
(2007) 06 BOM CK 0034

In the Bombay High Court

Case No : F.A. No's. 748 of 1977 and 618 and 257 of 1979 and Cross-objection
Stamp No. 149 of 1978

Adinath Limbaji Navale and Others

APPELLANT

Vs

Policeman Housing Society and Others

RESPONDENT

Date of Decision : 04-06-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Limitation Act, 1963 — Article 144, 64, 65
Maharashtra Co-operative Societies Act, 1960 — Section 164
Transfer of Property Act, 1882 — Section 41, 53A

Citation : (2007) 5 ALLMR 737 : (2007) 6 MhLj 781

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.P. Deshmukh, for P.R. Deshmukh, S.S. Choudhari, P.M. Shah for
S.M. Kulkarni, R.N. Dhorde and M.P. Harjule, for the Appellant;

Judgement

V.R. Kingaonkar, J.—These three appeals and Cross Objection arise out of Judgment rendered by learned Civil Judge (Senior Division), Beed in suit for recovery of possession and mesne profits. (Special Civil Suit No. 14 of 1973).

2. For sake of convenience, the parties may be referred to by their nomenclature in the trial Court. First Appeal No. 748 of 1977 (APP-I) is preferred by original defendant Nos. 1 to 8. First Appeal No. 618 of 1979 (APP-II) is preferred by original defendant Nos. 9 and 10, who are housing societies. First Appeal No. 257 of 1979 (APP-III) was preferred by original plaintiff No. 3 Fatema Begum. She died during pendency of the appeals and nothing significant has remained to be decided in her appeal. Cross-Objection is preferred by original plaintiffs. They impugn a part of the decree regarding refusal of mesne profits. The appellants in APP-I and APP-II seek to impugn Judgment and decree for possession. Deceased appellant in APP-III had impugned rejection of her claim as a co-owner for recovery of her share.

3. Original plaintiffs have died and their legal representatives have been substituted in their stead. Deceased plaintiff No. 1 - Abdul Sattarkhan was a Superintending Engineer in Andhra Pradesh and used to reside at Hyderabad during tenure of his service. Deceased plaintiff No. 2 - Abdul Jabbarkhan was a Driver employed in M.S.R.T.C. He used to reside at Beed. Original plaintiff No. 3 - Fatima Begum was a widow and mother of deceased plaintiff Nos. 1 and 2, who were real brothers inter se.

4. The dispute relates to land Survey No. 30/1, admeasuring 18 acres, 24 gunthas and Survey No. 31, admeasuring 20 acres, 36 gunthas, situated at Beed. It appears that the suit lands were previously in the outskirts of the township but during passage of time, now they are within the limits of the township and surrounded by localities.

5. Admittedly, the suit lands were held by deceased Abdul Gaffarkhan, who was father of original plaintiff Nos. 1 and 2 and husband of plaintiff No. 3. He died somewhere in 1940-42 and thereafter, the suit lands came in the hands of the plaintiffs. The deceased plaintiff Nos. 1 and 2 each were having seven annas share, whereas deceased plaintiff No. 3 was having two annas share as per tenets of the Mohammedan law. Since original plaintiff No. 3 - Fatima Begum died during pendency of the appeals, now her share would devolve upon the two branches of the original plaintiff Nos. 1 and 2. They would take equal shares.

6. Original defendant Nos. 1 to 7 are legal representatives of deceased Limbaji Navale, who was real brother of original defendant No. 8 - Gyandev Navale. They claimed their rights in respect of the suit lands on basis of alleged agreement of sale executed by the deceased plaintiff Nos. 1 and 2. It is an admitted fact that deceased Limbaji and deceased defendant No. 8 - Gyandev alienated the suit lands in favour of original defendant Nos. 9 and 10, by virtue of two different sale deeds. The members of these housing societies have constructed dwelling houses over the plots allotted to them.

7. The deceased plaintiff Nos. 1 to 3 filed suit for recovery of possession in respect of the suit lands and also for mesne profits at rate of Rs. 1,500/- p.a. alleging that the defendants illegally dispossessed them somewhere in June, 1970. They averred that the defendant Nos. 1 to 8 had set up a false claim for injunction and had filed a suit (R.C.S. No. 98 of 1969) alleging that there was an agreement of sale dated 10-8-1951 between the parties and the suit lands were delivered into their possession on basis of such agreement. The original defendant Nos. 1 and 8 had contended in their suit (R.C.S. No. 98 of 1969) that they were ready and willing to perform their part of the agreement, sale permission was also granted but, the deceased plaintiff No. 2 - Abdul Jabbarkhan had caused illegal obstruction in their possession. It was alleged that the deceased plaintiff Nos. 1 and 2 had agreed to alienate suit lands for consideration of Rs. 6,000/- and had obtained Rs. 3,000/- as earnest amount. It was further alleged that subsequently, an amount of Rs. 1,000/- was paid at the time of verification of the affidavits required for obtaining sale permission and

remaining consideration of Rs. 2,000/- was paid in 1966. The suit was, however, withdrawn by them.

8. The plaintiffs' case was that they never executed any agreement of sale. There was no agreement to alienate the suit lands in favour of deceased Limbaji and defendant No. 8 nor possession thereof was delivered to them. The letters unauthorisedly took possession of the suit lands in or about third week of June 1970 and later on got withdrawn the suit (R.C.S. No. 98 of 1969). The plaintiffs, therefore, sought recovery of possession on basis of title and also claimed mesne profits from the date of institution of the suit.

9. The original defendant Nos. 1 to 3, 7 and 8 resisted the suit by their common written statement (Exh.33). Assertions of these defendants were that deceased Limbaji Navale and original defendant No. 8 Gyandev Navale, who were real brothers inter-se, had agreed to purchase the suit lands from the plaintiff Nos. 1 and 2. The deceased plaintiff No. 2 was managing the suit lands for himself and on behalf of deceased plaintiff No. 1. Initially, the plaintiff No. 2, for himself and as representative of the plaintiff No. 1, entered into an agreement of sale to alienate the suit lands for consideration of Rs. 3,000/- Osmaniya Sikke equivalent to Rs. 3,500/-, Indian currency. He accepted Rs. 550/- towards earnest amount and executed "Isaar Pavati" dated 16-2-1359-F (1949 A.D.). The deceased plaintiff No. 2 inducted deceased Limbaji and deceased defendant No. 8 Gyandev in possession of the suit lands on basis of the said agreement of sale. They further asserted that subsequently, deceased plaintiff No. 1 demanded more consideration as he felt that the earlier price was low. So, again the price was resettled at Rs. 6,000/- and the agreement was renovated on 18-8-1951, all other terms remaining the same except that of the price, which was enhanced. Then, deceased Limbaji and deceased defendant No. 8 - Gyandev paid Rs. 1,450/- towards part of the consideration, which was acknowledged by both the plaintiffs. They had agreed to obtain sale permission. Then, proceedings were initiated for permission to alienate the suit lands. That was granted by the competent authority. Though deceased Limbaji Navale and original defendant No. 8 - Gyandev Navale were ready and willing to perform their part of the agreement, the plaintiff Nos. 1 and 2 avoided to complete the transaction. Said Limbajirao Navale died on 14-1-1969 and thereafter, his legal representatives i.e. defendant Nos. 1 to 7 continued to remain in possession of the suit lands along with deceased defendant No. 8 - Gyandev Navale in pursuance to the terms of the agreement of sale as the prospective purchasers. They denied that the plaintiffs were dispossessed in third week of June, 1970.

10. The original defendant Nos. 1 to 8 pleaded defence of part performance u/s 53-A of the Transfer of Property Act. Besides, they asserted that the plaintiffs are not in possession since more than 23 years and hence, there is no subsisting title with the plaintiffs. They submitted that the suit is barred by limitation. Hence they sought dismissal of the suit.

11. The defendant Nos. 9 and 10 adopted the pleadings set up by the original

defendant Nos. 1 to 8. In addition, they would submit that they are the bona fide purchasers of the suit lands for valuable consideration and hence, deserve protection. They also contended that the suit is not maintainable without giving statutory notice of two months, as required u/s 164 of the Maharashtra Co-operative Societies Act, 1960. They contended that the suit is collusive and false. Consequently, they sought dismissal of the suit.

12. The parties went to trial over several issues framed below Exh.37-B. The trial Court held that the plaintiff Nos. 1 and 2 were joint owners of the suit lands. The trial Court negated the defences raised by the defendants. It was held that the defendants failed to prove their possession on basis of any agreement of sale. The trial Court further held that the suit was not barred by limitation. The trial Court decreed the suit for relief of possession but, did not allow the claim for mesne profits, as well did not consider the claim of original plaintiff No. 3 - Fatima Begum. Hence, the above three appeals and the Cross Objection.

13. Earlier, the appeals and Cross Objection were heard by a Division Bench of this Court. The Division Bench (Coram : A. A. Desai and A. D. Mane, JJ.) dismissed the APP-1 and APP-II and confirmed the trial Court's Judgment. The Cross-Objection was, however, allowed and the issue was remitted to the trial Court for holding enquiry under Order XX, Rule 12 of the Civil Procedure Code. The Division Bench of this Court held that the defence of part performance u/s 53-A of the Transfer of Property Act was not available because, the contract had become unenforceable since the remedy of specific performance was time barred. The question, whether defence of part performance can be availed in respect of an agreement of sale in which remedy for specific performance is barred by limitation was considered by the Apex Court in a group of Civil Appeals (Civil Appeal No. 2706 of 1991 with Civil Appeal Nos. 1349/1991, 1350/1991 and 3304/1993). The Apex Court reversed the view of the Division Bench. The Apex Court held that the view taken by the Division Bench was subsequently overruled by Full Bench of this Court in *Mahadeo Nathuji Patil v. Surajbai Khushal Chandel Lakkad and Ors.* 1994 M.L.J. 1145, which lays down the correct position of law. The Apex Court was pleased to set aside the Judgment of the Division Bench and send back the matter to decide the other questions involved in these matters.

14. Mr. P. M. Shah, Senior Advocate, Mr. S.S. Choudhari, and Mr. S.P. Deshmukh. learned Advocates appearing for the appellants in APP-I and APP-II would submit that the appellants are entitled to claim protection u/s 53-A of the Transfer of Property Act. They would submit that the agreement of sale dated 16-2-1949 A.D. (1359-F) is duly proved. They would submit that initially, plaintiff No. 2 alone entered into the agreement, representing to deceased Limbaji Navale and defendant No. 8 - Gyandev Navale that he was authorised to deal with the suit lands for and on behalf of the original plaintiff No. 1 - Abdul Sattar. They further submit that long standing revenue entries appearing in name of defendant No. 8 - Gyandev were never challenged by the original plaintiff No. 1 - Abdul Sattar and as such, his silence gives rise to inference that he was not having any claim

about the suit lands. It is argued that the original defendant Nos. 1 to 8 were entitled to seek protection u/s 53-A of the Transfer of Property Act because, they were inducted in possession on basis of the agreement of sale (Exh.107), which was subsequently ratified by original plaintiff No. 1 -Abdul Sattar in or about 1951. They argued that the learned trial Court unnecessarily considered the pleadings of the previous suit (R.C.S. No. 98 of 1969). They would submit that the earlier suit was withdrawn due to formal defects and hence, those pleadings were of no avail. They argued that the trial Court committed patent error while decreeing the suit though the written agreement of sale (Exh.107) is duly proved. It is further argued that the suit was barred by limitation inasmuch as it was governed by old Article 144 (Now 64) of the Limitation Act. It is further argued that the rights of the plaintiff No. 1 Abdul Sattarkhan were extinguished because, he did not challenge the agreement of sale executed by plaintiff No. 2 - Abdul Jabbarkhan within period of twelve years. It is argued by learned Advocate Mr. Deshmukh that alternatively possession of the defendants was hostile as against the original plaintiff No. 1 and, therefore, to that extent, defendant Nos. 1 to 8 became owners by adverse possession though they remained in possession of the rest of the share in the suit land as prospective purchasers of original plaintiff No. 2 - Abdul Jabbarkhan. It is argued by learned Advocate Mr. Choudhari that the suit could not be entertained without giving of statutory notice u/s 164 of the Maharashtra Co-operative Societies Act, 1960 because, the defendant Nos. 9 and 10 are the Co-operative Housing Societies. He would also submit that the members of the said societies are necessary parties to the suit for possession. Hence, the learned Advocates urged to allow the two appeals, i.e. APP-I and APP-II. As against this, learned Advocate Mr. Dhorde R. N., appearing for the original plaintiffs, argued that the agreement of sale is not proved nor induction of the deceased Limbajirao Navale and defendant No. 8 - Gyandev Navale on basis of such agreement of sale, into possession of the suit lands is proved. He would submit that the plaintiffs were dispossessed after seeking relief of injunction in the earlier suit. He would further submit that the defendant Nos. 9 and 10 have no privity of contract with the plaintiffs and cannot claim any protection, whatsoever, in view of Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through Lrs., . He supported the impugned Judgment and Decree and further claimed relief of mesne profits.

15. Considering nature of controversy involved, the following points need determination.

(i) Whether the trial Court was right in holding that deceased Limbaji Navale and defendant No. 8 - Gyandev Navale were not inducted in possession of the suit lands on basis of any agreement of sale executed by the plaintiff Nos. 1 and 2 or either of them ?

(ii) Whether legal protection is available u/s 53-A of the Transfer of Property Act to the defendants or any of them? If yes, then to what extent it is available ?

(iii) Whether original defendant Nos. 8 and 9, who are subsequent transferees,

may be regarded as persons claiming under the original transferees i.e. defendant Nos. 1 to 8 and, therefore, the protection available to defendant Nos. 1 to 8 can be extended to them ?

(iv) Whether the suit is barred by limitation ?

(v) Whether the suit is bad for non-joinder of necessary parties or for want of legal notice contemplated u/s 164 of the Maharashtra Co-operative Societies Act, 1960?

My findings on the above points are thus:

(i) No, they were inducted in possession on basis of agreement of sale (Exh.107) executed only by original plaintiff No. 2 - Abdul Jabbarkhan.

(ii) Yes, only to the extent of half undivided share of deceased plaintiff No. 2 - Abdul Jabbarkhan.

(iii) Yes, it can be extended to the extent of half share to which protection is available provided to original defendant Nos. 1 to 8 since they are claiming through the defendant Nos. 1 to 8.

(iv) No.

(v) No.

The reasons are discussed hereinafter.

16. Before I proceed to consider the rival submissions, it may be stated that the dispute looms over more than 30 years. Sometimes pendency of such a dispute gives rise to tendrils of innovative improvements and rise for new arguments. The dispute of such type gives benefit to those, who are in possession and rankles hearts of who are not. There is a possible danger to widen the scope of the dispute instead of narrowing the arena thereof. This I am inclined to say so in view of the fact that whatever arguments, which were advanced before the Division Bench, for and on behalf of the appellants, were limited and centered around the protection available u/s 53-A of the Transfer of Property Act and question of limitation. One of the limb of argument was that the original plaintiff No. 1 was not a party to the agreement of sale and hence, to that extent possession of the defendants was adverse. It was argued that they had perfected their title to the extent of the share of the original plaintiff No. 1 - Abdul Sattar. Still, however, now it is argued that plaintiff No. 1 - Abdul Sattar had ratified the agreement in 1951 after claiming more price. So, he too was bound by the terms of the agreement of sale.

17. It would be therefore useful to first settle the issues of facts. The trial Court, on appreciation of evidence, reached conclusion that "Isaar Pavati" dated 16-2-1949 (1359-F) and receipt regarding payment of Rs. 1,000/- on 26-6-1951 (Exh.107 and Exh.93) are duly proved. The trial Court held, however, that execution of subsequent agreement of sale (Isaar Pavati) dated 10-8-1951 was

not proved and the deceased plaintiff No. 1 was not a party to any such subsequent renovation of contract. The evidence on record would clearly show that deceased plaintiff No. 1 - Abdul Sattarkhan was gainfully employed and was residing at Hyderabad (Andhra Pradesh). He hardly could find time to look after cultivation of the suit lands. Cultivation of both the suit lands was being managed by deceased plaintiff No. 2 - Abdul Jabbarkhan. The lands were recorded in name of deceased plaintiff No. 1 - Abdul Sattarkhan as a "Pattedar". A brief survey of the revenue record would make it manifest that name of deceased Limbaji Navale was recorded in the column of cultivation for year 1950. Copy of the Namuna No. 3 (Pahani Patrak) (Exh.47) reveals that name of deceased Limbaji Navale was recorded as cultivator through the "Pattedars", i.e. deceased plaintiff Nos. 1 and 2. Similar entries were carried in the record for the year 1951 (Exh.48). The entries for the year 1952 continued to be identical (Exh.49). It is only in 1953, for the first time, that the entries in the Namuna No. 3 - "Pahani Patrak" (Exh.50) indicated possession of said Limbaji Navale on basis of "Isaar Pavati" (agreement of sale). Such entries were also recorded in 1954 in the copy of "Pahani Patrak" (Exh.51). The revenue entries go to show that Land Survey Nos. 30 and 31 were being cultivated by Limbaji Navale and original defendant No. 8 - Gyandev Navale.

18. The oral evidence of defendants would show that deceased plaintiff No. 2 - Abdul Jabbarkhan alone used to manage affairs of the suit lands. Original defendant No. 8 - Gyandev entered the witness box as DW-1. His version purports to show that he and deceased Limbaji Navale had agreed to purchase the suit lands. He deposed that deceased plaintiff No. 2 - Abdul Jabbarkhan represented to them that he was authorised to act for and on behalf of plaintiff No. 1 - Abdul Sattarkhan, who used to stay at Hyderabad. The version of DW-Gyandev reveals that the consideration was fixed at Rs. 3,000/- (Osmaniya Sikke), i.e. equivalent to Rs. 3,500/- Indian currency. He corroborated the execution of the agreement of sale (Exh.107). He gave details as regards payment of Rs. 550/- as earnest amount to deceased plaintiff No. 2 - Abdul Jabbarkhan at the time of agreement of sale, His version reveals that immediately, the possession of the suit lands was handed over to them though it was not so recited in the agreement. He further deposed that after one and half year, he paid Rs. 1,000/- to deceased plaintiff No. 2 Abdul Jabbarkhan towards part of the consideration and the latter executed a receipt (Exh.93) in his favour.

19. According to DW-Gyandev, somewhere in month of August, 1951, deceased plaintiff No. 1 - Abdul Sattarkhan visited Beed and questioned adequacy of the price. At his instance, the price was negotiated and resettled at Rs. 6,000/-. He states that a fresh agreement of sale was executed by both the brothers when he and Limbaji Navale further paid Rs. 1,450/-, which made the total payment at Rs. 3,000/-. According to him, the agreement to sale was scribed by Bansilal and both the plaintiffs had signed the same. He further deposed that the agreement of sale was attested by one Sakharampant and Gianadev Patil. This was the agreement, which is said to have been executed on 10-8-1951 and is allegedly

lost. It is stated that the said agreement was executed on a plain paper and was in custody of deceased Limbaji Navale.

20. The version of DW-Gyandev would show that he was ready and willing to perform his part of the agreement. He deposed that subsequently, additional payment of Rs. 1,000/- was made to plaintiff No. 2 - Abdul Jabbarkhan and thereafter, they filed affidavits and application for obtaining sale permission. The plaintiff Nos. 1 and 2, however, avoided to accept balance consideration of Rs. 2,000/- and execute the sale deed. His version reveals that defendant No. 1 - Adinath had filed suit for injunction against deceased plaintiff No. 2 - Abdul Jabbarkhan because, the latter had obstructed in his possession. That suit was, however, withdrawn because the obstruction had ceased.

21. The version of DW-Gyandev reveals that he and defendant No. 1 -Adinath sold 10 acres land to defendant No. 9 and approximately 10 acres land to defendant No. 10 under two different sale deeds. His cross-examination reveals that he had asked deceased plaintiff No. 2- Abdul Jabbarkhan to purchase a stamp paper for execution of the agreement of sale when the variation was effected. However, deceased plaintiff No. 2 - Abdul Jabbarkhan told that the stamp paper was not necessary. It is admitted that deceased plaintiff No. 1 was a Government servant and was well versed with reading and writing. According to DW-Gyandev, deceased plaintiff No. 1 - Abdul Sattarkhan was asked to scribe the document but, the latter told that it may be scribed through others. It is further stated that deceased plaintiff No. 1 had informed that it was not necessary to purchase the stamp paper for writing of the renovated agreement of sale.

22. Though the defendants obtained permission to lead secondary evidence, yet the quality of secondary evidence adduced by them is totally dissatisfactory. The deceased plaintiff No. 1 Abdul Sattarkhan was a responsible Engineer. When he expressed dissatisfaction regarding the price settled between deceased plaintiff No. 2 - Abdul Jabbarkhan on one hand and DW-Gyandev along with deceased Limbaji on the other hand, it was imperative that more caution would be taken while preparing a renovated agreement of sale. The revenue entries appearing in the "Pahani Patrak" (Exh.52) would show that the agreed consideration was of Rs. 3,000/-. The revenue entries do not show that the "Isaar Pavati" was written on 10-8-1951. It appears that such revenue entries were taken on 10-8-1951 and, therefore, the so-called story about variation in the price and renovation of the agreement of sale at instance of deceased plaintiff No. 1 - Abdul Jabbarkhan was subsequently developed. It does not stand to reason that once said Abdul Sattarkhan desired to change the terms of the agreement, the purchasers would not have insisted upon execution of such subsequent document on a duly stamped paper. The conduct of DW-Gyandev and deceased Limbaji Navale, in this context, is inexplicable. The oral evidence adduced by them is inconsistent with the revenue entries.

23. It is worthwhile to note that the so-called subsequent agreement of sale is said to have been lost. There is no iota of evidence to show when and how it was

lost. An attempt was made to show that it was filed in the proceedings for sale permission. No tangible evidence is adduced in this behalf. The defendants have not laid foundation to infer loss of so-called document. It appears from the copy of the sale permission (Exh.115) that the proceedings pertained to half portion of Survey No. 31. The application for sale permission was filed by deceased plaintiff No. 2 - Abdul Jabbarkhan as would be explicit from copy of publication (Exh.114). The copy of the relevant proclamation (Exh.113) would show that both the plaintiff Nos. 1 and 2 had filed a joint application for grant of sale permission. Still, however, there is hardly any documentary evidence to support the averment that they together had filed such application.

24. In this context, it may be noted that original defendant No. 1 - Adinath and defendant No. 8 - Gyandev had filed a suit (R.C.S. No. 98 of 1969) only against original plaintiff No. 2 - Abdul Jabbarkhan for perpetual injunction. It is an admitted fact that said suit was subsequently withdrawn and was accordingly disposed of. A copy of the plaint (Exh.116) in the said suit would show that the agreement was between the deceased plaintiff No. 2 - Abdul Jabbarkhan on one hand, and deceased Limbajirao Navale and present defendant No. 8 - Gyandev Navale on the other hand. The pleadings in the previous suit do not show that deceased plaintiff No. 1 - Abdul Sattarkhan was a party to such agreement of sale. In this view of the matter, the findings of the trial Court that deceased plaintiff No. 1 Abdul Sattarkhan had not entered into any agreement to alienate the suit lands, is proper and deserves to be confirmed.

25. The oral evidence of DW-2 - Arun, DW-3 Balram and DW-4 - Ramlal need not be elaborately discussed. They identified signatures of their respective fathers, since deceased, on the agreement of sale (Exh.107). The testimony of DW-5 - Sakharam corroborates execution of the receipt (Exh.93) regarding payment of Rs. 1,000/- in the month of June 1951 to plaintiff - 2 Abdul Jabbarkhan. The version of DW Denoba Giram would show that he was attesting witness of the subsequent agreement of sale, which was executed by the deceased plaintiff Nos. 1 and 2. He states that said agreement, of sale was written after police action (1949). It does not correspond to the period stated by the contesting defendants. His version is vague and unacceptable. The statement of DW-Antoni reveals that land to the extent of 9 acres 21 gunthas out of Survey No. 31 was purchased from original defendant No. 1 - Adinath and defendant No. 8 - Gyandev by virtue of sale deed dated 28-3-1973. He states that the housing society has purchased the same.

26. On behalf of the plaintiffs, PW-2 - Abdul Jabbar entered the witness box. He denied all the material averments and the documents. PW-1 - Abdul Sattarkhan denied execution of any agreement of sale. He produced a copy of his office tour diary for August, 1951 (Exh.70/2). The office record reveals that he had been on official tour at Khammam (District Adilabad) when the so-called subsequent agreement was allegedly renovated on 10-8-1951. His version shows that he never consented to any agreement of sale. He states that upto Police action, he

was having bullocks and agricultural implements. According to him, after the Police action (1948), he started cultivation of the suit lands through labours and used to hire the agricultural implements.

27. The trial Court appears to have properly appreciated the evidence on record. The trial Court was right in observing that non-examination of Shri Kadam Advocate, who was cited as a witness by the defendants, would give rise to the adverse inference that plaintiff No. 1 - Abdul Sattarkhan had not ratified the agreement of sale and had not executed any subsequent agreement on 10-8-1951. The affidavits attested by the plaintiff No. 2 - Abdul Jabbarkhan and deceased Limbaji are also not on record. Considering the evidence adduced by the parties, it will have to be held that deceased Limbaji Navale and original defendant No. 8 - Gyandev Navale had entered into an agreement of sale only with the deceased plaintiff No. 2 Abdul Jabbarkhan. He alone executed the said agreement of sale (Exh.107). The recitals of the agreement of sale (Exh.107) do not show that he was authorised to enter into such agreement of sale for and on behalf of plaintiff No. 1 - Abdul Sattarkhan. No document like Power of Attorney was executed in his favour by deceased plaintiff No. 1 Abdul Sattarkhan. Nor any authority letter was given in his favour. Consequently, deceased plaintiff No. 1 Abdul Sattarkhan was not bound by the agreement of sale (Exh.107).

28. This takes me to consider submissions of learned Advocates on legal aspects of the matter. Though objection was raised that the suit is liable to be dismissed for want of statutory notice u/s 164 of the Maharashtra Cooperative Societies Act, 1960, as against defendant Nos. 9 and 10, yet this objection is without substance. The defendant Nos. 9 and 10 are not proved to be registered co-operative societies and moreover, the nature of the suit is not such, which would "touch the business of the society". A plain reading of Section 164 of the Maharashtra Co-operative Societies Act, 1960 would make it amply clear that two months prior notice is necessary only when the suit is on subject, which pertains to touching concerned business of the society. The defendant Nos. 9 and 10 are strangers vis-a-vis the plaintiffs. The suit for recovery of possession would not require any such statutory notice.

29. Another objection raised on behalf of the defendant Nos. 9 and 10 is that they are the bona fide purchasers for valuable consideration and hence need protection. This argument is untenable. The evidence on record shows that no proper enquiry was made by the concerned office bearers of the defendant Nos. 9 and 10. The revenue record never indicated that the defendant Nos. 1 and 8 had acquired title. These defendants could not be termed as ostensible owners. Consequently, no protection u/s 41 of the Transfer of Property Act is available to the defendant Nos. 9 and 10. Mr. Choudhari, learned Advocate for the appellants would submit that the suit was liable to be dismissed because the agreement of sale was not challenged by deceased plaintiff No. 1 within 12 years. It is also argued that the suit is bad for non-joinder of members of the defendant Nos. 9 and 10. I do not agree. They have no independent rights as they are only

claiming through defendant Nos. 9 and 10, who are claiming through the defendant Nos. 1 to 8. There is no privity of contract between the plaintiffs and the members of the defendant Nos. 9 and 10 and as such, joining of such strangers is not necessary to maintain the suit like present one.

30. The main thrust of argument advanced by Senior Advocate Mr. P. M. Shah and learned Advocate Mr. S.P. Deshmukh is on the question of limitation. In support of their contention, learned Senior Counsel Mr. Shah and learned Advocate Mr. Deshmukh placed reliance on *Ramiah v. N. Narayana Reddy (Dead)* by L.Rs. (2004) 6 SCC 541. Mr. Shah would submit that under relevant notifications and rules before taking entry in the revenue record, a notice was required to be published. He also would submit that under the Hyderabad Tenancy and Agricultural Lands Act, 1950, vide notification dated 14-7-1950, rules regarding transfer of the agricultural land were framed and, therefore, it has to be presumed that the notice was duly published regarding proclamation issued at the time of granting sale permission in 1954. He would submit that knowledge could be imputed to the plaintiffs at least from 1954 and thereafter, the suit for possession filed on 11-5-1973 is hopelessly barred by limitation. In case of *Ramiah v. N.N. Reddy (supra)*, the Apex Court held that the applicability of the relevant Article (Article 64 or 65) has to be decided on the basis of pleadings. But, by suppression of material facts, and skillful pleadings, the plaintiff cannot seek to avoid any inconvenient Article. In the given case, the plaintiff was ousted from the property in 1971 and had filed the suit in 1984. The Apex Court held that Article 64 was applicable because, the plaintiff failed to prove that he was in possession of the suit land within twelve years of the date of the suit. The Apex Court held that Article 64 of the Limitation Act, 1963 is restricted to suits for possession on dispossession or discontinuance of possession and Article 65 is a residuary Article applying to suit for possession not otherwise provided for. It is observed, "suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65". In the present case, it is not a suit in which there is allegation of prior possession and subsequent dispossession. The suit is based on title and illegal dispossession at hands of the defendants. Hence, it is governed by Article 65 of the Limitation Act.

31. Mr. Deshmukh, learned Advocate for the appellants seek to rely on *Rajhmundry v. Chava Govindaraju* AIR 1940 Mad 798 , *Joseph Vs. John* , *Ram Singh Vs. Roop Singh*, and *Maulvi Abu Mohotned Abdool Kadar and Ors. and Srimati Amtal Karim Banu and Srimati Amtal Kader Banu* Vol.XV Indian Appeals 220. He also seeks to rely on *Manzoor Alikhan and Ors. v. Sukhabasilal and Ors.* 1974 M.L.J. 49. The Apex Court in the given case held that when suit is barred under one article though is within limitation under another article yet it must fail. It is held that in a suit for possession on dispossession, where plaintiff failed to show possession at any time within 12 years prior to the suit, the suit would fail. The suit herein is not merely based on previous possession and subsequent dispossession. They have not pleaded possessory title. They pleaded exclusive

title to the suit lands. In case of Joseph first defendant v. John, plaintiff" (supra), a Single Bench of Kerala High Court held that where one co-owner transfers entire co-ownership property to a stranger then possession of the stranger becomes adverse to the other co-owners from the date of his entry. This authority also is inapplicable to the facts of the present case. For, herein deceased plaintiff No. 2 - Abdul Jabbarkhan had not transferred by alienation the suit lands. He had only entered into an agreement of sale to transfer the suit lands to the deceased Limbaji Navale and defendant No. 8 Gyandev Navale.

32. Relying on Ram Singh Vs. Roop Singh, , Mr. S.P. Deshmukh would submit that the defendants acquired title by prescription. The pleadings of defendant Nos. 1 to 8 would show that till 1966, they continued to pay part of consideration to deceased plaintiff No. 2 -Abdul Jabbarkhan. Obviously, till 1966, there was no occasion to express hostility towards the title of the plaintiffs. It is the ipse dixit of the defendants that deceased plaintiff No. 2 Abdul Jabbarkhan had offered obstruction in their possession and, therefore, the earlier suit (R.C.S. No. 98 of 1969) was filed by original defendant No. 1 - Adinath for perpetual injunction. That suit was ultimately withdrawn on 25-6-1971. In other words, there was disturbance created in the process of prescription. The present suit was filed on 11-5-1973. Having regard to the sequence of events, it is not possible to say that the defendant Nos. 1 to 8 had perfected their title by prescription. Indeed, the deceased Limbaji Navale and defendant No. 8 Gyandev Navale were inducted in possession on basis of agreement of sale (Exh.107). Their possession was permissive. The view expressed in Ram Singh Vs. Roop Singh, , in this context, is not good law. This authority is overruled in Roop Singh (Dead) through L.Rs. v. Ram Singh (Dead) through LRs. AIR 2000 SC 1485. How I wish, learned Advocate Mr. Deshmukh should not have cited such overruled case law in support of his contention on question of limitation, and acquisition of title by prescription.

33. The Apex Court in Mohan Lal (deceased) through his L.Rs. Kachru and Ors. v. Mira Abdul Gaffar and Anr. AIR 1996 SC 910, held:

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription nec vi nec clam nee precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

34. Mr. Dhorde, learned Advocate for the respondents/plaintiffs would submit that no protection is available to defendant Nos. 9 and 10 because, they are subsequent purchasers and have no privity of contract with the plaintiffs. He would submit that the alienations made in favour of defendant Nos. 9 and 10 as

per the sale deeds (Exh.120 and 118) are clearly illegal and unauthorised. There is no dispute about the fact that the Land Survey No. 31 is mostly alienated in favour of the defendant Nos. 9 and 10. It appears that deceased Limbaji Navale and defendant No. 8 - Gyandev Navale together sold Southern 10 acres 18 gunthas area out of Survey No. 31 in favour of Chief Promoter of defendant No. 10 i.e. (Limbaji Nagar Housing Society) on 22-8-1970 and sold Northern 9 acres 20 gunthas area in favour of Chief Promoter of original defendant No. 9 - i.e. (Policeman Housing Society) on 28-3-1973. The members of the housing societies have raised constructions of dwelling houses at the place. Mr. Dhorde would submit that both these housing societies are unregistered and unauthorised. He seeks to heavily rely on Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through Lrs., . In the given case, owner of the land in question had filed suit for possession alleging that he had been wrongly dispossessed. It was case of the contesting defendant - Rambhau Gajre (appellant therein) that the original plaintiff and his brother had agreed to alienate the suit land to Pishorilal Punjabi, who had paid entire amount of consideration and was put in possession thereof in part performance of the said agreement. It was asserted that said Pishorilal Punjabi had executed an agreement of sale in favour of the defendant/appellant and hence, protection u/s 53-A of the Transfer of Property Act was claimed in defence of the suit. The Apex Court observed:

12. There was no agreement between the appellant and the respondent in connection with the suit land. The doctrine of part performance could have been availed of by Pishorilal against his proposed vendor, of course, to the fulfilment of the conditions mentioned above. It could not be availed of by the appellant against the respondent with whom he has no privity of contract. Appellant has been put in possession of the suit land on the basis of an agreement of sale not by the respondent but by Pishorilal, therefore, the privity of contract is between Pishorilal and the appellant and not between the appellant and the respondent. The doctrine of part performance as contemplated in Section 53-A can be availed of by the proposed transferee against his transferor or any person claiming under him and not against a third person with whom he does not have a privity of contract.

35. Mr. Dhorde would submit, therefore, that the defendant Nos. 9 and 10 cannot claim any protection u/s 53-A because, there is no privity of contract between them and the plaintiffs. He would urge, therefore, to maintain the decree to the extent of Survey No. 31 on this ground alone. Per contra, learned Senior Advocate Mr. P. M. Shah strenuously pointed out distinguishing features of the given case and that of the case in hand. He would point out that in case of Rambhau Namdeo Gajre (supra), the suit was filed only against the third person i.e. appellant - Rambhau who was inducted in possession by the prospective purchaser viz., Pishorilal Punjabi. Said Pishorilal Punjabi was not the party to the suit as is evident from the narration of facts of the case reported in Narayan Bapuji Dhotre deceased through legal representatives and others Vs. Rambhau

Namdeo Gajre, , whereas in the present case, the defendant Nos. 1 to 8 i.e. the prospective purchasers are the parties to the suit. He would further point out that the Apex Court clearly indicated that the doctrine of part performance could be availed by said Pishorilal, which herein can be said to be available to the defendant Nos. 1 to 8. Mr. Shah would submit that the defendant Nos. 9 and 10 cannot claim any protection independently. For, they derive only right of possessory title through the defendant Nos. 1 to 8. In other words, the rights of the defendant Nos. 9 and 10 are totally dependent on the rights of the defendant Nos. 1 to 8 since they have been inducted in possession on account of assignment of the rights by the formers.

36. The relevant part of the provision u/s 53-A of the Transfer of Property Act may be reproduced for ready reference:

53-A. Part performance.-xxx and transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

(Emphasis supplied)

37. Mr. Shah, learned Senior Advocate would submit that the expression, "the transferee and persons claiming under him" is wide enough to cover the defendant Nos. 9 and 10 because, they are claiming through the defendant Nos. 1 to 8 (transferees). He would, therefore, submit that such protection can be availed by them. The expression "any person claiming under him" needs to be interpreted so as to make Section 53-A workable. A person claims under another person, when he is either an assignee from that person or his legal representative. It cannot be lost sight of that Section 53-A is only a shield. It protects a transferee, who is willing to perform his part of the agreement and has been let in possession in pursuance of the agreement of sale, from oppressive claim set up by the transferor. The doctrine of part performance is based on equity. It is available as protection only to such a transferee, who has demonstrated equitable foundation for continuation of his possession.

38. Coming to the case in hand, I find that the original defendant Nos. 9 and 10 have no independent right to claim any protection but they are claiming their rights as assignees of the defendant Nos. 1 to 8 and as such whatever protection

is available to the letters, would be extendable to them. There is subtle yet clear distinction between the facts of the present case and the fact situation in *Rambhau Namdeo Gajre (D) by L.Rs. v. Narayan Bapuji Dhotre (supra)*. In the case before the Apex Court, the allegation was that the true owner was dispossessed from the land by the third party, who was transferee of said Pishorilal Punjabi. Thus, they were completely strangers and there was no privity of contract between the plaintiff and the third party. Had said Punjabi been a party to that suit, his plea of part performance could be decided on merits. It was his choice to raise such a defence or to abandon the same. One cannot assume that he must have raised it.

39. In the present case, however, the plaintiffs have pleaded unequivocally that after the withdrawal of the previous suit (R.C.S. No. 98/1969), they were dispossessed by the defendant Nos. 1 to 8. The assignment made by the defendant Nos. 1 to 8, in favour of the defendant Nos. 9 and 10, would make it explicit that they are claiming through such transferees. The transferees i.e. defendant Nos. 1 to 8 are the parties to the present suit and they are seeking protection u/s 53-A of the Transfer of Property Act. They can claim such protection on equitable grounds when they have proved that they parted with the consideration amount to the extent of Rs. 3,000/- as was agreed under terms of the agreement of sale (Exh. 107). It appears that the trial Court was much impressed by the pleadings in the earlier suit (R.C.S. No. 98/1969). In fact, when the previous suit was withdrawn and when it was only against original plaintiff No. 2 - Abdul Jabbarkhan, those pleadings could not be treated as gospel truth. As observed by the Apex Court in the case of *Rambhau Namdeo Gajre (D) by L.Rs., Pishorilal Punjabi* could have claimed protection u/s 53-A of the Transfer of Property Act. Likewise, the defendant Nos. 1 to 8 are entitled to claim such protection from dispossession at hands of the original plaintiff No. 2 Abdul Jabbarkhan to the extent of his half undivided share. The protection is, therefore, extendable to cover the defendant Nos. 9 and 10 also because, they are claiming their rights/interests through the defendant Nos. 1 to 8. Needless to say, the ratio laid down in case of *Rambhau Namdeo Gajre (D) by L.Rs. v. Narayan Bapuji Dhotre (D) by L.Rs.*, with great respect, would not squarely cover the fact situation obtained in the case in hand.

40. The defendant Nos. 1 to 8 will not be entitled to claim any protection, however, as regards the rights of ownership to the extent of half share held by deceased plaintiff No. 1 - Abdul Sattarkhan. He was not a party to the agreement of sale (Exh.107). He was not bound by the terms thereof. The defendant Nos. 1 to 8 have failed to prove that deceased plaintiff No. 1 - Abdul Sattarkhan ratified the agreement after June, 1951 and the consideration amount was increased as alleged by them. It appears that the deceased plaintiff No. 2 - Abdul Jabbarkhan was looking after the suit Sands for and on behalf of himself and the other members of the family but, had no authority to transfer the same to the extent of the shares of other members, i.e., deceased plaintiff No. 1 Abdul Sattarkhan and plaintiff No. 3 - Fatima Begum. The deceased plaintiff No. 2 - Abdul

Jabbarkhan became entitled to receive one ana share out of the two anas share held by the plaintiff No. 3 - Fatima Begum. Thus, by applying principle of feeding estoppel, the transaction to the extent of half share of deceased plaintiff No. 2 - Abdul Jabbarkhan would be binding on the rights of his branch. They cannot claim any share and the suit to their extent deserves to be dismissed.

41. The appellant Fatima Begum died intestate during pendency of the appeal (APP-III). She was survived only by the original plaintiff Nos. 1 and 2. Her two Anas share will be equally inherited by each of them. Thus, deceased plaintiff No. 1 - Abdul Sattarkhan was entitled to receive half share and deceased plaintiff No. 2 - Abdul Jabbarkhan was entitled to half share in the suit lands after the death of Fatima Begum. No particular decision is called for in respect of her appeal (APP-III).

42. The foregoing discussion leads me to record following findings:

(a) The deceased plaintiff No. 1 - Abdul Sattarkhan was not a party to the agreement of sale and was not bound by the same.

(b) The doctrine of part performance u/s 53-A of the Transfer of Property Act is available as protection only to the defendant Nos. 1 to 8.

(c) The defendant Nos. 1 to 8 are entitled to claim protection only against deceased plaintiff No. 2 - Abdul Jabbarkhan to the extent of his half undivided share in the suit lands. The protection of doctrine of part performance is not independently available to the defendant Nos. 9 and 10.

(d) The defendant Nos. 1 to 8 cannot claim any protection to the extent of half share to which deceased plaintiff No. 1 - Abdul Sattarkhan was entitled to. The legal representatives of deceased plaintiff No. 1 - Abdul Sattarkhan will be entitled to receive half share out of the suit lands along with proportionate mesne profits.

(e) The protection available to the defendant Nos. 1 to 8 will be available to the defendant Nos. 9 and 10 as their assignees only to the extent of half share owned by deceased plaintiff No. 2 - Abdul Jabbarkhan.

43. So far as the Cross Objection is concerned, it may be stated that the trial Court has not given any tangible reason to reject the claim for mesne profits. It is well settled that a successful party, in whose favour decree for possession is passed, would be entitled to relief of mesne profits. The defendant Nos. 1 to 8 were in possession of the suit land without any right to retain possession, at least to the extent of the half share owned by plaintiff No. 1 - Abdul Sattarkhan. Hence, mesne profits to the extent of his half share ought to have been granted by the trial Court. The Cross Objection would, therefore, partly succeed and deserves to be allowed.

44. In the result, both the first appeals (APP-1) and (APP-1I) partly succeed. The impugned Judgment and Decree is partly set aside to the extent of half share of

deceased plaintiff No. 2 - Abdul Jabbarkhan and the suit to the extent of his share stands dismissed. The impugned Judgment to the extent of claim of deceased plaintiff No. 1 - Abdul Sattarkhan is confirmed. His legal representatives will be entitled to receive half share in the suit lands by equitable partition thereof along with proportionate mesne profits from the date of the suit till realisation of the entire amount from the defendant Nos. 1 to 8 upto the date of the sale deeds executed in favour of defendant Nos. 9 and 10 and, thereafter, from the defendant Nos. 9 and 10. The legal representatives of the deceased plaintiff No. 1 - Abdul Sattarkhan are entitled to receive costs of the suit and the appeal from the defendants, whereas all the other parties shall bear their own costs throughout. These appeals are accordingly partly allowed. The First Appeal (APP-III) is disposed of as infructuous. with no order as to costs.