

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

SUIT NO.2067 OF 2009

1. Sharad Shantilal Chheda
2. Taruna Anil Chheda
32, 1st Floor, Bazar Road,
Opp. Jahangir Art Furniture,
(Roshan Manzil) Bandra (West),
Mumbai-400 050. .. Plaintiffs.

Versus

1. Concord Builders,
a partnership firm, having its place,
of business at B. Purshottam Building
Tribhuvan Road, Grant Road,
Mumbai-400 004.
2. BEML Limited
(Formerly known as Bharat Earth
Movers Ltd.) a Company incorporated
under the Companies Act, 1956,
having its Regional Office at
Raj Mahal, 1st Floor, 89,
Veer Nariman Point, Churchgate,
Mumbai-400 020. .. Defendants

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Mr. Karl Tamboly a/w Mr. N.C. Parekh, D.V. Dave and Mr. Nirav Marjadi i/b
Mansukhlal Hiralal & Co., for the Plaintiffs.

Mr. K.R. Parekh for the Defendants.

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CORAM	: S.C.GUPTE, J.
RESERVED ON	: 01 FEBRUARY 2016
JUDGMENT DELIVERED ON	: 28 JULY 2016

JUDGMENT :

The Plaintiffs claim to be owners of the suit property, and pray for a decree of possession and mesne profits against the Defendants.

2 The facts of the Plaintiffs' case may be briefly set out as follows :

(i) The suit property consists of a piece or parcel of land including houses and structures standing thereon. The Plaintiffs are co-owners of the suit property, having purchased the same from the original owner, one Maurice Concessio ("Maurice"), under a conveyance dated 22 November 1997. It is the Plaintiffs' case that the Defendants are trespassers occupying a structure forming part of the suit property without any right, title or interest. The Plaintiffs, in short, pray for a decree of possession and mesne profits against the Defendants, based on their title.

(ii) As for the Defendants' occupation of the structure, the Plaintiffs' case is that their predecessor in title, Maurice, represented to them that by an unstamped and unregistered agreement dated 11 August 1979, Defendant No.1 had agreed to purchase the suit property from him for construction of a new building; that the said agreement *inter alia* required Defendant No.1 to pay the balance consideration of Rs.40,000/- on completion of the building or within 12 months, whichever was later, and that until such payment, the purchaser (Defendant No.1) could not hand over possession of the new building to anybody; that despite passage of more than 2 years, the balance consideration was not paid by Defendant No.1, thus entitling Maurice to terminate the agreement for sale; that in response to a legal

notice sent by Maurice calling for payment of the balance consideration and communicating his intent of terminating the agreement in default of such payment, Defendant No.1 claimed that the building not having been completed, the time for payment of the balance consideration had not arrived; that further correspondence ensued between the parties, but no payment was forthcoming from Defendant No.1; that in the meantime, Defendant No.1 put Defendant No.2 in possession of a part of the building constructed by the former, without payment of balance consideration and thus in breach of the agreement with Maurice; and that Defendant No.2 has since been wrongfully occupying the subject structure.

(iii) Based on these pleadings, it is averred by the Plaintiffs that in view of the breach by Defendant No.1, the agreement for sale between Maurice and Defendant No.1 had stood terminated and revoked; that the right to file any suit for specific performance of the agreement had become time barred; that Defendant No.1 merely had a licence to enter upon the suit property for construction of a building, whilst the possession remained with Maurice; that Defendant No.1 had no authority to create any right in any portion of the suit property in favour of any third party; and that Defendant No.2, thus, has no title or authority to remain in occupation of any structure within the suit property.

3 The suit is not contested by Defendant No.1. Defendant No.2 has filed a written statement. Defendant No.2 pleads the bar of limitation. Defendant No.2 also claims ownership rights in respect of the premises occupied by it. It is the case of Defendant No.2 that during the subsistence of the agreement for sale between Maurice and Defendant No.1, one M/s

Granulated Fertilizers and Feeds Pvt Ltd agreed to purchase the suit premises from Defendant No.1 under agreements for sale dated 28 July 1980 and 29 July 1980; that M/s Granulated Fertilizers, in turn, by an agreement dated 13 April 1983, agreed to sell the premises to Defendant No.2; that both agreements, i.e. (i) agreements of 28 July 1980 and 29 July 1980, and (iii) agreement dated 13 April 1983, are valid and subsisting as of date; and that Defendant No.2 is entitled to the suit premises under the agreements read with the various provisions of the Maharashtra Ownership Flats Act ('MOFA') and defend its possession.

4 Based on these pleadings, the following issues have been framed by this Court (Per K.R. Shriram J, by order dated 16 September 2014) :

: I S S U E S :

1. Whether the suit is filed within limitation ?
2. Whether the Plaintiffs prove that they are entitled to a declaration as prayed for in respect of the suit premises ?
3. Whether the Plaintiffs prove that they are entitled to recover possession of the suit structure occupied by the Defendants situated on the suit property ?
4. Whether Defendant No.2 proves that M/s Granulated Fertilizers and Feeds Pvt. Ltd., proves that they have right, title and interest in respect of the premises sold by them to Defendant No.2 ?
5. Whether Defendant No.2 proves that they are holding the suit premises in their own rights, under the Maharashtra Ownership Flat Act, 1963 ?

6. Whether Defendant No.2 proves that the agreement dated 13 April 1983 is duly stamped and registered with the Sub-Registrar of Assurances as required under MOFA Act, 1983 ?
7. Whether the Plaintiffs prove that Defendant No.2 are trespassers and are required to be ejected from the premises occupied by them and are also liable to pay mesne profit in respect of the premises occupied by them till the possession is handed over to the Plaintiffs ?
8. What decree? What order ?

5 Both parties have tendered documentary and oral evidence. I have also heard Learned Counsel for both.

6 The main submissions advanced at the Bar are on the issue of limitation. The Defendant's case is that the suit, filed for the relief of declaration, is barred by the law of limitation inasmuch as the cause of action, on the Plaintiffs' own showing arose on 24 July 1997, when the conveyance was duly executed by Maurice in their favour, and the suit, for which limitation prescribed under Article 59 is three years, was filed on 20 July 2009. On the other hand, it is the Plaintiffs' case that the suit is governed by Article 65 of the Schedule to the Limitation Act, 1963 which provides for a twelve year period and the suit, filed within such period, i.e. before 24 July 2009, is within time.

7 We need to ascertain, at the outset, the correct Article of the Schedule to the Limitation Act, under which the present suit falls. Is it Article 58 as claimed by Defendant No.2, since the suit seeks a declaration that the Defendants have no right, title or interest to occupy the suit structure and prays for a decree of possession on the basis of such

declaration, or is it, as claimed by the Plaintiffs, Article 65, which provides for a suit to recover possession of immovable property based on the plaintiff's title. The answer is to be found in the Supreme Court judgment in the case of **State of Maharashtra Vs. Pravin Jethalal Kamdar**¹. Whenever a suit is filed to recover possession of immovable property based on title, which the present suit undoubtedly is, there is no need for the plaintiff to seek any declaration. The suit must come within Article 65 and the period of limitation would be 12 years. The fact that the plaintiff actually seeks a declaration is of no consequence.

8 Under Article 65, the starting point of limitation is the date “*when the possession of the defendant, becomes adverse to the plaintiff.*” Mr. Tamboly, learned Counsel for the Plaintiffs, submits that the onus to show adverse possession as of the date prior to the period of limitation (i.e. 12 years) is on the Defendants. The Defendants, who assert such possession, must prove both the factum of possession and animus possidendi. Learned Counsel relies on a judgment of the Supreme Court in the case of **Md. Mohammad Ali Vs. Jagadish Kalita**² in support of his contention.

9 As held by the Supreme Court in **Md. Mohammad Ali's** case, after the Limitation Act, 1963, the legal position obtaining under the old law (i.e. Limitation Act, 1908) underwent a material change. In a suit governed by Article 65 of the new Act, the plaintiff succeeds if he proves his title. It is no longer necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the

1 AIR 2000 Supreme Court 1099

2 (2004) 1 Supreme Court 271

contrary, it would be for the defendant to establish his title by adverse possession if he wants to defeat the plaintiff's claim. For that purpose, the defendant must not only prove actual possession for more than 12 years preceding the suit but also animus possidendi, that is to say, the intention of possessing the property. The position that it is now for the defendant to aver and prove adverse possession throughout the limitation period is, thus, hardly debatable.

10 Let us now consider if the Defendants in the present case have done so. A case of adverse possession has three components : (i) actual possession of the party alleging it (with intention to possess) throughout the limitation period; (ii) the hostility of such possession to the title (and possession) of the rightful owner; and (iii) openness of such possession, i.e. the notice of such possession to the rightful owner. We have to see, if these three elements are borne out by the case established at the trial.

11 Defendant No.2 claims such possession through the agreement for sale dated 13 April 1983 between it and Granulated Fertilizers, which in turn was based on agreements for sale between Defendant No.1 and Granulated Fertilizers of 28 July 1980 and 29 July 1980. Defendant No.1, on the other hand, is claimed to have possession of the land and right to construct the building through the agreement for sale dated 11 August 1979 with the original owner, Maurice. All four agreements are proved and admitted in evidence, respectively, as Exhibits D-3, D-5 & D-6, and P-3. Granulated Fertilizers delivered possession of the suit premises to Defendant No.2 under the agreements Exhibits D-5 and D-6 on 20 June 1984. There is a letter addressed by Granulated Fertilizers to Defendant

No.2 as of that date, confirming such delivery of possession. This letter is produced in evidence, so far marked as 'X-3' for identification. This letter is also accompanied by two other letters of the same date addressed by Defendant No.2 to Granulated Fertilizers and their advocates (marked 'X-1' and 'X-2') enclosing pay orders towards balance consideration and stamp duty, registration fees, etc. These documents, i.e. the original of the first mentioned letter and office copies (with acknowledgements of the addressee) of the other two letters, were called for by the Plaintiffs' Counsel at the cross examination of the Defendant's witness (DW-1). The genuineness of these letters can hardly be doubted. The letters are not only consistent both internally and with each other, but with the other evidence produced by Defendant No.2, and also in keeping with the Plaintiffs' own case based on the representations made to them by their vendor, namely, Maurice. The letters, marked X-1, X-2, and X-3 for identification, are, accordingly, admitted in evidence, marked as Exhibits D-21, D-22 and D-23, respectively. The documentary evidence of the agreements and the letters referred to above, read with the oral evidence of DW-1, clearly establishes that since 20 June 1984, Defendant No.2 has been in possession of the suit premises. Defendant No.1 was clearly in physical possession of the land, though as a licensee of Maurice; it constructed the building and put Granulated Fertilizers in possession under an agreement (Ex.P-3); Granulated Fertilizers, in turn, entered into the agreements for sale (Ex.D-5 & D-6) with Defendant No.2 and put the latter in possession of the suit premises. The physical possession of Defendant No.2 of the suit premises is, thus, clearly established. It is not in dispute that such possession has been continuous since its inception. There is no question raised at the trial as to the Defendant's intention of possessing the

suit premises. The Defendant has been occupying the suit premises as an agreement purchaser and its intent to so possess the premises unequivocally flows from such occupation.

12 Maurice's case is that the agreement between him and Defendant No.1 was breached and accordingly he sent a notice of termination to the latter, and that the possession of Defendant No.2 (claimed through the latter) is unauthorised and illegal. It is this case, which the Plaintiffs assert in the present suit as successors in title of Maurice. The Plaintiffs aver in the plaint, based on the representations by Maurice whilst conveying the property to them, that Defendant No.1 committed breach of the agreement with Maurice and illegally inducted Defendant No.2 in the suit premises and that the agreement between Maurice and Defendant No.1 had thereby stood terminated and revoked; and that Defendant No.2, thus, had no right, title and interest to occupy the suit premises or any part thereof. The possession Defendant No.2, in the premises, can only be termed as hostile to the rightful owner, i.e. first to Maurice and now to the Plaintiffs who claim through him.

13 Maurice was obviously aware of the possession of Defendant No.2. Besides his own case of third parties including Defendant No.2 being illegally put in possession, there is a whole lot of correspondence between the parties, including correspondence between the Advocate of Granulated Fertilizers and the Advocate of Maurice (as of 1986) regarding the rights of Defendant No.2 to the suit premises. (See, for example, Exhibits D-15 and P-20.) On the Plaintiffs' own showing, when they purchased the suit property from Maurice, they were put to notice (see Agreement for sale

between Maurice and the Plaintiffs dated 24 July 1997-Exhibit-P8) of (i) the agreement for sale between Maurice and Defendant No.1, (ii) the revocation and cancellation of that agreement on account of default/breaches of Defendant No.1, (iii) the bar of limitation for enforcement of specific performance of the agreement, (iv) handing over of possession of various premises within the suit property by Defendant No.1 to third parties, and (v) the subsisting occupation of such third parties. The conveyance of the suit property by Maurice in favour of the Plaintiffs was admittedly on 'as is where is' basis and subject to the occupation of third parties including Defendant No.2 herein. Plaintiff No.2 has admitted in his evidence (affidavit in lieu of examination in chief dated 16 September 2013) that the Plaintiffs knew in the month of July 1997, that Defendant No. 1 had not only committed breach of the agreement for sale with Maurice by omitting to pay the balance consideration, but also illegally inducted Defendant No.2 in the suit premises.

14 It is clear that the Plaintiffs claim their right to recover possession through Maurice. The question to ask, therefore, is, whether Maurice could have maintained this suit against Defendant No.2 on the date of the suit. The limitation period begins really to run from the date Maurice became aware of the hostile possession claimed by Defendant No.2. That was, as we have noticed above, more than 12 years prior to the filing of the present suit.

15 All three ingredients, namely, the factum of possession through the limitation period, the hostility of such possession *qua* the rightful owner and the openness of such possession, i.e. notice to the rightful owner, are,

thus, established at the trial. All these facts have come about more than twelve years prior to the filing of the present suit. The suit, in that case, would be clearly barred by the law of limitation.

16 Mr. Tamboli, learned Counsel for the Plaintiffs, relying on Section 22 of the Limitation Act, however, submits that unauthorized possession and occupation of the suit premises by Defendant No.2 is a continuing wrong and that a fresh period of limitation begins to run from every moment of time for which the wrong continues. He relies on the judgment of a learned Single Judge of our Court in the case of **Vinay A. Kaikini Vs. Court Receiver**³, in support of his contention. Adverse possession, whether claimed in support of extinguishment of right to property under Section 27 of the Limitation Act or in support of a defence on the ground of limitation to a claim for recovery of possession based on title, cannot be a continuing wrong. Neither Section 27 nor Article 65 would make any sense, if adverse possession were to be treated as a continuing wrong. There would not be any starting point of limitation under Article 65 and consequently, no determination of the period of limitation for instituting a suit for possession, if adverse possession, as a cause of action for seeking recovery of possession, were to be a continuing tort. We are not concerned here with a trespass simplicitor, but a case of adverse possession. Whenever any trespass matures into a case of adverse possession, as understood above, the clock starts ticking for filing of a suit based on title under Article 65 or a suit based on prior possession under Article 64 (where the plaintiff, while in possession, has been dispossessed). The judgment in **Vinay Kaikini's** case (supra) does not apply to the case of adverse possession and in any

³ 2011(2) Bom. C.R. 328.

event, its ratio cannot be extended to cover the case of adverse possession.

17 In the premises, the suit must be held to be time barred. Issue No.1 is, accordingly, answered in the negative.

18 The other issues, Issue Nos.2 to 7, which reflect on the merits of the Plaintiffs' case to recover possession from Defendant No.2 versus the latter's right to defend its possession, may be taken up together. There is obviously no contest as to the Plaintiffs' title to the suit premises. The real contest is on the Defendant's authority to possess and occupy the premises and defend its possession. Such authority, which is really an antithesis of the case of adverse possession, is claimed by Defendant No.2 on the basis of the agreements for sale entered into by it with Granulated Fertilizers (Ex. D-5 & D-6). Three questions directly arise from the assertion of such authority and its denial in the pleadings of the parties : (i) Did Granulated Fertilizers themselves have the authority to enter into such agreements and part with possession of the suit premises ? (ii) Was such authority duly exercised by them so as to bind the Plaintiffs and their predecessor in title ? and (iii) What is the nature of possession of Defendant No.2 as against the Plaintiffs and their predecessor ? These three questions sum up the contest on merits in the present suit.

19 Granulated Fertilizers' power and authority are claimed through Defendant No.1, who is the agreement purchaser of the entire property of which the suit premises form a part. Maurice, the owner of the property, who is also the predecessor in title of the Plaintiffs, entered into an agreement for sale with Defendant No.1 (Ex.P-3). The agreement is an

admitted document. What is disputed is its effect. The Plaintiffs claim that Defendant No.1 did not have any right, title or interest in the property and could not have dealt with it or any part thereof with a third party, namely, in this case, Granulated Fertilizers. The Plaintiffs also claim that the agreement with Maurice did not authorise Defendant No.1 to put anyone in possession of the property. It is submitted that till payment of the balance consideration to Maurice, Defendant No.1 was merely a licensee entrusted with the work of construction of a building in the property, without any authority to put anyone in possession. No doubt a mere agreement for sale does not create any right, title or interest in the premises. But a reading of the agreement (Ex.P-3) clearly suggests that Defendant No.1, in the present case, had the requisite authority to enter into agreements for sale in respect of flats in the building proposed to be constructed thereunder. In the first place, the expression "purchasers" in the agreement (Exh.P-3) includes "assignees" of the purchasers, thereby admitting of an assignment by the purchasers (i.e. Defendant No.1). Secondly, by its very nature, the agreement is not a mere agreement for sale but a development agreement (coupled with an agreement for transfer of interest) as was common to the trade. It authorises the purchaser to take all steps for development of the property and infact, complete the construction of the building before the sale actually takes place. Thirdly, it envisages actual transfer of title (by execution of conveyance) not only in favour of the purchasers, but "*in favour of such person or persons as the purchasers may direct*". That obviously means that the purchasers could create a right of transfer in favour of others and then direct the vendor to execute conveyance in favour of these others in keeping with such right. Fourthly, the very fact that the agreement merely contemplates withholding of delivery of

possession of the new building (till payment of balance consideration) itself suggests that there was no prohibition on creation of third party rights; the only embargo was on putting such third parties in possession. Coming now to the right of Defendant No.2 to possess the suit premises, it is important to note that unlike adverse possession, in the case of a right to possess, what we are concerned with is not just physical possession but juridical possession, that is to say, actual or constructive possession with power to exercise dominion or control over the thing possessed. (In an adverse possession case, the party asserting it has to simply show notorious possession, i.e. physical possession which is conspicuous.) In the present case, the agreement between Defendant No.1 and Maurice shows that till completion of sale or any rate, till payment of the balance consideration to the latter, the former merely had an authority to submit plans, get the same approved from the Municipal Corporation and construct a building on the property and, as we have held, to enter into agreements for sale with third party purchasers. The sale was to be completed within a period of twelve months from the date of the agreement for sale or within a period of one month of obtaining of the permission of the Competent Authority under the Urban Land (Ceiling & Regulation) Act, 1976 or completion of the building, whichever was later. There is an express stipulation in the agreement for sale (Clause 1(c)) which provided that Defendant No.1 shall not put anybody in possession of the new building *“until the balance amount due is paid to the Vendor by the Purchasers”*. It is not disputed by the Defendants that the balance amount was not paid by Defendant No.1 to Maurice. The upshot of the foregoing discussion is that on the date of the agreements between Defendant No.1 and Granulated Fertilizers (Ex.D-5 & D-6), the former did not have juridical possession of the property and could not have

put the latter into such possession. If the possession of Granulated Fertilizers and consequently, of Defendant No.2, is not legal or authorized as against the Plaintiffs or their predecessor in title, namely, Maurice, there is no question of any of the former claiming right to such possession or defend such possession against any of the latter. The nature of the possession of Defendant No.2 as against the latter is merely unauthorized physical possession, may be, notorious and thereby, adverse, but not lawful, which could be defended by Defendant No.2 in its own right through the rightful owner or in part performance under Section 53A of the Transfer of Property Act.

20 In the light of the above discussion, which bears out the lack of authority in Granulated Fertilizers to put Defendant No.2 in possession and the illegality of the latter's possession as against Maurice and his successors, the question whether the exercise of such authority by Granulated Fertilizers was due or not, really assumes no significance. But since there is an issue raised in connection with such exercise, namely, invalidity of the exercise due to non-stamping and non-registration of the agreement between Granulated Fertilizers and Defendant No.2, we may consider the legality of such exercise in the context of want of stamp duty and registration.

21 As of the date of the agreement, i.e. 13 April 1983, an agreement for sale of an immovable property fell under Item (h) of Article 5 of the Schedule to the Bombay Stamp Act and attracted stamp duty of Rs.5/-. The subject agreement for sale bears stamp of Rs.10/- and is accordingly adequately stamped. No doubt, registration of an agreement for sale of a

flat, under Section 4 of MOFA, is compulsory. Non-registration, however, does not render the agreement void and inadmissible in evidence for all purposes. Section 4A of MOFA permits the agreement for sale to be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882. The agreement for sale of 13 April 1983, thus, could be used in any suit to defend possession delivered to Defendant No.2 in part performance of same, provided of course that the possession was rightfully delivered. There is no substance, thus, in the objections raised to the receipt of the document in evidence on account of inadequacy of stamp or want of registration.

22 That completes our survey of the merits of the rival cases. The agreement for sale of 13 April 1983 in favour of Defendant No.2 is capable of being received in evidence. The possession delivered thereunder, however, is not legal or authorized as against the owner, Maurice, or his successors in title, the Plaintiffs. Neither Defendant No.1 nor Granulated Fertilizers had any right, title or interest in the suit premises, though they had the authority to enter into an agreement for sale in respect thereof by virtue of the original agreement for sale between Maurice and Defendant No.1 but no authority to part with possession of the building or any part thereof, in favour of any third party. The possession of Defendant No.2 is, thus, unauthorized and cannot be defended by it either in its own right as an agreement purchaser under MOFA or under Section 53A of the Transfer of Property Act. The Plaintiffs are, however, not entitled to any declaration or decree for recovery of possession or mesne profits, on account of the bar of limitation.

23 In the result, the suit is dismissed. There shall, however, in the facts of the case, be no order as to costs.

(S.C.GUPTE, J.)