VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 1053 OF 2005

1. Mrs. Purabai Arjun Mane (Deleted)
2. Sou. Rukmini A. Jadhav & Ors. … Appellants (Original Defendants)

Vs.

Shankar Bhau Patil & Anr. … Respondents (Original Plaintiffs)

***

Mr. G. N. Salunke, for the Appellants.

Mr. P. D. Dalvi, for the Respondents.

***

CORAM : A. M. DHAVALE, J.

JUDGMENT RESERVED ON : SEPTEMBER 11, 2018

JUDGMENT PRONOUNCED ON : OCTOBER 11, 2018

JUDGMENT :

1. This second appeal was admitted on 17th July, 2007 on substantial questions of law regarding maintainability of the suit in view of S. 144(2) CPC, when the application filed under S. 144(1) CPC was dismissed in default. After hearing the parties, I have framed additional substantial question of law under S. 100 (5) CPC on 6th September, 2018 with regard to

limitation and adverse possession.

2. The brief factual aspects, essential to properly understand and decide the controversy leading to the issues involved, are as under:

3. The appellants herein are original defendants whereas the respondents are original plaintiffs. For the sake of convenience, the parties are hereinafter referred to as per their status in the trial court.

4. The Respondents had filed Regular Civil Suit No. 114 of 1998 in the Court of Civil Judge, (S.D.), Gadhinglaj. The pleadings disclose that the subject matter of the suit was a house at Survey No. 123, Block No. 276 alongwith surrounding land at village Atyal, taluka Gadhinglaj. The plaintiffs had earlier filed Regular Civil Suit No. 1 of 1961 against Ganpati Govilkar and against the husband of defendant No. 1 for partition and separate possession. The said suit was decreed holding that the plaintiffs herein were owners of half share in the land Survey No. 123 and a decree for possession of half land was passed in

favour of the plaintiffs (actually Ganpati Govilkar had filed suit against the plaintiffs and four others wherein plaintiffs were held to be having half share). Defendant Nos. 3 to 6 therein were encroachers and having no interest therein. Arjun Mane, common ancestor of the present defendants was defendant No. 5 therein. The judgment and decree directed for removal of the structures of encroachers, including that of Arjun Mane. The plaintiffs herein filed Regular Darkhast No. 7 of 1978 for vacant possession of their half part of the land. It is their contention that at the time of execution, Arjun Mane compromised with them and accepted Rs. 625/- for the structures thereon and gave vacant possession of land with structure. Thus, under the court decree, the plaintiffs have obtained possession in 1979 as owners thereof.

4.1. Arjun Mane thereafter filed Regular Civil Suit No. 81 of 2018 against the plaintiff claiming that he was in possession of the suit land and the structure thereon, and claimed perpetual injunction. On 16th June, 1983 *exparte* temporary injunction

was granted in his favour. Taking undue advantage of the same, he took forcible possession of the suit structure and in view of injunction order, the plaintiffs could do nothing. Later, the said temporary injunction application came to be rejected and the miscellaneous appeal therefrom was also rejected. Lateron, the suit for perpetual injunction also came to be rejected on 23.9.1987.

4.2 The plaintiffs herein then filed Civil Application No. 13 of 1988, purportedly under S. 144(1) C.P.C. The said application came to be rejected in default on 14.2.1998. The plaintiff claimed that his right of possession and limitation were protected while rejecting the application(but no such order is found).

4.3 Both the courts below have concurrently held that the plaintiffs herein had received possession of the land in 1979 through court. Those are supported by documentary evidence in the form of certified copies of court orders Exhibits 57, 58, 73, 75 and Exhibits 80, 81, 82. I don't find any material infirmity in

the said finding. The said finding needs no interference.

4.4 Thereafter, the plaintiff filed the present suit on 14.7.1998 for possession on the basis of title and for mesne profits of Rs. 3,600/- for three years. The rejection of Misc. Application No. 13 of 1988 on 14.2.1998 is shown as cause of action.

5. Meanwhile Arjun Mane expired and was represented by legal heirs the present defendants, who are appellants herein. They denied the plaint averments and claimed that the suit was not within limitation and also claimed that they have become owners as they were in adverse possession of the suit land for more than 40 years. They were not dispossessed in execution of decree, as claimed by the plaintiff. On these pleadings, the learned Civil Judge framed issues, which included issue No. 3 on the point of adverse possession and issue No. 4A on the point of maintainability of the suit in view of S. 144(2). There was no issue on the point of limitation.

6. After recording the evidence, learned Civil Judge,

J.D. Gadhinglaj was pleased to record all findings in favour of the plaintiff, except on the point of maintainability of the suit. He held that suit was hit by S. 144(2) C.P.C.

7. Being aggrieved, the plaintiff preferred Regular Civil Appeal No. 42 of 2003 before the Additional District Judge, Gadhinglaj. The learned Additional District Judge assumed (though wrongly) that the only issue for his consideration was – whether the suit was maintainable or barred by S. 144(2) C.P.C.? He answered it in the negative and decreed the suit. Hence, this appeal.

8. Learned advocate Mr. Salunke for the Appellants argued that the learned Appellate Court committed error in not following the judgment of this Court in **Datta Raghoba Sawan Vs. Ashok Tukaram Naik Salgaonkar [2011 (1) Bom.C.R. 209] on the premise** that the specific performance can also be granted under S. 151 C.P.C. He argued that the above judgment was squarely applicable to the facts of the present case, and there was no scope for the learned Additional District Judge to

take a contrary view.

9. It was also claimed that as per Order 41, Rule 22 C.P.C., the defendants were entitled to challenge finding of the learned trial court without filing cross-objection to support the decree of dismissal of suit. The learned first appellate court should have appreciated the facts with regard to the other findings, which were in favour of the plaintiff.

10. Per contra, learned advocate Mr. P. D. Dalvi has supported the judgment and decree of the first appellate court. He argued that dispossession of the plaintiff by the defendants was not under the order of any court, and therefore, the restitution could not have been claimed under S. 144(1) and the bar of S. 144(2) was not applicable.

11. He raised objection for framing of substantial questions of law with regard to adverse possession and limitation. He argued that the same cannot be framed in the absence of necessary pleadings and for the first time in this Court. The issue of limitation was a mixed question of law and

fact. If at all, the said issue is necessary, the matter will have to be remanded to the trial court. With regard to adverse possession, he claimed that the defendant has not admitted ownership of the plaintiff, and therefore, there was no substance in the plea of adverse possession. He relied on number of rulings, which will be considered in due course.

12. The substantial questions of law alongwith my findings are as under:

1.	Whether the suit for restitution is not maintainable in view of Section 144(2) of the Code of Civil Procedure, even though, the said application was dismissed in default?	In the negative
2.	Whether the reversal order passed by the Appellate Court in view of Section 144 (2) of the CPC is perverse?	In the negative.
3.	a) Whether the suit was within limitation?	In the affirmative.
	b) Whether the defendant has become owner by adverse possession?	In the negative.

4. What order? The Appeal is dismissed with costs.

REASONS

13. The law under S. 144(1) is laid down by the Apex Court in various rulings as under:

(i) **Mahijibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai & Ors. [AIR 1965 SC 1477]** wherein it is observed in paragraph 22 that "Section 144 of the present Code does not create any right of restitution. As stated by the Judicial Committee in *Jai Berham v. Kedar Nath Marwari [AIR 1922 PC 296 at p. 271]*,

> "It is the duty of the Court under section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."

The section, to avoid the earlier conflict, prescribes the procedure, defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and

unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree. ”

(ii) In **South Eastern Coalfields Ltd. Vs. State of M.P. & Ors. [(2003) 8 SCC 648]** in paragraphs 27, 28 and 29 it is held as under:

“27. Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In ***Jai Berham*** v. ***Kedar Nath Marwari*** **AIR 1922 PC 269**, their Lordships of the Privy council said (p-271):

"It is the duty of the Court under Section 144 of

> the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."

Cairns, L.C., said in ***Rodger*** v. ***Comptoir d'Escompte de Paris***, **[(1871) PC 465 (ER p. 125)]**

> "One of the first and highest duties of all Courts is to take cars that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case".

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, ***A. Arunagiri Nadar*** v. ***S.P. Rathinasami***, **[(1971)1 MLJ 220]**. In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act

of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise corned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the set of such party.The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding

out of the interim order even though the battle has been lost at the end. This cannot be countenanced, we are, therefore, or the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.

29. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978."

(iii) In **Union Carbide Corporation Vs. Union [AIR 1992 SC 248]** in paragraph 76 and 77 it is observed as under:

"76. But, in the present case, Section 144 CPC does not in terms apply. There is always an inherent jurisdiction to order restitution a fortiori where a party has acted on the faith of an order of the court. A litigant should not go back with the impression that the judicial-process so operated as to weaken his position and whatever it did on the faith of the court's order operated to its disadvantage. It is the duty of the court to ensure that no litigant goes back with a feeling that he was prejudiced by an act which he did on the faith of the court's order. Both on principle and authority it becomes the duty of the court to - as much moral as it is legal - to order refund and restitution of the amount to the UCC - if the settlement is set aside.

In *Binayak v. Ramesh [AIR 1966 SC 948]* this Court dealing with scope of Section 144 CPC observed:

" ... The principle of the doctrine of restitution is

that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from....” (at p. 950 of AIR)

In *Jai Berham and Ors. v. Kedar Nath Marwari and Ors. [AIR 1922 PC 269 at p. 271]*, the Judicial Committee noticed that:

“The auction-purchasers have parted with their purchase-money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to...”.

and said:

“...and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.”

In *L. Guran Ditta v. T.R. Ditta*, AIR 1935 PC 12 Lord Atkin said:

“ ...The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not made: and for this purpose the Court is armed with powers [the 'may' is empowering, not discretionary] as to mesne profits, interest and so forth. As long ago as 1871 the Judicial

Committee in (1871) 3 PC 465 made it clear that interest was part of the normal relief given in restitution: and this decision seems right to have grounded the practice in India in such cases...". (p. 13)

In *Jagendra Nath Singh v. Hira Sahu and Ors. AIR 1948 All 252 (FB)* Motham J. observed:

> "Every Court has a paramount duty to ensure that it does no injury to any litigant and the provisions of Section 144 lay down a procedure where effect can be given to that general provision of the law. The Court should be slow so to construe this section as to impose a restriction upon its obligation to act right and fairly according to the circumstances towards all parties involved." (p.253)

77. We are satisfied in this case that the UCC transported the funds to India and deposited the foreign currency in the Reserve Bank of India on the faith of the Court's order. If the settlement is set aside they shall be entitled to have their funds remitted to them back in the United States together with such interest as has accrued thereon. So far as the point raised by the learned Attorney-General as to the corporate changes of the UCC is concerned, we think, a direction to the UCC to prove and establish compliance with the District Court's order dated 30th November, 1986, should be sufficient safeguard and should meet the ends of justice."

(iv) **K. T. Venkatgiri & Ors Vs. State of Karnataka & Ors. [AIR 2003 SC 1819]**, wherein it is held as

under:

> "29. The appellants admittedly took benefit of the interim order passed by this Court in Khoday's case. They cannot, having regard to the doctrine of 'unjust enrichment' retain the undue advantages derived by it. They must be asked to pay back the amount received either directly or indirectly on account of MSIL. The doctrine of restitution must, thus, be applied in these appeals."

14. S. 144 C.P.C. is essentially a provision to undo the wrong occurred to any party, in view of the orders of the court which order was lateron set aside. Section 144 reads as follows:

> "S. 144 **Application for restitution -** (1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any order, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.
> **Explanation:**

> For the purpose of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include,
>
> (a) Where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance;
>
> (b) Where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order;
>
> (c) Where the court of first instance has ceased to exist or has ceased to have, jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.
>
> (2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

15. It is clear that sub-section (2) was bar for institution of the suit for the reliefs, which could be obtained under S. 144(1).

16. Section 144(1) of C.P.C. provides for restitution of position of the parties which they were occupying before any decree or order, which was subsequently set aside, modified or

altered. There can be two types of cases under this category.

17. (i) In the first category, the court passes specific order of delivery of possession either by way of mandatory injunction or by a decree of possession. The decree holder under the said order obtains possession, and thereafter the said decree of possession is set aside, altered or modified or reversed in the same proceeding or in appeal. In such case, the applicability of S. 144(1) is clear and beyond the scope of any dispute.

(ii) The second category is where the plaintiff obtains injunction to restrain the defendant from dispossessing him when he was not in possession and thereafter he takes disadvantage of the injunction and dispossesses the defendant without the help of the court.

18. The case in hand falls in second category. In the present case, Arjun Mane filed suit claiming that he was in possession of the property when he was not. He played fraud on court, and by practicing fraud he obtained *exparte* interim order

of injunction. The court never intended to help him to obtain possession if he was not in possession. He, without the help of court, misused the *exparte* order and forcibly dispossessed the plaintiffs herein. In such cases, the applicability of S. 144 becomes doubtful.

19. In **Harishchandra Maurya Vs. Rajendraprasad Varma [1997 (3) Mh.L.J. 437],** this Court in similar facts and circumstances (Coram : R. M. Lodha, J.) it was held that in such case, S. 151 of C.P.C. is applicable and during pendency of the suit, on a simple application, the possession of the defendant was restored in the same suit. The ruling clearly indicates that such order could not have been passed under S. 144(1), but the inherent powers under S. 151 were exercised. This is what is observed. It is observed in paragraph 11, as under:

> "11. However, present case is not a case where the defendant was seeking a temporary injunction against the plaintiff under Clauses (b) and (c) of Rule 1, Order 39 and Nanasaheb's case (supra) has no application wherein the plaintiff on mis-statement of facts or mis-representation of facts obtain a order of temporary injunction from the Court against the defendant and in the guise and garb of that injunction order seeks to

dispossess the defendant and in fact dispossesses the defendant. In such situation, and once it is found that in the garb of Court's order; the plaintiff has taken law in his own hand and by use of his muscle and power dispossessed the defendant, the Court in exercise of its inherent power could always pass an order of restoration of possession to the defendant to meet the ends of justice. Such power of the Court could be traced in section 94 as well as section 151 of the Code of Civil Procedure. ..."

"The Court cannot be mute and silent spectator to the illegal act and exercise of force by the plaintiff in dispossessing the defendant, in the garb of Court's order of ad-interim injunction and once the Court finds that the plaintiff has taken the law in his own hand and by abusing the process of Court has sought to dispossess the defendant, the Court may not only pass an appropriate order for restoration but also it becomes bounden duty of the Court to ensure that the defendant who has been dispossessed by force is restored back his possession. Such order by the Court may be an exercise of its inherent powers under section 151 of the Code of Civil Procedure or under section 94 of C.P.C. and need not be covered under Clause (b) and (c) of Rule 1, Order 39, of the Code of Civil Procedure. In this background and legal position, the order of the trial Court in my view is expedient and meets the ends of justice. The impugned order is also imminently just and proper warranting no interference by this Court.
"

20. In **Datta Sawan Vs. Ashok Salgaonkar [2011(1) Bom. C. R.209]**, Single Brother Judge of this Court took a view

that case was governed by S. 144 (1), but in that case, the facts were different. In that case, the learned trial court had granted injunction restraining the defendant from interfering in any manner and from obstructing the plaintiff from enjoyment of the suit shop. The case was that plaintiff was in possession of the suit shop and the defendant had trespassed in the said shop. The order was in the form of mandatory injunction. The same was implemented by the court by giving police protection on the request of the plaintiffs. That case is similar to the category (i) referred above. In the present matter exparte injunction was not to disturb the possession. It was not in mandatory form and no court help was given for helping Arjun Mane. This case certainly stands on different set of facts and can be easily distinguished. Therefore, the learned first appellate court has rightly followed the judgment of Andhra Pradesh High Court and has not committed any error. Hence, no interference is called for in his findings.

21. The Respondent has placed reliance in the trial court

on two additional judgments, viz.

(i) In **Bhaurao Mulak Vs. Smt. Savitribai Jaiswal [1991 Mh.L.J. 136]**. In this case, there was exparte decree in favour of the landlord on 23.12.1983 against the tenant for eviction. It was held that permission of the rent control authority was necessary.

The landlord got possession under the said decree. The tenant challenged the said exparte decree, which came to be dismissed. Thereafter, the tenant filed regular civil suit contending that the decree was obtained by the landlord by playing fraud. In that case, the Civil Judge directed the landlord to open lock, which they have put on the first floor and allowed the tenant to get possession. The said order was confirmed by the District Court and was challenged in revision before the High Court. The tenant withdrew the suit, contending that he would pursue the remedy under S. 47 C.P.C., which was allowed. The High Court held that in view of withdrawal of the suit, the injunction granted also stands automatically vacated and the defendant was entitled for order of restitution.

The above facts disclose that there were clear directions

and help of the court for the party to secure possession and when that order was vacated, the otherside was entitled for restitution, as it falls under category (i) referred above. The said ruling will not be applicable to this case.

(ii) In ***Kothapalli Suryanarayan Vs. Bandikatala Anjaneyulu [1998 6 ALD 82]***, the facts were similar to the present case. The defendant filed EA seeking restitution of property from the plaintiff on the ground that the plaintiff dispossessed him by taking advantage of the orders of temporary injunction passed by the trial court and confirmed by the appellate court. The High Court held that when there was no delivery of property in pursuance of the court order and the plaintiff dispossessed the defendant on the basis of temporary injunction, which does not contemplate any such delivery of the property to the plaintiff, the defendant is not entitled to the recourse to the provision of S. 144 C.P.C. It was held that positive order was necessary to attract S. 144.

22. When any person, owner or trespasser is

dispossessed of his possession, he has a common law remedy to get back his possession on the basis of title of ownership. If his possession is lost due to the directions of the court, then he need not file a suit and he can file application under S. 144(1) for cheaper and more convenient and speedy remedy to get back his possession. In cases, where the plaintiff plays fraud and obtains *exparte* injunction and thereafter takes the law in his hand and he dispossesses the defendant, the remedy of the defendant is under the common law as well as Section 151 C.P.C. The grant of relief under S. 151 is discretionary and not a matter of right. In such situation, the right under S. 151 CPC will not take away the common law remedy to claim possession on the basis of title. In this case S. 144(1) is not squarely applicable, as there was no assistance to the plaintiff by the court. In fact, the court had not assumed that grant of injunction in favour of the plaintiff would enable the plaintiff to obtain possession from the defendant. When S. 144(1) is not applicable, bar of S. 144(2) would not be applicable.

23. It was argued that the point of limitation cannot be framed in the second appeal. In this regard, I find that the defendant had raised the issue of limitation as well as issue of adverse possession. The learned trial court did not frame the issue and the Additional District Judge also did not consider the same. As held in (i) **Vithoba N. Adel vs. Vijaya Bank and Ors. 2005 (1) ALL MR 390**; (ii) **State of Gujrat Vs. Kothari & Associates [(2016) 14 SCC 761]**, question of limitation is mandate for forum and irrespective of fact whether it is raised or not, the forum must consider and apply the same.

24. In **Vithoba N. Adel** (supra), it is laid down that it is duty of the courts to see that suit is brought within the limitation. As per Section 100(3), if there is evidence on record, this Court has jurisdiction to consider the same and decide the issue.

25. In the present case, the issue of limitation simplicitor, apart from plea of adverse possession cannot be material. The suit is based on title. Though dispossession has

been shown, all the necessary facts regarding the title are pleaded. In such case, the suit is governed by Article 65 and not by Article 64 of the Limitation Act. The cause of action will not arise from the date of dispossession, but from the moment the defendant pleads his possession as adverse to the true owner. Hence, it is necessary to consider whether the respondent has made out a case of adverse possession or not.

26. A person claiming adverse possession must admit previous ownership of the plaintiff. In the present case, the respondent has nowhere admitted ownership of the plaintiff, but he has gone to the extent of denying that he had dispossessed the plaintiff in 1983 and claimed that they were in possession for 40 years. There was concurrent finding of both the courts below that plaintiff has proved his title and he had received possession in 1979 upon a court decree. In such case, the specific date when the defendant's predecessor Arjun Mane came into possession must be pleaded and proved. There is no such evidence. Therefore, claim of ownership by adverse

possession is not sustainable. The learned advocate Mr. Dalvi in this regard has rightly relied on judgment of Apex Court in **Dabadabai (dead) by L.Rs. Vs. Abbas @ Gulab Rustum Pinjari [2017 (3) Civil Court Cases 311 (SC)]** wherein it is observed in para 18 and 21 as under:

> "18. Third, the plea of adverse possession being essential a plea based on facts, it was required to be proved by the party raising it on the basis of proper pleadings and evidence. The burden to prove such plea was, therefore, on the defendant who had raised it"
>
> "21. …. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights over such property, is required to prove his case only against the true owner of the property. It is equally well-settled that <u>such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner</u> and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants."

27. The finding of the first court on this point is correct and needs no interference. The view of learned first appellate court that only point for his consideration was the point on

which the appellant has filed appeal is not correct. Order 41, Rule 22(1) of C.P.C. permits the respondent to support the decree by challenging the findings recorded against him by the trial court. He is not required to file cross-objection to challenge the finding if the decree is in his favour. Normally, the first appellate court is last court of appreciation of facts. It should record the arguments advanced from both the sides and frame separate points for determination and record his findings separately on each point with reasons. The growing tendency to adopt a shortcut and frame only a point as to whether any interference is required in judgment and decree of trial court is contrary to the provisions of Order 41, Rule 31 C.P.C.

28. In view of this, the substantial questions of law framed are answered accordingly. The appeal deserves to be dismissed and is accordingly dismissed with costs.

Sd/-
[A. M. DHAVALE, J.]

Vinayak Halemath