

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8012 OF 2021

Sujata Himmatrao Shankhpal

Petitioner

Versus

Shamkant Bhagwantrao Sonawane
and others

Respondents

Mr.Amol S. Sawant, advocate for the petitioner

CORAM : AVINASH G. GHAROTE, J.

DATE : 28th July, 2021.

PC :

1 Heard Mr.Sawant, learned Counsel for the petitioner.

2 The petitioner has instituted a suit, for declaration that she has become the owner of land admeasuring 3200 square feet from and out of the land of plot no.26, totally admeasuring 8800 square feet, as against respondent no.1, by way of adverse possession; so also a declaration that the sale deed dated 11.11.2020 executed by respondent no.1/defendant no.1 in favour of respondents no.2 and 3 is null and void and not binding upon the petitioner/plaintiff.

3 Both the Courts below have concurrently held that the petitioner is not in possession of the property and, therefore, did not have any *prima facie* case, in absence of which, the application for grant of temporary injunction has been rejected by the trial court, which has been confirmed by the appellate Court.

4 Mr.Sawant, learned Counsel for the petitioner, submits that the Courts below have rejected the relief only on the ground that the relationship between the plaintiff and defendant no.1 has not been disclosed, by ignoring the affidavits of the neighbours regarding the possession of the plaintiff and that of the contractor who had constructed the boundary wall over the disputed property, at the instance of Himmatrao, father of the plaintiff and, therefore, the impugned orders cannot be sustained.

5 The relationship between the parties is material. The respondent no.1 is the husband of the petitioner's real sister Sushma. Sushma is said to have passed away in February-1999, since which date, it is alleged that the relations are strained. However, learned Counsel Mr.Sawant fairly admits that this statement neither find place in the plaint nor in Exhibit-5.

6 It is an admitted position on record that the relationship between the parties, as indicated above, has not been disclosed in the plaint. There does not appear to be any apparent reason not to disclose the same. In fact, in my considered opinion, disclosure of the relationship, was material, as it had a bearing upon the plea raised by the plaintiff, of being in exclusive possession, hostile to defendant no.1.

7 It is not in dispute that plot no.26, situated at Dhule, originally measured 8800 square feet, out of which an area of 2800 square feet was purchased by late Himmatrao on 04.01.1997 and balance area of 3200 square feet was purchased by Respondent no.1 on the same day by a sale deed dated 04.01.1997. It is also not disputed that the relationship between late Himmatrao and defendant no.1 was that of father-in-law and son-in-law. It is also not disputed that Respondent no.1, due to his employment, was residing outside. From the affidavit of the contractor, at page 63, dated 14.01.2021, it appears that the boundary wall was constructed by late Himmatrao around the entire plot no.26. The affidavit of the contractor – Nathu Uttam Bhadane, however, does not say anything else.

8 Considering the relationship between defendant no.1 and Himmatrao and purchase by them of two portions of plot no.26, it can be inferred, that Himmatrao was acting in the interest of his son-in-law – defendant no.1. There is nothing in the affidavit of Nathu Bhadane to indicate otherwise.

9 The plaintiff, admittedly has not made any construction whatsoever, on any portions of the plot no.26. The portion of plot no.26 owned by the defendant no.1 was lying vacant since long. It is averred by defendant no.1 that whenever he used to visit Dhule, he would go upon the suit property and inspect the same. This being the position, the claim of the plaintiff, of being in possession of the property, can also be construed to be for and on behalf of the defendant no.1, considering the relation between them.

10 Surprisingly, the reading of the plaint, though it claims relief of declaration of having become owner by way of adverse possession, does not contain a single averment, that at any point of time, there was any assertion of any hostile title, by the plaintiff *vis-a-vis* the defendant no.1, which is an essential ingredient of law

of adverse possession. It is a well settled position of law that possession, however long, cannot be termed as adverse, unless the necessary ingredient of having asserted a hostile title to the knowledge of the actual owner for a continuous uninterrupted period of 12 years, is established. Though Mr.Sawant, learned Counsel for the petitioner, places reliance on paras 5 and 7 of the plaint, a reading of these paras, does not indicate so and, therefore, in the instant matter, there is absolutely no averment in this regard, Not only this, Mr.Sawant, learned Counsel for the petitioner, fairly admits that there is no document to indicate any assertion of a hostile title by the plaintiff as against defendant no.1 from 1999 till the date of filing of the suit. That being the position, a mere statement, that the plaintiff is in possession of the suit property openly and, therefore, has become the owner of the same, by way of an adverse possession, is clearly unacceptable, as it does not satisfy the essential requirements of the plea of adverse possession.

11 Both the Courts have rendered a concurrent finding that the plaintiff had failed to establish her possession of the open land of the suit property. Merely because there was a common boundary wall, constructed by Himmatrao - the father of the

plaintiff, during his life time, considering the relationship between the parties, it cannot be said that either Himmatrao, during his life time, or for that matter, the plaintiff, after the demise of Himmatrao, have acquired exclusive possession over the suit property to the exclusion of the defendant no.1. The plaintiff, obviously appears to be taking advantage of the construction of the boundary wall on the land of plot no.26 by Himmatrao, during his life time. However, the relationship belies the plea of exclusive possession, adverse to that of the defendant no.1.

12 It has also come on record that though Himmatrao expired on 21.07.2014, during his life time, he did not take any steps to mutate his name in the records of the city survey *vis-a-vis* the suit property and even after his demise, the plaintiff also did not do so in spite of the fact that she claims title to the same on the basis of the will said to have been executed by late Himmatrao, during his life time, in her favour. It is only in the year 2018, that the attempt was made to enter the name of Himmatrao and the plaintiff, which has been opposed by the defendant no.1. In the judgment of the appellate Court, it has come on record, that the defendants no.1 to 3 have demolished the wall and have constructed a wall between the two portions of plot no.26 and

defendants no.2 & 3 also obtained electricity connection and got their names mutated in the property records *vis-a-vis* the suit property and, therefore, have established their possession over the same.

13 The affidavits of the neighbours, relied upon by Mr.Sawant, learned Counsel for the petitioner, merely speak about the compound wall and user by the plaintiff and nothing else. They, therefore, do not support the plea of the plaintiff, that she was in exclusive possession of the suit property, adverse to that of defendant no.1, which, even otherwise, cannot be presumed, considering the relationship between the plaintiff and defendant no.1 and the manner in which the property was acquired by Himmatrao and defendant no.1.

14 In view of the above, I do not find any infirmity with the impugned order and judgment of the trial Court and the appellate Court on the temporary injunction application. The petition is, therefore, without merit and is accordingly dismissed. No order as to costs.

(AVINASH G. GHAROTE)
JUDGE