

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

SECOND APPEAL NO. 153 OF 2014

The Maternity Home, Pulgaon,
A Registered Public Trust,
Registered under the Bombay Public
Trusts Act, 1950, bearing Registration
No. F/34(N),

Through :

- (i) Shri Rameshkumar Suvalal Patni,
Aged about 73 years, Occupation:
Business, President of Appellate Trust,
R/o. Pulgaon, Tahsil : Deoli,
District : Wardha.
- (ii) Purushottam Balkisan Rathi,
Aged about 70 years, Occupation :
Business, Secretary of Appellate Trust,
R/o. Pulgaon, Tahsil : Deoli,
District : Wardha.

.... **APPELLANT.**

// VERSUS //

1.Narayan Marotrao Pohankar

1 a) Sundara W/o. Narayan Pohankar,
Aged about 70 years, Occu. Housewife,

1 b) Vasanta S/o. Narayan Pohankar,
Aged about 45 years, Occu. Business,
Both R/o. Kurla Ward, Nachangaon
Road, Opp. R.K. School Pulgaon,
Tah. Deoli, District : Wardha.

.... **RESPONDENTS.**

Shri C.B.Dharmadhikari and Shri M.J.Kulkarni, Advocates for Appellant.
None for the Respondents.

CORAM : ANIL S. KILOR, J.
DATED : DECEMBER 02, 2021

ORAL JUDGMENT :

1. This appeal is arising out of the judgment and decree dated 17/07/2012 passed in Regular Civil Appeal No. 120 of 2009 by the Principal District Judge, Wardha partly dismissing the suit for removal of encroachment in respect of Plot No. 1639.

2. The facts in brief are as under: (The parties are referred as per their status before the trial Court):

3. The appellant / plaintiff filed suit for removal of encroachment, eviction, possession, mandatory and permanent injunction. It is the case of the plaintiff that it is a registered public trust, registered in the year 1962. The agricultural land Survey Nos.26/1, 26/4, KH admeasuring 3.28 acres Class I, situated at Mouza : Nachangaon, Tahsil : Deoli, District : Wardha was

bequeathed by one Shri Panibai Krishnagopalji Gandhara on 2nd July 1954 by way of registered Will in favour of the plaintiff trust for public purpose and after the death of Panibai in the year 1976, the above referred property devolved upon the plaintiff trust with absolute right, title and interest. During re-measurement and consolidation proceedings, the said property was given Survey No. 388 and the four rooms therein were given as Plot No.1635-A and 1636, whereas, rest of the land given Plot No.1637. The area of Plot No.1637 includes also Plot No.1639. On finding of an encroachment over the suit land, the suit was filed, which was decreed by the learned trial Court after considering and appreciating oral as well as documentary evidence vide judgment and decree dated 28/04/2009 passed in Special Civil Suit No. 212 of 2004.

4. The defendant, feeling aggrieved by the said judgment and decree, filed Regular Civil Appeal No.128 of 2009 which came to be allowed and thereby the judgment and decree passed by the trial Court in respect of Plot No.1639 came to be set aside. The

said judgment and decree dated 17/07/2012 is under challenge in the present appeal.

5. I have heard Shri Dharmadhikari, learned counsel appearing for the appellant(s). None for the respondents, though served.

6. This Court on 12/06/2017 framed following substantial question of law :

“Whether the reversal of the decree by the appellate Court with regard to plot No.1639 on the ground that the original defendant had perfected his title by adverse possession and that the suit for recovery of possession was barred by limitation is based on material available on record?”

7. Shri Dharmadhikari, learned counsel for the appellants has drawn attention of this Court to the written statement of the defendant, more particularly paragraph No.5 of the written statement, wherein, the defendant has denied ownership and possession of the plaintiff as regards the plot bearing No.1639, Sheet No.12, area 66.50 Sq.Mts. Then it is pointed out that on one

hand the defendant has denied the ownership and possession of the plaintiff and on the other hand the defendant is claiming that they have become owners by way of adverse possession. It is submitted that the learned trial Court, while considering and answering the issue framed as regards the limitation, has held that in the light of denial of title of the plaintiff, the defendant cannot be said to be hostile against the real owner and accordingly, it was held that the suit was well within limitation. It is further pointed out that the learned trial Court, while holding that the suit was barred by limitation in respect of the claim made as regards Plot No.1639. The learned lower Appellate Court has not considered and discussed the aspect or the case of the defendant that the plaintiff trust is not owner of the said plot. Therefore, it is submitted that the learned lower appellate Court has committed an error in holding that the suit was barred by limitation. For this purpose, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Uttam Chand ..vs.. Nathu Ram*¹.

1 (2020)11 SCC 263

8. To consider the contention of the learned counsel for the appellants, I have gone through the record and also perused the judgments of both the Courts below and the judgment cited by the learned counsel for the appellants.

9. After going through the record, it is revealed that in written statement in para No.5 the defendant has denied the ownership of the plaintiff in the following words:

“It is specifically denied being false that plaintiff trust owns and possesses plot bearing no.1639”

10. The learned trial Court while answering the issue of limitation has observed in following terms:

“The ratio laid down in the above cited case laws and the observations of the Hon’ble Lord-ship applying with the facts of the preset case in hand is definitely helpful, hence, I respectfully relied on it. After considering it, even though the possession of the defendant over the suit property can be a long possession but in the light of denial of the title of the plaintiff which the plaintiff trust already succeeded to established it, but the defendant failed to produce sufficient evidence to show that Panibai was never owner of the suit property, the possession of the defendant can not be said to be hostile against the real owner i.e. the plaintiff trust. The learned counsel

Shri Guru also placed his reliance on, 2007 (6) Mh.L.J., 336 P.T. Munichikkanna vs Revamma, wherein it is held that:

“Adverse possession – Onus of proof – The pleas on title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced – Once a party proves its title the onus of proof would be on the other party to prove claims of title by adverse possession.”

From the observations of the Hon’ble their Lordships in the above cited case law it is clear that mere long possession is not enough to hold adverse possession and hence I respectfully relied on it. After considering it, only because of long possession it cannot be said that the suit is not within limitation. Hence, the submission of learned counsel Shri Dhruv in respect of Arts. 64 and 65 of the Limitation Act are also not believable and hence not accepted. ...”

11. However, while reversing the said finding of the learned trial Court, the discussion as made by the learned lower appellate Court is in paragraph No.20, which is reproduced as under:

“20. I see absolutely no force and substance in the submission of learned Adv. Shri Guru for respondent. It is crystal clear from the plaint, so also the testimony of PW 1 Bansilal and other material on record that this construction occupying plot no. 1639, area 66.50 sq. mtrs is an old one and the said land was in exclusive

possession and use of the appellant from 1986 itself. The appellant however started to encroach upon the area of plot no. 1637 owned by respondent-Trust in 2002. The respondent, therefore, approached the court with the aforesaid suit. At the behest of respondent-plaintiff Trust, Commissioner was appointed to measure the said encroachment. Shri R.S.Padole from the office of TILR measured the said land as per the writ served on him and the submitted the map at Exh.100 showing therein the encroached portion of survey no. 1637 by blue colour, it measures 3.80 mtr x 4 mtr = 15.20 sq. mtrs. It discerns from whole of the evidence that so far as the encroachment of the appellant over plot no. 1639 is concerned, that is right from 1986, however, the disputed construction in plot no. 1637 occupying 15.20 sq. mtrs land, he started in 2001 or 2002. After this encroachment the plaintiff- Trust rushed to the court with the aforesaid suit. The encroachment of appellant is thus on plot No. 1639 and 15.20 sq. mtrs of plot no. 1637. As observed above, the appellant has perfected his title over plot no. 1639 area 66.50 sq. mtrs by adverse possession. However, he failed to establish that the area 15.20 sq. mtrs of plot no. 1637 shown by blue colour in map Exh. 100 as a portion encroached upon by appellant, is in his possession for a period of more than 12 years. Hence, Art. 65 of the Limitation Act which speaks for 12 years limitation to institute the suit for possession would attract with respect to plot no. 1639, but not with respect to blue colour encroached portion of plot no. 1637. Accordingly the suit for recovery of possession of plot no. 1639 area 66.50 sq. mtrs was barred by

limitation. The suit was however tenable only with respect to the aforesaid encroached portion of plot no. 1637”

12. Thus, there is no dispute that the defendant has denied the ownership and possession of the plaintiff over Plot No.1639 and that was the basis for holding that the learned trial Court has perfected the title by way of adverse possession.

13. The Hon’ble Supreme Court of India in *Uttam Chand* (supra) after considering the various judgments has concluded in paragraph No.16 of the said judgment, which read thus:

“16. In the present case, the defendants have not admitted the vesting of the suit property with the Managing Officer and the factum of its transfer in favour of the plaintiff. The defendants have denied the title not only of the Managing Officer but also of the plaintiff. The plea of the defendants is one of continuous possession but there is no plea that such possession was hostile to the true owner of the suit property. The evidence of the defendants is that of continuous possession. Some of the receipts pertain to 1963 but possession since November 1963 till the filing of the suit will not ripen into title as the defendants never admitted the appellant-plaintiff to be the owner or that the land ever vested with the Managing Officer. In view of the judgments referred to above, we find that the findings recorded by the High Court that defendants have

perfected their title by adverse possession are not legally sustainable. Consequently, the judgment and decree passed by the High Court is set aside the suit is decreed. The appeal is allowed.”

14. In the teeth of the above referred well settled principles of law, I am of the considered view that the trial Court has rightly considered the fact of denial of title of the plaintiff by the defendant while holding that in view of the denial of title of the plaintiff by the defendant it cannot be held that the defendant has perfected his title on the basis of adverse possession. However, without considering the fact of denial of title and possession of the plaintiff by the defendant, the lower appellate Court has reversed the finding and further held that the appellant/ defendant has perfected his title over Plot No.1639 by adverse possession and held that the suit was time barred as per Article 65 of Schedule-I of the Limitation Act.

15. In view of the well settled principles of law, the said finding recorded by the learned lower appellate Court is erroneous and liable to be set aside.

16. Accordingly, I have answered the Substantial Question of Law in the above terms and pass the following order:

- i) The appeal is allowed.
- ii) The judgment and decree dated 17/07/2012 passed by Principal District Judge, Wardha in Regular Civil Appeal No.120 of 2009 is hereby set aside and the judgment and decree dated 28/04/2009 passed by 3rd Joint Civil Judge Senior Division, Wardha in Special Civil Suit No. 212 of 2004 is hereby confirmed.

The second appeal is **disposed of** accordingly. No order as to costs.

(ANIL S. KILOR, J)

RRaut..

Digitally signed
by
SACHINDANAND
K NAIR
Date: 2021.12.21
17:23:39 +0530