

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

**SECOND APPEAL NO.604 OF 2021**

RAHUL AMRUTSING VASAVE  
VERSUS  
ADHUNIK DETERGENT LIMITED THROUGH THE POWER OF  
ATTORNEY HOLDER ANANDSING RADHANATHSING

...  
Mr. A. S. Abhyankar h/f Mr. S. V. Natu, Advocate for the appellant.  
...

**CORAM : SMT. VIBHA KANKANWADI, J.**

**Reserved on : 03.12.2021**

**Pronounced on : 07.01.2022**

**ORDER :-**

. Present appeal has been filed by the original defendant challenging the concurrent judgment and decree passed by the Courts below. Present respondent – original plaintiff had filed Regular Civil Suit No.06 of 2008 before the learned Civil Judge Junior Division, Nawapur, Dist. Nandurbar for permanent injunction. The said suit came to be decreed on 12.02.2014. It will not be out of place to mention here that the present appellant – original defendant had made counterclaim and sought declaration that he has become owner of the suit property by adverse possession. His counterclaim came to be dismissed in the said decree. The present appellant challenged the said judgment and decree before learned Principal District Judge, Nandurbar by filing Regular Civil

Appeal No.23 of 2014. The said appeal came to be dismissed on 05.08.2021. Hence, the present second appeal has been filed.

2. Heard learned Advocate Mr. A. S. Abhyankar holding for learned Advocate Mr. S. V. Natu for the appellant.

3. It has been vehemently submitted on behalf of the appellant that the Courts below have not appreciated the evidence as well as law points properly. Plaintiff is a company whose main office is situated at Borivali, Mumbai. It was contended that the company had purchased the suit property on 03.09.1987. It was agricultural land at that time, however, thereafter it has been made as non agricultural and the number has been given as Gut No. 103/1. The another piece of land was also purchased on the same day by the company which is now numbered as Gut No.94/1, which is the southern part of Gut No.94. The land was purchased for erecting a mill/factory, however, since last 4-5 years prior to the suit, the factory is closed. If this fact is tried to be compared with the report of the Court Commissioner Exhibit-41, then it can be seen that there are various trees in the land. A boring connection was taken of which electricity bill is being paid by the defendant. So also, there is tomb of his father erected in marble. The land was levelled and sugarcane crops have also been taken. There is cattle shed erected. It shows the possession of the defendant over the suit land. In spite of

this fact, both the Courts below have held that the possession is that of plaintiff. The report will have to be given weightage. Reliance has been placed on the decision in *Southern Command Military Engineering Services Employees Co-op. Credit Society Vs. V. K. N. Nambiar (since deceased) by Legal Representatives Madhvi Devi, [AIR 1988 SC 2126]*, wherein the view taken that “when Court Commissioners report has been produced which showed demised premises were not in occupation of tenant but in occupation of strangers, then inference about subletting will have to be drawn.” On the same footing, the interpretation of the report of the Court Commissioner will have to be taken that the possession is that of defendant and not that of plaintiff. Both the Courts below have not considered the credible evidence which has been produced by the defendant. It is also not seen by the Courts below that at no point of time when the defendant was levelling the land, erecting tomb of his father, getting big trees cultivated and taking fruits of those trees as evidence about hostility. The evidence of Power of Attorney of the plaintiff who had no personal knowledge could not have been relied by both the Courts below. Substantial questions of law are, therefore, arising in this case requiring admission of the second appeal.

4. At the outset, in view of the decision in *Ashok Rangnath Magar Vs. Shrikant Govindrao Sangvikar, [2015 Mh.L.J. Online (S.C.) 140 ::*

*(2015) 16 SCC 763]*, it is not even necessary that the defendant should be heard at the stage of admission. It is the bounden duty of the appellant to show that substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case and then only the appeal can be admitted and notice can be issued to the respondents. The paperbook is made available and perusal of the pleadings as well as evidence and the reasons assigned by both the Courts below is definitely required to be considered here. It appears that the defendant is more relying on the Court Commissioner's report than even his own evidence. The first and the foremost question that arises is as to whether the Court Commissioner could have been appointed by the learned Trial Judge for collecting evidence. The question involved from the pleadings was, as to who was in possession and, therefore, for collecting the evidence on the point of possession, the Court cannot resort to the provisions of Order XXVI of the Code of Civil Procedure. Now, that report is not directly in question in the second appeal, but on the basis of that report, which was the assessment of the Court Commissioner about the inspection made by the Court Commissioner on 19.10.2008, whether it will prove the continuous possession of defendant for a period of 12 years, is a question. No doubt, he noted many trees in the land and recorded the statement that they were grown

by the father of the defendant, yet exactly when those seeds/plants for those trees were embedded in the earth cannot be assessed. According to the defendant, his father expired on 18.10.2005 and even if we take that the tomb is constructed in the suit premises, yet, it is to be noted that the suit is filed in the year 2008. Therefore, it cannot prove possession of 12 years period.

5. Though in the written statement, the defendant had denied the ownership of the plaintiff, yet it can be seen that in the cross-examination, he has specifically admitted that Gut No.94/1 and 104/1 are owned by the plaintiff. In any way, when the defendant was claiming ownership by adverse possession, then he will have to admit the ownership of the plaintiff. The further question that arises is as to who was in possession. The normal rule would be the person who is the owner would be the possessor. Here, in this case, the defendant has not come with specific pleading in the written statement-cum-counterclaim as to exactly when the defendants father took possession of the suit property and in which manner i.e. forcible or in any other manner. No doubt, his lands are adjacent to the suit land, it cannot be then stated that while cultivating his own land, he took possession of the suit land and started cultivating it in order to reckoning of minimum 12 years period. The defendants should say when his father took the possession

of the suit land. He has merely stated that since prior to 1994 his father started cultivating the land. This vague statement will not prove the adverse possession. Hostile animus is the key ingredient to prove adverse possession. Even if for the sake of arguments it is accepted that there are certain statements, which are in favour of the defendant to show his possession over the suit land, yet those will not be sufficient because the basic requirement is to prove continuous and open possession that too in hostility for a period of 12 years or more. By no stretch of imagination, the evidence that has been led by the defendant can be stretched to 1987 or prior to that. The suit lands were purchased in the year 1987 by registered instruments and, therefore, it will have to be then presumed that the vendor of the plaintiff had put plaintiff in possession of the suit lands on the date of the sale-deeds. Question then arises in what manner, after 1987, defendant's father took possession of the property. Plaintiff has not come with the case that after the purchase of the land factory was erected. Though word used is factory is closed, there is no pleading that factory was constructed. Therefore, it is to be noted even from the revenue record also that has been produced which has continuous entry of ownership as well as cultivation column in favour of plaintiff; showing the possession of the plaintiff over the suit land. Much has been said about the payment of agriculture cess by the

father of the defendant in respect of the suit land. When it has not been denied by the defendant that the suit land was converted to non agriculture, then question of payment of agriculture cess for the suit land doesn't arise. It cannot be taken as an act in hostility. Taking into consideration the fact that adjoining land belongs to the defendant giving sugarcane to the factory and incurring electricity charges on the part of that land by the father of the defendant cannot be ruled out.

6. Interesting point to be noted is that as per the plaintiff, plaintiff had given application to the Taluka Inspector Land Records, Navapur for measuring non-agriculture Gut No.103/1 and 94/1. Even notice was issued to the defendant, who was the adjoining owner to remain present for the purpose of measurement, however, defendant objected for measurement. If he would have allowed the land to be measured, then the things would have come crystal clear, as to in whose area the trees are situated. The act of the defendant in obstructing Taluka Inspector Land Records from doing his duty is in fact not advantageous to the defendant. That refusal on the part of the defendant to allow measurement of the land was the cause of action for the plaintiff to file the suit and then the Court Commissioner has been got appointed in this case, who was in fact not an expert, but an Advocate practicing before the said Court.

7. Both the Courts below have, therefore, come to a correct conclusion that the plaintiff is the owner and possessor of the suit land, whereas the defendant has failed to prove that he has perfected his title over the suit land by adverse possession. The suit has been correctly decreed and the counterclaim has been correctly dismissed. The ratio laid down in *Southern Command Military Engineering Services Employees Co-op. Credit Society (Supra)* will not be applicable here as the said citation does not give complete facts in detail and the view that has been expressed is based on the evidence that was before the Apex Court.

8. No substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case requiring admission of the second appeal. The second appeal deserves to be dismissed at the threshold. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

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