

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1384 OF 2015

TEDCO EXPORTS PVT. LTD.]
A Private Limited Company, duly]
registered under the provisions of]
Indian Companies Act and having its]
registered office at M-72, Connuaght]
Circus, New Delhi – 110 001]..... Petitioner.

Versus

1] SULEMAN CHAMBERS]
CO-OPERATIVE HOUSING SOCIETY LTD]
A Co-operative Housing Society duly]
Registered under the provisions of the]
Maharashtra Co-operative Societies Act]
1960, having its office at 9, Suleman Chambers]]
4 Battery Street, Colaba, Bombay – 4000039]
2] VISHWAMBHAR KHEMCHAND MEHROTRA]
An Adult Indian Inhabitant residing at C/o.]
Smt. Tara Tekchandani, 216-A, 6th road]
Khar, Mumbai – 400052]..... Respondents

Ms. Mamta Sadh i/by Mr. Rahul Karnik for the Petitioner.
Mr. A G Damle, Senior Advocate with Mrs. Bina H Jariwala & Mr. Shivaji Haral i/by M/s. Auroma Law for the Respondent No.1.
Mrs. Tanmayee Gadre – Rajadhyaksha i/by Mr. S J Khera for the Respondent No.2.

CORAM : R. M. SAVANT, J.
Reserved on : 30th April 2015
Pronounced on : 7th July 2015

JUDGMENT :-

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 19/09/2014 passed by the Maharashtra State Cooperative Appellate Court, Mumbai by which order the Appeal filed by the Respondent No.1 herein being Appeal No.31 of 2014 came to be allowed and resultantly the order dated 12/07/2013 passed by the Co-operative Court No.I, Mumbai in Dispute No.CC/I/1032 of 1993 dismissing the Dispute came to be set aside, and the Dispute in turn came to be allowed.

3 The facts giving rise to the filing of the above Writ Petition can be stated thus :-

The Respondent No.1 is a Co-operative Housing Society and is classified as a “Tenant Co-partnership Housing Society”. The dispute relates to Flat No.22, situated on the 3rd Floor of the building of the Respondent No.1 herein. The said flat would be herein after referred to as “the suit flat”. The Respondent No.1 herein filed the Dispute in question for seeking possession of the suit flat from the Petitioner herein on the ground that the Petitioner was in illegal occupation of the suit flat. In so far as the suit flat is concerned, the same was originally standing in the name of Shri Khemchand Ghorumal

Mehrotra who expired on 12/12/1973 leaving behind the Respondent No.2 herein as his only heir. It appears that at the relevant time the Respondent No.2 was residing at, and pursuing his profession as a Solicitor in London. It appears that the wife of the Respondent No.2 herein Smt. Aruna Vishwambhar Mehrotra got the suit flat transferred in her name by representing that she is the heir of late Khemchand Ghorumal Mehrotra. However, it seems that later on the Respondent No.2 and his wife Smt. Aruna Mehrotra arrived at a amicable settlement by virtue of which the said Smt. Aruna Mehrotra consented to the transfer of the flat in the name of her husband i.e. the Respondent No.2 herein. The Respondent No.1 herein – Society subsequently transferred the suit flat as also the share certificate and issued maintenance bills in the name of the Respondent No.2 herein i.e. Shri Vishwambhar Khemchand Mehrotra.

It seems that the said Smt. Aruna Mehrotra in the year 1975-1976 inducted the Director of the Petitioner one Shri A.K. Mishra in the suit flat. It appears that the said Director represented to Smt. Aruna Mehrotra that the suit flat was required to carry out the export business activities of the Petitioner. It is the case of the Respondent No.1 Society that the Petitioner was inducted without the consent of the Respondent No.1 Society and in violation of the bye-laws of the Society and therefore the Petitioner was in wrongful occupation and was in occupation by way of a trespasser. It is the case of the

Respondent No.1 Society that the Petitioner was presumably inducted by Smt. Aruna Mehrotra however without taking the consent of the Respondent No.1 Society for such induction of the Petitioner in the suit flat. As a result the occupation of the suit flat by the Petitioner was illegal and unauthorized. It is the case of the Respondent No.1 Society that it was therefore entitled to see to it that the Petitioner vacates the suit flat and hands over the vacant and peaceful possession of the suit flat to the Respondent No.1 Society, and since the Petitioner is not a member of the Respondent No.1 Society it is also liable to pay mesne profits for the unauthorized use and occupation of the suit flat.

4 The cause of action for filing the Dispute in question was the apprehension of the Respondent No.1 Society that the Petitioner who is not the member of the Society is trying to sell and dispose of the suit flat to a third party and/or is trying to sub-let or induct a third party and/or create rights in favour of the third party in the suit flat. The Respondent No.1 Society i.e. the Disputant in the said Dispute therefore prayed that interim and ad-interim injunction as prayed for be granted in favour of the Respondent No.1 Society so that the suit flat is not dealt with by the Petitioner. It is the case of the Respondent No.1 Society that the Respondent No.2 has shifted to Mumbai and was residing with his aunt at Khar, and therefore, requires the premises in question for his residence. The Respondent No.1 Society therefore averred that it is absolutely necessary that the Respondent No.2 herein should get the

possession of the suit flat for his personal use as the Petitioner has no legal right to occupy and use the suit flat. In the said Dispute the Respondent No.1 has referred to the letter dated 29/10/1993 issued by it to the Petitioner.

5 The Respondent No.1-Society in the Dispute had therefore sought the following substantive reliefs, for a direction to the Opponent No.2 in the Dispute i.e. the Petitioner herein to quit, vacate and hand over the peaceful possession of the flat No.22 in the Respondent No.1 Society and for a direction to the Opponent No.1 i.e. the Respondent No.2 herein to occupy the suit flat No.22 as a member and owner in accordance with the bye-laws and regulations of the Society.

6 In the said Dispute a Written Statement came to be filed on behalf of the Petitioner who was the Opponent No.2 in the said Dispute. The maintainability of the Dispute was questioned by the Petitioner herein on the ground that the Dispute does not disclose passing of any resolution by the Respondent No.1 Society to file the Dispute as also any resolution authorizing the person who has filed the Dispute. The maintainability of the Dispute was also challenged on the ground of description of the parties especially the Petitioner. The maintainability of the Dispute was also challenged on the ground of limitation. It was stated in the Written Statement that induction of Shri A K Mishra the Managing Director of the Petitioner was on 30/04/1976

and therefore the Dispute filed in the year 1993 was hopelessly time barred. The case of the Respondent No.1 Society of the Respondent No.2 being the member of the Society was questioned. It was sought to be contended in the Written Statement that the said Smt. Aruna Mehrotra was a member of the Society till she agreed to transfer the suit flat in the name of her husband i.e. the Respondent No.2 herein and therefore the transaction that was entered into with the Petitioner was sought to be justified. The maintainability of the Dispute was also questioned on the ground that the endeavour is to evict the Petitioner through the instrumentality of the Respondent No.1 Society. A stand was also taken in the Written Statement that the Petitioner has become a tenant and therefore the Dispute filed was in violation of the Bombay Rent Act. A plea of estoppel was also sought to be raised on the basis of acceptance of outgoings by the Respondent No.1 Society through the hands of Shri A K Mishra the Director of the Petitioner Company. It was contended that in view of the acceptance of the outgoings, the Respondent No.1 society is now estopped from contending that the occupation was illegal, however, the principal ground challenging the maintainability of the Dispute was the ground of limitation which was reiterated by the Petitioner in its Written Statement. It was sought to be contended that the transaction entered into between Shri Mishra and Smt. Aruna Mehrotra was well known as also the fact that the export business was carried out in the said premises. It was sought to be contended that the cause of action for filing the Dispute in question is now

barred by law of limitation, as also on the ground that the Respondent No.1 Society has acquiesced in the user of the said premises by the Petitioner. Dismissal of the Dispute was therefore sought by the Petitioner on the ground that it is not maintainable as being barred by limitation as also being in violation of the provisions of the Bombay Rent Act.

7 The Respondent No.2 herein i.e. Vishwambhar Khemchand Mehrotra also filed his Written Statement. The sum and substance of the Written Statement of the Respondent No.2 was that he was always an Associate Member and continued to be an Associate Member as his wife was admitted as a member and subsequently the shares were transferred exclusively in the name of the Respondent No.2 as full-fledged member. It was contended in the Written Statement that at no point of time the Respondent No.2 seized to be the member of the Respondent No.1 Society. It was therefore contended that any action taken by the wife of the Respondent No.2 or even by the Respondent No.1 Society on the basis of the mis-representations made by his wife are not binding on the Respondent No.1 society as also on the Respondent No.2.

8 The Respondent No.2 also contended that the occupation of the Petitioner is in breach of the bye-laws as no permission was sought for before the induction of the Petitioner in the suit flat. It was therefore contended that

the Petitioner is required to vacate the suit flat and hand over the vacant and peaceful possession of the suit flat to the Respondent No.1 Society in order to enable it to hand over the vacant and peaceful possession of the suit flat to the Respondent No.2. The Respondent No.2 therefore in terms supported the case of the Respondent No.1 Society and therefore prayed that the Dispute be allowed and the Petitioner be evicted from the suit flat so as to enable the Respondent No.1 Society to hand over the possession of the suit flat at the earliest.

9 In the light of the pleadings of the parties, the Trial Court i.e. the Co-operative Court framed 10 Issues amongst which was the issue relating to limitation (Issue No.6) which was to the following effect.

“Whether the Dispute filed is beyond limitation ?”

The Respondent No.1 Society i.e. the Disputant examined two witnesses where as the Petitioner examined its Director as a witness. The Respondent No.2 also examined himself in the said Dispute. The Co-operative Court on the basis of the material on record answered the Issue Nos.1 to 9 excluding Issue No.6 against the Petitioner. In so far as Issue No.6 is concerned, which is the Issue of Limitation, the Trial Court answered the said issue against the Respondent No.1 and held that the Dispute filed was beyond the period of limitation. In so far as the other Issues are concerned, as indicated herein above, the said Issues

were answered in favour of the Respondent No.1 Society and it was held that the Petitioner was in illegal occupation of the suit flat and thereby a trespasser.

10 The Respondent No.1 Society aggrieved by the judgment and order dated 12/07/2013 of the Co-operative Court filed an Appeal being No.31 of 2014 in the Co-operative Appellate Court. The Co-operative Appellate Court in view of the dismissal of the Dispute on the ground of limitation framed the Issues to the said effect. In the context of the present Petition Issue Nos.1 and 2 are material and are reproduced herein under :-

- 1] Is the society entitled to possession of flat ?
- 2] Is the dispute barred by limitation?

In so far as the Issue of limitation is concerned, the Co-operative Appellate Court adverted to the fact that since the Respondent No.1 Society is a “Tenant Co-partnership Housing Society”, the said Dispute has been filed by the Respondent No.1 on the basis of its title to the suit flat. The Co-operative Appellate Court therefore held that it would be Article 65 of the Limitation Act which would be applicable in so far as the issue of limitation is concerned. The Co-operative Appellate Court held that since the Respondent No.1 Society was in illegal occupation of the suit flat, the cause of action was continuous and therefore, the Dispute filed in the year 1993 was not beyond limitation. The

Co-operative Appellate Court also rejected the case of the Petitioner that it had perfected its title by adverse possession. The Co-operative Appellate Court held that the Respondent No.1 to prove that it was claiming title to the suit flat, had not placed any material that its claim was hostile to the claim of the owner. The Co-operative Appellate Court held that merely because the knowledge of some writing which had taken place is attributed to the Respondent No.1 Society, the same does not crystallize in assertion of title by adverse possession. The Co-operative Appellate Court accordingly by the impugned judgment and order dated 19/09/2014 allowed the Appeal by setting aside the order passed by the Co-operative Court and directed the Petitioner herein to hand over vacant and peaceful possession of the suit flat within three months of the date of the order. In so far as the claim for mesne profit till the filing of the Dispute is concerned, the said claim of the Respondent No.1 Society was dismissed. However the Co-operative Appellate Court ordered that an enquiry under Order XX Rule 12 of the Code of Civil Procedure could be held by the Co-operative Court to decide the quantum of mesne profit, post the judgment. It is the said judgment and order dated 19/09/2014 passed by the Co-operative Appellate Court which is taken exception to by way of the above Writ Petition.

CONSIDERATION

11 As indicated herein above the Co-operative Court had framed as

many as 10 Issues amongst which Issues was the Issue whether the Petitioner herein was in unauthorized occupation of the suit flat, as also the Issue as to whether the Dispute was maintainable under Section 91 of the Maharashtra Co-operative Societies Act. As indicated above all the Issues except the issue of limitation were answered against the Petitioner herein by the Co-operative Court. The Co-operative Court in terms has held that since there was non-compliance of Section 29 of the said Act, the induction of the Petitioner herein was illegal and therefore occupation of the Petitioner herein was unauthorized. The Co-operative Court has thereby held that the Petitioner is a trespasser. The Co-operative Court has also held that the Dispute is maintainable as the Petitioner herein can be said to be claiming through the Respondent No.2 herein who was the member of the Respondent No.1 Society. In so far as the findings on other issues are concerned, the Petitioner did not file any Appeal challenging those findings. Hence in so far as those findings are concerned, which include the finding that the Petitioner herein is in unauthorized occupation, they have become final and conclusive. It is the Respondent No.1 Society aggrieved by the fact that the Dispute was dismissed on the ground of limitation after all the issues have been answered in its favour, which filed the Appeal wherein the instant impugned order has been passed by the Co-operative Appellate Court.

12 Hence the controversy that is required to be addressed is only as

regards, whether the Dispute filed by the Respondent No.1 Society was in limitation. The learned counsel appearing on behalf of the Petitioner herein fairly accepts the said position and states that since the findings on the other issues have not been challenged, the issue that remains is only in respect of limitation.

13 In so far as the said issue of limitation is concerned, the Co-operative Court has placed reliance on Section 92 of the Maharashtra Co-operative Societies Act and in the light of Section 92(1)(c) of the said Act held that the Dispute was required to be filed by the Respondent No.1 Society within 6 years of the induction of the Petitioner in the suit flat. Since the Dispute was filed in the year 1993, the same was beyond limitation. The Co-operative Appellate Court however has dis-agreed with the Co-operative Court in so far as application of Section 92 of the said Act is concerned. The Co-operative Appellate Court analyzed the said provision and observed that the said provision is in 3 parts and that the instant case does not fall in either of the 3 parts and therefore the question of condoning the delay under subsection 3 of Section 92 of the said Act does not arise. The Co-operative Appellate Court held that since Section 92 does not apply to the Dispute in question, it would be the Limitation Act that would apply. It seems that before the Co-operative Appellate Court, the learned counsel appearing on either side did not have any objection to the said proposition proposed by the Co-

operative Appellate Court.

14 In so far as the issue of limitation is concerned, the determining aspect for a particular Article of the Limitation Act to apply, are the pleadings of the parties. It would therefore be necessary to advert to the pleadings in the Dispute that has been filed. In so far as the Dispute is concerned, the Respondent No.1 Society has averred in the Dispute that it is a “Tenant Co-partnership Housing Society” comprising of the members of the Society. In so far as the suit flat No.22 is concerned, the Disputant i.e. the Respondent No.1 Society has stated that the Respondent No.2 herein is a legal tenant member in respect of the suit flat No.22 and that the Petitioner herein who is the Opponent No.2 in the Dispute is non-member of the Society who has occupied the flat illegally and unlawfully. It has been averred in the Dispute that the Petitioner has been inducted in the suit flat presumably by the wife of the Respondent No.2 herein i.e. Mrs. Aruna Mehrotra. It is further averred that neither the Respondent No.2 herein nor his wife Mrs. Aruna Mehrotra had taken any written consent to induct the Petitioner herein in the suit flat. It has been further averred that occupation of the suit flat by the Petitioner is illegal and unauthorized and that the Disputant i.e. the Respondent No.1 Society is entitled to see that the Petitioner vacates the suit flat and hands over the vacant and peaceful possession of the suit flat to the Respondent No.1 Society. It is further averred that the Disputant i.e. the Respondent No.1 Society has

learnt that the Petitioner is trying to sell and dispose of the suit flat No.22 to a third party and/or is trying to sub-let or induct a third party and/or create the rights of the third party in the suit flat. It is lastly averred that the Respondent No.2 herein has shifted his residence to Mumbai from London and therefore he requires the suit flat for residence as presently he is residing with his relation at Khar, Mumbai. It is also lastly averred that the wife of the Respondent No.2 herein i.e. Mrs. Aruna Mehrotra did not have any authority to sell and dispose of the suit flat in the absence of the consent of the Respondent No.2 herein. Hence in so far as the Respondent No.1 Society is concerned, which is the Disputant in the Dispute, it claims the title to the suit flat on the basis that it is a "Tenant Co-partnership Housing Society". The Dispute therefore was filed seeking the possession of the suit flat on the ground of title of the Respondent No.1 Society as also on the ground that the legal occupant of the suit flat is the Respondent No.2 herein who was required to be put in possession.

15 Now coming to the written statement filed on behalf of the Petitioner herein. Though the case of adverse possession was sought to be put across at the appellate stage, it is significant to note that the written statement is bereft of any pleadings, laying a foundation for the said case of adverse possession. A reading of the written statement discloses that it is replete with averments relating to the authority of the said Mrs. Aruna Mehrotra to put the Petitioner in possession of the suit flat and lack of authority in the Respondent

No.2 to claim the suit flat. The written statement is also replete with the averments relating to how the Dispute is not within limitation. The sum and substance of the case of the Petitioner is that the Respondent No.1 Society was aware that the Petitioner was put in possession in the year 1976, however, the instant Dispute has been filed in the year 1993. It has also been averred in the written statement that by accepting maintenance charges from the Petitioner the Respondent No.1 Society has waived its right to question the occupation of the Petitioner of the suit flat. However, as indicted above though the title is sought to be claimed on the basis of adverse possession, there is absolutely no foundation laid in the written statement for the said case of adverse possession.

16 The controversy in the present Petition which as indicated above is now restricted to only whether the Dispute filed by the Respondent No.1 society is within limitation. Before proceeding to consider the submissions urged on behalf of the parties, it would be necessary to re-visit the findings recorded by the Co-operative Court Mumbai and the Co-operative Appellate Court. In so far as the Co-operative Court, Mumbai is concerned, it framed as many as 10 issues amongst which were the issues relating to whether the Petitioner was in unauthorized occupation, and whether the Dispute filed was in limitation. The Co-operative Court has held that the Petitioner is in unauthorized occupation of the suit flat in view of the fact that the permission of the Respondent No.1 Society under Section 29 as also the bye-laws was not

obtained before induction of the Petitioner. The Co-operative Court has thereby held that the Petitioner is a trespasser. However, after so recording the findings on other issues the Co-operative Court has answered the issue of limitation against the Respondent No.1 Society. The Co-operative Court applied Section 92 of the said Act and held that since the Dispute was not filed within 6 years of the year 1981 and was filed in the year 1993, the same was beyond limitation and therefore not maintainable. The Respondent No.1 Society filed an Appeal against the findings recorded by the Co-operative Court on the issue of limitation, however, the Petitioner did not take any exception to the findings recorded by the Co-operative Court which included the finding that the Petitioner is in unauthorized occupation and therefore a trespasser. The said findings have therefore become final and binding as against the Petitioner.

17 In so far as the Co-operative Appellate Court, before whom the Appeal was only restricted to the issue of limitation, is concerned, the Co-operative Appellate Court held that Section 92 would not have application and that the issue of limitation would have to be considered as per the Limitation Act. It seems that the learned counsel for the parties did not have objection to the said proposition of the Co-operative Appellate Court. The Co-operative Appellate Court on the basis of the pleadings came to a conclusion that Article 65 of the Limitation Act would apply and that the Petitioner is a trespasser and since there was absolutely no material on record to substantiate the case of

adverse possession of the Petitioner, the cause of action was a continuing cause of action and the Dispute filed by the Respondent No.1 Society was therefore within limitation. The Co-operative Appellate Court accordingly set aside the order passed by the Co-operative Court by allowing the Appeal.

18 It is in the background of the findings recorded by the Co-operative Appellate Court that the learned counsel for the Petitioner sought to fit the Petitioner's case either in Article 64 or Article 65 or Article 66 of the Limitation Act, 1963. Whether the said course of action was permissible for the Petitioner after having taken a stand before the Co-operative Appellate Court that the Petitioner claims title by adverse possession is a question which begs an answer. The learned counsel for the Petitioner in her endeavour to bring home the fact that the Dispute as filed was beyond limitation sought to place reliance on the evidence of the Secretary of the Respondent No.1 Society Mrs. Shahanaz Rustom Vakil especially her cross examination wherein she has stated that the Opponent No.2 (i.e. the Petitioner herein) was in occupation of the suit flat without permission of the society since 1976, as also her statement that Mrs. Aruna Mehrotra was the legitimate member of the Society. The learned counsel for the Petitioner also sought to place reliance on the evidence of the Opponent No.1 (i.e. the Respondent No.2 herein) wherein he has stated that by letter dated 25/06/1981 he had called upon the Petitioner herein to vacate the suit flat. Based on the said evidence it was the submission of the

learned counsel for the Petitioner that the starting point for limitation is the year 1976 as the Secretary of the Society has accepted the knowledge of occupation of the petitioner from the said year. The learned counsel for the Petitioner would further contend that if starting point is not 1976, it is at least the year 1981 in which year the said letter dated 25/06/1981 was addressed by the Respondent No.2 herein to the Petitioner herein. The learned counsel would also contend that since the year 1976 the Petitioner is in occupation and since the Society through its Secretary has accepted the fact that the said possession is without permission, the said possession is adverse to the society. It was therefore the contention of the learned counsel for the Petitioner that applying any of the Articles i.e. Articles 64, 65 or 66, the Dispute filed in the year 1993 was beyond limitation. The learned counsel for the Petitioner lastly contended that since the wrongful occupation or possession has taken place in the year 1976, the Co-operative Appellate Court has erred in holding that it is a continuing wrong and therefore the Dispute filed in the year 1993 was within limitation. The learned counsel for the Petitioner sought to place reliance on the following judgments in support of the Petitioner's case :-

1] Tribhuvanshankar v/s. Amrutlal¹, 2] Ramlal Ganjhee and others v/s. Lodha Munda and others² 3] Rajendar Singh and others v/s. Santa Singh and others³ 4] Taherbhai T Poonawala & ors v/s. S Hamid H Patel

1 (2014) 2 SCC 788

2 AIR (39) 1952 Patna 201

3 AIR 1973 SC 2537

(deceased by L.Rs.) and ors.⁴ 5] Ramaiah v/s. N Narayan Reddy (Dead) by
L.Rs.⁵ 6] Balakrishna Savalram Pujari Waghmare and others v/s. Shree
Dhaneshwar Maharaj Sansthan and others⁶ 7] Kusheshwar Jha and
another v/s. Uma Kant Jha and others⁷ 8] J.H.S. Evangelical German
Mission, Superintendent Leprosy Asylum Chandkhuri v/s. Mahant
Ramasahaigir Chela Sunsergir Gosawi⁸ 9] Khair Mohd. Khan and another
v/s. Mt. Jannat and others⁹

19 On the other hand it is the contention of the learned counsel for the Respondents i.e. Shri A G Damle, the learned Senior Counsel for the Respondent No.1 and supported by Mrs. Tanmayee Gadre Rajadyaksha the learned counsel for the Respondent No.2 that in the instant case Articles 64 and 66 have no application. The learned Senior Counsel would contend that the Dispute is filed by the Respondent No.1 which is a “tenant co-partnership society” and therefore the land and building is of the ownership of the society and hence the Dispute has been filed by the Respondent No.1 claiming possession based on its title. The learned Senior Counsel would contend that the Petitioner is not entitled to take a stand that Articles 64 and 66 apply after having urged a case of adverse possession before the Co-operative Appellate Court. The learned Senior Counsel for the Respondent No.1 would contend

4 AIR 2007 Bombay 80

5 AIR 2004 SC 4261

6 AIR 1959 SC 798

7 AIR (29) 1942 Patna 188

8 AIR 1939 Nagpur 145

9 AIR 1940 Lahore 359

that in so far as the case of adverse possession is concerned, the Co-operative Appellate Court has rightly rejected the said case of the Petitioner as the pleadings are bereft of any such case and that mere long possession does not convert itself into a case of adverse possession unless the ingredients of adverse possession are established. The learned Senior Counsel Shri A G Damle relied on the following judgments in support of his contentions :-

1] Annasaheb Bapusaheb Patil and others v/s. Balwant Alias Balasaheb Babusaheb Patil (Dead) By LRs and Heirs and others¹⁰ 2] S M Karim v/s. Mst. Bibi Sakina¹¹ 3] Hemandas J Soni v/s. I T Zariwalla¹²

The learned Senior Counsel would lastly contend that since the Co-operative Court i.e. the Trial Court has held that the Petitioner is a trespasser, the cause of action is a continuing cause of action and therefore the Dispute filed by the Respondent No.1 for possession is within time. The learned Senior Counsel sought to place reliance on the judgment of a learned Single of this Court in the matter of Vinay Ambadas Kaikini & Anr v/s. Court Receiver¹³.

20 Now coming to the submissions urged on behalf of the Petitioner

10 (1995) 2 SCC 543

11 AIR 1964 SC 1254

12 AIR 1989 Bombay 355

13 2011(2) Bom. C.R. 328

that the Dispute is beyond limitation even if either of the Articles i.e. 64, 65 or 66 of the Limitation Act are applied. In my view, it is not open for the Petitioner now to contend that either Article 64 or Article 66 applies once having urged the case of adverse possession before the Co-operative Appellate Court. Assuming that the Petitioner is entitled to place reliance on either Article 64 or Article 66 of the Limitation Act, this Court ventured to test the Petitioner's case. In so far as Article 64 of the Limitation Act is concerned, it covers the cases where there is a dispossession and the suit is filed for possession. In the instant case, there is no dispossession but the Petitioner has been put in possession by a person who was not authorized to do so and also without the permission of the Respondent No.1 Society. Hence the present Dispute does not fall in Article 64 of the Limitation Act.

21 Now coming to Article 66 of the Limitation Act, it covers the cases where the Plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. The said Article also cannot apply as it is not the case of the Disputant that the possession of the Petitioner is in breach of any condition or on account of any forfeiture. In fact in so far as the reliance placed on the aforesaid two Articles i.e. Article 64 and Article 66 is concerned, it must be said that the same was not done with any deal of conviction by the learned counsel appearing on behalf of the Petitioner.

22 In fact the main thrust of the submission of the learned counsel was revolving around Article 65 of the Limitation Act which the Co-operative Appellate has held applied to the instant Dispute. In so far as Article 65 is concerned, it covers the cases where the possession is sought on the basis of title and the limitation prescribed is 12 years when the possession of the Defendant becomes adverse to the Plaintiff. The limitation under Article 65 therefore starts from the point when the possession of the Defendant becomes adverse to the Plaintiff. Hence in so far as Article 65 is concerned, the onus is on the Defendant to prove that he is in adverse possession, as that is the only ground on which the Plaintiff can be non-suited, on the ground of limitation if the suit is filed 12 years after the Defendant's possession becomes adverse to the Plaintiff. In so far as adverse possession is concerned, one of the requirements is that it has to be claimed and has to be put in issue and that there has to be proof of hostile possession which is open and continuous and to the knowledge of the public at large. If one comes to the facts of the instant case, the written statement does not contain any such averment. In fact the Petitioner was required to file a counter claim if it was its case that it was claiming a right on the basis of adverse possession. No such counter claim was filed, neither is any averment appearing in the written statement. The sine-qua-non if one can say of adverse possession is hostility to the title of the true owner, no such fact is pleaded nor brought on record to prove such hostility though the Petitioner herein claims to be in possession since the year 1976.

Hence the Petitioner has not satisfied the test of adverse possession and therefore the finding of the Co-operative Appellate Court that in view of the fact that the Petitioner is in unauthorized possession meaning thereby a trespasser the cause of action was continuous and the Dispute therefore filed in the year 1993 was within limitation cannot be faulted with

23 Now coming to the judgments cited on behalf of the Petitioner, the said judgments are on the aspect of adverse possession, limitation, vis-a-vis dispossession and what constitutes a continuing wrong.

24 The judgment of the Apex Court in *Tribhuvanshankar's* case (supra) deals with the issue as to when a suit for possession is required to be filed against a person who claims adversely against the true owner. The Apex Court has held that the policy behind prescribing limitation is that if a person does not pursue his remedy within the specified time, the right to sue gets extinguished. The said judgment also lays down the pre-requirements for a claim of adverse possession. In my view, the judgment in *Tribhuvanshankar's* case (supra) would hardly aid the Petitioner as it is in the same judgment that the Apex Court has held that a mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. The Apex Court in the said context also referred to its judgment in the matter of *Karnataka Board of Wakf v/s. Govt. of India* reported in (2004) 10 SCC 779

wherein it has been held by the Apex Court that it is for the person claiming adverse possession to clearly plead and establish all facts necessary to establish adverse possession.

In *Ramlal Ganjhee's* case (supra) the Division Bench of the Patna High Court in the facts of the said case held that though in the written statement the Defendants had not specifically pleaded a case of adverse possession but having regard to what was pleaded in para 16 of the written statement which was to the following effect :-

(16) "That these defendants Nos.1 to 7 are the landlores of the village. The jungle has been recorded in their names. The lac on the lac bearing trees are reared by them. As usual this year also lac was reared by them."

held that if the lac was reared and appropriated by the defendants as alleged by them their possession would prima-facie be adverse to the Plaintiffs.

In the instant case, there are absolutely no pleadings in respect of adverse possession and pleadings are revolving around how the suit is barred by limitation as the Petitioner has been put in possession in the year 1976.

In so far as *Rajendar Singh's* case (supra) is concerned, the issue before the Apex Court was whether the registration of lis pendens would arrest the time from running in so far as filing of suit against the person who is illegally in possession is concerned. The Apex Court held that the relief against

the wrong done must be sought within the time prescribed and that is the only mode of redress provided by law for such cases. Section 52 of the Transfer of Property Act was not meant to serve indirectly as a provision or a substitute for a provision of the Limitation Act to be excluded. The said judgment would have no application as in the instant case the Dispute has been filed on the basis of a continuing cause of action.

In *Taherbhai Poonawala's* case (supra) the facts were that the tenant had never stayed in the suit premises and right from inception had illegally sublet the suit premises since the breach of the tenancy condition occurred on the date of said illegal subletting, the suit filed 12 years after the date of illegal subletting was held to be barred by limitation. The judgment in Taherbhai Poonawala's case (supra) has no application, as it was the case of illegal subletting by the tenant whereas the instant case is of unauthorized occupation amounting to trespass by the Petitioner which is a continuing wrong.

In so far as *Ramaiah's* case (supra) is concerned, it was a case of dispossession in the year 1971 and was therefore, covered by Article 64 of the Limitation Act. The Apex Court in the fact situation of the said case held that the suit filed after 13 years was barred by limitation. The said judgment would therefore also have no application in the facts of the present case as the said

case is a case of dispossession.

In so far as the judgment in *Balakrishna Savalram Pujari Waghmare's* case (supra) is concerned, the issue before the Apex Court was whether the suit as filed where the Pujari's had claimed ouster would be covered by Section 23 of the Limitation Act i.e. a continuing wrong. The Apex Court held that since the decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued. The Apex Court held that as soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants cause of action de die in diem. In the said case therefore there was decree against the Pujari's i.e. the appellants as a consequence of which they were ousted, which ouster had taken place at the time of execution of the decree and therefore, the Apex Court has observed that the injury was complete on the date of the decree. Such is not the case in the instant matter. As in the instant matter there is absolutely no intervening fact which can be said to be the starting point from which the period of limitation can be said to run.

In so far as the judgment in *Kuseshwar Jha's* case (supra) is concerned, the said case was also a case of dispossession. The Division Bench of the Patna High Court observed that the real question in a case of trespass or encroachment is not whether the wrong is continuing or not, but whether the wrong amounts to a complete ouster of the Plaintiff, that is, to his dispossession. The Division Bench observed that where it is a case of dispossession and the suit is for recovery of possession by ejectment of the Defendant, that Article 142 would apply, which provides a period of 12 years limitation from the date of the Plaintiff's ouster. The said judgment was rendered in the context of Article 142 of the Limitation Act 1908 and would therefore, have no application in view of Article 65 of the Limitation Act 1963.

In so far as the judgment of the learned Single Judge of the Nagpur High Court (as it then was) in *J.H.S. Evangelical German Mission's* case (supra) is concerned, the question before the learned Single Judge was, whether the suit was barred under Order IX Rule 9 of the Code of Civil Procedure. The said case also involved the dispossession of the Plaintiff. In the said case the learned Single Judge held that if the case of continuing wrong is to be accepted, then it would be impossible to apply Article 142 or Article 144 of the Limitation Act. The learned Single Judge held that the dispossession of the owner of the land is complete from the moment of dispossession. The said judgment was rendered with reference to Articles 142 and 144 of the

Limitation Act 1903 and hence would have no application.

In so far as last judgment in *Khair Mohd. Khan's* case (supra) is concerned, the Full Bench of Lahore High Court in the said case made a distinction between injury and the effect of that injury. In my view, the said judgment would also have no application in the facts of the instant case, as indicated herein above the said judgments are rendered in the context of Articles 142 and 144 of the Limitation Act, in view of Article 65 of the Limitation Act 1963 the said judgments cannot aid the case of the Petitioner in any manner. In my view, the judgment cited on behalf of the Petitioner does not further its case in any manner in so far as the issue of limitation is concerned.

25 Now coming to the judgments cited on behalf of the Respondent No.1 and the Respondent No.2.

In so far as the judgment in *Annasaheb Bapusaheb Patil's* case (supra) is concerned, the Apex Court was dealing with a case under Article 65. The Apex Court held that under Article 65 the burden is on the Defendants to prove affirmatively. The Apex Court held that a person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title

to the property claimed. The Apex Court has held that where a possession was referable to a lawful title, it will not be considered to be adverse. In the instant case, as indicated above, the Petitioner had initially sought to justify the entry in the suit flat on the basis of the agreement entered into with Mrs. Aruna Mehrotra and has thereafter taken a plea of adverse possession in respect of which plea there are absolutely no pleadings in the written statement filed by the Petitioner. Hence the Petitioner cannot be said to have satisfied the test laid down in *Annasaheb Bapusaheb Patil's* case (supra) which test has been laid down by the Apex Court having regard to Article 65 of the Limitation Act.

In so far as the judgment in *Hemandas J Soni's* case (supra) is concerned, in the said case the Appellant's suit was based on title. The defence taken was that of tenancy. The learned Single Judge of this Court (Bharucha, J. as His Lordship then was) has held that a suit on title can on the ground of limitation be defeated only by a claim of possession adverse to the owner. In the facts of the said case, the learned Single Judge held that the said test has not been satisfied. The learned Single Judge also referred to the judgments which were cited before him in the context of Articles 142 and 144 of the Limitation Act 1903. The learned Judge held that the said judgments would have no application as they were rendered prior to the present Limitation Act being enacted.

In so far as the judgment in *S M Karim's* case (supra) is concerned, the Apex Court rejected the plea of adverse possession by holding that long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The said judgment, in my view, applies on all fours to the facts of the present case wherein, as indicated in the earlier part of the judgment, there is absolutely no pleadings of adverse possession and what is pleaded is only the long standing possession.

In so far as the judgment in *Vinay Ambadas Kaikini's* case (supra) is concerned, the learned Single Judge of this High Court held that in case of trespass, the right to sue would continue de die in diem till it is removed. In the instant case there is a finding recorded by the Co-operative Court that the occupation of the Petitioner is unauthorized and illegal. The Co-operative Court has thereby held that the Petitioner is a trespasser. The said finding having not been challenged the same has become final. If that be so, the right to sue to the Respondent No.1/Petitioner will continue de die in diem till it is removed and thereby the Dispute as filed by the Respondent No.1 Society was within limitation as held by the Co-operative Appellate Court.

26 In the light of what has been stated herein above and having regard to the judgments relied upon by the Respondents, it would have to be held that the finding recorded by the Co-operative Appellate Court that the

Dispute filed by the Respondent No.1 is within limitation cannot be faulted with. Hence no case for interference in the writ jurisdiction of this Court is made out. The Petition is accordingly dismissed. Rule discharged with parties to bear their respective costs.

[R.M.SAVANT, J]

Date : 07th July 2015

After pronouncement, the learned counsel appearing on behalf of the Petitioner Shri Jaspreet Anand seeks stay of the instant order for a period of six weeks. In the facts and circumstances of the present case, the instant order is stayed for a period of six weeks from date.

[R.M.SAVANT, J]