

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 659 OF 2014  
IN  
SUIT NO. 2975 OF 2007**

Jerson John Braganza ...Applicant

**In the matter between**

Nitesh Prataprai Kothari ...Plaintiff

vs.

John Braganza & Ors. ....Defendants

WITH

**NOTICE OF MOTION NO. 4016 OF 2007  
IN  
SUIT NO. 2975 OF 2007**

Nitesh Prataprai Kothari ...Plaintiff

vs.

John Braganza & Ors. ....Defendants

Mr. R.A. Thorat, Senior Advocate alongwith Mr.P.J. Thorat for the Plaintiff.  
Mr.Anil D'souza for Respondents.

**CORAM : S.C. GUPTE, J.**

**RESERVED ON : 08 DECEMBER 2015**

**PRONOUNCED ON : 26 APRIL 2016**

**ORDER :**

The Plaintiff has filed the present suit for possession of the suit premises. The Plaintiff has taken out a notice of motion in the suit (Notice of Motion No.4016/2007) for appointment of Court Receiver and interlocutory injunction restraining the Defendants from creating third party rights in respect of the suit premises. During the pendency of the suit, the original Defendant expired and his heirs were brought on record as Defendant Nos.1(a), 1(b) and 1(c).

These Defendants object to the maintainability of the suit on the ground of bar of limitation and have moved a notice of motion (Notice of Motion No.659/2014) for framing and deciding a preliminary issue in that behalf. By his order dated 29 January 2015, a learned Single Judge of this Court was pleased to frame the following issue as a preliminary issue :

“Whether the suit is filed within the period provided under Law of Limitation?”

The parties have chosen not to lead any oral evidence on the preliminary issue and instead argue the same on pleadings and admitted documents. This order disposes of the preliminary issue.

2. The Plaintiff's case in brief may be set out thus:

The Plaintiff claims to be an absolute owner and as such seized and possessed of the suit property. The suit property is part of a larger property consisting of a plot of land admeasuring 14770.60 sq.mtrs. being part of Survey Nos.32, 33 and 36 and bearing CTS Nos.70, 71, 72, 73, 74, 75, 84A and 84/7 of Village Kurar and situate at Pratap Nagar, Daftary Road, Malad (East), Mumbai – 400 097. Out of this larger property, the Defendant is said to be in possession of a plot of land admeasuring 1474 sq.yards bearing Survey No.33, Hissa No.1 corresponding CTS No.72 of Village Kurar together with the structures standing thereon (hereinafter referred to as “the suit premises”). The Plaintiff has traced his title to the larger plot of land, including the suit premises. By a Deed of Conveyance dated 13 June 1975 duly registered with the Sub-Registrar of Assurances, Bombay, the larger plot of land, originally jointly owned by one Shantaram Bhalchandra Sukhtankar (“Shantaram”) and Sitaram Bhalchandra Sukhtankar (“Sitaram”), was released and transfered unto Sitaram by Shantaram. By a Deed of Partnership dated 30 November 1976 Sitaram entered into partnership with Prataprai Nandlal Kothari (“Prataprai”), father of the Plaintiff herein, to carry on business in the firm name and style as Nilesh Construction Company for redevelopment of the larger plot of land. The larger plot of land was

brought into the joint stock of the firm as capital of Sitaram. The partnership was subsequently dissolved by a duly registered Deed of Dissolution dated 30 April 1977 executed between the partners. By that Deed of Dissolution, Sitaram released his right, title and interest in the larger plot of land in favour of Prataprai for consideration received thereunder. The larger plot of land is shown in the revenue records in the name of Prataprai. Prataprai exercised his ownership rights in respect of the land *inter alia* by filing an application for exemption under Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 as also converting the same from agricultural to non-agricultural use by N.A. orders. Prataprai also obtained municipal sanction to the building plans for construction of building/s on the larger plot of land. It is the Plaintiff's case that the Defendant is an encroacher in respect of a portion of the larger plot of land, namely, the suit premises. Sometime in 1981, the Defendant filed a suit, being Suit No.3120/1981, against Prataprai in the City Civil Court at Bombay for permanent injunction restraining Prataprai from disturbing the alleged possession of the Defendant in respect of the suit premises otherwise than in accordance with due process of law. The City Civil Court, after recording evidence of both parties, decreed the suit in favour of the Defendant. That decree was challenged by Prataprai before this Court, in First Appeal No.348/1983. The Defendant also filed his own appeal before this Court, being First Appeal No.407/1983. The appeal filed by the Plaintiff was allowed by a learned Single Judge of this Court, whilst the Defendant's appeal was dismissed. The Defendant filed a letters patent appeal, being LPA No.87/1989, before a Division Bench of this court against both the judgments. The Division Bench allowed the letters patent appeal and set aside the judgments of the learned Single Judge in both First Appeals and restored the judgment of the trial court. That order was carried by Prataprai before the Supreme Court. By a judgment and order dated 4 May 1999, the Supreme Court confirmed the judgment delivered by the Division Bench in the letters patent appeal. On or about 6 May 2006, Prataprai expired. The Plaintiff, as the only legal heir of Prataprai, succeeded to the larger plot of land, including the suit premises. The Plaintiff has now filed the present suit for possession based on his title.

3           In his written statement, it is the case of the original Defendant that the Defendant at all material times was seized and possessed of the suit premises under a registered Lease Deed dated 27 May 1964 duly registered with the Sub-Registrar of Assurances. The Defendant relies on various documents showing his possession from the date of the lease. The Defendant also puts the Plaintiff to the strict proof of the latter's ownership of the larger plot of land, including the suit premises. On limitation, the Defendant's case is that the Defendant has been in long and continuous possession of the property since about 1963, having also filed an injunction suit in 1981, which was contested between the parties till 1999. It is submitted by the Defendant that the period of limitation for filing the present suit for recovery of possession, namely, 12 years, has lapsed long back and the suit is liable to be dismissed as barred by limitation.

4           At the outset, it is important to note that the Defendants have not so far proved any of their documents showing possession since 1963. As I have noted above, the parties have chosen to argue the present preliminary issue only on the basis of pleadings and admitted documents. At the hearing of the preliminary issue, learned Counsel for the Defendants submitted that the Defendants would rely on the Plaintiff's own admission that the Defendant encroached the suit premises in or about 1979-80, having constructed structures thereon illegally and unauthorisedly. Secondly, it is submitted that in 1981 the Defendant also filed Suit No.3120/1981 before the City Civil Court at Bombay for a permanent injunction restraining the predecessor-in-title of the Plaintiff from disturbing the possession of the Defendant of the suit premises otherwise than by due process of law, which suit was decreed by an order and judgment dated 26 April 1982, the judgment being finally confirmed by the Supreme Court in the year 1999. It is submitted that having regard to the Plaintiff's own admission of encroachment by the Defendant of the suit premises in 1979-80 and also by reason of the Defendant having filed a suit asserting his possession in the year 1981 against the predecessor-in-title of the Plaintiff, the present suit, filed more than 12 years thereafter, is clearly barred by the law of limitation.

5 It is common ground that the suit, being a suit for possession based on title, is governed by Article 65 of the Schedule to the Limitation Act, 1963. The Article is quoted below :

| Description of suit As is                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Period of limitation | Time from which period begins to run                                  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|-----------------------------------------------------------------------|
| <p>“65. For possession of immovable property or any interest therein based on title.</p> <p>Explanation.-For the purposes of this article-</p> <p>(a) Where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the state of the remainderman, reversioner or devisee, as the case may be, falls into possession;</p> <p>(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the females dies;</p> <p>(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.</p> | Twelve years         | When the possession of the defendant becomes adverse to the plaintiff |

6 As is plain from its language, the Article provides that the starting point of limitation is the date when the defendant's possession becomes adverse to the plaintiff. On a plea of limitation, therefore, the question is whether or not the possession of the defendant has become adverse to the plaintiff more than 12 years prior to the filing of the suit.

7           Before we answer this question, in the light of the facts of the present case, let us note the law on the subject. In the first place, under Article 65, the onus is on the defendant to prove adverse possession. The Supreme Court in the case of **Saroop Singh vs. Banto**<sup>1</sup> noticed the change in the statutory provisions of limitation in respect of suits for possession based on title. The court noticed that the relevant provisions of the old Limitation Act (Limitation Act, 1908), namely, Articles 142 and 144, required the plaintiff not only to prove his title but also to prove his possession within 12 years preceding the date of institution of the suit. The Court noticed the change in the legal position effected by Articles 64 and 65 of the Limitation Act, 1963, under which once the plaintiff proves his title, the burden shifts to the defendant to establish acquisition of title by adverse possession. This proposition was once again affirmed by the Supreme Court in the case of **M. Durai vs. Muthu**<sup>2</sup>, holding as follows :

“7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.””

To the same effect are the observations of the Supreme Court in the case of **Annakili vs. A. Vedanaygam**.<sup>3</sup>

8           Secondly, it is important to note that mere possession, however long, does not necessarily mean that it is adverse to the true owner. What adverse possession means is hostile possession asserted by the defendant in express or implied denial of title of the true owner. In order to constitute adverse possession, the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. Such possession

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1 (2005) 8 SCC 330

2 (2007) 6 SCC 59

3 (2007) 14 SCC 308

must be coupled with 'animus possidendi'. The possessor claiming such possession must show a requisite animus of asserting such possession through the period of prescription. The law is laid down by the Supreme Court in **T. Anjanappa vs. Somalingappa**<sup>4</sup> in the following words :

“20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possession actually informing the real owner of the former's hostile action.”

9                   The Supreme Court asserted the importance of animus possidendi in the case of **Saroop Singh vs. Banto** (supra) in the following words :

“30. “Animus possidendi” is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd.Mohd. Ali vs. Jagadish Kalita [(2004)1 SCC 271], SCC para 21.).”

10                  Let us now consider, in the light of the principles discussed above, whether the Defendants have discharged the burden of establishing perfection of their title by adverse possession, that is to say, the original defendant having asserted hostile possession in express or implied denial of title of the true owner, in this case, the Plaintiff, more than twelve years back and that such possession

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4 (2006) 7 SCC 570 : (2006) 8 Scale 624

having throughout the prescription period of twelve years been adequate in continuity, publicity and extent so as to be adverse to the latter. What is urged in support of such case is, firstly, the plea in the Written Statement that the Defendant has been in possession of the suit premises for more than twelve years prior to the filing of the suit and had even filed an injunction suit against the Plaintiff in 1981. Whilst joining issues with the plaintiff's plea concerning limitation, this is what the Defendant has to say in his Written Statement. (Para-28):

“28. With reference to para 20 of the Plaint, this Defendant says and submits that this Defendant is in long and continuous possession of the suit property since 1963 and this Defendant filed injunction suit in 1981 bearing Suit No.3120 of 1981 in the Bombay City Civil Court, At Bombay and contested till 1999 when the Civil Application No.3263/91 filed by the father of the Plaintiff rejected by the Supreme Court of India under order dated 16<sup>th</sup> May 1999 therefore, the maximum limitation of filing the present suit for recovery of possession is twelve years is lapsed and, the Plaintiff has filed the present suit after twelve years therefore the present suit is not filed by the plaintiff within the period of Limitation, hence the present suit is liable to be dismissed with costs.”

Secondly, the Defendants rely upon the Plaintiff's own assertion in the plaint (Para 7), which is as follows :

“7. The Plaintiff states that the Defendant encroached upon a portion of land admeasuring 1474 sq. yards in CTS No.72 totally ameasuring 4635.1 sq. mtrs. in or about year 1979-80 and that he constructed illegally and unauthorisedly a structure thereon ameasuring 36'-3" x 21'-8" with extestion thereto ameasuring 11' x 10'-10". The plaintiff states that the Defendant filed Suit No.3120 of 1981 against Shri Prataprai Nandlal Kothari in the Hon'ble Bombay City Civil Court at Bombay for permanent Injunction restraining the said Defendant from disturbing alleged possession of the Defendant in respect of the premises otherwise than in due process of law. The Plaintiff states that the evidence of parties was recorded in said suit No.3120 of 1981 and that by Judgment dated 26<sup>th</sup> April, 1982 the said suit was decreed in relation to the suit premises. The Plaintiff states that he is in possession of the papers and proceedings in the said suit and he craves leave to refer to and rely upon the same, when produced. Hereto annexed and marked Exhibit-'L' is typed copy of Decree dated 26<sup>th</sup> April, 1982 in B.C.C.C. Suit No.3120 of 1981.

11           It is plain, to my mind, that what these assertions show is simply the Defendant's possession of the suit premises. What they do not show is that the Defendant at any time claimed a title to the suit premises adverse to the true owner ( i.e. the Plaintiff) either expressly or impliedly. Even the suit filed in 1981 was merely on the basis of his possession. What he claimed in the suit was the right not be dispossessed otherwise than by due process of law. By definition, such a plea does not rule out the true owner's right to recover possession from him by adopting due process of law. In fact, in its judgment in the Defendant's Suit (Suit No.3120 of 1981), the trial court noted as follows :

“Before parting with the case I would like to make it clear that the relief granted to the plaintiff in this suit is based purely on the question of his possession and threat of his being dispossessed otherwise than by due process of law. The question of title of both the parties and their rights and remedies on the strength of title are left open including their rights in respect of those portions of the property in regard to which relief is granted in this suit.”

These observations of the trial court were, in fact, quoted by the Supreme court when it dismissed the Plaintiff's SLP, upholding the order of the Division Bench of this court setting aside the order of the Single Judge in First Appeal from the trial court's order. The Supreme court concluded its reasons in the following words :

“(11) We have already extracted the summary of conclusions arrived at by the learned Single Judge of the High Court. That shows that his conclusions were vitiated by his view that the appellant had title and possession followed title. It is quite obvious that the learned Single Judge had not taken note of the principle of possessory title or the principle of law that a person who has been in long continuous possession can protect the same by seeking an injunction against any person in the world other than the true owner. It is also well settled that even the owner of the property can get back his possession only by resorting to due process of law.”

What emerges from the foregoing is that there was simply a case of long continuous possession on the part of the Defendant, which he was entitled to protect against the world at large save and except the true owner. The owner

himself is certainly entitled to recover possession based on his title, of course by a due process of law.

12            Mere possession, however long, as we have seen above, does not entitle the possessor to raise a plea of adverse possession. If there is no assertion of title adverse to the true owner or at least, a denial of the title of the true owner, expressly or by necessary implication, there cannot be commencement of a claim of adverse possession. The defendant, as we have seen above, not only has to show commencement of such claim of adverse possession, but its continuation throughout the period of twelve years prior to the filing of the plaintiff's suit. Only then does he establish his title by adverse possession.

13            The Defendants in the present case have, thus, failed to establish adverse possession for the statutory period of twelve years. Consequently, their plea of bar of limitation fails.

14            The preliminary issue is, accordingly, answered in the affirmative, in favour of the Plaintiff. Notice of Motion No.659 of 2014 is disposed of. Notice of Motion No.4016 of 2014 shall now appear before the Court taking Motions for hearing and final disposal.

**(S.C.GUPTE, J.)**