

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

SECOND APPEAL NO. 642 OF 2019

Dattatraya Dhondiba Ghodke	..Appellant
Vs.	
Hanumant Dattatraya Phalle	..Respondent

Mr. Dilip Bodake for the Appellant.
Mr. V. B. Tapkir for the Respondent.

**CORAM : C.V. BHADANG, J.
RESERVED ON : 11th FEBRUARY 2021
PRONOUNCED ON : 16th MARCH 2021**

P.C.

. The challenge in this appeal is to the judgment and decree dated 25/6/2019 passed by the learned Ad-hoc District Judge, Pune in Regular Civil Appeal No.555/2015. By the impugned judgment, the learned District Judge, while dismissing the appeal, filed by the appellant has confirmed the judgment and decree dated 13/1/2015 passed by the learned Senior Civil Judge Pune in Special Civil Suit No.1152/2011.

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

The respondent filed the aforesaid suit against the appellant, for removal of encroachment and for possession etc. The subject

matter of dispute happens to be a land admeasuring 199.25 sq. mt. from eastern side, from out of Plot No.27 (survey No.37/2) of Vadgaon Sherry within the limits of Pune Municipal Corporation. The suit property is more specifically described in para 1 of the plaint.

3. The case made out by the respondent is that the respondent has purchased the suit property from Dattu Ramchandra Galande under registered sale deed dated 29/9/1988 alongwith rectification deed dated 5/1/2011. As per mutation entry No.16226, the suit property has been recorded in the name of the respondent in the revenue record.

4. The respondent was in Government service and has since retired on 31/5/2009. Somewhere in May 2009 when the respondent went to the suit property, he noticed that the appellant has unauthorisedly encroached in the suit property and has made a construction thereon. Upon inquiry, the appellant claimed that the said portion has been given to him by Dattu Galande. According to the respondent, the previous owner Mr. Dattu Galande informed the respondent that the appellant has no concern with the suit property.

5. The respondent issued a notice dated 20/4/2011 asking the appellant to remove the encroachment. The appellant failed to comply and issued a reply dated 23/5/2011 refusing to deliver vacant possession which led the respondent to file the suit as aforesaid.

6. The appellant resisted the suit on various grounds. The correctness of the description of the property was denied. It is the material defence that the appellant was working with Mr. Dattu Galande in his flour mill and was residing in Geetabai Chawl as a tenant of Shri. Galande. In the meantime, Mr. Galande delivered the possession of the said chawl to a builder for development and in such circumstances, the appellant was required to vacate the premises in Geetabai Chawl and the suit property was given to the appellant somewhere in the year 1995 as an alternate accommodation. In short, according to the appellant, he is residing in the suit property from the year 1995 after erection of the tin shed. He made certain construction in the suit property somewhere in the year 2010.

7. On the basis of the rival pleadings, the learned Trial Court framed as many as six issues.

8. The respondent examined himself alongwith adjacent owner Dnyaneshwar Ganpat Madne. The appellant examined himself in support of his defence. Both the parties produced certain documents.

9. The learned Trial Court answered issue No.1 to 3 and 5 in the affirmative and issue No.4 in the negative and by judgment and decree dated 13/1/2015 decreed the suit directing the appellant to handover vacant possession of the suit property to the respondent.

10. Feeling aggrieved the respondent challenged the same before the learned District Judge.

11. The learned District Judge by the impugned judgment and decree has dismissed the appeal.

12. I have heard Mr. Bodake, the learned counsel for the appellant and Mr. Tapkir, the learned counsel for the respondent. With the assistance of the learned counsel for the parties, I have gone through the record.

13. It is submitted by the learned counsel for the appellant that the identity of the suit property has not been established on record.

It is submitted that in the absence thereof there is no proof about ownership and title of the suit property, as claimed by the respondent within the meaning of Section 102 to 104 and 110 of the Evidence Act.

14. It is submitted that the suit as framed and filed simplicitor for removal of encroachment and for possession was not maintainable in the absence of a declaration as to ownership, as per Section 31, 34 and 35 of the Specific Relief Act, 1963.

15. It is submitted that both the Courts below have failed to properly appreciate the evidence on record, in the context of the legal provisions as aforesaid.

16. It is next submitted that the suit as framed and filed was not maintainable and could not have been decreed in the absence of compliance with the mandatory provision of Order VII Rule 3 (Bombay Amendment) to CPC i.e. for non filing of a sketch. It is submitted that admittedly no measurement of the suit property has been carried out. It is submitted that the Courts below ought to have seen that the appellant has perfected his title by adverse possession as per Article 65 of the Limitation Act.

17. It is submitted that in any event, in the absence of there being any evidence as to the measurement showing the nature and extent of the encroachment, the suit could not have been decreed. On behalf of the appellant, reliance is placed on the decision of this Court in **Sudhakar s/o. Baburao Kulkarni Vs. Gorabai w/o. Thansing Marag and Ors. 2019(3) ALL MR 823**. It is submitted that the First Appellate Court was in error in placing reliance on the decision of this Court in **Catarina Fernandes and Ors. Vs. Jose Menino Rodrigues and Another 2013(1) Mh.L.J. 367**.

18. The learned counsel for the respondent has supported the impugned judgment. It is submitted that the property has been properly identified. In the year 2011, there was a mere correction of the eastern and western boundaries of the land purchased by the respondent and Dnyaneshwar Madne (P.W.2). It is submitted that the First Appellate Court has noticed in para 26 of the impugned judgment that the case set up by the appellant is discrepant and he has failed to establish that he has perfected his title by adverse possession. It is submitted that in the absence of the appellant admitting the title of the respondent or anybody else, the plea of adverse possession cannot be sustained. For this purpose, the learned counsel has placed reliance on several decisions namely-

1. T. Anjanappa and Ors. Vs. Somalingappa and Anr. 2006 AIR SCW 4368.
2. Thakur Kishan Singh (dead) Vs. Arvind Kumar AIR 1995 SC 73.
3. Dagadabai (D) by L.Rs. Vs. Abbas @ Gulab Rustum Pinjari 2017(4) ALL MR 448 (S.C.).
4. M. Durai Vs. Muthu and Ors. (2007) 3 SCC 114.
5. The State Bank of Travancore Vs. Arvindan Kunju Panicker and Ors. AIR 1971 SC 996.
6. Md. Mohammad Ali (Dead) by LRs. Vs. Jagadish Kalita and Ors. (2004) 1 SCC 271.
7. Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan & Ors. (2009) 16 SCC 517.
8. Yoshita R. Rivankar and Ors. Vs. Sunita Haldankar and Ors. 2014(4) Mh.L.J. 463.
9. Indira Vs. Arumugam and Anr. (1998) 1 SCC 614.
10. Sharfunnisa w/o. Abdul Karim Vs. Maruti Sakharam Kale 2001(4) Mh.L.J. 772.

19. It is submitted that the provisions of Order VII Rule 3 of CPC are not mandatory. It is submitted that in a case where the entire suit property has been encroached upon of which the possession is sought. Compliance with Order VII Rule 3 of CPC is not necessary.

For this purpose, reliance is placed on the decision of this Court in **Catarina Fernandes**.

20. I have carefully considered the rival circumstances and the submissions made. Indisputably, Dattu Galande was the owner of the suit property including the portion sold to P.W.2 Dnyaneshwar Madne. By virtue of a sale deed dated 29/9/1988 (Exh.24), 2 Ares of land is shown to be sold by Dattu Galande to the respondent. By a separate sale deed dated 29/9/1988 (Exh.58), one Are of land is sold to P.W.2 Dnyaneshwar Madne. However, it appears that although the land shown to be sold to Dnyaneshwar Madne was on eastern side of the suit property (sold to the respondent), the same was shown on the western side. Thus, only the eastern and western boundaries of the portion sold to the respondent and Dnyaneshwar Madne came to be corrected by executing separate rectification deeds dated 4/1/2011 which are at Exh.25 and 62. Exhibit 58 is the sale deed executed in favour of Dnyaneshwar Madne.

21. Be that as it may, the First Appellate Court after juxtaposition of the boundaries, as mentioned in the sale deeds Exh.24 and 58 and the rectification deeds Exh.25 and 62, has found in para 14, that the correction was in respect of the eastern and western boundaries. The First Appellate Court has found that the plots

purchased by the respondent and Dnyaneshwar Madne are adjacent to each other and are situated between the plot of Badambai Hiralal Mutha and a public road. Thus, the First Appellate Court has found and to my mind rightly so that the identity of the property has been property established.

22. It is the case of the appellant that he was working in the flour mill of Dattu Galande and used to reside in the premises better known as Geetabai Chawl which was given by Dattu Galande for redevelopment. It is in these circumstances that the appellant was permitted to reside in the suit property somewhere in the year 1995. Initially, the appellant was residing there by constructing a shed and subsequently in the year 2010 had made a construction and the open portion was being used for storage of the material as the appellant was doing the business as a decorator. Thus, the material case is about permissive user of the suit property as permitted by Dattu Galande. The evidence of the appellant shows that he also claimed that Dattu Galande had informed him that although he had sold two Ares of land to the respondent, the respondent had paid consideration of only 1 Are and therefore, the balance 1 Are was purchased by the appellant for which he had paid Rs.5,000/- to Dattu Galande in the year 1996 and thereafter, Rs.1,000/- and Rs.3,000/- to his sons i.e. Balkrishna Dattu Galande and Nivrutti

Dattu Galande in the year 1997 and 2000 respectively. Although the appellant claimed that he would be examining the previous owner Dattu Galande as well as Balkrishna Galande and Nivrutti Galande, they were not examined. That apart, admittedly, there is no evidence about execution of any registered sale deed in respect of 1 Are of land in favour of the appellant. It is trite that the transfer of immovable property of a value more than Rs.100/- has to be by a written instrument duly registered. The First Appellate Court in para 26 of the judgment has also noted that in the application and undertaking (Exh.47 to 53) submitted by the appellant to the Electricity Board, he claimed that he was in possession of the suit property in the capacity as a tenant. Thus, the defence of the appellant, as noticed by the First Appellate Court is discrepant. In any event, in the absence of a registered sale deed the appellant has failed to establish his title in comparison with the title of the respondent which is supported by the sale deed Exh.24 alongwith Rectification deed Exh.25.

23. Coming to the issue of adverse possession, it is trite that any possession which is a permissive possession is anaethema to a case of adverse possession. It is also well settled that adverse possession presupposes that it is hostile to the true owner. In the absence of the appellant admitting the ownership of the respondent, it cannot be

said that the plea of adverse possession can be sustained. As noticed earlier, initially the case set up is about Dattu Galande having permitted the appellant to use the suit property somewhere in the year 1995. There is nothing in the pleadings or in the evidence to show as to when such permissive possession became adverse or hostile to the true owner. I do not find that the finding recorded by the Courts below suffers from any infirmity or is against the weight of the evidence on record.

24. Coming to the requirement of the respondent having sought a declaration of title, it is now well settled that it is only when there is a cloud on the title of the plaintiff, raised that the plaintiff has to seek such declaration and not otherwise. To put it differently, it is not in every case where the possession is sought on the basis of title that a party would be required to seek such declaration. It is only when a cloud is raised on the title of the plaintiff that such declaration needs to be sought. Coming to the present case, there is a sale deed and the rectification deed executed by Dattu Galande in favour of the respondent. Dattu Galande is admittedly the previous owner. As against this, the case set up by the respondent as noticed earlier is of permissive possession by Dattu Galande. Thus, I do not find that there is any cloud raised as on the title of the respondent, so as to require the respondent to seek a declaration of title.

25. Coming to the ground based on Order VII Rule 3 of CPC, this Court in the case of **Catarina Fernandes** (supra) has held that the non filing of the sketch showing the extent of encroachment, is not fatal when the encroachment is on the entire property. In the present case, the entire suit property is claimed to be encroached by the appellant. Thus, I do not find in the facts and circumstances of this case that non filing of the sketch would be fatal.

26. The learned counsel for the appellant has also referred to the provisions of Section 102 to 104 and Section 110 of the Evidence Act which provides for burden of proof. Section 110 which is relevant for the purpose, provides that when the question is whether any person is owner of a property of which he is shown to be in possession, the burden of proving that he is not the owner is on the person claims that such person is not the owner. The section incorporates the well established principle that possession follows title. In the present case, the burden has been properly discharged on the basis of the sale deed Exh.24 read with the rectification deed Exh.25 particularly in the context of the failure of the appellant to establish adverse possession.

27. To conclude, this is a case where there is a sale deed and the rectification deed in favour of the respondent executed by Dattu

Galande who is admittedly the previous owner of the suit property. Quite to the contrary, the case of the appellant is of permissive possession. The appellant also claims to have perfected the title by adverse possession, which he has failed to establish. The appeal is without any merit and is accordingly dismissed with no order as to costs. A decree be drawn accordingly.

26. At this stage, the learned counsel for the appellant seeks extension of the interim relief which was operating during the pendency of the appeal. The prayer is opposed on behalf of the respondent on the ground that the respondent is a senior citizen and has no other place to stay.

27. However, considering the fact that the interim relief was operating during the pendency of the appeal, the same is extended for a period of six weeks.

C.V. BHADANG, J.