

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

SECOND APPEAL NO. 372 OF 1992
WITH
CIVIL APPLICATION NO. 1708 OF 2013

Bajirao son of Bala Sakre,
Age 56 years, occupation:
Agriculture, r/o Borgaon (Bazar)
Taluka Sillod, District Aurangabad,
At present r/o Khedi, Taluka Kannad, .. Appellant/Original
District Aurangabad Defendant

versus

Bhika s/o Totaram Murme,
Age: 46 years, occupation :
Agriculture, R/o Khedi, ..Respondent/Original
Taluka Kannad, District Aurangabad Plaintiff

Mr. R. M. Sharma, Advocate for appellant
Mrs. M. B. Gangwal (Patni) for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 25th August, 2016

ORAL JUDGMENT :

1. This second appeal arises out of decisions dated 27th July, 1990 in Regular Civil Suit No.26 of 1984 delivered by Joint Civil Judge, Junior Division, Kannad and dated 8th

January, 1992 rendered by Second Additional District Judge, Aurangabad in Regular Civil Appeal No. 221 of 1990.

2. Regular Civil Suit No.26 of 1984 had been instituted by present respondent against appellant for possession and injunction in respect of suit property, an area admeasuring about 92 *aar*, from land bearing Gut No.63 for referred to by boundaries in the plaint. [Parties, hereinafter are referred to by their original status before the trial court viz; respondent herein as "plaintiff" and appellant herein as "defendant"]

3. The plaintiff's case is that Totaram had married to Sarjabai and he is son of marital relationship between Totaram Yadav and Sarjabai. Plaintiff's pleading is that Gut No.63 admeasuring about 4 Acre, 22 *guntha* was originally owned and possessed by Totaram Yadav - father of the plaintiff. After death of Totaram, the property has wholly devolved on the plaintiff and stands in his name continuously.

4. However, an area of 92 *aar*, from the same had been encroached over by the defendant from a period of about eight-nine years before institution of the suit. Sarjabai had earlier on, married to one Bala Sakare. From Bala Sakare, a son had begotten to Sarjabai namely Bajirao Bala Sakare-

defendant in the suit. Since request did not yield favourable response, the suit ensued for possession and injunction.

5. In defence, the defendant - Bajirao Bala Sakare claimed that Totaram had granted gut No.63 to him under a written agreement of 1935 (Exhibit-37 in suit proceedings) and the defendant had been put in possession and since then he had been continuously, without any interruption for over a period of twelve years, in possession of the land to the knowledge of all, including Totaram and the plaintiff. The defendant claimed that execution of document has not been disputed and being a thirty year old document, it's execution is admissible in evidence.

6. It is further being referred to by the defendant that by virtue of his relationship with Sarjabai, a certain residential property had also been given to him. Thus, according to the defence, there is sufficient room available to consider that the defendant had been in possession of the suit property since the date of agreement. It is contended that plaintiff has a sister-Gajarabai and necessary parties are not impleaded in the suit.

7. With reference to the pleadings of the parties, issues as were necessary, were framed by the trial court, such as, as to whether the plaintiff has title to the suit property; whether it is proved that the defendant has caused encroachment over disputed property; whether the defendant proves his ownership by adverse possession and whether the plaintiff is entitled to possession.

8. Answering all the issues in favour of the plaintiff under judgment and order dated 27-07-1990, the trial court has observed that the record sufficiently bears out that the property upon death of Totaram had been recorded in the name of plaintiff viz; *khasra patrak*, *pahani patrak* and 7 x 12 extracts and further that Totaram having died even before 1956 and it is not a matter in dispute between the parties, the plaintiff had become owner of the property left behind by Totaram. It did not appear that in the circumstances, presence of either Sarjabai or for that matter her daughter Gajrabai-sister of plaintiff would be necessary in the suit.

9. It has been observed that no evidence worth credence had been adduced by the defendant, neither the revenue record nor the document referred to as agreement would be

able to establish his claimed possession over the suit property being purportedly for a period more than 12 years in hostility to the title of the plaintiff to claim title by adverse possession to the property. Moreover, the defendant has not given particulars necessary to acquire title by adverse possession as to the date from which he has claimed to have come in possession or the date from which his possession is stated to be adverse to the title of the plaintiff. The trial court held that there is no challenge at all at the instance of the defendant to the title of the plaintiff.

10. It appears to have been appreciated by the trial court that while reliance is being placed by defendant on agreement of 1935, it emerges that the age of the defendant at the time of execution of said document had been about 14 years and thus he was not major nor does it appear that the agreement had surfaced at any time before the suit had been instituted nor does it appear that any cognizance of said transaction had been taken in any record and much less by revenue authorities. Even the document which is being relied on does not show that it is in respect of entire gut no. 63 as is sought to be claimed for the first time while giving evidence. In fact, the document shows that the defendant, at

the most, if at all it is to be considered, would be able to stake claim to 1/4th of the land referred to in the document. The trial court, in the circumstances, has decreed the suit.

11. The appellate court has also found lot of discrepancies in the claims in defence and the document relied on by the defendant.

12. The appellate court appreciated that the document relied on by the defendant i.e. *kararnama* does not appear to have any efficacy insofar as rights of plaintiff over suit property are concerned. The document refers to the 1/4th share in '*Ambewala*' field whereas the defendant has not been able to relate gut no. 63 to the field known as '*Ambewala*'. It has been considered that although the document is stated to be 30 year old, it was in favour of a minor without any reference in the same to the minor's guardian. On the basis of said document there does not appear to have been any effort made by the defendant to bring his name on record of revenue nor it is a case that he had been paying land revenue for the suit land. In revenue record, all along, it is the plaintiff's name which is appearing in the columns of ownership as well as cultivation.

13. The appellate court has considered that there are no particulars about acquisition of title by defendant by adverse possession. There is no evidence coming forth from the defendant to show any specific date from which he has denied title of the plaintiff. In absence of necessary pleadings with regard to adverse possession, appellate court found it difficult to go by contentions of the defendant. There is also no evidence which can be said to favour defendant in any way.

14. The appellate court additionally considered that even if defendant's case is to be accepted, the same, at the most, is of permissive possession as the same is being claimed with reference to *kararnama* and further that permissive possession would not perfect title in the defendant.

15. The appellate court further noted that despite the document relied on, on behalf of the defendant, name of Totaram continued to appear in revenue record in respect of gut no. 63. After death of Totaram, it is the plaintiff Bhika whose name appears to have been entered and continued in the revenue record.

16. The appellate court has concurred with the findings given by the trial court about the plaintiff being the title holder of suit property and entitled to possession while discarding the claim of adverse possession by defendant, finding further that the defendant has caused dispossession of the plaintiff. The appellate court has found that a strong case had been made out by the plaintiff of title to the property in view of the undisputed position that the plaintiff is son of Totaram from Sarjabai and Totaram having died before 1956. Thus, plaintiff had been the absolute owner of the property.

17. In the circumstances, the appellate court found lot of substance in the contentions of the plaintiff and considered defendant's possession being unlawful and as such, appeal came to be dismissed.

18. Learned counsel Mr. R. M. Sharma appearing for defendant vehemently contends that the defendant has been in possession continuously, uninterruptedly and to the knowledge of the true owner for over a period of twelve years since the date of agreement. He refers to that there is sufficient indication that gut no. 63 is '*Ambewala*' field since reference in the agreement is to '*Ambewala*' land. For the

purpose, he purports to rely on *namuna* no. 2, a document, which refers to existence of mango tree in the field. He contends that as such aforesaid constitutes sufficient material to make reference in the agreement to the land as ' *Ambewala* ' due to mango tree standing in the field.

19. He submits that relationship among the persons, particularly it is not being disputed that Sarjabai had performed *gandharva* marriage with Totaram. It has also gone undisputed that Totaram had granted certain property to the defendant for the purpose of residence which had ancestrally come to Totaram. He thus submits that this fact sufficiently indicates that it is quite possible that the suit land had been given to defendant by Totaram for his sustenance and in order to maintain harmony among the children of Sarjabai.

20. He contends that from Sarjabai's relationship with Totaram, plaintiff and his sister Gajarabai had been born and having regard to that the two persons i.e. Sarjabai and Gajrabai left behind by Totaram also inherited property and Sarjabai had been alive while suit had been instituted. Going by plaintiff's case, those persons being not party to suit, the suit ought to fail for non impleading necessary parties.

21. He further contends that while the courts have considered that there is no revenue record supporting defendant's case, the courts were oblivious of that from 1967 till 1974 there have been entries, may be pencil entries, in revenue record which would refer to the name of defendant, indicating that defendant had certain claim in respect of suit property.

22. Learned counsel further submits that having regard to that the document of the year 1935, it is a thirty year old document coming from proper custody and having been proved by defendant and a witness in support of the same, it has presumptive value and it should have received its due while evidence was being appreciated. Both the courts have not addressed to this aspect properly and have decided the matter erroneously in favour of the plaintiff.

23. Learned counsel for defendant in support of claim of adverse possession, places reliance on certain decisions, a compilation of which has been submitted during the course of arguments today.

24. He refers to and relies on a decision of the supreme court in the case of *Gurudwara Sahib vs. Gram Panchayat Village*

Sirthala, reported in (2014) 1 SCC 669, and particularly lays emphasis on paragraph no. 9 of the same which reads as under :

" 9. However, we also find from the reading of the judgment of the High Court that the High Court has refused the injunction observing that the appellant was not entitled to the same as it is the Gram Panchayat which is the owner of the property in dispute and as the appellant is in possession without any right, it has no right to seek injunction against the Gram Panchayat. This finding is totally perverse and, in fact, unnecessary. In the first instance, there was no occasion or reason for the appellant's counsel to seek this prayer in the second appeal. As pointed out above, the relief of injunction had already been granted by the civil court and this portion of the decree had not been challenged by the respondents. Decree to this extent in favour of the appellant had attained finality. The first appellate court also specifically recorded this fact and observed that by not challenging the judgment and decree passed by the learned Civil Judge, the respondents accepted that the appellant was in adverse possession of the land since 13-04-1952. We, thus, clarify that observations of the High Court that the appellant is not entitled to injunction, were unnecessary and beyond the scope of the appeal. "

25. Perusal of aforesaid judgment relied on shows that in no way it has any nexus with the dispute involved in the present second appeal.

26. The next citation relied on by defendant is in the case of *M. Durai vs. Muthu and others*, reported in (2007) 3 SCC 114, on the point of limitation, contending that defendant herein claims to be in possession since 1935 and suit of the plaintiff having been filed in 1982 is barred by law of limitation. He

particularly refers to and relies on head note (B) of the judgment which reads :-

" B. Limitation Act, 1963. Arts. 64 and 65 vis-a-vis Limitation Act, 1908, Arts. 142 and 143-Adverse possession-Burden of proof-Held, under the former once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected title by adverse possession-Under the latter, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit. "

27. While reliance is being placed on aforesaid note B, it will also have to be taken into account that head note A and paragraph no. 9 of the judgment reading thus;

" A. Limitation Act, 1963-Arts. 64 and 65-Adverse possession-Burden of proof-Held, lies on the defendant-High Court in the instant case, formulating an erroneous substantial question of law in second appeal by holding that the burden of proof lay on the plaintiff to prove his title-Impugned judgment unsustainable and matter remitted to High Court for reconsideration after formulating appropriate substantial question of law-Civil Procedure Code, 1908-S.100-Section Appeal-Substantial question of law (paras 6 to 11)

9. This aspect of the matter has since been considered by this Court in Saroop Singh v. Banto wherein it was held thus : (SCC pp3 39-40, paras 28-30)

" 28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiffs-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any

plea of adverse possession. In that view of the matter the suit was not barred.

29. *In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak).*

30. *'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohammad Ali v. Jagdish Kalita, SCC para 21) " ,*

show that it is the defendant who is under obligation to prove adverse possession. As such, said authority does not carry forward case for the defendant as desired and would tilt the situation in favour of the plaintiff.

28. It has been found by trial court in present case that the defendant has not been able to lay any claim from a specific period from which his claim to suit property can be said to have started running adverse to that of the plaintiff, the title being held in heritance by the plaintiff. The courts hitherto have held that even assuming that defendant has come in possession of the property as claimed by him under an agreement, such a possession, at the most, is permissive in nature and it would not be a case of possession being held by

defendant adverse to the title of the plaintiff – the true owner. Apart from aforesaid, there is no overt assertion of title by defendant to the suit property to the knowledge of the plaintiff. The document relied on does not appear to have been acted upon till institution of suit nor there is any evidence about its cognizance being taken in any record much less by any contemporaneous record upon its contended execution. The contention with regard to pencil entries about possession, have not been shown to relate to said document for the contended period of 7 to 10 years (1967-75). Thus, the second citation as well is of little assistance to defendant.

29. The third citation in the case of *Munnabai wd/o Ganeshlal vs. Ashru s/o Waman*, reported in [1998 (2) Mh. L. J. 161, relied on by Mr. Sharma is also relating to limitation.

30. However, in the absence of specific period from which there is acquisition of title under adverse possession, a basic requirement of averment in respect of possession running adverse to the title of the true owner being vague and uncertain, all these citations would seldom carry any fruitful purpose as far as defendant's case is concerned.

31. The two courts on appreciation of evidence have considered that the defendant has failed to place on record any evidence with regard to acquisition of title by adverse possession. Although it is being argued on behalf of defendant that there is reference to pencil entries indicating his possession as in the evidence given by defendant, yet it would not take place of plea of title being running adverse to that of the plaintiff. That apart, what one would be required to consider is that the very basis on which possession is being claimed by defendant, namely, agreement, by itself is not shown to be sufficient to prove that defendant had been put in possession of the suit property.

32. In the first place, the appellate court has referred to that the document does not relate to entire property referred to in the document but only to 1/4th of the property. Secondly, said document refers to ' *Ambewala* ' field and not the suit field. Thirdly, the appellate court has observed that the document is in favour of one Bayaji and not Bajirao. As such, the court has appreciated that the claims being made by the defendant in respect of suit property is deficient. In addition, the appellate court has also found that the revenue

record sufficiently bears out that there is substance in the rights claimed by the plaintiff. It is not disputed by the defendant that the plaintiff is the son of Totaram, relationship between Totaram and Sarjabai is not disputed and plaintiff being born from said relationship is also a fact not disputed and Totaram died before 1956 giving full-fledged ownership of property to the plaintiff. Further, death of Totaram being before 1956 is not in dispute and as such, objection being taken that necessary parties are not added to the suit, which as far as present dispute is concerned is technical and hardly is of any consequence.

33. As regards the first question, contention that the document being of 1935 is 30 year old, the two courts having not placed any reliance on the same, appears to be hollow for the reasons as have been referred to by the appellate court that though the document is purportedly placed on record, authenticity of its' content has not been established. It relates to immovable property and if at all it is in respect of transfer of property, it is not the case that it is a registered document. Secondly, the property concerned in said document has not been established to be related to the suit property. Thirdly, the document relates only to 1/4th share in

the property, and not the entire one, of Totaram. In such a case, the claim to entire property under the agreement is vacuous. As such, substantial questions of law as sought to be framed under grounds no. 3, 5 & 6 are of little consequence and it cannot be said that the courts have faltered, even if it is assumed that specific defence is taken and no specific construction is placed on the document. In the circumstances, the same is inconsequential. Upon aforesaid background, substantial questions as have been formulated under grounds no. 3, 5 and 6 in the memo of appeal and referred to while admitting the appeal, will have to be answered accordingly.

34. As far as ground no. 8-A is concerned, it is being contended by the defendant that no specific issue with regard to said document had been framed and that has caused prejudice to his case. However, having regard to the facts and circumstances of the case on record, it transpires that the parties have adduced evidence and had an opportunity to lead the evidence in respect of the same. In fact, said document is sought to be proved by defendant through testimony of one more witness. However, in spite of said testimony, both the courts have found that there is no veracity in the claims of

witness of defendant, for, he had not been certain about the same and could not show with certainty that the document relates to suit property. Further, he has been taking vacillating stands in respect of the extent of property covered by the document. The witness has deposed completely outside the document, stating that entire land has been covered by said document, whereas the document produced on record shows otherwise. In such a scenario, although it is being claimed that prejudice is being caused to defendant for want of framing of issue, it appears that the parties had been given ample opportunity to lead evidence and which appears to have been utilized. In any case, no grievance was ever made about the same while the appeal had been filed at defendant's instance. In the circumstances, said ground also would not be able to tilt the scale in favour of the defendant.

35. Ground 8-B relates to that since the document on which reliance is placed by defendant is of the year 1935 when the defendant was minor, said document was for the benefit of the minor and ought to have received its due. However, the record sufficiently indicates that the defendant has failed to show any nexus between the document and the suit field.

36. As far as ground 8-C is concerned, the same is with regard to section 91 of the Evidence Act, contending that the plaintiff is precluded from denying the document. However, since the document is stated to be with regard to immovable property, the same requires registration but not having been registered would seldom form evidence of giving title to the defendant. Even it does not appear to have been pleaded that on the basis of said document, the defendant is trying to claim title to property, for, it is his case that he has claimed title on the basis of adverse possession.

37. Over and above, one will have to see that the document sought to be relied on claimed to be of 1935 has seen light only after institution of the suit and not any time before and the document relates only to 1/4th of the property. Said document does not appear to have ever been acted upon. No entries in the revenue record on the basis of said document had ever been taken. The defendant has not been able to relate the document to suit property. No credible material in support of the same has been produced on behalf of the defendant. In view of aforesaid, grounds 8-A, 8-B and 8-C are answered accordingly.

38. Additionally, outside the pleadings, Mr Sharma purports now to refer to a development that there was yet another suit filed by the plaintiff against the defendant bearing regular civil suit no. 126 of 2008 in the court of Civil Judge, Junior Division, Kannad, seeking permanent injunction but plaintiff has failed to seek relief sought. Said suit is stated to have been withdrawn presumably for the reason that the matter is pending in second appeal before this court for recovery of possession of the very same property.

39. Learned counsel for plaintiff Mrs. Gangwal, on instructions, states that since the property's nature was being altered, aforesaid regular civil suit no. 126 of 2008 was filed, however, in view of pendency of present second appeal, the said suit has been withdrawn on 15-06-2011, considering that it would not be necessary to proceed with the suit.

40. In view of aforesaid, it does not appear that the judgments rendered by the trial as well as appellate court can be flawed on any grounds and much less on the grounds purporting to raise substantial questions of law as have been referred to in the second appeal.

41. Second appeal as such, fails and stands dismissed. Consequently, civil application does not survive and stands accordingly disposed of.

42. At this stage, learned counsel Mr. Sharma for the appellant-defendant states that since interim relief has been granted in favour of the defendant, same be continued for a period of eight weeks.

43. As such, interim relief as is stated to have been operating to continue for a period of twelve weeks from today.

SUNIL P. DESHMUKH,
JUDGE

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