

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

SECOND APPEAL NO. 812 OF 2016

Nandkishor Chaganrao Khardekar
and others

.. Appellants

Versus

Laleetprasad Balaprasad Jaiswal

.. Respondent

Mr. A. M. Gholap, Advocate h/f Mr. R. J. Nirmal, Advocate for the
Appellants.

Mr. S. P. Shah, Advocate for Respondent.

CORAM : KISHORE C. SANT, J.

DATED : 11th SEPTEMBER, 2023.

P. C. :-

. This second appeal arises out of the judgment and order passed by the learned District Judge 2, Jalna, dated 19.09.2016 dismissing the appeal of the original defendant/heirs of defendant No. 4. The suit of the plaintiff was decreed directing the defendants to deliver the possession of the suit premises to the plaintiff within three months from the date of order and granted liberty to initiate eviction proceedings under the Maharashtra Rent Control Act against defendant No. 2 – present appellant No. 2. The defendant Nos. 3 to 6 were further directed to pay Rs. 18,000/- each and defendant No. 7 was directed to pay Rs. 54,000/- to the plaintiff towards past mesne profit.

The facts in short are as below :

2. For the purpose of convenience the parties are referred to as per their original status in the suit. The plaintiff brought the suit against the defendants with a case that he was owner and was in possession of godown No. 9 in CTS No. 263, Market Yard, Jalna as the ancestral property. He became absolute owner in family partition. Being the owner of the property he entered into an agreement to sale with defendant No. 1 of the southern side half portion of the godown. The consideration was Rs. 30,000/-. Towards earnest amount he accepted an amount of Rs. 10,000/- and executed an agreement to sale. The parties had agreed that the plaintiff would execute sale deed in favour of defendant No. 1 on 24.12.1974 by accepting the balance consideration. The sale deed came to be executed on the said date, however, the plaintiff thereafter realized that defendant No. 1 has played fraud by mentioning the entire godown property in the sale deed. On realizing this he filed special civil suit bearing No. 67/1975 in the Court of Civil Judge Senior Division, Aurangabad. The same came to be dismissed. First appeal therefore came to be filed bearing First Appeal No. 87/1980 in the High Court at Bombay. The High Court while allowing the appeal held that the sale deed to the extent of half portion of northern side is inoperative and does not affect the

rights of the plaintiff. The defendant No. 2 at the time of sale deed was in possession of northern side in the capacity as a tenant. It is alleged that, during the pendency of the proceedings defendant No. 1 in collusion with defendant No. 2 took possession of northern side of godown that was in possession of defendant No. 2 and constructed shops and leased out those shops to defendant Nos. 2 and 7.

3. After the decree was passed by the High Court in the first appeal the plaintiff requested defendant No. 1 for possession, however, the defendant refused to hand over the possession. The plaintiff was therefore required to issue legal notice to defendants asking for delivery of possession by notice dated 11.09.1990. Only defendant No. 2 replied the notice. The plaintiff therefore filed suit for recovery of possession with past mesne profit of Rs. 1,44,000/- and for an enquiry in future mesne profit. Defendant No. 1 – Nandkishore admitted previous ownership of the plaintiff. His case is that there was an agreement to sale the entire godown No. 9. He obtained possession in the month of December 1981 by entering into compromise in RCS No. 327/1979. It is the defence of adverse possession stating that his possession is since 1981 and the suit is filed in the year 1996. His case is that the plaintiff cannot recover the possession unless the tenancy is determined. The defendant No. 2 was in possession of some portion of

the suit premises and he cannot be evicted without following due procedure of law under the Maharashtra Rent Control Act. It is further defence that the defendant No. 2 was evicted during the pendency of earlier appeal before the High Court. It was necessary for the plaintiff to amend the suit accordingly and now the same is barred by limitation. The defendant No. 2 has put in possession and therefore the same is required to be protected under Section 53-A of the Transfer of Property Act and prayed for dismissal of the suit.

4. The case of defendant No. 4 – Kamlakar is that the sale deed was in fact for the entire godown. He is in possession over the suit premises since December 1981 and thus he has perfected his title by way of adverse possession and the suit is barred by limitation and also under Order 2 Rule 2 of the Code of Civil Procedure. He also contended that the plaintiff ought to have approached the rent controller for eviction under the provisions of the Hyderabad Rent Control Act.

5. The defendant Nos. 3, 5, 6 and 7 also filed written statement. Their case is that they are the tenants over the suit premises and hence they cannot be evicted by the Civil Court. They also claimed that they have perfected the title by way of adverse possession.

6. On the basis of these pleadings the following issues were framed by the learned Trial Court.

Sr. No.	ISSUES	FINDINGS
1	Whether the plaintiff proves that defendant No. 1 got executed sale deed of entire godown No. 9 from the plaintiff by practicing fraud and misrepresentation on the plaintiff ?	Yes
2	Whether the plaintiff proves that the northern portion of godown in respect of which the sale deed has been cancelled in appeal by the Honourable High Court was in possession of the defendant No. 2 as plaintiff's tenant ?	Yes
3	Whether the plaintiff proves that defendant No. 1 made unauthorised construction of the shops on the northern portion of godown by illegally dispossessing defendant No. 2 from the said portion in his possession as tenant ?	Yes
4	Whether the plaintiff proves that all the defendants are in illegal possession of the suit property ?	Yes
5	Whether the plaintiff proves that defendant No. 1 is recovering the rent from defendants No. 2 to 7 illegally ?	Yes
6	Whether the defendant No. 1 proves that he became owner of the suit property by adverse possession as claimed ?	No
7	Whether the plaintiff proves his title over the suit property ?	Yes
8	Whether the suit is within limitation ?	Yes
9	Whether this Court has jurisdiction to try this suit ?	Yes
10	Whether the suit is maintainable ?	Yes
11	Whether the defendant No. 4 proves that he is in legal possession over the suit property ?	No

12	Whether the plaintiff is entitled to recover possession of the suit property from defendants as claimed ?	Yes
13	Whether the plaintiff is entitled for decree of mesne profit as claimed ?	Yes
14	To what reliefs the plaintiff is entitled ?	As per final order
15	What decree, order and costs ?	---Do---

7. The learned Trial Judge held that the sale deed was executed by playing fraud and misrepresentation for the entire godown that the defendant No. 2 is in possession in the capacity as a tenant. It is further held that the defendant No. 1 has made unauthorized construction of the shops on the northern portion of godown by illegally dispossessing defendant No. 2 from the said portion and that all the defendants are illegally in possession of the suit property. That the defendant No. 1 is getting rent from remaining defendants illegally. As regards the defendant it is held that the defendant failed to prove that he became owner of adverse possession. It is the plaintiff who has title over the suit property. About the limitation it is held that in view of Article 65 the suit is within limitation and passed the decree.

8. In the appeal the defendants failed to prove their case and therefore, they are before this Court. It is argued that in view of Article 65 of the Limitation Act since the suit was based on title the limitation

was only of years. The cause of action arose in the year 1981 when the tenant gave possession to defendant No. 1 during the pendency of the first appeal.

9. Learned advocate Mr. Gholap for the appellants submits that all the ingredients required to prove the adverse possession are present as it was to the knowledge of the plaintiff. It was continuous and hostile as against the plaintiff. In the suit there is no prayer for possession. There is no amendment carried out in the earlier suit or in the appeal after defendant No. 2 handed over possession to defendant No. 1. The suit was brought on 27.12.1995 and thus was not within limitation. He submits that, the findings of both the Courts below are perverse since both the Courts have taken cause of action in the year 1988 that is when the first appeal came to be decided by this Court. He submits that, there is in fact tacit admission given by defendant No. 1 in paragraph No. 5.

10. Learned advocate for respondent Mr. S. P. Shah opposed the admission of second appeal submitting that there is nothing to show that the plaintiff had knowledge of possession of defendant No. 1 on the northern side of the godown. There is no pleading in the written statement of the defendants that the plaintiff had knowledge in the year 1981 about the hostile possession of the defendants till the appeal

in the previous suit was decided. He submits that, the development on the property took place only in the year 1985 and taking even that date as a date of cause of action the suit was within limitation. Since there is no case on merits to the defendants a plea of admission is taken. He submits that admittedly the agreement to sale was only in respect of half portion on the southern side. There was no question of executing the sale deed for the entire property. The recital in the sale deed in respect of entire property thus is only by way of playing fraud. When the sale deed is outcome of fraud the entire sale deed is vitiated. There is specific finding recorded by the Court that the sale deed is outcome of fraud and thus the transaction is void. Even the case of defendant No. 1 is taken that it is defendant No. 2 who put him in possession is also by way of fraud as the defendant No. 2 was in occupation only as a tenant and without knowledge or direction from the true owner he could not have handed over the possession to defendant No. 1. He submits that, in 1988 the sale deed is partly set aside. Since the defendant is claiming possession in the capacity as owner he cannot claim adverse possession for taking plea of adverse possession. First, the defendant has to accept the ownership of the plaintiff over the property. Thus, the case of hostile possession is not proved. For want of such admission he submits that both the Courts have rightly held in favour of the plaintiff. He further submits that, in favour of defendant

there was sale deed of the property and thus there is no question of his possession being hostile. About the knowledge he submits that the plaintiff got the knowledge only on decision of first appeal and he prays for dismissal of appeal.

11. In rejoinder, learned advocate Mr. Gholap for the appellants submits that, the cause of action relates back to the date of institution of suit. Thus the case that the plaintiff got the cause of action is not correct as the suit is not for ownership. He submits that, the plaintiff ought to have entered into witness box as things were within his personal knowledge. As he did not enter into witness box no admission could be secured from the plaintiff. He submits that even there is no question of permissible possession as the sale deed is executed and thus the possession is totally hostile.

12. Considering the above submissions, this Court has to consider only the questions. The questions are thus, whether the suit is within limitation and secondly, whether the possession of the defendant can be said to be adverse to the plaintiff.

13. Learned advocate for the plaintiff relied upon following judgments.

(i) **L. N. Ashwathama and another Vs. P. Prakash**

reported in (2009) 13 SCC 229.

(ii) Annasaheb Babusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil reported in (1995) 2 SCC 543.

(iii) Gurbux Singh Vs. Bhooralal reported in (1964) 7 SCR 831.

(iv) Inacio Martins (Deceased through LRs.) Vs. Narayan Hari Naik and others reported in (1993) 3 SCC 123.

(v) Dagadabai (dead) by legal representatives Vs. Abbas Alias Gulab Rustum Pinjari reported in (2017) 13 SCC 705.

14. In the case of L. N. Ashwathama and another (supra), a specific question No. (iii) was considered i.e. *whether the defendant has perfected his title by adverse possession and therefore the suit is barred by limitation*. It is held that the pleas based on title and adverse possession are mutually inconsistent and latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period of prescription will not commence. In that case the defendant do not contend that he entered the possession under or through the plaintiffs, but it was his case that

he came in possession as a tenant and later became owner by purchasing the plot from one Gowramma and in the alternative it was contended that said Gowramma was not having title and his claim of title was rejected, his possession was hostile to the true owner. The Court held that though there was considerable force in the contention of defendant that was subject to establishing adverse possession for more than twelve years. It is clearly held that the possession should not be independent hostile and adverse possession to the knowledge of transferor or his successor in title or interest and the true owner as acquiesced to his illegal possession for twelve years.

15. In the case of **Annasaheb Babusaheb Patil and others** (supra) the Hon'ble Apex Court considered Article 65 of the Limitation Act and the plea of adverse possession. It is held that the person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. It is further held that, one who holds possession on behalf of another, does not by mere denial of that other's title when his possession adverse to get the benefit of limitation.

16. In the case of **Gurbux Singh** (supra) the Hon'ble Supreme Court in paragraph No. 6 has considered the plea of bar under Order 2 Rule 2(3) of the Code of Civil procedure.

17. The cases of Inacio Martins (Deceased through LRs.) (supra) and Dagadabai (dead) by legal representatives (supra) are in respect of Order 2 Rule 2(3). Since the plaintiff has not argued much on the said aspect are not necessary to consider the same.

18. Since in this case the main issue revolves around plea of adverse possession by the defendant from the admitted/established facts it is clear that, an agreement to sale was in respect of the half portion of godown. However, the sale deed was executed in respect of entire godown. In suit by the plaintiff there is clear finding recorded that the sale deed was an outcome of a fraud. The said finding attained finality as no further challenge is raised to the said judgment. As regards, the possession of defendant No. 1 it is clear that the defendant No. 2 was a tenant on half portion of godown. Without any lawful authority and without knowledge of the plaintiff he handed over possession to defendant No. 1. There is no question of plaintiff getting knowledge of such possession. Further that, at no point of time defendant ever asserted his possession in the capacity as the owner. Thus, there is no element of animosity proved by the defendant. As regards the adverse possession the plea thus cannot be accepted.

19. Defendant's alternative plea that the plaintiff cannot recover the possession unless the tenancy is determined also does not hold any

matter in the facts of the case. It is thus not necessary for the plaintiff to approach the rent controller for eviction. Even the plea about the protection under Section 53A of the Transfer of Property Act is also not tenable.

20. Considering the ratio in the judgment of L. N. Ashwathama and another (supra) the defendant has failed to prove that his possession was hostile to the knowledge of true owner. On one hand the defendant also claimed that he has purchased the entire godown and therefore he is the owner. However, that case is totally negated by the High Court by setting aside the sale deed to that extent. Thus, the main ingredient of hostility is absent in this case and therefore, the theory of adverse possession cannot be accepted. As regards Article 65 of the Limitation Act is concerned, this Court finds that, both the Courts have rightly held that the suit was within limitation as the plaintiff got the knowledge only after his appeal came to be decided in the year 1988. This Court does not find any error committed by any of the Courts i.e. by the learned Trial Court as well as by the learned Appellate Court.

21. Thus, this Court finds that, no case is made out giving rise to substantial question of law. Since there is no substantial question of

law arises in the matter the appeal deserves to be dismissed.
Therefore, the appeal is dismissed.

(KISHORE C. SANT, J.)

P.S.B.