

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION (ST.) NO. 15013 OF 2017
IN SA/372/1992

BAJIRAO BALA SAKRE
VERSUS
BHIKA S/O TOTARAM MURME

Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for applicant
Smt. M.B. Gangwal (Patni), Advocate for respondent

CORAM : SUNIL P. DESHMUKH J.
DATE : 10-11-2017

ORDER :

1. Heard learned counsel for appearing parties on Review Application.
2. Parties hereinafter are referred to by their status in regular civil suit no. 26 of 1984.
3. Applicant - defendant is before this Court seeking review of the judgment and order dated 25-08-2016 passed in second appeal no. 372 of 1992.
4. Plaintiff had instituted regular civil suit no. 26 of 1984

against the applicant for possession and injunction in respect of suit property admeasuring 92 Are from land gat no. 63, more particularly referred to in the plaint. There does not appear to be any dispute that plaintiff is son of Totaram from Sarjabai. Suit property belonged to Totaram. Gat no. 63, a piece of land about 4 Acre, 22 Guntha had been owned and possessed by Totaram. Plaintiff had been to the court claiming that about 8 - 9 years before institution of the suit, defendant, who happens to be son of Sarjabai from her earlier marriage, before she had married to Totaram, had encroached upon about 92 Are land. It is in these circumstances, suit for possession and injunction ensued.

5. Whereas in the defence, the applicant - defendant had claimed that Totaram had granted a portion of land from gat no. 63 under an agreement of 1935 and he had accordingly been in possession of said portion of land continuously without any interruption over a period of 12 years to the knowledge of Totaram and the plaintiff. Alongwith the same by virtue of defendant's relationship with Sarjabai, certain residential property had also been given to the defendant. It appears that in defence, the applicant-defendant had purportedly mentioned that the suit is not within limitation.

6. The trial court had decreed the suit holding that record depicts after death of Totaram, the property had been recorded in the name of plaintiff. Neither Sarjabai nor plaintiff's sister Garjabai had ever staked claim to suit property. The record continuously bore petitioner's name as owner in possession. Trial Court further found that there had been no evidence nor any document had been referred to in respect of any agreement worth consideration nor was there any evidence to show that for more than 12 years, the defendant had been in possession with hostility to title of plaintiff nor any particulars necessary to acquire title by adverse possession had been given.

7. The decision rendered by trial court on facts and in law had been fully endorsed by appellate court. Appellate court further additionally had observed the evidence led on behalf of the defendant does not lead to property claimed by the plaintiff. It further found that even going by case of the defendant, his case had been of permissive possession.

8. While the matter had come up for final hearing in second appeal, it has been observed that the basic requirement for defendant's claiming possession adverse to title of true owner had

not been satisfied at all in the pleadings and even submissions in this respect had been vague and uncertain, particularly, having regard to that the two courts, on appreciation of evidence have considered that the defendant had failed to place on record any material for acquisition of title by adverse possession. These findings recorded by the two courts were not found to be in any way perverse.

9. Learned counsel Mr. Mustafa appearing for review applicant - defendant submits that Supreme Court had given an opportunity to the defendant to raise a new question which had not been raised before the courts below and that he is trying to raise a pure question of law on admitted facts.

10. He submits that admittedly, suit property originally belonged to Totaram. He further submits that it emerges Sarjabai had been his wife. In the circumstances, he submits that while Totaram died before 1954, Sarjabai had a right to the property left behind by Totaram by virtue of Hindu Women's Right to Property Act, 1937. For said purpose, he proposes to rely on Section 3(3) of said enactment. He, therefore, contends that in view of the same, since Sarjabai had a right to property, plaintiff's suit could not have been decreed by the two courts and atleast defendant would succeed to

the share of Sarjabai.

11. Other question which Mr. Mustafa proposes to lay emphasis on, is about issue with regard to limitation having not been framed.

12. Learned counsel for applicant purports to contend that as no specific issue with regard to limitation had been framed despite there being pleadings in respect of the same, the judgments rendered thus far deserve to be set aside and the suit be restored for re-adjudication before trial court.

13. He further submits that such a contention as a new plea would also be available in second appeal. For said purpose, he purports to place reliance on a decision of this court in the case of *Nagorao Narayan Diwane (since deceased) V. Narayan Awadutrao Dighe (since deceased)* reported in 2000(1) ALL MR 555, referring to head note 'C' thereof. Since it is incumbent under section 3 of the Limitation Act, the Court has to examine the said aspect.

14. He further purports to rely on a decision of a Division Bench of this court in the case of *Vithoba N. Adel V. Vijaya Bank and others* reported in A2005(1) ALL MR 390, wherein defence was allowed to raise

a point of limitation by High Court. He, therefore, submits that issue of limitation deserves to be framed and matter be sent back accordingly.

15. Learned counsel Mrs. Gangwal on the other hand, submits the Supreme Court has passed the order in view of submissions advanced on behalf of the review applicant seeking liberty to raise a new question. She submits there is no basis for these submissions in the pleadings at all and, as such, such a ground cannot be raised in review application.

16. She further submits that Sarjabai during her lifetime had never questioned the ownership of plaintiff over the entire property nor had asserted right to the same. She further submits that conduct of Sarjabai is eloquent enough suggesting that she too intended to give property left behind by Totaram to her son begotten from Totaram and not to defendant.

17. Learned counsel Mrs. Gangwal on the ground of limitation submits that the issue may not have been explicitly referred to by trial court, however, the same would find place in the points for determination, as have been framed by appellate court. She, apart from aforesaid, submits that parties have led evidence in

respect of the same and the same has been properly appreciated. She submits that defendant had claimed ownership by adverse possession and led evidence in that regard. She, therefore, submits that the parties had an opportunity and have addressed themselves accordingly on the point of limitation.

18. Position emerges that plaintiff's title to the property had not been a matter of question even by the defendant. Defendant had purportedly developed a theory of adverse possession, which he had failed to establish.

19. In the circumstances, suit based on title from the date of dispossession as well as denial of title, appears to have fallen for consideration of the court and has been decided accordingly.

20. Although learned counsel for applicant-defendant has advanced submissions, it appears that the aspect of limitation appears to have been considered elaborately, since it was plaintiff's case that dispossession had taken place 8 - 9 years before institution of the suit and further such point had been framed by appellate court and additionally about the plea of adverse possession and findings thereon with reference to evidence in this respect have been rendered by the courts concurrently. Parties had led evidence

accordingly.

21. It may not be at the trial stage, there had been any specific issue, yet, it would not be a case wherein it can be said that this aspect had not undergone consideration at all.

22. Perusal of the judgment of trial as well as appellate court would show that the question of adverse possession has been quite elaborately considered and dealt with. Even a point for determination about plaintiff proving his dispossession before 9 years of institution of suit had been considered by appellate court and appellate court has given affirmative finding in favour of the plaintiff having established that the plaintiff had been dispossessed 8 - 9 years before institution of the suit. It is difficult, therefore, to accede to the request being made under review application.

23. So far as sub-section 3 of section 3 of Hindu Women's Right to Property Act, 1937, is concerned, Mrs. Gangwal points out that Sarjabai during her lifetime had never questioned the ownership of plaintiff over the entire property, showing her intention to treat property as plaintiff's absolute property.

24. As referred to above, Section 3 of Hindu Womens Right to Property Act, 1937 would hardly be of any assistance to the

review applicants for the reasons as are already been referred to above.

25. The purported new grounds sought to be raised do not give rise any question, as would be amenable for consideration under section 100 of the Code of Civil Procedure.

26. In the circumstances, the review is unlikely to succeed.

27. Review Application is thus rejected.

28. Learned counsel Mr. Mustafa requests for four weeks time in order to enable him to pose a challenge to this decision. It is for applicant, to prevail over the executing court, if at all it comes to delivery of possession.

[SUNIL P. DESHMUKH]
JUDGE

arp/