



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 90 OF 2023

1. Hamidbi w/o Syed Gafoor
Age 69 years, Occu: Household
R/o Illat Nagar, Old Jalna, Dist. Jalna
 2. Shamimbi w/o Sk. Ahmed
Age 49 years, Occu: Household
R/o Dahegaon Tq. Selu, Dist. Parbhani
 3. Shahlinbi w/o Rafiq Pathan
Age 47 years, Occu: Household,
R/o Adul Tq. & Dsit. Aurangabad
 4. Taherabi w/o Syed Anwar
Age 44 years, Occu: Household
R/o Ranjani Tq. Ghansavanti Dist. Jalna
- ... Appellants
(Orig. Plaintiffs)

VERSUS

1. Prabhakar s/o Raosaheb Deshmukh,
Age 53 years, Occu: Agriculture,
R/o Erandeshwar Tq. Mantha Dist. Jalna
 2. Ganesh s/o Bhagwanrao Deshmukh,
Age 33 years, Occu: Agriculture,
R/o Erandeshwar Tq. Mantha Dist. Jalna
- ... Respondents
(Orig. Defendants)

Mr. Namit Sunil Muthiyan, Advocate for the Appellants,

CORAM : Y. G. KHOBRAGADE, J.

DATED: 2nd April, 2024

PER COURT :

1. Heard Mr. Muthiyan, learned counsel appearing for the appellants at length.
2. The appellants have preferred present second appeal under

section 100 of the Civil Procedure Code challenging the judgment and decree dated 26.09.2022 passed by the learned Principal District Judge, Jalna in appeal bearing R.C.A. No. 56 of 2019, thereby affirmed the judgment and decree dated 20.02.2019 passed by the learned Civil Judge, Junior Division, Mantha Dist. Jalna in suit bearing R.C..S. No. 10 of 2013.

3. The Appellants are original Plaintiff and Respondents are original Defendants in Regular Civil Suit No. 10 of 2013. For the sake of brevity, I would like to refer the parties to the present appeal in their original capacity as Plaintiff and Defendants.

4. The Plaintiffs have filed an R.C.S. No. 10 of 2013 alleging that, Mr. Syed Gafoor Syed Karim, the husband of Plaintiff No.1 and father of Plaintiff Nos. 2 to 4 had purchased 5 acres of land out of Survey No.9 (hereinafter referred to as the Suit property) from one Mr. Madanlal Kotecha on 09.05.1983 vide registered sale deed bearing registration No. 930/1983 for a valuable consideration of Rs. 4000/-. However, on 12.08.1985, Mr. Syed Gafoor died in road accident. Mr. Syed Karim, the father of Syed Gafoor had also purchase land admeasuring 5 acres from Survey No. 9 on 09.05.1983 under registered sale deed bearing registration No. 929/1983.

5. According to the Plaintiff, Syed Gafoor was cultivating the

suit land alongwith land of his father, but after his death, Mr. Syed Karim, the father in law of Plaintiff No.1 and grandfather of Plaintiff Nos. 2 to 4 was cultivating the suit land alongwith his 5 acres of land and was maintaining them while residing at village Erandeshwar. After death of Mr. Syed Gafoor, Plaintiff No.1 started residing at her parental house at Jalna and her father-in-law i.e. Syed Karim mutated his name in the revenue record in respect of the suit land in collusion with Talathi. However, the Plaintiff No.1 was continued in possession of the suit land. She was cultivating the suit land with the help of servants till April, 2012. On 10.06.2012, when her servants were performing agricultural operation at that time Defendants forcibly entered into the suit land and taken the possession of the suit land. Thereafter, she came to know that Mr. Syed Karim, her father-in-law sold the suit land to Defendant No.1 without having any right and title. Therefore, the plaintiff prayed for declaration that the sale deed executed by Mr. Syed Karim in favour of the Defendants is illegal, bad in law and not binding. The plaintiffs further prayed that, the mutation entries carried out in the name of Defendant No.1 on the basis of sale deed by posing a partition between them to the extent of 40 R of land is not binding upon them. Further, they are in possession being owner of the suit land, hence, prayed for declaration of ownership and recovery of possession of the suit land.

6. The Defendants denied all the allegation and pleadings of the plaintiffs by filing written statement at Exh. 11. According to Defendants, Mr. Syed Gafoor Syed Karim was the original owner of the suit land. The Plaintiff Nos. 2 to 4 are daughters of Syed Gafoor and they were minors at the time of death of Syed Gafoor. The Plaintiff No.1 Hamidabi, was widow of Syed Gafoor, but she performed second marriage after sad demise of her husband and started cohabitation with her 2nd husband. The Plaintiff No. 1 left her daughters with her father-in-law Mr. Syed Karim, who has well maintained the Plaintiff Nos. 2 to 4. Accordingly, names Plaintiff Nos. 2 to 4 were recorded in revenue record as per mutation entry No. 93 and name of Mr. Syed Karim was entered in the revenue record of suit land as guardian of the Plaintiff Nos. 2 to 4. After death of Syed Gafoor, his daughters i.e Plaintiff Nos. 2 to 4 were owner of the suit land and their grandfather Syed Karim maintained them. However, their grandfather sold the suit land to Defendant No.1 for consideration of Rs. 53,000/- and executed sale deed No. 1315 of 1995 on 19.04.1995 to meet legal necessity. Accordingly, Mutation Entry No. 107 was effected and since then, Defendant No.1 is in possession of the suit land. Subsequently, partition has been effected and 40 R of land allotted to Defendant No. 2 from Gat No.161. Therefore, the Plaintiffs are not entitled for decree as prayed and hence, prayed for dismissal of the suit.

6. The learned trial court framed issues at Exh. 13 and has held that, the Plaintiffs have proved that they are the owners of the suit property, however the Plaintiffs have failed to prove that they were illegally dispossessed from the suit property by the Defendants on 10.06.2012. Further, Mr. Syed Karim, the erstwhile father-in-law of the plaintiff No. 1 and grandfather of the plaintiff Nos. 2 to 4 executed the sale deed illegally in favour of Defendant No.1 without having any Right, however, the suit was barred by limitation hence suit was dismissed.

7. The learned first appellate court passed the impugned judgment and decree on 26.09.2022 in First Appeal bearing R.C.A. No. 56 of 2019 holding that, the disputed sale deed was executed on 19.04.1995 and the name of Defendant No.1 mutated in the revenue record. The Plaintiff No. 1 who claimed to be in possession of the suit land deemed to have knowledge about the mutation entry in the revenue record and therefore, the Plaintiffs could have averred and proved that the suit filed in the year 2013 is within period of limitation and in absence of any such averment or proof, the suit fails.

8. The learned counsel appearing for the appellants canvass that, both the courts below concurrently held that, Mr. Syed Gafoor, the husband of the plaintiff No. 1 and father of the plaintiff Nos. 2 to 4 was

the owner of the suit property, however, Mr. Sayed Karim had dishonestly executed the sale deed on 19.04.1995 by posing himself as guardian of minors/plaintiffs Nos. 2 to 4 and dishonestly entered his name in the revenue record as guardian. So also, Mr. Sayed Karim had no Right at all to execute the sale deed in favour of the Defendant No.1. Therefore, so called possession of the Respondents over the suit land is not valid and legal. Therefore, the plaintiffs are entitled for possession of the suit property.

9. To buttress this submissions the learned Counsel appearing for the appellants has placed reliance on the case of ***Md. Mohammad Ali (Dead) By LRs. Sri Jagdish Kalita & ors. AIR 2004 SC 342***, wherein it has been held that in a suit governed by Article 65 of the Limitation Act, 1963, the Plaintiff will succeed if he proves his title and it would be no longer necessary for him to prove, unlike in a suit governed by articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding to filing of the suit. On contrary, Defendant has to prove if he wants to defeat the Plaintiff's claim to establish his title by adverse possession. In the case in hand, none of the Defendants have raised any plea that at any stage that the possession of the Defendants assumed a hostility. There was not even a whisper regarding the holding of possession with hostility either with the intention or with

the knowledge that the Plaintiff would be ousted from his rightful claim."

10. Further relied on the case of *Narayan Vs. Trimbakrao Gopalrao Bagde and others, reported in AIR 1988 Bom.94*, wherein it has been held that, "under Article 65 of the Limitation Act, a suit for possession of immovable property or any interest therein based on title requires to be instituted within 12 years from the date when the possession of the Defendant becomes adverse to the Plaintiff.

11. Learned counsel for appellants further relied on the case of *Sopanrao Vs. Syed Mehmood, reported in AIR 2019 SC 4113*, wherein admittedly, the possession of the land was handed over to the Trust only in the year 1978. The suit was filed in the year 1987. The appellants therein contended that the limitation for such suit is three years as the suit is for declaration. Under such circumstance, the Hon'ble Apex Court held that the suit is not only for declaration, but the Plaintiff has also prayed for possession of the suit land. The limitation for filing a suit for possession on the basis of title is 12 years and, therefore, the suit is within limitation. Merely, because one of the reliefs sought is of declaration that will not mean that the outer limitation of 12 years is lost.

12. The Plaintiff Hamidabi (PW-1) stated in her evidence

affidavit that, after death of her husband, she started residing at her parental house at Jalna. Thereafter, her father-in-law Mr. Syed Karim get sanctioned mutation entry and entered his name in 7/12 extract in respect of the suit land. Subsequently, Mr. Syed Karim illegally sold suit land to Defendant No.1. She and her daughters Plaintiff Nos. 2 to 4 being legal heirs are owners of the suit land. Her father-in-law Mr. Syed Karim had no right to sell the suit land. Therefore, execution of the sale deed by her father-in-law in favour of Defendant No.1 is not binding upon her as well as upon her daughters.

13. The Plaintiff No.4 Taherabi (PW-2) filed evidence affidavit at Exh. 30 and stated that, the Plaintiff No.1 is her mother and Plaintiff Nos. 2 and 3 are her sisters. Her father died in road accident on 12.08.1985. After death of her father, her grandfather Syed Karim drove them out of his house. Therefore, she, her mother and her sisters had started residing at their maternal uncle's house at village Ner. Her mother (PW-1) maintained her and her sisters. Her father Syed Gafoor had purchased the suit land from Madanlal Kotecha vide sale deed No. 930/1983. Her father was owner of suit land and was in possession of the suit property. After death of her father, she, her mother and her sisters became owner of the suit land and were cultivating the same. Her grandfather Syed Karim had no right to sell the suit land, but he

illegally executed the sale deed in favour of Defendant No.1.

14. In order to prove marriage ceremony of PW-1 with Syed Gafoor on 02.06.1978, the Plaintiff examined PW-4 Wahedkhan Bashratkhan at Exh. 40, deposed that he being Kazi, has performed marriage of Plaintiff No.1 with Syed Gafoor on 02.06.1978.

15. The Plaintiff examined PW-5 Shaikh Salim Shaik Guljar to prove sale deed No. 930/1983 at Exh. 47 under which Syed Gafoor had purchased the suit land from Madanlal Kotecha.

16. Needless to say that the Plaintiffs have prayed for decree of declaration of ownership and recovery of possession of the suit property by claiming that the sale deed executed by Mr. Syed Karim in favour of Defendant No.1 on 19.04.1995 is illegal, bad in law and not binding upon them. The plaintiffs further prayed for possession of the suit property being owners. Therefore, it become clear that, the Plaintiffs have not claimed possession of the property by adverse possession.

17. As per evidence of Plaintiffs, Mr. Syed Karim sold suit property in favour of Defendant No.1 and had handed over possession in the year 1995 on the date of execution of the sale deed itself. On perusal of evidence of the defendants it proves that, the sale deed registered on 19.04.1995 with the Sub Registrar, Partur and

consideration of Rs.53,000/- paid to the vendors through the guardian. Thereafter, mutation entry was taken in the revenue record Exh. 66 on basis of Sale Deed. The revenue record proves that Defendant No.1 is the owner and in possession of the suit property. The mutation entry No. 544 Exh. 26 proves that on the basis of partition, land admeasuring 40 R from Gat No. 161 has been allotted to Defendant No.2.

18. As per evidence of Defendants, Syed Karim maintained Plaintiff Nos. 2 to 4 and performed their marriages because, their mother Plaintiff No. 1 left her matrimonial house and performed second marriage. Therefore, to meet the legal necessities, Syed Karim sold the suit land to Defendant no.1.

19. Since, the Plaintiffs claim possession over the suit land being owner and sought recovery of possession based on the title, therefore, as per Article 65 of the Limitation Act of 1963, period of 12 years is provided which began to run when the possession becomes adverse.

20. In the case in hand, the Plaintiffs have not claimed possession of the suit land by virtue of hostile possession of the Defendants. However, the Plaintiffs have claimed possession of the suit land on the basis of title and being successors of late Syed Gafoor Syed Karim who died in road accident on 12.08.1985. The claim of

Defendant No.1 is that on 19.04.1995, he purchased the suit land from Syed Karim, the guardian of Plaintiff Nos. 2 to 4 on payment of consideration and mutated his name in the revenue record. Not only this, but the Plaintiffs also pleaded that the sale deed which has been executed by Syed Karim in favour of Defendant No.1 is not binding upon them. However, the Plaintiffs have not claimed declaration that the sale deed dated 19.04.1995 executed by Mr. Syed Karim in favour of Defendant No.1 is illegal, bad in law and not binding upon them. Therefore, unless the sale deed is declared as null and void, the Plaintiffs are not entitled for said relief. Nonetheless, when the plaintiffs have filed suit for declaration that they are owners of the suit property by succession and they are entitled for possession of the suit property, therefore, certainly suit requires to be filed within period of 12 years from the date of dispossession within the meaning of Art. 65 of the Limitation Act. However, the plaintiffs have filed the suit beyond limitation provided under Article 65 of the Limitation Act of 1963, which is certainly barred by law.

21. On Perusal of the impugned judgment and order dated 26.09.2022 passed by the learned first appellate Court in Regular Civil Appeal No. 56 of 2019 it appears that, the learned first appellate court has well appreciated the evidence available on record and has held that

as per Article 65 of the Limitation Act, 1963 limitation is of 12 years for recovery of possession of the immovable property and the Defendants have not taken any plea of adverse possession, but claim of the Defendants is that since date of execution of sale deed i.e. 19.04.1995 by Syed Karim, they are in possession of the suit land. Therefore considering the fact that, on 19.04.1994, sale deed was executed by Syed Karim in favour of the Defendant No.1 and the plaintiff have filed suit on 05.02.2013 after lapse of more than 17 years. Both the learned courts below have concurrently held that the suit of the Plaintiffs is barred by limitation, which does not appears to be perverse and no substantial question of law is involved to interfere with the findings recorded by the both the Courts below.

22. In view of the above discussion, **present Appeal is hereby dismissed.** No order as to costs.

(Y. G. KHOBRADE, J.)

JPChavan