

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**FIRST APPEAL NO.387 OF 2018**

|                                      |   |                   |
|--------------------------------------|---|-------------------|
| Smt. Savita Bhiku Kadam              | } |                   |
| age about 55 years, occu: housewife, | } |                   |
| residing at Bhiku Kadam Chawl,       | } | .... Appellant    |
| Borsapada, Poisar, Kandivali (west)  | } | (Orig. Plaintiff) |

**V/s.**

|                                                    |   |                   |
|----------------------------------------------------|---|-------------------|
| Smt. Volley D'Mello                                | } |                   |
| Adult, Age not known, Occu: Housewife              | } |                   |
| Residing at Flat No. 6, Church View,               | } |                   |
| Plot No. 424, 14 <sup>th</sup> Road, Bandra(West), | } |                   |
| Mumbai 400 050.                                    | } | ...Respondent     |
|                                                    |   | (Orgi. Defendant) |

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Mr. S.A. Abhyankar with Ms. Anjali Neel Helekar, for the Appellant.  
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**CORAM : KISHORE C. SANT, J.**

**RESERVED ON : 8TH JANUARY 2024.**

**PRONOUNCED ON : 15TH JANUARY 2024.**

**JUDGMENT : (KISHORE C. SANT, J)**

1. This appeal is filed by the original plaintiff who had filed suit bearing Short Cause Suit No. 1639 of 2015 for a declaration that she has become owner by way of adverse possession and for injunction against the respondent from disturbing her possession. The suit came to be decreed only to the extent of granting injunction against the

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*This judgment is corrected as per speaking to the minutes of the order dated 18.0.2024*

defendant. So far as relief of declaration that she has become owner by adverse possession came to be rejected. The appeal is thus filed only to the extent of not granting declaration as per prayer clause (a) of the plaint.

2. It is the case of the plaintiff that her mother-in-law was in possession of the suit property i.e. Chawl and she was collecting rent from the tenants in Chawl. Her mother-in-law died in 1978 and thereafter, her husband Bhiku Kadam was looking after the Chawl and was collecting rent. Defendant had a clear knowledge of the possession of the suit property that the plaintiff's mother-in-law was claiming to be owner of the property in spite of this knowledge she never objected to the said possession. After demise of husband, it is the plaintiff who is collecting the rent from the tenants. Her possession is thus, adverse to the interest of owner, is open and to the knowledge of all since 1997 i.e. more than 12 years from filing of this suit.

3. Initially the learned Civil Judge at City Civil Court, Dindoshi framed a preliminary issue of jurisdiction. The Plaintiff therefore, was required to file First Appeal (St) No. 32661 of 2016. This Court by order dated 5<sup>th</sup> July 2017 was pleased to set aside the order framing preliminary issue and remanded the suit.

4. After remand, one application for intervention was also filed. From the record, it is not clear as to what happened to the said application later on.

5. So far as the defendant is concerned in spite of service, she did not appear before the trial Court and the suit proceeds ex-parte. Even in this appeal she has not appeared before the Court. Initially, this Court had passed an order asking the plaintiff to make positive statement as to whether the defendant / respondent is dead or alive. Learned advocate could not make any statement. The appeal thereafter was posted for final hearing on several occasions but could not reach.

6. Heard the learned advocate for the appellant. He submits that the learned trial Court has accepted the fact of possession and has granted injunction in favour of plaintiff. When the suit is not contested by the defendant and she allowed the suit to proceed as ex-parte. Still the Court has refused to grant decree of declaration of ownership by way of adverse possession. There is ample evidence on record in the form of enquiry register showing that the mother-in-law of the applicant is in possession. In the enquiry register no objection is recorded by the defendant. Except her name in 7/12 extract, there was no document in favour of the defendant.

7. He invited attention to the entries taken in the enquiry register by the Deputy Collector and CA of U.L.C, Greater Mumbai. It is pointed out that in the assessment bills issued by the BMC, the said chawl is shown to have been constructed before 1961-1962 in the name of Laxmibai Kadam. The affidavit of the present plaintiff is also taken.

8. Learned Advocate further submits that all these documents show that possession of the plaintiff is open and interrupted to the knowledge of all the concerned and therefore, the suit ought to have been allowed in its entirety. He relies upon the judgment in the cases of *“Maruti Dagadu Charwad (D) through legal representative vs. Bhau Nama Gujar (d) through LRs.”*<sup>1</sup> and *“Ravinder Kaur Grewal and Ors. vs. Manjit Kaur and Ors.”*<sup>2</sup>.

9. Since none appears for the defendant, this Court proceeds to decide the appeal on the basis of the submissions by original plaintiff and the judgment. In the case of “Maruti Charwad” (Supra), this Court has considered the provisions of Article 65, Para 11 of the said judgment reads as under:

“11. Now the next question is whether this adverse possession was open and sufficient in publicity so as

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1 (2017) 5 Mh. L.J. 627

2 (2019) 8 SCC 729

to mature into adverse possession, defeating the true owner's right to the property. Even here, the first Appellate Court was in clear error in proceeding on the footing that there was no notice of his adverse possession by Defendant No.1 to the Plaintiffs or their predecessor Rama. The law does not require any specific notice or, for that matter, any proof that there was specific knowledge on the part of the true owner of the adverse possessor's possession or assertion of title. What is important is whether the possession was so open and sufficient in publicity as to impute knowledge on the part of the true owner. It should be open and not concealed. It should be effective so as to impute knowledge on the part of the true owner. It is not for the adverse possessor to establish specific knowledge of the true owner in all cases of adverse possession. As the Supreme Court noted in T. Anjanappa's case (supra), adverse possession is of two kinds—one of a trespasser or a non-permissive possessor, which is adverse *ab initio* to the true owner and the other of a permissive possessor which becomes adverse by a change in his position, namely, the possessor asserting a hostile title or denying the title of the true owner. This assertion or denial, or, in other words, change in the position of the possessor, must be shown as being within the knowledge of the true owner and the courts may insist on a notice of such change in the position of the possessor to the true owner. That, however, is not a case where the possession is that of a trespasser or non-possessor, which is adverse *ab initio*.

10. It is clear that for considering the possession adverse to the owner needs to be shown is that the possession is so open and sufficient in publicity as to impute knowledge on the part of the true owner. The

possession should be inferred and not considered. The possession is non-permissive etc.

11. In the case of **Ravinder Kaur Grewal** (supra), the Hon'ble Supreme Court has considered Section 27 of the Limitation Act, 1963. It is held that when the possession is for more than 12 years adverse to the owner then in view of Section 27 of the Act not only remedy is barred of the true owner but his right of the true owner also expires. This judgment is passed in reference. Para 53 of the said judgment reads as:

“53....There is the acquisition of title in favour of plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part under [Article 65](#) of Act. Under [Article 65](#), the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse possession by the defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession”.

12. On considering the judgment, this Court finds that in the

present case there were various documents produced on record showing that the possession of the plaintiff is open uninterrupted and to the knowledge of all. There are documents in favour of the plaintiff's mother-in-law showing that she was in possession and was collecting rent from the tenants. Her name was also taken in the enquiry register after holding due enquiry, the mother-in-law died in 1978 and even the husband of the plaintiff has died on 1997. There is no contrary pleading or evidence as the suit proceeded ex-parte.

13. After going through the reasoning of trial Court, it is only seen that Court has observed that the plaintiff has failed to prove nature of her possession. The plaintiff could not specifically show the knowledge to the defendant of her hostile possession. This Court finds that the documents on record clearly establish that the possession of the plaintiff is continued to the knowledge of all public. The observation that plaintiff could not prove nature of possession, in the opinion of this Court is not correct. This Court finds that the observation to that extent need to be set aside by allowing suit in its entirety. In the matter of adverse possession what is required to be proved is only factum of possession to knowledge of original owner, uninterrupted. In this care, Court need not go to the question of

nature of possession when the same is shown prior to 1961-1962. It is not a case that the defendant has come with any other theory to show that the possession of the plaintiff is permissive. In the result following order:

**ORDER**

- i). The appeal stands allowed.
- ii). Short Cause Court Suit No. 1639 of 2015 is decreed in terms of Prayer clauses (a) & (b) which read as below:

*“(a) The Hon’ble Court be pleased to declare the Plaintiff herein as owner by virtue of adverse possession in respect of suit property, viz, all that piece and parcel of land situate, lying and being at Kadam Chawl, Borsapada, Poisar, Village Kandivali, Taluka Borivali, M.S.D; Mumbai, bearing CTS Nos. 29, 29-1 to 8 and 30 totally admeasuring about 2479.8 sq. mts or thereabouts together with structures standing thereon.*

*(b) The Hon’ble Court be pleased to issue permanent order of injunction restraining the Defendant or her servants and agents in any way dispossessing the Plaintiff and / or interfere with the Plaintiff’s possession in respect of the suit*

*property, viz. All that piece and parcel of land situate, lying and being at Kadam Chawl, Borsapada, Poisar, Village Kandivali, Taluka Borivali, M.S.D; Mumbai, bearing CTS Nos. 29, 29-1 to 8 and 30 totally admeasuring about 2479.8 sq. mts. or thereabouts together with structures standing thereon.”*

14. The First Appeal is accordingly disposed off.

(KISHORE C. SANT, J)