

**(1924) 12 BOM CK 0021**

**Bombay High Court**

**Case No:** Second Appeal No. 683 of 1922

Tarabai Ramrao Patankar

APPELLANT

Vs

Dattaram Govindbhai Gujar

RESPONDENT

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**Date of Decision:** Dec. 15, 1924

**Citation:** AIR 1925 Bom 465 : (1925) 27 BOMLR 441 : 87 Ind. Cas. 765

**Hon'ble Judges:** Norman Macleod, J; Crump, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

Norman Macleod, Kt., C.J.

The main facts in this appeal are common to S. A. 683 of 1922 and need not be wet out again The heirs of Vinayak filed the suit to recover possession of the other half of the Vatan lands. After the final decree in the suit of 1896 was passed in April 1912, Vinayak obtained possession of his half share, in July 1913. In August 1915, Tarabai, in execution of her decree against Antaji, dispossessed the tenants of Vinayak as well, Jankibai, widow of Vinayak's uncle, sought to recover possession, but her application was rejected in 1916. After her death her grand-daughter filed this suit against Tarabai making Vinayak's grandson and nephew party defendants,

2. The trial Judge hold that the validity of the mortgage ceased at the death of Htinmaiitrao, and Parchure who was then in possession became a trespasser, But the plaintiff did not claim through Parchure and until July 1913 neither they nor their predecessors had any possession at all. From July 1913 they had only symbolical possession. As Tarabai sued Parchure for possession and was successful, plaintiff's right to possession also ceased. Consequently the suit was dismissed. The appellate Judge agreed with this decision except that he found that the Agashes obtained possession in 1913.

3. In appeal before us it was argued that the Agashes had acquired a title by adverse possession to a moiety in the suit lands Now Antaji Parchure was in possession aa

sole mortgagee till it was declared in the suit of 1896 that the assignment of Datta-ram's share in the mortgage was void, and it was further held that the mortgage had been paid off. If Antaji could have been considered as holding adversely to the next heir of Han-mantrao while holding possession as mortgagee any suggestion of that sort is put an end to

(1) by the finding that the mortgage was paid off so that the owners of the equity of redemption became entitled to possession under their purchases.

(2) by the decision in Tarabai's suit against Antaji.

4. It was faintly argued that Antaji must be considered as having been in possession of half the mortgaged lands in trust for Dattaram and consequently that Dattaram had acquired some interest by adverse possession. But this was an impossible argument. There could be no question of trust while Antaji was holding under the assignment in his favour; when that was set aside he became liable to account for half the profits.

5. But it was argued that the Agashes had acquired a title to the equity of redemption, by adverse possession. It is difficult to see how a person can be in possession of an equity of redemption adversely to the true owner. A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. It is true that it appears to have been considered in *Puttappa v. Timmaji* I.L.R.(1889) 14 Bom. 176 that an equity of redemption can be acquired by adverse possession, but in that case Narsibai actually delivered possession to her vendee Ramappa in 1856 and it was contended that the plaintiff's suit was barred by his adverse possession for more than twelve years, and consequently it did not become necessary to determine what right Narsibai had when she sold. In *Ohinto v. Janki* (1892) ILR 18 Bom. 51 it was held that there may be possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. *Puttappa v. Timmaji* was considered and I think that though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming is in physical possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee but not to the mortgagor. Since Tarabai must be considered as the only person with a title other than possessory to the moiety in suit she is entitled to succeed against the plaintiffs who are out of possession unless they can show not only that her rights have been extinguished but that they have already acquired a good title. But at the most they obtained possession in July 1913 and retained it for two years. It is impossible, therefore, to say that they have a right to cost Tarabai and in my opinion the decree in her favour was correct and the appeal should be dismissed with costs.

Crump, J.

6. This is a suit by the heirs of Agashe against Tarabai. As regards this moiety of the lands Agashe's heirs hold the rights of both mortgagor and mortgagee by virtue of the order of the High Court in 1907. The question is whether they or those through whom they claim have acquired any title by adverse possession. It is obvious that on Hanmantrao's death in 1897 any alienation by him became null and void, but it may be that persons who remain in possession after that date could acquire a title by prescription against the heirs of Hanmantrao who were at that date entitled to immediate possession. It is necessary, therefore, to consider the possession of the lands from 1897 onwards.

7. If I apprehend the position correctly the only persons who could acquire any title by adverse possession would be the persons in actual possession of the lands. The actual possession up to 1913 was with Parchure. Up to 1907 the heirs of Agashe held one half of the equity of redemption, and in 1912 they became the full owners but they got no possession until 1913. If the possession of Parchure as mortgagee was adverse to the heirs of Hanmantrao, they might have become entitled to hold as mortgagees, but from 1907 their possession was also adverse to the heirs of Agashe whose share was then declared free of the mortgage. It is difficult, therefore, to see how the heirs of Agashe could acquire a title by adverse possession and as between Parchure and the heirs of Ramrao the matter is concluded by the suits of 1912. As regards the suggestion that there was adverse possession of the equity of redemption it is clear that Agashe's heirs could not hold that equity adversely when they were never in physical possession of the property. As matters stood Hanmantrao's heirs could not at any time have sued the heirs of Agashe alone as holders of the mere right to redeem.