

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.**

SECOND APPEAL NO. 401 OF 2018

- | | |
|---|--|
| <p>1. Sainath Rama Dhavale
Age : 36 years, Occu. Agriculture,
R/o. Court Road, Paithan, Tq. Paithan, Dist. Aurangabad.</p> <p>2. Bababai W/o. Rama Dhavale,
Age : 75 years, Occu. Agriculture,
R/o. As above.</p> | <p>....Appellants
(Orig. Plaintiffs)</p> |
|---|--|

Versus

- | | |
|---|---|
| <p>1. Dagdu Namdeo Dhavale,
Age : 83 years, Occu. Agriculture,
R/o. Court Road, Paithan, Dist. Aurangabad.</p> <p>2. Manik Uttam Dhavale,
Age : 53 years, Occu. Milk Dairy,</p> <p>3. Sunil Waman Dhavale,
Age : 36 years, Occu. Agriculture,
All 1 to 3 - R/o. Court Road, Paithan,
Tq. Paithan, Dist. Aurangabad.</p> | <p>....Respondents
(Orig. defendants)</p> |
|---|---|

.....
Mr V. D. Salunke, Advocate for the appellant
Mr R. V. Gore, Advocate for respondent
.....

CORAM : A. M. DHAVALA, JJ.

DATE OF RESERVING THE ORDER : 02ND NOVEMBER, 2018.
DATE OF PRONOUNCING THE ORDER : 06TH DECEMBER, 2018.

ORDER :-

1. Heard Mr V. D. Salunke, learned counsel for the appellant and
Mr. R. V. Gore, learned advocate for respondent. With the consent of

the parties, the appeal is taken up for final disposal at the stage of admission.

2. The appellants herein are the original plaintiffs and the respondents are the original defendants.

3. As per admitted facts, one Namdeo was common ancestor of the parties and was protected tenant of the suit land at Survey No. 24, Paithan, adm. 5 Acres & 7 gunthas. Namdeo died leaving behind four sons namely; Dagadu, Uttam, Waman & Rama. The plaintiffs are widow and daughter of deceased Rama. Defendant No. 1 Dagadu is son of Namdeo and defendants No. 2 and 3 are grandsons of Namdeo through their deceased father Uttam & Waman, respectively. Admittedly, deceased Namdeo was cultivating the suit land till his death. The plaintiffs filed suit bearing RCS No.196/2009 claiming that, after death of Namdeo, they started cultivating the land as tenants and they are in exclusive possession for more than 25 years. The defendants had no concern but they were obstructing the plaintiffs. After death of Rama, the plaintiffs applied for getting their names entered into the revenue record. The defendants raised objections. The Tahsildar accepted the possession and accordingly, mutation was effected. Hence,

the plaintiffs filed suit for perpetual injunction. The defendants claimed that, they are co-heirs of the plaintiffs and they were also in cultivating possession of the suit land. They were cultivating land of their share separately and the suit for perpetual injunction was not maintainable. The decision of Tahsildar has been challenged by way of appeal.

4. Both the courts below on facts held that, the plaintiffs were in *de facto* possession. The ld. trial Court held that, as per Section 99 of Maharashtra Land Revenue Code, the decision of Tahsildar, Tribunal or Collector cannot be challenged before the Civil Court. He therefore granted decree of perpetual injunction restraining the defendants from disturbing the possession of the plaintiffs. In RCA No. 110/2014, the ld. First Appellate Court held that the plaintiffs and the defendants are co-owners. There was no evidence of exclusion or ouster of the defendants and therefore the plaintiffs were not entitled for perpetual injunction.

5. Mr V. D. Salunke, learned counsel for the appellant argued that, assuming that the plaintiffs were the co-sharers, but they were in exclusive possession and, therefore, they are entitled for protection of their possession. Reliance is placed on Karam Singh & Anr. Vs.

Lakhbir Kaur & Ors. reported in **2011 (1) ICC 248** (Punjab & Haryana High Court) [Para 11]. He further argued that, after death of Namdeo, for a period of more than 25 years, the defendants did not claim any right nor challenged the exclusive possession of the plaintiffs. After Namdeo, the name of Rama was mutated and after Rama, the name of the plaintiffs were mutated and they enjoyed the exclusive possession. The right of the defendants, if any, stands barred by limitation. The defendants were excluded from joint enjoyment. In this regard, he relied on following judgments:

[i] **Ramchandra Dagdu Sonawane Vs. Vithu Hira Mahar (2009) 10 SCC 273.**

57. Once 1941 proceedings are accepted by the civil court and a decree was passed, the said decree becomes final and binding on the parties. The respondent Vithu was disentitled to approach the State Government nearly after fourteen years. The period of limitation provided under Section 27 of the Limitation Act, if a right to property is not exercised within twelve years from the date on which the cause of action accrues to him, he would lose his right of remedy under the Limitation Act.

[ii] **Commissioner of Customs and Central Excise Vs. Hongo India Private Limited & Anr. (2009) 5 SCC 791**

35. In our considered view, that even in a case where the special law does not exclude the provisions of [Sections 4 to 24](#) of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the [Limitation Act](#), therefore, to be judged

not from the terms of the [Limitation Act](#) but by the provisions of the [Central Excise Act](#) relating to filing of reference application to the High Court.

[iii] **Chhotelal Babulal and Anr. Vs. Premlal Girdharilal and Ors
1976 DGLS (M.P.) 25**

7. We may point out that, in the first instance, what amounts to exclusion in a particular case would depend on the particular facts and circumstances of each case. An intention to exclude is no doubt an essential element and it is necessary for the Court to be satisfied in each case that there was an intention on the part of those in control and possession of the joint family property to exclude the person and that exclusion was to his knowledge. In the Privy Council case referred to above, N., a member of a joint Hindu family after the death of his father and mother went to live with his maternal uncle voluntarily. He was not turned out. But he went with the consent of the eldest male member in the joint family. He was helped by his maternal uncle and was living in an humble way. He was not educated in the same way as the other members of the joint family, but he was not dissatisfied with the conditions under which he was living. In these circumstances, their Lordships were pleased to hold that the mere fact that during the time he was living with his maternal uncle and the members of the joint family did not subscribe towards his maintenance and marriage expenses did not prove that those in control and possession of the joint family property intended to exclude him from his share of the joint family property. It was further held that the members of the joint Hindu family never intended to exclude him from his share in the family property. The circumstances of the present case, as we have narrated above, are quite different. The irresistible conclusion as it flows from the acts, omissions and conduct of the plaintiffs, as borne out from the evidence of Chhotelal himself, is that the defendants intended to completely exclude the plaintiffs from the control and possession of the house in question a fact of which the plaintiffs had full knowledge. In this view of the matter, the suit instituted by the plaintiffs' on 4-5-1966 was clearly time-barred. We are also unable to interfere with the findings of the

Court below that there was ouster of the plaintiffs from the suit property and the defendants had perfected then title to the same by adverse possession.

[iv] **First National Bank Ltd. (in Liqn.) Vs. Seth Sant La**
AIR 1959 Punjab 328

12. It is well known that the [Limitation Act](#), with regard to personal actions, bars the remedy without extinguishing the rights. It is only in the case of a suit for possession of any property that on the determination of the period of limitation not only the remedy, but the right also, is extinguished under [Section 28](#) of the Limitation Act. But a debt does not cease to be due, because it cannot be recovered, after the expiration of the period of limitation provided for instituting a suit for its recovery.

In all personal actions, the right subsists although the remedy is no longer available. If, therefore, a creditor, whose debt becomes statute barred, has any means of realising and enforcing his claim by any method except by a suit, the [Limitation Act](#) does not prevent him from recovering his debt by such means. After a debt becomes barred a person is still deemed to owe. In case he pays the amount after the expiration of the period of limitation, he cannot, after having paid his debt, claim to be entitled to recover it back, on the ground, that the time barred debt was not "money due" or "owing".

It is a well established proposition that payment of a time barred debt, is a valid consideration for transfer of property. Similarly, an agreement in writing undertaking to pay a time barred debt is lawful and binding. Again, a creditor can adjust a payment made by a debtor who owes several debts, towards a debt which had become time barred. Sir Shadi Lal Chief Justice held in Nur Din v. Allah Ditta, ILR 13 Lah 817: (AIR 1932 Lah 419):

"The rule of law is firmly established that a debt does not cease to be a debt because its recovery is barred by the Statute of Limitation."

6. Per contra, Mr. R. V. Gore, learned counsel for respondent pointed out that there is absolutely no pleadings and evidence about exclusion of jurisdiction and ouster. These points are raised for the first time. He submitted that, the Tahsildar's order was in challenge and it was not under the provisions of the Hyderabad Tenancy & Agricultural Lands Act, 1950. He relied on;

[i] ***Sarjerao Maruti Sathe Vs. Pralhad Laxman Sathe & Ors. 2010 (2) Mh.L.J. 970.*** The tenancy is heritable. On death of original tenant, tenancy rights dedevolved upon his three sons. Two of them being minors, name and major son substituted in place of the deceased tenant. Purchase of tenancy land by the said major son without notice to other sons would not make him exclusive owner.

[ii] ***B. Bal Reddy Vs. Teegala Narayana Reddy & Ors. (2016) 15 SCC 102***

12. It is not the case of the appellants that the protected tenancy of Teegala Shivaiah was terminated in a manner known to law. In the absence of such valid termination of “protected tenancy”, the interest of such protected tenant continued to be operative and subsisting I law and could develop on his legal heirs and representatives who could then claim restoration of possession. As laid down in Sada case even if the protected tenant had lost possession, without there being valid termination of his status as a protected tenant, he would still be entitled to all incidents of protection under the Act.

[iii] ***Vishwanath Borude Vs. Pandharinath Gopinath Borude & Ors. 2017 (6) Bom. C. R. 468***

22. On the basis of this provision the tenancy shall be deemed to have been continued in favour of all heirs of the tenant and so Pandharinath alone cannot claim that he had become tenant after the death of Gopinath. Further, the landlord was treating all the heirs of Gopinath as tenant. For the same reasons, when more heirs are present, one heir of the tenant cannot become exclusive owner under the law. At the most the heir who has paid the purchase price can say that if other heir wants to assert his right, he should pay the price in respect of his share.

23. On the aforesaid point learned Counsel for the petitioners from Writ Petition No. 1411/2014 placed reliance on the cases reported as (1) 2001(1) Bom.C.R. 219 : 2001(3) Mh.L.J. 90 (Bombay High Court) (Vasudeo Ramchandra Vs. Vijay Bhikaji); and, (2) (2011) 3 S.C.C. 755 (Ramdeo Vs. Board of Revenue, Uttar Pradesh). In these cases it is laid down that only one heir cannot be declared as exclusive tenant when there are other heirs, co-sharers. Similar observations are made by this Court in the casereported as 2010 B.C.I. (soft) 54 : 2010(2) Mh.L.J. 970 (Sarjerao Vs. Pralhad).

7. Namdeo the common ancestor of the plaintiffs and the defendants was admittedly the protected tenant of the suit land till his death. He was in cultivating possession. As per the plaint, the plaintiffs have claimed that, after his death in 1983, Rama started cultivating the suit land exclusively. His name was mutated in the revenue records and the defendants never raised any claim for a period of more than 25 years. Any claim for tenancy rights can be determined by the competent authority under Hyderabad Tenancy & Agricultural Lands Act. The Tahsildar may be vested with the powers of competent authority under

HTAL Act but his decision under Maharashtra Land Revenue Code cannot be treated as decision under HTAL Act. In the proceedings before him, he was merely considering whose names should be entered in the revenue records on death of Namdeo. It is well known that the entries in the records or rights are made for fiscal purpose. They do not create any rights. They are not even indicative of ownership rights. Those are relevant only for determining possession.

8. The entire plaint shows not even a whisper about exclusion of the defendants from the enjoyment of the suit land or relinquishment of rights by them. The arguments of Mr Salunke based on deemed relinquishment or exclusion or ouster cannot be considered in the absence of any pleadings. No substantial question of law can be framed in the absence of pleadings. In this regards, I rely on **Syed Rehmunisa v Malan B. 2016 (10) SCC 315.**

9. The contention that, a co-sharer in exclusive possession can file suit for injunction against other co-sharers to protect his possession cannot be accepted. There are judgments of several High Courts consistently taken a view that, the co-owners, co-sharers or co-heirs cannot claim perpetual injunction against other co-owners, co-heirs or

co-sharers. In *Parmeshwari Devi Ruia v. Krishnakumar Nathmal Murarka* 2007(6) Bom.C.R. 180, by placing reliance on Mohd. Zainulabudeen Vs. Syed Ahmed Mohidee 1990(1) S.C.C. 345, it was observed in para 40, which reads thus:

40. In paragraph- 12, the Apex Court has observed that it is well settled that where one co- heir pleads adverse possession against another co-heir then it was not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. The possession of one coheir is considered in law, as possession of all coheirs. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is further observed that it is settled rule of law as between co-heirs that there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster. It is rightly submitted on behalf of the Plaintiff that the plea taken by the Defendant No.1 being one of co-heir or for that matter other co-heirs supporting his claim, is not one of ouster or adverse possession as such. On the other hand, their claim is that the Defendant No. 1 has become exclusive and absolute owner of the 1/3rd share in the suit property -firstly by virtue of the Will executed by Jankibai bequeathing her right in the property in favour of the Defendant No.1; and in any case by virtue of family arrangement arrived at in 1992 after the demise of Nathmal. The contesting defendants can succeed in resisting the claim of the Plaintiff, even if they were to establish one of the above stand. However, if both the claims of the contesting Defendants, referred to above, were to be rejected or discarded, in that case, it will necessarily follow that the possession of the suit property with the Defendant No.1 was for and on behalf of all the co-owners; as in law there is presumption of jointness of possession of the co-owners. At any rate, the limitation period will start running from the date of execution of the Consent Terms and consequential documentation in the form of Development Agreement, irrevocable Power of Attorney and Conveyance Deed. The Consent Terms and the Development Agreement have been executed on 25th February, 2005, whereas, the suit is filed on 11th April, 2007. Therefore, by no standard it can be said that this suit claim is barred by law of Limitation.

10. This ruling of our own High Court is squarely applicable to the facts and contrary view expressed in Karam Singh's case by Punjab & Haryana High Court in para 11 cannot be followed.

11. The reliance on the judgment in the case of Ramchandra v. Vithu and particularly para 57 thereof is misplaced. In that case, in 1941, the proceedings were accepted by the civil court and decree was passed, the said decree had become final and, therefore, the respondent was held to be dis-entitled to approach the State Government after 14 years. It is clearly distinguishable on facts.

12. Reliance on Commissioner of Customs and Central Excise's case is also misplaced. The issue in that case was whether the provisions of Limitation Act would be applicable or the provisions of Central Excise Act relating to filing reference application to the High Court. It is in total different set of facts.

13. In Chhotelal's case, there were hostile acts of title and exclusive possession exercised by the defendants against the plaintiffs. The High Court was satisfied that there was complete exclusion of

plaintiffs from the suit property. In the present case, there is neither pleading nor evidence of exclusion of the defendants. Hence, this ruling is also not applicable. Para 12 in First National Bank's case, deals with general discussion regarding extension of remedy and not right after the period of limitation is over. This ruling is also not applicable to the facts of the present case.

14. Per contra, as held in Sarjerao Sathe's case, as per Section 40 of BTAL Act, which is in para materia with HTAL Act, the tenancy is heritable. No decision has been given by any competent authority under HTAL Act as to which heir will be entitled to continue the tenancy. The plaintiffs have not obtained such orders and therefore, in absence of any order, all the legal heirs of Namdeo would be presumed to be joint tenants.

15. In B. Bal Reddy's case, relying on the decision of the Full Bench of Andhra Pradesh High Court in **Sada v. Tehsildar** AIR 1988 AP 77, it was held that, no limitation or adverse possession could be raised against the protected tenancy. It was further observed that, the respondents being legal heirs & lineal blood descendants of the Protected Tenant, they were entitled to seek restoration of possession.

In the light of the facts, the Apex Court observed in para 12 as follows:

12. It is well settled that the interest of a Protected Tenant continues to be operative and subsisting so long as 'protected tenancy' is not validly terminated. Even if such Protected Tenant has lost possession of the land in question, that by itself does not terminate the 'protected tenancy'. The observations of the Full Bench of Andhra Pradesh High Court in Sada's case (supra) which were quoted with approval by this Court in Boddam Narsimha v. Hasan Ali Khan are quite eloquent.

16. As held in B. Balreddy's case, there was no termination of protected tenancy of the defendants in the present case. The judgment is squarely applicable to the facts of the present case.

17. The certified copies produced before me shows that, in Case No. 19/B/2011/A, the Maharashtra Revenue Tribunal, Aurangabad, by Judgment dt. 05.03.2013 dismissed the revision application filed by respondent No. 1 herein - Dagdu against the plaintiffs. The order discloses that, the claim was made by Dagdu on the basis of Section 40 of HTAL Act. The Id. Member of MRT held that, the dispute relating to tenancy cannot be solved by revenue authorities and Tahsildar only deals with matters pertaining to entry in the record of rights and the procedure under HTAL Act was not required to be followed. Thus, the judgment makes it clear that, the adverse decision of Tahsildar has no

impact as it was under the MLRC. I, therefore, find that unless the plaintiffs approach the competent authority under the HTAL Act and they declare themselves as exclusive protected tenants by virtue of inheritance from Namdeo, they could not have claimed perpetual injunction to protect their exclusive possession.

18. In the light of the facts, I hold that, no substantial question of law is raised and the ld. First Appellate Court has committed no error. No interference is called for. Hence, the Second Appeal is dismissed *in limine*.

[A. M. DHAVALA]
JUDGE