

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

SECOND APPEAL NO. 108 OF 1992

Sitaram Bhauji Patil

age : 67 years, occupation:

pensioner, R/o Amalner,

District : Jalgaon

.. Appellant/original

Plaintiff

versus

1. Pandharinath Keshav Patil,

age : 65 years, occupation:

pensioner, R/o Khed Bhokari,

Taluka : Chopra, District : Jalgaon

2. Paulad Tukaram Patil,

age___ , since deceased,

per legal representatives :-

(a) Durgadas Paulad Patil,

age : 19 years, occupation: Agril.,

r/o Khed Bhokari, Taluka : Chopra,

District : Jalgaon

(b) Smt. Jhalabai Paulad Patil,

age : 65 years, occupation:household,

R/o as above

.. Respondents/

original

Defendants

Mr. Pratik Kothari, Advocate h/f Mr. S. S. Bora, Advocate
for appellant

Mr. Ajinkya Kale, Advocate h/f Mr. S. B. Talekar, Advocate
for respondents no. 2 (a) and 2(b)

CORAM : SUNIL P. DESHMUKH, J.
DATE : 24th November, 2016

ORAL JUDGMENT :

1. After hearing the learned counsel, the question that may arise for consideration substantially as of law in this matter is ;

" Whether, defendant no. 2 can be said to have acquired title to the property under the suit, land bearing Gut no. 55 by adverse possession and the plaintiff could have been shut out from claiming partition and separate possession of the same, in the facts and circumstances of the case ? "

2. Reference to a few facts in the background would facilitate appreciation of matter in its proper perspective.

Bhivaji had left behind him lands gut no. 55 and 31, respectively admeasuring 96 *aar* and 92 *aar* situated at village Khedi Bhokari and Mauje Gorgawale. There is no dispute that he was original owner of said properties and that he was uncle of Sitaram and Pandharinath. Further, there is no dispute about that Bhivaji had bequeathed said properties to Sitaram and Pandharinath under his will dated 25-04-1955 and accordingly after death of Bhavji mutation entries bearing no. 661 and 473 in respect of aforesaid lands in favour of Sitaram and Pandharinath had been effected.

Proceeding bearing regular civil suit no. 165 of 1982 had been instituted by Sitaram–plaintiff against Pandharinath–defendant no.1 and Pauldad–defendant no. 2, for partition and separate possession of gut no. 55. [Parties hereinafter are referred to by their status in aforesaid suit viz; appellant as “ plaintiff ” and respondents no. 1 and 2 as “ defendants no. 1 and 2 “ respectively]

3. It is the case of the plaintiff that aforesaid lands gut no. 55 of village Khedi Bhokari and gut no. 31 of village Gorgawale were being cultivated under an arrangement between the brothers, separately viz; plaintiff - Sitaram and defendant no. 1 – Pandharinath respectively. Accordingly, from a very long time, gut no. 31 was being cultivated by plaintiff and gut no. 55 by defendant no. 1. Defendant no. 1 did not heed request for partition of lands accordingly.

4. However, around 1982, defendant no. 1 instituted proceeding bearing regular civil suit no. 73 of 1982 for injunction against plaintiff -Sitaram, claiming to be in possession of half of gut no. 31 and he had also secured interim injunction in said suit against present plaintiff. Learned counsel for the parties, do not have any particular instructions with regard to further progress of said suit by defendant no. 1 against the plaintiff.

5. Aforesaid action of defendant no. 1 caused concern to the plaintiff and he instituted regular civil suit no. 165 of 1982 against defendants claiming his share in gut no. 55, concerned in this second appeal.

6. The suit by present plaintiff came to be resisted by defendants no. 1 and 2. Defendant no. 1 admitted the position that land gut no. 55 was owned by him and plaintiff. Defendant no.1, however, purported to deny arrangement between brothers that land gut no. 55 had been given to him for cultivation and land gut no. 31 was under cultivation of the plaintiff. According to defendant no.1, plaintiff and him had sold gut no. 55 to defendant no. 2 Paulad. Defendant no. 1 had put defendant no. 2 in possession of the suit land and defendant no. 2 since then has been in continuous possession without obstruction and as such he purported to contend that defendant no. 2 is owner of the suit property.

7. Defendant no. 2 averred that suit land had been agreed to be sold by the brothers to him and they had accordingly put him in possession of the same. Agreement of sale had been executed twelve years before institution of suit and since then defendant no. 2 is in possession of the same as owner thereof continuously without obstruction and had become owner by adverse possession.

8. The trial court framed issues to the effect, does plaintiff prove that suit land gut no. 55 is owned by him and defendant no. 1; does he prove that gut no. 55 was given to defendant no. 1 for cultivation and plaintiff was cultivating gut no. 31 as a matter of arrangement and convenience; does plaintiff prove defendant no. 1 gave possession of gut no. 55 to defendant no. 2; does plaintiff prove defendant no. 1 took possession of half portion of gut no. 31; is plaintiff entitled to half portion of gut no. 55; does defendant no. 1 prove that him and plaintiff had agreed to sell suit land to defendant no. 2 and had shared the proceeds equally; does defendant no. 1 prove him and plaintiff gave possession of suit field to defendant no. 2; whether defendant no. 2 proves pursuant to agreement of sale he is owner of the suit land and whether defendant no. 2 proves that suit land is in his possession for more than 12 years and he became owner of the same by adverse possession and is plaintiff entitled to mesne profits.

9. Plaintiff had produced 7 x 12 extracts of the suit land from 1976-77 to 1981-82, copy of will deed and certified copies of plaint, written statement and issues in regular civil suit no. 73 of 1982. Whereas, defendant no. 1 has not produced any record. Defendant no. 2 had produced

agreement of sale and 7 x 12 extracts of suit land from 1967-70 to 1973-74.

10. The trial court considered, it is an admitted position that the plaintiff and defendant no. 1 had become owners of lands gut no. 55 and 31 under a will deed by their uncle Bhivaji Patil. It had been considered that it would not be said that gut no. 31 was being exclusively cultivated by plaintiff and as such declined to buy line of plaintiff's contention that under oral arrangement between the brothers, lands gut no. 55 and 31 were being separately cultivated by them.

11. The trial court further went on to hold that defendant no. 1 has not been able to establish that him and plaintiff had entered into an agreement of sale of gut no.55 with defendant no. 2 and accordingly had handed over possession to defendant no. 2 and that the proceeds under the transaction were shared equally between defendant no. 1 and plaintiff. Trial court found that plaintiff was not present at the time of agreement and execution of *saude pawati* and the same showed that agreement of sale was for the amount given to defendant no. 1 by defendant no. 2. The court, under the circumstances, considered that it cannot be said that the agreement is with consent of plaintiff. Trial court further

considered that defendant no. 1 had only half share in suit land and, therefore, he was not entitled to execute agreement of sale for whole of the land and hence, title does not pass by the agreement of sale and further adverted to that sale deed had not been executed and therefore considered that defendant no. 2 had not become owner of suit land by virtue of *saude pawati*.

12. The trial court, however, considered that the plaintiff was owner of half share in suit land and since he was aware of the agreement of sale and possession of defendant no. 2, over whole of the suit land, the same amounts to denial of title of plaintiff on the date of execution of agreement of sale. According to trial court since the plaintiff had knowledge immediately within a period of three weeks of execution of the agreement and about defendant no. 2's name having started appearing in cultivation column and a pencil entry had been recorded and yet plaintiff did not prefer any proceeding against the same and had not obstructed defendant no. 2's possession, defendant no.2 being in continuous peaceful possession without interruption with the knowledge to the plaintiff about the same, the possession had become hostile to his title and as such plaintiff ought to have brought suit within a period of twelve years.

13. Learned trial judge further considered that defendant no. 2 had not entered witness box, however, as the plaintiff had filed an application for examination of defendant no. 2 and the request had been rejected and no proceedings were preferred against said rejection and thereafter he had filed pursis and had admitted possession of defendant no. 2, it would not have been necessary for defendant no. 2 to get himself examined. Since his possession was adequate, in continuity and publicity and there is no attempt of concealment, the ingredients required for title by adverse possession of defendant no. 2 were duly fulfilled.

14. The court declined to go by the citation relied on, on behalf of the plaintiff, in the case of *Deepnarayanai and other versus Pundeorai and others* reported in *AIR 1947 Patna 99*. The trial court considered that in the cited case, the plaintiff had not been aware of defendant's possession till he returned to India in contrast to the position in the present case that the plaintiff herein was aware of possession of defendant no. 2 and denial of his title. In view of the same, the court considered that the plaintiff is not entitled to partition of the suit land and thus dismissed the suit under judgment and decree dated 16-08-1985.

15. The appellate court in civil appeal bearing no. 111 of 1989 (old number 282 of 1985) challenging trial court's judgment and decree had framed two points for consideration germane to controversy. First, whether the plaintiff proves that gut no. 55 was given to defendant no. 1 and gut no. 31 to the plaintiff and had recorded the finding in the affirmative. The second was as to whether defendant no. 2 proves that he has become owner of suit land by adverse possession, and held that he does and considered that decision of trial court does not require any interception and thus dismissed the appeal under judgment and decree dated 04-09-1991.

16. The appellate court, with respect to earlier point about arrangement between the brothers in respect of lands gut no. 55 and 31, has found that both the lands had been bequeathed under a will by uncle Bhivaji to the two brothers and accordingly revenue record had been depicting the same. After discussing the evidence, the appellate court considered, plaintiff and defendant no.1, were taking yield of gut no. 55 and 31 respectively. The appellate court has observed, defendant no. 1 had admitted in his cross examination that the plaintiff had equal share with him in suit field and their names were recorded in 7 x 12 extracts and that one of them

is not exclusively entitled to sell whole of the field and yet defendant no. 1 entered into an agreement of sale with defendant no. 1 which lends credence to the version of the plaintiff about the brothers separately cultivating the lands – gut no. 55 and 31 and as such the appellate court considered that there is no reason to disbelieve the version of the plaintiff. The appellate court concurred with the findings by the trial court about defendant no. 1 has not been able to prove that him and plaintiff had agreed to sell the suit land to defendant no. 2 for ₹ 9000/- and that both of them got equal share in the proceeds and further concurred with trial court's observations that it cannot be said defendant no. 1 had handed over possession of suit land to defendant no. 2 as exclusive owner.

17. The appellate court went on to consider, it has emerged in cross examination of plaintiff that the plaintiff came to know about transaction about three weeks after the agreement of sale and further that defendant no. 2 has been paying land revenue of suit land and is taking yield from the same and that the plaintiff had not preferred any appeal against pencil entry and order of tahsildar nor had he obstructed possession of defendant no. 2.

18. It was considered, since defendant no. 1 had executed agreement of sale in respect of whole of the suit land though he was not full owner of entire suit land, it would amount to denial of title of the plaintiff on the date of agreement of sale. The appellate court has observed that defendant no. 2 had not come before the court and had not entered the witness box but, the fact remains that from the date of agreement of sale, defendant no. 2 was in possession of the suit property. The fact of not moving the court for specific performance of contract is of no consequence for the purpose of determination of title on the basis of agreement. The appellate court declined to go along submissions on behalf of the plaintiff that possession under the agreement of sale being permissive cannot be said to be adverse. Accordingly, the court considered, as was the case by the trial court, defendant no. 2 had acquired title by adverse possession.

19. Learned counsel Mr. Pratik Kothari quite persuasively submits that the crux lies in mis-consideration by the two courts hitherto that awareness of agreement for sale by plaintiff would tantamount to hostility to title of plaintiff to suit property. Learned counsel submits, there is no such pleading by defendants in their defence. He submits, it is the case of the defendants that the agreement for sale had been

entered into with the consent of the plaintiff, so is the pleading that the plaintiff and defendant no. 1 had put defendant no. 2 in possession of suit property. Learned counsel submits that the courts have missed out on vital aspect of the matter that pursuant to the pleadings, the position emerges that possession of defendant no. 2 has all along been permissive having entered into by an agreement by defendant no. 1 which is pleaded to be with the consent of the plaintiff. It is not the case of the defendants, from any particular point of time they intended to deny title of the plaintiff. He submits that it was, as such, erroneous assumption by the courts that the possession over 12 years to knowledge of the plaintiff would give title to defendant no. 2 by adverse possession while the possession all along had been permissive.

20. Learned counsel Mr. Ajinkya Kale, appearing on behalf of defendants no. 2(a) and 2(b) contends that entire consideration under agreement has been paid by defendant no. 2 and as such only an act that had been required to be performed which having regard to the facts and circumstances would be ministerial in nature and it would not be imperative having regard to treatment meted out to the transaction by the parties to suit. He submits, while the

plaintiff had knowledge that he had right to the suit property and yet defendant no. 1 alone entered into transaction with defendant no. 2 is an indication of the fact that the plaintiff was aware of the defiance by the defendants. A passage of time since then had been more than 12 years and as such, the defendant no. 2 had mustered title to the property by possession running adversely to the interest of the plaintiff. Both the courts, having regard to the evidence on record, have rightly adjudged the matter and in second appeal the same is not required to be intercepted. Appreciation by the courts hitherto has been concurrent based on the facts, circumstances and evidence and it can hardly be said to be not in accordance with the same. He, therefore, requests to confirm the orders passed by the two courts and dismiss the second appeal.

21. It would be pertinent to refer to that Bhivaji had bequeathed two properties to the two brothers – Gut No.31 and Gut No.55. Gut No.31 according to plaintiff was being cultivated by him and Gut No.55 was given to defendant No.1. Plaintiff in his evidence has referred to that defendant No.1 had not acceded to his request to partition the lands accordingly.

22. Case submitted on behalf of the plaintiff that the brothers had been cultivating two lands coming their way under the will from their uncle, separately, appears to have been an arrangement considered to be perennial in nature. The appellate court has considered that, brothers were separately cultivating the same. There appears to be lot of credibility and force in the case of the plaintiff that the lands were being cultivated pursuant to the arrangement. Defendant No.1, as such, purported to cause and try a dealing with said property solely, and accordingly entered into agreement with defendant no. 1 alone. The Plaintiff discernibly had put his foot down to let defendant No.1 go ahead with the purported transaction in respect of Gut No.55 till partition takes place as desired. Revenue record continued to show names of both the persons in respect of both the properties. Thus specific performance had not been claimed by the defendants pursuant to agreement of sale as plaintiff's title continued to gut no. 55.

23. However, disturbance to this understanding of arrangement had been caused in 1982 by defendant No.1, in respect of Gut No. 31 which impelled and compelled the

plaintiff to institute present suit claiming partition of Gut No.55, since part of Gut No.31 had been claimed to be in possession of defendant No.1 under orders of the court in suit filed by defendant No. 1 against the plaintiff in respect of Gut No.31. This has given a cause of action for the plaintiff to assert his title to Gut No.55.

24. There are pleadings of ownership by the plaintiff. Title of the plaintiff to suit property is accepted by the defendants. The title of the plaintiff continued to Gut No.55 and position gets underscored in the pleadings of defendants No.1 and 2. Defendants No.1 and 2 have unequivocally averred that the agreement of sale had been entered into with consent of the plaintiff. Further pleading that the plaintiff and defendant No.1 had put defendant No.2 in possession.

25. Perusal of the judgments of the trial as well as appellate court would show, it has been adverted to that there being an agreement of sale by defendant no. 1 in respect of whole of gut no. 55 in favour of defendant no. 2, while the plaintiff and defendant no. 2 being the owners of the property, title would not pass on the basis of the agreement of sale to defendant no. 2 of gut no. 55. Further, the appellate court adverted to

that there is no specific performance sought of the agreement.

26. Yet the courts appear to have been drifted away to consider that there had been hostility to the title of plaintiff by defendant no. 2 by execution of agreement of sale by defendant no. 1 alone.

27. Defendant No.2 purports to lay claim to suit property as owner and ownership having acquired by him by adverse possession, for, his possession being over twelve years to the knowledge of the plaintiff.

28. While a claim of adverse possession is being made by defendant No.2, it would be required to be considered and which would be relevant for appreciation that both the defendants have averred that the transaction had been with the consent of the plaintiff. In such a case, knowledge by plaintiff about transaction between defendants no. 1 and 2 would not by itself be able to show that the intention of the parties was to deny title of the plaintiff. It is not the case of defendants that from any particular point of time, there had been hostility to title of plaintiff and much less from 1968. It appears, there had been no denial of the title of the plaintiff till

the pleadings or for that matter, it can be said that there had been specific denial of title of plaintiff to suit land in the pleadings by defendants no. 1 and 2.

29. The possession of defendant no. 2 in the circumstances on defendants' own saying had been permissive. There had been no action by defendant no. 2 for specific performance.

30. Execution of agreement of sale which, as considered by the courts hitherto, would not pass title to a party and the possession being under the agreement of sale would be a permissive possession without getting transformed into the full bloomed ownership. It would not be said that title would be deemed to be acquired by mere long possession.

31. Passage of 12 years, in the circumstances, would not be able to lay claim to adverse possession by saying that defendant no. 1 alone had entered into transaction with defendant no. 2. Ingredients for title by adverse possession would be required to be pleaded and proved by a party on the foundation of specific pleadings. There is no foundation in pleadings for such a contention. Defendant no. 2 had failed to put in appearance to testify his acquisition of title by adverse possession.

32. Claim by defendant no.2 of acquisition of title by adverse possession with reference to a statement of plaintiff about awareness of transaction would not be able to prove the case for defendant no.2. It is not the case of the defendants at all that while agreement of sale was executed, the parties to the transaction had intended to deny rights of plaintiff to the property. As a matter of fact, the case of defendants is otherwise, and they have specifically contended the transaction to be with the consent of plaintiff.

33. It is contended on behalf of defendants, the plaintiff being aware of the agreement of sale and yet having not objected to the same would not by itself tantamount to hostility to the title of the plaintiff. Besides, there is no such pleading by defendants. Both the courts have missed out in giving consideration to these aspects involved in the matter.

34. Facts, circumstances, events as have been pleaded and the evidence on record, would conspicuously evince that defendant No.2 would hardly be able to lay claim to acquisition of title to suit property by adverse possession. In the first place, even if some latitude is to be given to defendant No.2 for parties being from *mufossil* area, the pleadings are construed liberally, yet, the pleadings on behalf

of defendant No.2 fall far too short of comprising ingredients to claim acquisition of title by adverse possession. There is no specific pleading about plaintiff being aware of hostility to his title at the behest of defendant No.2. On the contrary, a statement of the plaintiff is now being sought to be made use of against him which is contended to reflect him being aware of the agreement of sale. However, such a statement appears to have been taken out of context and furthermore that merely knowledge of agreement of sale would not be able to take away title of the plaintiff to the suit property. That apart, there is no evidence given by the defendants about hostility to the title of the plaintiff. In fact, defendant No.2 had not entered witness box at all. There appears to be fundamental fallacy in the claim by defendant No.2 to acquisition of title to suit property by adverse possession. Attending circumstances do evidence that the claim is lame. It further will have to be noted that weakness in the evidence of opposite side would not be able to discharge the burden to prove the claim sought to be laid by it. Secondly, defendants as have been referred to hereinabove, have accepted title of the plaintiff to the suit property and have accordingly referred to in the pleadings that transaction had been with the consent of the plaintiff, in

the circumstances, its knowledge would hardly be able to be construed as hostility to the title of the plaintiff to the suit property.

35. Looking at the pleadings and the considered knowledge of the transaction by the plaintiff, soon after execution of the agreement of sale, in the circumstances would not let defendant No.2 to lay claim to acquisition of title by adverse possession, since the entry into possession of suit land by the defendants own saying has been permissive and there is nothing placed on record by the defendants that from any particular point of time title to the property had ever been asserted by defendant No.2 at least until submission of written statement by defendant No.2.

36. Furthermore, neither defendants had ever tried to deny title of the plaintiff to the suit property nor any evidence had been led therefor. The claim in the pleading is merely of continuous possession over twelve years. Passage of twelve years would not divest title of plaintiff to suit property. Mere possession for over twelve years would not be able to acquire title by adverse possession for defendant No.1. As a matter of fact, having regard to pleadings by the defendants, it would be that the defendants are estopped from laying claim to suit

property by way of adverse possession. As such, the question as framed having considered to be substantially arising in the matter stands answered holding it would not be a case where it can be said that defendant no. 2 would be said to have proved his claim of having acquired title to suit property by adverse possession.

37. In the present matter, the plaintiff has come for partition and separate possession of the suit land and as such the same deserves to be considered, since other property coming the way of two brothers appears to be meted out with such treatment by defendant no. 1. The suit of the plaintiff, thus, deserves to be decreed as prayed for.

38. Thus, second appeal stands allowed. The judgments and decrees passed by the trial, as well as appellate court, stand set aside. Suit of the appellant – plaintiff stands decreed as prayed for under prayer clause (a) of the plaint and about mesne profits, an enquiry pursuant to Order XX, rule 12 of the Code of Civil Procedure, 1908 shall take place.

39. Second appeal stands disposed of.

SUNIL P. DESHMUKH,
JUDGE

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