

Varsha

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO. 328 OF 1992**

1. Gundu Sandu Gummaidu		
2. Mainabai w/o Moti Kawal	...	Appellants
Vs.		
1. Asaram Bhagwan Chandwade	...	Respondent

Shri M.M. Patil (Beedkar)- Advocate for Appellants.

**CORAM : GAURI GODSE, J.
RESERVED ON : 2nd MARCH 2023
PRONOUNCED ON : 3rd MAY 2023**

JUDGMENT:

1. This Second Appeal is preferred by the original Plaintiff for challenging the concurrent Judgments and Decrees passed by both Courts, thereby dismissing the Suit filed for possession of the suit property. The suit was filed based on the title of the suit property by relying upon a registered gift deed executed by the original owner in favour of the father of the Appellants. The Respondent is claiming to be in possession of the suit property as owner by claiming to be the heir of the original owner. In the alternative, the Respondent has also raised a plea of perfecting title by way of adverse possession.

2. The Second Appeal was admitted on 28th July 1992 by passing the following Order:-

“ Heard.

This involves a substantial question of law regarding title by adverse possession which is a mixed question of law and facts.

Admit. Notice.”

3. The Appellants filed suit for possession based on the title. It was contended that one Tulsiram Kaluram Chandwade was the original owner of the suit property. The original owner was the maternal uncle of the father of the Appellants. Tulsiram treated the father of the Appellants as his son, and he was residing with the said Tulsiram. The Appellants contended that Tulsiram executed a registered gift deed dated 30th December 1959 in favour of the Appellants' father and had also delivered the possession of the suit property to the father of the Appellants. Tulsiram died issue-less on or about 17th December 1962. Thus, it was contended by the Appellants that his father had become the exclusive owner and was in possession of the suit property till 1969 when the father of Respondent illegally occupied the suit property.

4. The Respondent appeared in the Suit and filed written statement, and denied the suit claim. The Respondent specifically denied that the Appellants' father was at any time in possession of the suit property. The Respondent further contended that Tulsiram was in possession of the suit property till his death, and thereafter, the father of the Respondent was in possession of the suit property as owner and heir of the deceased Tulsiram. Respondent denied the validity of the gift deed and contended that it was never acted upon. It was contended that the suit was bad for non-joinder of other heirs of the father of the Appellants. Thus, the Respondent claimed to be the owner of the suit property and specifically denied the title of the Appellants. The Respondent relied upon an Order dated 6th April 1964 passed by the Special District Magistrate in proceedings under section 145 of the Code of Criminal Procedure to support his contention that he was in long-standing possession of the suit property. The Respondent, in the alternative, claimed to have perfected title by way of

adverse possession.

5. The learned trial Judge dismissed the suit. The learned trial Judge held that the Appellants proved that there was a valid gift deed, and the title of the suit property was transferred to the father of the Appellants and, after his death, to the Appellants. The learned trial Judge held that the Respondent failed to prove the plea of adverse possession. The learned Trial Judge held that the suit was based on title. Thus unless Respondent proved that he was in continuous adverse possession by admitting title of Appellants, he cannot claim any title by way of adverse possession. The learned Trial Judge, however, dismissed the Suit for non-joinder of all the heirs of the Appellant's father as necessary parties.

6. Being aggrieved by the dismissal of the suit, the Appellants preferred an appeal. The First Appellate Court framed points for consideration as to whether the suit is bad for non-joinder of necessary parties, whether the Respondent has proved that he has become the owner of the suit property by adverse possession and whether the Appellants are entitled to seek possession of the suit property. The First Appellate Court confirmed the findings of the Trial Court and accepted the title of the Appellants to the suit property. However, the First Appellate Court held that the Respondent had perfected the title of the suit property by adverse possession. The First Appellate Court did not accept the finding of the Trial Court on the point of non-joinder of necessary parties. However, based on the findings recorded with respect to the title of the Appellants and Respondent perfecting the title by adverse possession, the First Appellate Court dismissed the Appeal filed by the Appellants and confirmed the dismissal of the Suit by the Trial Court.

7. I have heard the learned counsel for the Appellants. None appeared for the Respondent. The learned counsel for the Appellants made the following submissions; findings recorded by the first Appellate Court on adverse possession are perverse. The Trial Court had rightly appreciated the evidence on record and held that the Respondent failed to prove that he had perfected the title by way of adverse possession. Respondent had pleaded possession on the strength of ownership, being the heir of Tulsiram. Therefore, the first Appellate Court could not have presumed possession on the basis of revenue record. When Respondent is disputing Appellant's title and is asserting his own title, there is no question of Respondent perfecting his title by adverse possession. Respondent has never given up his plea of ownership, claiming to be heir of Tulsiram. Therefore, Respondent cannot claim title by way of adverse possession. The first Appellate Court had accepted the findings recorded by the Trial Court on the validity of the gift deed. Thus, the Appellant's ownership of the suit property was accepted. As the Respondent had failed to prove ownership by adverse possession, he had no right to retain possession of the suit property.

8. The learned Counsel for the Appellants relied upon the decisions of the Hon'ble Supreme Court in the cases of *Uttam Chand Vs Nathu Ram* ¹, *Dagadabai Vs Abbas@ Gulab Rustum Pinjari*,² and *Hemaji Waghaji Jat Vs Bhikhabhai Khengarbhai Harijan & Others*,³ in support of his submissions that the Respondent is not entitled to retain possession by claiming adverse possession when he has claimed to be in possession on the basis of his title claiming to be heir of the original owner Tulsiram.

1 2020 (11) SCC 263

2 2017 (13) SCC 705

3 2009 (16) SCC 517

9. I have considered the submissions made on behalf of the Appellants. Perused the record of the Second Appeal as well as the paper book of the Regular Civil Appeal No. 33 of 1986. The question of law to be considered in the present case is whether the Respondent has perfected title by way of adverse possession.

10. Learned Trial Judge held that the suit would come under Article 65 as it was based on title and thus was within limitation. The learned trial Judge held that the Respondent failed to prove the plea of adverse possession. However, the learned Trial Judge held that all the heirs of the father of the Appellants were entitled to a share in the suit property, and thus suit property takes the character of joint family property, and thus all the heirs were necessary parties to the suit. Thus, the learned trial Judge dismissed the Suit for non-joinder of all the heirs of the Appellant's father as necessary parties.

11. First Appellate Court has held that the original gift deed was not produced on record. However, as per the certified copy of the Judgment passed by Tahsildar on 29th June 1965, it appeared that the original gift deed was produced on record before the Tahsildar. The Appellants have produced on record the certified copy of the gift deed. The First Appellate Court further held that mere contention that the gift deed has never been acted upon cannot be held to be a ground for holding that there was no gift deed executed. Thus, the first appellate Court confirmed the findings of the Trial Court and accepted the title of the Appellants to the suit property.

12. The First Appellate Court held that the revenue record at exhibits 55 to 59 showed that the Appellant's father was not in possession of the suit property.

First Appellate Court held that the Appellants had not challenged the revenue entries till the year 1970 and that entries on record right from the year 1961-62 till the year 1977-78 were unchallenged and, therefore, the same would have presumptive value. Thus, the Appellate Court has held that the suit property was in the possession of Respondent and his predecessor right from the year 1962-63. The First Appellate Court, therefore, held that the adverse possession started on the date on which the proceeding for correcting the revenue record was initiated by the predecessor in title of the Appellants, and the same was opposed by Respondent somewhere in the year 1964. The First Appellate Court held that the evidence on record showed that the Respondent and his predecessor in title were in continuous possession for a period of twenty years. It, thus, held that since the Appellants and their predecessor in title had challenged the revenue entries and in view of the Order dated 6th April 1964 in proceedings under section 145 of the Code of Criminal Procedure, they had knowledge that the Respondent and his predecessor in title were holding the suit property to their hostile title, the possession of Respondent was adverse to the title of the true owner. Thus, the first Appellate Court held that the Respondent had perfected the title of the suit property by adverse possession.

13. The first appellate Court held that it was the case of the Appellants that they were dispossessed in the year 1969, hence, the cause of action arose in the year 1969. The learned Judge held that in the year 1969, Appellants had knowledge of the Respondent's intention to hold the property by adverse possession. However, the suit was not filed within a period of 12 years from the year 1969. Thus, the Appellant's right of ownership in respect of the suit property was extinguished.

14. Though the First Appellate Court in paragraph 11 has accepted the findings recorded by the Trial Court of accepting the title of the Appellants on the basis of the gift deed, in paragraph 25, it held that Appellants failed to prove that they acquired the possession of the suit property pursuant to the gifted deed. The First Appellate Court did not accept the finding of the Trial Court on the point of non-joinder of necessary parties. However, based on the findings recorded with respect to the title of the Appellants and Respondent perfecting the title by adverse possession, the First Appellate Court dismissed the Appeal filed by the Appellants and confirmed the dismissal of the Suit by the Trial Court.

15. The first Appellate Court has completely ignored that once the Respondent is disputing the Appellants' title and is asserting his own title, there is no question of he being in adverse possession. The pleading that the Respondent became the owner being the heir of Tulsiram is neither proved nor given up by the Respondent. The Respondent did not elect one of the two alternate pleas. He always disputed the title of the Appellants. Thus, in view of the fact that the Respondent persisted with the plea that he has become the owner of the suit property, he is disentitled to seek title on the basis of adverse possession. The First Appellate Court has recorded inconsistent findings. On one hand, the First Appellate Court had accepted the title of the Appellants on the basis of the gift deed, and on the other hand, the learned Judge, by relying on the revenue record, erroneously held that the Appellants had not acquired possession on the basis of the gift deed. Delivery of possession is one of the essential ingredients of a valid gift deed. Thus, acceptance of the validity of the gift deed in favour of the Appellants impliedly proves that the Appellants had acquired possession. The suit is filed for possession based on the title. The

cause of action pleaded is illegal dispossession of the Appellants at the hands of the Respondent. Thus, mere long-standing possession on the basis of revenue record is not enough to hold that the Respondent has perfected title by adverse possession.

16. On the plain reading of the written statement, it is clear that the Respondent claimed to be in possession on the basis of ownership over the suit property and has disputed the title of the Appellants and has also disputed that they were at any time in possession of the suit property and resultantly also disputed that Appellants were dispossessed as claimed by them. The Respondent has thus raised mutually inconsistent pleas on the title of the Appellants and claim of perfection of title by way of adverse possession. Thus, it was incumbent on the part of the defendant to renounce one of the pleas at the time of hearing. The Hon'ble Supreme Court, in the case of *Uttam Chand*, has held that plea of adverse possession requires all the three classic requirements to co-exist at the same time, namely adequate in continuity, adequate in publicity and adverse to a competitor, in denial of his title and knowledge. In the facts of the said case plea of the defendant was of continuous possession, but there was no plea that such possession was hostile to the true owner. The Hon'ble Supreme Court in the said case thus decreed the suit for possession based on the title.

17. Thus, in view of the settled principles of law on the plea of adverse possession, it was incumbent on the part of the Respondent to plead that his possession was hostile to the true owner. However, the Respondent has denied the title of the Appellants over the suit property. When a person is trying to

defeat the right of the true owner, it is obligatory on the part of that person to clearly plead and share all the facts necessary to prove his plea of adverse possession.

18. The Respondent has raised mutually inconsistent pleas by denying the title of the Appellants and also claiming title by adverse possession. The Respondent has not given up the plea of denial of the Appellant's title. Thus, there was no question of the Respondent perfecting title by adverse possession. Thus, the decisions in the cases of *Uttam Chand, Dagadabai* and *Hemaji Waghaji Jat* relied upon by the learned Advocate for the Appellants squarely apply to the facts of the present case.

19. Both the Courts have accepted the validity of the gift deed in favour of the predecessor in title of the Appellants. The Respondent has not claimed any independent right of ownership. The claim of ownership of the Respondent is on the basis of being the heir of the original owner – Tulsiram. Once the validity of the gift deed executed by Tulsiram in favour of the predecessor in title of the Appellants is accepted by both the Courts, there is no question of Respondent acquiring title being the heir of Tulsiram. I have already held that the Respondent has not made out any case to claim the title by way of adverse possession. Thus, the period of limitation has not begun for filing the suit based on the title. Hence suit filed by the Appellants is clearly within the period of limitation in view of Article 65 of the Limitation Act. Hence, the Respondent has no right to retain possession of the suit property. The Appellants, having proved title to the suit property, are entitled to a decree of possession. The question of law framed is only with respect to the title by way of adverse possession.

20. Thus, for the reasons stated above, the Second Appeal is allowed by passing following order:

- i) Judgment and decree dated 8th January 1992 passed by the 3rd Additional District Judge, Jalna in Regular Civil Suit No. 33 of 1986 as well as judgment and decree dated 21st January 1986 passed by the Joint Civil Judge, Junior Division, Jalna in Regular Civil Suit No. 397 of 1982 is quashed and set aside.
- ii) The Regular Civil Suit No. 397 of 1982 is decreed.
- iii) Respondent/Defendant is directed to hand over possession of the suit property to the Appellants/Plaintiffs within a period of three months from today.
- iv) Necessary inquiry for mesne profits to be conducted under Rule 12 Order XX of the Code of Civil Procedure, 1908, from the date of institution of the suit till the delivery of possession to the Appellants.
- v) There will be no order as to costs.
- vi) Second Appeal is allowed in the above terms.
- vii) Decree to be drawn up accordingly.

[GAURI GODSE, J.]