

ORDER BELOW EXH. 05 IN R.C.S. NO: 358/09
KRISHNATH VS. VILAS ETC.6

1. In a suit for declaration and permanent injunction, plaintiff filed this application Exh.5 urging thereby to restrain the defendant from disturbing his possession over the suit property as well as to restrain the Mandal Officer, Koparde Haveli or revenue officer from deliving the possession of the suit property in favour of the defendant.

2. It is submitted in the application that, suit property 1B land Gat no. 48, admeasuring 0.68 HR, out of which 19 HR area has been measured on 05.08.97 by the T.I.L.R., Karad. The suit land as described in plaint Para 1B is owned by the plaintiff by way of an adverse possession and he is in continuous possession of the same. The suit land Gat no.48 was having old Survey No. 17/1A, 17/1B, 17/4, 17/7, 17/1C . Since long, there is cattle shed, fodder, firewood were kept by the plaintiff and accordingly plaintiff is using the same, since his ancestors. City Survey land Gat no.48 is formed from old Survey no. 17/1A, 17/1B, 17/4, 17/7, 17/1C and accordingly wrongly recorded in the name of Vasu Sripati Kadam. However, the suit property was actually in possession of the plaintiff. The ancestors of the plaintiff were not received the notice of Consolidation

Scheme as per section 15A of the Act, therefore, plaintiff had applied for correction of the entries in Consolidation Scheme, however, the objection was rejected on the technical ground of delay. Defendant no.1 to 5 thereafter, applied to Tahasildar, Karad vide B.N.D. application No. 15/97, thereby claiming 0.19 HR land from the suit property 1B from the plaintiff. Since 1961, plaintiff is in possession of the suit property, therefore, defendants have no right to get the possession of the said property. All the record of the Consolidation Scheme are illegal. The revenue officers have not right to make inquiry in BND case regarding adverse possession of the plaintiff, therefore, the order passed by the revenue officer dated 12.01.09 to deliver the possession of the suit property to defendant is illegal. Plaintiffs received the notice for delivery of encroached portion of the suit property in favour of the defendant from revenue officers. Therefore, according to them as they are the owners of the suit property by way of an adverse possession, they filed this application thereby restraining the revenue authority to deliver the possession of the suit property 1B in favour of the defendants as well as to restrain the defendants from disturbing their possession over the suit property, pending the suit.

3. The suit summons and notices were issued to

defendants. The defendants appeared and filed his say at Exh.31. They denied all the contentions of the plaintiff in the suit. He denied that, plaintiff is the owner of the suit property by way of adverse possession. They also denied the plaintiff's possession over the suit property. According to them, suit land Gat no.48 is the ancestral land of defendant which was in their possession jointly. Said land is mutated in their name. Towards the western side land Gat no. 46 is situated. On the application of the defendants, for fixing the boundaries of the land Gat no.48, suit property was measured on 05.08.97 and it was found that, the father of plaintiff namely V.P.Kadam committed an encroachment to the extent of 0,19 HR in suit land Gat no.48. Defendant thereafter applied to Tahasildar Karad vide S.R.no. 15/97 on 03.09.97. Sufficient opportunity was given to the plaintiff and after due inquiry, it reveals that, plaintiff committed the encroachment in their land Gat no.48, and therefore, revenue officer on 12.01.09, directed to remove the encroachment to the plaintiff. It is further submitted that, in spite of Consolidation Scheme, objection was also raised by the plaintiff, however, on 30.09.02, the said objection has been dismissed. The petition preferred by the plaintiff in Writ Petition no. 4067 regarding the entry in the Consolidation Scheme has been also dismissed by the

Hon'ble High Court.

4. As per the order dated 12.01.09, plaintiff removed the encroachment, therefore, on the application of the defendants and by issuing the notice to both the sides, revenue officers delivered the possession of the suit property from land Gat no.48 admeasuring 0.19 HR in favour of the defendants by removing the encroachment. So plaintiff is not in possession of the suit property. On this sole ground, defendant submitted for rejection of the application. It is further submitted that, against the order of revenue officer in BND 15/97, plaintiff preferred appeal before the Sub-Divisional Officer Karad, and therefore, plaintiff has no locus-standi to file the instant suit for claiming the same relief. The suit is not within limitation. Plaintiff has no right, title, interest in the suit property, nor he is in possession of the suit property. On all such counts, defendant submitted for rejection of the application.

5. On rival pleadings of the parties, following points arise for my determination and I answer my findings thereon with reasons to follow as under:

POINTS

FINDINGS.

1. Whether plaintiff has prima-facie case in his favour ? : No.
2. Whether balance of convenience

lies in favour of plaintiff ? : No.

3. Whether an irreparable loss
will cause to plaintiff if
injunction is refused ? : No.

4. What order ? : Application is rejected.

R E A S O N S

6. Plaintiff placed on record the documents as per list Ex.3, Ex.24, affidavit of plaintiff, photographs as per the list Ex.41. Defendant placed on record the documents as per list Ex. 43 including affidavit of Sampat Bhau Kadam,Vilas Nana Kadam, copy of statement recorded at the time of consolidation scheme on 28.7.1961, affidavit of Tanvej Kamu Patel.

As to point No. 1 to 4:

7. Heard both the sides at length. Perused the record of the case. Before discussing the argument and the documentary evidence available on record it is desirable to consider the relief claimed by the plaintiff in this application Ex. 5. i.e defendants be restrained from dispossessing the plaintiff from the suit property 1B as well as the revenue authorities be restrained from taking the possession of the suit property 1 B from the plaintiff.

8. So it is expected from the plaintiff to show that he is in possession of the suit property 1B, lawfully. Counsel

for the plaintiff Shri Gaikwad Adv vehemently argued that since 1961 plaintiff is continuously in possession of the suit property hence by way of adverse possession plaintiff became the owner of the suit property. As such according to him plaintiff has valid title over the suit property. Defendant therefore has no right to initiate any action against him as well as to dispossess the plaintiff from the suit property. In support of his submission he placed his reliance on following various authorities , those are,

9. **Narendra Voikunt Raikar v/s Amaral Pereiara**
2007 (3) Mh.L.J.252 (Bombay).

“It is cardinal principle that a person who claims adverse possession must plead to that effect and must show on what date he came into possession, what was the nature of his possession, whether the fact of his adverse possession was known to the owner and what was the period of such adverse possession.”

10. Further reliance is also placed on a case **Namdeo**
Karbhari Bodake v/s Chababu @ Chahadu Rangnath
2006(1) Mh.L.J 878 (Bombay).

“As noted earlier the plea of limitation in the instant case would commence when the defendants put up the claim of their title adverse

to the title of the original owner and this plea was taken up by the defendants after the plaintiffs asked for the return of the encroached land based on the surveyors report.”

11. **M.Kallappa Setty v/s V.Lakshminarayana Rao AIR 1972 S.C. 2299,**

“Plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. Once it is accepted as the trial court and the first appellate court have done that the plaintiff was in possession of the property ever since 1947 , then his possession has to be protected as against interference by someone who is not proved to have a better title than himself to the suit property. On the finding arrived at by the fact finding courts as regard possession the plaintiff was entitled to the second relief asked for by him even if he had failed to prove his title satisfactorily.”

12. **Smt. Sarladevi v/s Shailesh AIR 1996 Bombay 98,**

“42... it is now amply proved that the plaintiffs possession is uninterrupted right from 1965 or at

least after the death of her husband in 1980 , till the date of filing of the suit. In that view of the matter, the plaintiff would certainly be entitled to an injunction as prayed for by her and both the courts below having failed to correctly appreciate the factum of possession of the plaintiff over the suit land ,have erred in law in refusing her the injunction.”

13. **Bashir Ahmad v/s Ghulam Mohammad AIR 2001 J & K 32,**

“6. Now the challenge (d) that the court has exceeded its powers. The argument needs to be appreciated in the light of mandate of order XXXIX rule 1 (b) CPC. In terms of the said provisions of law the court has not only the power to grant a temporary injunction but power also flows to it to make such other order for the purpose staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property as the court thinks fit until the disposal of the suit or until further orders.”

14. **Badrilal v/s Rampyari AIR 1992 MP 231,**

“Finality may attach the entry made in the

revenue papers and the plaintiffs might be debarred by lapse of time from disputing the correctness of the entry so made still if they have perfected title in the property by prescribing hostile title over the statutory period, the entry in the revenue papers/settlement papers and the finality attaching therewith cannot come in the way of acquisition of title by adverse possession being recognized by a competent court of law.”

15. **Ushabai v/s Wasudeo 2004 (2) Mh.L.J 594,**

“6. where the maps are made for the purpose of a suit there is even apart from fraud which may exist a tendency to colour exaggerate and favour which can only be countenanced by swearing the maker to the trust of his plan. Hence there is no presumption of accuracy in respect the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must therefore be duly proved and it is not admissible in evidence in absence of proof of its accuracy.”

16. **P.T.Munichikkanna Reddy v/s Revamma 2007 (2) SCCR 139,**

“This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.” I read the above cited authorities very carefully.

17. As against it counsel for the defendants Shri A.B. Patil Adv vehemently argued that plaintiff is not the owner of the suit property, he has no valid title. He further submitted that plaintiff had committed encroachment over the suit property and possession of the said encroached portion has been delivered by the revenue authorities in favour of the defendants. Defendants received the possession of the encroached portion from the government authorities in lawful manner as such application is not maintainable. He further submitted that plaintiff filed false affidavit. Plaintiff has preferred the appeal against the order of the Tahsildar and as such plaintiff is not entitled to claim the two relief at two different forum. Hence he submitted that application be rejected.

18. At the outset of the above argument, let me turn to the record of the case. It reveals from the plaint as well as the documents placed on record by the plaintiff, that

there was dispute in respect of the entries of the suit property 1B in the consolidation scheme. It is the contention of the plaintiff that the objection of the plaintiff was rejected on technical ground. The order of the deputy director of land record also placed on record. It reveals from the said order that due inquiry was made at the time of the consolidation scheme. The objection raised by the father of the plaintiff was rejected before the Deputy Director Land Record. Not only this against the said order writ, preferred by the father of the plaintiff vide writ petition no. 4067/2006 also dismissed by the Honourable High Court Bombay. So now the objection raised in respect of the consolidation scheme have been already decided till Honourable High Court holding that the inquiry of the consolidation scheme was proper , at this stage plaintiff has no right to challenge the entries in respect of the consolidation scheme.

19. It is pertinent to mention here that in the year 1961 the consolidation scheme was effected and after such long gap plaintiff is seeking the declaration that the record of the consolidation and the scheme of 1961 is illegal ,null and void. The said objection has been already decided till Honourable High court hence prayer of the declaration on that count it self appears to be not tenable.

20. It is pertinent to mention here that plaintiff is claiming the relief of declaration of ownership over the suit property by way of adverse possession. The plea of adverse possession can be used as a shield and not as a sword. Plaintiff can opt the plea of adverse possession for his defense but not for declaration of his title. So the prayer of the plaintiff about the declaration of his title also appears to be not tenable.

21. On careful scrutiny of the documents i.e. 7/12 extract of the suit property Ex. 7 reveals that the said property is not standing in the name of the plaintiff, but the defendants are shown as owner of the said property. So as per the entries in the revenue record the suit property 1 B is standing in the name of the defendants. Thus the defendants have better title over the suit property 1 B than the plaintiff. The map produced by the plaintiff itself pinpoints that plaintiff himself had committed encroachment over the suit land Gat no. 48 of the defendant. Thereafter application was moved to the Tahsildar Karad and on due inquiry by him vide BND case No./SR-15/97, Tahsildar Karad accordingly directed the plaintiff to remove the encroachment over the suit property. Accordingly notices were issued to plaintiff to remain present on 9.12.2009 at the suit property 1 B for delivery of

the possession in favour of the defendants.

22. As per section 237 of the Maharashtra Land Revenue Code the summery inquiries conducted by the revenue officer are judicial proceeding and the authority holding the inquiry are deemed to be the civil court for the purpose of this inquiry. So in view of section 237 of the said act the inquiry conducted by the Tahsildar Karad is judicial proceeding and the said authority is deemed to be the civil court. So it cannot be said that the Tahsildar Karad has illegally conducted the proceeding for removal of the encroachment of the plaintiff. It is pertinent to note here that after the order of the Tahsildar dt. 12.1.2009 in the said proceeding , plaintiff appears to have preferred the appeal before the S.D.O. ,on 26.11.2009, thereafter on 5.12.2009 plaintiff also filed this suit for declaration. The affidavit filed by the plaintiff pinpoints that during the pendency of the appeal before the SDO plaintiff again filed this suit claiming similar relief. As per section 41 of the Specific Relief Act equal efficacious relief was available to plaintiff in the appeal before the S.D.O. Karad. Plaintiff has to choose either of the forum to challenge the order of the Tahsildar. However plaintiff approached both the forum and is seeking the relief from both the forums. So there is question also as to whether subsequent filing of this suit is maintainable or

not.

23. Not only this defendant also placed on record the “*Kabjepatti*” i.e possession receipt in respect of the the suit property 1 B which shows that on 9.12.2009 in between 14.00 Hrs.,to 17.00 Hrs. the revenue officers have delivered lawfully the possession of the suit property 1 B in favour of the defendants in presence of the panchas. So the said possession receipt clearly pinpoints that the possession of the encroached suit property 1 B has been already delivered lawful in judicial proceeding of the Tahsildar in favour of the defendants from the plaintiff. So it reveals that plaintiff is not in possession of the suit property 1 B. The said receipt clearly pinpoints that the order of removal of encroachment of the plaintiff by delivering its possession to defendants has been already implemented by the revenue officers and nothing is left to be executed. It is true that on 9.12.2009 when defendants not appeared till 5.25 p.m. ,and the court passed the order to direct the defendant to maintain the status quo of the suit property however prior to it the possession has been already delivered in favour of the defendant in between 2.00 p.m. To 5.00 p.m., in lawful manner on the same day. So it prima facie appears that the application for grant of temporary injunction has become infructuous at this stage.

24. Thus in view of aforesaid facts and circumstance plaintiff has no better title than the defendants. Plaintiff is not in possession of the suit property. Possession of the plaintiff was of trespasser and the possession has been already delivered to defendants. The prayer in respect of the declaration of ownership by way of adverse possession as well as declaration of entries of consolidation scheme as illegal are appears to be not maintainable. If any order of injunction is passed against the defendants it will be nothing but to restrain the revenue authorities from conducting the further proceeding pending before them. There is a bar of section 41 (h) of the specific Relief Act for this application in view of pendency of appeal before the S.D.O. Karad. Hence plaintiff has no prima facie case in his favour, balance of convenience also does not lie in his favour. Since the plaintiff is not in possession of the suit property and he has no better title than the defendants ,no irreparable loss would cause to him if the injunction is refused. Under such set of facts the authorities cited by the plaintiff are not applicable to the case in hand. Application therefore deserves to be rejected. Hence by recording my finding to point no. 1 to 3 in negative , I proceed to pass the following order.

Order

1. Application Ex.5 for Temporary injunction is hereby rejected.
2. Cost in cause.

Karad
Dt.19.12.2009

(A.D.Jawalkar)
3rd Jt.C.J.J.D. Karad.