
(1986) 11 BOM CK 0001
In the Bombay High Court
Case No : F.A. No. 463 of 1976

Achyut Amrit Rasal

APPELLANT

Vs

Shrikrishna Vyankatesh Chincholkar and others

RESPONDENT

Date of Decision : 27-11-1986

Acts Referred:

Evidence Act, 1872 — Section 116

Transfer of Property Act, 1882 — Section 13(1)(f), 53A

Citation : (1988) MhLj 250

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.A. Deshpande, for the Appellant; K.J. Abhyankar, for the Respondent

Judgement

Sharad Manohar, J.—Although the facts in this appeal appear to be somewhat diffused ones, the appeal is really speaking capable of being disposed of on the basis of just a few facts and, what is more important, on the basis of the law expounded by the Supreme Court in the case of Shri Ram Pasricha vs. Jagannath and others, AIR 1976 Supreme Court 2335. The facts of the case are set out more or less fully by the trial Court in its judgment and since I am confirming the said judgment, I do not propose to set out the facts in details or to discuss the evidence at length on all the points. This is particularly so because the entire appeal is capable of being disposed of on the basis of just a few facts existence of which cannot be seriously disputed.

2. The appeal arises out of the suit filed by the present respondent No. 1 (who will be referred to hereinafter as the plaintiff) for recovery of the possession of the suit-house which is situated at Shegaon. Admittedly, one Shridhar Bapuji purchased the said house in the year 1917. His father Bapuji had three sons - Shridhar, Vyankatesh and Damodhar. (We will call this Vyankatesh as Vyankatesh senior-Sr.). The contention of the plaintiff has been that the suit house belonged to Shridhar exclusively and after his death it devolved upon his two sons

Ranganath and Vyankatesh. (This Vyankatesh will be referred to hereafter as Vyankatesh Junior-Jr.). Ranganath was the Karta of the family. He seems to have died sometime in the year 1960 (which appears to be a fatal year for many of the persons referred to in the suit). He left behind three daughters as his heirs. The relevant part of the Genealogy may, therefore, be set out as follows:

According to the plaintiff as partition took place between the two brothers Ranganath and Vyankatesh sometime in the year 1969 and in that partition the suit-house came to the share of Vyankatesh-Jr. exclusively. Vyankatesh (Jr.) had four sons viz. the plaintiffs and the original defendants Nos. 2 to 4. According to the plaintiff during his life time Vyankatesh-Jr. brought about a partition between himself and his four sons and in that partition, he allotted the suit-house to the share of plaintiff Shrikrishna. But he did not rest content with that. He also made a Will, Exhibit 94 dated 19-5-1972. In that Will it is specifically mentioned that the suit house had come to his share in the partition that had taken place between himself and his elder brother Ranganath. He also mentioned in the Will that after the partition he had made an application to the Village Panchayat for mutation of his name in the Panchayat record as regards the suit house but that nothing can be done by the Village Panchayat in that behalf till the date of the Will. Shortly after making of the Will Vyankatesh (Jr.) died in the year 1972 itself. Thereafter the plaintiff made an application to the Village Panchayat for mutation of his own name in the Panchayat records as regards the suit house and there is no dispute at least at the stage of this appeal that an application was made for the mutation in the Panchayat record for mutation of the plaintiffs name in the record of the Village Panchayat.

3. According to the plaintiff, it was noticed by him in the year 1974 that the present appellant (who will be referred to hereinafter as defendant No. 1) has been making extensive alterations in the suit house. The plaintiff, therefore, objected to the same and gave to him the notice dated 5-4-1974. He objected to the construction that the defendant No. 1 had started on the suit house. By his reply dated 23-5-1974 (Exhibit 59) the first defendant objected to the plaintiffs objection. He questioned the plaintiff's title to the suit house and his right to raise any such objection. Plaintiff says that by that reply the defendant No. 1 set up title to the suit house in himself. In this view of the matter, the plaintiff gave to the first defendant the second notice dated 8-6-1974 terminating his tenancy, inter alia, on the ground of denial of title. This is the genesis of the present suit filed by the plaintiff on 17-7-1974 for possession of the suit house from defendant No. 1.

To the suit he impleaded his three brothers defendants Nos. 2 to 4 as party defendants.

4. By his written statement (Exhibit 24) the first defendant flatly denied the plaintiff's title to the suit house and claimed title in himself stating that he had been in possession of the suit house right from the year 1942 as its owner and that, hence, he had perfected his title to the same by adverse possession.

Alternatively he contended that there had been an agreement of sale and that at least from the time of the agreement of sale he was in possession of the suit house as the owner thereof and he having remained in possession of the same as such owner for a period exceeding 12 years before the date of the suit, in any event, he had perfected his title to the suit house as from the date of the said agreement. He denied ever having been the tenant in respect of the suit house. He also denied the validity, veracity or legality of the Will (Exhibit 94) set up by the plaintiff.

5. But the more important contention raised by defendant No. 1 which is (sic) for the purpose of this appeal and which is somewhat ardently pressed into service by Shri Deshpande, the learned counsel for the appellant, is that there took place no partition whatsoever between Rangnath and Vyankatesh. The further part of the contention is that really speaking Shriknshna was not the sole owner of the property at all. According to the first defendant, when Shrikrishna purchased the property the purchase was not on his own behalf exclusively but it was on behalf of the joint family of which Damodar was the other Co-parTener. According to the defendant no partition took place between the branch of Shrikrishna on the one hand and of Damodar on the other. The plea was that the heirs of Damodar had as much of share in the suit house and since the notice given by the plaintiff was not on their behalf and since they had not been impleaded in the suit either as plaintiffs or party defendants, the suit filed by the plaintiff against the first defendant was not Maintainable.

6. So far as defendants Nos. 2 to 4 are concerned, they admitted the plaintiffs claim.

7. On these pleadings issues were framed by the learned Judge and the parties went in trial. The trial Court held that the suit house must really have belonged to Ranganath and Vyankatesh only. He further upheld the plaintiffs plea of partition between Ranganath and Vyankatesh. He also held the Will (Exhibit 94) set up by the plaintiff as proved. However, he also held further that Vyankatesh could have a right to will away only his 1/5th share of the property and not the entire house. Hence, he held that the Will was efficacious only to the extent of Vyankatesh's 1/5th share in the property. The plaintiff, he held, had already got 1/5th share in the suit house which was the property of the joint family of which Vyankatesh was the Karta and his four sons (the plaintiff and defendants Nos. 2 to 4) were the other members. Plaintiff, thus, could get his 1/5th share in the suit-house plus the 1/5th share which was bequeathed upon him by his father Vyankatesh. Normally speaking, therefore, according to the learned Judge the plaintiff would be entitled to recover only 2/5th share in the suit house but since other defendants had conceded the plaintiff's claim the Court held that the plaintiff was entitled to set up title to and file a suit for recovery of possession of the entire house.

So far as the defendant's plea of acquisition of title by adverse possession was concerned, the learned Judge examined the evidence led by the plaintiff which

shows that the defendant No. 1 had got himself inducted on the suit property by taking a "tenancy from Ranganath. The learned Judge examined the abundant evidence on record which went to show that not only that the first defendant had made entry upon the suit property as tenant of Ranganath, but that from time to time he had asserted the said position to various authorities proclaiming that he was just a tenant on the land. For instance, the Gram Panchayat had made demand for payment of taxes and on each of the occasions he had directed the Gram Panchayat to recover the taxes from the owner because he was only a tenant in the property. The learned Judge, therefore, held that a person who comes into possession of the immovable property as a tenant cannot set up adverse possession against the landlord because a neat plea of estoppel could be set up against him u/s 116 of the Act, The learned Judge held that unless the first defendant had surrendered possession in the first instance, it was not open for him to set up the plea of adverse possession against the landlord. The defendant's plea of acquisition of title by adverse possession was, therefore, negated by the learned Judge.

8. Even the defendant's contention of his possession in pursuance of the Agreement of Sale was negated by the learned Judge, holding that a completed agreement was not proved at all.

Having regard to these findings, the learned Judge decreed the plaintiff's suit for possession with costs.

9. In this appeal Mr. Deshpande, the learned counsel for the appellant, the first defendant, has not controverted the position that the defendant was inducted on the property initially by virtue of the tenancy given to him by Ranganath. It is, therefore, unnecessary for me to discuss the veritably clinching evidence led by the plaintiff in that behalf. Further, the learned counsel did not dispute the legal position that if the tenancy relationship was held established, the tenant would be estopped from denying the landlord's title at the commencement of the tenancy or to plead adverse possession against the landlord or the persons claiming through the landlord. In this view of the matter the contention of the defendant of acquisition of title by adverse possession was not pressed into service before me by the learned counsel and to my mind quite rightly. The fact that the defendant had got his initial entry in the suit-house as a tenant is established by unimpeachable evidence on record and it is now well settled that once the person enters into premises as tenant, he cannot set up adverse possession against the landlord or against any persons claiming through landlord unless he has firstly surrendered the possession. I do not wish to deal with the question as to how he could surrender the possession and then, still, claim adverse possession. That branch of law does not arise for my consideration in this appeal because no arguments in that behalf have been advanced.

10. Even the contention that the defendant had gone into possession of the house in pursuance of the Agreement of Sale could not be and has not been seriously pressed into service by Mr. Deshpande. It does appear that there was

some kind of talk between Ranganath on the one hand and the defendant on the other for sale of the house to the defendant. But it is also clear from the evidence on record that the said negotiations had remained only at the level of negotiations or talks. Nothing concrete came out of them. Admittedly, the defendant never paid a farthing to Ranganath or to anybody else for purchase of the house. In fact, it cannot be and is not disputed that this defendant has got ingrained in him, a deep-rooted disdain for and objections against paying anything to anybody! He did not pay the purchase price which was payable to the landlord. He did not pay any rent to the landlord but he did not even pay the taxes for the house. Whenever any demand was made by the Gram Panchayat, he resorted to the convenient expedient of directing the officers of the Village Panchayat to the owner of the house contending that he, the defendant, was just a tenant. Moreover, there is nothing on record to show that the defendant, who was already in possession of the suit-house as tenant, did something further by virtue of which his possession could be attributable to the Agreement of Sale. Provisions of section 53-A of the Transfer of Property Act, therefore, do not come into operation at all. In fact that provision has not even been pressed into service. The contention of the defendant is that because there was an Agreement of Sale the subsequent possession of the defendant was that of an owner on the basis of the Agreement of Sale and that, that is the reason why he was perfectly entitled to the suit-house by adverse possession. The completed agreement is not established at all. No consideration whatsoever is paid for the same. There is nothing to show that the relationship of the defendant with his landlord changed after the talks relating to the agreement. The plea based upon the so called Agreement of Sale, it must be held, has been rightly negated by the trial Court.

11. The only question that remains is whether Mr. Deshpande's plea about the absence of the exclusive title vesting in the plaintiff can be accepted for non-suiting the plaintiff. Mr. Deshpande does not deny the following position of law viz. that if "A" landlord dies leaving behind three heirs "B", "C" and "D", "B" becomes one of the co-owners and as such co-owner can file a suit against "A"s tenant "X". Mr. Deshpande was not interested in disputing the proposition that if such a suit is filed by "B" even without impleading "C" and "D", his other co-owner, in such a suit "B" would be deemed to have the power to file suit, for possession against the tenant, as the agent or representative of his co-owners. In such a case "B" does not claim title exclusively for himself. He does not deny the rights of his other co-owners. A position that the other co-owners have allowed him to file suit on their behalf for recovery of possession from the tenant can be readily inferred or conceived of in such a case. This was precisely the position contemplated by and emanating from the judgment of the Supreme Court in the case of Kanta Goel Vs. B.P. Pathak and Others, . Mr. Deshpande does not dispute the correctness of this proposition of law.

12. But what Mr. Deshpande points out, and not without force, is that in the instant case the plaintiff has claimed exclusive title in himself. He has denied the title to his three brothers, defendants Nos. 2 to 4. Moreover, Mr. Deshpande

points out further that there exists a document on record. Exhibit 116, which clearly shows that this suit-house was purchased by Shridhar not on his own behalf but as the Karta of joint family consisting of himself, his brother Vyankatesh-Sr. and his another brother Damodhar. The position in this connection is sufficiently revealed by the Genealogy set out in para 2 above.

Vynakatesh-Sr., father of the plaintiff, had filed Special Suit No. 36 of 1954 for partition but to that suit not only Ranganath but even Govind Damodar, one of the sons of Damodhar, brother of Shridhar as also Laxman Shankar who was the grand-son of said Damodar were impleaded as party defendants. Not only that, but even sons of Govind Damodar viz. Damodar, Purshottam, Gangadhar and Nilkanth were impleaded as parties to that suit. It appears that initially a compromise was arrived at in that suit and by that compromise various properties appear to have been distributed amongst the parties but so far as the suit-house was concerned, the compromise appears to have provided that the suit-house should be kept common, that the same should be sold and that the sale proceeds should be distributed amongst the four branches (presumably the two branches of Shridhar and the two branches of Damodar. Vyankatesh-Sr., it appears died without any heir). This compromise was not accepted by Purshottam but since his father Govind, had agreed to the same, the compromise was considered to be complete and after the Signatures of the agreeing parties, application was made to the Court for decree in terms of the compromise.

It is on this document produced in these proceedings at Exhibit 116, that Mr. Deshpande's contention is based viz. that the property must really have belonged not only to Shridhar alone but also to his other brother Damodar. The argument is that plaintiff Shrikrishna may be entitled to file suit on behalf of the co-owners whose title he did not deny; but he is not entitled to file suit on behalf of the other co-owners viz. the heirs of Damodar as also the heirs of Ranganath whose title he must by necessary implications be deemed to be denying. Plea is that when plaintiff sets up exclusive title in himself by virtue of the Will of his father, he is in fact contending that Vyankatesh had title to the exclusion of all other co-Parteners and their Heirs. He is therefore, setting a title adversely against the other co-owners and if he does such a thing, he cannot be said to be representing the interest of other co-owners whose title he is denying and he cannot claim agency on their behalf to file the suit.

In support of that contention Mr. Deshpande has strongly relied upon a judgment of the Gujarat High Court reported in Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and Others, .

I must say that the distinction which is sought to be made by the learned counsel in the two categories of cases is very much identified and recognised by the Full Bench of the Gujarat High Court. When one co-owner does not deny the fact that the property is owned by some other co-owners as well and still gives notice all by himself terminating the tenancy of the defendant the law can presume that

the plaintiff landlord has the implied agency from the other co-owners for filing the suit against the tenant for possession or for recovery of rent because, after all, the decree in such a case is going to enure to the benefit of the entire body of co-owners. But when one of the co-owners denies the title of some of the other co-owners, expressly or by necessary implications, such as agency being given by the excluded co-owners cannot be readily inferred. This is the proposition of law which Mr. Deshpande has urged and it appears that this argument gets quite some support from the judgment of the Full Bench of the Gujarat High Court. Now in such a case, when one of the co-owners claims exclusive title in himself, it may be that he may create tenancy in favour of the tenant all by himself and in such a case even though there are other co-owners of the property leased by him, so far as the tenant is concerned, he would not be entitled to deny the title of the persons from whom he got the tenancy, merely on the ground that in that property some other persons had interest as co-owners. Section 116 of the Evidence Act creates a clear bar against such tenant from pleading any such absence of title against the person from whom he got the tenancy. But in the case such as the present one, the tenancy is taken by the defendant not from the plaintiff but from the plaintiff's predecessor-in-title. In such a case it would be open for the tenant to contend that not only the plaintiff but there are other persons who are having interest in the property leased to him and it would be possible for, him to contend that the suit by just one of the co-owners against him would not lie if the plaintiff co-owner cannot make out a case of agency on behalf of the other co-owners whose title he has expressly or impliedly denied.

The argument does have some force in it and it does appear that it has some foundation in this argument of the judgment of the Full Bench of the Gujarat High Court.

However, this judgment of the Gujarat High Court has been examined by the Supreme Court in *Sri Ram Pasricha Vs. Jagannath and Others*, . No doubt, in paragraph 20 of the said judgment, the Supreme Court has only distinguished the case but in paragraphs 29 and 30 of its judgment the Supreme Court has laid down a proposition of law which to my mind, sets at rest, the doubt if any, in a co-owner's capacity to file a suit for recovery of possession against the tenant without impleading the other co-owners. At first blush it may appear that the Supreme Court was considering only the provisions and effect of the West Bengal Premises Tenancy Act; but a careful reading of the authority leaves no room for doubt that the Supreme Court was laying down a general proposition of law. The very beginning of the paragraph 29 is by the words "jurisprudentially". It is worthwhile setting out the statement of law expounded by the Supreme Court in the said paragraphs 29 and 30 which runs as follows :

29. Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property.

The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises is not the owner of the premises within the meaning of Section 13(1)(f). It is not necessary to establish that the plaintiff is the only owner of the property for the purpose of Section 13(1)(f) as long as he is a co-owner of the property being at the same time the acknowledged landlord of the defendants.

30. Mr. Tarkunde also submitted that since the Calcutta High Court has held in *Yogamaya Pakhira vs. Santi Sudha Base*, ILR (1968) 2 Cal. 70 that a permanent lessee is not an owner within the meaning of Section 13(1)(f) a co-owner would not be in a better position. We are of opinion that a co-owner is as much an owner of the entire property as any sole owner of a property is. We, however, express no opinion about the case of a permanent lessee as this point does not arise in this appeal.

This proposition of law is based upon the substantive law viz. that a co-owner or a joint owner of the property is the owner not only of any particular part of the property, but his ownership extends to the entire property to the extent of his own share. It is on this basis that the Supreme Court has held that even one of the co-owners can file a suit against a tenant for recovery of possession or for arrears of rent. The implication appears to be that when the co-owner obtains possession or amount of rent from the defendant he may become accountable to the body of co-owners but so far as the defendant tenant is concerned, he has no right to question the right or title even of one of the co-owners to file a suit against him for recovery of possession. The Supreme Court has not examined the question as to what would happen if there exists a dispute between co-owners about the filing of the suit; nor am I required to examine that question. That question will be examined by the Court at appropriate time when the question is appropriately raised but that does not affect the proposition of law declared by the Supreme Court viz. that even one co-owner is entitled to file a suit against the tenant for relief relating to the tenancy even without impleading the other co-owners.

This being the position of law, the point raised by Mr. Deshpande stands fully answered and the appeal will have to be dismissed on this ground itself.

However, Mr. Abhyankar, the learned Counsel for the first respondent rightly pointed out to me that this is in fact a case where it can be said that the plaintiff has fully established even the facts that:

(a) After Shridhar's death the suit-house really belonged only to Ranganath and Vyankatesh and that Shridhar's brother Vyankatesh and Damodar had no interest in the same.

(b) That there came about a partition between Rangnath and Vyankatesh in the year 1955 in which partition of the suit-house had come to the share of Vyankatesh.

(c) That the plaintiff got his suit-house from Vyankatesh either by Will (Exhibit 94) or by virtue of the partition that was brought about by Vyankatesh between himself and his four sons.

13. There does exist enough evidence on record to reinforce Mr. Abhyankar's above arguments. In the first place we find that the Will (Exhibit 94) itself mentions the factum about the previous partition between Rangnath and Vyankatesh. The Will proceeds to state that the suit-house belonged to Ranganat and Vyankatesh only, that the partition was brought about between the two in the year 1959 and that in the partition the suit-house had gone to the share of Vyankatesh. The Will further states that pursuant to the partition Vyankatesh has made application to the Village Panchayat for mutation of his name in the Panchayat record vis-a-vis the suit-house. It is stated in the Will that no step is taken by the Village Panchayat in spite of his application for mutation. It is to be borne in mind that at the time when this Will was made there existed no dispute whatsoever either between plaintiff and the defendant or between the plaintiff's branch and the other branches. No doubt, the statement made in the Will was in the nature of the statement in his own favour; but such a statement made before the occurrence of the dispute does have evidentiary value. This evidentiary value, as rightly argued by Mr. Abhyankar, is very much corroborated by the circumstantial evidence on record viz. that even though the partition took place in 1959, between Ranganath and Vyankatesh, none of the other persons who would be having interest in the house, had it continued to belong to all the branches, raised any objection to such partition. Further, no objection was raised even to the application for mutation. Further, plaintiff himself made an application for mutation in the year 1972 and in pursuance of the application the house was mutated by the Panchayat in his name and still none of the persons who might be interested in the house if defendant's plea was correct, raised a small finger against such application or against the mutation entry. It is nobody's case that such objection was raised by anybody even later on. This is, to my mind, quite a strong circumstantial piece of evidence in favour of the plaintiff to prove that the suit-house must have been allotted to the share of Vyankatesh by concurrence of all other interested persons and that was the reason why the same was bequeathed by Vyankatesh upon the plaintiff by the Will (Exhibit 94) or why he allotted the same to the plaintiff's share in the partition that took place between Vyankatesh on the one hand and his four sons on the other. Whichever way you may take it, it has got to be held that the plaintiff has established enough title to the suit-house. In any event his title has become unchallengeable and unquestionable at least by person such as present defendant No. 1 who has not a title of title to the suit house.

In this connection, the attitude adopted by the defendant is extremely curious. He claimed title by adverse possession denying his initial tenancy. He failed. But in the same breath he had informed various authorities that he was not liable to pay taxes because somebody else was the owner. Evidently, that somebody else could not be any one other man the plaintiff or his predecessor. He has not paid

rent to anybody, he has not paid taxes to the Gram Panchayat. His original tenancy is denied by him but the denial is found to be futile. It follows that he is a brazen trespasser on the land. Allowing such rank trespassers to defeat the claims of legitimate owners and to remain in possession brazenly and with impunity is an extremely sorry state of affairs which should shock any Court of law, justice and equity.

Having regard to all these facts the appeal fails and the same is hereby dismissed with costs throughout.

14. Mr. Abhyankar has filed an application for appointing the Receiver, when immediately I heard the facts relating to the appeal I was inclined to grant the application subject, of course, to the argument that might be advanced by Mr. Deshpande in that behalf. However, since I have disposed of the appeal itself, I am not sure that I continue to be seized of the jurisdiction to pass an order appointing the Receiver after the disposal of the appeal. It will be of course open for the plaintiff to make appropriate application before the Execution Court for appointment of Receiver even before the actual possession of the suit-house is handed over to the plaintiff decree-holder in execution of the decree. If such an application is made, the executing Court will be entitled, nay bound, to pass appropriate order on the same in accordance with law as, particularly, in accordance with equity, bearing in mind that appointment of Receiver is the exercise of the Court's equity jurisdiction. If such an application is made, the lower Court shall act upon the minutes of this order without waiting for the writ of this Court.

Having regard to the fact that the appellant has been in illegal possession for decades and has stuck fast to the property even without payment of takes and rent, this would be an appropriate case to quantify the costs of this appeal at Rs. 2500/- .