

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.363 OF 2023
WITH
CIVIL APPLICATION NO.8259 OF 2023
IN SA/363/2023**

1. Sampat S/O Shankar Patare,
Age 68 years, Occ. Agriculture,
R/o Vambori, Rahuri, Taluka
Rahuri, Dist. Ahmednagar.
2. Baban s/o Sampat Patare,
Age 38 years, Occ. Agriculture,
R/o Vambori, Rahuri, Taluka
Rahuri, Dist. Ahmednagar.
3. Bapu s/o Sampat Patare,
Age 35 years, Occ. Agriculture,
R/o Vambori, Rahuri, Taluka
Rahuri, Dist. Ahmednagar.

...Appellants
(Original defendants)

VERSUS

Sachin s/o Genuji More,
Age 38 years, Occ. Medical Practitioner,
R/o Vambori, Rahuri, Taluka
Rahuri, Dist. Ahmednagar.

...Respondent
(Original plaintiff)

.....
Advocate for Appellants : Mr. N. S. Shah h/f Mr. S. V. Natu
Advocate for Respondent: Mr. M. K. Bhosale
.....

CORAM : ARUN R. PEDNEKER, J.

**Date of Reserving the Order : 14/07/2023
Date of Pronouncing the Order : 24/07/2023**

ORDER :

By the present second appeal the appellants are challenging the Judgment passed on 10/04/2023, by the learned District Judge - 3, Ahmednagar in Regular Civil Appeal No.117 of 2020, confirming the Judgment and decree dated 29/03/2018, passed by the learned Joint Civil Judge, Junior Division, Rahuri in Regular Civil Suit No.802 of 2013, declaring the plaintiff to be the owner of the suit property and directing the defendants to deliver the possession of the suit property to the plaintiff within three months from the date of the decree, and that the defendants are restrained perpetually from interfering with the plaintiff's possession over suit property and for mesne profits.

2. Brief facts leading to the filing of the second appeal can be summarized as under :-

The plaintiff filed suit for restoration of possession and perpetual injunction as regards the open plot property having dimension of 180.6 square meter, situated at village Vambori. It is contended by the plaintiff that the suit property is a open premises owned by the plaintiff. On 05/05/2012 the plaintiff purchased the suit property by the registered sale deed from vendor Tukaram

Jagannath Dudhade for consideration of Rs.1,10,000/-. Accordingly, his name is mutated in the Gram Panchayat record and City Survey Record. The plaintiff became lawful owner and possessor of the suit property. The defendants have no concern with the suit property. One Pandu Tukaram Patare was the original owner of the suit property. Thereafter, Tukaram Jagannath Dudhade purchased the same from the legal representatives of Pandu Patare vide registered sale deed on 19/08/2004, and accordingly name of Tukaram was entered in the Gram Panchayat and City Survey record. That on 05/05/2012 the plaintiff purchased the suit property from Tukaram by registered sale deed.

3. The defendants are having their own common property adjoining to the North of the suit property. It is the case of plaintiff that on 26/11/2012 when the plaintiff has been at the suit property, the defendants temporarily had erected shed with tin-sheets and encroached on the suit property. He also found that the defendants have initiated use of water and electricity connection for the utility of suit property. The defendants wrongly encroached upon the suit property by taking undue advantage of his out station residence. Thus, the plaintiff filed the suit for removal of encroachment and

possession.

4. The defendants appeared in the suit and filed their written statement and challenged the maintainability of the suit for non-joinder of necessary parties. They contend that their grandfather Rabhaji Patare used to reside in the suit property up to his death in the year 1949. After his demise, his son Shankar used to reside with defendant No.1 being their ancestral property. The defendant No.1 obtained electric connection therein for last 20 years and obtained water-tap connection for last 10 years. They used to pay the property cess and water charges to Gram Panchayat, Vambori. The plaintiff purchased the suit property on the basis of bogus sale deed by forging city survey record.

5. The defendant contend that MSEB also continued their electricity connection despite plaintiff's endeavor to disconnect it. It is contended that the plaintiff has no concern with the suit property and they prayed for dismissal of the suit with compensatory costs.

6. On examination of the pleadings, the Trial Court framed issues and answered as under : -

<u>Sr.No</u>	<u>ISSUES</u>	<u>FINDINGS</u>
1	Does the plaintiff prove that he is the owner of the suit property as described in the claim clause of the plaint ?	..In the affirmative
2	Does the plaintiff prove that after purchase of suit property defendants have encroached upon him ?	...In the affirmative
3	Whether the plaintiff is entitled to recover the possession of suit property from defendants ?	...In the affirmative
4	Whether the plaintiff is entitled to the perpetual injunction as prayed for ?	...In the affirmative
5	Whether the plaintiff is entitled for compensation as prayed for ?	...In the negative
6	Whether the plaintiff is entitled for mesne profit ?	...Accordingly
7	What order and decree ?	...As per final order

The Trial Court on examination of the entire pleadings and evidence, decreed the suit of the plaintiff.

7. The appellant challenged the order of the Trial Court before the Appellate Court and the Appellate Court framed points for determination along with its findings as under : -

<u>Sr.No</u>	<u>POINTS</u>	<u>FINDINGS</u>
1	Whether the plaintiff prove that he is owner of the suit property ?	...Proved
2	Whether plaintiff proved that after purchasing the suit property, the defendants committed encroachment upon the same ?	..Proved
3	Whether the plaintiff is entitled to	...Yes

	recover the possession of the same ?	
4	Whether the plaintiff is entitled to permanent injunction against the defendants ?	...Yes
5	Whether the plaintiff is entitled to compensation as claimed ?	...No
6	Whether the plaintiff is entitled to the mesne profits as claimed ?	...Partly Yes
7	What order and decree ?	...As per final order

8. The Appellate Court has held that the plaintiff is the owner of the suit property. The Appellate Court held that mere taking electric connection and water tap connection by the defendants is not enough and it cannot grant title to the suit property to the defendants. Even if it is assumed that they were able to take electric connection and water tap connection on the suit land, in absence of any credible evidence as to beginning of possession, which could be termed as adverse possession to the plaintiff, the claim of defendants is rightly rejected by the Trial Court.

9. The Appellate Court held that the possession must be adequate in continuity, in publicly and in extent to show that it is adverse to the true owner. There must be clear assertion of hostile title. Mere possession is not enough. There must be knowledge and adoption of an attitude. Plea of adverse possession is not always a

legal plea as such. It is based on facts which must be specifically raised, to that effect. The defendants never made a counter claim. They did not plead the facts of their possession from any particular dates against true owners in a succeeding manner. They did not give the dates when they declared their hostile possession to the true owners, and in absence of the same, there was no question of framing any issue of adverse possession.

10. The Appellate Court also held that a plea of adverse possession has to be set up against the true owner. Defendant cannot deny the title of the plaintiff and then claim that they were in possession of suit property since their ancestors and are owners of the suit property. On the contrary, the Appellate Court held that the title of the plaintiff to suit land is traced through various sale deeds and that the title is vested in the plaintiff by virtue on the strength of the registered sale deed which is not vitiated by the plea of adverse possession. The Appellate Court on consideration of material placed on record dismissed the suit, and upheld the order of Trial Court.

11. In the present second appeal, the appellants submit that the possession of the plaintiff over the suit property which is evidenced

by the electricity connection and the water tap connection, the defendants /appellants are in possession of the property much prior to the plaintiff purchasing the same and the possession of the defendant is adverse to the plaintiff, so also to the predecessor in title of the plaintiff, and as such, a substantial question of law arises for consideration in the present second appeal.

12. In case of *Chatti Konati Rao and Others Versus Palle Venkata Subba Rao*, reported in (2010) 14 Supreme Court Cases 316, the Hon'ble Supreme Court has discussed the law on adverse possession and has held as under : -

"12. We have bestowed our thoughtful consideration to the submission advanced and we do not find any substance in the submission of Mr. Bhattacharya. What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa v. Somalingappa (2006) 7 SCC 570, it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows :

"20. It is well-recognised proposition in law that mere

possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of Karnataka Board of Wakf vs. Government of India and Ors. (2004) 10 SCC 779. It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. Paragraph 11 of the judgment which is relevant for the purpose reads as follows :

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for

a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D.N. Venkatarayappa v. State of Karnataka (1997) 7 SCC 567) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for

him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma (1996) 8 SCC 128]."

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within 12 years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of 12 years thereafter.

15. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and

undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. Plea of adverse possession is not a pure question of law but a blended one of fact and law.”

13. Bear in mind the principles laid down as regards the adverse possession in the Judgment of Chatti Konati Rao and Others (Supra) both the Courts below in the instant case have held that the plaintiff's title is clearly established whereas the plea of adverse possession is neither sufficiently pleaded and proved. Animus possidendi is the requisite ingredient of adverse possession which is absolutely absent in the present case, and thus the suit is rightly dismissed.

14. On perusal of the Appellate Court Judgment it is apparent that the plaintiff has proved his title to the suit property by tracing his title from the various earlier sale deeds. The defendants are the owners of the adjacent plot and there is clear encroachment at the instance of the defendants. The defendants have taken possession of the property of the plaintiffs. However, the possession is not

adverse to the predecessor in title of the plaintiff. The plea is not set up as to when the defendants came in possession of the property and from when the defendants asserted their title over the suit property. For a claim of adverse possession, the defendants have to plead and lead evidence for necessary ingredients of the plea of adverse possession to succeed. There is no counter claim also filed by the defendants seeking declaration of their title over the suit property. Mere possession of the suit land cannot be protected against the true owner. The true owner is entitle to a decree of possession based on the title to the suit property. The plea of adverse possession has to be specifically pleaded and proved. Thus, the Courts below have rightly granted the decree of possession on the basis of title of the plaintiff. The respondents have no right to continue on the encroached portion.

15. In view of the above, no substantial question of law arises for consideration of this second appeal. Hence, the second appeal is dismissed. Pending civil application stands dismissed.

(ARUN R. PEDNEKER, J.)

vj gawade/-.