

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO. 945 OF 2022

Mehrnisabegum w/o. Wahabmiyya ... Appellants

Deshmukh (died) Saleem Wahabmiya

Deshmukh & Ors.

Versus

Salabatkhan Azimkhan (died) ... Respondents

Lrs-Majeed Khan s/o. Salabat Khan

Pathan & Ors.

Mr. Pravin Mandlik, Senior Advocate i/b. Mr. Prataprao Mandlik, Advocate
for the Appellants.

Mr. Mujtaba Gulam Mustafa, Advocate for Respondent Nos. 1/1 to 1/9.

CORAM: GAURI GODSE, J.

RESERVED ON : 22nd February 2023

PRONOUNCED ON : 27th April 2023

ORDER

1. This Second Appeal is preferred by the heirs and legal representatives of the original defendant for challenging the concurrent judgments and decrees for possession of the suit property.
2. Respondents are heirs and legal representatives of the original plaintiff. The suit was filed on the basis of title.

Plaintiff contended that by registered sale deed dated 5th April 1988, the plaintiff had purchased the suit property from the defendant and was in possession of the same. However, on the basis of an ex-parte temporary injunction, in a Suit filed by the defendant for cancellation of the sale deed, the defendant had dispossessed the plaintiff.

3. The plaintiff thereafter filed a suit for a permanent injunction against the defendant on the footing that he was in possession. In the suit filed by the plaintiff, there was an ex-parte temporary injunction granted in favour of the plaintiff. However, subsequently, the application for temporary injunction was dismissed on the ground that the plaintiff was not in possession of the suit property. The said suit was ultimately dismissed for default.
4. It was the case of the plaintiff that in such circumstances, the defendant continued to be in illegal possession of the suit property. The plaintiff, since 3rd October 2001, on various occasions, called upon the defendant to hand over possession of the suit property. However, the defendant had avoided to handover possession of the suit property to the plaintiff, and ultimately, on 20th February 2005, the defendant had refused to hand over possession of the suit property to the plaintiff. Hence the plaintiff filed Regular Civil Suit No. 41

of 2005 on 24th February 2005 for possession of the suit property from the defendant.

5. The defendant disputed the validity of the registered sale deed executed in favour of the plaintiff. The defendant claimed to be the owner of the suit property and was in possession of the same. It was contended by the defendant that the plaintiff was never in possession of the suit property. The defendant contended that the suit was barred by law of limitation as the same was filed beyond the period of 12 years from 5th April 1988 i.e. the date of the sale deed. The defendant also raised a plea of perfecting title by way of adverse possession.
6. The learned Civil Judge Junior Division, Sengaon, by judgment and decree dated 18th October 2013, decreed the suit filed by the plaintiff and directed the defendant to hand over possession of the suit property to the plaintiff. The learned trial judge also ordered an enquiry under Order XX Rule 12 of the Code of Civil Procedure, 1908 ("CPC"), The learned trial Judge framed issues with respect to the title of the plaintiff over the suit property, the claim of the defendant for perfecting title by adverse possession and on the point of the suit being barred by limitation.
7. The learned trial Judge, by relying upon the judgment passed in Special Civil Suit No. 2 of 1991 filed by Defendant for

cancellation of the sale deed in favour of plaintiff, the oral evidence on record and the pleading of the parties, held that the plaintiff had established title over the suit property on the basis of the registered sale deed executed by the defendant in favour of the plaintiff.

8. The learned trial Judge referred to various decisions of this Court as well as the Hon'ble Supreme Court for examining and deciding the claim of adverse possession of the defendant as well as the issue with respect to the suit being barred by limitation. The learned trial Judge relied upon the following decisions:

- (i) *Bhimrao Patil Vs. The State of Maharashtra* ¹
- (ii) *Ganpatrao S/o. Ramji Nagul and Anr. Vs. Dattatraya Guru Daulatgiri Maharaj and Anr.*²
- (iii) *Joginder Kaur Vs. Gurubachan Kaur and Ors.*³

9. The learned trial Judge thus held that the suit filed by the plaintiff was based on title, and hence the case was governed by Article 65 of the Limitation Act, and the time would run when the possession of the defendant became adverse to the plaintiff. The learned trial Judge thus held that the defendant had not made out any case as to from which date

¹ 2003 (3) Bom C.R. 150

² 2010(2) Mh.L.J. 718

³ 2013 (1) CCC 522 (P & H)

the possession of the defendant became hostile against the plaintiff.

10. Thus, the learned trial Judge, by accepting the title of the plaintiff over the suit property on the basis of the registered sale deed, held that the plaintiff had proved his title over the suit property. The learned trial Judge thus decreed the suit by judgment and decree dated 18th October 2013.

11. The first appellate Court also framed points for consideration on the basis of the claim of the defendant of perfecting title by adverse possession and the suit being barred by law of limitation and as to whether the suit was barred by Order II Rule 2 of CPC. The first appellate Court referred to certain admitted facts of the case with respect to the execution of the sale deed in favour of the plaintiff, the mutation entry sanctioned in favour of the plaintiff on the basis of the sale deed, filing of the said Special Civil Suit No. 2 of 1991 by the defendant for cancellation of the sale deed in favour of the plaintiff, *ex parte* injunction granted in favour of the defendant, dismissal of Special Civil Suit No. 2 of 1991 and the dismissal of the Civil Suit No. 444 of 2001 filed by the plaintiff for an injunction against the defendant.

12. The first appellate Court thereafter referred to the disputed facts regarding the date of possession of the defendant over the suit property and the title of the defendant perfected by

adverse possession. The first appellate Court held that the claim of the defendant, thereby raising a dispute on the validity of the sale deed executed in favour of the plaintiff, was dismissed by the Civil Court in the suit filed by the defendant. The first appellate Court thus held that the finding with respect to the validity of the sale deed had thus attained finality and was binding on the parties.

13. The first appellate Court held that in view of the finding recorded in Special Civil Suit No. 2 of 1991, which was confirmed upto this Court in the Second Appeal filed by the defendant, it was clear that the defendant had parted with possession of the suit property in favour of the plaintiff pursuant to the sale deed. Thus, the plaintiff became the owner of the suit property and was also in possession of the same. However, on the basis of the ex-parte order of temporary injunction passed in Special Civil Suit No. 2 of 1991, the plaintiff was dispossessed on 6th March 1991. The first appellate Court thereafter examined the plea of adverse possession.

14. The first appellate Court held that the ownership of the suit property was with the plaintiff and that the defendant had raised mutually inconsistent pleas on the title and adverse possession. Thus, it was incumbent on the part of the defendant to renounce one of the pleas. The pleading of the

defendant showed that the defendant claimed to be in possession even after the execution of the sale deed dated 5th April 1988 in favour of the plaintiff. The defendant has not raised any particulars as to in what manner the possession of the defendant became adverse to the plaintiff and from which date.

15. The first appellate Court referred to the decision of the Hon'ble Supreme Court in the case of *Ravindra Kaur Grewal and Ors. Vs. Manjit Kaur and Ors.*,⁴ as well as the decision of this Court in the case of *Rama Kashinath Dhumal, Vs. Laxman Deorao Dhumal and Ors.*⁵ and held that in view of the said position of law, it was incumbent on the part of the defendant to renounce one of the pleas. The first appellate Court also referred to the decision of the Hon'ble Supreme Court in the case of *Shri Uttam Chand (D) Through Lrs Vs. Nathu Ram (D) through Lrs & Ors.*⁶ and in the case of *Anjanappa and Ors. Vs. Somalingappa and Anr.*⁷ as well as in the decision of this Court in the case of ***Ganpatrao Ramji Nagul*** . Thus, by referring to the aforesaid decisions of this Court as well as the Hon'ble Supreme Court, the first appellate Court held that a person claiming adverse possession is required to plead and prove the date of possession, nature of possession, period of possession and

⁴ Mh.L.J. 2019 (6), 87

⁵ 2009 (4) AIR Bom R 243

⁶ AIR 2020 SC 461

⁷ 2006 (7) SCC 570

that the possession was open and undisturbed. The learned first appellate Court held that when a person is trying to defeat the right of the true owner, it is obligatory on the part of that person to clearly plead and share all the facts necessary to prove his plea of adverse possession. Thus, the first appellate Court confirmed the finding of the trial Court on the plea of the defendant of perfecting title by way of adverse possession.

16. The first appellate Court had framed the point of consideration as to whether the suit was barred by Order II Rule 2 as the plaintiff had earlier filed suit for simpliciter injunction. The first appellate Court, however, held that the earlier suit was simpliciter for an injunction on a different cause of action, and his present suit was filed on a different cause of action. Hence, there was no question of the suit being barred by Order II Rule 2. Arguments were made on behalf of the defendant with respect to remedy under Section 144 of the CPC. The first appellate Court held that in the present case, the plaintiff was dispossessed on the basis of an *ex parte* temporary injunction granted in favour of the defendant, and thus there was no question of applicability of the provision of Section 144 of CPC.

17. With respect to the suit being barred by law of limitation, the first appellate Court held that since the suit was based on the

title, the same would be governed by Article 65 of the Limitation Act, and the period of limitation would begin to run when the possession of the defendant became adverse to the plaintiff. The defendant failed to prove the plea of perfection of title by adverse possession. There was nothing on record to show that possession of the defendant had become adverse. Hence, in view of the finding recorded in the earlier proceeding, there was no starting point for showing the possession of the defendant being adverse. Thus, once the title of the plaintiff over the suit property was established and there was no starting point of the possession being adverse, there was no question of holding the suit to be barred by the law of limitation. Thus, the suit was held to be within the period of limitation, and the appeal preferred by the defendant was dismissed.

18. Learned Senior Counsel for the appellants submitted that the suit was governed by the provision of Article 64 of the Limitation Act and not Article 65 of the Limitation Act as held by both the Courts. The learned Senior Counsel, on behalf of the appellants, submitted that the suit filed by the plaintiff for simpliciter injunction was dismissed. The plaintiff himself had pleaded that he was dispossessed on 6th March 1991 on the basis of the order of temporary injunction passed in favour of the defendant. The plaintiff had further pleaded that after the

dismissal of the suit filed by the defendant, the plaintiff had filed suit for seeking a permanent injunction against the defendant. It was thus submitted on behalf of the appellant that the cause of action for filing the suit for possession arose at the time of filing such suit simpliciter for an injunction. However, the plaintiff failed to seek any prayer for possession of the suit property, and there was no leave taken under Order II Rule 2 for seeking such relief. Hence it was clear that the suit was barred by the provisions of Order II Rule 2.

19. The learned Senior Counsel further submitted that on the basis of pleading, it was clear that admittedly the plaintiff was dispossessed on 6th March 1991, and thus, the period of limitation for seeking prayer for possession would start from 6th March 1991. The suit was filed on 24th February 2005, which was clearly barred by limitation in view of Article 64 of the Limitation Act.

20. The learned Senior Counsel relied upon the decision of the Hon'ble Supreme Court in the case of *Ramaiah Vs N. Narayana Reddy (Dead) by Lrs.*⁸ Learned Senior Counsel submitted that the facts in the said case before the Hon'ble Supreme Court were similar to the facts of the present case. It was thus submitted that in the case before the Hon'ble Supreme Court, the owner of the suit property had instituted a suit for recovery of possession based on the title. The short

⁸ AIR 2004 SC 4261

question that arose before the Hon'ble Supreme Court was whether the plaintiff had proved that he was in possession of the suit land within 12 years of the date of the suit and that the suit was filed for recovery of possession based on the title. The learned Senior Counsel submitted that the Hon'ble Supreme Court in the said case held that Article 64 would be applicable in the facts of the said case. Thus, it was submitted that in the present case, also suit was filed for possession of the suit property based on prior possession and, therefore, as held by the Hon'ble Supreme Court in the case of *Ramaiah* in the present case suit was barred in view of Article 64.

21. Learned Advocate for the respondent submitted that the plain reading of the plaint would show that the suit was purely based on title, and hence the provision of Article 65 of the Limitation Act would apply. The defendant had raised a plea of adverse possession. Both the Courts, after examining the pleading as well as evidence on record, have come to the conclusion that the defendant failed to plead and prove ingredients of adverse possession. There was nothing produced on record to show in what manner possession of the defendant had become adverse to the plaintiff. The defendant had, in fact, pleaded that she was the owner of the suit property and that she was always in possession of the

same. The objection raised by the defendant with respect to the nature of the sale deed executed in favour of the plaintiff was not believed in the earlier round of litigation, and the sale deed executed in favour of the plaintiff was accepted as a validly executed sale deed. Hence the issue of title of the plaintiff over the suit property had attained finality, and the only question to be decided was the possession of the suit property. He submitted that there was nothing on record to prove the plea of adverse possession as raised by the defendant. Thus, it was clear that the suit was well within limitation as the suit is covered under Article 65 of the Limitation Act.

22. With respect to the submission made that the suit is barred by the provision of Order II Rule 2 is concerned, the learned Advocate for the respondent submitted that the cause of action pleaded in the earlier suit was only for the purpose of claiming simpliciter injunction. However, the cause of action to file the present suit for possession was a completely different cause of action, and hence there was no question of the suit being barred by law of limitation.

23. I have heard both parties. I have considered submissions made by both parties. I have perused the record of the Second Appeal as well as the paper book of Regular Civil Appeal No. 55 of 2013. A perusal of the plaint shows that the

plaintiff had come up with a clear case that he was the owner of the suit property. The registered sale deed was executed in his favour, and he was dispossessed on 6th March 1991 by the defendant by taking undue advantage of the ex-parte temporary injunction granted in her favour. The plaintiff further pleaded that he had filed the suit for a temporary injunction which was dismissed for default. Thereafter he had called upon the defendant to hand over possession of the suit property, which was not complied with and ultimately, on 20th February 2005, the defendant refused to hand over possession. Thus, the cause of action pleaded was a refusal on the part of the defendant to hand over possession. Hence suit was filed on 24th February 2005.

24. In the present case, the defendant has raised inconsistent pleas by disputing the nature of the sale deed executed by her in favour of the plaintiff and, at the same time, has also raised the plea of acquiring title by adverse possession. The defendant has pleaded that she was always in possession of the suit property, being the owner. She has thus disputed that the plaintiff was at any time put in possession of the suit property pursuant to the sale deed executed in his favour. Thus, by the plain reading of the written statement filed by the defendant, it is clear that the defendant claimed to be in possession on the basis of her original ownership over the

suit property and thus has disputed that the plaintiff was at any time in possession of the suit property and resultantly also disputed that plaintiff was dispossessed as claimed by him. With respect to the dispute raised on the title of the suit property, the suit filed by the defendant for cancellation of the sale deed executed by her in favour of the plaintiff was dismissed, and the same has attained finality. The case of the defendant that she had never handed over possession of the suit property to the plaintiff is disbelieved by both Courts. Hence, the sale deed in favour of the Plaintiff is legal and valid.

25. Both the Courts have recorded the finding that pursuant to the sale deed executed in favour of the plaintiff, he was put in possession of the suit property. Both Courts have believed the case of the plaintiff that he was dispossessed on 6th March 1991 based on the order of temporary injunction granted in favour of the defendant. Both the Courts have held that the suit is filed based on title and not based on prior possession. The averments made in the Plaint clearly show that the suit is based on title and not based on prior possession. The case of the plaintiff is of dispossession at the hands of the defendant. Hence the cause of action for filing the suit would be of the possession of the defendant becoming adverse to the plaintiff. As the suit is on title, Article

65 of the Limitation Act will apply and the starting point of limitation will be the date on which the possession of the defendant becomes adverse. The defendant has come up with a plea of acquisition of title by adverse possession, however, has failed to plead and prove the ingredients for claiming perfection of title by claiming adverse possession. In fact, the defendant has claimed to be in possession being the owner of the suit property. She has also denied that the possession was at any time handed over to the plaintiff. With such pleading, there was no question of the possession of the defendant being adverse to the plaintiff.

26. Article 65 of the Limitation Act provides for a period of limitation for a suit filed for possession of immovable property based on the title. The period of limitation prescribed under Article 65 is 12 years when the possession of the defendant becomes adverse to the plaintiff. The Hon'ble Supreme Court, in the case of *Ravinder Kaur Grewal* , has held that under Article 65, the suit can be filed based on the title for recovery of possession within twelve years of the start of adverse possession, if any, set up by the defendant, otherwise right to recover possession based on title is absolute irrespective of limitation in the absence of adverse possession by the defendant for twelve years.

27. The Hon'ble Supreme Court, in the case of *Uttam Chand*, has held that plea of adverse possession requires all the three classic requirements to co-exist at the same time, namely adequate in continuity, adequate in publicity and adverse to a competitor, in denial of his title and knowledge. In the facts of the said case plea of the defendant was of continuous possession, but there was no plea that such possession was hostile to the true owner. The Hon'ble Supreme Court in the said case thus decreed the suit for possession based on the title. Thus, in view of the settled principles of law on the plea of adverse possession and right to recover possession based on the title being absolute irrespective of limitation in the absence of adverse possession by the defendant for twelve years is covered under Article 65. Thus, in view of the aforesaid settled principles of law, the decision of the Hon'ble Supreme Court in the case of *Ramiah* relied upon by the learned senior counsel is of no assistance to the Appellant's case.

28. In the present case, there is nothing pleaded and proved to show that possession of the defendant became adverse to the plaintiff. The defendant has, in fact, disputed the execution of the sale deed in favour of the plaintiff and thus disputed the title of the plaintiff. The defendant has, though, taken a plea of perfection of title by adverse possession, she

has not admitted the title of the plaintiff. The defendant has claimed to be in continuous possession, being the owner of the suit property and has not pleaded any particulars as to from which date the possession of the defendant became adverse to the plaintiff. In fact, the defendant has disputed that the plaintiff was at any time put in possession pursuant to the sale deed. In such circumstances, there is nothing on record to show that possession of the defendant became adverse to the plaintiff, and thus the period of limitation has not, in fact, begun for filing the suit on the basis of title. Hence suit filed by the plaintiff is clearly within the period of limitation in view of Article 65 of the Limitation Act.

29. With respect to the argument of the learned Senior Counsel for the Appellant regarding the suit being barred by the provision of Order II Rule 2 is concerned, the same also does not have any merit. The earlier suit filed by the plaintiff was a simpliciter suit for an injunction. The present suit is a substantive suit based on title by specifically pleading that on 20th February 2005, the defendant refused to hand over possession of the suit property as called upon by the plaintiff. Hence the suit was filed on 24th February 2005. For the purpose of deciding whether the suit was barred by Order II Rule 2 of the CPC, it is necessary to find out whether the cause of action as pleaded in the present suit was available

to the plaintiff at the time of filing the previous suit. The plaintiff has pleaded that the suit filed by the defendant for cancellation of the sale deed was dismissed on 20th April 1993, and the same was confirmed by the District Court on 3rd October 2001 in an appeal preferred by the defendant. It is pleaded that thereafter the plaintiff had filed suit for a simpliciter injunction. However, the same was dismissed for default. The plaintiff has thereafter pleaded that the cause of action for seeking possession of the suit property arose only when the defendant refused to hand over possession. Thus, it is clear that the cause of action in the present suit has arisen after the earlier suit was dismissed. In view of the different causes of action in both the suits and as the suit is based purely on title, it cannot be said that the suit is barred by the provision of Order II Rule 2.

30. It is important to note that the Defendant has not entered into the witness box in the present suit, and she has only relied upon her evidence in the earlier suit being Regular Civil Suit No. 141 of 2008. The issue of the bar under Order II Rule 2 is not a pure question law, and the same is based on factual aspects. Thus, even otherwise, in the absence of any evidence in support of the objection regarding the bar under Order II Rule 2, the same does not raise any substantial question of law.

31. Thus, for the reasons stated above, I do not find that the Second Appeal involves any substantial question of law. Both the Courts, after examining the pleading as well as evidence on record, have held that the suit is within limitation in view of Article 65 of the Limitation Act and that there is no bar under Order II Rule 2 in view of the different cause of action pleaded by the plaintiff.

32. Both questions raised on behalf of the appellant would require re-appreciation of the facts as well as evidence on the record, as the same is based on facts. Re-appreciation of the fact as well as evidence is not permissible under Section 100 of the CPC. Hence the Second Appeal does not raise any substantial question of law. The Second Appeal is dismissed.

[GAURI GODSE, J.]

33. At this stage learned counsel appearing for the appellants seek extension of interim relief which is already granted in this matter thereby staying execution and operation of the impugned decree for possession.

34. Learned counsel for the Respondents opposed the request on the ground that the suit is of the year 2005 and the Respondents are deprived of the fruits of the decree in view of the pendency of the proceedings. Since the impugned decree was stayed till date, I am inclined to extend interim

relief which is already granted in this Second Appeal. Interim relief granted by this Court on 6th February 2023 to continue for a period of 12 weeks from today subject to the Appellants filing an undertaking that they will not create third party interest in the suit premises and shall hand over possession to the Respondents in the event no favourable orders are passed by the Apex Court. Such undertaking to be filed within a period of three weeks from today.

[GAURI GODSE, J.]