

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 341 OF 2020
WITH
INTERIM APPLICATION NO. 471 OF 2020
IN
SECOND APPEAL NO. 341 OF 2020

Pundlik Govindrao Shinde @ Patil .Appellant/
Applicant
Vs.

Ambadas Fakirchand Kshirsagar .Respondents
(since deceased through Lrs.) & ors.

Mr. Bhushan U. Deshmukh, Advocate, for the Appellant/Applicant
Mr. Girish R. Agrawal, Advocate, for the Respondents

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATE : 13th JUNE, 2022.

P C:-

1. This second appeal under Section 100 of the CPC assails the Judgment dated 19.10.2019 of learned District Judge-1, Niphad in Civil Appeal No. 41 of 2007. By the impugned judgment, learned District Judge set aside the Judgment dated 30.04.2007 of learned Joint Civil Judge, Junior Division, Yeola and consequently, decreed the Regular Civil Suit No. 160 of 2007 and directed the Appellant (hereinafter referred to as 'Defendant

No. 1') to handover possession of the suit land to the Respondent Nos.1A to 1F, the legal representatives of the original Plaintiff-Ambadas Kshirsagar (hereinafter referred to as 'the Plaintiff')

2. Heard learned counsel for the Defendant No.1 and the learned counsel for the Plaintiff. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

3. It is not in dispute that the property bearing Survey No. 82 of village – Yeola was originally owned by one Dhondiram Ganpat Patole and three other persons. The deceased Plaintiff had purchased 8 Acres of land from the said property on 28.11.1974 and 3 Acres of land on 04.06.1975. The Plaintiff had thus purchased land admeasuring 4 Hectares 44 Are. The Defendant No.1 had purchased 2 Hectares whereas Defendant Nos. 2 to 4 had purchased 3 Hectares and 13 Acre land from the same Survey number. Survey No. 82 was sub divided in three parts i.e. sub-division Nos.1, 2 and 3 of Survey No.82. The portion of land admeasuring 2 Hectares, purchased by the Defendant No.1 is surveyed under Survey No.82/1. Portion of land admeasuring 4

Hectares 44 Are which was purchased by the Plaintiff is surveyed under Survey No.82/1 and 3 Hectares and 13 Are purchased by Defendant Nos.2 to 4 is surveyed under Survey No. 82/3. It is the case of the Plaintiff that the land purchased by the respective parties was duly measured and that they were put in possession of their respective portions which was demarcated by boundary marks.

4. In the year 1984 a portion of land admeasuring 18 Acres came to be acquired from Survey Nos. 82/1 and 82/2 and 22 Ares was acquired from Survey Nos.82/3. After the acquisition, the Defendant No.1 continued to be in possession of 1 Hectare 82 Ares, the Plaintiff continued to be in possession of 4 Hectares 26 Ares and Defendant Nos.2 to 4 continued to be in possession of 2 Hectares 91 Are.

5. The Plaintiff claims that he used to remain outstation for business purpose. Whereas, the Defendants were residing close to the subject land. The Plaintiff suspected that taking advantage of his absence, the Defendants were encroaching upon his land under Survey No.82/2 (the suit property). Hence, he

applied to the T.I.L.R., Yeola for measurement of the land. The Plaintiff claims that the land was not properly measured as the surveyor measured only the suit property instead of measuring the entire survey number.

6. The Plaintiff claims that the Defendants have encroached over the suit property in the year 1992. He instructed the Defendants to remove the encroachment and suggested that dispute could be resolved amicably by getting the entire survey number measured. The Defendant refused the proposal. Hence, the Plaintiff got the land measured through a private surveyor and learnt that the Defendant No.1 had encroached in the suit property to the extent of 90 Ares on the northern side and that the Defendant Nos. 2 to 4 have encroached to the extent of 40 Acre. The Plaintiff, therefore, filed R.C.S.No. 160 of 2007 for removal of encroachment and for permanent injunction.

7. Learned Judge held that the Plaintiff had admitted that the Defendants were in possession of the suit property, despite which the Plaintiff had not taken any steps for a period of 12 years. Hence, the learned Trial Judge dismissed the suit on the

ground of limitation.

8. The learned District Judge relied upon the decision of the Calcutta High Court in the case of *Inshidar Ekka and another Vs. Dibakar Das 1997 SCC OnLine Cal 394* to hold that the suit for recovery of possession on the basis of title is not barred even, if the trespasser is in possession of the suit property for more than 12 years, unless the trespasser can establish that he is claiming adverse possession for more than 12 years. Learned District Judge held that the Defendant who claims to be in possession has failed to prove that he has acquired title by adverse possession and as such the suit is not barred by limitation. The learned Judge therefore set aside the order of the Trial Court and decreed the suit and directed the Defendant No.1 to handover possession of 90 Acres of land to the Plaintiffs with further direction to other Defendants to handover possession of the 40 Acres of land from from southern side of Plaintiff's land as shown in map at Exhibit-84. Being aggrieved by the said Judgment, the Defendant No. 1 has filed this Appeal.

9. It is not in dispute that the Plaintiff and the

Defendants had purchased their respective portion of land from Survey No. 82 of village – Yeola from the original owner - Dhondiram Ganpat Patole. The Sale Deeds do not mention the area of the land purchased by the respective parties. Nevertheless, the respective portion of land is surveyed under separate subdivisions which are recorded in their respective names. The land purchased by Defendant No.1 is surveyed under Survey No.82/1. The Defendant No.1 has admitted that he is in possession of the land which is in excess of the land purchased by him. The Defendant No.1 claims that he is in peaceful possession of the said property over which he has acquired the title by adverse possession.

10. It is to be noted that the Plaintiff had filed the suit for possession based on title and hence the suit is governed by Article 65 of the Limitation Act, which prescribes limitation of 12 years since the date the possession of the Defendant becomes adverse to the Plaintiff. In the case of *Deva (dead) through Lrs. v. Sajjan Kumar (dead) by Lrs.*, reported in *AIR 2003 Supreme Court 3907*, the Hon'ble Apex Court held that “*mere long possession for a period of more than 12 years without intention to possess suit*

land adversely to the title of the Plaintiff and to latter's knowledge cannot result in acquisition of title by the Defendant to the encroached suit land. ...The Plaintiff's title over the encroached land could not get extinguished unless the Defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years."

11. In the case of ***Namdeo Karbhari Bodake & Ors. Vs. Chababu @ Chahadu Rangnath Bhise & Ors.***, reported in **2006(2) ALL MR 54** this Court referring to the decision of the Hon'ble Apex Court in the case of ***D.N. Venkatarayappa and Anr. Vs. State of Karnataka and Ors. (1997) 7 SCC 567*** has reiterated the following principles in regard to the plea of ownership by adverse possession:-

"(a) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

(b) Apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession.

(c) One of the important ingredients to claim adverse

possession is that the person who claims adverse possession must have set up title hostile to the tile of the true owner.”

12. In the instant case, the Defendant Nos.2 to 4 have not challenged the decree. Though the Defendant No.1 has set up a plea of adverse possession, apart from the bare statement of PW1-Dnyaneshwar that he is in possession of the subject land since 1972-73, there is absolutely no evidence to prove that he had asserted hostile title in denial of the title of the true owner. In the absence of necessary animus intending to perfect his title, mere possession howsoever long, would not perfect his title to the property by adverse possession. There is thus no error in finding that the Defendants having failed to prove adverse possession, the suit for recovery of possession based on title, was within limitation. Since no substantial question of law has arisen, the appeal is dismissed. Interim /Civil Application (s), if any, stand (s) disposed of.

13. The interim relief which was operating in favour of the Plaintiff is extended by a period of four weeks.

(SMT. ANUJA PRABHUDESSAI, J.)