

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.282/2019

Ritesh Chandulal Gupta (Dead) Through his Legal heirs,
Smt. Aarti wd/o Ritesh Gupta and others
...Versus...
Sau. Anusayabai Bhikuji Lanjewar and others

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

Court's or Judge's orders

Shri Anjan De, Counsel for appellants
Shri Y.D. Nagpure, Counsel for respondent no.1

CORAM : AVINASH G. GHAROTE, J.
DATE : 22/01/2020

1. By an order dated 11/12/2019, the present second appeal was agreed to be decided finally at the stage of admission. I have exhaustively heard Shri Anjan De, learned counsel for the appellants as well as Shri Nagpure, learned counsel for the respondent no.1.
2. The original plaintiff - Anusayabai Lanjewar, having purchased the suit property from one Usha @ Shakantula Janardhan Saraf, by sale-deed dated 12/5/2005, filed a suit for possession against the original defendants bearing Special Civil Suit No.198/2006. It was the contention that the defendant no.1 – Sudhabai Wasudeo Kewale, was in occupation as a legal heir of one Wasudeo Kewale, her

husband, who is claimed to have been given the suit property as a caretaker, to look after the same. It is contended that after his demise, the defendant no.1 - Sudhabai had given a portion of the suit property to one Ritesh Chandulal Gupta the defendant no.2, who claimed that he was a licensee of defendant no.1 - Sudhabai. Two other portions of the properties were allegedly given to the defendant no.3 – Sahebrao Wadekar and the defendant no.4 - Smt. Ratnamala Fundkar. It has, however, come on record that the original defendant nos.3 and 4, have handed over possession of the portions in their occupation to the original plaintiff under a possession receipt dated 18/6/2011. The learned Trial Court recorded this position in paragraph 14 of its judgment dated 31/3/2009 and in the light of this position, dismissed the suit as against the original defendant nos.3 and 4.

3. A plea was raised before the Trial Court that Wasudeo, the husband of defendant no.1 – Sudhabai, had received the suit property by an oral gift from Damodar Saraf and Kushabai Saraf, which was negated by the Trial Court on the ground that under Section 123 of the Transfer of Property Act, an oral gift was not permissible in law. This finding has been confirmed by the Appellate Court. Learned Counsel Shri De, however, has not raised this plea and in my opinion rightly so, as under Section 123 of the Transfer of Property Act, an oral gift of immovable property is not permissible in law.

4. It is then contended on the part of the defendant no.1, that her husband Wasudeo was a licensee of the suit property, who had got his name mutated in the revenue records in the year 1983, which continued to be so recorded till the year 2003, when on an application by the plaintiff, the entry was reverted back in the name of Kushabai and thereafter the plaintiff. It is, thus, submitted that for the period between 1983 and 2003, since Wasudeo, the husband of the defendant no.1, claimed adversely to Kushabai Saraf, he had perfected his title by adverse possession. The present appellant, i.e., the defendant no.2, who claims to have been placed in occupation by the original defendant no.1 - Sudhabai to whom he was paying rent, claims to have succeeded to this plea of adverse possession, which he claims to enure to his benefit.

5. Shri De, learned Counsel for the appellants further contended that even if it is presumed that the defendant no.2/appellant was a licensee from Sudhabai the original defendant no.1, since he had made a construction over the land in question, under the provisions of Section 60 of the Indian Easements Act, the licence became irrevocable, as a result of which he could not be evicted from the portion occupied by him.

6. It is further contended that the vendor of the plaintiff, namely, Usha Janardhan Saraf was not the daughter of Kushabai and Damodar Saraf, in light of which she having

no title or interest in the suit property, the sale-deed dated 12/5/2005, did not confer any title upon the plaintiff Anusuyabai, resultant to which she would not have locus or right to institute a suit for possession against the defendants.

7. It is further submitted that Wasudeo Kewale was the nephew of Damodar Saraf and the education and upbringing of Wasudeo was done by Damodar. It is further submitted that Wasudeo was occupying the suit property, as a licensee and caretaker.

8. It is further submitted that the finding rendered in revenue proceedings regarding the entitlement of Usha Janardhan Saraf, as being owner of the suit property, could not be binding on the Civil Court and the finding rendered in this regard based upon the observations in the revenue proceedings, thus, cannot be sustained.

9. It is also contended that there was no pleading that Usha Janardhan Saraf and Shakuntala, daughter of Damodar Saraf, were one and the same person and in absence of any evidence in this regard, the findings as recorded by the learned Courts below were unsustainable in law.

10. Shri De, learned Counsel for the appellants further took me through the evidence recorded before the Trial Court and specifically the evidence of P.W.2 – Sanjay, son of Shakantula Janardhan Saraf, to contend that it is an admitted position that the name of Wasudeo stood recorded

in the Municipal record from 1983 to 2004, which it is claimed is indicative of establishing the plea of adverse possession. He further invited my attention to the evidence of Defendant no.2 – Ritesh Gupta in which he has stated that construction of a permanent nature was made by him upon the suit property, which is not controverted by the plaintiff. He, therefore, submits that in this light of the matter Section 60 of the Easements Act is clearly attracted and even if it is held that the licence was granted in favour of Ritesh by Sudhabai, the same has become irrevocable, whereby the institution of the suit itself was infirm. He further invites my attention to the evidence of Sudhabai Kewale and particularly the cross-examination to contend that the relation of Shakuntala with Usha has not been established, as a result of which the finding, as rendered by the Trial Court that Shakuntala and Usha were the same person, cannot be sustained in law.

11. He further submits that the Courts below have not considered the plea of adverse possession in the correct perspective. He submits that under the *doctrine of tacking*, the plea raised by Sudhabai/original defendant no.1 on the basis of the mutation entry of her husband Wasudeo in the record of the Corporation in respect of the suit property, would clearly be available to the appellant -Ritesh, and due to his demise, to his legal heirs the appellants.

12. He further attacks the power of attorney executed in favour of P.W. 2 – Sanjay and submits that though the same was challenged, the plea in that regard has not been considered by the learned Courts below. He further submits that since Usha Janardhan Saraf did not enter the witness box, she being the only person who could have spoken about her parentage, adverse inference ought to be drawn against her. He further submits that the description of the suit property was incorrect, which has been ignored by the Courts below. He, therefore, submits that substantial questions of law as mentioned in para 9 (a), (b), (f), (g), (l) and (n) of the memo of appeal arise for consideration.

13. Shri De, the learned Counsel for the appellants places reliance upon the judgment of the Hon'ble Supreme Court in the case of **Bokka Subba Rao Vs Kukkala Balakrishna**, reported in **2008 (3) SCC 99** to submit that the High Court is obliged to formulate a substantial question of law, before proceeding to decide the appeal. He further places reliance upon the judgment of the Hon'ble Supreme Court in the case of **Vidhyadhar Vs Mankikrao**, reported in **1999 AIR (SC) 1441** to contend that where a party does not enter the witness box and offers himself for being cross-examined by the other side, a presumption would arise that the case set up by him, is not correct. He further places reliance upon the judgment of the Hon'ble Supreme Court in the case of **Prataprai N Kothari Vs John Braganza**, reported

in 1999 AIR (SC) 1666 to contend that where no plea has been raised in the pleading, evidence cannot be led. He further relies upon the judgment of the Hon'ble Supreme Court in the case of Union of India and others Vs Vasavi Co-Op. Housing Society Ltd. and others, reported in 2014 (3) Mh.L.J. 244 to contend that entries in the revenue record do not confer title. He further places reliance upon the judgment of the Hon'ble Supreme Court in the case of C. Venkata Swamy Vs H.N. Shivanna (D) by L.R. and another etc., reported in 2018 (1) SCC 604 to contend that jurisdiction of First Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact in first appeal. He further relies upon the judgment of the Hon'ble Supreme Court in the case of Ravinder Kaur Grewal and others Vs Manjit Kaur and others, reported in 2019 (6) Mh.L.J. 87 to contend that the plea of adverse possession is permissible to be raised to claim title to the property.

14. Shri Nagpure, learned Counsel for the respondent/original plaintiff submits, that the original defendant no.2 – Ritesh Gupta cannot claim to have stepped into the shoes of Sudhabai, who herself claimed that she was a licensee. He further submits that once it is accepted by the original defendant no.2 – Ritesh Gupta that Sudhabai was a licensee, through her husband, it was impermissible in law for her to create a licence in favour of the defendant no.2. He

further invites my attention to issue no.5, as framed by the learned Trial Court on the point of adverse possession and the finding rendered negating the same. He further submits that no rights of any nature had been derived by the original defendant no.2 – Ritesh Gupta. He further submits that the revenue proceeding regarding deletion of the name of Wasudeo in the records and restoration of the name of Usha Janardhan Saraf had attained finality as the appeal filed by Sudhabai and Ritesh against the same was dismissed without any further challenge to the same. He further submits that in the light of the evidence of P.W.2 – Sanjay Saraf the fact of Shakuntala daughter of Damodar Saraf and Usha Janardhan Saraf being one and the same person stood proved. He, therefore, submits that there was no necessity for Usha @ Shakuntala Janardhan Saraf to enter the witness box. He further submits that even otherwise, Usha @ Shakuntala Janardhan Saraf was not a party to the proceedings before the Trial Court and therefore, the plea of she having failed to examine herself and therefore, adverse inference ought to be drawn in this regard, does not stand to reason. He further submits that the Courts below have correctly applied their mind to the facts and evidence available on record and rendered findings which are unassailable. He, therefore, submits that the judgment and decree as passed by the Trial Court and that of the Appellate Court, calls for no interference. He further submits that no substantial question

of law of whatsoever nature arises in the present matter and the appeal, therefore, needs to be dismissed.

15. Shri De, learned Counsel for the appellants, in rebuttal, has invited my attention to the averments in paragraph no.3 of the plaint, wherein the defendant no.1 Sudhabai has been described as a licensee and contends that the plea of adverse possession would certainly be available to the defendant no.1 as she succeeds to all the rights available to her husband. He, therefore, submits that the substantial questions of law as stated in para 9 (a), (b), (f), (g), (l) and (n) of the memo of appeal arise and are required to be determined.

16. I have heard the learned Counsel for the respective parties at length for substantial period of time, in the light of the earlier order of this Court dated 11/12/2019. I have also perused the record and the judgments as passed by the Courts below.

17. The question of formulating a substantial question of law would arise, if upon consideration of the arguments and the material, the Court finds that substantial question of law needs to be framed. In case the Court comes to a conclusion that no substantial question of law arises, it is not necessary for the Court to frame one, as in the opinion of the Court one would not arise at all for consideration. The language of Section 100 (1) and (4) of the Code of Civil Procedure is clear and succinct in this regard. The same is as

under :-

“Section 100. Second appeal (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2)

(3)

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.”

18. The use of the expression “if the high Court is satisfied that the case involves a substantial question of law-”, as occurring in Section 100 (1) and the expression “where the High Court is satisfied that a substantial question of law is involved in any case”, clearly indicate that, it is only in cases where the High Court is satisfied that a substantial question of law is involved that the Court is required to formulate it. In case the High Court is not satisfied that any substantial question of law is involved, it is not statutorily

called upon to formulate one as one does not arise in its opinion at all. Thus, the mandate of formulating a substantial question of law would only arise, where the High Court is satisfied that one exists and not otherwise. Where the High Court is satisfied that none exists, it would thus be permissible for it to dismiss the appeal, without framing any question, at the threshold itself. It would be illogical, where the High Court finds that in a second appeal no substantial question of law is involved, still, it has to formulate one and hear the appellant. That in my humble opinion cannot be the mandate of Section 100 of the Code of Civil Procedure. This is further substantiated from the language of Section 100 (4) of the Code of Civil Procedure, which obliges the High Court to formulate a substantial question, only when it is satisfied that one is involved and not otherwise. Thus, the satisfaction as contemplated can be either way. The High Court can be satisfied that no substantial question of law is involved and straightway dismiss the appeal or it can be satisfied that a substantial question of law is involved, in which case it would be obliged to formulate one.

19. The reliance by the learned Counsel Shri De on the judgment of the Hon'ble Supreme Court in the case of ***Bokka Subba Rao*** (supra) is clearly misplaced for the reason that ***Bokka Subba Rao*** (supra) was a case in which the suit for declaration and permanent injunction as filed by the plaintiff/respondent was dismissed, which dismissal was

affirmed in appeal. The High Court in second appeal had set aside the judgment and decree of the trial Court as well as of the Appellate Court and decreed the suit, without framing substantial question of law, in light of which the dictum of the Hon'ble Apex Court has to be considered. The judgment, therefore, would clearly not be applicable to the case at hand.

20. The plea raised by the learned Counsel Shri De that Wasudeo, had perfected his title by way of adverse possession, is on the basis of the mutation entries in the name of Wasudeo in respect of the suit property from 1983 to 2004. It is an admitted position on record, that the original owners of the suit property, namely, Ushabai and Damodar Saraf and so also their daughter Shakuntala were resident at Mumbai. To establish a plea of adverse possession, there has to be an open assertion of hostile title, to the knowledge of the real owner of the property. In the present case, there is no material on record that such an assertion claiming hostile title was ever made by Wasudeo during his life time, which was to the knowledge of the original owners of the property. Merely getting his name entered into the revenue/municipal records, for any length of time, cannot be said to satisfy the basic ingredient of the plea of adverse possession. It is the specific plea of the defendant no.1 as raised in her written statement, that due to love and affection, the suit property was orally gifted by Ushabai and Damodar Saraf, to her

husband Wasudeo. Thus, the very entry of Wasudeo in the suit property is claimed on the basis of oral gift and not otherwise. This clearly militates against the plea of adverse possession. When and at what point of time and in what manner, there was any open assertion of hostile title by Wasudeo in respect of the suit property, that too to the knowledge of Usha and Damodar Saraf, has not been stated in the written statement or in the evidence of Sudhabai. Unless and until there is an open assertion of hostile title to the knowledge of the real owner, the period of limitation would not begin to run, howsoever, long the period of occupation may be. In that light of the matter, the findings rendered by the Courts below that the plea of adverse possession was not available to Sudhabai as well as to the original defendant no.2 – Ritesh Gupta, are clearly well within the established parameters of law. The judgment in the case of *Ravinder Kaur Grewal* (supra), does not take a different view and therefore, is of no assistance to learned Counsel Shri De. In fact, the judgment in *Vasavi Co-Op. Housing Society Ltd* (supra) supports the plea of the respondent that a mere mutation entry in the records would not avail to the benefit of the appellant, to establish a plea of adverse possession.

21. Insofar as the plea that Shakuntala and Ushabai were not the same person, it is an admitted position that Shakuntala was the daughter of Kushabai and Damodar

Saraf. It has come in the evidence of P.W.2 – Sanjay Saraf, the son of Shakuntala that his mother was also called by the name Ushabai and that Ushabai and Shakuntala were one and the same person. The son, would be the best person to depose as to the identity of his mother. The reliance by Shri De, learned Counsel for the appellants on ***Vidhyadhar*** (supra) would therefore not be of any assistance to him, more so, as Ushabai @ Shakuntala was not a party to the proceedings in the present case. The further contention that there is no plea that Ushabai and Shakuntala were the same person and therefore evidence in that regard could not have been considered as there was no plea in this regard in the plaint, for which reliance is placed on ***Prataprai N Kothari*** (supra) is clearly without any merit for the reason that this plea was raised by the defendant in her defence, in light of which the son of Ushabai @ Shakuntala was examined as a witness for the plaintiff. The learned Courts below, therefore, have correctly relied upon the evidence of P.W. - 2 - Sanjay Saraf in holding that Ushabai and Shakuntala were the same person.

22. The proposition that the jurisdiction of the First Appellate Court is very wide like that of the Trial Court while hearing a first appeal as laid down in ***C. Venkata Swamy*** (supra), is of universal applicability. However, in the present case, nothing has been stated as to how the same has been not adhered to by the First Appellate Court.

23. The alternate submission that even if it is presumed that the appellant/defendant no.2 was a licensee from Sudhatai, the original defendant no.1, since he had made construction over the land, her licence became irrevocable, is also unworthy of consideration for the reason that any alleged licence *inter se* between the original defendant no.1/Sudhatai and the appellant/original defendant no.2, would not affect the legal rights of the plaintiff or for that matter her predecessor-in-title, namely Ushabai @ Shakuntala Saraf. The appellant/defendant no.2 admittedly does not claim to be a licensee of Ushabai @ Shakuntala, as such, the question of applying Section 60 of the Easements Act, to the appellant/defendant no.2 vis-a-vis the plaintiff or her predecessor-in-title does not arise at all.

24. Except for a bare statement, nothing much has been stated as to how and in what manner, the description of the suit property was incorrect. For bringing this plea home, it was necessary for the learned Counsel for the appellant to give details as to how and in what manner the description of the suit property was incorrect. Whether the incorrectness was as to the area, dimensions, location, etc. Nothing has been stated due to which the plea has to be stated to be rejected.

25. Considering the above position, no question of law, much less any substantial question of law arises in the present second appeal. The second appeal is, therefore,

without any merits and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

JUDGE

Wadkar, PS.