

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

SECOND APPEAL NO. 730 OF 2012
WITH
CIVIL APPLICATION NO. 12665 OF 2012

Syed Razak s/o Syed Ishaq,
died, through legal representatives
as under : Appellant /
Defendant

1. Bashidabee wd/o Syed Razzak,
Age 75 years, occup. household,
r/o Near the Saba Tailor,
Ramnastpura, Jinsi, Aurangabad
2. Syed Farooq Ahmed s/o Syed Razzak,
Age 55 years, occup. Agriculture,
r/o Ramnastpura, Aurangabad
3. Syed Badar Ahmed s/o Syed Razzak
age 52 years, occup. Agriculture,
r/o Ramnastpura, Aurangabad
4. Syed Aref Ahmed s/o Syed Razzak
age 50 years, occup. Agriculture,
r/o Ramnastpura, Aurangabad
5. Syed Javed Ahmed s/o Syed Razzak
age 48 years, occup. Agriculture,
r/o Ramnastpura, Aurangabad
6. Syed Sayeeda Begum w/o Sk. Dawood,
age 62 years, occup. household
r/o Kat Kat Gate, Aurangabad
7. Fahmida begum w/o Sk. Ahmed,
Age 53 years, occup. Household,
R/o Damodhar Park, Ghatkoper (West)
Mumbai

versus

Syed Ashfaq s/o Syed Ishaq,
r/o Tq. Ghansavngi, Dist. Jalna,
now residing at Shareef Colony,
Near Roshan Masjid, Kiradpura,
Aurangabad, Dist. Aurangabad .. Respondent/
Plaintiff

Mr. M.B.W. Khan with Mr. S.B. Khan, advocate Adv. for appellants
Mr. R. M. Deshmukh, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
27TH JANUARY, 2016

ORAL JUDGMENT:

1. Heard learned counsel on either side for quite some length.

2. This is second appeal by original defendant in regular civil suit no. 402 of 2009 who died during pendency of present appeal and is being represented by his legal representatives. The suit had been instituted by present respondent, seeking declaration of ownership and possession of a portion ad-measuring 11' x 20' of gram panchayat house bearing no. 332 situated at village Ghansavngi, along with shop over said portion. The suit had been dismissed by civil judge, junior division, Ghansavngi, under judgment and order dated 12-01-2010. However, appellate court (Principal District, Jalna) reversed said decree and allowed regular civil appeal at the instance of respondent-plaintiff bearing no. 19 of 2010 on 02-08-2012 and thus the second appeal by defendants. [Parties hereto are referred to by their status in regular civil suit o.402 of 2009]

3. Plaintiff and defendant are *inter se* real brothers. House property bearing gram panchayat number 251 situated at village

Ghansavngi was owned by their father. After father's death said property came to be partitioned among five sons left behind by him. Their shares in due course of time have been separately numbered and the portion which came to the share of the plaintiff had been numbered as 251/2 and was further renumbered as 332 as referred to hereinabove. Plaintiff's case is that, he had built a shop over said portion of 11' x 20 ft. of house property bearing 332. He contended that since he had been staying with his family at Jalna for livelihood, he was away from said property and it came to be occupied by the defendant. Despite several requests, property had not been vacated by defendant and as such suit ensued.

4. Case of the defendant is that plaintiff and another brother Syed Khalid were staying away from the village for livelihood and they executed two separate documents on 27-11-1992 on a stamp paper of ₹ 10/- giving in his favour their shares in the property left by their late father. According to defendant, pursuant to said documents, his name has been mutated in respect of said property and had started appearing in the revenue record. It is further contended that the document is of 1992 and since then he has been enjoying possession of the property as owner. His possession is for more than twelve years in said capacity and as such he became owner even by

adverse possession and thus prayed for dismissal of suit on that count.

5. Upon pleadings to aforesaid effect, the trial court framed issues, *inter alia*, whether the suit property is ancestral, whether it has been partitioned and plaintiff has built the shop; whether the defendant has proved adverse possession and whether the plaintiff is entitled to declaration sought.

6. The trial court held the suit property to be ancestral and that it came to the share of the plaintiff in partition, however, plaintiff had not been able to prove that he had built the shop over the same. It was further held that the question of adverse possession does not arise and if it is considered to have arisen, defendant has failed to prove such possession. Consequently, plaintiff is held to have not been entitled to declaration sought and as such suit came to be dismissed.

7. In appeal at the instance of plaintiff, appellate court framed points for determination about ownership over suit property, entitlement of plaintiff for declaration of ownership and possession. Appellate court found that appellant-plaintiff is the owner of suit property and entitled to possession of the same and as such allowed the appeal. This second appeal as such is at the defendant's instance.

8. Learned counsel Mr. M.B.W. Khan on behalf of the appellant-defendant vehemently submits that suit property after partition had come to the share of plaintiff, however, it being of no use to the plaintiff, had been given and handed over to defendant by plaintiff by executing document as far as back as in 1992 indicating unequivocal intention of the plaintiff to that effect. Alternatively, Mr Khan submits that the property had been relinquished by the plaintiff in favour of the defendant and having regard to the position that defendant has been enjoying possession of the property as owner for over twelve years, he has become owner of the same by adverse possession.

9. Learned counsel further submits that the plaintiff has miserably failed to establish on record that the shop over suit premises had been built by him. As a matter of fact, it is the defendant who had built said shop at his own expenses and he has been enjoying the same as owner along with land thereunder. This fact, according to him, should clinch the issue.

10. He further alternatively submits that the document executed in his favour by plaintiff has all the trappings of '*hiba*' i.e. oral gift. He submits that there is an offer, acceptance of it and delivery of possession and as such all the three ingredients required for *hiba* are present in the transaction. The document

is a clear indication of offer coming and acceptance of the same is amply borne out from the fact that consequent upon execution of the document, there has been delivery of possession of the suit property by plaintiff to defendant. He submits that with the passage of more than twelve years, time to reclaim the property by the plaintiff has been lost and in due course, it has earned title to the defendant as owner by adverse possession.

11. Mr. Khan, on behalf of the appellant refers to and relies on a case of *Bondar Singh vs Nihal Singh*, reported in *AIR 2003 SC 1905*, and particularly emphasizes head-note 'C' of the same that a unregistered document may not be admissible as evidence of title but can very well be used for collateral purpose, such as, nature of possession.

(a) In the case relied on by appellant, persons in possession of the property had instituted a suit for declaration of ownership by adverse possession and injunction restraining defendants from dispossessing them. Suit was decreed and in the appeal, judgment and decree passed by the trial court had been reversed. A further appeal before high court came to be allowed and against the same the matter had been before the supreme court at the instance of the defendants.

(b) It was claimed by plaintiffs that the land concerned had been sold by predecessor of the defendants, namely, Fakir Chand under an unstamped and unregistered sale deed executed on 09-05-1931 in favour of Tola Singh - predecessor of plaintiffs. Defendants had tried to dispossess plaintiffs, denying the sale, claiming that possession was permissive having been given only for the purpose of cultivation. It was a claim of defendants that the property had been taken back in possession from the predecessor of the plaintiffs. Land accordingly had been mutated in defendants' names in revenue record to the knowledge of plaintiffs. Plaintiffs' possession had been denied by defendants claiming that in fact defendants were in possession of the property and there was no question of plaintiffs being in adverse possession of suit land.

(c) The supreme court considered that main question in the suit was whether the plaintiffs were in hostile continuous possession of the suit lands by virtue of which they had perfected their title to the land by adverse possession. The supreme court considered that

the sale deed in question had shown that possession of the plaintiffs over suit land was not illegal and unauthorized and that the sale deed of 1931 executed by Fakir Chand had not been disputed by him during his life time who died around 1949-50. He had not disputed title or possession of the plaintiffs.

(d) The supreme court also recorded that there had been a notice on 16-04-1956 by defendants to the plaintiffs' predecessor asserting their possession and had also applied to revenue authorities on 08-05-1956 for declaration that the plaintiffs were trespassers over suit land.

(e) Revenue proceedings at the behest of the defendants which had been going on till 1962 were dismissed by sub divisional officer on 06-08-1962.

(f) It was thus found that the claim by defendants of having come in possession around 1957-58 stood negated. The supreme court has further observed that had really possession been taken by defendants in 1957-58, there was no necessity to continue proceedings till 1962 before revenue authorities.

(g) After having failed in said proceedings, defendants tried to dispossess the plaintiff constraining them to institute suit in 1972. The supreme court thus found the plaintiffs to be in lawful possession.

(h) The supreme court found that title started running hostile to the defendants at least from 1956 when they issued notice to plaintiffs. With passage of time and in the process the plaintiffs got their title perfected by adverse possession.

(i) It is under these circumstances that the supreme court had further observed that unregistered document may not be admissible in evidence but it can always be looked into for collateral purpose, such as, to see the nature of possession claimed over the property.

12. Said judgment of the supreme court, having regard to the facts involved in the present matter, does not have any similarity or even resemblance with the case on hand.

13. Learned counsel Mr. Khan further relied on a decision of the supreme court in the case of *Hafeeza Bibi vs Shaikh Farid*, reported in *AIR 2011 SC 1695*. This reported judgment had been pressed into service in support of the submission that *hiba* in

writing does not require registration. However, this plea, it appears, has been taken up for the first time in the second appeal. That apart, there is neither pleading nor any evidence indicating compliance of three ingredients required for establishing *hiba*, although learned counsel purports to contend that the document is an offer and that the defendant had accepted it and as such he has been put in possession and thus it should be deemed to be *hiba*.

14. However, in the absence of plea or evidence of *hiba*, the argument advanced at the stage of second appeal does not bear any substance and as such aforesaid authority though for the purpose that *hiba* in writing may not require registration is of no assistance to the appellant-defendant.

15. Mr. R. M. Deshmukh, learned advocate appearing on behalf of the respondent-plaintiff submits that in the face of admitted position that suit property had come to the share of the plaintiff and had been owned by him, his entitlement to declaration and possession is legitimate and rightful. He submits that the document dated 27-11-1992 relied on by defendant claiming it to be relinquishment of right by plaintiff over suit property has no substance. Said document had been denied by the plaintiff. According to learned counsel, a transfer of title in

respect of immovable property worth more than Rs.100/- can take place only under a registered document and not otherwise and in such a case, if it is to be considered relinquishment, it can be by no other way but under a registered instrument.

16. Mr. Deshmukh refers to a decision considered before lower appellate court, in the case of *Sneh Gupta vs Devi Sarup*, reported in 2010 (1) Mh. L. J. 293. According to him, appellate court has thus rightly held that in absence of registered deed, document relied on by defendant cannot be considered in evidence.

17. Learned counsel Mr. Deshmukh further refers to that although appellate court's judgment adverts to theory of *hiba* being developed by defendant, the same cannot be considered in the absence of any basis in evidence and as such the appellate court has rightly discarded said theory.

18. As far as adverse possession is concerned, Mr. R.M. Deshmukh heavily relies on a judgment of honourable single judge of this court in the case of *Ganpatrao Ramji Nagul vs. Dattatrya Guru Daulatgiri Maharaj*, reported in 2010 (1) ALL MR 802. Honourable single judge after taking stock of the situation and discussing the case law in the field, particularly referring to and reproducing paragraph number 15 from the case of *Annasaheb Patil vs Balwant*, (1995) 2 SCC 543 (9) which reads thus;

“ 15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that others title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. ” ,

has discussed the case in hand as under;

“ Turning to the case in hand as has been observed in preceding paragraphs that the defendants are claiming their induction in possession on the strength of a gift deed executed by the members of the Padmashali Samaj, at the same time, defendants claim that their possession is hostile to the interest of the members of the community. Thus, the pleadings raised in the written statement in respect of adverse possession are in mutual conflict with each other. Defendants have not pleaded nor have placed evidence on record as to from what point of time their possession turned adverse to the true owner. Defendants have neither pleaded nor have led evidence in respect of the necessary animus on their part for perfecting their title to the property by adverse possession. The essential ingredients for claiming perfection of title by adverse possession have neither been pleaded nor proved by the defendants. Mere continuance in possession for a period of more than 12 years in itself is not sufficient for holding that the defendants have perfected their title by virtue of adverse possession. All the ingredients necessary for arriving at the conclusion as stated in above referred paragraphs

are required to be proved and those have neither been pleaded nor proved by the defendants. Both the courts below have not applied their mind to these aspects and have recorded erroneous findings in respect of perfection of title by defendants by virtue of adverse possession. Plaintiffs have claimed their title to the property on behalf of the community. It has not been controverted by the defendants also that the property belonged to the Padmashali Samaj. Thus, plaintiffs have discharged their burden in proving their title and as such are entitled to claim possession of the property in dispute. Defendant no. 2 had no title to the property and it cannot be said that by virtue of unregistered gift deed executed in 1958 by the members of the community he has acquired title to the property. Defendant no. 2 therefore was not entitled to alienate the property in favour of defendant no. 1 by executing sale deed on 27-12-1969. Sale deed executed by defendant no. 2 in favour of defendant no. 1 therefore does not bind right, title or entitlement of the plaintiffs in relation to the property. Sale deed is inoperative as against the rights, title and entitlement of the plaintiffs. Plaintiffs are thus entitled to claim recovery of possession of the suit property. Property is in possession of defendant no. 1 and he has no entitlement to retain the same on the strength of sale deed got executed by him from defendant no. 2. "

19. The situation in the present case can be said to be similar to the one as aforesaid. In present case, on the basis of a document dated 27-11-1992, appellant-defendant claims to have come into possession of suit property. However, no title to property can be acquired under unregistered deed by appellant.

20. In the circumstances, questions sought to be raised do not appear to be substantial questions of law.

21. Second appeal, as such, fails and stands dismissed. Civil application does not survive and stands disposed of.

SUNIL P. DESHMUKH
JUDGE

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