

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 145 OF 1996 (AURANGABAD)
SECOND APPEAL NO. 679 OF 1986 (BOMBAY)

A. Pingubai @ Manibai Nathulal Agrawal
(Died through L.Rs.)

A-1 Amarchand Nathulal Agrawal
(Died through L.Rs.)

A-1(a) Rajendrakumar Amarchand Agrawal
Age 38 years, Occ. -

A-1(b) Sou Pushpadevi Jagishprasad Agrawal
Age 49 years, Occ. -

A-1(c) Sou. Mandadevi Omprakash Agrawal
Age 44 years, Occ. -

A-1(d) Sou. Meenadevi Radheshyam Agrawal
Age 39 years, Occ. -

All R/o. Shirpur, Tq. Shirpur,
District Dhule

...Appellants

versus

Ravji Sadu Chaudhari,
(since deceased, through legal heirs)

a) Smt. Reshmabai Ravji Chaudhari,
Age 75 years, Occ. Household,
R/o. C/o. Baban Ravji Chaudhari,
Opp. Vasudev Baba Temple
Vasudev Nagar, Shirpur
District Dhule

b) Smt. Janabai Vedu Chaudhari
Age 65 years, Occ. Household,
R/o. C/o. Rajendra Vedu Chaudhari
Sulochana Nagar, Shirpur
District Dhule

c) Suresh Ravji Chaudhari
Age 58 years, Occ. Agriculture

R/o. Gajanan Maharaj Colony,
Shirpur, District Dhule

d) Subhash Ravji Chaudhari
Age 56 years, Occ. Agriculture
R/o. Mali Galli, Shirpur
District Dhule

e) Arun Ravji Chaudhari,
Age 54 years, Occ. Agriculture
R/o. Ganesh Tea House
Near Shirpur Bazar Samiti Gate,
Shirpur, District Dhule

f) Baban Ravji Chaudhari
Age major, Occ. Agriculture
R/o. Opp. Vasudeo Baba Temple,
Vasudev Nagar, Shirpur
District Dhule

...Respondents

.....
Mr. G.V. Wani, advocate for the appellant
Mr. S.P. Shah, advocate for respondents
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment: 28.03.2018**

**Date of pronouncing
the Judgment: 04.06.2018**

JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the learned District Judge, Dhule dated 1.4.1986; in Civil Appeal No. 235 of 1982, the original plaintiff has preferred this second appeal.

2. Brief facts giving rise to the present second appeal are as follows:-

a) The appellant-plaintiff had instituted Regular Civil Suit No. 140 of 1970 for recovery of encroached portion and recovery of mesne profit. The appellant-plaintiff claims to be the owner of land survey No. 103 admeasuring 23 acres and 1 gunthas situated at village Karvand, Tq. Shirpur, District Dhule and the respondent-defendant is the owner of land survey No. 104 situated to the east of the suit survey number. According to the appellant-plaintiff, in the year 1957, the piece of land, which was in possession of the tenant was restored to her. In the year 1966, the portion of the suit land came to be acquired by the Government for the purpose of construction of water channel and as such, the area of suit land was reduced to the extent of 18 Acres 39 Gunthas and 14 Gunthas as Potkharaba. Thus, the total land admeasuring 19 acres 13 gunthas remained with the appellant-plaintiff. At the time of construction of water channel, the appellant-plaintiff suspected that there had been encroachment over her land at the instance of the adjoining owner. Consequently, the appellant-plaintiff got measured the suit land. It was revealed in the measurement that a portion of the suit land admeasuring $31\frac{1}{2}$ gunthas had been encroached upon by the respondent-defendant by shifting common bandh between the suit land and the defendant's land survey No. 104. The appellant-plaintiff had thus issued notice to the respondent-defendant on 1.3.1968 for

restoration of possession but the respondent-defendant refused to accept the notice and thus refused to return the encroached portion of suit land. The appellant-plaintiff thus constrained to institute the suit for the reliefs, as detailed above.

b) The respondent-defendant had strongly resisted the claim by filing written statement Exh.15. The respondent-defendant has specifically denied the encroachment as well as shifting of common bandh. The respondent-defendant has raised a plea that the suit was not maintainable since previous suit on the very cause of action, being Civil Suit No. 47 of 1969, was withdrawn and fresh suit was not allowed. Secondly, the respondent-defendant also contended that he had been in possession of the suit property for more than 12 years as a owner and such possession has been exercised openly and hostile to the appellant-plaintiff. It has been also contended that there was no measurement properly made in presence of the respondent-defendant.

c) On the basis of rival pleadings of the parties to the suit, the learned Judge of the trial court has framed as many as 11 issues covering the respective pleadings of the parties and also the legal points arising out of the objection regarding the bar of limitation and the bar of res-judicata to institute the suit. Both the parties led their

oral as well as documentary evidence in support of their rival contentions. The learned Judge of the trial court has decreed the suit and turned down the plea of adverse possession raised on behalf of the respondent-defendant and also ruled that the suit was well within the period of limitation. The plea of res-judicata too was negatived. The possession of the encroached portion of the suit land was directed to be delivered in accordance with the encroachment shown in the map Exh.65. However, the matter went in appeal and while examining the entire set of findings, both on facts and law, the learned District Judge in Civil appeal had come to the conclusion that the measurement made and recorded vide Exh.65 was not done properly as it was not made in presence of the respondent-defendant and secondly that the standing instructions as per the Garden's Manual were not followed. The matter was remanded to the trial court with direction to get the land measured and decide the suit afresh.

d) After remand, at the request of the parties, twice the suit land and the adjoining land owned and possessed by the respondent-defendant came to be measured. The learned C.J.J.D. Shirpur by judgment and decree dated 31.3.1982 decreed the suit and directed that the appellant-plaintiff shall recover actual possession of 31½ gunthas of land from survey No. 104 as shown in the map Exh.112

within two months from the date of order and also recover the mesne profit and further directed enquiry under Order XX Rule 12(1) (c) of the C.P.C. for future mesne profit.

e) Being aggrieved by the judgment and decree passed by the trial court, the respondent-defendant has preferred civil appeal No. 235 of 1982. The learned District Judge, Dhule by judgment and order dated 1.4.1986 allowed the appeal by setting aside the judgment and decree passed by the trial court and dismissed the suit. Hence, this second appeal.

f) Initially this second appeal was filed at the Principal Seat of this Bench and it was registered as second appeal No. 679 of 1986. By order dated 8.1.1987 this Court (Principal Seat at Bombay) has admitted the appeal only on the substantial question of law as to the limitation with observation that the question of limitation is arguable. However, subsequently, this second appeal came to be transferred due to transfer of jurisdiction of Dhule district to this Bench and this second appeal came to be numbered as second appeal No. 145 of 1996.

3. Learned counsel for the appellant-plaintiff submits that the learned District Judge has erred in law in not correctly applying the

provisions of Article 65 of Limitation Act 1963 and also Articles 142 and 144 of the Limitation Act 1908. Learned counsel submits that the period of limitation would start to run when the possession of suit property by the defendant came adverse to the plaintiff. The appellant-plaintiff need to prove her title only and she is not required to show that she was in possession within 12 years of the suit. Learned District Judge has confirmed the finding recorded by the trial court that respondent-defendant has not perfected his title through the process of adverse possession. Even the learned District Judge has recorded a finding in the affirmative and held that the appellant-plaintiff has established the encroachment at the hands of the defendant to the extent of 31½ gunthas over the suit land. Learned counsel submits that considering the provisions of Article 65 of the Limitation Act 1963 and even considering the provisions of Articles 142 and 144 of the Limitation Act 1908, the suit is well within limitation. Learned counsel submits that the tenancy over the suit land remained continued till 1.10.1957 and where during continuance of a lease, if the tenant was dispossessed by the third party, and enters into possession, the possession of such third party cannot be adverse to the landlord so long as tenant continues. The learned District Judge has ignored that during continuance of the tenancy, the appellant-plaintiff could not exercise any control over the disputed land and also could not recover the possession.

4. Learned counsel for the respondent-defendant submits that in terms of provisions of Article 142 of Limitation Act 1908, for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, the period of 12 years begins to run from the date of dispossession or discontinuation and as such, the burden, undoubtedly, is on the appellant-plaintiff to prove that she has been in possession and she was dispossessed and discontinued her possession within 12 years from the date of filing of suit. Learned counsel submits that if the suit is merely based on the adverse possession then Article 144 gets attracted. Consequently, the burden of proof, therefore, does not rest on the respondent-defendant. It is, therefore, for the appellant-plaintiff to prove that not only she had title to the suit property but also she had possession within 12 years and she was dispossessed and discontinued the possession within a period of limitation prescribed under Article 142 of Limitation Act and the said burden does not shift on the respondent-defendant.

Learned counsel for the respondent-defendant, in order to substantiate his contentions, places his reliance on the following two judgments:-

- i) Shyam Sunder Prasad and others vs. Raj pal Singh and another, reported in (1995) SCC 311
- ii) Ramiah vs. N. Narayana Reddy (Dead) By LRs. reported in (2004) 7 SCC 541,

5. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the pleadings and the grounds taken in the appeal memo. I have also gone through the record and proceedings.

6. Admittedly, the entire area of the suit land survey No. 103 was in possession of the tenant prior to 1957. There was no measurement of suit land survey No. 103 prior to the first measurement Exh.58 in the year 1968. There is specific admission that the suit land was not measured when it was obtained back by evicting the tenant. Consequently, in the year 1967-68, only the appellant-plaintiff came to know that some portion of her land was missing. The appellant-plaintiff did not know as to when the portion of the suit land found missing. Thus, there is no clear evidence as to when the area of suit land survey No. 103 came to be reduced. In the year 1967-68 when the measurement was carried out as per the map Exh.58, the area of the suit land was already reduced.

Consequently, it is not possible to find out the commencement of the encroachment or reduction in the area of suit land. The learned District Judge in para 22 of the judgment has thus rightly observed that the possibility of the area of the suit land having been detached and reduced while it was in possession of the tenant also cannot be ruled out.

7. By reason of Limitation Act 1963, the legal position as was under the Old Act 1908, underwent a change. In a suit governed by Article 65 of Limitation Act 1963, the appellant-plaintiff succeeds, if he proves his title and it would no longer necessary for him to prove that he was in possession within 12 years preceding of filing of the suit, unlike in a suit governed by the Articles 142 and 144 of the Limitation Act 1908.

8. In the case of ***Shyam Sunder Prasad and others vs. Raj pal Singh and another (supra)***, relied upon by learned counsel for the respondent-defendant, the Supreme court in para 4 of the judgment has made the following observations:-

“4. The question, therefore, is on whom the burden of proof lies in a suit based on title and for possession. In view of Article 142 of the Old Act, the burden, undoubtedly, is on the plaintiff-appellant to prove that he has title to and has been in possession and he was dispossessed and discontinued his possession within 12 years form

the date of the filing of the suit. It is necessary for the plaintiff, therefore, when the suit is laid on the basis of the title, to establish not only that he has title to the property but also he was dispossessed or discontinued his previous possession within 12 years on the date of filing of the suit. If the suit is merely based on adverse possession, then Article 144 gets attracted. The defendant did not come to the court to establish his adverse possession by prescription. The burden of proof, therefore, does not rest on him. It is therefore, for the plaintiff-appellant to prove that not only he had title to the plaint schedule property but also he had possession within 12 years and he was dispossessed or discontinued his possession within the period of limitation prescribed under Article 142. The burden, therefore, is always on him to prove that he had possession within 12 years from the date of the filing of the suit and he has title to the property. The burden does not shift on the defendant. The burden of proof, therefore, has rightly been placed on the appellant by the appellate Court. We do not find any error of law in the findings recorded by the appellate court warranting interference, though the High Court dismissed the appeal in limine."

9. In the case of ***Ramiah vs. N. Narayana Reddy (Dead) by LRs. (supra)***, relied upon by learned counsel for the respondent-defendant, the Supreme Court in para 9 and 10 of the judgment has made the following observations:-

"9. We do not find any merit in the aforestated arguments. Article 64 of the Limitation Act, 1963 (Article 142 of the Limitation Act, 1908) is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article, it must be shown that the suit is in terms as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by

discontinuance. Article 65 of the Limitation Act, 1963 (Article 144 of the Limitation Act, 1908) on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on plaintiffs' title in which there is no allegation of prior possession and subsequent dispossession alone can fall within article 65. The question whether the article of limitation applicable to a particular suit is article 64 or article 65 has to be decided by reference to pleadings. The plaintiff cannot invoke article 65 by suppressing material facts. In the present case, in suit No.357/60 instituted by N. Narayana Reddy in the Court of Principal Munsiff, Bangalore, evidence of the appellant herein was recorded. In that suit, as stated above, the appellant was the defendant. In his evidence, appellant had admitted that he was in possession of the suit property up to 1971. This admission of the appellant in that suit indicates ouster from possession of the appellant herein. In the present suit instituted by the appellant, he has glossed over this fact. In the circumstances, both the Courts below were right in coming to the conclusion that the present suit was barred by limitation. The appellant was ousted in 1971. The appellant had instituted the present suit only on 8.5.1984. Consequently, the suit has been rightly dismissed by both the Courts below as barred by limitation.

10. *In the case of Ram Surat Singh v. Badri Narain Singh, it has been held that if the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed, then he must show possession within 12-years under article 142 (now article 64) of the Limitation Act. To the same effect is the ratio of the judgment in the case of Mohammad Mahmud v. Muhammad Afaq. In commentary on the Limitation Act by Sanjiva Row [Ninth Edition IInd Volume page 549] it has been stated that the question as to which of the two articles would apply to a particular case should be decided by reference to pleadings, though the plaintiff cannot be allowed by skillful pleading to avoid the inconvenient article. On facts of the case, we find that the article 64 is applicable to the present suit. Consequently, the suit has been rightly dismissed by both the Courts below."*

10. The learned District Judge has rightly observed that the limitation has been expired prior to commencement of new Limitation Act and as such, despite the proof of existence of title, the remedy is not available because of extinguishment of the right through the passage or lapse of time. In view of Article 142 of the Limitation Act 1908, the burden, undoubtedly, is on the appellant-plaintiff to prove that she has title as has been in possession and she was dispossessed and discontinued her possession within 12 years from the date of filing of suit. The said burden does not shift on the respondent-defendant. The appellant-plaintiff has failed to discharge the said burden. I do not find any error in the findings recorded by the first appellate court warranting any interference. There is no substance in the second appeal. Hence, I proceed to pass the following order.

O R D E R

The Second Appeal is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)