

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

SECOND APPEAL NO. 528 OF 1992

Yamaji s/o Govind Gaikwad,
Age; 45 years, Occ; Agril,
R/o; Bhopla, Tq. Ambajogai,
Now residing Wala,
Tq. Ambajogai.

**..APPELLANT.
(Original
Plaintiff)**

V E R S U S

- 1) Dagdabai w/o Bhagoji Kalkopre,
Age; 50 years, Occ; Agril & Household,
(Died deleted as per Order Exh. 21).
- 2) Sadashiv s/o Bhagoji Kalkopre,
Age; 32 years, Occ; Agril,
R/o; Bhopla, Tq. Ambajogai.
- 3) Sheshrao s/o Bhagoji Kalkopre,
Age; 32 years, Occ; Agril,
R/o; As above.
- 4) Baluba s/o Bhagoji Kalkopre,
Age; 38 years, Occ; Agril,
R/o; As above.
- 5) Vithoba s/o Bhagoji Kalkopre,
Age; 30 years, Occ; Agril,
R/o; As above.
- 6) Pandurang s/o Bhagoji Kalkopre,
Age; 25 years, Occ; Agril,
R/o; As above.
- 7) Kisan s/o Bhagoji Kalkopre,
Age; 23 years, Occ; Agril,
R/o; As above.

- 8) Narayan s/o Bhagoji Kalkopre,
Age; 23 years, Occ; Agril,
R/o; As above.

**RESPONDENTS
(Orig.
Defendants)**

.....
 Mrs. M.A. Kulkarni, learned Advocate for the Appellant
 Mr. Avinash N. Patil Barhate h/f Mr. S.P. Chapalgaonkar and Mr. S.S.
 Chapalgaonkar, learned Advocate for the Respondent Nos. 2 to 5

CORAM : M.G. SEWLIKAR, J.

Date of Reserving Judgment : 19.12.2019
Date of Pronouncement of Judgment : 27.01.2020

JUDGMENT :

The original Plaintiff has preferred this appeal, being aggrieved by the judgment and decree passed by the learned Additional District Judge, Ambajogai, in R.C.A. No. 67 of 1982 dated 3.3.1992, confirming the judgment and decree passed by the Joint Civil Judge Junior Division, Ambejogai in RCS No. 276 of 1976 dated 15.3.1982. (Hereinafter the parties are referred to as per their original nomenclatures).

2. Facts giving rise to this appeal are that one Yamaji Gaikwad was the common ancestor. Vaijinath and Govind are the sons of Yamaji. Defendant No. 1 is his daughter and Defendant No. 2 to 8 are her sons. Plaintiff Yamaji is the son of Govind. Thus, the plaintiff/appellant and Defendant No. 1 Dagadabai are the real cousins. The suit properties Survey Nos. 10A ad-measuring 24 Acres and 25 Gunthas, 10/AA ad-measuring 3 Acres 9 Gunthas, 11A ad-measuring 4 Acres 29 Gunthas, 12A ad-measuring 14 Acres and 35

Gunthas, 13A ad-measuring 8 Acres 26 Gunthas and 14A ad-measuring 8 Acres and 16 Gunthas situated at village Bhopla, Tq.Ambejogai, are the ancestral properties of the Plaintiff and Defendant No. 1. It is further alleged by the Plaintiff that on 21.6.1970, all the defendants dispossessed him from the suit properties. Therefore, he has filed suit for partition and separate possession to the extent of his share.

3. Defendant Nos. 1 to 6 have filed Written Statement at exh. 23. They have admitted the relationship between the Plaintiff and Defendant No. 1. They also admitted their inter-se relations amongst Defendant Nos. 1 to 8. The common ancestor Yamaji, during his life time partitioned the suit properties in between Vaijinath and Govind. Vaijinath was allotted half eastern share in the suit properties and half western share was allotted to Govind. The plaintiff migrated to the place of his maternal uncle at Waka, Tq. Majalgaon, Dist. Beed about 30 years ago and is in possession of all the properties of his maternal uncle, owing to which it became difficult to him to manage the suit properties, therefore, he had relinquished his share in the suit properties in favour of Defendant No. 1, in the year 1956 itself. Since then, Defendant No. 1 has been in possession over the suit properties. Thus, Defendant No. 1 has perfected her title to the suit properties by adverse possession. They have, therefore, prayed for the dismissal of the suit.

4. Defendant Nos. 7 and 8 failed to appear, hence suit proceeded Ex-parte against them.

5. The learned Trial Court has framed issues at Exh. 25/B. The learned Trial Court has dismissed the suit holding that the Plaintiff did not prove his joint possession over the suit land. The Plaintiff has failed to prove that he was dispossessed from the suit land in the year 1970. The learned Trial Court held that Defendant No. 1 has proved the partition between Vaijinath and Govind and Govind got Western half portion in the suit land. The learned Trial Court also held that Defendant No. 1 failed to prove the alleged relinquishment by Plaintiff in her favour. The learned Trial Court also held that Defendant No.1 has perfected her title by adverse possession. The learned Trial Court further held that the suit is within the limitation.

6. Appeal preferred by the Appellant (Original Plaintiff) was also dismissed. The learned First Appellate Court also held that there was partition between Vaijnath and Govind. However, the learned Appellate Court held that Defendant No. 1 has not perfected her title by adverse possession and has also held that the suit is barred by limitation. Accordingly, the learned Appellate Court dismissed the appeal. This decree has been assailed in this appeal.

7. Heard Mrs. M.A.Kulkarni, learned Counsel for the Appellant and Mr. Avinash N. Patil Barhate h/f Mr. S.P.Chapalgaonkar/ Mr. S.S. Chapalgaonkar, learned Counsel for the Respondent Nos. 2 to 5.

8. While admitting the appeal following were framed as the substantial questions of law.

“V) The learned Judge wrongly casted burden on the appellant to prove jointness when admittedly the property is ancestral property of the appellant and respondents.

VI) The learned Judge ignored that in ‘Hindu’ there is presumption of jointness and arrived at wrong conclusion.

X) It ought to have been held that the Appellant proved that he was dispossessed from the suit property in 1970.

XV) The learned Judge misconstrued the concept of relinquishment and arrived at a wrong conclusion.

XIX) The learned Judge wrongly applied Article 65 to the present case when he himself decided point No. 4 in negative.

XX) The learned Judge wrongly applied Article 65 to the case of the appellant through the case of the appellant clearly falls under the provisions of Article 64 of the Limitation Act”.

9. Parties are ad-idem on the point that the suit properties are the ancestral properties. The Plaintiff is coming with the case that he was dispossessed from the suit properties in the year 1970. The Defendants are coming with the case that there was partition

during the life time of Yamaji and the eastern half portion was allotted to the share of Vaijinath and the western half share was allotted to the share of Govind. Admittedly, Yamaji was the original owner of the suit properties. He had two sons Vaijinath and Govind. The Plaintiff is the son of Govind. Defendant No.1 is the daughter of Vaijinath and Defendant Nos.2 to 8 are her children. Thus, Defendant No. 1 and the Plaintiff are cousin.

10. If the Defendants prove that there was partition between Vaijinath and Govind during the life time of Yamaji, theory of ouster propounded by the Appellant/Plaintiff will automatically be disproved. The revenue record shows that since 1959-60, till 1974-75, Defendant Nos. 1 to 8 are in possession over the suit properties. The name of the Plaintiff has not appeared in revenue record. Admittedly, there is no record of partition between Vaijinath and Govind. Both the Courts below have held that there was partition on the basis of some applications filed by the Plaintiff before the Revenue Authorities. Appellant/Plaintiff had filed an application before the Revenue Authority, i.e. before the Collector, Ambejogai on 16.6.1955, vide which Appellant had sought permission to sell his 4 Ana share. It does not say that it was his undivided 1/4th share. He further stated in the application that he has given up his profession of agriculturists permanently and adopted trade business.

11. Smt. Kulkarni, learned Counsel for Appellant argued that permission was not accorded as the land was not partitioned and the tenant Hariba had raised objection to this objection. This submission cannot be accepted because in the record of the Trial Court, there is an order of Deputy Collector stating that the permission could not be accorded as there is protected tenant on the land. Moreover, the Plaintiff has admitted in the cross-examination that he had initiated proceedings before Deputy Collector regarding the suit land to the extent of half share for seeking permission to alienate his half share. Thereafter, Defendant No. 1 Dagadabai had asked him not to alienate the suit land and get it cultivated by residing at village Waka. This admission clearly goes to show that there was partition between Vaijinath and Govind. Had not been it so, he would not have asked for permission to alienate his 1/4th share in the suit property. Had there been no partition, there was no reason for Dagadabai to advice him to cultivate his share by residing at village Waka. If the properties had been joint, the cultivation would also have been joint. The admission that appellant Yamaji/Plaintiff was asked by Dagadabai to cultivate the land even if residing at Waka goes to show that there was partition.

12. Mrs. Kulkarni, learned Counsel for Appellant placed reliance on the case of **Shub Karan Bubna @ Shub Karan Vs. Sita Saran Bulbna & Ors on 21 August, 2009**, in which it is held

that

"4. 'Partition' is a re-distribution or adjustment of pre-existing rights, among co-owners/ coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?"

13. Respondent No. 1/Defendant No. 1 has specifically alleged that the western portion of the suit land was allotted to Govind and the eastern portion was allotted to Vaijinath. This partition was effected during the life time of Yamaji. The learned Trial Court was right in holding that it was not possible for Dagadabai to give the details of the partition, as the said partition

was effected during the life time of Yamaji and that time Dagadabai must have been minor. The conduct of the Plaintiff and his admission narrated above, clearly indicates that there was partition between Vaijinath and Govind. Thus, once the theory of partition is proved, naturally the theory of dis-possession does not survive. The learned Trial Court had cast the burden of dispossession on the Plaintiff and the partition between Vaijinath and Govind. No fault can be found with this.

14. Defendant No. 1 has raised a plea of adverse possession. Article 65 of the Limitation Act mandates that a suit for partition shall be filed within twelve years from the date possession becomes adverse. In **“S.M. Karim @ Tamanna Saheb Vs. Mst. Bibi Sakina A.I.R. 1964 Supreme Court Cases 1254”** the Hon’ble Supreme Court observed as under :

“Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found”.

15. In the case of **Ravinder Kaur Grewal and Others Vs. Manjit Kaur and Others (2019) 8 Supreme Court Cases 729”** the three Judges Bench of the Hon’ble Supreme Court observed that

“adverse possession requires all three conclusive tests to co-exist at the same time must: 1) adequate in continuity, 2) Adequate in publicity and 3) adverse to a competitor, in denial of title and his knowledge, visible, notorious and peaceful so that if the owner does not take care to know notorious

facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required”.

16. In the case at hand respondent No. 1/Defendant No. 1 raised a vague plea of adverse possession stating therein that the Plaintiff had relinquished the suit properties to the extent of his share, in the year 1956 and since then defendant No. 1 has been in adverse possession over the suit properties for more than 17 years and the Plaintiff/Appellant has knowledge of the same.

17. It is pertinent to note that defendant No. 1 has raised plea of relinquishment of the suit properties to the extent of Plaintiff's share in her favour by the Plaintiff. It is her case that the Plaintiff had left the village Bhopla and had gone to the village Waka, Dist. Beed. The theory of relinquishment has not been proved by the Respondent No. 1/Defendant No. 1. Relinquishment has to be effected by registered deed. Registered deed is not forthcoming, nor it is the case of the Defendant No. 1 that Appellant/Plaintiff had relinquished the suit properties to the extent of his share by registered deed and therefore, the theory of relinquishment has to be held as not proved.

18. Once the Appellant had left the village Bhopla and had gone to village Waka, it clearly goes to show that he did not have

knowledge of the revenue entries effected in favour of Respondent No. 1. Moreover, the possession of Respondent No. 1 is not hostile to the Appellant. On the contrary, she has raised a plea of relinquishment. On the basis of these pleadings it cannot be said that the plea of adverse possession is made out. Since the Appellant was out of village and it is not the case of the Appellant/Respondent No. 1 that he used to come to the village, it cannot be said that he had knowledge of the alleged entries. Therefore, the plea of adverse possession cannot be said to have been properly raised and proved.

19. Mrs. Kulkarni, learned Counsel for the Appellant relied on “**P. Lakshmi Reddy Vs. L. Lakshmi Reddy - A.I.R. 1957 Supreme Court 314**” in which it is observed that

“It is settled rule of law that as between co-heirs there must be evidence of open assertion of hostile, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster”

20. In the case at hand, nothing has been brought on record to show that the possession of Respondent No. 1 Dagadabai was open assertion of hostile title. On the contrary, she claims possession on the basis of relinquishment, which is not proved. In view of this, it cannot be said that Defendant No.1 has proved the plea of adverse possession.

21. Thus, the Appellant has failed to prove that he was ousted from the suit property in the year 1970. Respondent No. 1 has proved that there was partition between Yashwanta and Govind during the life time of Yamaji. Respondent No. 1 has failed to prove relinquishment. Therefore, both the Courts did not commit any error in dismissing the suit. Hence the appeal is devoid of any substance. Appeal, therefore, is dismissed with no order as to costs.

(M.G. SEWLIKAR)
JUDGE

mahajansb/