

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.568 OF 2017

Shri.Kashinath Sadashiv Thete
(Deceased) Through Lrs.
Suresh Kashinath Thete & Ors. ...Appellants
V/s.

Madhukar sadashiv Thate
(Deceased) Through Lrs.
Padma Madhukar Thete & Ors. ...Respondents

Mr. P. B. Shah for the Appellants.
Mr. A. A. Joshi for the Respondents.

CORAM : C. V. BHADANG, J.

RESERVED ON : 12th MARCH 2021

PRONOUNCED ON : 20st APRIL 2021

PC.

. The challenge in this appeal is to the concurrent orders of the Courts below dismissing the suit of the appellant/plaintiff. The appellant filed RCS No.1559/1985 against late Madhukar Thete and late Narayan Thete (defendant Nos.1 and 2) and others for declaration and injunction. The suit property comprises of land Gat No.1566 (old Survey No.540) admeasuring 3 H 38 Ares of village Peth, Taluka Ambeaon, District Pune, with a right to fetch water from a well situated in Gat No.1563 which is more specifically

described in plaint para no 1. The case made out in the plaint is that the defendant No.1 was residing at Pune while the defendant No.2 was residing at Chembur, Mumbai since many years and the suit property was being cultivated by the plaintiff. In a compromise dated 13th April, 1971 entered in Special Civil Suit No.106/1970 between the parties, an area admeasuring 1 H 58 Ares had fallen jointly to the share of defendant Nos.1 and 2 while an equal area had fallen to the share of the plaintiff. However on account of the fact that the defendant Nos.1 and 2 were staying at Pune and Chembur the entire land was being cultivated by the plaintiff. In the compromise in Special Suit No.106/1970, it was agreed between the parties that the shares if intended to be sold shall not be transferred to third parties except amongst the parties. It may be mentioned that in amalgamation scheme the respective shares are recorded in the name of the plaintiff and the defendant Nos.1 and 2.

2. It is the material case that the defendant No.3 was bent upon purchasing the suit property and had made an attempt to interfere with the possession whereupon the defendant No.1 had filed RCS No.243/1981 against the defendant Nos.2 and 3 for injunction in which the plaintiff had filed an affidavit dated 14/12/1981 in support of the claim of the defendant No.1. It is contended that the

defendant No.1 secured the affidavit from the plaintiff to suit his claim. The said suit was withdrawn on 29/7/1985.

3. The plaintiff learnt that the defendant Nos.1 and 2 have sold their shares to defendant No.3. It is contended that the said alienation is in contravention of the compromise in RCS No.106/1970 and RCS No.5/1973 and the provisions of the Agricultural Tenancy Act and the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act ('the Act of 1947').

4. It is in these circumstances that the plaintiff filed RCS No. 1559/1985 before the Civil Judge Senior Division at Pune simplicitor for injunction restraining the defendants from interfering with the possession of the plaintiff over the suit property. The plaintiff also sought an order directing the defendant Nos.4 and 5 to correct the revenue record by deletion of the name of the defendant or from recognising the transaction between the defendant Nos.1 and 2 and the defendant No.3. Subsequently, the suit was amended on 11th July, 2000 seeking a declaration that the transactions between defendant Nos.1 and 2 and the defendant No.3 are illegal and *ab initio* void.

5. The defendant Nos.1 and 3 filed Written Statement Exh.65 which was adopted by the defendant No.2. The suit was resisted on the ground that the ownership of the defendant Nos.1 and 2 is settled in the consolidation proceedings and their names are recorded in the revenue record which cannot be challenged in a civil suit. It was contended that the defendant No.2 sold his share to the defendant No.3 under sale deed dated 21st October, 1981 and possession was also delivered. The defendant No.1 had filed RCS No.243/1981 claiming that the possession was a joint possession and for cancellation of the said sale deed. The plaintiff had sworn an affidavit in favour of the defendant No.1. Subsequently, the defendant No.1 also sold his share to the defendant No.3. All other adverse allegations were denied. It was denied that the sale transactions are in breach of the compromise as alleged. It was contended that the plaintiff never showed willingness to purchase the share of the defendant Nos.1 and 2. It was contended that the terms of the compromise are vague and not binding on the defendant Nos.1 and 2.

6. On the basis of the rival pleadings the learned Trial Court framed eight issues. The plaintiff examined himself while the defendant No.1 examined himself in support of his defence. The

plaint was amended and after the amendment the plaintiff again examined himself and the defendant No.3 examined his Power of Attorney holder Dasharath Karale.

7. The learned Trial Court answered all the issues except the Issue No.4 on court fees in the negative and dismissed the suit vide judgment and decree dated 21st July, 2010. The plaintiff challenged the same before the learned District Judge Pune in Civil Appeal No.208/2014. The learned District Judge by a judgment and decree dated 20th August, 2016 has dismissed the appeal. This is how the appellants are before this Court.

8. It may be mentioned that the Respondent Nos.6 to 8 have been impleaded in the appeal as they are subsequent purchasers.

9. I have heard Mr. Shah, the learned Counsel for the appellant and Mr. Patil, the learned Counsel for the contesting respondent Nos.6 to 8. Perused record.

10. It is submitted by Mr. Shah, the learned Counsel for the appellant that the Courts below were not justified in ignoring the compromise arrived at between the parties in Special Civil Suit No.

106/1970 in which the parties had agreed not to alienate their respective shares to third party except amongst themselves. It is submitted that the sale deeds of the year 1981 and 1985 were in breach of the said covenant and thus were illegal and void *ab initio*. It is submitted that the Courts below were also in error in holding that the appellant has not established possession ignoring the admission of the respondent No.1. It is submitted that the Courts below also failed to properly appreciate the provisions of the Act of 1947. It is submitted that there was no certificate under Section 24 of the said Act produced on record and in the absence of the same, the objection based on Section 36A of the said Act is not acceptable. Reliance is placed on the decision of this Court in **Ramchandra Jyoti Jadhav Kaikadi and Ors. Vs Gajendra Nana Gund and Ors. 2009(6) Bom.C.R.598** and in **Hemdas Premdas Ranbakuda and others Vs Smt. Surajbai Dhansao Sahu and others 2008(3) Mh.L.J. 293**. It is submitted that the Courts below also failed to see that the amendment of the year 2000 would relate back to the date of filing of the suit. Reliance in this regard is placed on the decision of the Supreme Court in **Prithi Pal Singh and Another Vs Amrik Singh and Ors (2003) 9 SCC 576**. It is submitted that the Courts below were in error in placing reliance on the decision of the Supreme Court in **L.C. Hanumanthappa (Since Deceased) through LRs. Vs. H. B.**

Shivakumar 2016(4) Mh.L.J. 762 which is distinguishable on facts. It is submitted that the plaintiff hails from a rural background and the pleadings have to be liberally construed. Reliance is placed on the decision of the Supreme Court in **Des Raj and Ors Vs Bhagat Ram (Dead) through LRs. & Ors. (2007) 9 SCC 641** in order to show the parameters and principles when it comes to appreciation of the moffusil pleadings. It is submitted that even otherwise the sale deeds of the year 1981 and 1985 are void in view of the law laid down by the Supreme Court in **Jehal Tanti and Ors Vs Nageshwar Singh (Dead) through LRs. 2013 AIR SC 2235** and the decision of this Court in **Sitakant Kashinath Parab Vs Goa Housing Board 2016(4) Bom C.R. 721**. It is thus submitted that the suit cannot be said to be barred by limitation as held. It is submitted that there is no material to show that the appellant had relinquished the rights in Survey No.540. The respondent No.3 did not enter into the witness box although he was the subsequent purchaser of the suit property.

11. The learned Counsel for the respondent Nos.6 to 8 has supported the impugned judgment. It is submitted that the suit was filed on 17th August 1985 without any averment or ground to challenge the sale deeds. The Written Statement was filed on 1st September 1987 disclosing the fact of execution of the sale deed of

the year 1981. However, the plaint was amended in the year 2000 by addition of para No.8A challenging the sale deed of the year 1981 which challenge is clearly barred by limitation under Article 59 of the Limitation Act which provides for a period of three years to seek cancellation or setting aside of an instrument. The period starts from the date of first knowledge of the instrument or the contract as the case may be. It is submitted that the amendment cannot relate back, on the well established principles as to the operation of the doctrine of relation back. It is submitted that the order allowing amendment cannot have a bearing on the issue of relation back as the considerations for allowing the amendment are different and there is nothing in the order allowing the amendment to show that the amendment was to relate back to the filing of the suit. It is submitted that there is no specific prayer for cancellation of the sale deeds of the year 1981 and 1985 in the plaint. It is submitted that the case of **Prithi Pal Singh** (supra) may not apply in the facts of the present case. On behalf of the respondents, reliance is placed on the decision of the Supreme Court in **Anathula Sudhakar Vs P. Buchi Reddy (Dead) through LRs. and others** (2008) 4 SCC 594, **Sampath Kumar Vs Ayyakannu and Anr.** (2002) 7 SCC 559, **Vishwambhar and Ors. Vs Laxminarayan (Dead) through LRs. & Anr.** (2001) 6 SCC 163 and **L C. Hanumanthappa** (supra).

12. I have carefully considered the rival circumstances and the submissions made. The suit was originally filed in the year 1985 simplicitor for injunction and was amended for declaration as to the “transactions” between defendant Nos.1 and 2 and the defendant No. 3” in the year 2000. It is not in dispute that under the compromise decree dated 13/4/1971 an area admeasuring 1 H 58 Ares had fallen to the share of the plaintiff and an equal area had fallen to the share of the defendant Nos.1 and 2 jointly. The suit claim is primarily based on the compromise decree under which the parties had agreed not to alienate their respective shares to third party except amongst themselves. The contention is that the alienation under the sale deed of the year 1981 and 1985 in favour of the defendant No.3 is in breach of the said term. According to the plaintiff, although the property was partitioned as above, under the compromise, he continued to cultivate the shares of the defendant Nos.1 and 2 also as they were not staying at Village Peth and were staying at Pune and Chembur, Mumbai. It is necessary to note that in his evidence, the plaintiff claimed that there was no compromise between him and the defendant Nos.1 and 2 in Suit No.106/1970. He further claimed that the agreement between him and the defendant Nos.1 and 2 in Civil Suit No.5/1973 was not acted upon. Thus, on one hand the appellant / plaintiff is basing his claim on the

term of the compromise in which the parties had agreed not to alienate their respective shares in favour of the third party and on the contrary the plaintiff is also disowning and claiming that the agreement was never acted upon. At one stage, the plaintiff also claimed that he is the owner of the entire land although ouster is neither specifically pleaded nor established. It is trite that the case of ouster requires clear pleadings and strong evidence to establish the hostile acts and the acts of the ouster of the co-owners / sharers. The learned Counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of **Des Raj** (supra) in order to submit that the mufosil pleadings have to be construed liberally. The contention in my considered opinion, cannot be accepted, in the present case, in as much as although the pleadings have to be construed liberally, this is a case where there is a total lack of pleadings on the point of ouster. The case of **Des Raj** (supra), in my considered view turned on its own facts. It is trite that whether the pleadings are sufficient or not would depend on the facts and circumstances of each case.

13. Coming back to the compromise, the relevant recital vide clause No.7 in the compromise in Special Civil Suit No.106/1970, provides that the parties shall not sale their respective shares in

favour of the third party. Clause No.7 further provides that in the event, there is such sale / alienation, it would constitute the breach of the consent / compromise terms and it would be open to the parties to bring this to the notice of the Court and to cancel the said compromise. Thus, the terms of the compromise itself provide for the consequences of the breach if any. The appellant has not sought any cancellation of the compromise decree and much to the contrary claims that it was never acted upon. The contention that the sale being in the breach of a prohibitory order / injunction of the Court also cannot be accepted. Thus, although the consequences of a said sale / alienation, which is in breach of the order / injunction granted by the Court, are well settled, this is not a case where there was such an injunction which was operating. The contention in my considered view cannot be accepted for more reasons than one. Firstly, the term agreed by the parties in the compromise cannot be considered as an injunction granted by the Court upon merits restraining any party from alienating or creating third party rights in the suit property. This is inspite of the fact that the Court may have placed its *imprimatur* on the consent terms. Secondly, the consent terms / compromise itself provides for the consequence of the breach namely a liberty being granted to the parties to move the Court for cancellation of the same which course is not adopted by

the plaintiff. Thus, the very basis of the suit claim, in my considered view, falls through.

14. The reliance placed on the decision in the case of **Sitakant Parab (supra)** is misplaced. That was a case where there was a specific ad-interim exparte relief granted and this Court found that the finding that the allotment of the plot was not in breach of the order of the injunction was prima facie against and contrary to the material on record.

15. Even in the case of **Jehal Tanti (supra)**, the sale deed was executed in favour of the respondent No.1, in the teeth of an order of injunction passed by the Trial Court. Thus, in my humble opinion, even the case of Jehal Tanti, turned on its own facts.

16. Coming to the issue of possession, the Courts below have rightly appreciated that the plaintiff had sworn an affidavit in favour of the defendant No.1 (who was the plaintiff) in RCS No.243/1981. At no point of time, prior to the filing of the present suit, the appellant / plaintiff tried to bring to the notice of the Court that the said affidavit was obtained by the defendant No.1 to suit claim in the suit of the year 1981. The Courts below on the basis of the

evidence have found and to my mind rightly so that the plaintiff has failed to establish his possession. The said finding of fact does not suffer from any infirmity.

17. I would next propose to consider the issue of limitation which goes to the root of the matter. It is a matter of record that the suit initially filed, was simplicitor for injunction, which is obviously based on possession. There is sufficient evidence on record that execution of the sale deed of the year 1981 was brought to the notice of the plaintiff in RCS No.243/1981. The suit claim was amended to challenge “whatever transactions” between the defendant Nos.1 and 2 and the defendant No.3. The prayer clause does not specifically refer to the sale deeds of the year 1981 and 1985. That apart, the amendment which is effected in the year 2000 was clearly barred by limitation. The contention that the said amendment would relate back to the filing of the suit, in my considered view, cannot be accepted. The question whether any amendment would be prospective or would relate back to the date of the filing of the suit, would depend on the facts and circumstances of the each case. On behalf of the appellant, reliance is placed on the decision of the Supreme Court in **Prithi Pal Singh** (supra) in order to submit that the amendment would relate back to

the date of the filing of the suit. In the said case, the suit was filed challenging the sale of the land and the suit was based on the claim of Pre-emption under Section 51(1)(a) of the Punjab Pre-emption (Amendment) Act, 1960. The defendant was the brother of the plaintiff. The suit was decreed by the Trial Court and the appeal filed by the defendant was dismissed. In the second appeal filed by the defendant, the plaintiff sought amendment of the plaint by introduction of additional plea that he was also co-sharer in the suit land. The said application was rejected which order went to the Supreme Court. The Hon'ble Supreme Court granted leave to the plaintiff to amend the plaint, as there was sufficient material / evidence already on record to establish that the plaintiff was co-sharer with the defendant and for the reason that by virtue of the said amendment only a new ground and not any new relief was sought to be incorporated. It can thus be seen that the case clearly turned on facts, in as much as in the said case, there was no new relief sought and only a ground was added and secondly there was sufficient material / evidence already on record to establish that the plaintiff was a co-sharer as the plaintiff and the defendant/vendor, were brothers.

18. On behalf of the respondent, reliance is placed on the decision

of the Supreme Court in **L.C. Hanumanthappa** (supra). In the said case, the Supreme Court taking note of the change of the language used in Article 58 of the Limitation Act 1963 as compared to the corresponding Article 120 of the 1908 Act has found that Article 58 provides for the starting point of limitation when the right to sue “first accrues”. The Supreme Court after taking a survey of various decisions has laid down the principles for operation of the doctrine of relation back. It has been held that doctrine of relation back would not apply, in the facts of the case, since a legal right accrued in favour of the defendant, would be taken away.

19. In the present case, as noticed earlier, the execution of the sale deed of the year 1981 was brought to the notice of the plaintiff in the suit of the year 1981 filed by the defendant No.1 and the plaintiff was also aware about the sale deed of the year 1985. However, although the suit was filed in the year 1985 simplicitor for injunction, it was amended for seeking declaration only in the year 2000. In view of Article 58 which provides for starting point of the limitation where the right to sue “first accrues”, the suit claim of declaration has rightly been held to be barred by limitation. Even in the present case a legal right which has accrued in favour of the defendants would be taken away, which was the reason why the

doctrine of relation back was not held applicable, in the case of **L.C. Hanumanthappa** (supra).

20. This is not a case where there was no change of relief claimed as such and only an additional ground was sought to be arrayed as found in the case of **Prithi Pal Singh** (supra). This is a case where entirely new relief was sought to be added and therefore in the facts and circumstances of the present case, I do not find that the amendment can relate back to the date of the filing of the suit.

21. This takes me to the ground based on the Act of 1947. A perusal of the para five of the plaint would show that appellant / plaintiff came with a case that the transaction between the defendant Nos.1 and 2 and defendant No.3 is in breach of the Tenancy Act and the Act of 1947. However, the plaint read as a whole, does not show that it challenges the consolidation scheme or the consolidation effected in so far as the earlier survey No.540 is concerned into land Gat No.1566. Thus, although the Courts have also invoked the provisions of Section 36A of the Act of 1947, I do not find it necessary to go into this question in as much as the suit does not challenge the consolidation scheme or the consolidation of Survey No.540 into Gat No.1566. Thus, it is not necessary to make

any reference to the decision in **Ramchandra Kaikadi** (supra) and **Hemdar Rambakuda** (supra).

22. To conclude, the plaintiff has failed to show that the two sale deeds one each of the year 1981 and 1985 are in breach of any order of injunction as such and they are illegal or void *ab initio*. The reliance placed on the alleged breach of the terms of compromise is also misplaced, in as much as the compromise provides for a consequences of the breach which are not availed of by the plaintiff, as noticed earlier. The amended suit claim staking challenge to the sale deeds cannot relate back to the date of the filing of the suit and therefore, that claim has rightly been held to be barred by limitation. Thus, no exception can be taken to the concurrent findings of fact recorded by the Courts below. The appeal is without any merit and is accordingly dismissed with no order as to costs. Decree be drawn accordingly.

23. At this stage, the learned counsel for the appellant seeks extension of the interim relief which was operating in the appeal in order to enable the appellant to consider further course of action. The prayer is opposed on behalf of the first respondent.

24. However, considering the fact that the interim order was operating from 24/09/2020, the same shall continue for a period of eight weeks from today.

(C. V. BHADANG, J.)