



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

979 SECOND APPEAL NO. 330 OF 2025
WITH
CIVIL APPLICATION NO. 9392 OF 2025
IN SA/330/2025

SHAIKH HAJI HARUN ISMAIL
VERSUS
SHAMWEL GANPAT KOPARE DECEASED THROUGH LEGAL HEIRS SMT
LAXMIBAI SHAMWEL KOPARE AND ORS

...
Advocate for Appellant : Mr. Ashwin V. Hon

...
CORAM : SHAILESH P BRAHME, J.

DATE : 04.09.2025

PER COURT :

Heard learned counsel for the appellant.

2. Present second appeal is arising out of concurrent findings of facts in granting decree of removal of encroachment and possession in favour of respondent-plaintiff,
3. The controversy pertains to part of CTS No. 2491, which was originally owned by respondent-plaintiff. After the demise of plaintiff, his legal heirs became owner of the property. It is contended that appellant-defendant no. 1 encroached upon it and made a construction. Hence, Regular Civil Suit No. 521/1993 is filed for removal of encroachment.
4. The appellant contested the suit on various grounds namely; non joinder of necessary party, limitation, lack of material particulars etc. It is their case that that Indubai purchased the property in the year 1964 from the respondent-plaintiff. Thereafter, in the year 1990 the property in question is transferred to the appellant by Indubai. They are in possession

since 1990 continuously. It is submitted that they are having title over the suit property and respondents have no right, title or interest in it.

5. After considering the oral and documentary evidence on record, the Trial Court decreed the suit vide judgment dated 29.04.2011 directing the appellant to remove the encroachment to the extent of 37.2 square meters and hand it over to the respondent. Being aggrieved, Regular Civil Appeal No. 48/2011 was filed, which was dismissed.

6. The learned counsel Mr. Hon appearing for the appellant submits that the suit was bad for non-joinder of Indubai, who received title of the suit property in 1964. It is submitted that appellant perfected title in pursuance of agreement to sell dated 19.01.1990 executed by Indubai and they are continuously in possession of the property. It is further submitted that no evidence is placed on record by respondents to show their title over the suit, still suit is decreed which is an error of jurisdiction. It is further contended that the limitation reckoned from 1964 and the suit is filed in the year 1993, which is hopelessly barred by time. It is further submitted that the appellant is in possession in pursuance of agreement of 19.01.1990 and by implication of Section 53A of the Transfer of Property Act, he is entitled to retain the possession and the same is lawful.

7. I have gone through the judgment and decree passed by both Courts below. The appellant claims that he derived title from Indubai on or about 19.01.1990. No sale-deed is placed on record to show that the appellant received title of the suit property. The document of 19.1.1990 is an agreement, and not the title document.

8. It is the case of the appellant that their vendor Indubai had purchased the property in the year 1964. Neither the document of sale transaction nor a specific date of sale is coming on the record. The title of Indubai itself is in grave cloud. In the absence of any tangible material on record showing transfer of title to Indubai and subsequently to the appellant, it is not

possible to accept that possession of the appellant is lawful. Both the Courts below have rightly appreciated the material on record in that regard.

9. The cause of action for filing present suit is the construction, which is done by the appellant. Considering the pleadings and reliefs claimed in the plaint, Indubai cannot be said to be necessary party. Besides that Indubai does not have any title. Therefore, the plea of non-joinder of necessary party holds no merit.

10. It is contended that the suit should have been filed within a period of 12 years from the year 1964, when Indubai was transferred the title. At the first place no such title is ever transferred to Indubai in the year 1964. Even the appellant is unable to point out his title, which he claims to have been received in the year 1990. The possession of the appellant is illegal and that of encroacher's. As there is no cause of action against Indubai, therefore, starting of limitation since 1964 is out of question. The plaintiff has come up with a specific case that before filing of the suit the encroachment was made. Both the Courts below have recorded findings on the plea of limitation against the appellant which cannot be faulted.

11. A plea is taken by the appellant that his possession needs to be protected under Section 53A of the Transfer of Property Act. The possession of a proposed transferee, who is willing and ready to perform his part of contract can be protected and that too as against the vendor. In the present case Indubai is not the vendor. The claim of the appellant that he was put in possession in pursuance of agreement dated 19.01.1990 executed by Indubai, cannot rescue him from the claim of encroachment made by the respondent-plaintiff. The submission made in this regard cannot be approved.

12. I do not find any perversity or patent illegality in the judgments passed by the Courts below.

13. The Second Appeal is dismissed.
14. Pending Civil Application is disposed of.

(SHAILESH P. BRAHME, J.)

mkd/-