

(2014) 01 BOM CK 0144
In the Bombay High Court
Case No : Second Appeal No. 51 of 1999

Ganpat Janu Wagh

APPELLANT

Vs

Vanmala, Sunanda Rambhau Sarap and Vasant Sakharam
Dobe

RESPONDENT

Date of Decision : 08-01-2014

Acts Referred:

Hindu Succession Act, 1956 — Section 14(1) 15(a) 8

Citation : (2015) 1 ALLMR 891 : (2015) 1 BomCR 870 : (2014) 4 MhLj 308

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : A.V. Bhide, for the Appellant;

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—This appeal challenges the judgment and order dated 8th September 1998 delivered by the Additional District Judge, Khamgaon in Regular Civil Appeal No. 47 of 1990 confirming the judgment and order dated 30th July 1990 passed by the Civil Judge, JD, Jalgaon (Jamod), District Buldana in Regular Civil Suit No. 50 of 1981 whereby suit of the plaintiffs (present respondents no. 1 and 2) was decreed. In that, original defendants no. 1 and 2 were directed to deliver possession of suit property i.e. Gat No. 5/6, area 1.21 HR situated at village Khamkhed, residential house situated in Ward No. 10, Jalgaon (Jamod) described in plaint paragraph 3 to the plaintiff. It was the grievance of the plaintiffs Vanmala and Sunanda that 1st defendant i.e. Ganpat Janu without any right, title or interest, sold gat no. 5/6 situated at Khamkhed, Tahsil Jalgaon Jamod, District Buldana to Vasant Sakharam (original defendant no. 2) vide sale deed dated 23.2.1981 for a sum of Rs. 6500/-. Contention of the plaintiffs was that they had immediately by notice dated 27.2.1981 (exhibit 31) had called upon defendants to restore possession of the suit land to the plaintiffs, but their notice remained unheeded. Thus, they had to file suit for possession on the ground that the suit land referred to above was exclusively owned and possessed

by their grand-father pursuant to sale deed executed in favour of Janabai wife of Vitthal Wagh for a sum of Rs. 750/- (exhibit 32). Thus, according to plaintiffs, owner of the suit land was Janabai (their grand-mother) under the registered sale deed and land was in possession of their grand-father Vitthal Janu Wagh. Mother of the plaintiffs by name Narmada d/o Vitthal Wagh had pre-deceased Vitthal Janu Wagh in the year 1971 while Vitthal died in the year 1978 as owner of suit land which was inherited from him by plaintiffs as only legal heirs of deceased Vitthal. Contention on behalf of 1st defendant Ganpat Janu Wagh was that suit land was ancestral and not self-acquired by Vitthal or Janabai. Defendant No. 1 claimed that as exclusive owner of the suit land, he sold it to Vasant Sakharam under sale deed dated 23.2.1981. However, this document referred to by defendant no. 1 is not supported in evidence. In the alternative, it was claimed by defendant no. 1 that plaintiffs had only 1/4th share if they proved their title. In second alternative, defendant no. 1 claimed that he was owner of suit property by adverse possession and was entitled to sell it to Vasant Sakharam as owner. The pleadings were examined by the trial Court and the trial Court found in favour of the plaintiffs Vanmala and Sundanda that they are entitled to possession of the suit land as legal heirs of Vitthal who was exclusive owner of the suit land. Thus, the trial Court disbelieved the case of defendant no. 1 that the suit land was ancestral property or that he was exclusively entitled to dispose of the same. The trial Court found that there was original sale deed of the suit land at exhibit 32 which indicated that suit land was purchased by Janabai Vitthal Wagh for a sum of Rs. 750/- on 2nd February 1955. The documentary evidence produced by the plaintiffs also consisted mutation extract (exhibit 30) in the name of Janabai dated 20th January 1956 to prove that she was absolute owner of the suit land. The legal position that she became absolute owner of the suit land in view of Section 14(1) of the Hindu Succession Act was also considered by the learned trial Judge. Thus, after Janabai's death, original and exclusive owner of the suit land, the suit land was mutated in the name of Vitthal Janu Wagh as legal heir of Janabai. Thus, it was Vitthal Janu Wagh who inherited from Janabai in view of Section 15(a) of the Hindu Succession Act. He remained in possession of suit land till he died in 1978 and thus, plaintiffs as legal heirs succeeded to the property (suit land) left by Vitthal. Considering the fact that Narmada daughter of Vitthal had predeceased Vitthal in the year 1971 leaving plaintiffs Vanmala and Sunanda as only legal heirs to inherit the suit land. Trial Court also considered crop statement (exhibit 34) indicating possession of Vitthal. Regarding the residential house situated at Plot No. 32 vide Sheet No. 131 in Ward No. 10 of Jalgaon Jamod, learned trial Judge considered the evidence that Nazul extract (exhibit 33) in respect of residential house indicated that plot no. 32 was partitioned in three equal shares amongst Vitthal, Ganpat (defendant no. 1) and Rajaram (3rd brother of Vitthal and Ganpat) on the strength of oral partition occurred in the year 1947. On the basis of extract of Nazul record, trial Court recorded a finding that ancestral house was partitioned in the year 1947 and 1/3rd share thereof was held by Vitthal who was owner and was in possession of suit house.

2. Learned Advocate for the appellant contended that in view of exhibit 33 house property mentioned in the Record of Right was shown in the name of three brothers Vithal, Rajaram and Ganpat. According to him, all heirs were not joined in the suit. However, considering the documents as it is, the document itself indicated clearly that there was oral partition between brothers Vithoba, Rajaram and Ganpat and accordingly, mutation entries were made. The trial Court held that Vithal at the time of his death in 1978 was in possession of suit house to the extent of 1/3rd share. That being so, plaintiffs being class-I heirs of Vithal Janu Wagh were entitled as owner and possessor of suit house to the extent of 1/3rd share which was already partitioned and was in possession of Vithal pursuant to the partition in the year 1947. Plaintiffs were thus claiming ownership and possession of suit property which was inherited by them from their grandfather Vithal. The relief in the suit was thus for possession from defendants who were claiming right in respect of suit property.

3. Defendant no. 1 Ganpat (appellant herein) had also claimed possession of suit property pleading hostility of title by means of adverse possession. Learned trial Court appears to have negated the claim by a well-reasoned judgment with due regard to Section 8 of the Hindu Succession Act that plaintiffs were entitled to succeed to the property of Vitthal upon his death in the year 1978. That being so, 1st defendant had no legal capacity to execute sale deed nor legal right to sell the suit land to 2nd defendant Vasant. For these reasons, the suit was rightly decreed in favour of the plaintiffs by ordering the defendants to deliver possession of suit property as described in plaint paragraph 3 to the plaintiffs.

4. 1st Appellate Court while dealing with appeal filed by defendant no. 1 Ganpat Janu considered his contentions as also family tree pleaded in the case and found that the plaintiffs were exclusive owner of the suit field and inherited the suit field and the house which was in possession of Vitthal while negating the claim of defendant no. 1 Ganpat in the appeal that he had perfected hostile title by virtue of principle of adverse possession. The appeal was found without merit and was dismissed by impugned judgment and order by 1st appellate Judge.

5. Thus, we find that there are concurrent judgments recorded against appellant herein. Original defendant no. 2 Vasant Sakharam Dobe did not choose to question validity and legality of judgments of trial Court and the 1st Appellate Court in High Court.

6. According to learned counsel for appellant, the decree passed by the trial Court was limited to property described in plaint paragraph 3. He invited my attention to exhibit 33 in the evidence which would indicate that Vithal was in possession of suit house to the extent of 1/3rd share in the ancestral house property pursuant to oral partition which took place in the year 1947. The plaintiffs were not claiming any relief beyond 1/3rd share possessed by Vithal at the time of his death in the year 1978. Hence, even on this count, I do not find any ground made out for to disturb any finding in the concurrent judgments recorded in this case.

7. The appeal was admitted on the limited substantial question of law as to whether it was necessary for the defendant to first admit ownership of the plaintiffs for contending his plea of adverse possession and whether the two Courts below adopted the proper approach of law in examining the issue concerning plaintiffs' possession, and In the event of defendant failing to prove adverse possession, what would be effect on the decrees under challenge?

8. Considering the concept of adverse possession, it is but necessary to be borne in mind that the claimant must establish occupation of the suit property for a period of 12 years or more without interruption of possession, to the exclusion of all persons openly and hostile to the true owner adequate in continuity and in publicity. It is settled position of law that plea of adverse possession must be expressly raised and established. Defendant has to necessarily admit that some one else is owner of the property and further more, according to law, such claimant must clearly plead and establish all the facts which are required to prove adverse possession. One cannot be permitted to raise mutually inconsistent pleas at different stages of the suit to base his claim as sharer in ancestral property and other plea based on adverse possession. Plea as to adverse possession and claim thereof cannot commence unless claimant denounces his title claimed as sharer in joint family property. Defendant no. 1 in the present case never denounced his title as son of Janu or as a brother of late Vitthal Janu Wagh nor he had admitted the ownership title of the plaintiffs to the suit land so as to be permitted to raise a plea of adverse possession. In my opinion, a person who is owner of the property under registered sale deed duly executed is deemed to be lawfully in possession so long as there is no intrusion. Non-user of property by owner even for long time would not affect title of the owner unless claimant to adverse possession has asserted hostile title in denial of title of the true owner peacefully, openly, continuously and for a continuous period of 12 years or more. Looking to this legal position, suit for possession was rightly decided by the Courts below. Substantial question of law formulated by order dated 18th August 1999 by this Court must be answered accordingly to the effect that it was necessary for defendant no. 1 Ganpat to first admit ownership of the plaintiffs to the suit property for to raise plea of adverse possession. He could not have been permitted to raise plea as to adverse possession as he never denounced his claim in the suit as a sharer in joint Hindu family property. In the result, therefore, in the absence of legal proof of adverse possession, both the Courts below by their concurrent judgment rightly decided the suit on the basis of legal evidence placed before them. Hence, I do not find any merit in the appeal. Appeal is accordingly dismissed with costs.