



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

SECOND APPEAL NO.444 OF 2019

Appellant : Madhukar s/o Gulabrao Bondse,
 (Ori. Plaintiff Aged about 60 years, Occu : Service,
 on R.A. No.1) R/o House No.3633/23, Rameshwari, Nagpur.

– Versus –

Respondents : 1. Madhusudan s/o Gopalrao Sapkal,
 (Ori. Defendants Aged about Major, Occu. Service.
 on R.A.) 2. Pradip s/o Gopalrao Sapkal,
 Aged about major, Occu. Service.
 3. Suresh s/o Gopalrao Sapkal,
 Aged about major, Occu. Service.

All r/o Near Gandhi Statute, Ganja Jamuna Road,
 Gandhibagh, Nagpur.

 Mr. A.S. Deshpande, Advocate for the Appellant.
 Mr. A.V. Lokhande, Advocate for the Respondents.

CORAM : **M.W. CHANDWANI, J.**
RESERVED ON : **4th OCTOBER, 2024.**
PRONOUNCED ON : **2nd JANUARY, 2025.**

JUDGMENT :

The appeal is an exception to the judgment and decree passed by the learned District Judge, Nagpur in R.C.A. No.319/2016 thereby setting aside the judgment and decree of the trial Court dated 25/11/2016 passed in R.C.A. No.812/2012 and dismissing the suit of the appellant.

02. The facts of the case in nutshell are as under :

- I. One Jagannath Pailuji Gudatkar and Venubai Shrawanji Mendhe purchased Plot No.23, admeasuring area 4000 sq.ft. at Rameshwari, Mouza Babulkheda, Nagpur by registered sale-deed dated 09/01/1947. The appellant purchased the eastern house portion, admeasuring area 2000 sq.ft. of Plot No.23 from Venubai by registered sale-deed dated 09/11/1979. It is the case of the appellant that though he had purchased the half portion of Plot No.23, he was handed over possession of the entire plot of 4000 sq.ft. The appellant then constructed a house thereon in the year 1979. Since then, the appellant is in continuous peaceful possession over the entire suit plot without any interruption from anybody including Jagannath, the co-owner or any of his family members. Though, he had received a notice dated 22/05/1987 from defendant No.1-Smt. Kamal @ Shalinitai Sapkal to vacate the suit plot i.e. western half portion of Plot No.23, the appellant refused to vacate the plot. Again on 08/04/2005, respondent No.3, the son of the original defendant No.1 asked the appellant to vacate the suit plot. Apprehending dispossession, the appellant filed a suit for declaration that he acquired title over the suit plot

by virtue of his adverse possession and for permanent injunction restraining the respondents from disturbing his peaceful possession over the suit plot.

II. Original defendant No.1 and respondent No.3 herein resisted the claim of the appellant and came up with a case that the appellant had been given the possession of eastern portion and not the western portion of the suit plot. However, the appellant illegally encroached upon the remaining half portion i.e. the suit plot owned by the legal heir/nephew of deceased Jagannath and since then they are in possession of the suit plot by erecting a temporary structure thereon.

III. The trial Court after hearing the suit on merits, decreed the suit of the appellant. Feeling aggrieved with the decree, the respondents filed an appeal before the first appellate Court. After finding that hostile and notorious title against the appellant and thereafter continuous possession for twelve years has not been proved by the appellant, the first appellate Court relying on the case of Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another¹ held that the adverse possession cannot be made a sword but it can be used as a shield only as a defence in the suit

and, therefore, declaration of title by way of adverse possession cannot be sought by filing a suit. On this ground, the appellate Court reversed down the decree passed by the trial Court and dismissed the suit. Feeling aggrieved with the judgment and decree of the first appellate Court, the appellant is before this Court.

03. The substantial questions of law framed vide order dated 10/10/2019 in this appeal are reproduced here.

*(i) Whether the impugned judgment and order passed by the Appellate Court is sustainable in view of latest position of law enunciated by the Hon'ble Supreme Court in case of **Ravinder Kaur Grewal and others vs. Manjit Kaur and others**, reported in 2019 SCC OnLine SC 975, wherein it has been categorically held that the plea of adverse possession can be used by the plaintiff as a sword to claim title in immovable property?*

(ii) Whether the findings rendered by the Appellate Court while reversing the decree passed by the Trial Court on the question of adverse possession are perverse?

04. The first substantial question of law does not require deeper consideration in wake of the decision in the case of Ravinder Kaur (*supra*), wherein the Supreme Court in paragraphs 67 and 69 has held as under:

“67. We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.

69. Resultantly, we hold that decisions of Gurudwara Sahab v. Gram Panchayat Village Sirthala (supra) and decision relying on it in State of Uttarakhand v. Mandir Shri Lakshmi Siddh

Maharaj (supra) and Dharampal (dead) through LRs v. Punjab Wakf Board (supra) cannot be said to be laying down the law correctly, thus they are hereby overruled. We hold that plea of acquisition of title by adverse possession can be taken by plaintiff under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a plaintiff.”

05. In view of observation by the Supreme Court that the decision of Gurudwara Sahab (supra) does not lay down the law correctly, the finding of the appellate Court that the suit for declaration of title by adverse possession is not tenable, is required to be set aside.

06. Having found so, let us turn to the next substantial question, whether the findings rendered by the appellate Court while reversing the decree passed by the trial Court on the question of adverse possession are perverse. I have heard the learned Counsel appearing for both the parties.

07. Mr. A.S. Deshpande, learned Counsel appearing on behalf of the appellant submitted that the appellant is in possession of the suit plot i.e. half eastern portion of plot No. 23 from 09/11/1979. Though, the notice was sent by the mother of the respondents on 22/05/1987 asking the appellant to vacate the suit plot, which has been replied to by the appellant and, therefore, there is no interruption to the possession of the appellant from 1979 till filing

of the suit in the year 2005. It is submitted that even if the date of notice i.e. 22/05/1987 is considered, the appellant is in peaceful possession of the suit plot from 1987, even though respondent No.3 tried to disturb the possession over the suit plot by asking the appellant to vacate the plot in the year 2005, the period of twelve years was already completed in the year 1999. Therefore, the possession of the appellant on the portion of plot No.23 becomes adverse to the respondents. He submits that this aspect has not been considered by the first appellate Court while allowing the appeal of the respondents.

08. As against this, Mr. A.V. Lokhande, learned Counsel appearing on behalf of the respondents vehemently submitted that neither a specific date of possession nor the nature of possession has been mentioned in the plaint. According to him, the western portion of Plot No.23 is a vacant land, the possession of which has been taken by the respondents with the help of police in the year 2005. According to him, the tax on the half portion of the plot is being paid by the respondents. He further went on to submit that the appellant became a co-owner of Plot No.23 along with the present respondents and, therefore, the possession of a joint possessor/co-owner is not presumed to be adverse. According to him, the appellate Court was justified in reversing the decree of the trial Court and hence, seeks dismissal of the appeal.

09. The position with regard to adverse possession has been settled by long standing precedents in line. For establishing the actual adverse possession, three classic requirements must 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 for due diligence he would have known it. The most essential ingredient i.e. *animus possidendi* under hostile colour of title is required. Trespasser's long possession is not synonymous with adverse possession. A reference can be made to the recent precedent in the decision in Ravinder Kaur (supra).

10. Turning to the case in hand, I have gone through the plaint minutely. The plaint depicts that the appellant claims that he is in possession of the entire plot and is residing therein after construction of the suit house over there as an absolute and exclusive owner since the date of sale-deed i.e. 09/11/1979. It has been further specifically pleaded that since 09/11/1979, nobody apart from the appellant-plaintiff had any right or title on entire Plot No.23. The relevant paragraph is reproduced here.

“6. The plaintiff, therefore, respectfully submits that the plaintiff is in possession of the entire plot No.23 and he is residing therein after construction of his house over there as

an absolute and exclusive owner right since the date of execution and registration of the sale deed in favour of the plaintiff on 09/11/1979. It is also submitted that right since 09/11/1979, none other than the plaintiff had ever any right of title or possession over the entire Plot No.23 and muchless on the suit property. It is also submitted that since prior to purchase of the eastern half portion of plot No.23, by the plaintiff on 09/11/1979, one of the original joint owners namely Shri Jagannath Gudatkar had already expired, the vendor of the plaintiff had handed over and delivered the possession of the entire plot No.23 to the plaintiff on 09/11/1979 itself and whereof the plaintiff is residing as absolute and exclusive owner and in possession thereof. It may also be stated over here that since 09/11/1979, no any person ever claimed any right, title or interests in the suit property since to the knowledge of the plaintiff the said Shri Jagannath Gudatkar who expired before the execution and registration of the sale deed of the plaintiff on 09/11/1979, none of his legal heirs, if any, ever claimed any right, title or interest over the suit property. At this stage the plaintiff submits that the plaintiff is not aware about the identity or whereabouts of the legal heirs, if any, of the deceased Jagannath Gudatkar. Even otherwise the plaintiff submits that since the plaintiff is in absolute and exclusive possession of the suit property rights since 09/11/1979 as an absolute owner thereof, the plaintiff has acquired title to the suit property by adverse possession which is adverse to the interests of the original owner Shri Jagannath Gudatkar and his legal heirs, if any. It is also submitted that the acquisition of title over the suit property

by the plaintiff by virtue of the plaintiff's long and continuous and peaceful possession is adverse to that of the owner of the suit property and therefore, the plaintiff is entitled for declaration of his ownership over the suit property by adverse possession. It is also submitted that since 09/11/1979, the plaintiff is in absolute possession and he has also constructed a house on the entire Plot No.23 and is residing therein, without any interruption and interference of his ownership and possession."

11. Thus, by way of a specific declaration in the plaint, the appellant has pleaded that he is the owner of the suit plot from the date of the sale-deed. Thus, the foremost condition of *animus possidendi* under hostile colour of title is missing. The appellant did not admit the ownership of the respondents. For claiming adverse possession, a person, who is in possession, must accept the title of the owner of the property and thereafter he must show his hostility to the title of the owner of the suit property. Therefore, the first appellate Court has rightly held that there is no hostility by the appellant to the title of the respondents. Though, the finding recorded by the appellate Court that no declaration of title can be sought on the basis of adverse possession is not correct in view of the ratio laid down by the Supreme Court in the case of Ravinder Kaur (supra), the first appellate Court was right in holding that the foremost element of *animus possidendi* was missing and, accordingly, dismissed the suit of the appellant by allowing the appeal by the

respondents. Consequently, the appeal fails and it is dismissed with no order as to costs.

**sandesh*

(M.W. CHANDWANI, J.)