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NARENDRA & ORS.

v.

AJABRAO S/O NARAYAN KATARE (D) THROUGH LRS.

(Civil Appeal Nos. 3533-3534 of 2008)

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OCTOBER 26, 2017

[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]

Code of Civil Procedure, 1908 – ss.96, 100 – Appellants-plaintiffs purchased a house – Original defendant (predecessor-in-interest of the respondents) was living in two rooms of the said house even before its purchase by the appellants – Suit filed by appellants for declaration of their title over the entire house and for possession of the portion of the house, which was occupied by the original defendant – Trial court dismissed the suit – First appeal by appellants was allowed – Second appeal by original defendant, allowed by High Court – On appeal, held: High Court decided the second appeal like a first appeal u/s.96 inasmuch as it went on appreciating the entire oral evidence and reversing the findings of fact of the first appellate court on the question of adverse possession – Such approach of High Court was not permissible in law – Impugned order is set aside – Judgment of the first appellate court, which rightly decreed the appellants' suit against the respondents is restored – Adverse Possession.

Adverse Possession – Nature of the plea – Suit filed by appellants, inter alia for possession of the portion of the house occupied by the original defendant – Plea of adverse possession set up by original defendant claiming to have been in possession of the house much prior to its purchase by appellants – Held: Plea of adverse possession is a plea based on facts – High Court has the jurisdiction, in appropriate cases, to interfere in finding of fact provided such finding is found to be wholly perverse or when it is found to be against any settled principle of law or pleadings or evidence – Such errors constitute a question of law and empower the High Court to interfere – However, no such error is found in the instant case more so when plea of adverse possession was neither properly pleaded nor made out.

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Adverse Possession – Law of – Held: Mere possession, howsoever long it may be, does not necessarily mean that it is adverse to the true owner – In the instant case, the original defendant failed to discharge the burden to claim ownership over the suit property or its part, to the exclusion of the whole world including its true owners, by any documentary evidence.

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Allowing the appeals, the Court

HELD: 1. The approach of the High Court in deciding the second appeal which resulted in dismissal of appellants' suit was wholly perverse and against the well settled principle of law applicable to second appeals and to the factual controversy involved in the case for the following the reasons. In the first place, the High Court decided the second appeal like a first appeal under Section 96 of the Code inasmuch as the High Court went on appreciating the entire oral evidence and reversed the findings of fact of the First Appellate Court on the question of adverse possession. Such approach of the High Court was not permissible in law. Second, the High Court failed to see that a plea of adverse possession is essentially a plea based on facts. It was more so as it did not involve any question of law much less substantial question of law. This aspect of law was also overlooked by the High Court. Third, the High Court has the jurisdiction, in appropriate cases, to interfere in finding of fact provided such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or when it is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law and empower the High Court to interfere. However, no such error is found here. Fourth, the High Court failed to see that the plea of adverse possession was neither properly pleaded and nor made out by the respondents. [Paras 16-20] [751-H; 752-A-F]

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2. Mere possession, howsoever long it may be, does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners' title. [Para 23] [753-A-B]

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A *T. Anjanappa & Ors. v. Somalingappa & Anr.* (2006) 7 SCC 570 : [2006] 5 Suppl. SCR 200 – relied on.

3.1 There is no merit in the plea of the respondents as regards to adverse possession for the following reasons. There was no assertion on the part of the original defendant to claim ownership over the suit property or its part to the exclusion of the whole world including its true owners. Second, it was not pleaded as to when and in what manner such assertion began. In other words, it was not pleaded as to from which date so as to enable the Courts to count the period of 12 years or 40 years, as claimed by the defendant, his assertion began which got converted into his absolute right of ownership over the suit house on the expiry of 12 years. Third, it was also not pleaded as to whether the assertion of ownership right was against the public at large or it was against its true owners, i.e., (predecessor-in-title of the appellants) or/and against the appellants and whether it was to their knowledge and, if so, was it open, hostile, express, continuous, peaceful and without any interruption from anyone including its true owners for a period of more than 12 years. Lastly, the burden being on the original defendant to plead and prove the adverse possession, he failed to discharge the burden by any documentary evidence. [Paras 25-28] [753-F-H; 754-A-B]

E 3.2 The present was a clear case of permissive possession where original defendant was allowed to occupy the two rooms in the suit house by the appellants' predecessor when they were the owners of suit house without conferring on him any kind of right, title and interest either in the suit house or/and in his possession. The appellants, on becoming the owners, withdrew the permission, which they had a right being the owners on the strength of registered sale deed, where after original defendant's possession in the part of suit house became unauthorized. He was, therefore, liable to restore the same to the appellants. [Paras 29, 30] [754-C-D]

Chatti Konati Rao & Ors. v. Palle Venkata Subba Rao (2010) 14 SCC 316 : [2010] 15 SCR 923 – relied on.

Case Law Reference

[2006] 5 Suppl. SCR 200	relied on	Para 23
H [2010] 15 SCR 923	relied on	Para 24

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3533- A
3534 of 2008

From the Judgment and Order dated 28.04.2003 in Second Appeal No. 48 of 1992 & Order dated 25.08.2005 in Review Application No. 235 of 2003 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur. B

Vivek Solshe, Amol B. Karande, Advs. for the Appellants.

Sachin Pahwa, Chander Shekhar Ashri, Advs. for the Respondents.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J. I. These appeal are filed by the plaintiffs against the final judgment and order dated 28.04.2003 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Second Appeal No.48 of 1992 whereby the Single Judge of the High Court while exercising jurisdiction under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") allowed the appeal filed by the original defendant, set aside the judgment and order passed by the appellate Court and confirmed the judgment and decree passed by the Trial Court and dated 25.08.2005 in Review Application No.235 of 2003 arising out of judgment/order dated 28.04.2003 passed in SA No.48 of 1992 by which the Review was also dismissed by the Single Judge. C D E

2. Facts of the case lie in a narrow compass so also the issue involved in the appeals is very short. The relevant facts, however, need mention *infra* to appreciate the issue involved in the appeal.

3. The appellants are the plaintiffs whereas the respondents are the legal representatives of the original defendant-Ajabrao, who died during the pendency of the appeal before the High Court, in the civil suit out of which these appeals arise. F

4. The dispute relates to the part of house bearing Corporation number 898 (old) and 989/0-4 (new) situated in ward No. 29 (old) and 51 (New) Cir.17/23 Khatikpura Timki Nagpur (hereinafter referred to as "suit house"). G

5. The suit house was originally owned and possessed jointly by Shri Narayan Janglujee Katare, Dokawdu Narayan Katare, Ajabrao Narayan Katare and Kamlakar Narayan Katare. All these four persons, H

A were the grand father, father and two uncles of the plaintiffs. These four persons sold the suit house by registered sale deed dated 21.10.1970 to one Laxminarayan Brijlal Jaiswal for a sum of Rs.30,000/- . However, the appellants(plaintiffs), by a registered sale deed dated 11.10.1985, purchased the suit house from Laxminarayan Brijlal Jaiswal for a sum of Rs.55,000/-.

B 6. The original defendant was living in two rooms of the suit house even before the purchase of the suit house by the appellants. The appellants after purchasing the suit house requested Ajab Rao to vacate the portion of the suit house, which was in his possession. Ajab Rao refused

C to vacate the rooms and instead denied the appellants' title over the suit house.

D 7. This gave rise to filing of the civil suit bearing Civil Suit No.1510 of 1986 by the appellants on 29.08.1986 against Ajab Rao. The suit was for a declaration of appellants' title over the entire suit house and possession of the portion of the suit house, which was in possession of Ajab Rao.

E 8. The suit was founded on the allegations, *inter alia*, that the appellants are the owners of the suit house having purchased the same vide registered sale deed dated 11.10.1985 from Laxminarayan Brijlal Jaiswal. It was alleged that Ajab Rao was in permissive possession of the portion of the suit house prior to appellants' purchasing the suit house. The appellants, having revoked the permission and requested Ajab Rao to vacate the portion of the suit house, who did not vacate, the appellants were entitled to claim possession of the part of the suit house from Ajab Rao on the basis of their title. A relief for damages at the rate of

F Rs.100/- per month for use and occupation of the part of the suit house was also claimed against Ajab Rao.

G 9. The defendant filed his written statement. He denied appellants' title and claimed that he has been in possession of the part of the suit house for 40 long years much prior to the appellants' purchasing the suit house. He alleged that the appellants' predecessor-in-title never sold the suit house to Laxminarayan Brijlal Jaiswal but they had mortgaged the suit house with Laxminarayan Brijlal Jaiswal. He also alleged that his possession is adverse to the appellants and Laxminarayan Brijlal Jaiswal on the strength of his long and continuous possession of 40 years. He also raised the plea of maintainability of the suit on the ground of

H non-joinder of necessary parties.

10. The Trial Court framed the issues. Parties led evidence. By judgment/decrees dated 22.03.1988, the Trial Court dismissed the suit. It was held that the appellants are the owners of the suit house except portion of the suit house, which is in possession of Ajab Rao. It was held that Ajab Rao has perfected his title by adverse possession over the portion, which was in his possession.

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11. The appellants, felt aggrieved, filed first appeal before the 7th Additional District Judge. By judgment/decrees dated 22.10.1991, the Additional District Judge allowed the appeal, set aside the judgment/decrees of the Trial Court and decreed the appellants' suit. The first Appellate Court held that the appellants are the owners of the suit house including that portion, which was in possession of Ajab Rao. It was also held that Ajab Rao failed to prove his title over the portion, which was in his possession by adverse possession. It was also held that he was only in permissive possession and such permission having been withdrawn by the appellants, he had to vacate the said portion of the suit house. The First Appellate Court also passed a money decree for Rs. 1000/- as damages for use and occupation of the portion of the suit house together with interest at the rate of 6% p.a. from the date of filing of the suit till realization and Rs. 100/- towards notice charge.

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12. Ajab Rao, felt aggrieved, filed second appeal under Section 100 of the Code before the High Court. By impugned judgment, the High Court allowed the appeal, set aside the judgment and decree of the First Appellate Court and restored that of the Trial Court. In other words, the effect of the order of the High Court is that the appellants' (plaintiffs') suit is dismissed.

13. Felt aggrieved of the judgment of the High Court, the plaintiffs have filed these appeals by way of special leave before this Court.

14. Heard Mr. Vivek Solshe, learned counsel for the appellants and Mr. Sachin Pahwa, learned counsel for the respondents.

15. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeals, set aside the impugned order and restore the judgment/decrees of the First Appellate Court, which rightly decreed the appellants' civil suit against the respondents.

16. In our considered opinion, the approach of the High Court in deciding the second appeal which resulted in dismissal of appellants' suit

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A is wholly perverse and against the well settled principle of law applicable to second appeals and to the factual controversy involved in the case as would be clear from our reasons set out hereinbelow.

17. In the first place, we find that the High Court decided the second appeal like a first appeal under Section 96 of the Code inasmuch as the High Court went on appreciating the entire oral evidence and reversed the findings of fact of the First Appellate Court on the question of adverse possession. Such approach of the High Court, in our opinion, was not permissible in law.

18. Second, the High Court failed to see that a plea of adverse possession is essentially a plea based on facts and once the two courts, on appreciating the evidence, recorded a finding may be of reversal, such finding is binding on the Second Appellate Court. It is more so as it did not involve any question of law much less substantial question of law. This aspect of law was also overlooked by the High Court.

19. Third, the High Court has the jurisdiction, in appropriate cases, to interfere in finding of fact provided such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or when it is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law and empower the High Court to interfere. However, we do not find any such error here.

20. Fourth, the High Court failed to see that the plea of adverse possession was neither properly pleaded and nor made out by the respondents.

21. The only averment is found in Para 2 of the specific pleadings of the written statement (page 44 of the SLP) which reads as under:

G "That moreover, the defendant since last 40 years is residing separately in the said house and is in continuous possession of his portion of the said house therefore, his possession is adverse to the owner, i.e., his father, said Jaiswal and present plaintiff."

22. What is "adverse possession" and on whom the burden of proof lies and lastly, what should be the approach of the Courts while dealing with such plea have been the subject matter of large number of cases of this Court.

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23. In **T. Anjanappa & Ors. vs. Somalingappa & Anr.**, (2006) 7 SCC 570, this Court held that mere possession, howsoever long it may be, does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners' title. A

24. Relying upon the aforesaid decision, this Court again in **Chatti Konati Rao & Ors. vs. Palle Venkata Subba Rao**, (2010) 14 SCC 316 in Para 14 held as under: B

“14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter”. C

25. Applying the aforementioned principle of law to the facts of the case on hand, we find absolutely no merit in the plea of respondents for the following reasons. D E F

26. There is no assertion on the part of the original defendant to claim ownership over the suit property or its part to the exclusion of the whole world including its true owners. Second, it is not pleaded as to when and in what manner such assertion began. In other words, it is not pleaded as to from which date so as to enable the Courts to count the period of 12 years or 40 years, as claimed by the defendant, his assertion began which got converted into his absolute right of ownership over the suit house on the expiry of 12 years. G H

A 27. Third, it is also not pleaded as to whether the assertion of ownership right was against the public at large or it was against its true owners, i.e., (predecessor-in-title of the appellants) or/and against the appellants and whether it was to their knowledge and, if so, was it open, hostile, express, continuous, peaceful and without any interruption from anyone including its true owners for a period of more than 12 years.

B 28. Lastly, the burden being on Ajab Rao (original defendant) to plead and prove the adverse possession, he failed to discharge the burden by any documentary evidence.

C 29. In our considered opinion, it was a clear case of permissive possession where Ajab Rao was allowed to occupy the two rooms in the suit house by the appellants' predecessor when they were the owners of suit house without conferring on Ajab Rao any kind of right, title and interest either in the suit house or/and in his possession.

D 30. The appellants, on becoming the owners, withdrew the permission, which they had a right being the owners on the strength of registered sale deed dated 11.10.1985, Ajab Rao's possession in the part of suit house became unauthorized. He was, therefore, liable to restore the same to the appellants.

E 31. We cannot, therefore, concur with the reasoning and the conclusion arrived at by the High Court which, in our opinion, is neither factually and nor legally sustainable. It, therefore, deserves to be set aside.

F 32. In the light of foregoing discussion, the appeals succeed and are allowed. The impugned orders are set aside whereas the judgment/decree of the First Appellate Court dated 22.10.1991 passed by 7th Additional District Judge is restored. As a consequence, the appellants' suit stands decreed against the respondents as per First Appellate Court judgment/decree dated 22.10.1991 passed in Civil Suit No.132 of 1988.