

Ghuge

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

**FIRST APPEAL NO.1377 OF 2022
WITH
INTERIM APPLICATION NO.30322 OF 2022**

Harishchandra Shautan Dhobi (deleted
since deceased) through LRS. 1A)
Rajmani Harishchandra Dhobi and Ors ... Appellants

V/s.

1. The State of Maharashtra (Deleted)
2. The Municipal Corporation for
Greater Bombay and Ors. ... Respondents

Mr. O.R. Tiwari for the appellant.

Ms. Anita Dwivedi for respondent No.5.

Mr. Dhruti Kapadia a/w Mr. Santosh Parad for
respondent No.2/MCGM.

Mr. M.D. Borse Sub-Engineer from maintenance
Department from R/South Ward present in Court.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 15, 2023

P.C.:

1. The appellant is original plaintiff who had filed suit seeking permanent injunction against the defendants not to disturb peaceful possession of the plaintiff over the suit property and not to demolish structure of City Survey No.1340-B and 1340-C of village Kandivali, Taluka Borivali, Mumbai Suburban District

situated at Mathuradas Road and Shivaji Road, near Atul Tower Opp. Abhilasha Railway Employees Co-operative Housing society Ltd, Kandivali West, Mumbai, 400 067 without following due course of law. As can be seen from the plaint, initially the plaintiff sought for declaration that he is a owner of structure and in lawful possession of the suit property.

2. The learned Trial Court based on pleadings of the parties framed issues, one of the issues was in relation to the ownership of plaintiff over the land bearing C.T.S. No.1340-C admeasuring 2,000/- square meters. According to the plaintiff, defendant No.3 was owner of property bearing C.T.S. NO.1340-C. It is alleged that he purchased the property from Atmaram Raghunath Patil by sale-deed dated 28th August, 1959. Thereafter, defendant No.4 in paragraph 46 of the plaint plaintiff himself has stated that defendant No.4 and 5 in collusion with defendant No.2 constructed new building by encroaching upon the land of plaintiff without following due process of law. It is also stated that defendant No.5/Society constructed and develop building A, B and C over the C.T.S No.1340 and put up a boundary wall. It is stated that the remaining part of the property is in possession of the plaintiff. During the pendency of the suit, the plaintiff deleted prayer of declaration of ownership. The suit remained to be for permanent injunction seeking injunction against the defendant not to disturb possession over the suit property.

3. The scope of inquiry before the learned Trial Court was to consider as to whether the plaintiff was in lawful possession of suit property on the date of filing of suit. The plaintiff in his cross-

examination has admitted as under.

“It is true to say that the property CTS no.1340-A is in exclusive possession of defendant no.5 Abhilasha Builders. It is true to say that the only BMC have exclusive possession and right over the property 1340-B and 1340-C and I have no right and authority over it”.

4. The plaintiff has further admitted in his cross-examination as under.

“Now I again say that I have no right title in CTS no. 1340-A. I do not know whether the CTS nos. 1340-B and 1340-C reserve for road widening, and I was know that the CTS nos.1340-B and 1340-C were handed over to BMC for road widening purpose”.

5. Based on aforesaid admissions, the learned Trial Court had dismissed the suit. On perusal of the evidence of plaintiff and cross-examination it is clear that the admission, Bombay Municipal Corporation is in exclusive possession is clear and unequivocal. The plaintiff has failed to explain the said admission during the course of his evidence. No other documentary or oral evidence is brought to notice to show exclusive possession of plaintiff over suit property. Therefore, learned Trial Court rightly recorded a finding that the plaintiff has failed to prove lawful possession over the suit property.

6. The plaintiff has prayed for relief of mandatory injunction alleging encroachment by defendant Nos. 3 to 5 over the land ad-measuring 5 x 40 square meter. The plaintiff though filed sale-deed dated 14th September, 1959 on record, the said sale-deed has not been proved. The said sale-deed cannot be taken into consideration for considering the relief of mandatory injunction. The learned Trial Court has, therefore, rightly dismissed the suit.

In view of the admission of the plaintiff and failure to prove the sale-deed, no question of fact and law arises.

7. Therefore, the First Appeal stands dismissed under Order 41 Rule 11 of the Code of Civil Procedure, 1908. No costs.

8. As the First Appeal dismissed the ad-interim relief shall vacated.

9. In view of the dismissal of the First Appeal the Interim Application does not survive and disposed of accordingly.

(AMIT BORKAR, J.)