

Supreme Court of India

Hemaji Waghaji Jat vs Bhikhabhai Khengarbhai Harijan & ... on 23 September, 2008

Author: D Bhandari

Bench: Dalveer Bhandari, Harjit Singh Bedi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1196 OF 2007

Hemaji Waghaji Jat

..Appellant

Versus

Bhikhabhai Khengarbhai Harijan & Others

.. Respondents

JUDGMENT

Dalveer Bhandari, J.

1. This appeal is directed against the judgment dated 27.12.2004 passed by the High Court of Gujarat at Ahmedabad in Second Appeal No. 146 of 2004.

2. Brief facts of the case which are necessary to dispose of this appeal are as under:-

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The appellant who has lost both before the Court of learned District Judge, Palanpur and the High Court has approached this Court by way of special leave petition under Article 136 of the Constitution.

3. The appellant (who was the plaintiff before the trial court) filed a suit for declaration of permanent injunction with the following prayer:

"1) To hold and declare that the plaintiff is the lawful owner and occupier in respect of land of survey No. 66/3 admeasuring 6 Acre 11 Guntha situated in the boundaries of village Yavarpura, Taluka Deesa.

2) That the defendants of this case themselves or their agents, servants, family members do not cause or to be caused hindrance in

the possession and occupation of the plaintiff in respect of land of survey No. 66/3 admeasuring 7 Acre 10 Guntha in the boundaries of village Yavarpura and also to grant permanent stay order to the effect that they not forcibly enter into the said land of survey No. 66/3 against the defendants and in favour of the plaintiff of this case.

3) To grant any other relief which is deemed fit and proper.

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4) To award the entire cost of this suit on the defendants."

The trial court framed the following issues:

"1. Whether the plaintiff has proved that he is the lawful owner of the disputed land?

2. Whether the plaintiff is entitled for permanent injunction as prayed for?

3. What order and decree?"

The trial court held that in the year 1925 the land was purchased for Rs.75/- from Gama Bhai Gala Bhai by the appellant and he is having possession of the same for the last 70 years. The learned trial court in the same judgment has also held that in 1960 the appellant forcibly took possession of the land in question and he has been in continuous possession till 1986, which is proved from the register of right of cultivation. Thus, the appellant became owner of the suit property by adverse possession.

4. It may be significant to note that neither the appellant ever pleaded adverse possession nor an issue was framed by 4 the trial court with regard to the ownership of the respondents by adverse possession. According to the appellant, there is no basis for the finding of the ownership of the appellant on the basis of adverse possession.

5. The respondents being aggrieved by the said judgment of the trial court dated 5.4.1986 preferred an appeal before the learned District Judge, Palanpur, Gujarat. The learned District Judge, after hearing the counsel for the parties and perusing the entire record of the case, came to the definite conclusion that the appellant herein has failed to prove that the land in question was purchased by him.

6. The learned District Judge referred to in the case of B. N. Venkatarayapa v. State of Karnataka [(1998) 2 CLJ 414 S.C.] wherein it was held that in absence of crucial

pleadings regarding adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest of the original grantee, the petitioners cannot claim that they have perfected their title by adverse possession. The burden of proof lies on the petitioners to show that they have title to and have been in possession and he was dispossessed and discontinued his possession within 12 years from the date of filing his suit. Adverse possession implies that it commenced in wrong and is maintained against right.

7. The learned District Judge further held as under:

"Thus, learned trial Judge has wrongly concluded that plaintiff has proved his title and ownership of this suit land through Revenue record and also by adverse possession and competent authority i.e. Special Secretary has also dismissed the revision application of plaintiff and the defendants' ownership was confirmed by the Special Secretary and thus, the learned trial Judge has erred in holding that plaintiff is a owner and holding that the title and also become owner through adverse possession. Thus, this appeal deserves to be allowed and in these circumstances and discussion as above, it appears that learned trial Judge has committed error in decreeing the suit in favour of plaintiff."

8. The appellant aggrieved by the said judgment of the learned District Judge preferred an appeal under section 100 of the Code of Civil Procedure before the High Court. In the impugned judgment, it has been held that the appellate court continues to be the final court on facts and law. The second appeal to the High Court lies only when there is substantial question of law. The High Court relied on Santosh Hazari v. Purushottam Tiwari (Dead) By LRs. AIR 2001 SC 565. The relevant portion of the said judgment reads as under:

"The first appellate Court continues, as before, to be the final court of facts; pure findings of fact remain immune from challenge before the High Court in Second Appeal. Now the first appellate Court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in Second Appeal because the jurisdiction of the High Court has now ceased to be available to correct the error of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

9. The High Court held that the respondents clearly established their title over the suit property. The relevant portion of the judgment of the High Court reads as under:

"The learned first appellate Judge has also discussed the relevant entries as well as order passed by Deputy Collector, Collector and Special Secretary in those proceedings and on the basis of the same, the learned first appellate Judge has reached to the finding that the plaintiff has failed to establish title over the suit property."

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The appeal filed by the appellant was dismissed by the High Court.

10. We have heard learned counsel for the parties at length and perused the impugned judgment and judgments of the subordinate courts. The first appellate court and the High Court have clearly held that the appellant has failed to establish his title over the suit property. The appellant also failed to establish that he has perfected his title over the suit property by way of adverse possession.

11. We deem it appropriate to deal with some important cases decided by this court regarding the principle of adverse possession.

12. In *Secretary of State for India v. Debendra Lal Khan* AIR 1934 PC 23, it was observed that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario and the possession required must be 8 adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

13. This Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy* AIR 1957 SC 314, while following the ratio of *Debendra Lal Khan's* case (supra), observed as under:

"But it is well settled that in order to establish adverse possession of non-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non- possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be one the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs' title. It is a settled rule of law that as between co- heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to be knowledge of the other so as to constitute ouster."

The court further observed thus:

"The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

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14. In S.M. Karim v. Bibi Sakina AIR 1964 SC 1254, Hidayatullah, J. speaking for the court observed as under:-

"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. There is no evidence here when possession became adverse, if it at all did and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea."

15. The facts of R. Chandevappa & Others v. State of Karnataka & Others (1995) 6 SCC 309 are similar to the case at hand. In this case, this court observed as under:-

"The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

16. In D. N. Venkatarayappa and Another v. State of Karnataka and Others (1997) 7 SCC 567 this court observed as under:-

"Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in

question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession."

17. In Md. Mohammad Ali (Dead) By LRs. v. Jagadish Kalita & Others (2004) 1 SCC 271, paras 21-22, this Court observed as under:

"21. For the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.

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22. ....We may further observe that in a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein."

18. In Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779 at para 11, this court observed as under:-

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

19. In Saroop Singh v. Banto (2005) 8 SCC 330 this Court observed:

"29. 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 the defendant's possession becomes adverse. (See Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak (2004) 3 SCC 376)

30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Md. Mohammad Ali (Dead) by LRs. v. Jagdish Kalita and Others (2004) 1 SCC 271)"

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20. This principle has been reiterated later in the case of M. Durai v. Muthu and Others (2007) 3 SCC 114 para 7. This Court observed as under:

"...In terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."

21. This court had an occasion to examine the concept of adverse possession in T. Anjanappa & Others v. Somalingappa & Another [(2006) 7 SCC 570]. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. 14 The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

22. In a relatively recent case in P. T. Munichikkanna Reddy & Others v. Revamma & Others (2007) 6 SCC 59] this court again had an occasion to deal with the concept of adverse possession in detail. The court also examined the legal position in various countries particularly in English and American system. We deem it appropriate to

reproduce relevant passages in extenso. The court dealing with adverse possession in paras 5 and 6 observed as under:-

"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See *Downing v. Bird* 100 So. 2d 57 (Fla. 1958), *Arkansas Commemorative Commission v. City of Little Rock* 227 Ark. 1085 : 303 S.W.2d 569 (1957);

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*Monnot v. Murphy* 207 N.Y. 240, 100 N.E. 742 (1913); *City of Rock Springs v. Sturm* 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See *American Jurisprudence*, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."

23. There is another aspect of the matter, which needs to be carefully comprehended. According to Revamma's case, the 16 right of property is now considered to be not only a constitutional or statutory right but also a human right. In the said case, this Court observed that "Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment, etc. but now human rights are gaining a multifaceted dimension. Right

to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the judgments of *Beaulane Properties Ltd. v. Palmer* (2005) 3 WLR 554 and *JA Pye (Oxford) Ltd. v. United Kingdom* (2005) 49 ERG 90. The Court herein tried to read the human rights position in the context of adverse possession. But what is commendable is that the dimensions of human rights have widened so much that now property dispute issues are also being raised within the contours of human rights."

24. With the expanding jurisprudence of the European Court of Human Rights, the Court has taken an unkind view to the 17 concept of adverse possession in the recent judgment of *JA Pye (Oxford) Ltd. v. United Kingdom* (supra) which concerned the loss of ownership of land by virtue of adverse possession.

25. In the said case, "the applicant company was the registered owner of a plot of 23 hectares of agricultural land. The owners of a property adjacent to the land, Mr. and Mrs. Graham ("the Grahams") occupied the land under a grazing agreement. After a brief exchange of documents in December 1983 a chartered surveyor acting for the applicants wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land."

26. The Grahams continued to use the whole of the disputed land for farming without the permission of the applicants from September 1998 till 1999. In 1997, Mr. Graham moved the Local Land Registry against the applicant on the ground that he had obtained title by adverse possession. The Grahams challenged the applicant company's claims under the 18 Limitation Act, 1980 ("the 1980 Act") which provides that a person cannot bring an action to recover any land after the expiration of 12 years of adverse possession by another.

27. The judgment was pronounced in favour of *JA Pye (Oxford) Ltd. v. Graham* 2000 Ch. 676 : (2000) 3 WLR 242. The Court held in favour of the Grahams but went on to observe the irony in law of adverse possession. The Court observed that the law which provides to oust an owner on the basis of inaction of 12 years is "illogical and disproportionate". The effect of such law would "seem draconian to the owner" and "a windfall for the squatter".

28. The court expressed its astonishment on the prevalent law ousting an owner for not taking action within limitation is illogical.

29. The applicant company aggrieved by the said judgment filed an appeal and the Court of Appeal reversed the High Court decision. The Grahams then appealed to the House of 19 Lords, which, allowed their appeal and restored the order of the High Court.

30. The House of Lords in *JA Pye (Oxford) Ltd. v. Graham* (2003) 1 AC 419 observed that the Grahams had possession of the land in the ordinary sense of the word, and, therefore, the applicant company had been dispossessed of it within the meaning of the Limitation Act of 1980.

31. We deem it proper to reproduce the relevant portion of the judgment in *Revamma's case* (*supra*):

"51. Thereafter the applicants moved the European Commission of Human Rights (ECHR) alleging that the United Kingdom law on adverse possession, by which they lost land to a neighbour, operated in violation of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

52. It was contended by the applicants that they had been deprived of their land by the operation of the domestic law on adverse possession which is in contravention with Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which reads as under:

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"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

This Court in *Revamma's case* (*supra*) also mentioned that the European Council of Human Rights importantly laid down three-pronged test to judge the interference of the Government with the right of "peaceful enjoyment of property".

53. In *Beyeler v. Italy* [GC] No.33202 of 1996 ' ' 108-14 ECHR 2000-I, it was held that the "interference" should comply with the principle of lawfulness and pursue a legitimate aim (public interest) by means reasonably proportionate to the aim sought to be realised.

The Court observed:

"54. The question nevertheless remains whether, even having regard to the lack of care and 21 inadvertence on the part of the applicants and their advisers, the deprivation of their title to the registered land and the transfer of beneficial ownership to those in unauthorised possession struck a fair balance with any legitimate public interest served.

In these circumstances, the Court concludes that the application of the provisions of the 1925 and 1980 Acts to deprive the applicant companies of their title to the registered land imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and the applicants' right to the peaceful enjoyment of their possessions on the other.

There has therefore been a violation of Article 1 of Protocol 1."

55. The question of the application of Article 41 was referred for the Grand Chamber Hearing of the ECHR. This case sets the field of adverse possession and its interface with the right to peaceful enjoyment in all its complexity.

56. Therefore it will have to be kept in mind the courts around the world are taking an unkind view towards statutes of limitation overriding property rights."

32. Reverting to the facts of this case, admittedly, the appellants at no stage had set up the case of adverse 22 possession, there was no pleading to that effect, no issues were framed, but even then the trial court decreed the suit on the ground of adverse possession. The trial court judgment being erroneous and unsustainable was set aside by the first appellate court. Both the first appellate court and the High Court have categorically held that the appellant has miserably failed to establish title to the suit land, therefore, he is not entitled to the ownership. We endorse the findings of the first appellate court upheld by the High court.

33. Consequently, the appeal being devoid of any merit is accordingly dismissed with costs, which is quantified at Rs.25,000/-.

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a 23 person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.

.....J.

(Dalveer Bhandari) 24 .....J.

(Harjit Singh Bedi) New Delhi September 23, 2008.