

A VISHWANATH BAPURAO SABALE
V.
SHALINIBAI NAGAPPA SABALE & ORS.
Civil Appeal Nos. 1782-83 of 2009

B MARCH 23, 2009

[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

Suit for declaration – Predecessors-in-interest of parties being brothers – Owned joint and self acquired properties – Father of defendant executed registered sale deed selling his share in joint properties and his self acquired properties to plaintiff's predecessor-in-interest and executed settlement deed in terms whereof he obtained right to enjoy those properties during his life time – Suit for declaration and injunction based on title –Decreed – Decree upheld by first appellate court and High Court – Held: The documents were registered, thus carried presumption of valid execution – There was no proof to show that documents were sham – Suit was based on title – Once plaintiff proved title, onus shifted on defendants to prove adverse possession which they failed to discharge – Plea of defendants that documents were executed to save properties from creditors not plausible as no action was taken by creditors against them – Also no suit for cancellation of documents was filed in terms of s.31 of Specific Relief Act, 1963 – Long possession not sufficient to prove adverse possession – Impugned order warrants no interference – Adverse possession.

'B', father of the appellant and 'S', the predecessor-in-interest of the respondents, were step brothers. They had some joint family properties. 'B' also had self acquired properties. He suffered substantial loss in his business and incurred loan of Rs.35000. On 21.7.1955, four registered deeds were executed in respect of the suit properties. The first was a deed of partition, in terms whereof, joint family properties were divided in equal

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shares and 'B' sold his share of joint family property to 'S'. He also allegedly sold his self acquired property to 'S'. Two deeds of settlement on the same day were executed by 'S', in terms whereof, the lands transferred in his favour were settled to 'B' for enjoyment during his lifetime. However, it was stipulated that 'B' would not have any absolute right over the properties and was not entitled to alienate the same. 'B' died in the year 1958.

After the death of 'S' which took place in the year 1977, respondents filed suits for declaration of title over suit properties and possession claiming the same as the heirs and LRs of 'S'. The Trial Court decreed the suits and the decrees were upheld by the first appellate court and the High Court. The defendants filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1. All the four deeds executed on 2-07-1955 were registered documents. They carried a presumption of valid execution. There was no proof to show that the said documents were sham or nominal. The courts below clearly held that the appellant failed to discharge the heavy onus on him. Exhibit 36 was a deed of sale in terms whereof 'B' sold his half share to 'S'. If the contention of defendant that there existed no joint family property was correct, it was for him to show that the same was self acquired property of 'B'. No evidence was brought on record to show that 'B' was in exclusive possession of the suit properties. A presumption as regards jointness of the family property could be raised as 'B' and 'S' despite being step brothers and despite having separate business and separate houses, were having some joint properties which were acquired prior to 1944. There does not seem to be any apparent reason to hold that the deed of sale was sham or nominal in character. [Paras 15, 16] [985-G-H; 986-A-D]

1.2. It may be true that the other sale deed (Exhibit 49) consisting of 8 items of properties were self acquired

A properties of 'B'. Indisputably 'B' was heavily indebted. He was required to repay loan incurred by him. PW-3, in his deposition, stated that 'S' in fact had paid the entire amount of loan to the creditors of 'B'. Indisputably 'B' continued to remain in possession of the properties in
B suit. The character of his possession however must be held to have changed having regard to the deeds of settlement executed in his favour by 'S'. His possession in terms thereof over the land in question was permissive in nature. [Para 17-18] [986-D-G]

C 2. There appears to be some understandings between the two brothers. There is no reason to differ with the concurrent findings of the courts below, that all the documents were executed bonafide. If the said deeds were sham or nominal in character, creditors of 'B' would have
D taken some actions against him. There is nothing to show that any suit or any other proceeding was instituted/ initiated against him. Although he continued to be in physical possession of the suit properties, on execution of the deed of sale as also the deeds of settlement on the
E same day, nature and character of his possession changed and he must in law be held to have been dispossessed and was put back to possession in a different capacity. It is true that despite death of 'B' in 1958, 'S' did not initiate any proceedings for eviction of wife of
F 'B'. It may or may not be an act of generosity on his behalf but the same by itself would not mean that the appellant started to possess the lands adverse to the interest of the respondent. [Para 19-20] [987-A-F]

G 3. The suit was based on title. Once plaintiff proved his title, the onus was on the original defendant no.1, who was the mother of appellant and consequently upon the appellant to prove that they started possessing properties adversely to the interest of 'S'. For the purpose of arriving at a finding as to whether appellant and his mother
H perfected their title by adverse possession, the

relationship of the parties may be taken into consideration. It must also be borne in mind that factum of execution of the documents being not in question, it was also expected that 'B' and after his death his wife would file a suit for cancellation of those documents in terms of Section 31 of the Specific Relief Act, 1963. [Para 21] [987-G-H; 988-A-C]

Prem Singh and Ors. v. Birbal and Ors. (2006) 5 SCC 353 – referred to.

4. For claiming title by adverse possession, it was necessary to plead and prove animus possidendi. A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession. [Para 23] [990-B-D]

P.T. Munichikkanna Reddy and Ors. v. Revamma and Ors. 2007 (6) SCC 59 – referred to.

Kalwa Devadattam and Ors. v. Union of India and Ors. AIR 1964 SC 880 – held inapplicable.

Case Law Reference

(2006) 5 SCC 353	referred to	Para 22
2007 (6) SCC 59	referred to	Para 24
AIR 1964 SC 880	held inapplicable	Para 25

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1782-1783 of 2009

From the Judgement and Order dated 22.01.2008 of the Hon'ble High Court of Judicature at Bombay in Second Appeal Nos. 105 & 107 of 2007.

U.U. Lalit, Gaurav Agrawal, with him for the Appellant.

A K.V. Viswanathan, Sudhanshu S. Choudhari, Arundhati S. Sukhtankar for Naresh Kumar, for the Respondents.

The Judgement of the Court was delivered by

S.B. SINHA, J.

B 1. Leave granted.

2. These appeals are directed against a judgment and order dated 22-01-2008 passed by a learned Single Judge of the High Court of Judicature at Bombay in Second Appeal No. 105 of 2007 and Civil Application No. 280 of 2007 with Second Appeal No. 107 of 2007 and Civil Application No. 284 of 2007.

C 3. Bapurao and Shivappa were step brothers. Laxmibai was wife of Bapurao. Shivappa married one Parvatibai.

D Bapurao died in the year 1958. Laxmibai died on 12-12-1978.

Appellant Vishwanath is the adopted son of Laxmibai having been adopted on 5-06-1967. Nagubai is the daughter of Shivappa and Parvatibai. Shivappa died in the year 1977.

E Respondent Nagappa, son of Nagubai is said to have been adopted by Shivappa on 24-01-1969. The parties are governed by Bombay School of Hindu Law. Nagappa was aged about 19 years when he was allegedly adopted.

F 4. Bapurao and Shivappa were living separately. They had separate businesses.

They however had some joint family properties which were acquired prior to 1934. Bapurao had also self acquired properties. Allegedly Bapurao, having suffered substantial loss in his business had incurred loan in the year 1955. He owed a sum of about Rs. 35,000/- to his creditors.

G 5. Purportedly with a view to save the property from the creditors, on or about 2-07-1955, four registered deeds were executed. The first being a deed of partition, in terms whereof, H the joint family properties were divided in equal shares (which

was marked as exhibit 36) and Bapurao sold his share of joint family property for a sum of Rs. 5000/- to Shivappa . He also allegedly sold his self acquired property to Shivappa for the said sum. Two deeds of settlement on the same day were executed by Shivappa, in terms whereof, the lands transferred in his favour were settled to Bapurao for enjoyment during his lifetime.

However, it was stipulated that Bapurao would not have any absolute right over the properties and were not entitled to alienate the same.

6. Plaintiff after the death of Shivappa which as noticed hereinbefore took place on 20th November, 1977 filed three suits before the Joint Civil Judge, J.D. Mohol, District Judge, Solapur and Principal District Judge, Solapur.

The first one marked as Regular Civil Suit No. 81 of 1978 was filed for declaration that 22 tin sheets in the possession of the appellants were owned by him and for mandatory injunction directing him to handover the same. Regular Civil Suit No. 85 of 1978 was instituted in the court of Joint Civil Judge J.D. Mohol for declaration of his title over the suit properties and possession claiming the same as the heir and legal representatives of Shivappa.

Regular Civil Suit No. 20 of 1979 was instituted with a prayer for grant of a decree for permanent injunction pertaining to the suit property.

7. Before the Trial Court, Plaintiff-Respondent No. 1 raised another contention that Shivappa executed an agreement in favour of Laxmibai allowing her to take the income from the property. According to him, the said agreement which was an unregistered one was executed out of love and affection toward Laxmibai (original defendant No. 1). On the allegation that she did not take care of the property and a wall collapsed; and, thus, breach of terms of the agreement had taken place, a mandatory decree for injunction was sought for directing handing over the possession of the property to the plaintiff. It was furthermore

A contended that as upon death of Laxmibai during pendency of suit, the said agreement came to an end, the plaintiff even otherwise became entitled to possession.

B 8. Appellant however in his written statement inter alia contended that:

- C (1) the suit property was the self acquired property of Bapurao Sabale.
- C (2) the documents executed on 2-07-1955 were sham and nominal ones which were not meant to be acted upon, having been executed for the purpose of saving the property from the creditors.
- D (3) The fact that as despite death of Bapurao Sabale in the year 1958, Shivappa or his wife did not exercise any acts of ownership, right or possession or claim for a period of 22 years, would go to show that the transactions were sham ones.
- E (4) the suit was barred by limitation as the cause of action to recover the property arose on the death of Bapurao.
- E (5) First respondent having not been validly adopted by Shivappa being aged 19 years at the time of adoption, he had no locus standi to maintain the suit.

F Alternatively it was pleaded that the appellant, being in possession of the suit property for a period of more than twelve years, acquired indefeasible title by adverse possession.

9. The learned Trial Judge framed the following issues:

G “ISSUES

Does plaintiff prove that his father by an agreement allowed the defendant No. 1 to entry (sic) the suit land till her demise on certain conditions?

Does plaintiff prove that both agreements were without consideration and never confirmed any right, title and interest in Bapurao or in Laxmibai? A

xxx xxx xxx

Do defendants prove that the partition between Shivappa and Bapurao was a colourable one and under that partition neither Bapurao received the amount of Rs. 5,000/- nor did he transfer title of his share to Shivappa? B

Do defendants prove that as the partition deed dated 02.07.1955 was colourable one brought into existence to save the property from the creditors of Bapurao the settlement deed was executed so that the lands should be saved also remains with Bapurao? C

xxx xxx xxx

Do defendants prove that sale deed dated 02.07.1955 was not acted upon and it was executed nominally to save the properties from creditors?" D

10. The learned Trial Judge held: E

(a) Shivappa and Bapurao owned joint family properties and it had not been shown how the deed of partition was colourable.

(b) Evidence of DW-3 Panchappa Nirvallyappa Shilwant examined on behalf of the appellant does not inspire confidence. F

(c) Admission of PW-3, Bapurao is reliable and only because he had stated in his cross-examination that Bapurao was not ready and willing to execute the document unless possession was permitted to be retained by him, was not sufficient to disbelieve him totally. G

(d) Adoption of first respondent by Shivappa was valid as there exists a custom in the Virshiva Lingayat H

A community, to which the parties belong for adoption of a child of more than 14 years of age and in terms of Bombay School of Hindu Law, although plaintiff could not prove the agreement allegedly executed in favour of Laxmibai.

- B (e) Her possession after the death of Bapurao was also being permissive, the Suit was not barred by limitation.

C 11. The learned Trial Judge on the said findings, decreed the said suits. Appeals preferred theragainst, as noticed hereinbefore, were dismissed.

D 12. Mr. U.U. Lalit, learned Senior Counsel appearing on behalf of the appellant fairly did not press the question as regards the validity of adoption of first respondent stating that even if the same was invalid, first respondent being the daughter's son of Shivappa would inherit his properties in terms of the provisions of Hindu Succession Act, 1956.

E 13. The learned Counsel, however would contend that all the transactions evidenced by four instruments executed on 2-07-1955 were sham transactions in support whereof reliance was placed on the following circumstances.

- F (i) Since 1934 the step brothers were living separated having separate businesses and houses and admittedly Bapurao was heavily indebted, expecting some actions from his creditors.
- G (ii) All four documents having been executed on the same day and as PW-3 the attesting witness of the said document categorically stated that possession of the properties in question was to remain with Bapurao.
- (iii) There was absolutely no reason as to why all the four documents were executed on the same day.
- H (iv) Even after execution of the said deeds Shivappa or his wife did not exercise any right of possession.

(v) If the deeds of settlement were genuine and were meant to be acted upon, an attempt to take over possession from Laxmibai was expected from Shivappa and the same having not been done for a period of 20 years. A

(vi) The purported unregistered agreement in favour of Laxmibai had neither been produced nor proved. It was furthermore contended that the suit having been filed during the life time of Laxmibai, the same should have been dismissed. B

14. Mr. K. V. Viswanathan, learned counsel appearing on behalf of the respondents, on the other hand, would contend : C

(a) All the three courts having arrived at concurrent findings of fact, the impugned judgments warrant no interference. D

(b) The plea of the appellant in his written statement that the said document had not been acted upon, being vague, no reliance could have been placed thereupon. E

(c) Appellant having not filed any suit in terms of Section 31 of the Specific Relief Act, 1963 could not raise the plea that the transactions were illegal and void.

(d) The sale deeds as also the deeds of settlement having been found to be valid, this court should not exercise its jurisdiction under Article 136 of the Constitution of India. F

(e) Appellant has miserably failed to prove that his possession was adverse to the interest of Shivappa or Parvatibai. G

15. All the four deeds executed on 2-07-1955 are registered documents. They carry a presumption of valid execution. There is no proof to show that the said documents were sham or nominal. H

A The learned courts below have clearly held that the appellant failed to discharge the heavy onus on him.

We would however consider the contentions raised before us independently.

B Exhibit 36 is a deed of sale in terms whereof Bapurao sold his half share to Shivappa. If the contention of Bapurao that there existed no joint family property was correct, it was for him to show that the same was his self acquired property.

C 16. No evidence has been brought on record to show that he was in exclusive possession of the properties in suit. A presumption as regards jointness of the family property could be raised as Bapurao and Shivappa despite being step brothers and despite having separate business and separate houses, were having some joint properties which were acquired prior to 1944. There does not seem to have any apparent reason to hold that the deed of sale was sham or nominal in character.

D 17. It may be true that the other sale deed (Exhibit 49) consisting of 8 items of properties were self acquired properties of Bapurao.

E Indisputably Bapurao was heavily indebted. He was required to repay loan incurred by him. PW-3, we may notice, in his deposition, stated that Shivappa in fact had paid the entire amount of loan to the creditors of Bapurao.

F 18. Indisputably Bapurao continued to remain in possession of the properties in suit. The character of his possession however must be held to have changed having regard to the deeds of settlement executed in his favour by Shivappa. His possession in terms thereof over the land in question was permissive in nature.

G 19. Submission of Mr. Lalit that the fact that consideration in each of the sale deed was shown as Rs.5000/- but in the deeds of settlement the consideration was shown to be H

Rs.15,000/- clearly go to show that the transactions were not meant to be acted upon is difficult to accept. There appears to be some understandings between the two brothers. If PW-3 is to be believed and we do not see any reason why we should differ with the concurrent findings of the courts below, all the documents must be held to have been executed bonafide. We would assume that Bapurao wanted to continue to remain in possession of the said properties but it must be held that that was precisely the reason why the deeds of settlement were executed. If the said deeds were sham or nominal in character, creditors of Bapurao would have taken some actions against him.

There is nothing to show that any suit or any other proceeding was instituted/initiated against him.

20. Although he continued to be in physical possession of the properties in suit, on execution of the deed of sale as also the deeds of settlement on the same day, he must in law be held to have been dispossessed and was put back to possession in a different capacity.

In other words, upon execution of the deed of sale as also the deeds of settlement, the nature and character of his possession changed.

It is true that despite death of Bapurao in 1958, Shivappa did not initiate the proceedings for eviction of Laxmibai. It may or may not be an act of generosity on his behalf but the same by itself would not mean that the appellant started to possess the lands adverse to the interest of the respondent.

21. We would proceed on the basis that respondent No. 1 has not been able to prove his contention that Shivappa executed an unregistered document in favour of Laxmibai.

The suit filed by Nagappa however was based on title. Once he proved his title the onus was on Laxmibai and

A consequently upon the appellant to prove that they started possessing adversely to the interest of Shivappa.

B For the purpose of arriving at a finding as to whether appellant and Laxmibai perfected their title by adverse possession, the relationship of the parties may have to be taken into consideration. It must also be borne in mind that factum of execution of the documents being not in question, it was also expected that Bapurao and after his death Laxmibai would file a suit for cancellation of those documents in terms of Section C 31 of the Specific Relief Act, 1963.

22. In *Prem Singh and Ors. v. Birbal and Ors.* [2006 (5) SCC 353], this court held :

D "20. If the plaintiff is in possession of a property, he may file a suit for declaration that the deed is not binding upon him but if he is not in possession thereof, even under a void transaction, the right by way of adverse possession may be claimed. Thus, it is not correct to contend that the provisions of the Limitation Act would have no application E at all in the event the transaction is held to be void.

F 21. Respondent 1 has not alleged that fraudulent misrepresentation was made to him as regards the character of the document. According to him, there had been a fraudulent misrepresentation as regards its contents.

G 22. In *Ningawwa v. Byrappa* this Court held that the fraudulent misrepresentation as regards character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating: (SCR p. 801 C-D)

H "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a

clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable.”

In that case, a fraud was found to have been played and it was held that as the suit was instituted within a few days after the appellant therein came to know of the fraud practised on her, the same was *void*. It was, however, held: (SQR p. 803 B-E)

“Article 91 of the Limitation Act provides that a suit to set aside an instrument not otherwise provided for (and no other provision of the Act applies to the circumstances of the case) shall be subject to a three years' limitation which begins to run when the facts entitling the plaintiff to have the instrument cancelled or set aside are known to him. In the present case, the trial court has found, upon examination of the evidence, that at the very time of the execution of the gift deed, Ext. 45 the appellant knew that her husband prevailed upon her to convey Surveys Plots Nos. 407/1 and 409/1 of Tadavalga village to him by undue influence. The finding of the trial court is based upon the admission of the appellant herself in the course of her evidence. In view of this finding of the trial court it is manifest that the suit of the appellant is barred under Article 91 of the Limitation Act so far as Plots Nos. 407/1 and 409/1 of Tadavalga village are concerned.”

27. There is a presumption that a registered document is validly executed. A registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.

A 28. If a deed was executed by the plaintiff when he was a
minor and it was *void*, he had two options to file a suit to
get the property purportedly conveyed thereunder. He could
either file the suit within 12 years of the deed or within 3
years of attaining majority. Here, the plaintiff did not either
B sue within 12 years of the deed or within 3 years of attaining
majority. Therefore, the suit was rightly held to be barred
by limitation by the trial court.”

C 23. Furthermore for claiming title by adverse possession,
it was necessary for the plaintiff to plead and prove *animus*
possidendi.

D A peaceful, open and continuous possession being the
ingredients of the principle of adverse possession as contained
in the maxim *nec vi, nec clam, nec precario*, long possession
by itself would not be sufficient to prove adverse possession.

24. In *P.T. Munichikkanna Reddy and Ors. v. Revamma*
and Ors., [2007 (6) SCC 59], this court held:

E “It is important to appreciate the question of intention as
it would have appeared to the paper-owner. The issue is
that intention of the adverse user gets communicated to
the paper-owner of the property. This is where the law
gives importance to *hostility and openness* as pertinent
F qualities of manner of possession. It follows that the
possession of the adverse possessor must be hostile
enough to give rise to a reasonable notice and opportunity
to the paper-owner.”

G 25. We must in fairness to Mr. Lalit notice a decision of
this court in *Kalwa Devadattam and Ors. v. Union of India and*
Ors. [AIR 1964 SC 880]. In that case income tax was due from
one Nagappa. The immovable property belonging to the joint
family of Nagappa and his sons were attached. Nagappa raised
H a plea of previous partition. Inter alia, on a finding that despite

the said purported partition, Nagappa continued management of the property, showed interest in prosecuting the suits and representing the entire family from other evidences brought on record, it was found as of fact that the transaction was a nominal one. The said decision is, therefore, not applicable to the fact of the present case.

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26. For the reasons above mentioned, there is no merit in the appeals. The appeals are dismissed accordingly with costs. Counsel's fee assessed at Rs.10,000/- (Rupees Ten Thousand only).

D.G.

Appeal dismissed.