. Firstly, a suit simplicitor for a declaration of acquiring title by adverse possession cannot be filed. Secondly, the suit was filed on the basis of a theory of possessory mortgage, in which, only one of the plea was of adverse possession. The suit was allowed to be dismissed for default and not restored. These actions cannot be construed as a designed to extinguish the title of the Respondent, as envisaged by the law laid down by the Apex Court. Intention to continue to occupy the property and efforts made for that purpose, is not the same thing as a hostile animus to extinguish the title of the true owner.

8. The District Judge was thus right in holding that the factors

pleaded by the Appellant will not be sufficient to establish the adverse possession. The learned counsel for the Appellant submitted that the finding that in the Written statement the Appellant has not given details is not correct. The question is whether the factors pressed in service by the Appellant, would constitute acts designed to extinguish the title of the true owner. In my opinion mere filing suit with alternate theory of adverse possession and not pursuing it and the entries in revenue record will not constitute adverse possession, nor such a suit can constitute starting period of limitation.

9. In these circumstances, there is no error in the view taken by the learned District Judge that the Appellant has failed to establish the factum of adverse possession. No substantial question of law arises. Second Appeal is dismissed.

(N.M.Jamdar, J.)