

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.692 OF 2021
WITH
INTERIM APPLICATION NO.2005 OF 2021

Istelin @ Stella Peter Disilva & Ors. .. Petitioners

Versus

Swapnil Santosh Nar & Anr. .. Respondents

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Mr.A.S.Peerzada for the Petitioners.

Mr.Mayur Khandeparkar with Ms.Kshitija Wankhede for the Respondents/Applicants.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 03rd DECEMBER, 2021
PRONOUNCED ON : 14th DECEMBER, 2021

ORDER:-

1. The petitioners, who are the plaintiffs in Regular Civil Suit No.534 of 2019 instituted before the Civil Judge, Junior Division, Vasai under Sections 34 and 38 of the Specific Relief Act, 1963, are aggrieved by an order passed by the District Judge-3, Vasai dated 08/01/2021 in M.C.A. No.38 of 2020. By the said order, the injunction granted in favour of the plaintiffs by the trial Court on 23/12/2020 below Exh.5 was turned down, on an Appeal filed by the respondents.

2. On being noticed, the respondents have put their response through the learned counsel Mr.Mayur Khandeparkar.

3. I have heard the learned counsel Mr.A.S.Peerzada for the petitioners and learned counsel Mr.Mayur Khandeparkar for the respondents. With their able assistance, I have perused the documents placed on record as a part of the writ petition.

4. Petitioner No.1-Istelin @ Stella Peter Disilva, aged 83 years alongwith petitioner Nos.2 to 5, claimed to be in possession of property specifically described as Survey No.48, Hissa No.2(a) admeasuring OH 77R-50 situated at village Vasalai, Tal.Vasai, Dist. Palghar and the said property is claimed to be an ancestral property, inherited by the petitioners since 1976.

5. Civil Suit came to be filed in the Court at Vasai bearing No.234 of 1982 by one Philip Carvalo and 10 others, seeking permanent injunction against the petitioners in respect of the suit property. At this stage, it is necessary to mention the description of the suit property in R.C.S. No. 234 of 1982 and the description is as under :-

“Land at Mouje Kolar Budruk Taluka Vasai, District Thane
Survey No.37 Hissa No.2A cultivable area 0-91-3 and
barren land admeasuring 0-12-9 .”

A map was also appended alongwith the plaint filed in the said suit, which is dismissed in default on 21/08/1998.

Another suit, vide Regular Civil Suit No.138 of 2007 came to be filed by one Walter Domnic Lopes, claiming through Mr.Philip, seeking a similar injunction against the petitioners. In the said suit, the Court Commissioner was appointed and the report is submitted on 13/01/2009, but the said suit was dismissed once again in default on 17/06/2011. Mr.Walter Domnic Lopes sought restoration of the said suit, but even the said application was dismissed on 04/03/2017, resulting into the proceedings in suit No.138 of 2007, attaining finality.

6. The case of the petitioners is to the effect that having failed to obtain any orders against the petitioners, Mr.Walter Lopes published a notice in a Marathi daily newspaper for sale of the suit premises and the petitioners through their Advocate objected to the sale, by bringing on record the past attempt of Mr.Walter Lopes, as a consequences, the petitioners were successful in restraining him for selling the suit property. It is further alleged by the petitioners that on 18/04/2019, Mr.Walter sold the suit premises and the respondents collectively forced an entry into the premises of the petitioners alongwith JCB and demolished all the structures standing thereon, which were mentioned in the report of the Court Commissioner. A police action was also initiated and the matter was referred to the Tahsildar, Taluka Vasai under the provisions of Section 145 of the CPC. I need not delve deep into the said proceedings but it is only relevant to mention that on the petitioners approaching the Sessions

Court, against the order passed by the Tahsildar, on 18/12/2020, status-quo came to be granted and the matter is still pending at the level of the Collector.

7. On 18/12/2019, the petitioners filed Suit No.534 of 2019 in the court of Civil Judge, Junior Division at Vasai in which a claim is staked to the effect that the plaintiffs have become owner of the suit property by adverse possession and they sought a declaration to that effect alongwith the relief of restraining the defendants from interfering with their possession or creating any third party interest in the said suit property. The suit filed by invoking Sections 34 and 38 of the Specific Relief Act, describes the suit property as ,

<u>Survey No.</u>	<u>Hissa No.</u>	<u>Area</u>
48	2A	0-64-60 HR
		<u>0-12-90 (barren) HR</u>
	Total	0-77-50 HR

Out of the above, the land under bawkhal and barren land was described as 0-06-60 HR with the property being described by referring to its boundaries on all the four sides.

8. In support of the relief sought in the plaint, it is pleaded that the aforesaid suit property is in the possession of the plaintiffs as being its owner and it has come into the possession of the plaintiffs and their predecessors and for last 37 years or more, they are enjoying the said property by way of adverse possession and even the entries in the record of

rights are mutated in the name of Philip Carvalo and others. It is also pleaded that the husband of plaintiff No.1 and father of plaintiff Nos.2 to 5 had planted fruit bearing trees and even a 'grotto ' (Cross) was also constructed in the year 1976 and in the year 2007, after obtaining necessary permission from Gram Panchayat Kolar, has compounded the same. It is pleaded that in the said property, there is Gram Panchayat House No.1901 and the tax is paid by the plaintiffs. Further, it is pleaded that electricity connection is also made available for the said house, since the plaintiffs are in ownership and possession of the suit property.

In view of the attempts of the defendants to dispossess the plaintiffs, the suit came to be filed which was accompanied by an application for temporary injunction.

9. The learned Civil Judge, Junior Division, Vasai granted the said application in the backdrop of the pleading, that Walter Lopes has executed a Sale Deed in favour of the defendants in respect of certain portion of the suit property, but the Sale Deed is merely a paper document, since the plaintiffs were never denuded of their possession. Recording that the 7/12 extract clearly mention the names of the plaintiffs, in contrast to the submission of learned counsel for the defendants that the names of the plaintiffs do not appear in the 7/12 extract with regard to Survey No.48, Hissa No.2(a), but they appear in Survey No.48, Hissa No.2(g), the learned Judge did not pay any heed to the arguments of the defendants, since the property in the Sale Deed is not properly described and that the defendants have failed to bring on

record its appropriate description. On the contrary, on the basis of the documents placed on record, it is recorded that the plaintiffs are in possession of the suit property. The learned Judge also record that the question with regard to their ownership, by way of adverse possession is to be decided at a latter stage, when the parties adduce their evidence. However, at present since the plaintiffs' possession over the suit property needs to be protected, the temporary injunction came to be granted on 23/12/2020.

10. On an Appeal being filed, the Appellate Court dealt with the case set out by the respective parties by recording that as per the plaintiffs, in the suit property, their house is located being House No.1901 and that the plaintiffs are regularly paying the tax and have also obtained electricity connection for the said house. The plea of the plaintiffs that they have become the owner of the suit property by way of adverse possession is also recorded.

In contrast, the case of the defendants is recorded to the effect that the plaintiffs have not properly described the suit property and they have not even mentioned the date on which, they actually came in possession and, therefore, their plea was recorded that in absence of the prima facie interest in the suit property being established by them, they are entitled for temporary injunction.

11. In the backdrop of the rival contentions where the defendants claim that in 7/12 extract of Survey No.48/2/A,

defendants have purchased immoveable property admeasuring 0-06-60 HR and in that Survey, there is 0-64-60 HR land which is good for cultivation while 0-12-90 land is barren land. As per 7/12 extract, immoveable property purchased by defendants is described as cultivable land and all the barren land stands in the name of one Sil family and the plaintiffs do not stake their claim of ownership qua any property in the said Survey land. The landed property of the plaintiffs is in Survey No.48/2/G. The 7/12 extract of both the Survey numbers was brought on record before the Appellate Court. Upon this, the learned Judge rendered a finding that the claim of the plaintiffs is based on adverse possession and, therefore, it is imperative for them to plead on what date, they came into the possession of the suit property, what was the nature of their possession, whether the factum of possession was adverse and how long the possession has continued, without any disturbance. Recording that a person pleading possession is not entitled for equities in his favour, since he is claiming his possession adverse to that of the true owner, he must establish the factum of adverse possession. By referring to the pleadings which are without any details and merely contain an averment that the plaintiffs are in possession of the suit property, since 1976, the learned Judge return a finding of fact that the plaintiffs have their property located in Survey No.48/2/G, which is adjacent to Survey No.48/2/A and to be more specific, and adjacent to west boundary of the suit property, the house of the plaintiffs is located. Admittedly, there being no demarcation between the two Survey numbers, the Court Commissioner had carried out the work of

demarcation, in absence of the plaintiffs. Drawing corroboration from the report of the Court Commissioner where there is no house noticed in the suit property, but the house was shown in the adjacent land, on the western side of the suit property, the learned Judge reversed the order passed by the trial Court. The suit property with reference to RCS No.138 of 2007 is described as barren land and in 7/12 extract of Survey No.48/2/A, there is a description of 0-12-90 HR barren land and is admeasuring 0-06-60 HR. The 7/12 extract of Survey No.48/2/A, include the barren land of 0-12-90 HR and is shown to be mutated in the name of Seal family whereas against the names of the defendants, the cultivable land admeasuring 0-06-60 HR is found to be mutated. Recording that the plaintiffs have failed to prove or plead a case of an adverse possession and, since, the properties of the plaintiffs and the suit property are clearly distinct one, the Appeal has been allowed and the application (Exh.5) came to be dismissed.

12. The photographs placed on record at page 116 of the paper-book reveal the position as brought on record by the learned Appellate Court. The land in which the banana trees are planted, which is the subject property is distinct from the house of the plaintiffs. The report of the Commissioner, which was filed in the earlier round of the litigation between the parties on 13/01/2019 while describing the suit property claimed by Mr. Walter Lopes, described as the one located in Mouje Vasalai, Survey No.48 (Old 37) out of Hissa No.2, an area admeasuring 0.06.6 is the land in bawkhal, which is an

unconstructed well and are peculiar in the region of Vasai-Vira, as the source of ground water. While describing the boundaries in the report, the Commissioner mentioned the house of Leslie Disilva on the South, on the North an 8 ft. wide road, on the East the main road and on the West, the property of the defendants (present plaintiff Nos.1,2, 4 and 5) i.e. bungalow styled as "Sun Shine".

The suit property is described to be surrounded by a concrete compound with an iron gate being installed with a Cross next to the gate, being erected. The suit property shows the presence of a garden where some trees are planted alongwith the presence of a shed of 8 X 8 ft. erected by using tin sheds where a electric meter is installed and a bill of house tax is affixed with description of House No.1901 in the name of Stela Peter Disilva. In the said shed, the agricultural equipments are found. At the same time, the Commissioner also described in his report that in the suit property, there is a bawkhal with stairs and the well in the property is of the diameter of 20 to 25 ft., which is the cement concrete well. The report of the Commissioner, when carefully perused, referred to the existence of bungalow, belonging to the plaintiffs and on comparison of the property described in the suit, in para 1 of the plaint, it can be seen that it is a larger property of O-77-50 HR, out of which, the barren land is described as O-06-60 HR alongwith bawkhal. If the property described in the earlier suit is perused, it is only some portion out of Hissa No.2 and the defendants are claiming the entire property from Survey No.2 and the learned Appellate Court has rightly recorded that the plaintiffs are claiming ownership

and possession over 0-77-50 HR, including the barren land and the bawkhal whereas the defendants have *prima facie* established that they have purchased the landed property in Survey No.48/2/A which is admeasuring 0-06-60 HR and this has become apparent from 7/12 extract of Hissa Nos.2A and 2G, which is placed on record. Moreover, on the plea of adverse possession as staked by the plaintiffs, not being proved or established, a *prima facie* case does not exist in favour of the plaintiffs and this is what the Appellate Court has recorded, while disturbing the temporary injunction granted in favour of the plaintiffs.

13. The order passed by the learned District Judge, being based on the aforesaid reasons, does not warrant any interference and the same is upheld. Consequently, the writ petition is dismissed.

In view of the dismissal of the writ petition, interim application does not survive and stands disposed of.

14. The suit filed by the petitioners is pending since 2019 and it would be appropriate to direct the Civil Judge, Junior Division, Vasai to conclude the proceedings in the suit, within one year from today.

(SMT. BHARATI DANGRE, J.)