

Dusane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.157 OF 2014
WITH
CIVIL APPLICATION NO.386 OF 2014
WITH
CIVIL APPLICATION NO.1771 OF 2017**

Shri. Sunil Shantaram Raut ...Appellant

V/s.

Shantaram Ganpat Raut & Anr. ...Respondents

Mr. Sachin Gite for Appellant/Applicant.

Mr. Kishor K. Malpathak for Respondent Nos. 1/1,
1/3 and 1/4.

**CORAM: MADHAV J. JAMDAR, J.
DATE: 18th July 2023**

P.C.:

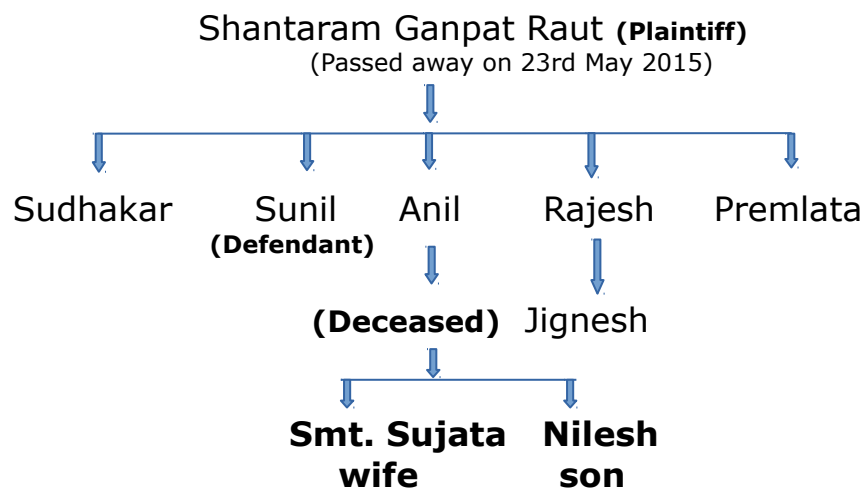
1. Heard Mr. Gite, learned Counsel appearing for the Appellant and Mr. Malpathak, learned Counsel appearing for the Respondents.

2. Mr. Gite, submitted that following substantial questions of law arise in this Second Appeal:

- (i) Whether the finding of both the Courts that the Defendant has failed to prove adverse possession is in accordance with the evidence on record ?
- (ii) As Plaintiff has not stepped into the witness box, adverse inference is required to be drawn against the Plaintiff ?

- (iii) Whether the Suit can be decreed on the basis of evidence of Anil Raut i.e. another son of the Plaintiff and whether his evidence can be relied on for decreeing the suit, when the individual interest of said Anil Raut is adverse to the interest of the Plaintiff?
- (iv) Whether the decree passed by both the Courts can be sustained when the original Plaintiff passed away on **23rd May 2015** during the pendency of this Second Appeal?

3. Before considering the substantial questions of law raised by Mr. Gite, the learned Counsel appearing for the Appellant, certain factual aspects are required to be taken into consideration. The genealogy of the family is as follows:



4. It is the case of the Plaintiff that another flat was acquired by him in 1978 and as the said building has become dilapidated, the suit flat i.e. Flat No. **E-87**, 8th Floor, Shreerang Unit No.25, Sahakari Gruh Nirman Sanstha Ltd, Building No.H-2, Opp. Brindaban Bus Stop, Thane-400601, admeasuring 475 sq. feet

(hereinafter referred to as "**the suit flat**") was allotted to him. Thus, in effect the suit flat was acquired by the Plaintiff in or about 1978.

5. It is the contention of the Appellant-Defendant No.1 in the Written Statement that he is the owner of the suit flat as he has also contributed for purchase of the said flat. It is undisputed position that the defendant was in possession of the suit property since 25 years prior to the filing of the suit. A perusal of record shows that in 1978, the Appellant was hardly of 18 years old. In any case, in this Second Appeal the Appellant has not challenged the ownership of the Plaintiff and the concurrent findings recorded by both the Courts that the Plaintiff has proved his ownership.

6. On 22nd December 2008, father-Shantaram at the age of 78 years filed Special Civil Suit No. 924 of 2008 through his constituted attorney i.e. Anil Shantaram Raut against the Defendant No.1 i.e. Sunil Shantaram Raut and said Shreerang Unit No.25 Sahakari Gruh Nirman Sanstha Ltd. seeking possession of the said flat. The learned Trial Court, by judgment and decree dated 20th July 2011 decreed the suit. The Defendant No.1 i.e. the present appellant challenged the same by filing Civil Appeal No. 207 of 2012 in the learned District Court at Thane and the same was dismissed by the learned First

Appellate Court by judgment and decree dated 20th August 2013. Both the Courts have concurrently held that the suit flat is owned by the original Plaintiff i. e. father and that Defendant No.1 has failed to prove that he has become the owner of the suit flat by way of adverse possession.

7. In the light of above position, at the outset, it is to be noted that in the evidence affidavit dated 23rd June 2011, the Defendant No. 1 has stated his age as 52 years. Therefore, it is clear that when the earlier flat in lieu of which suit flat has been allotted to the Plaintiff was purchased in the year 1978, the Defendant was hardly of 18 years old. Apart from that, both the Courts have taken into consideration the cross-examination of the Defendant No. 1 who has accepted that the payment was made by the father for purchase of said flat and that he has no documentary proof that he has purchased the said flat. Therefore, the said concurrent finding recorded by both the Courts that the Plaintiff has failed to prove that he is the owner of suit premises is in accordance with the evidence on record. It is significant to note that the Appellant has not challenged the said finding in this Second Appeal and in fact accepted the same.

8. Thus, it is significant to note that the Plaintiff has proved his ownership of the suit flat and the Defendant is claiming ownership by adverse possession. It is the main contention of

Defendant No. 1 that he is staying in the said flat for last 25 years before filing of the said suit and he is maintaining the said flat and contributing for the same and therefore, he has become the owner by adverse possession. However, the concept of adverse possession is something larger than the occupation of suit flat for 25 years and maintenance of the same. The same is explained by the Supreme Court in paragraph 60 in the decision between **Ravinder Kaur Grewal & Ors. vs. Manjit Kaur & Ors.**¹ The said paragraphs 60 reads as under:-

"60. The adverse possession requires all the **three classic requirements to co-exist at the same time**, namely, *nec vi* i.e. **adequate in continuity**, *nec clam* i.e., **adequate in publicity** and *nec precario* i.e. **adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. *Animus possidendi* under hostile colour of title is required.** Trespasser's long possession is not synonym with adverse possession.

(Emphasis added)

¹ (2019) 8 SCC 729

9. In view of above legal position regarding concept of adverse possession, it is necessary to see the case made out by the Defendant No.1 in his written statement dated 5th February 2009. The relevant portion of the written statement reads as under:-

i. The Defendant No.1 submits that the Defendant no.1 is residing separately from the Plaintiff and other brothers since more than 25 years and since then neither the Plaintiff nor other brother objected to use and occupy the Suit Premises or earlier one.

ii. The Defendant No.1 submits that it is vividly clear from the facts as aforesaid that the Defendant No.1 is residing in the said flat and earlier in flat no.E-123 as the owner thereof and by which the defendant no.1 paid cost of the construction of the incomplete work and installation of lifts and other works and the Plaintiff has never taken any pains to give the same and/or even to the enquire of the same, inspite of the fact that the plaintiff has given handsome amount to other sons for purchase of the property.

iii. This Defendant No.1 states that, no legal right is vested in the Plaintiff for declaration of ownership over the suit premises and possession of the suit premises. Since the Plaintiff has no legal

right to claim ownership and possession, there is no question of legal injury being caused to the Plaintiff in the matter.

10. Thus, it is clear that in the written statement the Defendant No.1 has never accepted the ownership of the Plaintiff and in fact contentions are raised claiming ownership. Therefore, there is no question of ownership by the adverse possession. For the adverse possession, it is important that the person claiming ownership by adverse possession should accept the ownership of the person against whom he is claiming ownership by adverse possession. A perusal of the entire written statement clearly shows that it is the claim of the Defendant No.1 that he is the owner of the suit flat and the said case is given up at the stage of the Second Appeal.

11. Both the Courts have concurrently held that the possession of the suit premises was given by the Plaintiff to Defendant No. 1 purely on gratuitous basis. Both the Courts have concurrently held that it is not established that the possession of Defendant No.1 over the suit premises was against the interest of the Plaintiff and to the knowledge of the Plaintiff and Defendant No. 1 has failed to establish specific dates from which his adverse possession has started. Both the Courts concurrently held that there is absolutely no evidence on record to show that at any

point of time Defendant No.1 has proved his title over the suit premises. The pleadings particularly contents of the written statement as well as the evidence on record do not show that the Appellant i.e. Defendant No.1 has established aforesaid all three requirements namely adequate in continuity, adequate in publicity and adverse to competitor, in denial of his title and his knowledge. Admittedly, the Defendant No.1 is in possession of the suit flat for last several years. However, the evidence on record do not show that other two requirements are proved. In fact, in the plaint nothing is mentioned when the alleged adverse possession of the Plaintiff has started. Mr. Gite, learned Counsel appearing for the Appellant has failed to point out anything on record to show that the said concurrent finding of both the Courts that the Appellant has failed to prove his claim of ownership by adverse possession is not in accordance with the evidence on record. Therefore, there is no substance in the first substantial question of law raised by Mr. Gite, that the finding that the Defendant No. 1 failed to prove adverse possession is not in accordance with the evidence on record.

12. The second substantial question of law raised by Mr. Gite, learned Counsel appearing for the Appellant that the Plaintiff has failed to enter into the witness box and therefore adverse inference is required to be drawn against him. In this behalf, it is

significant to note that when the suit was filed in the year 2008 the Plaintiff was 78 years old and the said suit was filed through his constituted attorney i.e. another son Anil Shantaram Raut. The affidavit of evidence of said Anil Raut was filed on 8th December 2010 i.e. when the age of the Plaintiff was 80 years old. The Affidavit of Evidence as well as cross-examination conducted by Advocate for Defendant No. 1 of said Anil Shantaram Raut clearly shows that he was personally aware of the facts of the case. Apart from this, it is admitted position that on the basis of evidence including documentary evidence on record and on the basis of cross-examination of the Defendant No.1, both the Courts have concurrently held that the Plaintiff is the owner of the suit property. Both the Courts have recorded said finding on the basis of documentary as well as oral evidence. In this Second Appeal, there is no challenge to the finding that the Plaintiff has proved his ownership. The contention that the Defendant No. 1 has become owner by adverse possession, is required to be proved by the Defendant No.1 and in fact by raising said contention the Defendant No.1 accepted the ownership of the Plaintiff. Therefore, there is no substance in the second substantial question of law raised by Mr. Gite that adverse inference is required to be drawn as the Plaintiff has not stepped into the witness box.

13. Third substantial question of law raised by the Appellant is that deposition of Anil Shantaram Raut cannot be relied on for decreeing the suit as said Anil Raut has got adverse personal interest against the Defendant No. 1. However, it is to be noted that the evidence of said Anil Raut is important *inter alia* to prove the ownership of the Plaintiff. Both the Courts have concurrently held on the basis of documentary and oral evidence and particularly the admissions of Defendant No. 1 in the cross-examination that the Plaintiff is the owner of the suit property. Hence, the Plaintiff has proved the ownership. It is for the Defendant No.1 to establish his right, title and interest. He has claimed adverse possession and as already discussed hereinabove both the Courts concurrently held that the Defendant No.1 has failed to prove the adverse possession. Therefore, there is no substance in the third substantial question of law raised by Mr. Gite.

14. The Fourth substantial question of law raised by Mr. Gite is that during the pendency of the Appeal, original Plaintiff has passed away and therefore the decree of eviction cannot be sustained. However, it is to be noted that Respondent No. 1(A) i.e. Sudhakar Shantaram Raut has filed affidavit dated 19th June 2023. By the said affidavit, registered Will dated 20th April 2012 of deceased-Shantaram Ganpat Raut has been brought on

record. By the said Will, the suit flat has been bequeathed in favour of Sudhakar Raut and Anil Raut.

15. It is significant to note that the said Will was executed at Thane and the suit flat is also situated at Thane. Therefore, said Will be effective immediately on the death of the Plaintiff and there is no necessity to obtain probate. As per Section 213 read with Section 57 of the Indian Succession Act, the Wills which are executed outside the territory of Mumbai and which are *inter alia* executed by Hindu and outside the local limits of ordinary original civil jurisdiction of the High Courts of Madras and Bombay, for such will probate is not required. Learned Counsel appearing for the Respondent has rightly relied on the judgment of the Supreme Court in the matter of **Clarence Pais and Others V. Union of India**². In the said case, it has been held that the effect of Section 213(2) of the Indian Succession Act is that the requirement of probate for the purpose of establishing the rights as an executor or legatee in a Court is made inapplicable *inter alia* in the case of a Will made by any Hindu which does not relate to immovable property situate within the territory of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of will executed within those territories. Thus, the Supreme Court has held that

² AIR 2001 Supreme Court 1151

no probate is required in the case of such wills. Admittedly, the Will in question is executed at Thane and suit property is also situated at Thane i.e. outside the ordinary civil jurisdiction of the High Court of Bombay. Therefore, there is no substance in the fourth substantial question of law raised by Mr. Gite.

16. Accordingly, the Second Appeal is dismissed however, with no order as to costs. In view of dismissal of the Second Appeal, nothing survives in the Civil Applications and the same are also dismissed.

(MADHAV J. JAMDAR, J.)

Note : Corrected as per speaking to minutes of order dtd. 12th October 2023 by showing corrections in bold on page 2 in paragraphs 2, 3 and 4.