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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 890 OF 2014

Smt. Veronica Paul Andrat and others .. Applicants

Vs.

Shri Santan Fredy Bhandari and others .. Respondents

Mr.Sandesh D.Patil, Advocate for the Applicants.

CORAM : R. G. KETKAR, J.

DATE : 10th AUGUST, 2015

P.C. :

. Heard Mr.Sandesh D.Patil, learned Counsel for the applicants at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendants have challenged the judgment and order dated 04/04/2014 passed by the learned 5th Joint Civil Judge, Senior Division, Thane below Exhibit 1 in Regular Civil Suit No. 499 of 2011. By that order, the learned trial Judge held that Suit is within limitation.

3. In support of this Application, Mr.Patil submitted that respondents, hereinafter referred to as plaintiffs, have instituted Suit inter alia for declaration that plaintiffs are the owners of the suit property; for mandatory injunction directing the defendants to demolish the illegal structure constructed on the suit property;

directing the defendants to hand over quiet, vacant and peaceful possession of the suit property to the plaintiffs. He submitted that upto paragraph 7, plaintiffs have highlighted as to how they acquired ownership over the suit property. In paragraph 9, plaintiffs alleged that defendants have no right and/or authority in respect of the suit property. Without any authority, defendants have encroached upon part portion of the suit property and constructed three structures thereon. The defendants have no right and/or authority to construct any structure on the suit property and as such, the act of the defendants is illegal and high handed.

4. In paragraph 10, the plaintiffs asserted that on 02/08/2011, when the plaintiff No.5 visited the suit property, plaintiffs came to know about defendants's commencing work of development in the suit property.

5. Mr.Patil submitted that during the pendency of the Suit, plaintiffs filed application Exhibit 5 for interim relief. The defendants filed reply inter alia contending that Suit is not maintainable as it suffers from law of limitation. Since prior to the year 1940, the predecessors of the defendants were in use, enjoyment and occupation of the suit property continuously, openly and without disturbance from anybody including the plaintiffs. The defendants became as owners by adverse possession. The defendants are seeking relief of declaration as owners by way of counter claim in

the present Suit.

6. In paragraph (V), defendants contended that plaintiffs are aware of the occupation, enjoyment and possession of the defendants in the suit property. However, they have not taken any steps to prove that possession of the defendants is illegal nor they have sought declaration about ownership and possession within prescribed period of limitation. On the other hand, plaintiffs admitted possession of the defendants. The plaintiffs have instituted present Suit after 70 years on the knowledge of the rights of the defendants and as such, Suit is barred by law of limitation.

7. Mr.Patil submitted that defendants thereafter filed application under Section 9-A of C.P.C.. In paragraph 7, it is contended that the plaintiffs are residing in the locality in which suit property is situate. Thus, plaintiffs are aware of the existence of the structures in the suit property as well as occupation of the defendants therein since from the year 1940. At the most, plaintiffs ought to have adopted remedy of declaration of their alleged rights within 3 years from the knowledge of losing their alleged rights in the suit property. The Suit is instituted after more than 70 years and there is no explanation given by them for the same. The Suit of the plaintiffs is hopelessly barred by law of limitation.

8. I have considered the submissions of Mr.Patil. I have also perused the material on record. By the impugned order, the

learned trial Judge has held that the plaintiffs have instituted Suit for declaration of their ownership over the suit property as also mandatory injunction for removal of illegal structures and for possession of the suit property. In the plaint, plaintiffs averred that defendants have started construction in the suit property on 02/08/2011 and thus, cause of action accordingly to the plaintiffs accrued in the year 2011,

9. In paragraph 10, the learned trial Judge has observed that the defendants objected to the Suit at the initial stage by raising plea of limitation. It was further observed that defendants have admitted ownership of the plaintiffs over the suit property and at the same time, they have raised the plea of adverse possession. The said plea requires evidence. To confer title by way of adverse possession, various factors fall for consideration such as hostility of title with the knowledge of true owner, continuous and uninterrupted possession for more than 12 years. They are required to be established by leading evidence and the limitation starts from the date where true owner has knowledge when the possession of the defendants became adverse to the plaintiffs. Merely, long standing possession is not sufficient to prove the plea of adverse possession and in the absence of evidence, the Court cannot uphold such contention.

10. After considering the reasons given by the learned trial Judge in paragraphs 9 & 10, I do not find that the learned trial Judge

has committed any error in holding that Suit is not barred by limitation. The learned trial Judge at interlocutory stage has rightly held that plea of adverse possession is required to be established by leading evidence and same cannot be considered at this stage. Article 65 of the Limitation Act lays down that for possession of immovable property or interest therein based on title, period of limitation is 12 years and time from which period begins to run is when the possession of the defendant becomes adverse to the plaintiff. In view thereof, no case is made out for invocation of powers under Section 115 of C.P.C. It is, however, made clear that in case, defendants file written statement and counter claim raising plea of becoming owners by adverse possession, the learned trial Judge will frame necessary issue in that regard. Subject to this, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)