

Balkrishna and Others Vs. Prakash and Others

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Court : Mumbai Nagpur

Decided On : Jan-10-2014

Judge : S.B. Shukre

Appeal No. : Second Appeal No. 74 of 1996

Appellant : Balkrishna and Others

Respondent : Prakash and Others

Advocate for Def. : Shri. Jibhkate

Advocate for Pet/Ap. : Shri. Jibhkate, Shri. Masood Shareef

Judgement :

Oral Judgment:

This appeal is preferred against the judgment and decree passed on 15.11.1995 by the 4th Additional District Judge, Nagpur, in Regular Civil Appeal No.21 of 1992, thereby reversing the judgment and decree passed on 20.11.1991 in Special Civil Suit No.161 of 1985 by the 7th Joint Civil Judge, Sr. Dn., Nagpur.

2. The appellants are the original defendants and the respondents are the original plaintiffs. For the sake of convenience, they are being hereinafter referred to as plaintiffs and defendants in the order in which they were arrayed as parties to the suit). The facts of the case are stated briefly in the subsequent paragraphs.

3. Plaintiffs no.1 to 3 (respondents 1 to 3) and plaintiff no.4 (respondent no.4) were respectively the sons and daughter of late Sheshrao Bhagwan Lohi, the brother of original defendant no.1 (original appellant no.1) deceased Balkrishna Lohi. Sheshrao and Balkrishna had one more brother named Narayan. The ancestral properties which had come into the hands of the brothers were amicably partitioned by them on 5.4.1951. In this partition, the house No. 100, new House No. 121, comprising a building of six Mayalis(rafters), five Tasmās(rooms) situated in Ward No. 24, Peth Budhwar, Katol, District Nagpur, more particularly described in the Schedule to the plaint (hereinafter referred to as suit house), came to be allotted to Sheshrao, father of the plaintiffs, while the other properties were allotted to Balkrushna and Narayan. After the partition, father of the plaintiffs became the exclusive owners of the suit house and he continued to be in its undisturbed and peaceful possession till his death on 21.11.1984. After his death, plaintiffs being the legal heirs of deceased Sheshrao became the absolute owners of the suit house. It was submitted on behalf of the plaintiffs that when they were busy performing the last rites of deceased Sheshrao, on or about 23.11.1984, defendant no.1 Balkrishna forcibly obtained possession of the suit house. Therefore, notice was issued to him for vacating of the suit house, but in vain. Ultimately, the appellant filed a suit for recovery of possession and mesne profits.

4. The defendants resisted the suit by filing their written statement. The defendants admitted the inter se relations between themselves and plaintiffs. They also admitted that Narayan was the third brother of defendant no.1. They submitted that Sheshrao died on 21.11.1984 not at Katol but at Sonkhamb. They admitted the partition having taken place by way of family arrangement on 5.4.1951 in which the suit house came to be allotted to Sheshrao. They submitted that the house that was allotted in the partition to Sheshrao bearing House No.100, consisted of two parts, bearing House No.100-A and 100-B. It was also submitted on their behalf that defendant no. 1 was already in possession of the House No. 100-A and Sheshrao was also in possession of the suit house of Mainabai, which house had been allotted to the share of defendant no.1 in partition and which was allowed to be retained by Sheshrao, and in addition to this, he was also given an amount of Rs.850/-. It was further submitted that thereafter House No.100-A was sold out by defendant no.1 and Sheshrao to one

Shivaji Lohi but the consideration thereof was received by Sheshrao. It was further submitted that this house No.100-A no longer remained under the ownership of either the defendant no.1 or the plaintiffs. As regards House No.100-B, it was submitted that same was purchased by defendant no.1 from Sheshrao vide Saleded dated 13.2.1967. It was further submitted that the entire house no. 100, at the time of the suit, was out of ownership and possession of the plaintiffs or their father late Sheshrao and, therefore, there was no cause of action surviving at that time. Alternatively, it was submitted by defendant no.1 that he had become owner of the suit house by way of adverse possession, as he had been in possession of the suit house and asserting his ownership thereof continuously, peacefully and without any interruption since the year 1955. On these grounds, it was urged that the suit of the plaintiffs be dismissed.

5. After considering the evidence adduced by the parties on the issues framed by the trial Court and also hearing both the sides, the trial Court found that defendant no.1 proved his case that the suit house was given to him in exchange for Mainabai's house given to the father of the plaintiffs and accordingly dismissed the suit by his judgment and order dated 20.11.1991.

6. Feeling aggrieved, first appeal was preferred against the said judgment and decree before the District Court by the plaintiffs. The learned District Judge, after hearing both the sides, allowed the appeal and reversed the said judgment and order passed by the trial Court by his judgment and decree passed on 15.11.1995. This time, it were the defendants who were not satisfied and, therefore, they have preferred the present appeal before this Court.

7. This Court by its order passed on 23.7.1996 had admitted the appeal on a substantial question of law as mentioned in the order. The substantial question of law that arises for my consideration is as follows :

œWhether the exchange of immoveable properties is required to be compulsorily registered??

8. This Court had also framed additional substantial question of law on 10.10.2013, which is as follows :

œWhether, in the facts and circumstances of the case, the appellants could claim to retain their possession alternatively by taking plea of adverse possession and, if so, whether the finding recorded by the first appellate Court that the appellants have not proved their adverse possession, is perverse??

9. I have heard Shri Jibhkate, learned counsel for the appellants/defendants and Shri Masood Shareef, learned counsel for the plaintiffs/respondents. With their assistance, I have gone through memo of appeal, impugned judgments and decrees and record of the trial Court.

10. In the written statement, defendant no.1 had taken up a plea that the suit house was divided into two parts, with its one part bearing house number 100-A being in his possession at the time of the partition and the second part bearing house No.100-B having been purchased by him subsequently from deceased Sheshrao, father of the plaintiffs. By such a plea, a confusion was tried to be created about the identity and status of the suit house, but these doubts vanish into thin air if we take a look at the admissions given by defendant no. 1 Balkrishna in his evidence vide Ex.52. He admits that the suit house was never divided into two parts, that he and Sheshrao never transferred any portion of œSix Mayali property? to Shivaji by any sale-deed and that the house which was purchased by him from Sheshrao had nothing to do with the suit house, which was all in contradiction to the defence taken by the defendants in their written statement. These admissions would make it clear that there was only one house bearing House No.100, and this is the suit house. As regards the suit house having been allotted to the share of deceased Sheshrao in the family partition of 1951, it must be said here, there is no disagreement between the parties. So, it would have to be seen as to whether the suit house bearing House No.100, and as described in the plaint, was ever exchanged by deceased Sheshrao for the house known as Mainabai's house allotted to the share of defendant no.1 Balkrishna.

11. Shri Jibhkate, learned counsel for defendants, has forcefully contended that immediately after the partition of joint family properties by way of family arrangement, there had been exchange of two properties in between deceased Sheshrao and defendant no.1 Balkrishna. In this exchange, he submits,

Mainabai's house that had fallen to the share of defendant no.1, was exchanged with Sheshrao for the suit house, which was allotted to Sheshrao. He further submits that this was done by way of a family arrangement orally and, therefore, no registration of this transaction was required. He submits that the trial Court was therefore right in upholding this exchange of properties between Sheshrao and defendant no.1 and the first appellate Court committed a serious error of law in holding that this transaction was required to be reduced into writing, being equivalent to that of a sale, attracting requirements of Section 54 of the Transfer of Property Act (for short T.P. Act). He also submits that in any case, the exchange of properties was on the basis of possession that the respective parties were already holding and that by exchange the respective parties were only allowed to retain their possession of the respective properties, and thus an exchange based upon possession, in accordance with the doctrine of part performance of the contract, would not require any registration. He further submits that alternatively the defendants had proved their plea of perfection of title to the suit house by adverse possession and the first appellate Court completely ignored the evidence brought on record by the defendants in this regard, committing thereby perversity in reversing the judgment and decree of the trial Court.

12. Shri Masood Shareef, learned counsel for the plaintiffs, has submitted that it is well settled law that exchange of properties of the value of Rs.100/- and upwards requires compulsory registration and in this case there being an admitted position about the alleged transaction of exchange being oral, no fault could be found with the finding recorded by the first appellate Court that the defendants failed to prove exchange of suit house for Mainabai's house. He further submits that in the instant case there had occurred a partition of the ancestral properties in the year 1951 itself whereby the parties to the partition, which was in the nature of family settlement, were put into separate possession of the properties allotted to them, and thereafter there was severance in status of jointness and commonness. Therefore, he submits, there could not have been any exchange of properties subsequently by way of family arrangement. He also submits that in order that mutual transfer of interests in property is valid in law, there has to be undivided interests of all the persons in the properties and they must hold these properties as tenants in common. If their interests in the properties are separated, any mutual

transfer of properties in between them would be in reality an exchange under Section 118 of T.P. Act requiring its compulsory registration, so submits Shri Masood Shareef. He further submits that in any case, in the instant case, there has been no evidence brought on record to prove that the exchange was accompanied by delivery of possession or that it was on the basis that respective parties were already in possession and allowed to retain their possession of the respective properties and, therefore, the doctrine of part performance would have no application to the facts of the instant case. He further submits that the plea of exchange of properties is based upon the admission of title of other person and, therefore, it is a plea inconsistent with plea of adverse possession, which is essentially rooted in open denial of the title of another. According to him, it is well settled that adverse possession cannot be proved in a case where a plea inconsistent with the plea of adverse possession is simultaneously taken. Therefore, he submits that the appeal deserves to be dismissed.

13. Learned counsel for the defendants has referred to me the following cases :

(i) Kale and ors. v. Dy. Director of Consolidation and ors. AIR 1976 SC 807.

(ii) RoshanSingh and ors. v. Zile Singh and ors. AIR 1988 SC 881.

(iii) BhagwanKaur and ors. v. Ranjit Singh and anr. AIR 1990 P. and H. 89.

(iv) Dada Vaku Nikam v. Bahiru Hingu AIR 1927 Bom. 627.

(v) State of West Bengal v. The Dalhousie Institute Society AIR 1970 SC 1778.

The principle that emerges from the decisions in Kale and ors. and Roshan Singh (supra) is that a partition by way of a family arrangement does not require any registration and it can be even oral. Registration would be necessary only if the terms of the family arrangement are reduced into writing. However, a writing which merely recites that there has in time past been a partition, is not a declaration of will constituting or severing ownership, but a mere statement of fact and it does not require registration.

14. In the case of State of West Bengal v. The Dalhousie Institute Society (supra) the Hon'ble apex Court has held that in order to perfect title by adverse possession, it must be established that party taking the plea is in open, continuous and uninterrupted possession and enjoyment of the site for at least such a period as prescribed under Articles 64 and 65 of the Limitation Act, 1963.

15. In the case of BhagwanKaur (supra), the learned Single Judge of Punjab and Haryana High Court has taken a view that when exchange is followed by delivery of possession, Section 54 of T.P. Act would not be applicable and thus registration of the exchange made orally would not be necessary. In the case of Dada (supra) it has been held by the Division Bench of this Court that where in pursuance of an oral agreement, there has been an actual exchange of land and the parties have remained in possession ever since that date without there being any question raised, the doctrine of part performance applies and, therefore, bar under Section 54 of T.P. Act is in reality removed. So, these two cases indicate that an oral agreement whereby there is an actual exchange of two immoveable properties between the parties followed by delivery of possession, does not require any registration.

16. There can be no dispute about the above referred principles of law and it would have to be seen whether defendants have proved their case as regards exchange by family arrangement and alternatively perfection of title by adverse possession in accordance with the principles of law laid down in the above referred cases.

17. In the instant case, admittedly, there was a family settlement between Sheshrao and two brothers“namely defendant no.1 Balkrishna and Narayan, whereby the ancestral properties were partitioned in between them and the suit house was allotted to Sheshrao and Mainabai's house was allotted to defendant no.1 Balkrishna. After this partition, the brothers held the properties allotted to them separately and there was severance in joint status of the properties. In law, whenever severance in the unity and jointness of the properties occurs after the partition in whatever manner, the properties become separate properties of the parties, and lose their character as ancestral properties. In this regard, I am

supported by the view taken by the learned Single Judge of this Court in the case of Subhadrabaiw/o KachariKhandagale v. Balwanta Narayan Jadhav “ 2005(1) Mh.L.J. 891, referred to me by the learned counsel for the plaintiffs, wherein the learned Judge has held that once the property is separated by whatever means and methods such property cannot be said to be ancestral property. In the instant case, as per the own case of defendants, exchange of properties had taken place after the partition of properties in the year 1951. So, at the time of exchange, the properties were held separately by Sheshrao and defendant no.1 and, therefore, principles applicable to transfer of interests by oral agreement or family arrangement, cannot be applied, unless it is proved by evidence that such transfer was followed by delivery of possession, and that is not the case here, as would be seen from the findings recorded by me in subsequent paragraphs. Such a mutual transfer of separate interests valued at Rs.100/and upwards has to be made, it being an exchange under Section 118 of T.P. Act, in the manner provided for the transfer of such property by sale under Section 54 of T.P. Act. In other words, it can be made only by a registered instrument.

18. The concept of oral family arrangement for transfer of interests in properties held jointly or in common not requiring any registration is valid in law. The Hon'ble apex Court has laid down in the afore-stated cases of Kale and ors. and Roshan Singh that the transfer of properties held jointly or in common by oral family arrangement does not require any registration. This principle applies to only those properties which are joint family properties or where the properties are held in common and there is no separation of individual interests in the properties. As long as co-owners or coparceners have common undivided interests in the properties, oral family arrangement for division or distribution of interests or even relinquishment of interest in favour of person not having antecedent title without registration is good in law. But, once the partition is effected, whether by way of family arrangement or deed of a partition, there occurs severance in jointness of the properties and the properties allotted to the parties in partition become separate properties of the coparceners or co-owners, or the persons in whose favour interests have been relinquished, and thereafter if any mutual transfer of properties takes place, it would fall within the scope of Section 118 of T.P. Act and would qualify itself to be called an exchange as defined under said Section. The

reason being that the term 'ownership' used in the said section means, in its ordinary and natural sense, ownership to the exclusion of ownership of another. If it were not so, the section would not have employed the expression 'when two persons mutually transfer the ownership of one thing for the ownership of another?' to define exchange. The words 'transfer of ownership of one thing for the ownership of another?' themselves indicate that what is contemplated by the section is mutual transfer of two separate and mutually exclusive properties. In case of joint family property or property held in joint tenancy, each coparcener or co-owner has some interest in the entire property and which is undivided with and not exclusive of the interests of the other coparceners or co-owners. In partition, there occurs giving away of some undivided interest by one for that of another's some undivided interest and, therefore, it cannot be called an exchange under Section 118 of T.P. Act, although it is a transfer of property within the meaning of Section 5 of that Act.

19. The view so taken by me receives support from the decision rendered in the case of *Ganuv. Shankar* " 1969 Mh. L.J. 379, referred to me by the learned counsel for the plaintiffs. The learned Single Judge of this Court has held therein that partition and exchange are two different concepts and a right of partition is an incident of property held in joint tenancy or tenancy in common which by virtue of Section 2(b) of T.P. Act is not affected by that Act and partition of such property can, by virtue of sections 2(b) and 9 of the T.P. Act, be made orally. The learned Judge has further held that this is true not only of partition between members of joint Hindu family but also of partition between co-owners where property is held in joint tenancy or tenancy in common. Thus, transfer of properties by way of oral family arrangement is possible only in respect of the properties which are held as joint family properties or held in joint tenancy. But, when there is a mutual transfer of separate properties by way of exchange, the provision of Section 118 of T.P. Act would be applicable.

20. In the case of *NivruttiKushaba Binnar v. Sakhubai w/o Keru Jorvar* " 2009(3) Mh.L.J. 737, referred to me by the learned counsel for the plaintiffs, the learned Single Judge of this Court has observed in paragraph 29 that an exchange of property as contemplated under Section 118 of T.P. Act must be effected by a

registered instrument. The learned Judge has further held that a plain reading of Section 118 of the Act would indicate that such a transfer would be valid only when it is effected as if it is a sale as contemplated under Section 54 of the said Act, if the value of the immoveable property is Rs.100/and upwards. In the case of Ram Kristo Mandal and anr. v. Dhankisto Mandal reported in AIR 1969 SC 204, Hon'ble supreme Court has held that a transfer of property in completion of exchange as contemplated by Section 118 of T.P. Act can be made only in the manner provided for the transfer of such property by sale.

21. I have already held that when the properties are held separately and there has been severance in their unity and jointness, there cannot be mutual transfer of such properties by way of oral transaction of family settlement for, it would amount to an exchange within the meaning of the term defined under Section 118 of T.P. Act. In the instant case, there is clear evidence available on record showing that partition of the ancestral properties took place in the year 1951 wherein the properties to the partition by way of family arrangement were put in separate possession of the parties to the partition. In this partition, the suit house was allotted to Sheshrao and Mainabai's house was allotted to defendant no.1 Balkrishna. The defendants do not dispute these facts. Therefore, after the partition there was separation of interests in the ancestral properties and these properties became separate properties of parties to the partition, and their ownership of these properties was in exclusion to the ownership of each other. So, for exchanging such properties, it would be necessary to fulfill requirements of Section 118 of T.P. Act or in other words exchange of these properties would be valid in law if it is effected by a registered instrument. In the instant case, admittedly the exchange of properties was on the basis of an oral transaction and, therefore, it must be held that there was no exchange of suit house for Mainabai's house, effective and valid in law.

22. Consequently. I do not find any illegality in the finding recorded by the first appellate Court that the defendants failed to prove that they became owner of the suit house by way of exchange of Mainabai's house for that of the suit house in a family arrangement between Sheshrao and defendant no.1. It is seen that the trial Court has not at all considered the fact that since there had been change in

character of the properties following partition, with Sheshrao and defendant no.1, holding them to the exclusion of another, there could not have been oral exchange by way of family arrangement of these properties. Therefore, the finding recorded by the trial Court in this regard cannot be sustained in law.

23. Learned counsel for the defendants has submitted that since in the exchange of properties, Sheshrao and defendant no.1 Balkrishna were allowed to retain possession of the properties exchanged, they being already in possession of these properties, the exchange did not require any registration, as held in the cases of BhagwanKaur and Dada (supra).

24. The principle laid down in the said cases of BhagwanKaur and Dada (supra) has been stated by me earlier and even on its basis, I do not think that the claim of the defendants that the suit house was received by them in exchange for Mainabai's house given to Sheshrao can be said to have been established in this case. The reason is that to seek any application of this principle of law, the defendants would be required to prove that they were in possession of the suit house at the time when the oral exchange took place. The evidence brought on record by them shows the position to be otherwise. The evidence of defendant no.1 Balkrishna (Ex.52) is relevant in this regard. He has stated in paragraph 2 that in the year 1954 there was exchange of properties between himself and Sheshrao on the basis of an oral agreement. He also states that in addition to giving of house of Mainabai to Sheshrao, he had paid Rs.850/- to Sheshrao. This would show that basically this transaction was not purely that of an exchange, as defined under Section 118 of T.P. Act but was also accompanied by a consideration in terms of money and, therefore, it was a transfer of ownership partly in exchange for a price and partly in exchange for ownership of one thing for the ownership of another. Such transaction would also fall within the definition of *æsale?* as given under Section 54. Section 118 clearly lays down that it is only that mutual transfer of ownership of one thing for the ownership of another, neither thing or both things being money only, which is exchange. Further, the evidence of defendant no.1 Balkrishna also does not show that the exchange was followed by delivery of possession or was on the basis that parties to the exchange were already in possession of the properties exchanged. He states in paragraph 2 that

he was living in the suit house since the year 1973-74. This would show that as per his own case, he did not start living in the suit house immediately after the exchange in the year 1954 and that would also imply that no possession of the suit house was given to him in the exchange. This conclusion is strengthened by another admission given by him in his cross-examination. In paragraph no. 4, he admits that after partition, Sheshrao lived in the suit property for 23 years. This admission would rather finally establish the fact that in the alleged exchange of properties, there was no handing over of possession of the properties, and that at that time neither Sheshrao was in possession of Mainabai's house nor defendant no.1 was in possession of the suit house. Therefore, the principle of law laid down in the aforestated cases of Dada and Bhagwan Kaur would have no application to the facts of the instant case. Accordingly, I find that there was no exchange of suit house for that of Mainabai's house in between Sheshrao and defendant no.1 Balkrishna and that defendants failed to prove their case that they became owner of the suit house on the basis of exchange of that house for Mainabai's house given to Sheshrao.

25. In view of above discussion, I have no hesitation to hold that the exchange of immoveable properties is required to be compulsorily registered unless followed by possession and since the alleged exchange in the instant case was admittedly by way of an oral transaction, and not by a registered instrument, without being accompanied or followed by possession, the defendants failed to prove their case of ownership of suit house on the basis of exchange. The first substantial question of law is answered accordingly. No interference with the finding of the first appellate Court on this count is warranted.

26. As regards the second question, as to whether the appellants/defendants could claim to retain their possession alternatively on the basis of plea of adverse possession, I find that it would be necessary first to discuss the case law referred to me by both the sides in this regard before an answer is attempted to the question.

27. The requirements for perfecting title by adverse possession have been stated in the case of State of West Bengal v. The Dalhousie Institute Society, supra,

referred to me by the learned counsel for defendants. They would show that by evidence, it must be established that the possession is open continuous, uninterrupted and adverse to the real owner for such a period as is prescribed under Articles 64 and 65 of the Limitation Act. The prescription for such a nature of possession is of 12 years.

28. In the case of L.N. Aswathama and anr. v. P. Prakash “ (2009) 13 SCC 229), referred to me by the learned counsel for the defendants, the Hon'ble apex Court has held that pleas based on title and adverse possession are mutually inconsistent and, therefore, unless the party taking the plea of adverse possession denounces title of another and asserts his own independent hostile adverse possession to the knowledge of the other person, adverse possession cannot be said to begin to operate. The Hon'ble apex Court has held that the person possessing the property must have the requisite animus to possess the property hostile to the title of the true owner and till that time the period for prescription will not commence. In other words, long and continuous possession for more than 12 years by itself does not constitute adverse possession and it is necessary for the defendants to show his animus possidendior his consciously hostile adverse possession to the knowledge of the plaintiffs and it is only from the date from which he starts asserting his possession with animus possidendithat the period of prescription necessary for perfecting title by way of adverse possession would commence.

29. In the instant case, there is absolutely no evidence led by the defendants showing that their possession with animus possidendibegan from a particular date. There is no evidence showing that on a particular date they gave up the plea of exchange and started denouncing the title of the plaintiffs to the suit house. Plea of ownership by exchange essentially denotes acceptance of ownership of another and, therefore, unless it is given up, any intention or animus to possess would not start. No date or year has been stated by defendants to be the point of time from which they started occupying the property with requisite animus possidendito the knowledge of the plaintiffs. Therefore, it cannot be said that the defendants have proved their title on the basis of plea of adverse possession. In the circumstances, I find that the defendants could not claim to retain their possession by taking plea

of adverse possession alternatively to the plea of exchange of properties. I find no error of law having been committed by the first appellate Court in this regard also. The second substantial question of law is, therefore, answered accordingly.

30. In view of the above, there is not merit in the appeal and it deserves to be dismissed. The appeal stands dismissed with costs. However, time of six months from the date of this order for handing over of possession of suit property by the appellants/defendants to the respondents/plaintiffs is granted.

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