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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.618 OF 1997

1. Sadashiv Mahadeo Shinde (since deceased) through LRs.
- 1a. Smt. Nirmala Sadasdhiv Shinde,
Adult, Occu: Household.
R/of 894, E-ward, Shahapuri
5th Lane, Kolhapur
- 1b. Sou. Snehal Milind Rawal, Adult,
Occu: Household, R/of Ghelot
Residency Center, 15, New Panvel,
Mumbai.
- 1c. Sou. Puja suresh Jadhav, Adult,
Occu: Business, R/of Plot No.17, 18
Gurumaharaj Nagar, Hockey Stadium,
Behind Isolation Hospital, Kolhapur.
- 1d. Sou. Sangita Sachin Suryavanshi, Adult,
Occu: Household, R/of 1737/B A-ward,
Sakoli Corner, Kolhapur.
- 1e. Sachin Sadashiv Shinde
2. Ashok Mahadeo Shinde (since deceased)
through LRs.
- 2a. Smt. Pramila Ashokrao Shinde, Adult,
Occu: Household.
- 2b. Prakash Ashokrao Shinde, Adult,
Occu: Business, Both R/of 1064/2,

Plot No.137, A ward,
Rajopadhyay Nagar, Kolhapur.

- 2c. Subhash Narayan Shinde, Adult,
Occu: Business, R/of 894/1, E Ward
Shahupuri, 5th Lane, Kolhapur. ..Appellants.

V/s.

1. Smt. Shakuntala Pandurang Shinde,
Adult, Occu: Household, R/of 894/1,
E ward, Shahupuri, 5th Lane,
Kolhapur.
2. Dattatray Krishna Shinde (Deleted)
3. Smt. Parvati Mahadeo Shinde (Deleted) ..Respondents.

Mr.Chetan G. Patil for the appellants.

Mr.P.G.Karmale with Mr.V.B.Jagdale for respondent.

CORAM : A.M.DHAVAL, J.

DATE : SEPTEMBER 24, 2018

ORAL JUDGMENT

The appeal has been admitted on the substantial question of law formulated as below :-

“ (i) Whether the lower Appellate Court erred in law in not considering the fact that the plaintiffs have conceded that there

was sufficient evidence on record showing that deceased Krishna had executed sale deed of suit properties in favour of Mahadeo on September 22, 1943 and thus accepted the title of the defendants since 1953 till 1985 when for the first time the plea of adverse possession was raised ?

(ii) Whether it ought to have been held that the plaintiffs have failed to prove continuous physical possession for more than 12 years and that such possession is hostile to title holder ? ”

2. Heard Mr.Chetan Patil, the learned counsel for the appellant and Mr.P.G.Karmale, the learned counsel for the respondents.

3. A brief reference to the factual aspect is necessary for deciding this appeal.

Respondent Nos.1 and 2 have filed Special Civil Suit No.244/1985 in the Court of Civil Judge S.D., Kolhapur against the appellants herein for declaration of title and for perpetual injunction. The suit property is land admeasuring 141 – 95 sq. mtrs. situated at City Survey No.894/1, 894/2 at Kolhapur and City Survey No.896 admeasuring 23.4 sq. mtrs. The suit property was of ownership of common ancestor Daulata Shinde, who had

four sons Tukaram, Krishna, Namdeo and Vishwas Krishna, died on March 8, 1953 leaving behind two sons Pandurang and Dattatray. Pandurang died on October 9, 1975 leaving behind the plaintiff, his widow and brother Dattatray. The plaintiff's ancestor Krishna was owner and they have inherited the suit property and it was in their possession. The defendants claim that their predecessor had purchased the suit property from the plaintiffs' father-in-law Krishna on September 22, 1943 by registered sale deed. According to the appellants, the said transaction was sham, hallow and bogus, there was no transfer of title nor there was delivery of possession. Alternatively, the plaintiffs claimed that the plaintiffs were in adverse possession of the suit property for more than 12 years and thereby they have become owners of the suit property. Hence they claimed declaration regarding the nature of sale, annulment of the sale deed and for perpetual injunction. The defendants filed their written statement Exhibit-18 and claimed that the said transaction was a genuine transaction and the same was not challenged within limitation. The claim for declaration is not maintainable. The defendants denied the claim of the plaintiffs of adverse possession.

4. The learned Civil Judge, S.D. Kolhapur after recording the evidence held that the plaintiffs were in possession, however, it was held that the plaintiffs failed to prove that the sale transaction dated September 22, 1943 was false, sham and bogus and also failed to prove adverse possession. He held that the possession was not lawful and held that the plaintiffs were not entitled for perpetual injunction. Hence, the suit came to be dismissed vide judgment and decree dated January 22, 1990.

5. Aggrieved, the plaintiffs preferred Regular Civil Appeal No.95/1990 before the District Court, Kolhapur. In the said appeal, the learned advocate for the plaintiffs did not press the challenge for declaration regarding the sale deed dated September 22, 1943 as null and void. The learned Additional District Judge, Kolhapur on the basis of material on record held that the plaintiffs have succeeded in proving adverse possession and, therefore, he granted a decree of declaration of ownership and perpetual injunction by judgment March 12, 1997.

6. Both the substantial questions of law relates to the issue of ownership by adverse possession. In the case of *Gurdwara*

*Sahib V/s. Gram Panchayat Village Sirthala and another*¹, the Apex Court has held that the claim of adverse possession can be made use of by way of shield and not as a sword, as a defence when arrayed as a defendant in a proceeding and, therefore, the suit for declaration that the plaintiffs have become owner by adverse possession is not maintainable. The decree for perpetual injunction was confirmed by stating that the possession of the appellants cannot be disturbed except by due process of law.

7. After hearing the learned advocates for the appellants, I find that the judgment referred above is squarely applicable to the present facts and, therefore, the findings of the first Appellate Court declaring the ownership by adverse possession is not sustainable and deserves to be set aside.

8. Learned advocate for the respondents argued that there is a finding of adverse possession and it is based on sound reasoning. In *Gurdwara Sahib (cited supra)* the finding of adverse possession was upheld observing that the possession of the appellant cannot be disturbed except by due process of law.

¹ (2014) 1 Supreme Court Cases 669

Though the suit of the appellant was dismissed, it was observed that -

“ it would be open for the appellant to plead in defence in case the respondents filed a suit that finding that the appellant had become owner of the property by adverse possession. Needless to mention at this stage, the appellants shall also be at liberty to plead that findings of issue No.1 to the effect that the appellant is in adverse possession since April 13, 1952 operates as res judicata. Subject to this clarification, the appeal is dismissed.”

9. The above observation in the judgment makes it clear that the Apex Court has not given any finding whether the finding of adverse possession has become a *res judicata* or not. The said issue was only kept open.

10. Mr.Chetan Patil, learned counsel pointed out that in the present matter there was a decree of adverse possession which was not challenged by the defendants. It was argued that in the first appeal, the defendants have not challenged that the plaintiffs were not in adverse possession and, therefore, the Apex Court has referred to the issue of *res judicata* which is not the case in the present appeal.

11. Considering the arguments and the ratio laid down in the above citation, I find that the appeal will have to be partly allowed. In this matter, the issue of adverse possession is not an issue relevant. The suit will have to be treated as a suit for injunction simplicitor. So far as the possession is concerned, there are concurrent findings that the plaintiffs are in possession for more than 12 years. This finding of fact cannot be assailed in a Second Appeal. Therefore, the plaintiffs are entitled to perpetual injunction to restrain the defendants from disturbing their possession, otherwise than due process of law.

12. If the defendants file a suit on the basis of title, it will be open for the plaintiffs herein to claim adverse possession and it will be for the Court to decide the same before whom the suit will be filed. It is pointed out that the defendants herein have already filed Special Civil Suit No.129/1990 which is re-numbered as Regular Civil Suit No.1145/2000 and is pending before the Civil Judge, J.D. Kolhapur. It will be for the Civil Judge, J.D., Kolhapur to decide in the said suit whether the possession of the plaintiffs has become adverse or not. The finding recorded by the first appellate Court to the extent that possession of the plaintiffs is

adverse to the defendants will have to be set aside as the said finding was not relevant in this suit and as the suit for ownership on the basis of adverse possession was not maintainable. Accordingly, the appeal is partly allowed. Hence the order.

- i) The appeal is partly allowed;
- ii) The judgment and decree in Regular Civil Appeal No.95/1990 decided by the Additional District Judge, Kolhapur on March 12, 1997 is hereby quashed and set aside and the claim of declaration that the plaintiffs have become owners of the suit property by adverse possession is dismissed as not maintainable. The right of the plaintiffs to raise the issue in any other title suit filed by the defendants is kept open;
- iii) The finding of the learned Additional District Judge, Kolhapur that the possession of the plaintiffs was adverse to the defendants is also set aside and it is kept open for decision in a suit filed by the present defendants.
- iv) The decree for perpetual injunction is modified and the defendants are restrained by perpetual injunction from disturbing the possession of the plaintiffs, except in

accordance with due process of law;

- v) In the light of the above facts, the parties shall bear their own costs throughout;
- vi) The decree be drawn accordingly;
- vii) The stay order, if any, regarding the said suit shall stand vacated.

(A.M.DHAVALA, J.)