

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 940 OF 2018

1. Sow. Malanbai w/o Bhimrao Dalvi,
Age 47 years, Occupation Business,
R/o Kabad Galli, Beed. Tq. Dist.
Beed.
2. Bhimrao s/o Haribhau Dalvi,
Age 52 years, Occupation Business,
R/o as above. ...Appellants.

VERSUS

1. Sow. Sunita w/o Kalyan Pingle,
Age 44 years, occupation Household,
R/o Pingle Galli, Beed Tq.Dist.Beed.
2. Sow. Smita w/o Sunil Dhande,
Age 47 years, occupation Household,
R/o Dhande Galli, Beed Tq.Dist.Beed.
3. Anil s/o Suryabhan Dhande,
Age 54 years, occupation Agriculture,
R/o Swarajya Nagar, Beed
Tq. Dist. Beed.
4. Sow. Vijaya Surendra Kasat,
Age 38 years, occupation Household,
R/o Subhash Road, Beed
Tq. Dist. Beed.
5. Varun s/o Uttamrao Misal,
Age 27 years, Occupation Business,
R/o Yeshwant Nagar, Beed
Tq. Dist. Beed. ...Respondents.

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Mr. C. V. Dharurkar, Advocate for the appellants.
Mr. S. S. Jadhavar, Advocate for the respondents No.1 to 5.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
06-02-2019**

**Date of Pronouncing the Order :
26-03-2019**

ORDER :

1. Present appellants/ original plaintiffs had filed Special Civil Suit No.59 of 2014. They had come with a case that Survey No.75 situated in front of Girl's High School, Taraf Giram, Beed was originally owned by one Gagandas Tekwani. It was also pleaded that one Sardar Khan was the original owner of survey No.75 which was admeasuring 4 Acres and 4 Cuthas. He migrated to Pakistan and then the land was taken by Government. It was given to one Avatrai Tekwani on lease. The Sub-Divisional Officer has cancelled mutation entry No.365 on 12-05-1983, which was taken on 06-11-1978. Plaintiffs contend that, the said mutation entry was not binding on them. Both the plaintiffs are running their hotel "Pragati" and one photocopy center "Varsha" in an area admeasuring 40 feet x 30 feet since 1981. They had obtained loan to run the said business. Their hotel was also recommended by Ex-MLA to run a government scheme in 1998. They are doing their business since 1981, without interruption and openly, hence, they have become the owners of the property. It was contended that Avatrai and others had no title to the property, but executed agreement to sell in favour of Law

College, Beed. It has been contended that defendants' predecessor had executed a sale-deed on 03-07-2010 in respect of area admeasuring 200 x 150 square feet from Survey No.75 is false, illegal and without consideration. Mutation entry No.6457 was effected on the basis of said sale-deed, but it is not binding on plaintiffs. Defendants are creating obstruction to the possession of the plaintiffs on the basis of said illegal sale-deed and therefore, suit was filed for declaration of ownership and consequential prayer of injunction has been made.

2. Defendants resisted the claim of the plaintiffs by filing written statement. They denied that suit property is in possession of plaintiffs since 1981, openly and uninterruptedly. They have denied that plaintiffs have become owners of the suit property. It has been denied that, their predecessor had no title or right to sale out the property to them. They have given the history as to how the property devolved on their predecessor. They have purchased a portion admeasuring 200 x 150 sq. Ft for a consideration of Rs.70,00,000/- and got sale-deed on 03-07-2010. It is contended that plaintiffs were carrying on the business on foot-path by making encroachment on public road. Their encroachment was removed by municipal authorities on several occasions. Under those circumstances, plaintiffs made encroachment on the suit property in June 2012. They had assured to the defendants that they would

vacate the premises by making alternative arrangements. However, instead of vacating the premises, the plaintiffs have filed suit, hence, counter-claim was made for possession.

3. Plaintiffs have filed written statement to the counter-claim. They have denied the contents of the claim of defendants and denied that they have committed encroachment on the suit property.

4. Taking the into considerations the rival claims, issues came to be framed. Parties have led oral as well as documentary evidence. Learned 2nd Joint Civil Judge, Senior Division, Beed has dismissed the said suit on 16-04-2016. Plaintiffs had challenged the said Judgment and decree in Regular Civil Appeal No.78 of 2016. The said appeal was heard by learned District Judge – 3, Beed and dismissed it on 10-09-2018. It will not be out of place to mention here that the said suit was also tried by the learned Trial Court with another suit viz. Special Civil Suit No.03 of 2015 filed by one Shaikh Majjid Shaikh Maheboob and another against defendants from said Special Civil Suit No.59 of 2014, but it was in respect of same survey number. The plaintiffs in Special Civil Suit No.03 of 2015 were also claiming declaration of ownership and perpetual injunction in respect of same property. Defendants had filed counter-claim in both the suits and claimed possession of respective suit properties from plaintiffs. Counter-claims in both the suits was allowed and plaintiffs

were directed to hand over the possession of respective portion of suit survey number to defendants. Hence, this second appeal. Since the decree passed in Special Civil Suit No.59 of 2014 was challenged in Regular Civil Appeal No.78 of 2016 and the decree passed in the said appeal is challenged in this second appeal, the facts and evidence relating to suit filed by present appellants would only be considered here.

5. It has been vehemently submitted on behalf of appellants that both the Courts below have not considered the facts as well as law applicable to the case in proper perspective. Both the Courts have failed to consider that the property was originally owned by Sardar Khan, who had then shifted to Pakistan. It was treated as evacuee property. It was allotted to Avatram Radhakisan Tekwani for cultivation. There was no right with him to sell out the land. He managed to file a suit for partition i.e. Special Civil Suit No.575 of 1961 and got a decree in their favour on 29-09-1965. His legal representatives had entered into agreement to sell and had delivered possession of portion of the land to defendants. However, by order dated 15-02-1982 Mutation Entry No.365 dated 06-11-1978 was set aside. The transaction of sale between defendants and their predecessor was without any right, title or interest. Plaintiffs are claiming possession over suit land since 1981. Their witnesses as well as documents produced on record would show their possession.

They were using the said premises as owner thereof. Therefore, they have become owner of the suit premises. Both the Courts erred in not granting the said relief to the plaintiffs.

6. Reliance has been placed on the decision in *Karnataka Board of Wakf v/s. Government of India and Ors.* Reported in [(2004) 10 SCC 779]; wherein it has been held that,

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession".

Similar ratio was also laid down in *T. Ajanappa and Ors v/s. Somalingappa and Anr.* reported in [2006 AIR SCW 4368]. On the basis of these citations, it was submitted that all these factors have been proved by the plaintiffs in this case. Hence, substantial

question of law is arising in this matter.

7. Per contra, the learned Advocate appearing for respondents submitted that the plaintiffs have not at all pleaded in clear terms in the plaint that they have become owner of the suit property by adverse possession. There was another opportunity also available to them to plead it in the written statement to the counter-claim; however, no such pleading was raised. There is no challenged to the title of defendants or their predecessors by the plaintiffs at any earlier point of time. In order to establish the plea of adverse possession, the plaintiffs should admit the title of the defendants and/ or their predecessor. Now for the first time in second appeal, plaintiffs are raising this plea, which can not be allowed. Both the Courts below have correctly appreciated the pleading, evidence and law applicable. No substantial question of law is arising.

8. At the outset, it is required to be seen, as to whether any substantial question of law has been pointed out by the original plaintiff, for exercising jurisdiction of this Court under Section 100 of the Code of Civil Procedure. As per the law laid down by Supreme Court in catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of Code of Civil Procedure, after the 1976 amendment, is confined only when the Second Appeal involves as a substantial question of law. The

existence of 'a substantial question of law' is a *sine qua non* for the exercise of the jurisdiction under Section 100 of the Code of Civil Procedure.

9. A reliance can be placed on decision in, *Ishwar Dass Jain vs. Sohan Lal*, reported in (2000) 1 SCC 434, wherein it has been observed that -

"Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

Therefore, it is now required to be seen, whether any substantial question of law can be raised by the appellant, taking into consideration the facts as well as evidence that has been adduced.

Therefore, taking into consideration the observations in the

above said case and also on the decision in, *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar* reported in (1999) 3 SCC 722, wherein it has been held that,

"In a Second Appeal under Section 100 of CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being :

(i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on in-admissible evidence or no evidence."

Further, it is observed in the said case that,

"If First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal."

10. Therefore, taking into consideration the above-said legal position, it is required to be seen as to whether any substantial question of law arises in this matter. Perusal of plaint as well as evidence led by plaintiffs would show that they have not given source of their entry point in the suit property. How they came to be inducted in the premises should have been disclosed by them in

clear terms. When they say that they are possessing the suit premises since 1981 lawfully, then the said lawful source ought to have been disclosed. They have not come with a case that they had purchased the suit premises from its original owner, nor their case is that they had obtained lease or they were the licencees. Merely because some third party had given loan or recommended them, will not make their possession lawful. They have also not come with a case their entry in the suit premises was unauthorized, but they are thereafter using the premises as of their ownership.

11. Plaintiffs have not taken a plea of adverse possession in specific terms in their plaint. In order to establish the plea of adverse possession, plaintiff should prove as laid down in (2004) 10 SCC 779 (supra) -(i) their date of possession, (ii) nature of possession, (iii) factum of their possession was known to defendants, (iv) period of possession and (iv) possession was open and undisturbed. Out of these requirements, plaintiffs have not proved (ii) i.e. Nature of possession. One more important requirement is not fulfilled in this case by the plaintiff and that is, plaintiffs have not admitted the ownership of the defendants over suit premises. Rather the plaintiffs have disputed the ownership of the predecessor of plaintiffs and contend that said predecessor of defendant had no authority to sale out the land to plaintiffs. In order to establish the plea of adverse possession, plaintiffs should prove

that at least for more than 12 years, they were admitting the ownership of defendants or their predecessor and then the plaintiffs were enjoying the property in hostility known to defendants and predecessor. In the said case of *Karnataka Board* (Supra), Hon'ble Apex Court has observed that,

"In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period".

12. Further reliance can be placed on the judgment of Hon'ble Apex Court in *Dabadabai (dead) by L.Rs. Vs. Abbas @ Gulab Rustum Pinjari*, reported in, [2017 (3) Civil Court Cases 311 (SC)] wherein it is observed in para 18 and 21 as under :

"18. Third, the plea of adverse possession being essential a plea based on facts, it was required to be

proved by the party raising it on the basis of proper pleadings and evidence. The burden to prove such plea was, therefore, on the defendant who had raised it."

"21. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well-settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants."

13. In this case, the plea of adverse possession has been taken by the appellants for the first time in this Second appeal. The same is mutually incompatible with their plea of ownership. Therefore the point raised by respondents that the plea of adverse possession must be specifically pleaded and proved, is correct proposition of law. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. This has been so held in, *Dr. Mahesh Chand Sharma v/s. Raj Kumari Sharma*, reported in [(1996) 8 SCC 128]. Further in *S. M. Karim v/s. Bibi Sakinal*, reported in, [AIR 1964 SC

1254] it has been held that,

"Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it."

In *P. Pariasami v/s. P. Periathambi*, reported in, [(1995) 6 SCC 523] Apex Court ruled that -

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

14. The law is very clear on the point that a plea of adverse possession should be raised specifically. When that plea was not taken specifically, both the Courts below have appreciated the evidence and the law properly. Plaintiffs can not challenge title of the defendants. It was sufficient for defendants to produce sale-deed to show their ownership. Plaintiffs have not produced cogent evidence to prove that previously they were running the business from suit premises only and not from the place out side the suit premises as contended by defendants. Now definitely they are carrying their business from suit premises. Hence, by the preponderance of probability, it can be inferred that their possession over the suit premises is permissive in nature. Defendants are entitled to get back the possession from plaintiffs.

15. For the afore-said reasons, it can be concluded that no

substantial question of law is arising in this matter, requiring admission of the matter. Hence, the second appeal is disposed of as **Not admitted**. The pending civil application stands disposed of, in view of the disposal of second appeal.

(SMT. VIBHA KANKANWADI)
JUDGE

vj gawade/-.