

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.**

SECOND APPEAL NO.418 OF 2017

APPELLANT: Smt. Sardadevi wd/o Devidin Gupta
(Dead) through LRs

1. Govind S/o Devidin Gupta, Aged about 50 years, Occ: Business,
 2. Madhukar S/o Devidin Gupta, Aged about 50 yrs., Occ: Business
- Both R/o F-18, Pratima Apartments,
Laxminagar, Nagpur.

-VERSUS-

RESPONDENTS: 1. Jayshree W/o Avinash Banait, Age 53 years, Occ: Private, R/o Congressnagar, Opp Dhanwate National College, Nagpur.

2. Smt. Kumudini Wd/o Prakashchandra Banait (Deceased) hence deleted.

Shri S. V. Bhutada, Advocate for the appellant.
Dr. R. S. Sundaram , Advocate for the respondents.

CORAM: A.S. CHANDURKAR, J.

DATED: SEPTEMBER 12, 2017.

ORAL JUDGMENT :

1. The appellants are the original defendants who are aggrieved by the decree for possession passed by the appellate Court in the suit filed by the respondent.

2. The brief facts giving rise to the present litigation are that the respondent alongwith one Kumudini claims to be the owner of land admeasuring 464.40 square meters which is part of Khasra Nos.22,23 and 30 situated at mouza Ajni. It is claimed that this land has been purchased by virtue of sale deed dated 18-9-1991 from Shri Deo Balkrushna Devghar Deosthan, Sitabuldi. According to the plaintiff, the defendant purchased land admeasuring 5000 sq. ft from the same vendor on 15-11-1968. The defendant's land is situated in Khasra No.29. As the defendant's land was adjacent to the plaintiff's land, the defendant committed encroachment and hence the common vendor issued a notice on 18-3-1985 calling upon the defendant to vacate the property. The defendant refused to do so by giving reply. Ultimately on 28-12-1993 the plaintiffs filed suit for possession by seeking eviction of the defendant from the suit property.

3. The defendant in her written statement denied the claim as made. According to her, she was in possession of land admeasuring 6700 sq. ft. since 25-10-1968 openly, peacefully and

continuously. It was further pleaded that being in such open possession, she had perfected her title to the suit property. The title of the plaintiffs was denied and it was pleaded that the suit was liable to be dismissed.

4. The trial Court after considering the evidence on record held that though the plaintiff had purchased the suit property on 18-11-1991, the defendant had perfected her title by way of adverse possession. On that basis the suit came to be dismissed. The first appellate Court held that the trial Court erred in holding the plea of adverse possession in favour of the defendant. It observed that the defendant had not proved as to when she had come in possession for claiming title on the basis of adverse possession. Accordingly, the judgment of the trial Court was set aside and the suit came to be decreed. Being aggrieved the defendant has filed this appeal.

5. Shri S. V. Bhutada, learned Counsel for the defendant submitted that the appellate Court erred in setting aside the decree of the trial Court. Referring to the documents on record it was submitted that the suit as filed on 28-12-1993 was barred by limitation inasmuch as the encroachment as alleged was in the year 1980. Though the trial Court did not frame any issue as to whether the suit was filed within limitation, it was for the plaintiffs

to demonstrate as to how the suit filed by them was within limitation. He referred to provisions of Section 3 of the Limitation Act, 1963 (for short, the said Act) to urge that the plea of limitation goes to the root of the matter and such plea could be raised at any stage of the proceedings. In that regard, he placed reliance on the judgments of the Hon'ble Supreme Court in *State of Gujarat Vs. Kothari and Associates* (2016)14 SCC 761, *Vasantiben Prahladi Nayak and others v. Somnath Muljibhai Nayak and others* AIR 2004 SC 1893 and judgment of learned Single Judge in *Ajab Enterprises v. Jayant Vegoiles and Chemicals Pvt. Ltd.* AIR 1991 Bombay 35. It was therefore submitted that having failed to initiate the proceedings within the prescribed period of limitation the suit was liable to be dismissed. He also referred to the evidence of the parties to support his submissions.

6. On the other hand, Dr. R. S. Sundaram, learned Counsel for the respondents supported the impugned judgment. He submitted that the appellate Court on a proper consideration of the material on record rightly decreed the suit. The suit was filed within limitation as prescribed by Article 65 of the said Act. It was for the defendant to come up with specific pleadings as to when she had come in actual possession of the suit property on the basis of which the time would begin to run against the real owner. He

submitted that on the contrary as per the reply dated 4-4-1985 issued by the plaintiff she had claimed ownership in herself without admitting the plaintiff's title. The defendant had failed to satisfy the ingredients for claiming title on the basis of adverse possession. In support of his submissions, learned Counsel placed reliance on the judgment of the Hon'ble Supreme Court in *Girja Kumar & others Vs. State of Himachal Pradesh and another* (2007) 14 SCC 90 and judgment of learned Single Judge in *Punja vs. Shivaji* 2017 (2) Mh.L.J. 111. It was thus submitted that the suit was rightly decreed by the first appellate Court.

7. I have heard the learned Counsel for the parties at length and I have also gone through the material placed on record. The plaintiff claims title on the basis of sale deed dated 18-9-1991 in respect of 464.40 sq. mtrs. land that was purchased from Khasra Nos.22, 23 and 30 of mouza Ajni. According to the plaintiff, prior to purchasing this land, their vendor on 18-3-1985 had issued a notice to the defendant alleging that though the defendant had purchased 5000 sq. ft. land from Khasra No.29 vide sale deed dated 15-11-1968, the said defendant had encroached upon land admeasuring 6700 sq. ft. from Khasra No.23/1. The defendant was therefore called upon to vacate the encroached portion. The defendant as per her reply at Exhibit-69 admitted that

she was in possession of the said land. It was further stated that an agreement for purchasing a plot admeasuring 50 ft x 100 ft. had been entertained into with the erstwhile Vendor. Similarly, extra land to the extent of 1700 sq. ft. was also intended to be purchased. It was then stated that as the defendant was in possession since 25-10-1968 she had become owner having perfected her title by adverse possession.

8. From the aforesaid, it can be seen that though the defendant was the owner of 5000 sq. ft. land from Khasra No.29, she was found in possession of further land to the extent of 6700 sq. ft. from Khasra No.23/1. According to the defendant, she was in possession since 1968 and had therefore perfected her title by way of adverse possession. There is no evidence on record placed by the defendant to indicate her possession of this land admeasuring 6700 sq. ft. from Khasra No.23/1. Moreover, in the reply at Exhibit No.69 dated 4-4-1985, the defendant admitted the erstwhile vendor's title by relying upon an agreement to purchase that land. There are no details given regarding this agreement of the defendant. Having recognized the Vendor's title, the claim of title having been perfected by way of adverse possession would arise only if there was evidence to indicate open and hostile possession of the defendant qua the real owner. Except the reply

dated 4-4-1985, there is no evidence on record to indicate open and hostile possession of the defendant. Moreover, the erstwhile owner is also not a party to the proceedings. The appellate Court, therefore, rightly found that the evidence on record was not sufficient to justify the claim of the defendant of having perfected title by way of adverse possession.

9. As regards the submission that the suit filed by the plaintiff on 28-12-1993 for possession was barred by limitation, it ought to be seen that the plaintiff acquired title as per sale deed dated 18-9-1991. She then issued a notice on 8-12-1993 to the defendant and thereafter filed the suit for possession. There is no evidence on record to indicate as to when the defendant came into actual possession of the suit property. There is also no evidence to indicate the open and hostile possession of the defendant to the exclusion of the real owner. According to the plaintiff's vendor, the defendant was in occupation as a trespasser prior to three years from issuance of the notice dated 18-3-1985. Thus, even if it is assumed that the defendant was in possession since the year 1982 and the plaintiff acquired title on 18-9-1991, the suit was filed within a period of twelve years from March, 1982 as required under Article 65 of the said Act.

10. Though it is true that under Section 3 of the said Act,

it is the duty of the Court to examine if the claim as made in the suit is within limitation, it cannot be lost sight of that when a defence is raised that title has been perfected by way of adverse possession, the question of limitation is always a mixed question of fact and law. In *State of Gujarat (supra)*, it was held that even if the defendant did not raise the issue of limitation before the trial Court, a duty was cast on the Court to consider this aspect on its own initiative. The legal question as regards bar of limitation could be raised in appeal. At the same time, it was also observed that in said case the Court was not confronted with the situation where the plea of limitation was a mixed question of fact and law. Considering the nature of pleadings in the present suit and the defence of title having been perfected by way of adverse possession, it is clear that the issue of limitation as sought to be raised is a mixed question of fact and law. There cannot be any dispute that the plea of limitation cannot be waived as held in *Ajab Enterprises (supra)*. At the same time, such question needs to be considered in the light of the evidence on record. Thus, after considering the entire material on record and in view of the discussion in paragraph 9 herein above, I am satisfied that the suit has been filed within limitation.

I do not find that the defendant has succeeded in

making out a case that the suit as filed was barred by limitation. I, therefore, do not find any reason to interfere with the judgment of the appellate Court. In view thereof, the appeal stands dismissed with no order as to costs.

JUDGE

/MULEY/