

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 686 OF 2010

Shri. Pandurang Tatnapal Mhatre

....Appellant/
Original Plaintiff

V/s.

Shri. Krishna Kashinath Mhatre
Since deceased through his legal heirs
and Ors.

.....Respondents
(Original Defendants)

* * * * *

Ms. Gauri Godse, Advocate for the appellant.
Ms. Jui Nerurkar, Advocate for the respondents.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

16th March, 2015.

P.C. :-

1). This Second Appeal challenges the concurrent findings of facts and law by the trial Court in its judgment and decree dated 15th July, 2006 passed in Regular Civil Suit No. 14 of 2000 and by the District Court in its judgment and order dated 30th July, 2010 in Regular Civil Appeal No. 214 of 2006.

2). The brief factual background of the case is that, the appellant filed suit for declaration of his title to the suit property being Survey No. 67,

Hissa no.20 admeasuring 5 Are situate at Village- Saja Pirkon, Taluka-Uran, District -Raigad, for removal of the encroachment thereon to the extent of 30 ft x 38 ft and for mesne profits. It is the case of the appellant that the title to the suit property was acquired by his forefather as per Section 32G of the Bombay Tenancy and Agricultural Lands Act on payment of occupancy price. Thereafter, the revenue records were suitably mutated. The respondents are his direct cousins. They allegedly began constructing a house on the property on 20th February, 1987. When despite obstruction from the appellant, they continued with the construction, the appellant had filed Reg. Civil Suit No. 20 of 1987 (renumbered as 87/1989) for perpetual injunction, simplicitor to restrain the respondents from carrying out the construction. That suit was dismissed on 17th November, 1989. Aggrieved by the judgment, the appellant had preferred Civil appeal No. 3 of 1990 which appeal was also dismissed by the District Court by its order dated 9th June, 1994. In the meantime, the respondents completed the construction of the house.

2). On 16th December, 1994 respondent no.1 moved an application before the Tahsildar, Uran to delete the name of the appellant from 7/12 extract. The appellant was served with the notice of the application. An enquiry was conducted into the application. The Tahsildar by his order dated 6th November, 1995 directed the Talathi to

delete the mutation entry from the revenue records. The appeal preferred by the appellant against the order was dismissed on 6th September, 1997. The appellant then made an application to the TILR for measurement of the suit property. The measurements were taken on 16th June, 1999 and the area occupied by the respondents was seen to admeasure 30 ft x 38 ft. Thereafter, the appellant filed the second suit claiming that cause of action has arisen in his favour after the measurements were taken on 16th June, 1999.

3). The respondents contested the suit contending that, it was barred by the law of limitation and by estoppel in view of the findings in the earlier suit. On merits, the respondents contended that they alongwith the appellant are descendants of the common ancestor. There is no severance of the joint family by partition. As such, there was no question of encroachment by the respondents. Further, they have been in possession of the suit property since the year 1987. The respondent's father had constructed a cattleshed with pucca walls admeasuring 18 ft x 16 ft. It was numbered as 501 in the year 1994 by the Gram Panchayat. In the year 1996, it was renumbered as House no.491. Behind the cattleshed, the respondents constructed a house admeasuring 30 ft x 38 ft on the foundation which was already in existence. The respondents also took an alternative plea of title by adverse possession.

4). The Courts below held that the suit for recovery of possession was barred by the law of limitation. The trial Court observed that, the appellant had, in his suit for injunction simplicitor filed in the year 1987, alleged encroachment by the respondent to the extent of 30 ft x 38 ft. The appellant's suit had been dismissed for want of seeking appropriate reliefs. Therefore, the suit for declaration of title and for possession filed on 4th June, 2000 was beyond the period of limitation of 3 years and 12 years prescribed under the Limitation Act. The lower Appellate Court confirmed the findings of the trial Court with a detailed discussion at paras-13 and 14 of its order. The same reads as follows :-

“13. The interesting question required to be discussed in this matter is about the plaintiffs assertion that he is owner in possession of S.No. 67/20. However, the defendant has encroached part of the area owned and possessed by him, on 20.02.1987. The cause of action arises, as in plaint on 20.02.1987, the plaintiff came to know that it is the act of the defendant, is illegal, as well as, the defendant has denied his title over the suit property still the plaintiff has filed simplicitor stay for injunction, in the form of earlier suit. The appeal was dismissed on 09.06.1994. The plaintiff did nothing up to 09.06.1994. The expected act of the plaintiff during the pendency of that suit itself, either to amend the plaint or to present a suit thereafter withdraw earlier suit. As the cause of action was continued one and seek all relief to avoid the bar under Order 2 Rule 2 of the

C.P.C.”

14). It was obligatory on the part of the plaintiff, even in such suit, besides relief of declaration and encroachment, to claim of recovery of possession. The plaintiff failed to seek main relief of recovery of possession in this suit also. In the background of knowledge of the plaintiff that the defendant has encroached on 20.02.1987 over the suit property, area 30 ft x 38 ft in part of the S.No.67/20. Keeping silence by plaintiff till measurements in question by an application for such measurements, moved before the T.I.L.R. Dated 16.06.1996 would not allow the plaintiff for the purpose of continuing a cause of action from the date 20.02.1987. The plaintiff has pleaded in the present suit the cause of action arose on 16.06.1999. As the plaintiff revealed alleged encroachment through such measurement. It is also knowledge of the plaintiff about exact area traced out through such measurements. This particular report of measurement, is an act of plaintiff, in the background of knowledge of plaintiff as to encroachment made by the defendant over the survey No. 67/20, on 20.02.1987.”

5). Ms. Godse, the learned Advocate appearing for the appellant submits that, the Courts below have apparently applied Article 64 of the Limitation Act to the suit, which is an error on their part. She argues that, the suit for possession based on title is not barred by limitation because there is no limitation prescribed for suits based on title. The only

defence to such an action would be adverse possession.

6). Ms. Godse submits that, the Limitation Act, for the purpose of prescribing period of limitation, places suits for possession under two categories. The first category, is of suits for possession based on previous possession alone and not on title. This is governed by Article 64. The second category is of suits for possession based on title, which is governed by Article 65. Though, the period of limitation prescribed for the two categories is same, the starting point of period of limitation defers. Under Article 64 the period of limitation begins to run from the date of dispossession, whereas, under Article 65 the period begins to run when possession of the defendant becomes adverse to the plaintiff. It is the argument of Ms. Godse that, since the suit for possession filed by the appellant was based on title and not on previous possession, it could not be said that the period of limitation began to run from the year 1987 when the earlier suit was filed. She argues that, the possession of the defendants cannot become adverse to the plaintiff until expiry of period of 12 years. Therefore, the suit as filed was within the period of limitation. It is her submission that, it is not necessary for the appellant to establish that he is in possession of the suit property within 12 years preceding the filing of the suit. On the contrary, it would be for the respondents so to prove, if they want to defeat the appellant's claim to

establish his title by adverse possession.

7). Undoubtedly, the Limitation Act places all suits for possession of immovable properties under two categories as mentioned above and the two categories are governed by Article 64 and Article 65. In the facts of the present case, since the suit for possession is filed on the basis of the title, the provision of Limitation Act that would get attracted is Article 65 and not Article 64. For this Article, the period of limitation of 12 years starts running from the date on which the possession of the respondents became adverse to the appellant. Once, adverse possession is alleged, then the plaintiff is necessarily put on guard and has to institute the suit within 12 years from the date when the hostile title is assumed. For this purpose, perusal of the pleadings and the evidence of the respondents would be material. In their written statement, the respondents at para-15, have specifically taken up the plea of title by adverse possession though, as an alternative plea. It is claimed therein that, the respondents have been in open, continuous and hostile possession of the suit property since the year 1957. The case of adverse possession was put to the appellant in his cross-examination. The appellant, admitted in his cross-examination that, the suit property has been in possession of the respondents since the year 1987 and that they have been claiming title to the same. He admits that, possession of the

suit property by the respondents is continuous and also hostile to him. He has categorically stated that, the respondents do not recognise him as the owner of the suit property. This admission, coupled with the averments made by the appellant in his suit, filed in the year 1987 is sufficient to hold that the suit which was governed by Article 65 of the Limitation Act, filed in the year 2000 was beyond the period of limitation of 12 years for possession and 3 years for declaration of title to the suit property.

8). It is also to be noted that, the first prayer in the suit is for a declaration that the appellant is the owner of the suit property and that the respondents have no right thereto. This relief has obviously been asked for by the appellant, because the respondents have been claiming to be the owners of the suit property. Therefore, the finding of the Courts below that the suit is barred by the law of limitation, is justified. The Second Appeal is therefore dismissed.

(SMT. R.P. SONDURBALDOTA, J)