

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

WRIT PETITION NO.1351 OF 2020

1. Dr. Om-Prakash son of Shankarrao
Sajjanwar, Aged about 63 years,
Occupation: Medical Practitioner.
2. Dinkar son of Shankarrao Sajjanwar,
Aged about 65 years,
Occupation: Service.

Both R/o Nikalas Mandir road,
Itwari, Road.
(Original Defendants On R.A.)

..... **PETITIONERS**

...V E R S U S...

Bhaurao s/o Chintaman Armarkar,
Aged about 72 years,
Occupation: Business,
R/o Plot No. 1405, New Nandanwan
Nagpur.

..... **RESPONDENT**

Mr. S. P. Kshirsagar, Advocate for Petitioners.
Mr. Onkar Ghare, Advocate for Respondent.

CORAM: **ROHIT B. DEO, J.**
DATE: **23rd MARCH, 2022.**

ORAL JUDGMENT:

Heard Mr. S. P. Kshirsagar, the learned counsel for the
petitioners and Mr. Onkar Ghare, the learned counsel for the
respondent.

2. The petitioners are the defendants in Special Civil Suit 3568/2001 instituted by the respondent – plaintiff seeking decree of possession and permanent injunction qua the suit property which is described in paragraph 1 of the suit plaint as western portion admeasuring 25.03 square meters of the Municipal House 819 (new) 19 (old) situated in Ward 36, Mouza Nagpur.

3. It would not be necessary to narrate the minute details. Suffice it to state, that the plaintiff claims to be the owner of the suit property having purchased the same from Smt. Mangala Rangbal vide registered sale-deed dated 07.12.1993. The plaint averment is, that while the defendants were the owners of the western side portion of the suit property, vide registered sale-deed dated 14.09.1993, the defendants sold the said portion to Smt. Mangala Rangbal, with the result that the defendants do not have share or interest in the suit property.

4. The defendants in the written statement submitted that the plaintiff is not entitled to any right in the suit property. The defendants denied having sold their share to Smt. Mangala Rangbal. However, the defendants did not deny the execution of the sale-deed. Rather, the defendants contended that since

Smt. Mangala Rangbal did not pay the balance consideration of Rs.9000/- (Rupees Nine Thousand), the sale is not complete. The defendants denied the title of the plaintiff. The defendants specifically submitted that since Smt. Mangala Rangbal did not acquire title under the sale-deed executed by the defendants, she could not have transferred title to the plaintiff. The defendants claimed to be the owners of the suit property, and on such premise, contended that the suit must be dismissed.

5. The defendants preferred an application under Order VI Rule 17 of the Code of Civil Procedure (Code) seeking amendment of the written statement, seeking to incorporate the plea of perfection of title by adverse possession. The plaintiff opposed the prayer seeking amendment of the written statement, *inter alia* contending that the only attempt is to prolong the litigation.

6. The learned trial Judge rejected the application seeking amendment of the written statement vide order dated 18.01.2020 *inter alia* observing that the suit is fixed for argument and judgment and that a new defence of adverse possession is sought to be introduced.

7. The defendants sought review of the order dated 18.01.2020. One of the grounds was that contrary to the observation of the trial Judge, the suit was not fixed for argument and judgment and that the evidence of the defendants is yet to be recorded. The defendants then submitted that the application seeking incorporation of the defence on the basis of adverse possession is moved in view of the decision in Second Appeal 5/2009.

8. The learned trial Judge rejected the application seeking review by an elaborate order dated 12.02.2020. The ground that the stage of the suit is incorrectly mentioned in the order under review is dealt with thus:

5] The first contention of Ld. Advocate for defendant is that it is wrongly observed while rejecting the application for amendment that the matter is for final arguments. According to him the matter was for cross examination of the plaintiff in view of order below Exh.110 whereby permission to cross examine has been granted subject to costs.

6] It appears that earlier plaintiff lead evidence and no cross order was passed and set aside. Plaintiff also filed evidence close pursis at Exh.90 on 28.06.2013. No cross examination order was for the second time passed on 12.02.2015. Application to set aside order is allowed on 09.02.2016. A review application

Exh.114 against imposition of costs is filed by defendant on 25.02.2016 and same is rejected on 07.06.2016. The costs thereafter appear to have been paid on 02.07.2016. However, no cross examination appears to have been conducted. It appears that unwarranted applications making complaints against Advocate for plaintiff are filed in the mean time at Exh.116, 119 which are also rejected with costs as found to be filed to cause mere delay. It appears from the Roznama that case was listed for defence evidence since 24.01.2019. Evidence of defendant is closed on 28.03.2019 and matter was listed for arguments and further for judgment on 20.06.2019.

7] Thereafter application for permission to cross examination and setting aside evidence close order is filed at Exh.126. Application is partly allowed only for setting aside evidence closed order subject to costs on 23.07.2019. Pursuant to application at Exh.128 costs are reduced on 09.08.2019.

8] The application for stay U/sec.10 of CPC at Exh. 131 is filed subsequently at the stage of defence evidence, on 17.08.2019 and allowed. It appears that the earlier suit in second appeal 5/2009 is finally disposed off by Hon'ble Bombay High Court on 11.11.2019. However, defendant did not conduct cross examination even thereafter on 20.11.2019. The Roznama to the effect for plaintiff's cross is erroneous. The application for amendment is filed by defendant on 07.12.2019. From the record of the proceeding it is obvious that the application for amendment is not rejected at the stage of cross examination of plaintiff as contended by defendant. The suit at one stage was for arguments and judgments and the observations in order below Exh.134 are not wrongful.

9. The learned trial Judge then noted the submission of the defendants that the amended provisions of Order VI Rule 17 of the Code would not apply, since the suit is instituted in 1997 (suit is re-numbered in the year 2001). The learned trial Judge held that the application deserves to be rejected even on the touchstone of the unamended provisions of Order VI Rule 17 of the Code. The submission that the amendment was necessary in view of the decision in Second Appeal 5/2009 is rejected on the premise that the observations in the judgment of the High Court do not furnish a cause of action, that the defendants did know every fact touching title and possession, and having not taken the plea of adverse possession, such plea could not be incorporated in the written statement at the stage of final argument.

10. The defendants are aggrieved by the refusal of the learned trial Judge to permit amendment to the written statement and are invoking writ and supervisory jurisdiction.

11. The learned counsel for the defendants Mr. S.P. Kshirsagar would submit that the learned trial Judge committed a serious error in not permitting the defendants to raise the plea of perfection of title by adverse possession. Mr. Kshirsagar would

submit that such plea was sought to be incorporated in view of the decision of the High Court in Second Appeal 5/2009. Mr. Kshirsagar would submit that the defendants are entitled to take inconsistent pleas.

12. In rebuttal, the learned counsel for the plaintiff Mr. Ghare would submit, that apart from the fact that the proposed amendment is not *bona fide* and the only attempt is to ensure that the litigation is protracted, the defendants cannot be permitted to incorporate plea of adverse possession.

13. Both the learned counsel rely on certain decisions to buttress the respective submissions, which decisions shall be considered, to the extent relevant and necessary.

14. Mr. Kshirsagar would rely on *Prithi Pal Singh and another v. Amrik Singh and others 2014(1) Mh.L.J. 610* to buttress the submission that a new ground can be incorporated in defence particularly since no new relief is sought. Mr. Kshirsagar then pressed in service the decision of the Supreme Court in *Ram Niranjan Kajaria v. Sheo Prakash Kajaria and others 2016(3) Mh.L.J. 172* which articulates that an admission made in the

written statement can be clarified or explained. Reliance is then placed on *Chakreshwari Construction Pvt. Ltd. v. Manohar Lal 2017(5) Mh.L.J. 195* which articulates that if the amendment proposed is *bona fide*, relevant and necessary for deciding the rights of the parties, permission to amend the pleadings can be granted at any stage of the proceedings.

15. Mr. Ghare relies on certain observations in *Ravinder Kaur Grewal and others v. Manjit Kaur and others (2019) 8 SCC 729* to buttress the submission that neither long possession nor illegal possession as trespasser would qualify for adverse possession. The said decision explains the concept of adverse possession and the essential conditions which must be established to claim relief. Mr. Ghare would then rely in *Arundhati Mishra (Smt.) v. Sri Ram Charitra Pandey (1994) 2 SCC 29* which articulates that the defendant in title suit who asserts himself to be the real owner and who denies the title of the plaintiff cannot be permitted to raise the additional plea of adverse possession by amending the written statement. The relevant observations in the said decision reads thus:

4. The question in this case is whether the plea of adverse possession sought to be set up by

the respondent could be permitted to be raised. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. It is his own case that he came into possession of the suit house in his own right and remained in possession as an owner. The appellant is only benamidar. Therefore, his plea is based on his own title. He never denounced his title nor admitted the title of the appellant. He never renounced his character as an owner asserting adverse possession openly to the knowledge of the appellant and the appellant's acquiescence to it. Thereafter, he remained in open and peaceful possession and enjoyment to the knowledge of the appellant without acknowledging/or acquiescing the right, title and interest of the appellant. The plea of adverse possession, though available to the respondent, was never raised by him. Only on receipt of the first notice he denied title of the appellant and made it known to him for the first time through the reply notice got issued by him. Even then the plea of adverse possession was not raised in the written statement. No explanation for the belated plea was given. Even assuming that the reply dated March 15, 1971 constitutes assertion of adverse possession, the limitation would start running against the appellant only from March 15, 1971 and not earlier. The suit was filed in 1978 within 12 years. Under these circumstances, the High Court is not justified in permitting the respondent to raise the plea of adverse possession. It is made clear that we are not expressing any opinion on merits. The judgment of the High Court is set aside and the matter is remitted to the High Court for disposal on merits according to law. The appeal is allowed but without costs.

Mr. Kshirsagar and Mr. Ghare, and having given due consideration to the record and reasons recorded by the learned trial Judge, I have no hesitation in holding that the proposed amendment is rightly rejected.

17. I have noted the conduct of the defendants which is culled out in the orders impugned, and in my considered view the proposed amendment is not *bona fide* and the only attempt appears to be to protract the litigation. I am further satisfied that the dismissal of Second Appeal 5/2009 has no relevance whatsoever. Second Appeal 5/2009 has its genesis in a suit instituted by the defendants in the present matter against the plaintiff seeking permanent injunction. The suit was decreed and the present defendants were held to be in settled possession and therefore, entitled to injunctive relief. The said decree was challenged in Regular Civil Appeal 33/2000 which appeal was allowed. The substantial question of law which was framed by the High Court was whether the findings recorded by the first appellate court on the issue of title to the suit property are sustainable in law. The High Court held that the suit for injunction simpliciter was not maintainable and that the question of title could not have been adjudicated.

It is difficult to appreciate the submission of Mr. Kshirsagar that it was in view of the decision of the High Court that the plea of adverse possession was taken. *Au contraire*, what can be understood from the facts culled out in the decision of the High Court is that the defendants had all along claimed to be the owners of the suit property.

18. The defendants are certainly entitled to take inconsistent pleas. However, mutually destructive or exclusive pleas stand on a different pedestal. A person who has set a title in himself cannot be permitted to alternatively plea perfection of title by adverse possession. The concept of adverse possession pre-supposes that the claimant accepts the title of the adversary. Adverse possession cannot begin to operate until the claimant renounces title and accepts the title of the adversary. In the factual matrix the defendants have all along claimed to be the owners of the property and have denied the title of the plaintiff. In this view of the matter, the learned trial Judge did not commit any error in refusing to permit amendment to the written statement at the fag end of the trial, to incorporate plea of adverse possession.

19. I see no error in the order impugned. The petition is dismissed.

20. The learned trial Judge shall decide the suit as expeditiously as possible and in any event within the next sixty days.

JUDGE

NSN