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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 20 OF 2013
WITH
CIVIL APPLICATION NO. 137 OF 2013
WITH
CIVIL APPLICATION NO. 138 OF 2013

Dhondiram Bhau Parit
Since deceased through his Lrs.

1.Krishnat Dhondiram Parit ... Appellant
Vs.

Hambirrao Dnyanu Patil
Since deceased through his Lrs.

1.Bhimrao Hambirrao Patil and others ... Respondents

Mr.S.G.Deshmukh i/b Mr.Ramdas Shelke, Advocate for Appellant.
Mr. K.S.Deval i/b Mr.J.M.Joshi, Advocate for Respondents No.1 to 3.

CORAM : R. G. KETKAR, J.
DATE : 20th APRIL, 2015

P.C. :

1. Heard Mr.S.G.Deshmukh, learned Counsel for the appellant and Mr.K.S.Deval, learned Counsel for respondents No.1 to 3 at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for 'C.P.C'), the heir and legal representative of the original defendant has challenged the judgment and decree dated 25/02/2004 passed by the learned Civil Judge, Junior Division, Tasgaon in Regular Civil Suit No. 256 of 1983 as also the judgment and decree dated 12/03/2012 passed by the learned District Judge – I, Sangli in Regular Civil Appeal No.78 of 2004. By these orders, the

Courts below partly decreed the suit instituted by the respondent- Habirrao Dnyanu Patil, since deceased, and ordered the original defendant- Dhondiram Bhau Parit to hand over possession of land admeasuring 57R out of Gat No. 718 having new Gat No. 922 situate at Punadi (Walwa), Tal.Tasgaon, Sangli (for short 'suit land'). The suit for perpetual injunction was dismissed.

3. In support of this appeal, Mr.Deshmukh submitted that initially Hambirrao, hereinafter referred to as plaintiff claims to have purchased the suit land on 20/12/1982 from one Kamal Gopinath Dixit. On 06/12/1983, the plaintiff instituted suit for injunction on the premise that he is in possession of the suit land. In the year 2003, he amended the plaint and in the alternative claimed possession. On 24/01/1984, the defendant filed his reply to application for interim relief. The said reply was treated as written statement. In the reply dated 24/01/1984, defendant specifically pleaded that he is in possession of the suit land right from 1967 even adverse to the predecessor-in-title of the plaintiff namely Kamal Gopinath Dixit. He submitted that in the year 1979, defendant perfected his title by adverse possession and consequently Kamal Dixit could not have executed sale deed in favour of plaintiff on 20/12/1982.

4. Mr.Deshmukh further submitted that initially learned trial Judge dismissed the suit on 29/08/1989. Aggrieved by that

decision, the plaintiff preferred Regular Civil Appeal No. 513 of 1989. By order dated 04/01/2002, the learned District Judge set aside the trial Court's decree and allowed the application filed in the appeal at Exhibit 12 for amending the plaint. The learned District Judge remitted the suit to the trial Court with direction that it shall allow the plaintiff to carry out amendment in the plaint to the extent of claim for possession of the suit land as described in application Exhibit 12 filed in the appeal. After carrying out amendment in the plaint, the trial Court was directed to give an opportunity to defendant to file written statement, if any, and then, to frame additional issues and allow both parties to lead evidence, if any, and after hearing both sides, decide the suit on merits.

5. Mr.Deshmukh submitted that the very fact that the learned District Judge while remanding the case permitted the defendant to file written statement as also directed the trial Court to frame additional issues shows that issue of limitation was specifically kept open. He submitted that in the first place, defendant had perfected the title by way of adverse possession qua predecessor-in-title of the plaintiff in 1979. The relief sought for possession in the year 2003 was, therefore, clearly barred by limitation. Secondly, in any case, on 24/01/1984, the defendant had specifically asserted that he is in possession of the suit land. The plaintiff ought to have amended the plaint and sought relief of possession within 12 years

from 24/01/1984. However, the plaintiff did not amend the plaint during this period and claimed possession. Even on this ground, the suit for possession is clearly barred by limitation as relief of possession was sought in the year 2003. Mr.Deshmukh further submitted that the cause of action for seeking injunction and cause of action for seeking possession are entirely different. The learned trial Judge, however, held that suit is based on the same cause of action.

6. Lastly, he submitted that plaintiff has no title to the suit land as the suit land was originally belonging to Gopinath Dixit. But sale deed executed by Kamal Gopinath Dixit in favour of plaintiff will not confer any title as plaintiff basically Kamal Dixit did not have title. He further submitted that at least after the suit was remanded to the trial Court, plaintiff ought to have elected relief. The plaintiff still pressed relief of injunction and in the alternative, for recovery of possession. According to him, this course is wholly impermissible.

7. On the other hand, Mr.Deval supported the impugned orders. He submitted that defendant has not claimed possession adverse to the interest of plaintiff. In fact, defendant has not admitted the title of the plaintiff. He submitted that though in the written statement, defendant claimed ownership by way of adverse possession against the predecessor-in-title of the plaintiff, before the learned District Judge it was submitted that Kamal Gopinath Dixit is not the owner of the suit land. Thus, even though in paragraph 10 of

the written statement, defendant claimed ownership by way of adverse possession against the predecessor-in- title of the plaintiff namely Kamal Gopinath Dixit, that case was not specifically argued before the Courts below. He further submitted that Article 65 of the Limitation Act, 1963 (for short 'Act') lays down the period of 12 years when the possession of the defendant becomes adverse to the plaintiff. Perusal of the pleadings and evidence of the defendant shows that at no point of time, he came with the case that his possession will become adverse to the plaintiff prior to 12 years and therefore, it cannot be said that suit is barred by limitation. He further submitted that the Courts below after appreciating the evidence on record, have concurrently held that plaintiff is the owner of the suit land and that defendant has failed to establish his ownership by way of adverse possession. He, therefore, submitted that no case is made out for invoking powers under section 100 of C.P.C. In support of his submissions, he relied upon the decision of the Apex Court in the case of *C.Natrajan Vs. Ashim Bai*, (2007) 14 **Supreme Court Cases** 183 and in particular, paragraphs 14 & 15 thereof.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted suit on 06/12/1983 for injunction simplicitor on the basis that he had

purchased the suit land on 20/12/1982 from Kamal Gopinath Dixit. On 24/01/1984, defendant filed his reply to the application for interim relief. Perusal of reply filed by defendant shows that he did not admit title of the plaintiff. In paragraph 10 of his reply, defendant alternatively pleaded that suit land was owned by Kamal Gopinath Dixit. He is in possession of suit land since 1967 openly against the true owners. The ownership rights of Kamal Gopinath Dixit were extinguished in the year 1979. Kamal Gopinath Dixit, therefore, had no right to execute sale deed in favour of plaintiff on 20/12/1982 as she ceased to be owner after 1979.

9. Initially, on 29/08/1989, the trial Court dismissed the suit. Aggrieved by that decision, plaintiff preferred Regular Civil Appeal No. 513 of 1989. The learned District Judge framed following points and recorded the findings against them as under :

<u>Points</u>	<u>Findings</u>
1. Whether plaintiff has proved that he purchased suit land Gat No.718 for a consideration of Rs.28,000/- on 20/12/1983 ?	Yes.
2. Whether plaintiff has proved that he is in possession of suit land on the date of filing of the suit ?	No.
3. Whether the defendant has proved that his possession over suit land from 1967 and that his title is perfected to the suit land by adverse possession ?	No.
4. Whether plaintiff is entitled to a decree of perpetual injunction ?	No.
5. What order or decree ?	As per order below.

10. In paragraph 12, the learned District Judge dealt with the case made out by the defendant that he is in possession of the suit land since 1966-67 till date and that he perfected title by adverse possession in the year 1979. The learned District Judge held that defendant failed to prove that he perfected his title by adverse possession as defendant failed to plead details of ingredients that are required for establishing adverse possession.

11. In paragraph 13, the learned District Judge dealt with application dated 02/02/1990 filed by plaintiff at Exhibit 12 for amendment of plaint. The learned District Judge allowed the application Exhibit 12. Paragraphs 13 & 14 of the judgment read thus :

13. After dismissal of suit, the appellant-plaintiff filed this appeal on 27/09/1989. However, on 02/02/1990, the appellant-plaintiff filed an application at Exh.12 for amendment in the plaint. The amendment sought in Exhibit 12 was regarding alternative prayer for possession of suit land on the basis of title. This amendment is sought only to avoid multiplicity of suit. Even in W.S., the defendant has contended that the plaintiff should file suit for possession against him. The defendant has filed say to this application at Exh.25. The defendant has denied that any such alternative prayer can be made by way of amendment in the plaint. However, in para.9 of his say (Exh.25), the defendant has contended that at the most, the plaintiff can seek amendment for seeking possession of suit land and if that amendment is allowed, the suit will have to be remanded back to the trial Court and in that event, he may be permitted to file additional W.S. and adduce evidence. So, it appears that the defendant has no objection to allow the application (|Exh.12) for amendment in the plaint to the extent of claim for possession.

14. I think that this application (Exh.12) can be allowed only to avoid multiplicity of the proceedings. In case of

Kichhal Bhai Vs. Jaswant Lal, reported in AIR 1966 S.C. 997, it is observed by Their Lordships that as the object of the rule for allowing amendment to the plaint was to avoid multiplicity of suits, this was proper case in which the Court should allow the plaint to be amended, otherwise if amendments were refused the plaintiff would have to bring another suit. Therefore, in view of contentions raised by appellant-plaintiff in application (Exh.12) regarding multiplicity of suit and in view of ratio laid down in the above-cited ruling, I think that this is a fit case in which an application for amendment of the plaint can be allowed. Moreover, in case of 'Quality Polly Closures Vs. Executive Engineer, M.S.E.B., Satara', reported in 2000 (4) Mh.L.J. 203, it is observed by Their Lordships that :

“The purpose and object of Order VI Rule 17 of Civil Procedure Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Mere delay cannot be a ground to reject the amendment. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice.”

In view of above-cited ruling of our High Court, I think that the proposed amendment sought by appellant-plaintiff, vide application (Ex.12), is required to be allowed.”

12. The learned District Judge thereafter recorded his conclusion in paragraph 15 to the effect that plaintiff has proved that he purchased the suit land on 20/12/1982, but failed to prove his possession over the suit land on the date of the suit. The learned District Judge further held that defendant also failed to prove his possession over the suit land from 1967 and that he perfected his title by way of adverse possession. The learned District Judge further held that plaintiff is not entitled to a decree of perpetual injunction. The learned District Judge allowed the appeal and the operative part of the order reads as under :

“Appeal is allowed as follows.

The judgment and decree, passed by trial Court in Regular C.S.No.256/1983 on 29/08/1989, is hereby set-aside and the application filed in this appeal at Exhibit 12 is allowed. The suit is remanded back to the trial Court with direction that it shall allow the plaintiff to carry out amendment in the plaint to the extent of claim for possession of suit land as described in application (Exh.12) filed in this appeal. After carrying out amendment in the plaint, the trial Court shall give an opportunity to the defendant to file Written Statement, if any, and then it shall frame the additional issues, allow both the parties to lead evidence, if any, and after hearing both parties, decide the suit on merits within a period of six months from the date of receipt of Record and Proceedings.....”

13. Perusal of paragraphs 13 & 14 and operative part of the order does not indicate that the learned District Judge had kept the issue of limitation open. Once the issue of limitation is not kept open, the amendment allowed will relate back to the date of institution of the suit. As noted earlier, plaintiff had instituted suit on 06/12/1983 for perpetual injunction and by way of amendment in the alternative for possession. Articles 64 & 65 of the Act read as under :

<i>Description of the suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.
65. For possession of immovable property or any interest therein based on title. (rest of it is not relevant for the present controversy)	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

14. Perusal of Article 64 shows that for possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed, the period prescribed is 12 years from the date of the dispossession. Perusal of the plaint clearly shows that plaintiff has instituted suit on the basis of the title. The plaintiff has also not claimed previous possession and that he was dispossessed. In view thereof, Article 64 of the Limitation Act will not be applicable.

15. Perusal of Article 65 of the Act shows that suit for possession of immovable property or any interest therein based on title, is to be instituted within 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. It is no doubt true that on 24/01/1984, defendant filed his reply to the interim relief application claiming to be in possession. However, he has not admitted ownership of the plaintiff. What is more important is that defendant's claim that he has perfected his title to the suit land by way of adverse possession was also specifically turned down by the learned District Judge while remanding the matter. The defendant has not challenged the order dated 04/01/2002 passed by the learned District Judge in Regular Civil Appeal No. 513 of 1989. In view of section 105(2) of C.P.C, the defendant is precluded from agitating his claim that he became owner by way of adverse possession.

16. As far as submission made by Mr.Deshmukh that suit is barred by limitation is concerned, having regard to the fact that issue of limitation was not expressly kept open, I do not find any merit in this submission. The amendment though allowed on 04/01/2002, without keeping issue of limitation open, will relate back to the date of institution of the suit. Understood thus, I do not find that the suit is barred by limitation.

17. In the result, I do not find that the Courts below committed any error in decreeing the suit. The defendant was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to the evidence on record. In view thereof, no question of law, much less any substantial question of law arises in this appeal. Hence, appeal fails and the same is dismissed.

18. In view of dismissal of the appeal, Civil Applications No. 137 of 2013 for stay and Civil Application No. 138 of 2013 for injunction do not survive and the same are disposed of accordingly.

(R. G. KETKAR, J.)