

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

SECOND APPEAL NO.177 OF 2018

(Bapurao s/o Rajeram Gautre .vs.. Smt. Dhrupatabai Maroti Lengure and others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mrs. R.S. Sirpurkar, Counsel for the appellant.

CORAM : ROHIT B. DEO, J.

DATED : 24-11-2018

The appellant, who is the defendant in Regular Civil Suit 104/2005 is assailing the judgment and decree dated 07-8-2009 passed by the learned 2nd Joint Civil Judge (Junior Division), Warora, thereby decreeing the claim for possession and rejecting the counter-claim and the confirmatory judgment dated 18-1-2018 rendered by the learned District Judge-2, Warora in Regular Civil Appeal 61/2009.

2. Mrs. R.S. Sirpurkar, learned Counsel for the appellant submits that the following substantial questions of law arise for adjudication :

1. Whether the learned Courts have erred in dismissing the plea of adverse possession especially when possession of defendant on the suit field has not been disputed and the plaintiffs have failed to prove that the defendant has illegally dispossessed them from the suit fields ?

2. Whether the learned Courts have erred in not framing an issue regarding alleged partition and thereby not placing the burden of proof on plaintiffs to prove the alleged partition of suit fields ?
3. Whether the learned Courts could have rejected the plea of adverse possession when they have arrived at a finding that plaintiffs have failed to prove that suit field was given to the defendant for cultivation on a contractual basis ?
4. Whether the suit was bad for non-joinder of parties?

3. The respondents instituted Regular Civil Suit 104/2005 against the appellant seeking relief of possession of agricultural field Survey 224, admeasuring 3.36 Hectares and portion admeasuring 22 R. of field Survey 118, admeasuring 44 R. in entirety. Irrefutably, the appellant and respondents are descendants of Nago. Deceased Sakhubai and deceased Sakhrabai were daughters of Nago. Bapurao-the appellant is the son of deceased Sakhubai and the respondents are the legal heirs of Maroti-one of the two sons of deceased Sakhrabai.

4. The plaintiffs averred that after the demise of Nago, Sakhubai and Sakhrabai, partitioned his estate. Agricultural field Survey 223, admeasuring 3.18 Hectares

fell to the share of Sakhubai, which she sold to one Pandurang Paturkar. Field Survey 224 came to the share of Sakhrabai. The remaining estate, including field Survey 118 was equally divided between Sakhubai and Sakhrabai. The suit property is field Survey 224 and portion admeasuring 22 R. of field Survey 118, which fell to the share of Sakhrabai pursuant to the partition *inter se*.

5. The plaintiffs averred that since they did not reside at Pimpalgaon, where the suit property is situated, they permitted the defendant to cultivate the suit property on “batai”. However, the defendant falsely claimed ownership by issuing notice dated 02-6-2005 and, therefore, the plaintiffs are constrained to institute the suit for possession, is the case of the plaintiffs.

6. The defendant filed written statement admitting that the suit property and other agricultural land was owned by Nago. The defendant denied that the estate of Nago was partitioned between Sakhubai and Sakhrabai. The defendant claimed that by oral agreement Sakhubai purchased the share of Sakhrabai and, therefore, the defendant is the owner of the suit property. In the alternate, the defendant claimed that his title is perfected due to adverse possession and lodged a counter-claim seeking declaration of ownership.

7. The trial Court decreed the suit for possession and dismissed the counter-claim. The contention of the defendant that the suit property was purchased by Sakhubai is rejected in the absence of any documentary evidenceing the alleged purchase. The trial Court noted that the names of the plaintiffs are duly recorded as owners in the 7/12 extract and that no steps are taken by the defendant to challenge the said revenue entry by taking recourse to the mechanism provided under the relevant statute. The trial Court further rejected the counter-claim recording a finding that the defence of adverse possession is not available to the defendant, who admits the ownership of Sakhrabai qua the suit property and then puts forth a specific case that the suit property was purchased by Sakhubai from Sakhrabai. This finding of fact, which is affirmed by the appellate Court, is unexceptionable. Neither the pleadings nor the evidence is sufficient to conclude that the defendant asserted hostile title openly for the statutorily prescribed period which is *sine qua non* for pleading perfection of title by adverse possession.

8. The appellate Court has recorded a finding that the evidence on record clearly indicates that pursuant to the death of Nago, Sakhubai and Sakhrabai, partitioned the suit property including the suit property. This finding is again consistent with the evidence on record. It is irrefutable that Sakhubai sold field Survey 223 to

Pandurang Paturkar, which clearly indicates that there was a partition and Sakhubai and Sakhrabai received defined share in the estate of their father Nago. The revenue entries, to which reference is made by the appellate Court, and which do have presumptive value, corroborate the case of the plaintiffs that there was partition by metes and bounds. I do not find any perversity either in approach or in appreciation of evidence giving rise to a substantial question of law.

9. It is well settled that mere long and continuous possession would not ripen into title by adverse possession. The hostile assertion must be open and to the specific knowledge of the real owner. In view of the findings of fact recorded, the first question urged by Mrs. R.S. Sirpurkar, learned Counsel, as a substantial question of law, is not involved in this appeal. The submission that failure of the trial Court to frame issue regarding partition raises a substantial question of law, must be rejected. The parties were well aware of the case which they were required to meet. The defendant lodged a counter-claim seeking declaration of ownership. Elaborate evidence is adduced and it is crystal clear that the defendant did not suffer any prejudice due to the non framing of the issue. Perusal of the memo of appeal before the first appellate Court would reveal that no ground is raised qua the failure of the trial Court to frame issue as regards partition. The further submission

that the failure of the plaintiffs to join one of the co-owners to the suit is fatal, deserves rejection since assuming that one co-owner is not impleaded, the suit was clearly maintainable. The appeal does not involve any question of law much less a substantial question of law and is dismissed with no order as to costs.

JUDGE

adgokar