

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

SECOND APPEAL NO.50 OF 2021

Shantabai Pandurang Mhaske & Ors. **..Appellants**

Vs.

Sou. Varsha Vijaykumar Kshirsagar
Through Power of Attorney Holder

Shri.Yuvraj Narasingrao Kshirsagar & Ors. **..Respondents**

Mr.Nikhil Wadikar i/b Nandu Pawar for the Appellants.

Mr.V.S. Talkute for the Respondents.

CORAM : C.V. BHADANG, J.

RESERVED ON : 10th FEBRUARY 2021

PRONOUNCED ON : 08th MARCH 2021

P.C.

1. This is second round of litigation between the parties before this Court.

2. The appellants are the original defendants, challenging the judgment and decree dated 09th December 2019 passed by the learned District Judge at Satara, in Regular Civil Appeal No.137 of 2019 thereby confirming the judgment and decree dated 01st April 2019 passed by the learned Civil Judge Senior Division, Satara in

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Special Civil Suit No.158 of 2017 filed by the respondents (Plaintiffs).

3. The brief facts necessary for the disposal of the appeal may be stated thus :-

That land admeasuring 48 feet x 47 feet i.e. 2256 sq.ft. from out of City Survey No.231 situated at Godoli, Taluka-Satara, District-Satara is the subject matter of dispute. CTS No.231 was originally owned by Eknath Jagtap. Late Vithal Ramchandra Mhaske who is predecessor in title of the appellant purchased a land admeasuring 48 x 43 feet from out of CTS No.231 under a registered Sale Deed dated 30th January 1948 from Eknath Jagtap. The respondents claim to have purchased the remaining land from out of the said Survey Number under Sale deed dated 29th December 2019 from the heirs of Eknath Jagtap.

4. For the sake of convenience parties are referred to in their capacity as plaintiffs and defendants. Earlier the defendants filed RCS No.427 of 2011 claiming declaration of ownership in respect of an area i.e. 90 feet x 48 feet (which is in excess of the area purchased under the Sale Deed of the year 1948). The declaration was claimed on the basis of the title based on the sale

deed and for the balance portion on the basis of adverse possession. The defendants sought perpetual injunction against the plaintiffs from disturbing the possession of the defendants over the said area. It appears that the plaintiffs filed RCS No.430 of 2011 seeking an injunction against the defendants from disturbing their possession and from restraining the defendants from interfering with the construction undertaken by the plaintiffs as per the sanctioned plan.

5. The learned trial Court by a common judgment and decree dated 12th March 2013 partly decreed RCS No.427 of 2011 to the extent of granting perpetual injunction. However, the claim of the defendants of declaration of title by adverse possession was rejected. RCS No.430 of 2011 filed by the plaintiffs was also dismissed. Being aggrieved by the said common judgment and decree the defendants preferred RCA No.146 of 2013 while the plaintiffs filed RCA No.166 of 2014 before the learned District Judge against the dismissal of their suit.

6. The learned District Judge, Satara by a common judgment and decree dated 06th May 2016 partly allowed RCA No.146 of 2013 (Filed by the defendants) and held that the defendants were in settled possession of an area to the extent of 90

x 48 sq.ft. and accordingly restrained the plaintiffs from evicting the defendants, without following due process of law or causing interference in their possession. It is necessary to note that the part of the judgment and decree refusing to grant declaration of ownership on the basis of adverse possession was confirmed. RCA No.166 of 2014 filed by the plaintiffs was also partly allowed, thereby granting a decree of perpetual injunction in favour of the plaintiffs and restraining the defendants from disturbing the possession of the plaintiffs or interfering with any construction activities in accordance with law, in the balance area of CTS No.261 i.e. excluding the area referred to above i.e. 90 feet by 48 feet.

7. It appears that the defendants Pandurang Mhaske and Others filed Second Appeal Nos.642 of 2016 while the defendants Baban Mhaske & Others filed Second Appeal No.656 of 2016 challenging the said judgment and decree. The record discloses that by an order dated 28th February 2017 and with the consent of parties this Court appointed the Taluka Inspector of Land Record (TILR) to demarcate separate portion of the lands out of CTS No.231 as property-A, Property-B and Property-C as referred to in paragraph Nos.6,7 and 8 of the common judgment and decree dated 06th May 2016 passed by the learned District Judge.

8. It appears that the City Survey Officer, Satara after giving notice to all concerned carried out measurement on 03rd April 2017 and demarcated the respective portions and submitted a map along with report to this Court. It is necessary to note that both the parties accepted the said report. It is in these circumstances, that the Second Appeal Nos.642 of 2016 and 656 of 2016 came to be disposed of by order dated 06th September 2017 by consent of parties. The relevant paragraph No.13 reads thus:-

“13. In light of the aforesaid developments, I am of the view that the following order would substantially address grievances on both sides, and meet the ends of justice, particularly having regard to the peculiar facts and circumstances of the present case and in view of the narrow controversy involved in the present Second Appeal. Hence, with the consent of the Advocates and parties, the following workable order is being passed:

(i) The Common judgment and decree dated 06-05-2016 Regular Civil Appeal Nos.146 of 2013 and 166 of 2014 is hereby confirmed. The map submitted by the Surveyor dated 03-04-2007 pursuant to order dated 28-02-2017 passed by this Court will form part of the decree for the purpose of ascertaining the title and actual possession of the respective parties with reference to property described as Property-A, Property-B- and Property-'C' in the said judgment and decree.

(ii) The TILR, Satara is directed to subdivide CTS No.231 situate at Godoli, Taluka and District-Satara as per the map dated 03-04-2017 within a period of 1 months from the date of uploading of this order.

(iii) The City Survey Officer is directed to give effect of the said subdivision in the City Survey Records.

(iv) The Respondents are restrained from dispossessing the Appellants in Property-B without following due process of law.

(v) The Respondents are entitled to carry out construction in the whole area of Property-'C' utilizing the FSI available to the area referred to the extent of Property-'B' subject to condition that the Respondents shall file an undertaking within a period of one week from the date of uploading of this order to the effect that they shall keep flat/s approximately admeasuring not less than 1,200 carpet area in the building constructed by the respondent C.T.S. No.231, Godoli, Taluka and District Satara, unsold and unencumbered for the period set out in clause vii hereinafter.

(vi) The Respondents are at liberty to file within eight weeks from the date of this order to evict the Appellants from the property referred to as Property-'B' in the common judgment and decree dated 06-05-2016 passed by the learned District Court, Satara in Regular

Civil Appeal Nos.146 of 2013 and 166 of 2014 and in the map submitted by the Surveyor dated 03-04-2017 (Proposed Suit).

(vii) The aforesaid Flats shall be kept unsold and unencumbered as indicated in Clause V above, until a final decree is passed in the proposed suit, subject to Appeal/s, if any, only if the proposed Suit is filed within wight weeks from the date of this order. In the event the propose Suit is dismissed by final decree, after attaining finality, the Respondents shall execute a Sale Deed in respect of the aforesaid Flats in favour of Appellants.

(viii) In the event the Respondents get a final decree in the proposed Suit to evict the Appellants from the entire Property-'B' referred to hereinbefore, the Respondents shall be entitled to dispose of the aforesaid unsold and unencumbered Flats in the manner the Respondents desire and the Appellants shall not have any right, title or interest in the said Flats.

(iv) In view of the aforesaid arrangements, the consent of the Appellants is not required revision of the Sanctioned Plan which may be filed by the Respondents with the Satara Municipal Council. The Satara Municipal Council is free to consider the revision of modification of the sanctioned plan which is to be

submitted without insisting upon any separate consent of the Appellants, for such revision.

(x) For the purpose of giving effect to the present order, the TILR/Survey Officer, Satara who has carried out commission work pursuant to order dated 28-02-2017 is directed to visits the site on 15-09-2017 for the actual fixing of the boundary marks; the parties shall attend to, and cooperate with, the fixation of the boundary marks.

(xi) The Appellants shall not obstruct the Respondents for the construction of a compound wall with tin sheets between the properties which are in possession of the respective Appellants and Respondents as mentioned in the Judgment and Decree dated 06-05-2016 passed by the learned District Court, Satara in Regular Civil Appeal Nos.146 of 2013 and 166 of 2014 and in the map submitted by the Surveyor dated 03-04-2017. The Senior Inspector of Police/In-charge inspector of the local police station is directed to provide police protection for constituting the said compound wall with tin sheets, on the application of the Respondents, if necessary.

(xii) The Appellants shall not create any third party interests or part with the possession of the property described as Property-'B' during the pendency of the proposed Suit to be filed by the Respondents.

(xiii) The proposed Suit, if instituted by the Respondents, shall be disposed of by the learned Trial Court as expeditiously as possible and in any event within a period of 9 months from its institution.

(xiv) The parties are liberty to move for clarification or for giving effect to the aforesaid order, if necessary.

(xv) The Second Appeal are disposed of in the aforesaid terms.

(xvi) All concerned to act on ordinary copy of this order duly authenticated by the PA of this Court.

9. In pursuance of the liberty granted by this Court the plaintiffs filed Special Civil Suit No.158 of 2017 for possession of the area admeasuring 2256 sq.ft. (the suit property) shown by letter-B in the map after removing any structure standing thereon and for damages.

10. The defendant No.3 filed a written statement Exhibit-32 and resisted the suit. It was contended that the plaintiff has shown the portion-B to be the open space when actually there is a house of the defendant standing over the said portion. It was also contended that the measurement made by the City Survey Officer in pursuance

of the order passed by this Court in Second Appeal Nos.642 of 2016 and 656 of 2016 was not correct and in any event that measurement was limited to the dispute in the said appeal. In short the correctness of the map was sought to be disputed. It was also contended that the plaintiffs have already utilized the entire FSI including the one available over the suit portion and therefore the valuation of the suit property is nil. There were other contentions raised about the pecuniary jurisdiction of the Court.

11. The defendant Nos.1, 2 and 4 to 12 filed a Pursis Exhibit-52 and adopted the written statement of the defendant No.3.

12. On the basis of the rival pleading the learned Trial Court framed the following issues:-

<i>Sr.No.</i>	<i>Issues</i>
<i>1</i>	<i>Do the plaintiffs prove that, they are the owner of the suit property situated in C.S.No.231 which is shown by letter "B" in plaint map ?</i>
<i>2</i>	<i>Whether the plaintiffs are entitled for possession of suit property as prayed for ?</i>

- 3 *Whether the plaintiffs are entitled to get compensation of Rs.13,00,000/- from the defendants as prayed for ?*
- 4 *Whether the plaintiffs are entitled for permanent injunction as prayed for ?*
- 5 *What order and decree ?*

13. The plaintiff examined Yuvraj Narsingrao Kshirsagar (PW-1) and produced the Property Card Exhibit-9, the copy of the Sale Deed dated 29th December 2019 (Exhibit-71) and the copy of the judgment of this Court in Second Appeal Nos.642 of 2016 and 656 of 2016 (Exhibit-11). The defendants did not lead any evidence.

14. The learned trial Court answered issue Nos.1 and 2 in the affirmative and the Issue Nos.3 and 4 in the negative. In the face of the findings as above, the learned trial Court by a judgment and decree dated 01st April 2019 partly decreed the suit directing the defendants to hand over the vacant and peaceful possession of the suit property i.e. admeasuring 2252 sq.ft. shown by Letter-B in the plaint map, by removing construction/shed, if any, which decree has been confirmed in appeal.

15. I have heard the learned counsel for the appellant and the learned counsel for the respondent. With the assistance of the learned counsel for the parties I have gone through the record.

16. In the appeal memo the appellant has framed the following draft substantial question of law.

“(a) Whether the Ld. Trial Court as well as District Court failed to appreciate the settled position of law that when there is discrepancy between the boundaries and the area of the property sought to be transferred vide a sale deed, the boundaries prevail over the area ?”

17. It is submitted by the learned counsel for the appellant that there was no issue about the ownership framed in the earlier round of litigation. It is submitted that Section 91 of the Evidence Act, would require the plaintiffs to produce the Sale Deed to prove title and the title cannot be proved on the basis of oral evidence. It is next submitted that there is discrepancy in the area and boundaries and in such a case it is the boundaries which shall prevail. It is submitted that the Courts below have not properly appreciated the contentions in this regard.

18. On behalf of the appellants reliance is placed on the decision of the Supreme Court in the case of *Ramlal and Another V/s. Phagua & Others*¹ and of this Court in *Temple of Maruti, situated at Cacoda, by its attorney Shri.Shashikant Shembu Nagvenkar V/s. Balkrisna Suryaji S. Kakodkar & Anr.*².

19. The learned counsel for the respondents has supported the impugned judgment.

20. It is submitted that in the earlier round of litigation the suit property was got measured and the report filed by the City Survey Officer and the map annexed was not disputed. It is submitted that the Second Appeal Nos.642 of 2016 and 656 of 2016 were disposed of by consent of parties. It is submitted that the Court below in the earlier round of litigation have concurrently refused to accept the case put forth by the defendants based on adverse possession and thus now the appellants cannot question the same particularly when the said findings have attained finality. It is submitted that there is no dispute about the identity of the property and in any event the property is sufficiently identified by portion-B

1 AIR 2006 Supreme Court 623

2 1998(3) Bom. CR. 540

as shown in the map annexed to the plaint. He therefore submitted that the appeal does not raise any substantial question of law.

21. I have carefully considered the rival circumstances and the submissions made and I do not find that the appeal raises any substantial question of law.

22. The contention that there was no issue about the ownership framed in the earlier round of litigation cannot be considered or accepted for more reasons than one. The previous round of litigation ended in the order dated 06th September 2017 passed by this Court in Second Appeal Nos.642 of 2016 and 656 of 2016 which order is shown to be passed by consent of the parties. That matter is obviously not carried any further. Thus, it is not now open to the appellants to claim that there was no issue of the ownership framed, in the earlier litigation.

23. That apart, except the land purchased by the predecessor of the defendants under Sale Deed dated 30th January 1948 (i.e. land admeasuring 48 x 43 feet) the claim of the defendants in the suit to the balance area was based on adverse possession, which was concurrently negated by the Courts below in

the earlier round of litigation. When the claim of the defendants in respect of the balance land was admittedly based on adverse possession it pre-supposes that the defendants are not questioning the prior ownership of the plaintiffs. A claim of adverse possession can be made and sustained only against the real owner. Thirdly, contention about the absence of any such issue, in the earlier round of litigation cannot be examined in the present appeal. Lastly, as noticed in the order 28th February 2017 in Second Appeal Nos.642 of 2016 and 656 of 2016, there was no challenge to the report filed by the City Survey Officer and the map.

24. Even so far as the ground based on the discrepancy in the area and boundaries is concerned, it is true that in the event of such discrepancy the boundaries would prevail. However, whether there is any such dispute about the area and boundaries would obviously depend upon the facts and circumstances of each case. The First Appellate Court has dealt with this aspect in paragraph 21 onwards. It is necessary to note that the defendants did not produce their Sale Deed of the year 1948 on record. However, the First Appellate Court has noted the boundaries of the suit property as mentioned by the defendants in RCS No.427 of 2011 filed by them. The First Appellate Court has then juxtaposed the said boundaries

with the boundaries mentioned in the Sale Deed dated 29th December 2019 and has thereafter come to the conclusion, on the basis of the recitals in the Sale Deed, which go to show that the plaintiff has purchased the balance area out of CTS No.231 after excluding the area purchased by Vithal Mhaske under registered Sale Deed dated 30th January 1948.

25. I have carefully gone through the reasoning as articulated by the First Appellate Court and I do not find that it suffers from any infirmity.

26. The learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of *Ramlal and Anr.*, in order to submit that where both the Courts below concurrently erred in not appreciating the oral and documentary evidence properly, the High Court would be at liberty to re-appreciate the evidence and record its own conclusion in reversing the orders passed by the Court below. There cannot be any manner of dispute with the proposition as relied upon by the appellant. However, here again, whether the findings recorded are perverse and whether there is proper appreciation of the oral and documentary evidence or not would again depend on the facts and circumstances in each case.

27. Coming to the present case before the trial Court the only evidence available was of PW-1. The defendant did not lead any evidence. As noticed earlier both the Courts upon appreciating the said evidence and in particular the order passed in Second Appeal Nos.642 of 2016 and 656 of 2016 which is passed by consent of parties and in the wake of the fact that there was no objection taken to the report and the map submitted by the surveyor, have come to the conclusion about the plaintiff having established their case. Thus I do not find that the finding so recorded can be said to be perverse or against the weight of the evidence on record so as to give rise to any substantial question of law. The appeal is without any merit and it is accordingly dismissed, with no order as to costs.

Decree be drawn accordingly.

C.V. BHADANG, J.