

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.276 OF 2017
WITH
CIVIL APPLICATION NO.1190 OF 2016

Rahimatbi Abbas Mulani

...Appellant.

Versus

Mr. Mahadev Dashrath Nimbalkar (Thr. POA
Nagnath Pandharinath Nimbalkar) and Ors.

...Respondents.

Mr. Sandeep Salunkhe for the appellant.

Mr. Vishwanath Patil i/b Mr. Yuvraj Patil for the respondent No.1.

Coram : Sharmila U. Deshmukh, J.

Date : 17th April, 2024.

P. C. :

1. Heard.

2. Being dissatisfied by the judgment dated 1st August 2014 passed by the Appellate Court in Regular Civil Appeal No.116/2012 rejecting the appeal thereby upholding the judgment of the Trial Court dated 15th February 2012 passed in Regular Civil Suit No.73/2007 decreeing the suit for recovery of possession on the basis of title, the original defendant No.1 is before this Court.

3. Regular Civil Suit No.73/2007 was filed by the plaintiff seeking recovery of possession of agricultural land bearing Gat No.61 and Gat No.115 on the basis that the plaintiff is the owner. It was contended that the plaintiff had entered into an agreement for sale of the suit property with the husband of defendant No.1 on 7th July 1971. Regular Civil Suit No.23/1977 was instituted by the plaintiff earlier seeking injunction on the basis that he was in possession of the suit property which came to be dismissed. As against which appeal was also dismissed. Regular Civil Suit No.103 of 1996 was filed by the defendant No.1 claiming title by adverse possession which was dismissed. However injunction was granted in that proceedings till the possession of the suit property is recovered by the plaintiff through legal process. Said decision was accepted by the defendant as no appeal was preferred.

4. After the passing of the judgment in RCS No.103 of 1996, the present Suit i.e. RCS No.73/2007 was filed seeking recovery of possession.

5. Defendant No.1 resisted the suit claiming that they are in adverse possession of the suit property as said period of agreement of sale had expired. Defendant No.1 also raised plea of *res judicata*

and limitation. The Trial Court on the basis of evidence came to a finding that the possession of defendant is unlawful possession and decreed the suit.

6. As against this Civil Appeal No.116 of 2012 was filed. The Appellate Court re-appreciated the evidence and noted that in earlier RCS No.103 of 1996 the plea of adverse possession was rejected and injunction was granted till the plaintiffs obtained possession by following due process of law. As against which no appeal was filed. The Appellate Court noted that the plaintiff is the owner of the property and dismissed the appeal holding that the defendants are not entitled to retain possession of the suit property.

7. Heard Mr. Sandeep Salunkhe, learned counsel for the appellant and Mr. Vishwanath Patil learned counsel for the respondent No.1.

8. Learned counsel appearing for appellant submits that substantial question of law arising in the present case is the issue of limitation as according to him the cause of action arose in the year 1977 when RCS No.23/1977 filed by the plaintiff for permanent injunction came to be rejected holding that the husband of defendant

No.1 was in possession. He would further submit that the present suit has been filed in the year 2007 and is therefore clearly barred by limitation. He would further submit that the agreement of sale dated 7th July 1971 has not been cancelled by the plaintiff and that being so the possession is protected under Section 53A of the Transfer of Property Act.

9. *Per contra*, learned counsel for respondent would submit that the cause of action would arise upon the suit being RCS No.183/1996 seeking declaration of ownership by adverse possession being rejected and liberty was granted to recover possession by adopting legal process. He submits that in the written statement the specific case of the defendant is that the agreement of sale has expired and that being so there is no obstacle to the plaintiff recovering possession as the possession of the defendant is unlawful possession. He further points out that the Trial Court and the Appellate Court on the basis of the evidence on the record have rendered concurrent findings as regards the unlawful possession and the same may not be interfered with under Section 100 of CPC.

10. Considered the submissions and perused the record.

11. The issue raised for consideration is issue of limitation and the applicability of doctrine of part performance under Section 53A of the Transfer of Property Act. The previous litigation between parties is not disputed. The question is what is the starting point for computing the period of limitation under Article 65 of the Limitation Act, as suit is for possession based on title. Plain reading of Article 65 of the Limitation Act would indicate that the period of 12 years prescribed under the said Article would commence upon the possession of defendant becoming adverse to that of the plaintiff. In the instant case in the year 1996 RCS No.183/1996 was filed by the defendant claiming ownership by adverse possession which came to be dismissed on 4th April 2006. The starting point of limitation as per third column of Article 65 of the Limitation Act would therefore commence from the claim of adverse possession. The suit therefore filed in the year 2007 was within limitation.

12 As regards the issue of doctrine of part performance, the provisions of Section 53A of the Transfer of Property Act specifically provides that the possession of the purchaser will be protected provided that he is ready and willing to perform his part of the agreement for sale. In the present case, by filing Suit in the year 1996 claiming adverse possession, it has been made clear that defendant

No.1 is not ready and willing to perform the obligation under the agreement for sale dated 7th July 1971. It has also come on record that in the present case also the defendants are claiming ownership by adverse possession. The plea of ownership by adverse possession and the plea of protection of possession under Section 53 A of the Transfer of Property Act are inconsistent pleas. As specific plea of ownership by adverse possession has been raised, the ingredients of Section 53A are not established. In that case the possession cannot be sought to be protected by applicability of Section 53A of the Transfer of Property Act. The defendant has herself come with the plea that the period of agreement to sale has expired and that being so the contention that agreement for sale is not cancelled does not stand to reason. There are concurrent findings rendered by the Trial Court and the Appellate Court based on evidence holding that the possession of the defendant is unlawful possession.

13. In view of the above, there is no perversity in the findings of the Appellate Court. The suit is not barred by limitation and the provisions of Section 53A is not applicable in view of the plea of adverse possession raised by the defendants. As such no substantial question of law arises. Appeal stands dismissed.

[Sharmila U. Deshmukh, J.]