

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

**SECOND APPEAL NO.494 OF 2017
WITH
CIVIL APPLICATION NO.899 OF 2017**

Shri Ramchandra Genu Raut
Age:65 Yrs., Occ: Retired,
R/o 6/2, Ambika Gruhnirman
Society Ltd., Mahabaleshwar,
Taluka Mahabaleshwar,
Dist. Satara

... Appellant

Vs

Shri Mohan Kondiram Wadkar
Since deceased through Legal Heirs
a. Kamal Mohan Wadkar
Age: Major, Occu: Nil
b. Sudhir Mohan Wadkar
Age: Major, Occu: Nil
c. Aarati Santosh Malusare
Age: Major, Occu: Nil
d. Vishal Mohan Wadkar
Age: Major, Occu: Nil

... Respondents

...

Mr. Yuvraj P. Narvankar for the Appellant.

Mr. Surel Sunil Shah for the Respondent Nos.1(a) to 1(d).

CORAM : SANDEEP K. SHINDE J.
JUDGMENT RESERVED ON: 20TH MARCH, 2019
JUDGMENT PRONOUNCED ON: 12TH APRIL, 2019

Judgment :

Pending Second Appeal, Respondent No.1 died on 20th December, 2017. His legal heirs are brought on record. Mr. Shah the learned counsel waives service on behalf of respondent nos.1(a) to 1(d).

2 Against the decree for possession, defendant's Regular Civil Appeal No.402 of 2012 was dismissed by the learned District Judge-2, Satara vide judgment and order dated 29th April, 2017. Thus, this Second Appeal is preferred by the defendant against the decree passed in the Regular Civil Appeal No.402 of 2012.

3 For the sake of convenience, I shall be referring to the parties by their nomenclature in the Suit.

4 With consent of the parties, appeal is taken up for final hearing at the admission stage.

5 The brief facts of the case are as follows:

Subject suit property is house in Final Block Nos.255-256, at Mahabaleshwar (Suit House for short). Plaintiff is member of the Ambika Griha Nirman Society, Mahabaleshwar. It is floated for the benefit of members belonging to low income group. Half portion

of plot no.6 was allotted to him by the society wherein he constructed the suit house by availing loan from United Western Bank. Defendant is his close relative and at his request, he was inducted in the Suit House as gratuitous licensee, in the year 1979. Defendant refused to vacate and hand over possession of the suit house and, therefore, vide notice dated 12th January, 1996, he terminated license of the defendant and called upon him to hand over possession of the suit house. Defendant refuted his request and thus, he instituted the suit for possession of the suit house in November, 1999.

6 Defendant raised multiple inconsistent and mutually destructive defences. He would admit, that the plot of land was allotted to the plaintiff but denied that the suit house was constructed by the plaintiff. He would contend that in the year 1979, plaintiff did not have enough money and, therefore, initial contribution for securing allotment of the plot no.6 was paid by him to the Society. He would contend that though the loan was availed from United Western Bank for constructing the suit house, it is he

who had availed the loan from the bank in the name of the plaintiff and also repaid the entire loan. He thus, denied his status of gratuitous licensee and would claim that transaction was benami in nature. It is defendant's case that suit house was constructed by him at his own cost and he is in continuous possession of it since 1979 without obstruction, continuously and uninterruptedly for a period more than 12 years and thus perfected his title by adverse possession. Defendant would also contend that the suit, was barred by limitation.

7 The learned trial Judge held and concluded that the defendant was occupying the suit house as gratuitous licensee and same has been validly terminated by the plaintiff. Plea of benami transaction was held to be not maintainable and also negated plea of adverse possession. The trial Court thus, decreed the suit on 31st August, 2012 and directed defendant to hand over possession of the suit house to the plaintiff.

8 Decree of the trial Court was carried in appeal, being Regular Civil Appeal No.402 of 2012. The learned Appellate Court

dismissed the appeal upon re-appreciating the evidence and confirmed the decree of the trial Court.

9 Thus, appeal on hand gives rise to the following substantial questions of law:

“(i) Whether findings of the Courts below on the question of adverse possession are justified in law on facts, materials and evidence available on record ?

(ii) Whether plea of benamidar and ownership by adverse possession are mutually destructive and whether defendant is entitled to raise this plea in the suit for possession ?”

(iii) Whether suit was barred by the Limitation ?

10 It is settled law that when the contesting defendant raises the plea of adverse possession, burden is on him to prove affirmatively that his possession was adverse to the knowledge of the real owner.

11 Both the courts have rendered the findings of fact, that defendant could not establish his title was perfected by adverse possession. It is the defendant's case that since 1979, he is in

continuous possession of the suit house uninterruptedly and it being hostile to the real owner , it amounted to denial of the title to the property claim. It is his evidence that a year after he was allegedly inducted in the suit house, in the year 1980, plaintiff called upon him to hand over vacant possession of the suit house which gave rise to disputes and the complaint to the police. Thus, since 1980, he being in continuous possession to the exclusion of all persons openly and hostile to the true owner for a period more than 12 years, it has matured into title. The defendant would also contend that suit was filed in the year 2012 and, therefore, it was barred by limitation.

12 It is settled law that if the defendant's initial possession being permissive, it is for him to establish by cogent and convincing evidence to show his hostile possession was to the knowledge of the real owner. The Apex Court in the case of **Roop Singh v. Ram Singh AIR 2000 SC 1485** has held thus;

“mere possession for a long time does not result in converting permissive possession into adverse possession”.

A permissive possession to become adverse must be

established by cogent and convincing evidence to show history animus and possession was to the knowledge of the real owner. It is settled law that the person who claims adverse possession has to prove that from which period onwards, he has been in possession and enjoyment of the property against the true owner. He has to raise specific pleadings in his written statement, and prove the claim of adverse possession, as per procedure known to law. In this case, the appellant/defendant has not pleaded period, onwards which his possession and enjoyment of the suit house was adverse to plaintiff. In fact he would contend, though the plot no.6 was allotted to the plaintiff, it is he who has purchased the plot and constructed the suit house on the said plot. Thus, on one hand he claims that his title to the suit property is matured by adverse possession and on the other hand by raising the plea of benami purchaser has denied plaintiff's title to the suit house. He would assert even after the police complaint lodged in the year 1979-80, he is in possession of the suit house continuously uninterruptedly to the express knowledge of the plaintiff. In fact police complaint filed in the year 1990 indicates

disapproval of the plaintiff. Just because the plaintiff did not initiate action against the defendant since 1990, inference cannot be drawn that plaintiff has approved defendants possession in the Suit House. In fact, it is otherwise. It is in these circumstances, defendant ought to have pleaded and proved by cogent and convincing evidence that his possession since after 1990 was hostile to its owner or in denial of title of the plaintiff.

13 Thus, both the Courts upon appreciating the evidence and pleadings of the defendant have rendered findings, of fact that the defendant could not establish plea of adverse possession and his title to the suit house is matured by the adverse possession. In my view, the findings recorded by both the Courts below cannot be faulted with either on the facts or on the law.

14 The next question is whether appellant is precluded from raising plea of adverse possession, in view of Benami Transaction (Prohibition Act), 1988. One can raise the plea of adverse possession when he is not owner of the property . However, a party to the suit when claims himself to be owner of the property either as benami

purchaser or otherwise and simultaneously raises plea of adverse possession, obviously, these two pleas being inconsistent and mutually destructive cannot be permitted to raised. The appellant can claim title, either independently by way of purchase or inheritance or by adverse possession. In this case, the defendant would contend that initial amount for securing allotment of the plot from the society was paid by him and though loan from the co-operative bank was availed by the plaintiff for constructing the suit house, it is he who availed the loan in plaintiff's name and repaid it. The appellant has produced the paying-in-slip, counter-foil and the Bank pass-book to substantiate that loan amount was repaid by him. It goes to show that the appellant was claiming himself, as a benami purchaser and at the same time was asserting adverse possession.

15 This Court in the case of **Rama Kashinath Dhumal (died) through L.Rs. v. Laxman Deorao Dhumal & Ors. (2009 (4) AIR BOM R 243)** wherein Court in paragraph 16 and 17 has held thus;

“16 The plaintiff has based his claim on title as well as adverse possession. Both the pleas are mutually inconsistent. There is no bar as such to take mutually inconsistent pleas. However, it is for the plaintiff to establish as to since when he disclaims his assertion based on the title and to further prove the assertion of his independent hostile possession to the knowledge of the title holder. In the instant matter, the plaintiff has failed to discharge his burden in respect of proving adverse possession.

17 In order to claim adverse possession, plaintiff has to renounce his earlier plea based on the title.”

16 The learned counsel for the appellant has relied upon the judgment of the Delhi High Court in the case of **Prema Devi Rastogi v. Bimla Devi Rastogi** wherein the Division Bench of the Delhi High Court in paragraph 38 has held thus;

“38 We may note that contradictory pleas which are mutually destructive cannot be pleaded. A plea of benamidar and ownership by adverse possession are not mutually destructive for the reason evidence pertaining to the plea of benamidar would not destroy the plea of adverse possession or vice versa.”

With due respect, I do not concur and agree with

the findings of the Delhi High Court in **Prema Devi Rastogi (Supra)**.

17 In fact, The Appellant - defendant seems to have moulded his pleadings to make it appear that plea of Benami transaction is given up but scrutiny of proceedings at trial as well as appellate stage reveals that the plea was not given up.

18 The learned counsel for the appellant would submit that suit was barred by limitation. It is his contention that suit ought to have been filed within twelve years but having filed in the year 2010, suit was barred of limitation. Limitation of 12 years begin when possession of the defendant becomes adverse to that of the plaintiff. Thus, it is incumbent on the plaintiff to file suit for possession within 12 years from when possession of the defendant became adverse to the plaintiff. In the case of **Ram Nagina Rai & Anr. v. Deo Kumar Rai (Deceased) by LRS. And Anr. 2018(10) Scale 630**, the Apex Court has held thus;

“Article 65 presupposes that limitation starts only if the defendants prove the factum of adverse possession affirmatively from a particular time. Adverse possession

means a hostile assertion, i.e. a possession which is expressly or impliedly in denial of the title of the true owner. The person who bases his title on adverse possession must show, by clear and unequivocal evidence, that the possession was hostile to the real owner and it amounted to the denial of his title to the property claimed. In deciding whether the acts alleged by the person constitute adverse possession, regard must be given to the animus of the person doing such acts, which must be ascertained from the facts and circumstances of each case.”

19 In fact, it is incumbent on the plaintiff to file the suit within twelve years from when the possession of the defendant became adverse to the plaintiff and Article 65 pre-supposes that the limitation starts only if defendant proved factum of adverse possession affirmatively from particular time. Thus, it is defendant's duty to prove factum of adverse possession affirmatively and the time at which it became adverse. In the case on hand, the defendant could not establish his adverse possession affirmatively and, therefore, contention of the defendant/appellant that the suit was

barred by limitation deserves no consideration.

20 In the case on hand, there is no evidence on record to hold that the defendant was claiming hostile possession against the plaintiff. The mere contention that since 1979-80, plaintiff never objected to his possession over the suit house, his longstanding possession is not sufficient to hold and conclude that the defendant became the owner by adverse possession.

21 In the case of **Ram Nagina Rai (Supra)** the Apex Court has held that where the possession can be referred to lawful title, it would not be considered to be adverse, the reason being that the person whose possession can be drawn to lawful title, will not be permitted to show that his possession was hostile to another's title. Simply put, one who holds possession on behalf of another, does not by mere denial of the other's title, makes his possession adverse so as to give himself the benefit of statute of limitation.

22 In the case on hand, defendant would contend that since initial contribution for securing allotment of the plot no.6, was paid by him and though loan was obtained from the bank in the name of the plaintiff, in fact, it is he who secured the loan in the name of the plaintiff and repaid the same. He would contend that he had spent about 60,000-70,000 Rs. for constructing the suit house. On this set of facts, he would claim that it was benami transaction and thereby denied title of the plaintiff to the suit house. That once possession is referred to the lawful title, plea of adverse possession is not available as held by the Apex court in the case of **Ram Nagina Rai (Supra)**. That even otherwise the defendant did not lead the evidence to establish that he had repaid the entire loan amount and initial contribution for securing allotment of the plot made by him.

23 On the other hand, the plaintiff has examined office bearers of the society and has proved that plot was allotted to him for constructing the suit house. No evidence was brought on record by the defendant to show that he has repaid loan allegedly obtained

by him in the name of the plaintiff. Evidence sought to be produced before the Court in the form of paying-in-slip and bank pass-book was falling short to prove factum of repayment of loan and has been rightly rejected by the Courts below.

24 Thus, taking into consideration facts of the case, evidence on record and settled law, in my view, both the Courts rendered findings on all the issues consistent with the evidence. All questions framed are answered accordingly. Appeal is, dismissed. All civil applications are disposed of.

25 The learned counsel for the appellant, seeks continuation of the protection, which was in operation throughout. It is for this reason, the impugned decree shall not be executed for a period of six months from today.

(SANDEEP K. SHINDE, J.)