

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

**SECOND APPEAL NO. 266 OF 1992
WITH CA/1175/1997 IN SA/266/1992**

Sortabai w/o Puna Chavan
died Through her legal representatives : ... **Original plaintiff.**

- 1) Ukha s/o Puna Chavan,
Age 58 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.
- 2) Devidas s/o Puna Chavan,
Age 54 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.
- 3) Chabibai w/o Ganpat Rathod,
Age 73 years, Occ. Household,
R/o. At Chandikawadi Post Patanadevi,
Tq. Chalisgaon, Dist. Jalgaon.
- 4) Babibai w/o Damu Rathod,
Age 65 years, Occ. Household,
R/o. At Post Amba Tanda, Tq. Kannad,
Dist. Aurangabad.

...Appellants

VERSUS

- 1) Soma s/o Gobru Rathod
died his legal representatives : ...**Original Defendant.**
- 1/1) Pandit s/o Soma Rathod,
Age 60 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.
- 1/2) Raju s/o Soma Rathod,
Age 55 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.
- 1/3) Subhash s/o Soma Rathod,
Age 50 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,

Dist. Aurangabad.

1/4) Hari s/o Soma Rathod,
Age 40 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.

2) Uda s/o Gobru Rathod
died his legal representatives :

2/1) Babu s/o Uda Rathod,
Age 65 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.

2/2) Bhilas s/o Uda Rathod,
Age 55 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.

2/3) Ramesh s/o Uda Rathod,
Age 40 years, Occ. Agriculture,
R/o. Amba Tanda, Tq. Kannad,
Dist. Aurangabad.

... Respondents.

(Respondents No. 1 & 2 are
the original defendants)

...

Advocate for the Appellants : Mr. K. M. Nagarkar.

Advocate for the Respondent Nos. 1/1 to 1/4 : Mr. B.V. Thombre.

Advocate for the Respondent Nos. 2/1 to 2/3 : Mr. S. M. Gunjal.

CORAM : MANGESH S. PATIL, J.

DATE : 08.03.2022.

JUDGMENT :

This is a second appeal by the plaintiff Sortabai whose suit for possession on the basis of title was decreed by the trial court which judgment was set aside and reversed by the lower appellate court by the judgment and order under challenge thereby dismissing the suit.

2. The original respondents Soma and Uda were the defendants. The

second appeal is now being contested by the legal representatives of the plaintiff and defendants.

3. Sortabai filed the suit with a brief assertion that the suit property which is bearing Gat No. 40 was originally owned by her father Mohan Umla. She being the only heir, after his demise she was entitled to inherit it. Since Mohan was ill and she was still a minor, he had simply allowed Gobru Rama and Mangu Kalu to cultivate the property and look after this father and minor daughter duo. After demise of Mohan initially Mangu and Gobru shown their willingness to return the property but she allowed them to continue cultivation even after her marriage. Each Mangu and Gobru were cultivating half portion of the land to the extent of 1-H 73 Are respectively. Mangu subsequently returned the possession of his 1-H 73-Are and a mutation entry No. 2 was effected on 14.10.1978. When she raised similar demand with Gobru he did not oblige her and continued to enjoy the possession. After death of Gobru defendants Soma and Uda who are his sons continued to enjoy possession and refused to deliver it back when she demanded it on 01.05.1984. Hence the suit.

4. Defendants Soma and Uda initially contested the suit denying every averment in the plaint. However, they admitted that Sortabai was the only legal heir of Mohan. They contended that the suit property was the ancestral property of the family. They did not dispute about Mangu having returned possession of half of the land but contended that Gobru was the owner of the remaining half.

5. On such pleadings issues were framed, hearing was conducted and the suit was decreed. The decree was challenged by defendants Soma and Uda before the lower appellate court which partly allowed the appeal. Quashed and set aside the judgment and decree and remanded the suit for decision afresh permitting the parties to amend their pleadings including a leave to the defendants Soma and Uda to take a plea of adverse possession.

6. After such remand, plaintiff Sortabai did not carry out any amendment in the plaint. However, defendants Soma and Uda inserted the plea of having become owners by adverse possession, in case it was held that she was owner of the property. Additional issue regarding adverse possession was framed. They led additional evidence but she did not. The trial court once again decreed the suit refuting the plea of adverse possession. Once again they challenged the judgment and decree before the lower court. Their appeal has been allowed and the suit has been dismissed by the judgment under challenge.

7. The second appeal was admitted on 10.06.1992 mentioning that the grounds No. II, III, IX, XII and XVI were the substantial questions of law, which read thus :

“II) That having held that the respondents have taken the defence of adverse possession, the Additional learned District Judge, should have realized that the title and ownership of the appellant stands proved and admitted. It is an illegality thereafter, to hold and decide that the appellant does not have the title of ownership over that area of land in dispute.

III) That, the learned Additional District Judge, committed illegality in brushing aside the admission of the respondents on oath that the father of the appellant was the owner of the land in dispute. The learned Additional District Judge, should have realized that the admissions given on oath in a contested suit binds that person. But even this well laid down position has been overlooked by the learned Additional District Judge, Aurangabad. It is an illegality.

IX) Respondents father having entered in permissive possession of the land in dispute, the learned Additional District Judge, should have held that the title of the appellant

and that of her father to the land in dispute continues and remains intact and unimpaired.

XII) It is an illegality committed by the learned Additional District Judge, when he observed that there are no admission made by the respondents about the title of appellant to the land in dispute. The learned Civil Judge, Junior Division, Kannad, when originally decided the case has held that there are such admissions. When the matter was brought up in appeal by Regular Civil Appeal No. 233/1989 it is held in terms that there are such admissions. After remand the learned Joint Civil Judge, J.D. Taluka Kannad, again held and decided that there are such admissions.

XVI) That the case mainly rests upon the reliability of witnesses and upon appreciation of oral evidence. In view of this peculiar situation the Honorable learned Additional District Judge, Aurangabad, while deciding R.C.A. No. 224/1991 should have realized that originally when suit R.C.S. No. 84/1984 was decided by the trial court it pointedly held that the witnesses for the present appellant are reliable and trustworthy. The evidence for the present respondents is not trustworthy. Moreover, after remand also the trial court Judge again held that the present appellant and her witnesses are trustworthy and not the evidence for the present respondents. As such the Hon'ble learned Additional District Judge, Aurangabad transgressed the limits of powers granted under Section 96 of C.P.C. in this respect. It is an illegality."

8. I have heard the arguments of both the sides and perused the record. The lower appellate court has allowed the appeal by recording a finding about plaintiff Sortabai having failed to prove her title and simultaneously

and interestingly enough, holding about the defendants Soma and Uda having perfected their title by way of adverse possession. *Ex facie*, such findings are clearly incompatible and contradictory. I would turn to each of them a bit later. Suffice for the purpose to observe that the lower appellate court was surely unmindful of the very concept of adverse possession and the well known principles *nec vi nec calm nec precario*. The very basis for a plea of adverse possession presupposes that the person putting forth such a plea admits the title of the other side. If the lower appellate court was to conclude that the defendants Soma and Uda had perfected their title by principle of adverse possession, it was imperative for it to have concluded that plaintiff Sortabai was having title to the suit property. Therefore, recording of such inconsistent finding clearly demonstrates utter lack of understanding of the principle of adverse possession.

9. Now taking up the issue regarding title and the claim for possession based on it in juxtaposition to the plea of adverse possession, as has been cursorily mentioned herein above, initially, the defendants Soma and Uda had not raised the plea of adverse possession which they were allowed to add when the matter was remanded by the lower appellate court. It is thereafter the written statement was amended and even Soma recorded his additional testimony. Conspicuously, in his earlier deposition he specifically admitted in the examination in chief itself that the suit property was originally owned by Mohan, the father of plaintiff Sortabai. He then stated that after death of Mohan his father Gobru and Mangu entered into possession of half share each. Half of the portion was returned to her due to the intervention of Panchas for her maintenance from the share that was in possession of Mangu. In his additional examination in chief he did not add anything more except that he was the owner of the suit property.

10. If such is the stand of the defendants Soma and Uda, it cannot be said that he was coming with a fair admission of plaintiff Sortabai being the owner of the suit property. In the absence of which, their hostile animus was

conspicuously absent. In one breath this witness was admitting that Mohan was the original owner but in another he was denying the fact. Since this was the reason given by the trial court for refuting the plea of adverse possession, one can easily conclude that it was indeed an unassailable conclusion which was not squarely met by the lower appellate court while reversing it. The lower appellate court concludes on the basis of the evidence discussed herein above, and rightly so, that the defendants Soma and Uda were admitting the title of the plaintiff Sortabai since they were putting up plea of adverse possession. It then proceeded to examine if necessary ingredients for setting up such a plea were made out, which in a way was putting at naught the earlier observations whereby it had reached a conclusion that she did not hold any title to the suit property.

11. Interestingly, the lower appellate court has proceeded to conclude that all the necessary ingredients were made out and the suit was barred by limitation which observations were sought to be made out without even discussing the oral testimony of defendant Soma (D.W. 1), by merely observing that even in the absence of the oral testimony on behalf of defendants Soma and Uda, the ingredients could be made out from the other evidence, documentary and orally. If one bears in mind that hostility is a mental condition of a man which is one of the main ingredients for constituting adverse possession, the emphasis ought to have been on the oral testimony of defendant Soma. In his examination in chief he never sought to disclose that he was possessing necessary animus to disclose hostility. He had not uttered that he was having sufficient animus to hold the possession adversely to the appellant Sortabai. The lower appellate court has grossly erred in not noticing such absence of mental condition of defendant Soma (D.W. 1) and simply jumped to the conclusion that this ingredient could be made out from other evidence. Howsoever indolent plaintiff Sortabai was, her inaction could not have been sufficient to disclose the intention of defendant Soma to hold possession adversely.

12. The lower appellate court therefore has grossly erred in appreciating all the facts, circumstances and evidence on the record in the proper perspective. The whole approach of the lower appellate court is like putting a cart before the horse. It has proceeded to scrutinize the evidence to demonstrate as to how plaintiff Sortabai has failed to establish her title and after recording a negative finding to the point No. 1 in respect of the title has proceeded to scrutinize the evidence in respect of point No. 2 regarding plea of adverse possession and has recorded an affirmative finding to it.

13. There was ample evidence on the record demonstrating, firstly, that plaintiff Sortabai's father Mohan was the original owner of the suit property and the defendants' predecessor Gobru and one Mangu were merely given permissive possession for the reason that Mohan was ill and to maintain her and subsequently half of the land was returned to her by Mangu which was evidenced by an old mutation entry No. 2 (Exhibit 24). Defendant Soma (D.W. 1) admitted title of Mohan to the suit property during his testimony. The reasoning given by the trial court was clearly sound. The lower appellate court has without any cogent and convincing reason has laboured in reaching a different conclusion which does not borne out from correct appreciation of the evidence. It has given unnecessary importance to some portions of the pleadings in the plaint in spite of being alive to the fact that the pleadings in the mufassil have to be interpreted liberally. Interestingly, it has tried to deviate from this trite principle for an untenable reason that the principle was archaic or old one and insinuates that being an old one it was not to be followed.

14. The observations and the conclusions of the lower appellate court are clearly perverse, arbitrary and capricious and not sufficient enough to dislodge the conclusions and the reasonings given by the trial court. I, therefore, answer all the aforementioned substantial questions in favour of the appellant and allow the appeal.

15. The second appeal is allowed. The impugned judgment and order of the lower appellate court is quashed and set aside and the one passed by the trial court is restored. The cost in cause.

16. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

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