

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 292 OF 2023
WITH
INTERIM APPLICATION NO. 4012 OF 2023
IN
SECOND APPEAL NO. 292 OF 2023

Bhimrao Bhau Dhaigude and Anr.

... Appellants

Versus

Vaman Shankar Mahanavar and Ors.

... Respondents

...

Mr. Manoj Patil i/b Mr. B. A. Lawate for the Appellants.

...

CORAM : SANDEEP V. MARNE J.

DATED : 1 MARCH 2024.

ORDER-

1) This Appeal is filed by Appellants challenging Judgment and Decree dated 20 July 2022 passed by District Court Judge-5 Baramati, in Regular Civil Appeal No. 77 of 2012. The First Appellate Court has allowed the Appeal and has set aside the decree dated 3 April 2012 passed by Civil Judge Junior Division, Baramati in Regular Civil Suit No. 116 of 2005. The suit is decreed by the First Appellate Court directing Appellant/Defendants to hand over vacant possession of the suit property to the Plaintiffs and has further injuncted the Defendants from making any encroachment in the suit property i.e. Gat No. 313. An enquiry into mesne profit is also directed in respect of the suit property under Order 20 Rule 12 of the Code of Civil Procedure.

2) Land admeasuring 52 Ares in Gat No. 313 Village Sonkaswadi, Tal. Baramati, District Pune is the subject matter of the suit instituted by Respondent Nos. 1 to 5 / Plaintiffs seeking a decree for recovery of possession as well as injunction against the Appellants/ Original Defendants. The Trial Court dismissed the suit by Decree dated 3 April 2012 holding that Plaintiffs could not prove any encroachment by the Defendants in respect of the suit property. The First Appellate Court has reversed the decree of the Trial Court and has decreed Plaintiffs' suit directing Appellants/Defendants to hand over vacant possession of the suit property to the Plaintiff and has further enjoined Defendants from making any encroachment over suit property.

3) I have heard Mr. Manoj Patil the learned counsel appearing for the Appellants. He would submit that the Appellants/Defendants are in separate possession of the suit property for several years. That the Appellants/Defendants set up a claim of adverse possession in their written statement. That the claim of adverse possession was virtually admitted by Plaintiffs' witness in the cross examination. That the witness deposed during the course of cross examination that Defendants are cultivating the suit property for several years, thereby showing knowledge on the part of the Plaintiffs about possession of the suit property by the Defendants. That all the ingredients required for proving the claim of adverse possession are met with. Inviting my attention to Article 65 of the Limitation Act, Mr. Patil would submit that the suit filed by Plaintiffs for recovery of possession based on title was barred by limitation in view of admission given by Plaintiffs' witness that the suit property is in possession of Defendants for over 30 years. That the Trial Court had rightly dismissed the suit filed by the Plaintiffs and that First Appellate Court has committed an error in reversing well-reasoned Order of the Trial Court.

4) I have considered the submissions canvassed by Mr. Patil. Perusal of the plaint shows that the Plaintiff averred in paragraph 2 thereof that Defendants started obstructing Plaintiffs' possession of suit property admeasuring 52 Ares, 5/6 years before institution of the suit. They pleaded that Defendants started destroying and shifting the boundary / bund between Gat Nos. 313 and 314. That after noticing such attempts on the part of Defendants, Plaintiffs applied for and got Gat No. 313 measured on 29 October 2004. That the boundaries were fixed after such measurement on 18 December 2004 in presence of Defendants. Plaintiffs thereafter filed a suit for recovery of possession of the suit property. In response, Defendants filed written statement and raised plea of adverse possession in paragraph '9'. They claimed that in addition to cultivating Gat No.314 admeasuring 2.31 Ares, Defendants have been cultivating 52 Ares area out of Gat No. 313 since 1983/1986. That despite knowledge of such cultivation, Plaintiffs never objected such possession and cultivation of suit property by Defendants. On these broad pleadings, the case of adverse possession was set up.

5) The Trial Court framed an issue as to whether Defendants proved ownership by adverse possession. The issue was however answered against Defendants and it was held that Defendants did not adduce any evidence to prove their possession without obstruction by Plaintiffs. On the contrary, the Trial Court held that the Plaintiffs were unable to prove that Defendants possessed the suit property. Though the Defendants' plea of ownership by adverse possession was rejected by the Trial Court, they did not challenge that finding by filing cross appeal/cross objection before the First Appellate Court. The finding therefore attained finality.

6) The First Appellate Court, in Appeal filed by Original Plaintiffs held that Defendants made encroachment in suit property admeasuring

52 Ares in Gat No. 313 and that they failed to prove that they became owners by adverse possession. The First Appellate Court accordingly reversed the Trial Court's decree and has decreed Plaintiffs suit.

7) It is well established principle that a mere trespasser with long possession does not become owner by adverse possession. Trespasser's long possession is not synonymous with adverse possession and owner can take back possession from a trespasser at any point of time and the length of time for which trespasser continues in possession is irrelevant. The three tests must be proved to claim ownership by adverse possession:

- i) adequate in continuity.
- ii) adequate in publicity and
- iii) adverse to a competitor, in denial of title and his knowledge.

8) Thus there must be some event where the Defendants claiming the adverse possession must question Plaintiff's title to prove his ownership by adverse possession. In the present case Defendants did not claim that they became owners of the suit property. There is nothing on record to indicate that any claim was raised by the Defendants prior to filing of suit by the Plaintiffs that title was acquired by them by prescription. It is only when Plaintiffs filed a suit for recovery of possession that the Defendants thought of raising a vague plea of proving of ownership by adverse possession. In my view the requirements of proving claim of ownership by adverse possession are not met in the present case. Both Trial Court and First Appellate Court have rightly rejected Defendants claim for adverse possession.

9) Mr. Patil has strenuously relied upon cross examination of the Plaintiff to prove the claim of adverse possession. In my view, Plaintiffs came with specific case that disturbance of possession by Defendants was noticed

5/6 years before filing of the suit. Therefore, some stray admission given in the cross examination cannot and does not prove the claim of ownership by adverse possession. The burden of proving acquisition of title by adverse possession rested on the shoulders of Defendants. Apart from raising a vague plea in the written statement, the Defendants did not lead any evidence to satisfy the conditions necessary for proving acquisition of title by adverse possession.

10) The First Appellate Court has rightly observed that both Gat Nos. 313 and 314 were originally owned by same owner Shri. Kokare. That Plaintiffs purchased Gat No. 313 from Kokare Family. Whereas Gat No. 314 was originally sold by Kokare Family to one Shri. Gaikwad, who later sold Gat No. 314 to Defendants. The Defendants case is that they are possessing the same land of which possession was given to them by Shri. Gaikwad after purchase of Gat No. 314. Thus, the case of the Defendants appears to be that they are possessing excess area (of Gat No. 313) on account of lack of knowledge of the exact boundaries. The possession of Defendants in respect of area admeasuring 52 Ares (suit property) is not deliberate, but the same appears to be out of inadvertence as parties did not know the exact boundaries of Gat Nos. 313 and 314. Possession of excess area out of inadvertence or due to lack of knowledge about exact boundaries, cannot amount to acquisition of ownership by adverse possession. In fact, the case of the Defendants that they have been possessing area admeasuring 52 Ares in Gat No. 313 on account of handing over the possession to them by Shri. Gaikwad after purchase of Gat No. 314 contains an implied admission that the Plaintiffs did not know that the land in their ownership was actually being possessed by the Defendants. Thus, possession of area admeasuring 52 Ares by Defendants is not with knowledge of the Plaintiffs. At no point of time Defendants denied the title of Plaintiffs in respect of land admeasuring

52 Ares. Thus, the three mandatory tests of *nec vi* (without force), *nec clam* (without secrecy) and *nec precario* (without permission) are not satisfied. The plea of acquisition of title by adverse possession is rightly repelled by the First Appellate Court.

11) So far as issue of limitation is concerned, it is seen that the parties were apparently unaware about the exact boundaries of Gat Nos. 313 and 314 and possession of excess area of 52 Ares by Defendants is apparently attributable to ignorance/confusion between parties about boundaries. Therefore, it cannot be said that the possession of suit property admeasuring 52 Ares in Gat No. 313 became adverse to the Plaintiffs 12 years prior to filing of the suit. Therefore the suit cannot be held to be barred by Article 65 of the Limitation Act.

12) After considering the overall conspectus of the case I am of the view that no serious error can be traced in the order of the First Appellate Court in reversing the decree of the Trial Court. Plaintiffs own the suit property admeasuring 52 Ares in Gat No. 313, which is possessed by Defendants out of sheer confusion about boundaries. They must hand over possession of the land to Plaintiff as the same is not in their ownership.

13) No substantial question of law is involved in the Appeal. The Second Appeal is accordingly rejected.

14) In view of the rejection of the Second Appeal, Interim Application No. 4012 of 2023 does not survive and the same is also disposed of.