

(2004) 04 BOM CK 0064

In the Bombay High Court

Case No : Second Appeal No. 475 of 1990

Abdul Hamid Abdul Kadar

APPELLANT

Vs

Mohamed Hasankhan Amirkhan since deceased by his legal
heirs Zarina Hasan Khan and Others

RESPONDENT

Date of Decision : 20-04-2004

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : (2004) 3 MhLj 973

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : K.S. Bhadri, for the Appellant; S.V. Pitre, for the Respondent

Judgement

D.Y. Chandrachud, J.—A decree for possession was passed by the Civil Judge, Junior Division, Pune in a suit instituted in 1977, on 13th July 1987. The decree has been affirmed in appeal by the Additional District Judge, Pune on 21st July 1990. This Second Appeal was admitted on 12th September 1990. The substantial question of law which arises for the consideration of the Court is as to whether the suit for possession that was instituted by ,the original plaintiff was barred by limitation.

2. The suit premises consist of Block No. 3 in a house bearing No. 404/400 situated at Rasta Peth Road, Pune. Block No. 3, was in possession of one Lalkhan, the father-in-law of the original defendant. Lalkhan had six brothers and the house has been purchased in February 1919 by the eldest brother Ahmedkhan. Upon the death of Ahmedkhan, the property was transferred in the name of Usman Khan and was purchased by a deed of sale dated 2nd September 1946 by Amir Khan, the father of the original plaintiff. The original defendant married the daughter of Lalkhan and resided in the premises. At the time of the death of the plaintiffs father in 1947, the plaintiff was a minor. After he attained majority, the plaintiff issued a notice to the original defendant terminating his tenancy. On 17th September 1968 the plaintiff instituted a suit in the Court of

Small Causes at Pune for possession of the suit premises on the basis that the defendant was a tenant. The suit was decreed by the trial Court on 8th April 1971. The appeal filed by the defendant was allowed by the Appellate Court on 15th July 1972 on the ground that there was no relationship of landlord and tenant as a result of which the suit was not maintainable in the Court of the Small Causes. A petition filed under Article 227 of the Constitution before this Court was dismissed on 11th November 1976. Thereupon, the original plaintiff (predecessor-in-title of the Respondent) instituted Regular Civil Suit No. 1635 of 1977 in the Court of the Civil Judge, Junior Division, Pune claiming possession from the original defendant (predecessor-in-title of the Appellant) on the basis that he was a trespasser. In response to the suit, the defendant set up a plea of adverse possession and claimed, in the alternative, that the suit premises were gifted by Usman Khan to Lalkhan, the father-in-law of the Appellant. Both the plea of adverse possession, and of a gift by Usman Khan in favour of Lalkhan were negated by the Trial Court. In appeal, these findings have been affirmed. Insofar as the question of limitation is concerned, both the Courts below held that the suit which was instituted against the original defendant was within the period of limitation. The Appellate Court held that the original plaintiff was entitled to the benefit of Section 14 of the Limitation Act, and that the period which was spent in deciding the proceedings in the earlier suit before the Court of Small Causes was liable to be excluded. The Appellate Court held that it was an admitted position that the plaintiff was a minor when his father expired in 1947 and that he was looked after by his uncle Usman Khan. Hence, it was not expected that he would be aware as to how the defendant was in possession, of the suit property". Admittedly, there were three other tenants in the suit property. The Appellate Court held that in these circumstances, it was conceivable that the plaintiff believed that the defendant also is a tenant and it was under that impression that the suit was instituted in the Court of Small Causes. The Court was of the view that earlier suit was filed in good faith on the misapprehension that the defendant was a tenant. The decree passed in the aforesaid suit was reversed by the Appellate Court and the suit which was instituted on 19th September 1977 within a period of 10 months after the dismissal of the Writ Petition by this Court in November 1976.

3. Learned Counsel appearing on behalf of the Appellant has urged that the Appellate Court has erred in granting to the Respondent-plaintiff the benefit of the provisions of Section 14 of the Limitation Act. Counsel urged that the cause of action for the earlier suit which was instituted in the Court of Small Causes was different from the cause of action for the present suit which has culminated in a decree for eviction. Secondly, it was submitted that there was no plea in the plaint that was instituted in the present suit in regard to the exclusion of the time that was spent before the Court of Small Causes. The submission was that the ground for exemption from the law of limitation ought to have been pleaded in view of the provisions of Order 7 Rule 6 of the Code of Civil Procedure, 1908. These submissions have to be considered. Before dealing with the submissions

which have been urged, it would be necessary to advert to a recent judgment of the Supreme Court in *Deena (Dead) through LRs. Vs. Bharat Singh (Dead) thr. LRs. and Others*, wherein the Supreme Court held that the main factors which would guide the Court in extending the benefit, of Section 14 of the Limitation Act, 1963 to a litigant is whether the prior proceeding had been prosecuted with due diligence and good faith. That is because the party prosecuting the suit in good faith in the Court having no jurisdiction is entitled to exclusion of that period. The Supreme Court held that the expression "good faith" as used in Section 14 means "exercise of due care and attention". That expression qualifies the prosecution of the proceedings in the Court which ultimately is found to have no jurisdiction. Most importantly for the present purpose, the Supreme Court held that the finding as to good faith or the absence of it is a finding of fact. Similarly, it is now well settled that the words "or other cause of a like nature" are to be construed ejusdem generis with the words "defect of jurisdiction". The defect in other words must be of such a character as to make it impossible for the Court to entertain, the suit or application and to decide it on merits. This principle has also been laid down in the earlier decision of the Supreme Court in *Gurdit Singh and Others Vs. Munsha Singh and Others*, .

4. Section 14 of the Limitation Act, 1963 postulates the exclusion of a certain period of time in computing the period of limitation for any suit. That period of time is the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant. The proceedings must, however, relate to the same matter in issue. Moreover, the proceedings must be prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. The submission of the learned Counsel appearing on behalf of the appellant that the matter in issue in the earlier round of proceedings was not the same as that in the present suit, cannot be accepted. Both in the earlier suit as well as in the present suit, the matter in issues arose out of a claim of the original plaintiff for the recovery of possession. Undoubtedly, it is true that the earlier suit proceeded on the basis that there was a relationship of landlord and tenant and the suit was instituted after the termination of tenancy. However, the Appellate Court in the present case has noted that the conduct of the original plaintiff was bona fide and that the prosecution of the proceedings before the Court of Small Causes in the earlier round was not tainted with mala fides. There were three other tenants in the suit property. The father of the original plaintiff expired in 1947 when he was minor and in these circumstances; the Appellate Court held that the earlier suit was prosecuted with due diligence. This is, in view of the judgment of the Supreme Court in *Deena's* case, a finding of fact which does not warrant interference in this Second Appeal. Even otherwise, the view which has been taken, by the first Appellate Court is a correct view and should not in my view be, therefore, disturbed. The matter in issue in the earlier suit was the claim of the respondent to possession of the premises. That continued to be so in the present round of proceedings. In the

earlier round of proceedings, it was the Appellant who defended the suit by contending that there was no relationship of landlord and tenant. About this, there is no dispute between the Counsel before the Court. That objection having been upheld, the Court of Small Causes had no jurisdiction to entertain the suit for possession in the absence of a relationship of landlord and tenant.

5. Insofar as the second submission, is concerned, there can be no doubt about the principle which is enunciated in Order 7, Rule 6 of the Code of Civil Procedure, 1908. That provision lays down that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. The proviso, however, lays down that the Court may permit the plaintiff to claim exemption, from the law of limitation on any ground not set out in the plaint. In the present case, the relevant paras of the Plaint in the present suit have been perused by the Court. In paragraphs 2, 3 and 4 of the Plaint, there is a clear reference to the prosecution of the earlier proceedings. The original plaintiff has adverted to the fact that during the lifetime of his father it was the father who was looking after the property. There is a reference to the fact that the father of the plaintiff was during his lifetime collecting rent of the property from all the tenants. The plaintiff averred that he was a minor when his father expired and the property was thereafter, looked after by his uncle who recovered the rent. The earlier suit was instituted on the assumption that the original defendant was also a tenant in respect of the suit premises after the notice of termination dated 8th January 1968. There has then been a reference to the proceedings which took place before the Court of Small Causes and before this Court, in paragraph 8 of the plaint, it has been averred that the cause of action, accrued after the decision of the Appellate Court and again after the decision of this Court dismissing the Special Civil Application. Having regard to the averments which have been made in paragraphs 2, 3, 4 and 8 of the Plaint I am of the view that sufficient foundation was made in the pleadings for availing of the benefit of Section 14. Article 65 of the Schedule to the Limitation Act provides for the period of limitation for a suit for possession of immovable property or interest therein based on title. The period of limitation is 12 years and limitation begins to run when possession of the defendant becomes adverse to the plaintiff. In the present case, the Appellant has failed in his effort to establish a case for adverse possession and very fairly that not has been the issue which has been canvassed before this Court. Be that as it may, I am of the view that the finding which has been arrived at by the Courts below on the question of limitation is correct and does not call for interference in this Second Appeal. The appellant has manifestly failed to establish any claim or interest of whatsoever nature in respect of the suit premises or any entitlement to continue therein. The original defendant has expired during the pendency of the proceedings and the appeal has now been prosecuted by his daughter who has come on the record. In the circumstances, there is no merit in the appeal which is accordingly dismissed. However, on the request of learned Counsel appearing on behalf of the Appellant, time to vacate

the premises is granted till 31st December 2004 subject to the filing of the usual undertaking by the Appellant as well by the person in occupation within a period of four weeks from today. Learned Counsel for the Appellant states that the brother's son Mr. Isaq Shaikh is in possession and that an undertaking will, therefore, be filed by the Appellant and by the aforesaid person. Time as aforesaid is granted subject to the filing of the undertaking within four weeks from today.

6. Parties be given copies of this order duly authenticated by the Sheristedar/ Personal Secretary of this Court.