



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 515 OF 2018
WITH
CIVIL APPLICATION NO. 1190 OF 2018
IN SECOND APPEAL NO. 515 OF 2018

Shri.Damodar Narayan Kshirsagar

... Appellant.

Versus

Gopinath Kathod Patil (since deceased)
through his LRs 1/1. Smt.Ashwini Gopinath
Patil and Ors.

... Respondents.

Ms. Minal J. Chandnani, Advocate for the Appellant.

Mr. Sanjay S. Patil, Advocate for Respondent Nos.1/1, 1/2 and 2.

CORAM : SHARMILA U. DESHMUKH, J.

Date : January 08, 2024

ORDER :

1. The Second Appeal has been preferred being dissatisfied with the judgment and decree dated 3rd January, 2017 passed by the Appellate Court in Civil Appeal No.98 of 2015 reversing the judgment and decree dated 17th April, 2015 passed by the trial Court in Regular Civil Suit No.111 of 2001 and dismissing the suit.
2. Briefly stated the facts of the case are that Regular Civil

Suit No.111 of 2001 was instituted by the Appellant seeking *inter alia* declaration that the plaintiff is sole owner, Kabjedar and Vahivatdar of suit house No.449 at Kopar Post Kalher, Taluka Bhiwandi, District Thane and the defendants have no right and title and interest in the suit house and the defendants have no right to interfere in the settled possession of the plaintiff. It was pleaded that the plaintiff's grandmother one Chandrabai Dhanagar was the tenant of the suit property since the year 1926, of one Bayaramji Chinoy. That in 1936 notice to quit was issued which was subsequently withdrawn due to settlement between the owner and the plaintiff's grandmother.

3. It is further pleaded that after the settlement neither the owner nor any other person had asked for rent or vacate the house and thereafter Chandabai had not paid rent to anybody since 1936 onwards and frequently told the plaintiff till her death in the year 1980 that the house belongs to them and they are the owners. It is further pleaded that in the year 1936, the owner Bayaramji Chinoy died. In paragraph 8 of the plaint, it is pleaded that the plaintiff is in peaceful and uninterrupted settled possession since

1936 onward and the plaintiff claims ownership by adverse possession and also claims from the beginning since 1925 as a protected tenant.

4. The suit was resisted by the defendants denying the contentions and the parties went to trial. The trial Court by the judgment dated 17th April, 2015, decreed the suit as against which the defendants filed Civil Appeal No.98 of 2015 which came to be allowed and the suit being Regular Civil Suit No.111 of 2001 came to be dismissed.

5. Heard Ms. Chandnani, learned counsel for the Appellant and Mr.Patil, learned Counsel for Respondent Nos.1/1, 1/2 and 2.

6. Ms.Chandnani, learned counsel for the Appellant would submit that the substantial question of law which arises is whether the Appellate Court is justified in reversing the findings of the trial Court without properly appreciating the evidence on record. She would submit that the trial Court has rightly appreciated the factum of possession of the plaintiff since the time of his grandmother. She would further submit that considering the longstanding and uninterrupted possession of the plaintiff, the trial

Court has decreed a suit declaring the plaintiff as the owner of the suit property. She further submits that the Appellate Court had applied the wrong parameters as to the acquisition of title by prescription without considering the longstanding possession of the plaintiff.

7. Considered the submissions and perused the record.

8. The Appellant has filed compilation of documents which has been carefully scrutinized. The suit was filed seeking a declaration of ownership as regards the suit house. The case of the plaintiff as regards the ownership is firstly, that he is in peaceful and uninterrupted settled possession since 1936 and as such, has acquired ownership by adverse possession; secondly, on the ground that he is a protected tenant since the year 1925 and thirdly, that he is the owner of the property as there was settlement between the grandmother and the original owner. The trial Court on the basis of the pleadings framed the following issues for consideration:

“ISSUES

FINDINGS

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| 1. | <i>Whether the plaintiff proves his ownership over the suit house by</i> | <i>In the affirmative</i> |
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adverse possession against the defendants ?

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| 2. | <i>Whether the plaintiff proves his possession over the suit house ?</i> | <i>In the affirmative</i> |
| 3. | <i>Whether the plaintiff proves that the defendants are illegally trying to obstruct his possession over the suit house ?</i> | <i>In the affirmative</i> |
| 4. | <i>Whether the suit is bad for non-joinder of necessary parties ?</i> | <i>In the negative</i> |
| 5. | <i>Whether the plaintiff is entitled for declaration as sought ?</i> | <i>In the affirmative</i> |
| 6. | <i>Whether the plaintiff is entitled for injunction as sought ?</i> | <i>In the affirmative</i> |
| 7. | <i>What order and decree ?</i> | <i>Suit is decreed with costs."</i> |

9. As regards the Issue No.1, it has come in the evidence that in the year 1926 Chandrabai, who was his grandmother had come in possession of the suit house as tenant and as such, the contention of the plaintiff in respect of the possession of the suit house is unshattered. The trial Court considered that in case of adverse possession the plaintiff is required to show the date when he came in possession, the nature of his possession and that possession is adequate in continuity. Based on the longstanding possession, the trial Court has declared the ownership of plaintiff

by adverse possession. The Appellate Court observed that the witnesses have deposed about the Defendants having taken possession of half portion of the suit property and inspite thereof plaintiff has claimed ownership by adverse possession in respect of the entire property. After examining the pleadings, the Appellate Court has held that the plaintiff has nowhere pleaded as to when the predecessor-in-title or he himself denied the title of the owner in respect of the suit property so as to claim adverse possession.

10. The Appellate Court held that in Regular Civil Suit No.484 of 1995, instituted by the present plaintiff against the defendant, there is a specific pleading that the suit property is owned and held by late Bhimabai Kathod Patil and Lalchand Kathod Patil and the heirs which include the defendant and their name appears in the revenue records and as the suit is filed for declaration of title, they are necessary parties to the suit and therefore, the suit is bad for non-joinder of necessary parties.

11. It needs to be seen that contrary pleas are taken in the plaint on the aspect of the ownership of the defendant. In paragraph 9, the plaintiff has pleaded that as he is in

uninterrupted possession since 1936, he has acquired the title by prescription and thereafter, he claims protection of his tenancy rights which are existing in the year 1925. The pleadings nowhere reflect the denial of the title of the owner of the suit property to claim adverse possession.

12. It is settled that the party claiming adverse possession must prove that his possession in “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The party claiming adverse possession must show on what date he came in possession, nature of possession, whether the factum of possession was known to the other one and the date on which his possession became hostile in respect to the title of the original owner. As held by the Appellate Court, in the previous suit i.e. Regular Civil Suit No.484 of 1995, which was filed by the present defendant, the present plaintiffs have pleaded that the defendants have entered their names in the record of rights. As such, it was incumbent on the plaintiff to plead and prove all facts necessary to establish adverse possession and plea is required to show when the possession became adverse to show starting point of limitation. It is well settled that the mere

assertion of possession is not sufficient until the plaintiff proves “*animus possidendi*”.

13. In the present case, the pleadings do not plead hostility of title. On the contrary, the pleadings have raised mutually inconsistent pleas of title and adverse possession and it is settled that the plea of adverse possession does not commence to operate unless title is renounced. Having accepted that he was a tenant in the premises, it was required of the Appellant to disclaim his right and to plead and prove assertion of his independent hostile adverse possession to the knowledge of the owner.

14. In the present case, the trial Court on the basis of the pleadings have specifically held that there is no plea as to when the plaintiff's predecessors-in-title or the plaintiff has setup the title of the ownership for the purpose of claiming the adverse possession. The trial Court while decreeing the suit and answering the issue of declaration of ownership by adverse possession has failed to apply the necessary parameters and only on the basis of the longstanding possession has held that the plaintiff has proved his ownership by adverse possession which finding has been

rightly corrected by the Appellate Court vide impugned judgment.

15. Having regard to the observations above, no substantial question of law arises in the present case, as the Appellate Court has rightly appreciated the evidence and the pleadings and was justified in reversing the findings of the trial Court on the aspect of ownership by adverse possession.

16. In view of the above, Second Appeal stands dismissed. The Civil Applications do not survive for consideration and stand disposed of.

(Sharmila U. Deshmukh, J.)