

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

**SECOND APPEAL NO.252 OF 2013
WITH
CIVIL APPLICATION NO.4975 OF 2013**

1. Krishnabai w/o Sakharam Kendre,
Since deceased, thr. L.Rs.
- 1/a. Chandarans s/o Sakharam Kendre,
Age: 66 years, Occu: Agri.
- 1/b. Udhav s/o Sakharam Kendre,
Age: 39 years, Occu: Agri.
- 1/c. Bapurao s/o Sakharam Kendre,
Died, his L.Rs.
- 1/c/a. Prayagbai w/o Bapurao Kendre,
Age: 59 years, Occu: Household
- 1/c/b. Gangasagar w/o Bapurao Kendre,
Age: 28 years, Occu: Household
- 1/c/c. Narsabai d/o Bapurao Kendre,
Age: 34 years, Occu: Household
- 1/c/d. Saraswati d/o Bapurao Kendre,
Age: 32 years, Occu: Household
- 1/c/e. Janabai d/o Bapurao Kendre,
Age: 35 years, Occu: Household
- 1/c/f. Parshuram s/o Bapurao Kendre ,
Age: 30 years, Occu: Agri.
- 1/c/g. Datta s/o Bapurao Kendre,
Age: 29 years, Occu: Agri.
- 1/c/h. Vithal s/o Bapurao Kendre,
Age: 26 years, Occu: Agri.
- 1/c/i. Tukaram s/o Bapurao Kendre,
Age: 24 years, Occu: Agri.

- 1/c/j. Pandurang s/o Bapurao Kendre,
Age: 22 years, Occu: Agri.
2. Sadashiv s/o Sakharam Kendre,
Died, thr. L.Rs.
- 2-A. Ahilyabai w/o Sadashiv Kendre,
Age: 55 years, Occu: Household
- 2-B. Jivanrao s/o Sadashiv Kendre,
Age: 42 years, Occu: Agriculture
- 2-C. Navnath s/o Sadashiv Kendre,
Died, thr. L.Rs.
- 2-C-1. Gangasagar w/o Navnath Kendre,
Age: 35 years, Occu: Household
- 2-C-2. Gangasagar w/o Navnath Kendre,
Age: 35 years, Occu: Household
- 2-C-3. Omkar s/o Navnath Kendre,
Age: 12 years, U/g of Appellant
No. 2-C-2-Gangasagar Navnath Kendre
- 2-C-4. Venkatesh s/o Navnath Kendre,
Age: 9 years, U/g of Appellant
No. 2-C-2-Gangasagar Navnath Kendre
- 2-C-5. Nikita s/o Navnath Kendre,
Age: 23 years, U/g of Appellant
No. 2-C-2-Gangasagar Navnath Kendre
- 2-D. Prakash Sadashiv Kendre,
Age: 34 years, Occu: Agriculture
- 2-E. Sakharam Sadashiv Kendre,
Age: 27 years, Occu: Agriculture
- All R/o. Loni, Tq. Udgir,
District Latur
- 2-F. Kondabai Ashokrao Nagargoje,
Age: 34 years, Occu: Household,
R/o. Takalgaon (Nagargoje)
Tq. Ahmedpur, Dist. Latur

3. Vasudev s/o Sakharam Kendre,
Age: 46 years, Occu: Agri.,
All R/o Loni, Tq. Udgir,
District Latur

..APPELLANTS
(Orig. Defendants)

VERSUS

1. Bhimrao s/o Limbaji Gaikwad,
Age: 61 years, Occu: Agri.,
R/o Loni, Tq. Udgir
2. Ganpati s/o Limbai Gaikwad,
Since deceased, thr. L.Rs.
- 2a. Radhabai w/o Ganpati Gaikwad,
Age: 61 years, Occu: Household
- 2b. Dhondubai w/o Manohar Bhalerao,
Age: 41 years, Occu: Household
- 2c. Gangadhar s/o Ganpati Gaikwad,
Age: 31 years, Occu: Agri.
- 2d. Tukaram s/o Ganpati Gaikwad,
Age: 41 years, Occu: Agri.
- 2e. Rajkumar s/o Ganpati Gaikwad,
thr. L.Rs.
- 2e-1. Sheela Rajkumar Gaikwad,
Age: 27 years, Occu: Household,
R/o. Loni, Tq. Udgir,
District Latur
- 2e-2. Ku. Balika Rajkumar Gaikwad,
Age: Minor, U/g of natural
mother Sheela Gaikwad

..RESPONDENTS

Mr N. L. Jadhav, Advocate for appellants;
Mr Ram S. Shinde, Advocate for respondent No.1;
Mr N. G. Kale, Advocate for respondent Nos. 2a to 2d

CORAM : N.W. SAMBRE, J.

DATE : 10th July, 2017

ORAL ORDER

The present appellants are the defendants in Regular Civil Suit No.207 of 1994 which was filed by the respondents-plaintiffs for declaration of ownership and recovery of possession of suit property which could be specifically identified as survey No.105-A, to the extent of 7 Acres 14 Gunthas, situated at village Loni, Tq. Udgir, District Latur.

2. The said survey No.105 was initially ad-measuring 14 Acres and 28 Gunthas which was owned by one Balaji. Balaji was blessed with two sons Vithoba and Narsing. The present appellants-defendants are claiming title to the suit property through Vithoba and Narsing by virtue of adverse possession.

3. Narsing, son of Balaji, vide sale deed dated 18th October, 1966, transferred the suit property in favour of Dagdoba and Sitaram, who in turn, executed registered sale deed in respect of suit property in favour of Limbaji on 8th November, 1966, thereby passing possession of the suit property in favour of Limbaji.

4. The respondents are claiming title through Limbaji, being his legal heirs.

5. The respondents filed suit, alleging that on 30th March, 1994 and preceding that on Gudhipadwa of 1990 the present appellants unlawfully dispossessed them and as such, brought the suit into action.

6. The suit of the present respondents came to be dismissed on 30th August, 2007, by answering issue of title in favour of the present appellants.

7. In an appeal preferred by respondents-plaintiffs being Regular Civil Appeal No.100 of 2007, the judgment and decree of the Trial Court came to be reversed and the suit came to be decreed thereby directing the present appellants to deliver possession of suit property to the respondents herein. Thus, the present second appeal.

8. Mr Jadhav, learned Counsel appearing on behalf of appellants while making strenuous efforts to make out a case before this Court for indulgence would agitate on the issues, whether the suit of the plaintiffs was maintainable in view of the provisions of the Limitation Act. According to him, limitation prescribed for instituting a suit for recovery of possession is twelve years as per Article 65 and for declaration three years as per Article 58 of the Limitation Act. According to him, in present case, the fact remains that there were revenue proceedings before the Tahsildar in relation to suit property, which were answered in favour of the appellants way back in 1966, which has to be

considered as starting point of limitation. According to him, in the said revenue proceedings it was within the knowledge of the present respondents-plaintiffs that the appellants-defendants are claiming possession over the suit property.

9. For the aforesaid purpose, he would invite attention of this Court to the judgment of the Apex Court in the matter of **Bondar Singh and other vs. Nihal Singh and others** reported in **AIR 2003 Supreme Court 1905**, particularly paragraphs 5 and 6 thereof. According to him, once the revenue authorities found that by virtue of possession the mutation is carried in favour of the appellants, the suit has to be held barred by limitation having been instituted almost after a period of 18 years.

10. The next limb of contention of the present appellants is, the suit is liable to be dismissed in view of perfection of title in favour of present appellants-defendants by virtue of plea of adverse possession. To substantiate the said contention, the appellants have invited attention of this Court to the proceedings initiated by Narsing in the year 1966 against the present appellants seeking possession of the property. According to him, having perfected the title the appellate Court's judgment and decree on the aforesaid issue is not sustainable and thus is liable to be set aside.

11. A ground is sought to be raised relying upon judgment of this Court in the matter of **Santosh Hazari vs. Purushottam Tiwari deceased by L.Rs.** reported in **2001 (2) Mh.L.J. 786**, that the appellate Court while upsetting the judgment and decree of the Trial Court has not dealt with findings recorded by the Trial Court.

12. Per contra, learned Counsel appearing on behalf of respondents would urge that the appellate Court has dealt with and answered the issue of title in favour of the respondents-plaintiffs. According to him, the suit was well within the limitation as 1990 and 1994 are the crucial dates which are taken into account for the purpose of dealing with issue of limitation. He would submit that though the findings as regards limitation are not very happily worded by the appellate Court, yet this Court may substitute its findings in respect of issue of limitation in view of the provisions of Order XLI, Rules 23 and 24 and Order XLII of the Code of Civil Procedure.

13. His next limb of submission is, the revenue entries cannot be considered as a basis for the purpose of calculation of limitation as the law provides that the same are considered only for fiscal purpose. So as to substantiate his contention and proposition, the learned Counsel would invite attention of this Court to the judgment of the Apex Court in the matter of **State of Himachal Pradesh Vs. Keshav Ram & others**, reported in **AIR 1997 SC 2181**. In addition, he would urge that the

plea of adverse possession is demolished by appellants-defendants themselves by denying the title of the respondents-plaintiffs. As such, according to him, the appeal is liable to be dismissed.

14. So far as issue of limitation is concerned, admittedly, Article 65 of the Limitation Act provides for limitation of twelve years in case a party seeks possession based on the title.

15. Though it is canvassed by the learned Counsel for the appellants-defendants that such limitation should begin to commence from the date of the revenue entries which were taken adverse to the interest of the respondents-plaintiffs, however, I am in disagreement with the same having regard to settled principle of law that such revenue entries are only for fiscal purpose and revenue authorities, in absence of any statutory powers, are not entitled to record a finding of fact as regards possession of parties to such proceedings. The issue of possession has to be determined based on appropriate pleadings and evidence in support thereof, which powers in the present case absolutely vest in the said Court.

16. Though Shri Jadhav learned Counsel for the appellants was right in inviting attention of this Court to the position that such revenue entries are required to be considered for collateral purpose in the matter of appreciation of evidence while deciding an issue of

possession, still what is required to be considered herein is, present respondents-plaintiffs are claiming the relief in a suit for possession and declaration based on their title to the suit property.

17. It is admitted position on record that deceased Balaji had two sons, namely, Vithoba - father of defendant No.1 and Narsing-uncle of defendant No.1. From the record, particularly the factual matrix and evidence, it could be inferred that there was partition between Vithoba and Narsing and Narsing transferred his independent share in the suit property along with possession in favour of the plaintiffs. Apart from above, it appears that Narsing had taken out proceedings against the present appellants independent of the aforesaid proceedings in relation to the suit property for possession. The present suit property was not included in the said civil proceedings, which speaks and clearly indicates that possession of the suit property remained with Narsing by virtue of the sale deed passed over to the plaintiffs.

18. It is then to be noted that in the proceedings before the Tahsildar in relation to revenue entries it was consistent stand of the present appellants-defendants that the parties are litigating before the Civil Court and the revenue authorities should not change the revenue entries effected and the same be maintained as it is. In the aforesaid background, in my opinion, the claim that the limitation is to begin to count from the date of revenue entries is rightly rejected by the lower

appellate Court. Though the attention of this Court is invited to the judgment of the Apex Court in the matter of Bondar Singh (supra), still the law laid down by the Apex Court in the matter of Santosh Hazari (supra) is also required to be appreciated. The law laid down in the matter of Bondar Singh (supra), will hardly have any assistance to the present appellants-defendants when the fact remains that there appears to be partition between the parties i.e. Vithoba and Narsing and present defendant No.1 succeeded to the property which had gone to the share of Vithoba, whereas Narsing appears to have dealt with his property independently. It is worth to observe here that though the sale deed executed in favour of the present respondents was well within knowledge of appellant-defendant No.1, neither defendant No.1 had filed any independent suit questioning the said title nor any counter claim to that effect is raised. As such, it has to be observed that respondents had absolute title to the suit property.

19. Apart from above, it is required to be noted that the issue of limitation is a mixed question of facts and law and same has been rightly dealt with by the lower appellate Court, particularly in the factual background as is considered herein above. As such, the said ground is rightly rejected by the learned lower appellate Court.

20. So far as plea of adverse possession is concerned, upon reading of the written statement filed by the present appellants it

appears that the appellants in categorical terms and in repeated manner have come out with a plea of denial of title of the respondents-plaintiffs. Though a contradictory plea of adverse possession is raised by appellants, still having denied title of the present respondents, the plea of the present appellants that they remained in possession of the suit property by virtue of adverse possession has been rightly rejected by the lower appellate Court. What is required to be demonstrated while establishing a plea of adverse possession is the starting point and mode of getting possession of the suit property, continuous and uninterrupted possession thereof for twelve years and such possession is to the knowledge of the true owner.

21. In the present case, though possession of the present appellants over the suit property is claimed to be from 1966, still the mode and manner thereof is not at all described. Though the revenue entry is sought to be relied upon for the purpose of establishing possession over the suit property, still the fact that the property has gone to the share of Narsing and he executed sale deed in favour of respondents through Dagdoba and Sitaram is not at all questioned by the appellants. Having regard to the same, in my opinion, plea of adverse possession has been rightly answered against the present appellants.

22. Though a ground is sought to be raised as regards non-consideration of the issues based on the judgment in Santosh Hazari's

case (supra), it is required to be noted that in the present case, the lower appellate Court has substituted its findings in place of the findings recorded by the Trial Court. Though the Trial Court has recorded lengthy findings, the lower appellate Court has dealt with relevant issues and recorded the finding substituting the findings to that of the Trial Court. While doing so, the lower appellate Court has also considered findings recorded by the Trial Court, though may not be in such details, however, the judgment reflects that the appellate Court was conscious of the findings recorded by the Trial Court on the issue over which the appellate Court has recorded the findings. That being so, in my opinion, the claim of the present appellants that the appellate Court has given a go-bye to the provisions of Section 96 of the Code of Civil Procedure will hardly be sustainable.

23. In view aforesaid, the appeal lacks merit and stands accordingly dismissed. In view of dismissal of the appeal, Civil Application No.4975 of 2013 does not survive and stands disposed of accordingly.

24. The executing Court shall stay its hands away for a period of six weeks from today.

(N.W. SAMBRE, J.)

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