

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

**SECOND APPEAL NO.48 OF 2019  
WITH  
CIVIL APPLICATION NO.43 OF 2019  
IN  
SECOND APPEAL NO.48 OF 2019**

Anton Barnad Gomes and Ors. ...Appellants

Versus

William Francis Fudtat and Ors. ...Respondents

...

Dr. Uday Warunjikar with Mr. Jenish Jain, Mr. Aditya Kharkar for the Appellants.

Mr. Suresh M. Kamble for Respondent Nos.1 to 6.

**CORAM: SMT. ANUJA PRABHUDESSAI, J.**

**DATED: 8<sup>th</sup> NOVEMBER, 2023.**

**P. C. :-**

1. The appeal is admitted on the following substantial questions of law :-

“Whether the Appellate Court was justified in granting the decree of possession on the basis of the amended pleadings without giving opportunity to the Defendants to meet the amended pleadings?”

2. With consent, the matter is heard finally.

3. The Appellants are the Defendants and the Respondents are the Plaintiffs in the Suit and shall be hereinafter referred to as the 'Defendants' and 'Plaintiffs' respectively.

4. The dispute is in respect of the property under Survey No.48, Hissa No.3(p) admeasuring Hector 0-03-0 Ares from village-Mulgaon, Taluka-Vasai. The said property shall be hereinafter referred to as the 'suit property'.

5. The Plaintiffs, who claim to be the owner of the suit property filed a suit for declaration and perpetual injunction with a grievance that the Defendants are interfering with the suit property. The Defendants claimed that they had purchased the suit property from Francis Fudtat, the predecessor of the Plaintiffs. They claimed that the predecessor of the Plaintiffs did not execute the sale deed. However, he had received the sale consideration and put them in possession of the suit property. The Defendants contended that they have their residential house and a cattle shed in the suit property, which are registered in Gram Panchayat under H. No.229 and 804. In addition they have planted several trees and are in exclusive

possession of the suit property for more than 35 years.

6. During the pendency of the suit, the Plaintiffs filed applications for amendment at Exhibits-30 and 36 to incorporate subsequent events viz. encroachment and construction of permanent structure in the suit property. The Plaintiffs sought demolition of the structures and recovery of possession of the suit property. The said applications were allowed but the Plaintiffs failed to carry out the amendment. They filed application at Exhibit-175 to permit them to carry out the amendment. The Plaintiffs also filed another application at Exhibit-176 to amend the plaint and seek recovery of possession of the entire suit property. Both these applications were dismissed as a consequence, the amendment as per the order on applications at Exhibits -30 and 36 was not carried out.

7. The trial court upon considering the evidence on record held that the Plaintiffs are the owners of the suit property. Relying upon house tax receipts, panchayat records and Form No.4, the trial court held that the Defendants are in possession of the suit property since prior to 1970 and held that the suit was barred by limitation and accordingly dismissed the suit. The first appellate court has reversed

the decree mainly on the ground that the Plaintiffs are the owners of the land and that the Defendants have failed to prove their title by adverse possession. Being aggrieved by the impugned judgment, the Defendants have filed this appeal under Section 100 of the CPC.

8. It is pertinent to note that the Plaintiffs had filed a suit for declaration of title and perpetual injunction with foundational facts that they are the owners in possession of the suit property and further that the Defendants were trying to disturb their possession. The Plaintiffs had sought to incorporate the prayer for recovery of possession of the suit property contending that the Defendants had encroached in the suit property during the pendency of the suit. A perusal of the records reveals that the Plaintiffs had failed to carry out the amendment, as allowed by the trial court as per orders on Exhibits-30 and 36 and the application at Exhibits 175 and 176 seeking leave to carry out the amendment were dismissed by the trial court. The Appellate Court while setting aside the order on Exhibits-175 and 176 has observed thus:-

“ 22] *Point No.4:*

*Originally, the plaintiffs have prayed only for the relief to restrain the defendants from committing encroachment upon the suit land excluding the hut*

*admeasuring 15x15 feet constructed on the suit land. Later on, as per order below Ext nos.30 and 36 respectively dated 11/10/1999 and 6/12/1999, plaintiffs amended the plaint to implead the facts. Again plaintiffs moved application at Ext.174 on date 26/9/2014 by contending that only the partly amendment was carried out in the plaint as per order below Ext. no.30 & 36 hence permission was sought for carrying out the full amendment and prayer that the vacant possession of the suit land may be returned to the plaintiffs by directing the defendants with mandatory injunction to remove the constructions made by them on the suit land as allowed as per order below Ext. No.36 also. The said application at Ext. No.174 however was rejected on dated 28/10/2014 on account of delay. Later on the plaintiffs again moved application at Ext. No.176 for allowing the plaintiffs to amend the plaint for claiming the possession of entire suit land but again that was rejected. Thus, amendments granted as per order at Ext.Nos.30 and 36 were not fully allowed by trial court to be carried out in plaint.*

*23] Plaintiffs' however in the present appeal have moved the application at Ext.No.12 praying that orders below Ext.Nos.175 and 176 for rejecting to carry out amendment may be set aside and the plaintiffs be permitted to implead those facts and prayer in*

*the plaint. This court by the order dated 20/04/2017 permitted the plaintiffs to treat present appeal as also the appeal against those orders at Ext. Nos.175 and 176 as per S.105(1) of CPC 1908 to decide their legality.*

24] *It is evident as per the findings on point nos 1 to 3 the strong defence about acquiring title of the entire suit land by defendants on plea of adverse possession is not acceptable. It has been held that the plaintiffs being the title holder of the suit land are entitled to possess it. Therefore, the trial court's impugned order below Ext. Nos.175 and 176 disallowing plaintiffs to carry out the amendments already granted as per order below Ext.Nos.30 and 36 would be hyper-technical approach. The plaintiff who is otherwise entitled for relief to recover possession of suit land and the material facts are already found in plaint then plaintiffs are to be permitted to implead relief to recover possession of suit land by setting aside orders below Ext.Nos.175 and 176. Therefore, I do not find any need to remand the matter to the trial court u/O.41 R.29 of CPC 1908 for again merely to direct plaintiffs to implead the facts in plaint about their entitlement to possess the entire suit land on the basis of their title and making the payer to recover the possession of the suit land from the defendants.*

*As the relevant facts and sufficient evidence in that regard is already presented on the record before this court hence on this ground also I do not find the necessity to direct the parties to meet that sheer technicality.”*

9. The Appellate court cannot be faulted for permitting the plaintiffs to carry out the amendment, which was already allowed by the trial court, but not carried out due to mistake and negligence or inadvertence. The question however is whether the Appellate Court was justified in not affording an opportunity to the Defendants to file an additional written statement and controvert and contest the amended pleadings. As noted above, the plaintiffs had sought the relief of perpetual injunction with an assertion that they were in possession of the suit property. The Defendants had resisted the suit with specific pleadings that they were in exclusive possession of the suit property since last over 35 years. By allowing the Plaintiffs to carry out the amendment, the Appellate Court has permitted the Plaintiffs to introduce fresh allegations of facts, which allegedly occurred during the pendency of the suit. Having permitted the Plaintiffs to incorporate altogether new or disputed question of fact, it was incumbent upon the Appellate Court to afford an opportunity to

the Defendants to file additional written statement and lead additional evidence, if any, to controvert the amended pleadings and to put forth their pleas with regard to the new facts introduced by amending pleadings. The Appellate Court denied this very opportunity to the Defendants.

10. The procedure followed by the Appellate Court is not in accordance with law and such manifest error of law, which has resulted in injustice to the Defendants, vitiates the impugned judgment. Therefore, without entering into the merits of the case, the matter needs to be remanded to decide the same afresh after giving opportunity to the Defendants to file additional written statement and to adduce additional evidence, if necessary.

11. Under the circumstances, the appeal is allowed. The impugned judgment is set aside. The matter is remanded to the Trial Court with directions to give an opportunity to the Defendants to file additional written statement to frame additional issues, if necessary and to give opportunity to the parties to adduce evidence on the amended pleadings, if they so desire. The Trial Court shall decide the matter afresh after taking into consideration the entire evidence

adduced by the respective parties.

12. The Trial Court shall make an endeavour to decide the suit within a period of one year from the date of receipt of copy of this order.

13. In view of disposal of the second appeal, the civil application does not survive and hence stands disposed of.

**(SMT. ANUJA PRABHUDESSAI, J.)**