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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 347 OF 2014
WITH
CIVIL APPLICATION NO.5317 OF 2014**

1. Syed Ahemad Bashir Ahemad
(since deceased, through legal heirs)
 - 1.1 Bano Begum Bashir Ahemad,
Age: 48 years, Occ: Household,
 - 1.2 Bashira Begum Bashir Ahemad,
Age: 28 years, Occ: Household,
 - 1.3 Shaikh Wasim Syed Ahemad,
Age: Minor, Occ: Nil,
Under guardianship of appellant
No. 1.2
Bashira Begum Syed Ahemad
 - 1.4 Shanno Begum Bashir Ahmad,
Age: Minor, Occ: Nil,
Under guardianship of appellant No.1.2
Bashira Begum Syed Ahemad
 2. Gulam Jilani Abdul Razzak,
Age: 59 years, Occ: Agri.,

All residents of Ghatambri,
Tq. Sillod, Dist. Aurangabad
- ...Appellants
- versus
1. Sk. Mehboob Noor Mohd.
(Since deceased, through legal heirs)
 - 1.1 Mehrunnissa Sk. Mehboob,
Age: 76 years, Occ: Household,
R/o. Jogeshwarwadi, Tal. Gangapur,
Dist. Aurangabad.
 - 1.2 Jamilabee Sharibkhan Pathan,
Age: 58 years, Occ: Household,
R/o Pishor, Tal. Kannad,
Dist. Aurangabad.

- 1.3 Abdul Aziz k. Mehboob,
Age: 56 years, Occ: Labourer,
R/o. Galli No.3, Kiradpura,
Aurangabad.
- 1.4 Zulekhabee Mohd. Khaja,
Age: 53 years, Occ: Household,
R/o. Jogeshwarwadi, Tal. Gangapur,
Dist. Aurangabad.
- 1.5 Sk. Abdul Hafiz Sk. Mehboob,
Age: 51 years, Occ: Agriculture,
R/o. Ghatambri,
Tal. Sillod, Dist. Aurangabad.
- 1.6 Gulam Nabi Sk. Mehboob,
Age: 49 years, Occ: Teacher,
R/o. Anwa, Tal. Sillod,
Dist. Aurangabad.
- 1/7 Akeelabee Sk.Mehboob,
Age: 43 years, Occ: Household,
R/o. Jogeshwarwadi,
Tal. Gangapur, Dist. Aurangabad.
- 1.8. Malekhabee Sk. Naeem,
Age: 50 years, Occ: Household,
R/o. Galli No.4, Kiradpura,
Aurangabad.
- 1.9. Abdul Razzak Noormohammad,
Age: 88 years, Occ: Agri.,
R/o. Ghatambri, Tal. Sillod,
Dist. Aurangabad.
(Deleted in view of order
dtd. 31/10/14 in CA No.9265/2014) ...Respondents

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Mr. D.P. Palodkar, Advocate for appellants
Mr. P.F. Patni, Advocate for respondent Nos. 1-1 to 1-8

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CORAM : N.W. SAMBRE, J.

DATE : 31st JULY, 2015

ORAL ORDER :

This appeal is by original defendant Nos. 1 and 2.

2. Respondent No.1-original filed Regular Civil Suit No. 166 of 2006 in the Court of Civil Judge, Junior Division, Sillod for declaration and possession in relation to the suit property bearing Gat No. 147 old Survey No. 112 total admeasuring 14 acres 21 guntha, of which half portion of north side which was allotted to the plaintiff, situated at village Ghatambri, Taluka Sillod, District Aurangabad.

3. The suit came to be dismissed on 19/03/2011 which was subject matter of Regular Civil Appeal No.141 of 2011. The appeal came to be allowed by learned District Judge, Aurangabad by the judgment and order dated 19/03/2014. As such, present second appeal.

4. Few facts as are necessary for deciding the present appeal are as under :

Parties are referred to their status in the suit.

5. The plaintiff and defendant No.3 were real brothers,

wheres defendant No. 2 is son of defendant No.3 and defendant No. 1 is son of defendant No.2 and grandson of defendant No. 3.

6. The suit property consists of half portion on north side out of Gat No. 147 (old Survey No. 112) situated at village Ghatambri, Taluka Sillod, District Aurangabad, which was total admeasuring 14 acres 21 gunthas and half portion of which has come to the share of plaintiff.

7. It is claimed by the plaintiff that south side half portion of Gat No. 147 was allotted to defendant No. 2. The plaintiff and defendant No. 2 jointly purchased the said property from one Misrilal Jaiswal by registered sale deed on 30/04/1968. The revenue record was accordingly modified in respect of Gat No. 147. Land Gat No. 147 accordingly stands in the name of plaintiff and defendant No. 2 since 1973-74 till 1992-93.

8. In 1996 the defendants have raised dispute about right and possession of the plaintiff over the suit property. As such, the plaintiff came to know that the defendants in collusion with the revenue authorities entered their name i.e. defendant No.1's name as owner and possessor of the suit property. The plaintiff then initiated proceedings for carrying out correction in the revenue record and as

such, the revenue authorities have taken entry as 'dispute' in the revenue record since 1973-74 in relation to the suit property.

9. The plaintiff has filed the suit for perpetual injunction and possession over the suit property bearing Regular Civil Suit No. 180 of 1996 which was dismissed on 19/07/2006 which was based on the long standing mutation entry in favour of defendant No. 1 which was taken as having presumptive value in regard to the possession of the defendant No.1. Since the plaintiff failed to prove his possession by rebutting the said presumption, the suit came to be dismissed. It was the case of defendant No. 1 in the said suit that the suit property was purchased by defendant No.1 from the plaintiff, which contention was also rejected. Taking advantage of the above referred dismissal of Regular Civil Suit No. 180 of 1996, it is claimed by the plaintiff that he was dispossessed in the year 2006 by the defendants. In view of above, present suit was brought in to action.

10. The defendants filed their written statement at Exhibit-10 and resisted the suit. It is claimed by the defendants that in 1968 the suit property was purchased by the plaintiff and defendant No.2 and plaintiff and defendant No. 2 remained in cultivating possession for some period. It is further admitted that there was partition in between the plaintiff and defendant No. 2 and north portion came to the share

of plaintiff, whereas south portion to the share of defendant No.2 out of Gat No. 147. It is further claimed by the defendants that there was oral sale of the share of plaintiff in favour of defendant No.1. It is further alleged that in view thereof, the Consolidation Officer has made entry in the revenue record vide Mutation Entry No. 42. It is further claimed that the suit was barred by limitation and the property remained in possession of defendant No.1 for more than 12 years. As such, the plea of adverse possession was also sought to be raised.

11. The trial Court pursuant to above referred pleadings framed issues vide Exhibit-12 in the matter of whether the plaintiff has proved that he is owner of the suit property and whether he was in possession of north side portion of the suit property bearing Gat No. 147?. Both the issues were answered against the plaintiff. The trial Court also held that the suit was not within limitation and gave findings that defendant No.1 is in possession of the property by virtue of his ownership and the plaintiff is not entitled for the relief as claimed.

12. In support of the said pleadings, the plaintiff so as to prove his possession over the suit property has examined two witnesses i.e. plaintiff himself at Exhibit-11 and one witness

Hamidkhan Imamkha at Exhibit-17. The defendants so as to prove their possession and title to the property examined defendant No.1 at Exhibit-19 and defendant No.2 at Exhibit-20 and one Vijay Fakira Digre at Exhibit-22.

13. Learned trial Court noticed that M.E. No. 42 was taken in 1980 and remained there in favour of defendant No.1 which demonstrates continuous possession of defendant No.1 over the suit property. According to learned trial Court, the share of plaintiff to the extent of 7 acre 10 gunthas as such remained in possession of defendant No.1. The trial Court disbelieved the testimony of plaintiff's witness No.2 Hamidkha who was examined at Exhibit-17 as he was resident of Nanegaon, whereas the suit property is located at Ghatambri. The trial Court then accepted the version of defendant No.1 that the suit property was sold for Rs.950/-0 by the plaintiff to defendant No.1 and his mother and accordingly, M.E. No. 42 was taken. The said sale deed for the year 1980 was effected when the age of defendant No.1 was about five years, however relying upon the M.E. No. 42 accepted the said testimony. The trial Court also relied upon Exhibit-48, judgment in earlier suit bearing R.C.S. No.180 of 1996 filed by the plaintiff so as to conclude that from 13/06/1980 the defendants are in possession of the suit property. Apart from above, 7/12 extracts at Exhibits-45 and 49 were taken into account.

The trial Court then proceeded to decide the issue of limitation by answering that the suit was not brought within limitation i.e. 12 years from the date of dispossession which is admittedly since the year 1980. The suit was brought into action after 26 years and as per Article 64 of the Limitation Act the suit should have been brought within 12 years from the date of dispossession.

14. The appeal to the lower appellate Court by the plaintiff has prompted the lower appellate Court to frame the points as regards ownership of the plaintiff over the suit property, his entitlement for recovery of possession and also on the aspect, whether the suit is within limitation or not.

15. Learned lower appellate Court in view of scope of Section 96 read with Order 41 Rule 31 of the Code of Civil Procedure has reappreciated the entire evidence, both documentary and oral and decreed the suit by allowing appeal. The lower appellate Court noticed that the execution of the sale deed in question in relation to Gat No. 147 in favour of the plaintiff and defendant No. 2 in the year 1968 was not in dispute, so also joint possession of the plaintiff and defendant No.2. Learned lower appellate Court noticed that defendant No.2 in categorical terms admitted that there was partition in between the plaintiff and defendant No. 2 and such partition was in

east west direction and as such, has drawn conclusion that land Gat No. 147 was divided into north and south part and in view thereof, learned lower appellate Court concluded that the plaintiff was allotted north side portion of Gat No.147 in the partition. The said conclusion was drawn from the evidence of defendant No. 2.

16. Learned lower appellate Court then has proceeded to analyze the case of defendant No.1 as regards the oral sale deed by the plaintiff in favour of defendant No. 1 and his mother in the year 1980. Upon analyzing the evidence of defendant No.1 at Exhibit-19, cross examination of defendant No. 2 Gulam at Exhibit-20 and noticed that the alleged sale deed in 1980 was executed when defendant No.1 was of five years. Lower appellate Court also noticed that defendant No. 2 has admitted that *Sauda Pawati* was prepared in respect of transaction of sale. Defendant No. 2 in his cross examination deposed contrary to the earlier statement and stated in his cross examination that there was oral sale of the land for consideration of Rs.950/-.

17. In earlier suit i.e. R.C.S. No. 180 of 1996 initiated by the plaintiff stand taken by the defendants was that suit property was purchased for valuable consideration of Rs.9500/-. Learned lower appellate Court then upon analyzing the evidence of plaintiff and

defendants has given finding that just because there was M.E. No. 42 in favour of defendant No.1, that is not sufficient to conclude that defendant No.1 has become owner of the property, particularly in absence of any title deed in favour of defendant No.1. Lower appellate Court then proceeded to analyze the entitlement of defendants to the suit property in the back ground of Section 54 of the Transfer of Property Act and Section 17 of the Registration Act and effect of non registration of document/oral sale deed and answered the said issue in favour of the plaintiff as admittedly in the present case there was no registered sale deed. Lower appellate Court then gave finding that the title to the suit land is that of plaintiff and the defendants have failed to prove title.

18. Lower appellate Court also analyzed the claim of the defendants based on the adverse possession and answered that the plea of adverse possession raised by the defendants cannot be considered as it was plea of defendant No.1 himself that he was in permissive possession of the property by virtue of oral purchase of the suit property. Learned lower appellate Court then proceeded to analyze the aspect of limitation and gave finding that the suit was well within limitation as Article 65 of the Limitation Act is attracted in the present case and since the defendants have failed to prove adverse possession over the suit property, the suit was well within

limitation and gave finding that the plaintiff is entitled for recovery of the possession.

19. With the above back ground, learned Counsel for the appellants-defendants would urge that the judgment of the lower appellate Court is liable to be upset as the same is perverse and contrary to the legal provisions and the evidence brought on record. In addition to above, he would urge that in view of provisions of Section 27 of the Limitation Act, right of present respondents gets extinguished to the property as the suit was not brought within limitation. According to him, the cause of action cited in the present suit is completely imaginary and earlier R.C.S.No. 180 of 1996 which was decided against present respondents fortifies the above referred issue. According to him, the specific description of the suit property was not proved and as such, present appeal is liable to be allowed.

20. In view of the above referred submissions, learned Counsel for the present respondents-plaintiffs would urge that the present appellants-defendants have admitted the entitlement of the plaintiffs to the half portion of the suit property. According to him, in view of the provisions of Order 7 Rule 7 of the Code of Civil Procedure, it is open for this Court to mold the relief if so required. He would further urge that since the appellants have raised plea of

adverse possession, same amount to admitting the title of present respondents-plaintiffs. According him, the appeal is liable to be dismissed.

21. In the back ground of above referred submissions, this Court is initially required to analyze whether the suit of the respondents-plaintiffs was within limitation and if so what is effect of Section 24 of the Limitation Act over the right of the respondents. It is required to be noted that learned lower appellate Court while dealing with the said aspect of the matter has noted that the suit land was purchased vide registered sale deed dated 30/04/1968 by the plaintiff and defendant No. 2 and after effecting partition of the said property separated their equal 1/2 share. It is further observed by lower appellate Court that initially the property stood in the joint possession of the plaintiff and defendant No. 2 and thereafter in the evidence of defendant No. 2 noted an admission that the partition was effected in east west direction. The consequences of the partition is east west property in Division of Gat No. 147 into south and north portion. Defendant No. 2 then his cross examination also admitted the partition and as such, once the partition is effected in two parts, the conclusion that was drawn by lower appellate Court that the north portion of Gat No. 147 was gone to the share of the plaintiff.

22. Lower appellate Court considered the defence of the defendants that the suit property was orally sold to them in the year 1980 by the plaintiff.

23. So far as the sale deed aspect is concerned, in the light of provisions of Section 54 of the Transfer of Property Act which provides for transfer by registered instrument and Section 17 of the Registration Act dealing with compulsory registration of the document and effect of non registration, lower appellate Court has rejected the defence of the present appellant that there was oral sale deed for consideration of Rs.950/- in favour of defendant No.1 and his mother. It is required to be noted that the consideration as is mentioned in the present proceedings is Rs.950/-, whereas in the earlier suit it was Rs.9500/-.

24. In view of above fact as regards the defence of present appellant was also rejected. In view of above referred background, the plea of adverse possession raised by the present appellant if tested, it is required to be noted that the requisite of the adverse possession is, it should be open, peaceful and continuous and must be established to be adverse to the true. Same has to be established in the light of back ground that somebody is owner of the property and is aware of the fact that the person seeking adverse

possession is in possession thereof for continuous 12 years with the knowledge of such owner. The effective physical possession is prerequisite of continuity. In view of above background, lower appellate Court held that the defence of present appellants that since last 12 years they are in possession of the property by virtue of oral sale deed was analyzed, the plea of adverse possession was not established as the defendant-appellants themselves have come out with the case of permissive possession. In view of above referred background, the aspect of limitation when was examined, once the defendants have come out with the case of adverse possession which was at all not proved by present appellants-defendants, the appellate Court applied provisions of Section 65 of the Act and observed that limitation of 12 years shall run from the date of dispossession. In the present case, once the appellants have come out with the case of permissive possession, in view thereof of Article 65 of the Limitation Act is attracted and provisions of Section 27 of the Limitation Act will have hardly any effect over the same. The plaintiff-respondents have come out with specific case of their dispossession and as such, learned lower appellate Court has rightly proceeded to appreciate the issue as regards limitation, adverse possession and that of oral sale deed.

25. Appropriate support can be drawn from the judgment of

the Apex Court in the matter of ***Indira vs. Arumugam and another*** reported in ***AIR 1999 SC 1549(1)***. The Apex Court, while dealing with the aspect of limitation particularly under Article 65 in the background of plea of adverse possession has held in paragraph-5 which reads thus :

“5. It is, therefore, obvious that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Unfortunately, this aspect of the matter was missed by the learned Judge and, therefore, the entire reasoning for disposing of the Second Appeal has got vitiated. Only on that short ground and without expressing any opinion on the merits of the question of law framed by the learned Judge for disposing of the Second Appeal, this appeal is allowed. The impugned decision rendered is set aside and the Second Appeal is restored to the file of the High Court with a request to proceed further with the hearing of the appeal with respect to the substantial question aforementioned in accordance with law. No costs.”

26. In view of above, it is required to be noted here that the respondent-plaintiff cannot be non-suited, once he has brought suit on the basis of title for possession on the ground of adverse

possession. If the appellant-defendants have come out with plea of adverse possession, they were duty bound to prove the same, particularly in the matter of their possession for prescriptive period.

27. In my opinion, the findings recorded by the lower appellate Court is in tune of pleadings, evidence and legal provisions. In view thereof, appeal fails, same stands dismissed. Consequently, civil application stands disposed of.

[N.W. SAMBRE, J.]