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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.208 OF 2017
WITH
CIVIL APPLICATION NO.476 OF 2017
IN
SECOND APPEAL NO.208 OF 2017.**

Pandurang Krishna Patange (decd)

through Legal Heirs

Pundalik Pandurang Patange and ors

... Appellants

V/s.

Dattatray Balkrishna Mule (decd)

Through Legal Heirs

Smt. Vithabi Dattatray Mule

and ors

... Respondents

Mr. Sandesh Patil i/by Triyama Legal, for the appellants.

Mr. Anil Kumar Patil i/by Anilkumar Patil & Gaikwad, for respondent Nos. 1A, 1A(ii), 1A(iii), 1(C), 1(D), 2(B), 2(A) (iii).

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 18th JULY, 2018.

P.C. :

1] Heard learned counsel for the appellants and respondents.

2] Admit.

3] With the consent of both the learned counsels, the appeal is taken up for final hearing at the stage of admission itself.

4] This appeal takes an exception to the Judgment and

decree dated 2.11.2016, passed by Ad-hoc District Judge-3, Sangli, in Regular Civil Appeal No.214 2010, thereby dismissing the appeal, which was preferred against the judgment and decree dated 27.7.2010, passed in Regular Civil Suit No.89 of 1991, by Civil Judge Junior Division, Sangli.

5] The suit was filed by respondent herein for possession of the suit property, mesne profit and compensation against appellant-defendant No.1.

6] By this Second Appeal, for challenging the concurrent findings of fact as recorded by the Appellate Court and trial Court, three fold contentions are raised by learned counsel for the appellant.

7] The first pertains to the issue of limitation. It is submitted that admittedly the appellants are in possession of the suit property since last more than 30 years and therefore, their possession has become adverse and hence under Article 65 of the Limitation Act, the suit should have been filed within 12 years, at least from the year 1972. However, as the suit is filed only in the year 1991, it is barred by limitation.

8] In order to appreciate the submission made by learned counsel for appellant, the facts of the suit can be referred to the effect that one Krishna was the original owner of the suit property. He had

purchased it on 17.5.1908. On 17.3.1942, he has gifted the suit property to Ambubai. As per the recitals in the gift deed, the possession of the suit property was also handed over to her. Thereafter on 1.9.1972, Ambubai gifted the said property to her sons, that is original plaintiffs. It was specific case of the plaintiffs as stated in paragraph No.4 of the plaint that defendant-appellants herein, are closely related to them, defendant No.1 being maternal uncle, defendant Nos. 2 and 3 being sons of defendant No.1. The relations between them were cordial. Hence, considering the difficulties of the defendant No.1, plaintiffs permitted the defendants to reside in the suit property. Thereafter they were called upon to vacate the suit premises as plaintiffs were in need of the same. Defendants did not do so, hence notice dated 13.12.1990 was issued. The cause of action as stated, has arisen on 19.11.1990, on which date notice was given and permission to occupy the suit premises was cancelled or withdrawn.

9] Thus, the case put up in the plaint is that the possession of defendants in the suit property was permissive, on the basis of relations between the parties were cordial. Admittedly, the plea of adverse possession is not taken up before the trial Court or even before the Appellate Court. In such circumstances, even accepting that the possession of defendants in the suit property is from the year 1972, in that case also, having regard to the provisions under Article

65 of the Limitation Act, and the case put up by plaintiffs that the suit is for possession of the suit property, the period of 12 years is the limitation which starts when the possession of defendants becomes adverse to the plaintiff.

10] In the instant case, it was for the defendants to show when their possession which was permissive in nature became adverse to the title of the plaintiffs. The defendants, however, have not taken the plea of adverse possession. Therefore, their mere permissive possession for years together from 1972 cannot become adverse, so as to take the suit of the plaintiffs beyond the period of limitation. Here the cause of action arose only when the plaintiffs gave notice to defendants calling upon them to vacate the suit premises and hand over possession to them.

11] Therefore, the finding recorded by the trial Court and confirmed by the Appellate Court as regards the issue of limitation, being based on sound legal position, it does not call for any interference.

12] The second contention is that the gift deed dated 17.3.1942 was not properly proved as original gift deed was not produced and its certified copy was produced. The Trial Court has admitted it in evidence under Section 90 of the Evidence Act. Once certified copy of the gift deed is allowed to be brought on record as

“secondary evidence”, then both the Courts have rightly held that the gift deed of 1942 is properly proved.

13] As regards the gift deed dated 1.9.1972, plaintiff has also examined two witnesses. Hence the validity of the gift deed and contents thereof being properly proved, the finding of fact on this aspect, as recorded by the trial Court and confirmed by the Appellate Court, is beyond the purview of this Court in the Second Appeal.

14] The third contention raised is relating to the nature of the property, that it was belonging to the joint family property. It was originally owned by Krishna, their father. However, once of the gift deed was executed by Krishna in favour of Ambubai and said gift deed is properly proved, there hardly remains any substance in this contention.

15] The Second Appeal, thus, holds no merit and therefore, stands dismissed.

16] In view of dismissal of the Appeal itself, Civil Application No.476 of 2017 becomes infructuous and the same is accordingly disposed off.

[DR.SHALINI PHANSALKAR-JOSHI, J.]