

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

**933 SECOND APPEAL NO.27 OF 2020
WITH CA/762/2020 IN SA/27/2020**

**NATTHU SONU WANI DIED LRS. MADHUKAR NATTHU WANI AND OTHERS
VERSUS**

VITTHAL KASHINATH WANI AND OTHERS

...

Mr. P.B. Patil, Advocate for appellants

Mr. Girish Rane, Advocate for the respondent Nos.1 and 2

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 25th AUGUST, 2021.

ORDER :

1 Present appeal has been filed by the original defendants to challenge Judgment and Decree passed in Regular Civil Appeal No.36/2016 by learned District Judge-2, Amalner, Dist. Jalgaon dated 16.09.2019, thereby reversing the Judgment and Decree passed by learned Civil Judge Junior Division, Parola, Dist. Jalgaon on 30.06.2016 in Regular Civil Suit No.30/2010. Present respondents had filed the said civil suit i.e. Regular Civil Suit No.30/2010 for declaration and possession. It was dismissed on 30.06.2016. Now, after the reversal of the said decree by the learned Trial

Judge; the First Appellate Court has decreed the suit, thereby granting declaration that the suit property belongs to the Joint Hindu Family consisting of plaintiffs and original defendant No.4 as owners. Further, the original defendant Nos.1 to 3 were directed to deliver the vacant and peaceful possession of the suit property to the plaintiffs. Separate inquiry has been directed in respect of mesne profits.

2 Heard learned Advocate Mr. P.B. Patil for appellants and learned Advocate Mr. Girish Rane for the respondent Nos.1 and 2.

3 It has been vehemently submitted on behalf of the appellants that the learned First Appellate Court has not considered the evidence as well as law point involved in the matter in proper perspective. The plaintiffs had come with a case that their father late Kashinath Malhari Wani had purchased the suit property i.e. land Gat No.96 admeasuring 01 H 52 R situated at village Undirkhede, Tq. Parola, Dist. Jalgaon from Devinijanandi Tai Maharaj Trust out of his own income on 16.06.1964. Their father expired on 13.02.1974. Names of the plaintiffs along with their mother came to be recorded vide Mutation Entry No.2994. They have contended that mental condition of their mother was not proper and the father of the appellants-original defendant Nos.1 to 3 Sonu Malhari Wani in collusion with Revenue Officers got his name mutated to the suit property on 02.10.1974 vide

Mutation Entry No.2999, illegally, showing that the mother of the plaintiffs had given that property in partition and put him in possession. They came to know about the alleged illegal acts from one Rajubai Vishwanath Wani on 01.07.2010 and thereafter they collected the papers and filed the suit. Defendants had resisted the suit by filing written statement and denying other averments going against them. The learned Trial Judge after scanning the evidence had correctly assessed it and held that the suit property was not the self acquired property of father of plaintiffs. Defendants' father had never colluded with the Revenue Officers to get his name entered to the suit property. The suit cannot be said to be within limitation, for the simple reason that the name of the defendant Nos.1 to 3's father came to be mutated on 02.10.1974 and he was enjoying the said property since then as owner thereof. Learned First Appellate Court failed to consider the point of limitation in proper perspective. It has been wrongly held that the suit was within limitation. Further, both the Courts have wrongly held that the defendants have not proved that they have become owners by adverse possession. The scope and the effect of Article 65 of the Limitation Act on the suit has not been properly considered.

3.1 Learned Advocate for the appellants has relied on the decision in **Ravinder Kaur Grewal and others vs. Manjit Kaur and others, (2019) 8**

Supreme Court Cases 729. He especially relied on following paragraph :

“59. Possession is the root of title and is right like the property. As ownership is also of different kinds of viz. sole ownership, contingent ownership, corporeal ownership, and legal equitable ownership. Limited ownership or limited right to property may be enjoyed by a holder. What can be prescribable against is limited to the rights of the holder. Possession confers enforceable right under Section 6 of the Specific Relief Act. It has to be looked into what kind of possession is enjoyed viz. de facto i.e. actual, “de jure possession”, constructive possession, concurrent possession over a small portion of the property. In case the owner is in symbolic possession, there is no dispossession, there can be formal, exclusive or joint possession. The joint possessor/co-owner possession is not presumed to be adverse. Personal law also plays a role to construe nature of possession.”

3.2 He further relied on the decision in **Vasantiben Prahladi Nayak and others vs. Somnath Muljibhai Nayak and others, (2004) 3 Supreme Court Cases 376**, wherein on the facts of the case Hon’ble Apex Court had come to the conclusion that the right of the reversioner to recover possession of the property within twelve years from the death of the widow is not only based on provisions of the Limitation Act but on the principles of Hindu Law and the general principles that the right of a reversioner is in the nature of spes successionis (estate in expectancy) and such reversioner does not trace his title through the widow.

3.3 He further relied on the decision in **Ramchandra Sakharam Mahajan vs. Damodar Trimbak Tanksale (dead) and others, 2007(6) Mh.L.J., 609**, wherein it has been held

“The suit is for recovery of possession on the strength of title obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions.”

3.4 He further relied on the decision in **Ramlal and another vs. Phagua and others, AIR 2006 SC 623**, wherein it has been held that “*in an appeal under Section 100 of the Code of Civil Procedure, 1908, if both the Lower Courts concurrently erred in not appreciating oral and documentary evidence properly, then High Court is at liberty to re-appreciate the evidence and record its own conclusion by reversing orders passed by Lower Courts*”.

4 He, therefore, submitted that the substantial questions of law are arising in this case.

5 Per contra, the learned Advocate for the respondent Nos.1 and 2 strongly supported the reasons given by the learned First Appellate Court. He submitted that the learned Trial Judge has not appreciated the evidence

properly, and therefore, the First Appellate Court was required to take into consideration all the facts, evidence that was adduced on behalf of the plaintiffs. The defendants i.e. present appellants had not filed any documentary evidence nor they had led any oral evidence. They had not challenged the findings given by the learned Lower Court, which had gone against them. The learned Trial Judge had held that defendants had failed to prove that the suit property was purchased in the name of Kashinath from the income of the joint family. It was also held that the defendants have failed to prove ownership over the suit property by adverse possession. The learned Lower Court failed to consider that when he was holding that the defendants had failed to prove that the suit property was purchased from the joint family income, then his own finding to Issue No.1 that the suit property was not the self acquired property of the Kashinath, is contrary to each other. Therefore, when the sale deed was produced on record by plaintiffs, it was coming from the proper custody and document was more than 30 years old, by virtue of Section 90 of the Indian Evidence Act. The Lower Court ought to have held that it was the self acquired property of Kashinath. The mistake, that was committed by the Lower Court, has been corrected by the First Appellate Court. Further, though father of the defendants had got his name mutated on 02.10.1974, showing that Shantabai i.e. mother of the plaintiffs gave him that property in partition itself, will have to be considered as wrong and

illegal, as Shantabai cannot be said to be a Karta of the family. Though possession was taken, it cannot be said to be forcible or hostile to plaintiffs since 1974. Merely on the basis of said mutation, no title could be derived to Sonu – father of the defendants and then to the defendants, and therefore, a perfectly legal and correct Judgment and Decree has been passed by the First Appellate Court. No substantial question of law is arising in this case.

6 At the outset, it can be said that merely because both the Courts below are not concurring without the findings, it will not lead to a substantial question of law, and therefore, even at the stage of admission of the necessary facts and legal position will have to be considered. Here, in this case, the present appellants, who had alternatively claimed ownership by adverse possession have not led any evidence, that is, either documentary or oral, to support their contention. They had not challenged the findings in the negative given by the Trial Judge that they had failed to prove that they have become owner by adverse possession. This fact has been noted by the learned Appellate Court, and therefore, only those points have been framed, which were in dispute before him. For proving ownership by adverse possession, the defendants should have admitted the ownership of the plaintiffs and then to show hostile possession for more than twelve years. Definitely, the possession appears to be since 1974, but when the defendants

have not proved that it was hostile in nature, both the Courts below were justified in arriving at a conclusion that the defendants have failed to prove that they have become owners by adverse possession.

7 In order to prove the ownership, plaintiffs have produced on record sale deed executed in favour of their father by the Trust on 10.12.1963, at Exh.53. No objection appears to have been taken on behalf of the defendants while exhibiting the said sale deed. In any circumstance, there was no dispute that the sale deed was in the name of Kashinath, but it appears to be the contention of the defendants that the property was purchased out of joint family income. At the costs of repetition, it can be placed on record that the defendants have not led oral as well as documentary evidence to support this fact also. Under the said circumstance, it will have to be accepted that the amount of consideration, that was paid in sale deed Exh.53, was from the income of Kashinath alone. After the sale deed, Mutation Entry No.2493 (Exh.48) came to be effected in the name of Kashinath and after Kashinath had expired, names of plaintiffs, their mother and sister-defendant No.4 came to be recorded vide Mutation Entry No.2994 (Exh.49). Defendants have not disputed these documents. Thereafter, the plaintiffs have also produced on record Mutation Entry No.2999, at Exh.50. It shows that plaintiffs' mother Shantabai had given suit property to Sonu –

father of the defendant Nos.1 to 3, in partition on 02.10.1974. According to the plaintiffs, this mutation entry has been got effected by Sonu in collusion with revenue officers. There cannot be a direct evidence about collusion, but it can be seen that defendants have not come with a case and have not adduced any evidence to show that there was partition between Sonu and Shantabai on or prior to 02.10.1974. If this would have been the fact, then which properties went to the share of Shantabai and which properties went to Sonu, all those details are not coming forward from the defendants' side. Another fact to be noted is that when there was no evidence adduced by defendant Nos.1 to 3, to show that there was joint family of Kashinath and Sonu and it continued after Kashinath's death, how Shantabai can become Karta of the family, is a question. At the costs of repetition, when the partition details are not given, we cannot say that there was any substance in that mutation entry Exh.50. That mutation entry could not have passed title on Sonu. No doubt, the possession appears to have been handed over, and therefore, at the most, that possession could have been only permissive possession. Permissive possession howsoever wrong, it can be, it will not become adverse unless specific acts of ownership in hostility are exercised. Again, it can be seen that those acts of hostility have not been stated by the defendant Nos.1 to 3 not proved.

8 Coming to the point of limitation, the ratio laid down in authorities above said cannot be disputed. However, it can be definitely said that those ratio are not applicable to the facts of the case. In **Ravinder Kaur Grewal** (supra) Hon'ble Apex Court was dealing with question of law, "Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of the Limitation Act, 1963 for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person ?" Here, the defendant Nos.1 to 3 have failed to prove the adverse possession and as aforesaid, their possession appears to be permissive in nature, and therefore, it cannot be said that the suit was barred by limitation. In the present case, the plaintiffs have proved their title by producing sale deed and inheritance and they have not depended on the weaknesses of the defendants' evidence. Therefore, the ratio in **Ramchandra Sakharam Mahajan's** case (supra) is not applicable here.

9 When the First Appellate Court has appreciated the evidence properly, pointed out the wrong findings arrived at by the Lower Court by

considering those documents, which though proved have not been considered at all, coupled with the legal aspects, definitely, no substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908 are arising in this case, requiring admission of the Second Appeal. In view of **Kirpa Ram (D) through LRs. and others vs. Surender Deo Gaur and others, 2021 (3) Maharashtra Law Journal, 250**, the Second Appeal can be dismissed without framing of question of law, much less substantial question of law, at the stage of admission. Therefore, the Second Appeal stands dismissed, as no substantial questions of law are arising in this case. Civil Application No.762 of 2020 for stay stands dismissed.

10 After the pronouncement of the order, learned Advocate for the appellants prays that the possession of the appellants be protected for some period, so that the appellants can go and challenge the order of this Court. It is not in dispute that the appellants are in possession. Under such circumstance, *status quo* in respect of the land be maintained till 01.12.2021.

(Smt. Vibha Kankanwadi, J.)