

(2010) 2 BomCR 216

Bombay High Court (Aurangabad Bench)

Case No: Second Appeal No. 85 of 1993

Ganpatrao Ramji Nagul
and Another

APPELLANT

Vs

Dattatrya Guru
Daulatgiri Maharaj and
Another

RESPONDENT

Date of Decision: Oct. 16, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 8
- Limitation Act, 1963 - Article 65
- Registration Act, 1908 - Section 17, 49
- Transfer of Property Act, 1882 - Section 123, 53A

Citation: (2010) 2 BomCR 216

Hon'ble Judges: Borde R.M., J

Bench: Single Bench

Advocate: A.G. Godhamgaonkar, for the Appellant; G.O. Wattamwar, h/f. S.G. Rudrawar, for the Respondent

Final Decision: Allowed

Judgement

Borde R.M., J.

This is an appeal by original plaintiffs raising challenge to the judgments delivered by both the courts below.

2. Plaintiffs instituted Regular Civil Suit No. 546/1981 claiming declaration of ownership and recovery of possession of plot situate at Chouphala, Nanded and further declaration that the registered sale-deed executed by defendant No. 2 in favour of defendant No. 1 on 27-12-1969 is null, void and ineffective as against the rights of the plaintiffs. Plaintiffs belong to Padmashali Samaj and claim themselves to be the active members of the Samaj It is claimed that the Mandal owns and administers Mahadev/Shiv and Ganpati

temple situate at Chauphala, Nanded. There is open plot adjoining the temple which belongs to the Samaj/community. The temple is in existence since 1949-1950. In 1958, defendant No. 2 came in contact with the active members of the community and he was called upon to serve the temple as "Poojari". Defendant No. 2 thereupon started residing at the temple and performing the functions of "Poojari". An area admeasuring 100" X 64" has been earmarked and gift deed came to be executed by the members of the community in favour of defendant No. 2 for looking after the property as well as the temple. Defendant No. 2 was performing his functions as "Poojari" for all the years preceding presentation of the suit, Plaintiffs came to know that defendant No. 2 has tendered an application seeking registration of the temple in his own name. The members of the community presented objection petition with the trust authority and resisted the application. It was also later on revealed that defendant No. 2 has sold out certain portion out of the plot in favour of defendant No. 1 by executing registered sale-deed on 27-12-1969. Infact defendant No. 2 has no right to alienate the property belonging to the community. Portion sold away by defendant No. 2 is numbered as house No. 9-3-106 and certain construction has been raised on the plot which has been alienated in favour of defendant No. 1. It is further stated in the plaint that the members of the community had served upon defendant No. 2 a notice of revocation of the gift deed on 27-6-1981. It is contended that the transaction effected by defendant No. 2 is illegal and does not bind the right, title and entitlement of the plaintiffs or the members of the community.

3. Contentions raised in the plaint have been controverted by defendant Nos. 1 and 2 in the written statement presented at Exh. 19. Defendants question entitlement of the plaintiffs to present the suit on behalf of the community. Defendant No. 2 has admitted that an area admeasuring 100" X 64" has been given to him by the members of the community and a gift deed to that effect has been executed on 28-10-1958. Defendant thus claims his entitlement to the property on the basis of gift deed. Defendant No. 2 contends that he has title over the property and is therefore justified in alienating certain portion out of the property to defendant No. 1 by executing registered sale-deed on 27-12-1969. Defendant No. 2 claims that he has every right in respect of suit plot and the property does not belong to the temple or the Padmashali Samaj. In additional written statement while stating additional facts in paragraph No. "C", it is stated that after donation of plot by the members of the community in favour of defendant No. 2, he started construction over the plot after securing permission from the municipal authority. Defendant No. 2 claims that he has transferred portion out of the suit plot in favour of defendant No. 1 by executing registered sale-deed. At the same time, defendants claim in paragraph Nos. "F" and "G" that defendants are in possession over the property since last more than 12 years and the nature of possession is adverse. It is claimed that defendant Nos. 1 and 2 are in possession since the date of execution of gift deed in their favour as owners. Their possession is continuous, open and to the knowledge of all the members of the community and without any interruption from anybody. Defendants as such claim adverse possession and contend that they have perfected their title by virtue of their continuous, open and adverse possession. Defendants as such pray of dismissal

of the suit.

4. After considering the pleadings raised by the parties, trial Court framed issues and after receiving evidence led by the parties, trial Court came to the conclusion that the plaintiffs have failed to substantiate their case and as such dismissed the suit. Judgment and decree passed by the trial Court was subjected to challenge at the instance of original plaintiffs in Regular Civil Appeal No. 90/1984 which came to be heard and disposed of by the 3rd Additional District Judge, Nanded who was pleased to dismiss the same on 20-8-1992.

5. I have heard arguments advanced by Mr. Godhamgaonkar, learned Counsel for the appellants and Mr. Wattamwar, Advocate holding for Mr. Rudrawar, learned Counsel for respondent No. 1.

6. Substantial questions of law that arise for consideration in the appeal are:

1. Whether the courts below were justified in recording findings in respect of adverse possession of the defendants and to hold that the defendants have perfected their title by virtue of adverse possession?

2. Whether the findings recorded by the first Appellate Court on point Nos. 2 and 3 are mutually contradictory and run contrary to each other?

3. Whether in a suit governed by Article 65 of the Limitation Act, plaintiff will succeed if he proves his title and it would be no longer necessary for him to prove that he was in possession within 12 years preceding filing of the suit and on the contrary it would be for the defendant to prove his title by adverse possession?

7. Some of the undisputed facts are:

Execution of gift deed in favour of defendant No. 2 by Choudhari and Panchas of the community has not been controverted. The date of execution of gift deed is 28-1-1958 and defendant No. 2 has assumed possession of the disputed plot in pursuance to execution of the gift deed. Execution of sale-deed by defendant No. 2 in favour of defendant No. 1 has also not been controverted. Defendant No. 2 has asserted his title to the property on the strength of the gift deed and has further claimed his entitlement to transfer the property as the owner in favour of defendant No. 1 by executing sale-deed in 1969. So far as competency of plaintiffs to present the suit is concerned, it has been recorded by both the courts below that the plaintiffs are competent to present the suit claiming relief of possession and declaration. It is not controverted that the plaintiffs are the members of Padmashali community.

After presentation of the suit, application at exh. 7 under Order I, Rule 8 of the CPC was presented by the plaintiffs seeking permission of the Court to proceed with the suit in representative capacity and the application has been allowed by the trial Court and

permission has been accorded to the plaintiffs to prosecute the suit in representative capacity. Thus, suit presented by the plaintiffs claiming relief of recovery of possession and declaration is maintainable and finding recorded in that respect has not been assailed in the second appeal also.

8. It has been urged by learned Counsel for the appellants that defendant No. 2 claims his entitlement to the property on the strength of a gift deed executed on 28-1-1958. Admittedly, gift deed is unregistered one. It is contended that no title has been vested in defendant No. 2 by virtue of unregistered gift deed executed by certain members of the community in 1958. Section 17 of the Registration Act, 1908 mandates that the instrument of gift of immovable property shall be registered one. Consequences of non-registration of the document required to be registered are stated in Section 49 of the Registration Act. Section 49 of the Registration Act reads thus:

49 Effect of non-registration of documents required to be registered-

No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)] to be registered shall

a affect any immovable property comprised therein, or

b confer any power to adopt, or

c be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property act, 1882 (4 of 1882), or as evidence of any collateral transaction not required to be effected by registered instrument.]

Thus, the document namely gift deed alleged to have executed on 28-1-1958 in favour of defendant No. 2 will have no effect on entitlement of the plaintiff or the members of the community in respect of the immovable property which is subject-matter of the unregistered gift deed and the said document would not invest in defendant No. 2 title in respect of immovable property. Section 123 of Transfer of Property Act also mandates that gift of immovable property must be effected by registered instrument signed by or on behalf of the doner and attested by at least two witnesses. Thus, by virtue of Section 17 of the Registration Act, unregistered instrument executed in favour of defendant No. 2 by the members of the community will not vest any title in him and, further more, the

document being not in consonance with Section 123 of the Transfer of Property Act, cannot be construed as evidence entitling defendant No. 2 to claim the property. Thus, by virtue of the unregistered instrument on which reliance is placed by defendant No. 2 claiming his entitlement in respect of the property, shall not have an effect of transfer of title in his favour. Title of the community in respect of the property in dispute therefore cannot be said to have been divested by virtue of the unregistered deed on which reliance is placed by defendant No. 2 for claiming his entitlement. Thus, it can be concluded that no title has been passed in favour of defendant No. 2 by virtue of unregistered instrument of gift which is in conflict with the provisions of Section 17 of the Registration Act and Section 123 of the Transfer of Property Act.

9. What is required to be proved by plaintiffs for claiming recovery of possession is their entitlement/title in respect of the property. It is admitted fact that the property belongs to the Padmashali Samaj and the suit is presented by the plaintiffs in representative capacity they being the members of the Padmashali Samaj. Thus, title of Padmashali Samaj to the property is not disputed and once the plaintiffs prove their title, the onus of proof would be on other side i.e. on the defendants to prove the claim of title by adverse possession. Defendants in the instant matter have claimed title by adverse possession. It would be thus essential to find out as to whether the defendants have established their title by virtue of adverse possession. Both the courts below have recorded finding that the defendants have proved their claim of title by adverse possession. However, finding recorded by the courts below is in conflict with the settled position of law and is also not in conformity with the pleadings and evidence placed on record by the defendants. Defendants have categorically stated in their written statement that defendant No. 2 has assumed possession of the property in pursuance to execution of the gift deed effected by members of the community on 28-10-1958. Defendant No. 2 has been put in possession in pursuance to execution of the gift deed. Thus, defendants have claimed their title on the strength of the unregistered gift deed and have also contended that they have been put in possession by the members of the community in pursuance to the gift deed executed in 1958. Thus, induction of the defendants by plaintiffs or members of the Samaj is by virtue of execution of the gift deed in 1958. In the same breath, defendants have also claimed in paragraph No. "G" of the additional written statement thus:

G The defendants 1 and 2 are in possession since the date of Dan patrak in favour of the defendant No. 2 and sale-deed in favour of defendant No. 1 by defendant No. 2 as owners. Their possession is continuous openly to the knowledge of all and without any interruption by any body is there on the suit plot. It is an adverse possession and completes the ownership by prescription.

Defendants thus claim themselves to be the owners of the property on the strength of the gift deed and at the same time, they are claiming their title by adverse possession from the date of their induction in possession in pursuance to execution of the gift deed. Pleadings raised in paragraph No. "G" of the additional written statement are mutually in conflict. Defendant in the instant matter is claiming title in himself on the strength of the

unregistered gift deed and at the same time is basing his claim adverse to the plaintiff on the basis of the same gift deed executed by members of the community. It is essential in a case where the plea of adverse possession is projected that the defendant has to admit the plea that someone else was the owner of the property. It has been observed in [Karnataka Board of Wakf Vs. Government of India and Others](#), thus;

A plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In [P. Periasami \(Dead\) by Lrs. Vs. P. Periathambi and Others](#), this Court ruled that:

Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

In [Mohan Lal \(Deceased\) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another](#), it is held thus:

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period his tide by prescription nec vi nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

Thus, in the instant matter, defendant No. 2 claims that he is put in possession in pursuance to execution of the gift deed in his favour by the members of the community in 1958 and has further claimed his title to the property on the basis of said unregistered gift deed. At the same time, defendant has claimed his adverse possession and claimed that he has been put in possession in pursuance to the gift deed and his possession is open to the knowledge of the members of the community. Both the pleas raised by defendant are mutually inconsistent and cannot be entertained. Defendant is claiming that he has been put in possession by the members of the community in 1958. Thus, induction of defendant over the property is with the consent of the community. It is not known as to from what point of time possession of the defendant became adverse to the real owner. Defendant has neither pleaded the date or period of commencement of his adverse possession nor has led any evidence to show that there was any animus or intention made known to the plaintiffs that the possession of the defendant is adverse to owner. Apart from the actual and continuous possession which are amongst other ingredients of

adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession. It is also necessary for the person who claims adverse possession to set up title hostile to the title of the true owner. Thus, the starting point of limitation has neither been pleaded nor has been proved by the defendants. It has been held by the Apex Court in the matter of [S.M. Karim Vs. Mst. Bibi Sakina](#), thus:

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

However, in the instant matter, defendants have not pleaded the starting point of limitation. They have claimed that their induction in possession by plaintiffs is in pursuance to execution of the gift deed and at the same time, they claim their possession adverse to the true owner from the date of their induction in possession. Defence raised by defendants in their written statement is mutually contradictory and thus, it cannot be said that the defendants have substantiated their case in respect of perfection of their title by virtue of adverse possession.

In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date, defendant's possession becomes adverse. [Vasantiben Prahladi Nayak and Others Vs. Somnath Muljibhai Nayak and Others](#), .

"Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has requisite animus the period for prescription does not commence. [Md. Mohammad Ali \(Dead\) by Lrs. Vs. Sri Jagadish Kalita and Others](#), .

This Court in case of [Bhimrao Dnyanoba Patil and Others Vs. State of Maharashtra and Others](#), relying upon the decisions of the Apex Court in the cases of [S.M. Karim Vs. Mst. Bibi Sakina](#), , [P. Lakshmi Reddy Vs. L. Lakshmi Reddy](#), and [Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others](#), has held as under:

The essential ingredients of adverse possession are actual and continuous possession along with necessary animus on the part of the person intending to perfect his title to the property by adverse possession. The possession of the property with the bona fide belief that the same belongs to him would disclose absence of necessary animus for perfecting the title by adverse possession in relation to such property. Unless the enjoyment of the property is accompanied by adverse animus, mere possession for a long period, even over a statutory period, would not be sufficient to mature the title to the property by adverse possession. Certainly, these essential ingredients of adverse possession are to be established by the person claiming acquisition of title to a property by adverse possession...there must be open and explicit disavowal and disclaimer brought to the knowledge of the owner. Mere possession for however long of time does not result in

converting the permissive possession into adverse possession. The permissive possession has necessarily to prove some overt act on his part indicating assertion of hostile title. It is well said that permissive possession and hostile animus operate in conceptually different fields, and the permissive possession does not become adverse by a mere change in the mental attitude of the person in possession and it is for such person to prove from which date the permissive possession became hostile.

In [D.N. Venkatarayappa and another Vs. State of Karnataka and others](#), following principles have been reiterated by the Apex Court in regard to the plea of ownership of adverse possession:

a The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

b Apart from the actual and continuous possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession.

c One of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up tide hostile to the tide of the true owner.

In [Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil \(dead\) by LRs. and heirs etc.](#), the Apex Court has held that:

15. Where possession can be referred to a lawful tide, it will not be considered to be adverse. The reason being that a 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. One who holds possession on behalf of another, does not by mere denial of that others tide make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful tide, cannot divest another of that tide by pretending that he had no tide at all.

Turning to the case in hand as has been observed in preceding paragraphs that the defendants are claiming their induction in possession on the strength of a gift deed executed by the members of the Padmashali Samaj, at the same time, defendants claim that their possession is hostile to the interest of the members of the community. Thus, the pleadings raised in the written statement in respect of adverse possession are in mutual conflict with each other. Defendants have not pleaded nor have placed evidence on record as to from what point of time their possession turned adverse to the true owner. Defendants have neither pleaded nor have led evidence in respect of the necessary animus on their part for perfecting their title to the property by adverse possession. The essential ingredients for claiming perfection of title by adverse possession have neither been pleaded nor proved by the defendants. Mere continuance in possession for a period of more than 12 years in itself is not sufficient for holding that the defendants have perfected their title by virtue of adverse possession. All the ingredients necessary for arriving at the conclusion as stated in above referred paragraphs are required to be

proved and those have neither been pleaded nor proved by the defendants. Both the courts below have not applied their mind to these aspects and have recorded erroneous findings in respect of perfection of title by defendants by virtue of adverse possession. Plaintiffs have claimed their title to the property on behalf of the community. It has not been controverted by the defendants also that the property belonged to the Padmashali Samaj. Thus, plaintiffs have discharged their burden in proving their title and as such are entitled to claim possession of the property in dispute. Defendant No. 2 had no title to the property and it cannot be said that by virtue of unregistered gift deed executed in 1958 by the members of the community he has acquired title to the property. Defendant No. 2 therefore was not entitled to alienate the property in favour of defendant No. 1 by executing sale-deed on 27-12-1969. Sale-deed executed by defendant No. 2 in favour of defendant No. 1 therefore does not bind right, title or entitlement of the plaintiffs in relation to the property. Sale-deed is in-operative as against the rights, title and entitlement of the plaintiffs. Plaintiffs are thus entitled to claim recovery of possession of the suit property. Property is in possession of defendant No. 1 and he has no entitlement to retain the same on the strength of sale-deed got executed by him from defendant No. 2.

10. In the result, appeal deserves to be allowed and the same is accordingly allowed. Judgment and decree passed by the trial Court on 17-2-1984 in Regular Civil Suit No. 546/1981 which has been confirmed by the first Appellate Court in Regular Civil Appeal No. 90/1984 on 20-8-1992 is quashed and set aside. Suit presented by plaintiffs is decreed. Plaintiffs are entitled to recover possession of the suit property from defendants and defendant No. 1 shall handover possession of disputed property to plaintiffs. Registered sale-deed executed by defendant No. 2 in favour of defendant No. 1 on 27-12-1969 is inoperative/inoperative as against the right, title and entitlement of the plaintiffs. In the facts and circumstances of the case, there shall be no order as to costs. Decree be drawn up accordingly.