

(1992) 01 BOM CK 0071

In the Bombay High Court

Case No : Appeal No. 295 of 1982 in Suit No. 260 of 1974

Amirchand Tulsiram Gupta and Others

APPELLANT

Vs

Vasant Dhanaji Patil and Others

RESPONDENT

Date of Decision : 08-01-1992

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 50
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1
Limitation Act, 1963 — Article 65, 3

Citation : (1992) 2 BomCR 22 : (1992) 94 BOMLR 965

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Advocate : G.K. Munshi and H.P. Patel, instructed by Gordhandas and Fozdar, for the Appellant; R.R. Pandit, instructed by Pandit and Pandit for respondent No. 1, M.R. Sathe and D.J. Dalal, instructed by Choksey and Co. for respondent Nos. 5 and 6, J.M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

M.L. Pendse, J.—This is an appeal preferred by the original plaintiffs against judgment dated April 30, 1981 delivered by learned Single Judge in Suit No. 260 of 1974 dismissing the plaintiffs' suit for declaration of title and recovery of possession with the incidental reliefs in respect of six pieces of lands situated at Bhandup in Greater Bombay. The appellants are the Trustees of the Tulsiram Devidayal Charitable Trust, a Trust registered on July 9, 1953 under the Bombay Public Trusts Act, 1950. Respondent No. 11 is the brother of appellant No. 1 and is a co-trustee and was joined as defendant No. 11 to the suit in pursuance of an order dated January 6, 1981 passed by the learned Judge granting amendment of the plaint.

2. The plaintiffs claimed that by registered Deed of Conveyance dated August 14, 1957 a piece of land admeasuring 14,017 sq. yards situated at Bhandup was purchased from Dwarkadas Hiraji Keni for a consideration of Rs. 42,501/-. The sanction for purchase of the property was secured from the Charity

Commissioner on August 6, 1963. The Trustees also purchased adjoining plot of land admeasuring 37,883 sq. yards from Hirjibhai Dinshaw Billimoria by registered conveyance dated June 27, 1959 for consideration of Rs. 1,48,000/-. The sanction and approval of the Charity Commissioner for this purchase was secured by order dated May 19, 1959. Both these plots of lands purchased from Keni and Billimoria are adjoining to each other and the Trustees were put in actual possession after execution of the conveyances. On the date of the execution of the conveyances the lands were not surveyed by the District Land Survey. Officer of the Government of Bombay, though the work of survey was undertaken sometime in the year 1958-59. The lands purchased by the trustees were subsequently surveyed and were given Survey numbers and those Survey Nos. are :

- (1) Survey No. 81 Hissa No. 1;
- (2) Survey No. 81 Hissa No. 2;
- (3) Survey No. 90 Hissa No. 1;
- (4) Survey No. 90 Hissa No. 2;
- (5) Survey No. 90 Hissa No. 3; and
- (6) Survey No. 81 Hissa No. 5.

Survey No. 81 Hissa No. 1 admeasures 4 Acres 34 Gunthas, while Survey No. 81 Hissa No. 2 admeasures 9. Gunthas, Survey No. 90 Hissa Nos. 1, 2, 3 and 5 admeasure 2 Acres 26 Gunthas, 17 Acres. Guntha and uncultivated portion of 9. Gunthas, 15 Gunthas and 1 Acre 7 Gunthas, respectively. These survey numbers were treated as agricultural lands by the Revenue authorities and the assessment was levied on that basis.

After the work of survey was complete, proceedings were instituted under the Bombay Land Revenue Code before the Mahalkari by various parties claiming title to different survey numbers. It is required to be stated that Bhandup village was a Khoti village and Khoti rights were abolished and the estates were resumed under the Salsette Estates (Land Revenue Exemptions) Abolition Act, 1951, which came into effect from March 1, 1952. Under the provisions of the Act the land revenue exemption enjoyed by the Khots was abolished. The Khoti rights were managed by an organisation known as Bhandup Estate and claims were made of title to various pieces of survey numbers involved in the suit by one Dhanaji Patil and Bhandup Estate. On inquiry and after examining the evidence produced in support of the respective claims, it was held by the Inquiry Officer under the Bombay Land Revenue Code that the lands involved in the suit are owned by the plaintiff trustees and the trust has acquired title to the suit properties by two conveyances secured from Keni and Billimoria. It is the claim of the Plaintiffs that in April 1969 the trustees noticed that certain structures were erected on a portion of the land by defendant No. 5. The trustees called upon defendant No. 5 to remove the structures and the encroachments made upon the

portion of the lands. Defendant No. 4 declined to do so and claimed that certain portion of the suit property was sensed out to a partnership concern known as Hind Maharashtra Construction Company by Dhanaji Patil by documents of lease (Exhibits 33 and 34) executed on June 7, 1996. Defendant No. 5 asserted that Hind Maharashtra Construction Co., is a partnership concern consisting of defendant Nos. 5 and defendant No. 7. Defendant No. 5 also claimed that defendant No. 6 is the daughter of defendant No. 5 and certain area of the suit property is in her occupation. The plaintiffs claimed that after having noticed encroachment on various portions by different persons, four suits, being Suits Nos. 3314, 3315, 3316 and 3317 of 1969 were instituted in the Bombay City Civil Court against Dhanaji Patil and the trespassers for recovery of portions of the suit lands, on which the defendants in those suits had encroached and erected small sheds. The trustees complained that the defendants had encroached upon the portion and erected structures without the property being converted for non-agricultural use and without obtaining any permission from the Bombay Municipal Corporation. The trustees complained that the Deputy Collector, Bombay Suburban Division, Mulund by order dated September 20, 1970 levied non-agricultural assessment and penalty for the unauthorised construction on the Trust. The Deputy Collector held that defendant Nos. 5 and 6 were trespassers and had trespassed on the said land and the Trust was the occupant of the said land.

The plaintiffs then claimed that in the suits instituted in the Bombay City Civil court the Court Receiver was appointed to take possession of the encroached portion and when the Court Receiver visited the site, obstruction was raised by several encroachers. The trustees visited the site in January 1974 for taking photographs and making inquiries to ascertain how many illegal structures are constructed, and defendant No. 5 and the other defendants in collusion prevented the trustees from entering upon the suit lands. Defendants Nos. 1 to 4 are the heirs and legal representatives of Dhanaji Patil. Defendant No. 8 is claimed to be a trespasser upon portion of the suit land, while defendant No. 9 is a proprietary concern of the daughter of defendant No. 5. Defendant No. 10 is also a trespasser on the part of the suit land. The plaintiffs on these averments instituted suit on the Original Side of this Court on March 27, 1974 for declaration of title and for recovery of possession. The reliefs sought were :

(a) declaration that the plaintiffs as the trustees of the charitable trust are the owners of the suit lands and the defendants have no right, title or interest in the suit lands and are trespassers ;

(b) that the defendants should be directed to hand over quite, vacant and peaceful possession of the suit lands to the plaintiffs; and

(c) that the defendants and their agents and servants or any person claiming through them should be restrained by an order of permanent injunction from entering upon the land or from continuing trespass.

The plaintiffs also claimed a sum of Rs. 7,20,000/- as damages for wrongful occupation for a period of three years prior to the institution of the suit. The plaintiffs also claimed future compensation or damages at the rate of Rs. 25,000/- per month from the date of the suit till recovery of possession.

3. The suit was not resisted by defendants Nos. 1 to 4, who are the legal representatives of deceased Dhanaji Bhau Patil. Defendant No. 8 also did not file any written statement. Defendant No. 9 filed written statement claiming that an agreement of lease of plot of land admeasuring 2117 sq. yards from Survey No. 90 Hissa No. 2 was entered between defendant No. 9 and Dhanaji Bhau Patil in the month of March 1986. Defendant No. 9 claimed that in view of the appointment of the Court receiver, defendant No. 9 lost possession and thereafter is no longer interested in the suit land. Defendant No. 10 filed written statement claiming that Dhanaji Patil had delivered possession of the portion of the land admeasuring 4500 sq. yards from Survey No. 81 Hissa No. 1 (part) and Survey No. 81 Hissa No. 2 (part) and about 1200 sq. yards from survey No. 90 Hissa No. 1 and defendant No. 10 is enjoying possession thereafter as the full owner. Defendant No. 10 after filing the written statement did not participate at the trial and did not enter the witness box nor did cross-examine the plaintiffs or any of their witnesses. Defendant No. 11, who is brother of plaintiff No. 1 and was a co-trustee filed a written statement pointing out that as no relief was claimed against defendant No. 11 nothing further is required to be done.

The suit was resisted by defendant Nos. 5 to 7. Defendant No. 5 claimed that the suit was barred by law of limitation and was also bad for multifariousness and for failure to join the necessary parties, that is defendant No. 11 who was a co-trustee at the time of institution of the suit. Defendant No. 5 also claimed that the suit was not maintainable as the plaintiffs' had earlier instituted Suit No. 2317 of 1968 in Bombay City Civil Court for recovery of possession of land bearing Survey No. 81 Hissa No. 1 from Patil and another trespasser. The plaintiffs were permitted to withdraw the suit without obtaining leave to file a fresh suit on the same cause of action and therefore, the present suit is barred by provisions of Order XXIII, Rule 1 of the Code of Civil Procedure. Defendant No. 5 then claimed that the plaintiff had filed four suits, being Suits Nos. 3314, 3315, 3316 and 3317 of 1969 for possession of different portions of suit lands which were alleged to have been trespassed by the defendants in those suits. One of the common defendant in all the suits was Dhanaji Patil. Dhanaji Patil died sometime in October, 1971 and thereafter as his legal representatives were not brought on record in all the four suits, orders were passed that claim against Dhanaji Patil stands abated. Defendant No. 5 claimed that as the claim against Dhanaji Patil had abated the present suit filed for recovery of possession was barred by principles of res judicata, in respect of those portions of land which were involved in the four suits in the Bombay City Civil Court. Defendant No. 5 then challenged the title of the plaintiffs by asserting that the vendor Kini and Billimoria had no title to the suit lands and consequently could not have transferred valid title in favour of the trustees. Defendant No. 5 asserted that

Dhanaji Patil and his predecessors were in possession of the suit from time immemorial and consequently had perfected their title by adverse possession. It was also claimed that Dhanaji Patil and his predecessors were Sutidars or cultivators in respect of the suit lands and Dhanaji Patil had leased out several portions of the lands to various parties by registered deeds asserting absolute title in the suit lands. Defendant No. 5 claimed to have secured the suit land from Dhanaji Patil by lease deeds (Exhibits 33 and 34) executed on June 7, 1996. Defendant No. 5 claimed that the lease was initially in favour of a partnership firm consisting of defendant Nos. 5 and 7 but subsequently the firm was dissolved on March 29, 1969 and thereupon defendant Nos. 5 and 7 divided the suit lands amongst themselves. Defendant No. 5 therefore, pleaded that Dhanaji Patil having perfected his title by adverse possession and defendant Nos. 5 to 7 having secured possession from Dhanaji Patil, the suit instituted by the plaintiffs for declaration of title and recovery of possession is not maintainable. Defendant No. 5 also claimed that he had leased out several portions of lands to various persons and structures were erected after converting the land for non-agricultural use and obtaining permission from the Bombay Municipal Corporation. Defendant Nos. 5 pleaded that none of the documents in support of the claim are available in view of the raid at his house in which all the documents were lost.

Defendant Nos. 6 and 7 filed separate written statements adopting the contentions raised by defendant No. 5.

4. On the strength of this pleadings, the learned Single Judge raised various issues and parties led evidence both oral and documentary in support of their claims. The plaintiff No. 1 entered witness box and deposed about purchase of the suit lands by two conveyances and securing actual possession from the Vendors Keni and Billimoria. The plaintiffs also examined Pandurang Mate (P.W. 4) to produce the record in inquiry held under Bombay Land Revenue Code by Mahalkari, District Deputy Collector, Bombay Suburban District, Bombay and the appeals preferred therefrom. The plaintiff also examined N.G. Bhansali, the Tahsildar, who produced the relevant documentary evidence. The plaintiffs also examined three other witnesses Sohrab H. Ardeshir, Ramakant G. Patil and Sureshchandra Harikrishna Sutar. Defendant No. 5 entered the witness box and examined five witnesses Bapurao V. Juvekar, a Special Executive Magistrate, Shankar Narayan Gavand, Mohammed Umer Mohammed Hussein Khan, Narayan Mahadeo Kakade and Jagdish Prasad Garibaprasad Pandey. These five witnesses deposed that they had seen Dhanaji Patil on the suit lands and Dhanaji Patil used to cultivate lands and grow rice and paddy. The parties also produced Village Records in the form of 7/12 extracts, the property register cards, notices issued by the Collector levying penalties and notices for unlawful conversion from agricultural use to non-agricultural use. On consideration of this evidence the trial Judge came to the conclusion that the plaintiffs failed to establish title to suit lands and on the other hand defendant No. 5 established that Dhanaji Patil had perfected his title to the suit lands by adverse possession. The trial Court also

recorded a finding that the plaintiffs failed to establish the identity of the lands purchased by the two conveyances with that of the suit lands. The trial Court further held that the suit instituted by the Trustees without obtaining prior permission of the Charity Commissioner as contemplated under sections 50 and 51 of the Bombay Public Trust Act was defective and not maintainable. The trial Judge held that the suit should be instituted after obtaining permission only in the City Civil Court and consequently the High Court has no jurisdiction to entertain the plaintiffs' claim. The trial Judge did not accept the technical defences raised by defendant No. 5 about the multifariousness, failure to join the necessary parties, limitation, judicate etc. The trial Judge held that the plaintiffs had failed to establish the quantum of damages suffered for a period of three years prior to the date of institution of the suit. On the strength of this finding, the trial Judge dismissed the suit and directed the plaintiffs to pay costs of defendant Nos. 5, 6 and 7 in two sets.

5. The plaintiffs feeling aggrieved by the impugned judgment, have preferred the present appeal, while defendants Nos. 5, 6 and 7 have filed cross-objections to challenge certain findings recorded by the trial Judge against the defendants in regard to the technical objections. Before advertng to the submissions advanced in support of the appeal, it is necessary to state that the Court Receiver, High Court, Bombay was appointed to take possession of the suit lands and several proceedings were adopted by the plaintiffs pending the suit complaining that inspite of appointment of the Court Receiver, who had permitted defendants Nos. 5 to 7 to remain in occupation as the agent of the Court Receiver, defendant Nos. 5 to 7 indulged in erecting further illegal structures and inducting various trespassers on the property. It is also required to be stated that in respect of certain interim orders passed by the this Court in the present appeal, defendant No. 5 had moved the Supreme Court and Supreme Court after taking suo moto proceedings punished defendant Nos. 5 under the Contempt of Courts Act for making wild and unsubstantial allegations against the former Chief Justice of this Court. These developments do not affect the merits of the case, but are set out only to high light the grievance of the plaintiffs that defendant No. 5 has acted high handedly throughout. The principal contention which requires determination in the appeal is whether the plaintiffs established title to the suit lands and whether defendant No. 5 has succeeded in proving that Dhanaji Patil has perfected his title to the suit lands by adverse possession and therefore decree of recovery of possession cannot be passed against defendant Nos. 5 to 7 who are claiming as lessors of Dhanaji Patil. Dhanaji Patil having died in the year 1971, that is prior to the institution of the suit and legal representatives of Dhanaji Patil having failed to resist the suit, the entire burden and which is quite heavy to establish that Dhanaji Patil has perfected title by adverse possession, is on the shoulders of defendants Nos. 5 to 7. Before examining that claim, it is necessary to examine the finding of the trial Court that the suit was not maintainable in absence of permission of the Charity Commissioner under sections 50 and 51 of the Bombay Public Trusts Act.

6. The Bombay Public Trusts Act, 1950 was enacted to regulate and to make better provision for administration of public religious and charitable trusts in the State of Bombay. The plaintiffs are the trustees of a charitable trust registered under this Act. Section 50 of the Act deals with the topic "suits by or against or relating to public trusts or trustees or other", and inter alia provides that where a direction or decree is required to recover the possession of a property belonging to a public trust from a trustee, ex-trustee, alliance, trespasser or any other person, including a person holding adversely to the public trust, the Charity Commissioner may institute a suit in the Court within the local limits of whose jurisdiction the subject matter of the Trust is situated. The section provides that apart from the Charity Commissioner two or more persons having the interest and having obtained consent in writing of the Charity Commissioner can institute the suit and seek reliefs which are set out in the section. Section 51 of the Act provides that if person having an interest in any public trust intends to file a suit of the nature specified in section 50, then such person shall apply to the Charity Commissioner in writing for his consent. The Charity Commissioner in writing for his consent. The Charity Commissioner may grant or refuse consent depending upon the satisfaction of the existence of a prima facie case. The contesting defendants urged before the trial Judge that consent under sections 50 and 51 of the Public Trusts Act is a condition precedent for institution of the suit by the trustees for recovery of possession against the trespassers or a person claiming adversely to the interest of the trust and failure to obtain consent must result in dismissal of the suit. The contention was met by the plaintiffs by relying upon two decisions of this Court reported in 63 Bom.L.R. 312, *Gurusiddappa Tipanna Mugeru v. Miraj Education Society, Miraj*, and 69 Bom.L.R. 472, *Rajgopal Raghunathdas Somani v. Ramchandra Hajarimal Jhavar*. The latter decision is of a Division Bench and follows the earlier decision recorded by the Single Judge. The Division Bench held that the trustee is the legal owner of the trust property and enjoys all the rights inherent in a natural owner of a property and can sue to recover trust property, and section 50 cannot apply as a bar to the substantive rights of the trustee to institute suit. The Division Bench further held that the provisions of section 92 of the CPC are analogous to the provisions of section 50 and the separate right of a trustee de hors the provisions of section 50 to file a suit for protection of trust properties cannot be disputed. The Division Bench there upon held that provisions of section 50 are not restrictive but cumulative and it only entitles a person having an interest to sue and does not prohibit any suit being filed by trustees of a public trust. The Division Bench then observed :

"The trustee who is in the position of a legal owner of property can sue to recover the property from persons who are in occupation without any right, title or interest without obtaining any previous sanction from the Charity Commissioner".

The view consistently taking by this Court is also followed by the decision of the Gujarat High Court reported in *Nadiad Nagarpalika, Nadiad Vs. Vithalbhai Zaverbhai Patel and Others*, , and the Full Bench of the Mysore High Court in the

case reported in AIR 1972 Mys 1, Gollaleshwar Dev of Golgeri v. Gangawwa Kon Shantayya Math.

The learned trial Judge was bound by the decision of the Division Bench and should not have dismissed the suit on the ground that in absence of permission of the Charity Commissioner the suit was not maintainable. The learned Judge accepted the claim of defendants Nos. 5 to 7 that the decision of the Division Bench of this Court is no longer a good law in view of the amendment to section 50 as also to section 2(10) by Maharashtra Act No. 20 of 1971. Section 2(10) Clause (e) provides that "person having interest" in the case of any public trust includes trustees or beneficiaries. Initially the word "trustees" did not find place but was inserted by Amendment Act of 1971. Section 50 initially provided that permission is necessary where the possession of the property of the public trust is sought to be recovered from any person, including a person holding adversely to the public trust. After amendment the section provides that where the property is to be recovered from a trustee, ex-trustee, alliance, trespasser or any other person, including a person holding adversely to the public trust but not a tenant or a licensee, consent is necessary. The learned Single Judge felt that the decision recorded by the Single Judge and Division Bench of this Court as well as by the Gujarat High Court considered the provisions of section 50 prior to the amendment and therefore are not good law. It was concluded that the amendment demands that when a suit is instituted against a trespasser for recovery of the property belonging to the trust, consent of the Charity Commissioner in writing is obligatory.

Mr. Munshi, learned Counsel appearing for the appellants, complains that the view taken by the Single Judge is entirely unsustainable and we find considerable merit in the submission of the learned Counsel. We are unable to appreciate how the amendment will take away effect of the decision recorded by this Court and which has held field for several years. The inclusion of the word "trustee" in section 2(10)(e) makes no difference whatsoever, because the expression "person having interest" cannot leave out trustee even though the word "trustee" was not specifically included prior to the amendment. Shri Sathe, learned Counsel appearing for the contesting respondents, very fairly stated that it cannot even be suggest or that the trustees could not have been treated as "person having interest" prior to the amendment. We are also unable to appreciate how the amendment to provisions of section 50 would make it obligatory for the trustees to obtain permission of the Charity Commissioner to institute suit for recovery of possession against the trespasser. The amended section makes no departure from the earlier section. The amendment section clearly provided for obtaining of consent to recover possession from a person including a person holding adversely to a public trust, and surely a trespasser holds the possession adversely to the public trust. The mere fact that expression "trespasser" was specifically used in the amended section makes no difference whatsoever to the ratio laid down by this Court and by Gujarat High Court and the Mysore High Court that section 50 is not a bar for the trustees to institute a

suit in exercise of their common law rights. In our judgment, the finding of the learned Single Judge that the suit was not maintainable in the absence of the consent is entirely erroneous. The amendment carried out in 1971 does not alter the ratio laid down by the Division Bench of this Court.

7. It is necessary in this connection to refer to the decision in *Shree Gollaleshwar Dev and Others Vs. Gangawwa Kom Shantayya Math and Others*, . The Supreme Court held that section 50 created and regulated a right to institute a suit by the Charity Commissioner or by two or more persons interested in the trust, in the form of supplementary statutory provisions without defeasance of the right of the manager or a trustee or a shebait of an idol to bring a suit in the name of idol to recover the property of the trust in the usual way. In other words the Supreme Court accepted the view taken by the Division Bench of this Court that the right of a trustee to bring a suit in the usual way, that is in exercise of rights under the Common Law is not affected by provisions of section 50 of the Public Trusts Act. The ratio laid down by the Supreme Court was followed by a Single Judge of this Court in the decision reported in 1986 M.L.J. 773, *Vidarbha Kshatriya Mali Shikshan Sanstha v. Mahatma Fuley Shikshan Samiti Amaravai*, holding that trustees who want to enforce their civil rights are not covered by definition of the expression "person having interest" and are entitled to file suits without obtaining prior permission. The same view was taken by another Single Judge in the decision reported in 1988(2) *Bombay Cases Reporter* 429, *Leelavati w/o Vasantrao Pingle v. Dattraya D. Kavishar & others*. The same view was taken by another Single Judge in an unreported decision dated September 13, 1990 delivered in Original Side Suit No. 958 of 1975 and the decision of the Single Judge was confirmed in Appeal No. 1315 of 1990 by the Division Bench by judgment dated March 14, 1991. The Division Bench specifically disapproved the view taken by the trial Court in the present case holding that the decision reported in 69 *Bom.L.R.* 472 *Rajgopal Raghunathdas Somani v. Ramchandra Hajarimal Jhavar*, still holds field and section 50 does not prohibit a suit being filed by trustees to recover possession from a trespasser without obtaining prior permission. We are in respectful agreement with the view taken by the Division Bench and the learned Single Judges, and we entirely disagree with the finding of the trial Judge that the suit was not maintainable in absence of permission. The learned trial Judge was clearly in error in holding that after amendment of section 50 and section 2(10)(e) it is incumbent upon the trustees to obtain prior approval of the Charity Commissioner to institute suit against a trespasser for recovery of possession. As the finding of the trial Judge on this count is set aside, consequently the finding that the High Court had no jurisdiction to entertain the suit and the suit could be filed only in the City Civil Court after obtaining prior approval cannot stand.

8. That takes us to the main issue involved in the appeal, and that is as regard title of the plaintiffs to the suit property. The plaintiffs claim title to the suit property by two conveyances dated August 14, 1957 executed by Dwarkadas Keni for an area of 14107 sq. yards and conveyance dated June 27, 1959 executed by

H.D. Billimoria for an area of 37,883 sq. yards. There is no dispute about the execution of these conveyances in favour of the plaintiffs for considerations of Rs. 42,501/- and Rs. 1,48,0000/- respectively. The trial Judge non-suited the plaintiffs by holding that the plaintiffs failed to establish that the lands purchased under these two conveyances is one which is comprised in the suit. In other words the trial Judge felt that identity of the suit property with the land purchased under the two conveyances was not established. The trial Judge also held that the plaintiffs failed to establish that Vendors Keni and Billimoria had title to the suit lands. Before examining the evidence led by the plaintiffs in the respect, it is necessary to bear in mind that the contesting defendants are not claiming right to the suit lands through any title deeds, but only by assertion that Dhanaji Patil had acquired title to the suit lands by adverse possession. Before examining the claim of adverse possession set up by the defendants, it is necessary to ascertain whether the plaintiffs established identity of the suit lands with the properties purchased under the two conveyances.

9. As mentioned hereinabove on the date of the conveyances the lands were not surveyed and the survey was undertaken by the Government authorities only after the date of the two conveyances. The persual of the Schedules to the conveyances makes it clear that the properties sold are described in the books of Collector of Bombay and formerly in the books of the Khots of Bhandup. The Schedule sets out the name and description of the land and the area is set out in Bighas and Panda as well as in square yards. The measurement of the lands sold is also notified with the boundaries. Plaintiff No. 1, who entered the witness box deposed that the lands described in the schedules to the two conveyances are suit lands and the vendors had put the plaintiffs in actual possession. Apart from the oral testimony of plaintiff No. 1, reliance is placed upon the documentary record maintained by the Government authorities. The lands in village Bhandup were surveyed from the year 1958-59 onwards and the revenue authorities allotted survey numbers to various lands. The suit lands were allotted Survey Nos. 81 Hissa Nos. 1 and 2 and Survey No. 90 Hissa Nos. 1, 2, 3, and 5. After the work of survey was completed, claims were lodged before the Mahalkari, an officer under the Bombay Land Revenue Code for entering the names owners in respect of various survey numbers. In respect of Survey No. 90 Hissa No. 2 the Manager of Bhandup Estate claimed that the property belongs to the Bhandup Estates, while in respect of Survey No. 81 Hissa No. 3 Dhanaji Patil claimed to be the owner and sought inclusion of his name in the Revenue Records. The claim made by the Bhandup Estates and Dhanaji Patil was resisted by the trustees asserting that these two survey numbers formed part of the lands purchased under the two conveyances and the name of the trust should be entered as the owner in revenue record. The Mahalkari by order dated November 21, 1964 held that Survey No. 90 Hissa No. 2 belongs to Dhanaji Patil. Survey No. 81 Hissa No. 3 is not a part of the suit lands. The trust filed appeals against the order of Mahalkari before the District Deputy Collector, Bombay Suburban District and the Deputy Collector on June 11, 1968 set aside the order of the Mahalkari and

directed holding of a fresh enquiry in respect of the these two lands. On remand the proceedings were taken up by the Inquiry Officer No. 7, City Survey, Bombay Suburban District Mulund in respect of these two lands. The Inquiry Officer also was required to hold inquiry in respect of Survey No. 81 Hissa No. 1, No. 2 and Survey No. 90 Hissa Nos. 1 and 2 which forms part of the suit lands and which were claimed to have been purchased by the trustees. The inquiry in respect of these lands was conducted after services of notices to the trustees Dhanaji Patil and properties of Bhandup Estate. The trustees before the Inquiry Officer gave up their claim to land bearing Survey No. 81 Hissa No. 3 and thereupon the Inquiry Officer held that the name of Dhanaji Patil should be entered in respect of this land. It is not in dispute that this land does not form part of the suit lands. As regards the rest of the lands, Dhanaji Patil claimed that Survey No. 90 Hissa No. 2 is held by Dhanaji Patil from time immemorial though there is no documentary proof in support of the same. Dhanaji Patil conceded that earlier the Mahalkari had held that the claim of Dhanaji Patil in respect of Survey No. 81 Hissa Nos. 1 and 2 Survey No. 90 Hissa Nos. 3 and 5 was not sustainable and Dhanaji Patil had not preferred any appeal against that finding of the Mahalkari. The Inquiry Officer framed the requisite points for consideration and examined the evidence led by the parties and the record available with the Revenue Officers and concluded that the lands bearing Survey No. 81 Hissa Nos. 1 and 2 and Survey No. 90 Hissa Nos. 1, 2, 3 and 5 owned by the Trust, being purchased under the two conveyances executed by Keni and Billimoria. To record this finding the Inquiry Officer noted six or seven circumstances. The first circumstance was that the predecessors in title of the trust, that is Keni and Billimoria were paying assessment with local funds to proprietors of the Bhandup Estate for over several years clearly indicating their ownership of the suit-lands. The second circumstance was that the record maintained by the Sub-Registrar, Bandra in respect of title to the properties establishes that Billimoria had purchased the lands from one B.E. Mehta and Shri Vaiti as per the conveyances dated June 8, 1944 and February 1, 1946 and which conveyances were registered in Sub-Registrar Office at Register at Bandra. The third circumstance was that Billimoria had mortgaged the lands on April 20, 1950 in favour of F.F. Taraporewala and the transaction was duly registered in the Sub-Registrar's Office on July 24, 1950. A declaration dated April 19, 1950 indicating the ownership of Billimoria was also registered. The next circumstance was that in the year 1950 Billimoria had executed mortgage deed in respect of the suit lands in favour of M/s. Shapurji Palanji Co. The Inquiry Officer very rightly held that these documents establish the legal title and possession of Billimoria and Keni of the suit lands. The Inquiry Officer further noticed that the name of Dhanaji Patil does not appear as Sutedar in the Khata maintained by the Khots and the claim of Dhanaji Patil that he was cultivating the land as Sutedar is not acceptable. The Inquiry Officer further held that the trustees claimed that one D.B. Patil was the tenant of Billimoria for sometime and D.B. Patil in his statement recorded on November 11, 1967 accepted that fact. The Inquiry Officer then noted that during the course of inspection of the site it was noticed that Dhanaji Patil had

inducted one Panelkar and Smt. Koutuk by putting up structures on the land in or about the year 1963. On the examination of the entire material, the Inquiry Officer by order dated June 19, 1968 concluded that the trustees are the owners of the suit lands which are identical as those which were purchased under the two conveyances obtained from Keni and Billimoria. There is one more important finding recorded by the Inquiry Officer which is required to be noted. The claim of defendant Nos. 5 and 7 that Dhanaji Patil had executed lease in favour of their partnership concern known as Hind Maharashtra Company was frivolous, because Dhanaji Patil by filing an affidavit before the Inquiry Officer claimed that he had never executed a lease in favour of defendants Nos. 5 and 7. The Inquiry Officer noted that defendant Nos. 5 and 7 were making unauthorised non-agricultural use of some part of the suit lands. Dhanaji Patil filed an appeal against the order of the Inquiry Officer, being Appeal No. 97 of 1968 before the Sub-Divisional Officer, but the appeal ended in dismissal by order dated March 7, 1970. It is therefore clear from the record of the Inquiry Officer produced before the trial Judge and marked as Exhibit Z-2, that in the inquiry conducted pursuant to the conclusion of survey of the lands in Bhandup village, the Inquiry Officer found that the plaintiffs are the owners of the suit lands and which lands were purchased by them under the two conveyances from Keni and Billimoria. This finding of the Inquiry Officer clearly establishes the identity of the suit lands with that purchased by the plaintiffs under the two conveyances.

In accordance with the finding recorded by the Inquiry Officer, the Relevant Authorities prepared the Inquiry Registrar and entered the Chalata numbers, Survey numbers and corresponding City Survey numbers in respect of various pieces of lands. A copy of the relevant portion of the inquiry registrar was produced at Exhibit "P" and the persual of the same leaves no manner of doubt that the plaintiffs were entered as owners of suit lands. There is one more circumstances depicted in the documentary evidence produced before the trial Judge which conclusively establishes that the predecessors of the plaintiffs, that is Keni and Billimoria are the owners of the suit lands, and which they had conveyed to the plaintiffs by registered sale deeds. Exhibit 39 is the 7/12 extract produced by the contesting defendants and persual of the same indicates the names of Dwarkadas Keni and H.D. Billimoria were initially mentioned as Kabjedars or holders in these extracts in respect of various lands covered by the suit. Subsequently after execution of the two conveyance by Keni and Billimoria the entry of the name of the trust was made in the column of "holder". The extracts also establish that the entries were duly certified or mutated. The procedure before certifying the mutation entry is to give notice to the transfer of the vendors and record this statement. The provisions of the Land Revenue Act prescribe that initially and entry is made in pencil on an application received by the authorities and only after recording the statement of the vendor and on satisfaction that a legal and valid transfer has taken place that the name of the transferee is entered in ink in the 7/12 extract in the column of holder. It is interesting to note that the names of Keni as well as Billimoria were entered in

the column of holders after the mutation entry was duly certified and so also the name of the trust. This contemporaneous record leaves no manner of doubt that the plaintiffs established beyond any doubt the identity of the properties purchased under the two conveyances as those covered by the lands in the suit.

10. The trial Judge in paragraph 106 of the judgment, while dealing with Issue No. 14, held that the identity of the property is not established because the land was described in the conveyances in terms of Bighas and Pandas and the plaintiffs did not lead satisfactory evidence to link the properties transferred under the conveyances with that of the suit lands. We are unable to share the view of the trial Judge in face of the strong and reliable documentary evidence to which reference is made hereinabove. It could not have been overlooked that after the finding was recorded by the Inquiry Officer on June 19, 1968, and which finding was confirmed by the Sub-Divisional Officer in appeal on March 7, 1970, Dhanaji Patil, who was still alive, did not take any steps to establish his title to the suit lands. Failure of Dhanaji Patil to take any steps is a clear pointer to the fact that Dhanaji Patil never disputed the title of the trustees to the suit lands. In our judgement, the trial Judge was clearly in error in holding that the plaintiffs failed to establish the identity of the properties purchased under the two conveyance with the lands covered by the suit. We have no hesitation in concluding that the suit lands are the lands referred to in the two conveyances and the plaintiffs have established their title to the suit lands. We are also unable to share the view of the trial Judge that the plaintiffs failed to establish that the vendors Keni and Billimoria had no title to the suit lands. It is required to be stated that the Charity Commissioner had given sanction to the purchase of the suit lands by order dated August 6, 1963 and May 19, 1959 and the suit lands are entered in the register maintained by the Charity Commissioner. The title of Keni and Billimoria cannot be doubted in face of the documentary evidence and to which the Inquiry Officer has made reference. The fact that Keni and Billimoria had paid the assessment with local funds to the Khots and the fact that Billimoria and Keni had obtained title to the lands by registered deed and thereafter had mortgaged the land from time to time leaves no manner of doubt that Keni and Billimoria were owners of the suit lands and had legally and validly transferred the title in favour of the trustees. In face of this evidence and especially when the contesting defendants are not claiming that Dhanaji patil had any documentary evidence in support of the title, the trial Judge was in error in not recording a finding in favour of the plaintiffs on the issue of title. In our judgement the plaintiffs have established the title to the suit lands.

11. Once it is found that the plaintiffs have established title to the suit lands, the claim for declaration and recovery of possession can be denied only if the defendants succeeded in establishing that Dhanaji Patil had perfected title by adverse possession to the suit lands. Before we examine this aspect, it is required to be reiterated that Dhanaji Patil had died sometime in October 1971 and his legal representatives, that is defendants 1 to 4 have not chosen to resist the claim filed by the plaintiffs. The claim for declaration and recovery of

possession is resisted only by defendants 5 to 7 and defendant Nos. 5 and 7 claim to be the lessees from Dhanaji Patil from the year 1966 onwards. The claim of the plaintiffs can be defeated by defendant Nos. 5 to 7 provided these defendants could establish that Dhanaji patil was holding the suit lands adversely to the interest of the true owners and had perfected his title by adverse possession. It hardly requires to be stated that it is not sufficient for the contesting defendant to establish that Dhanaji Patil was in occupation of the suit lands for a period of more than 12 years to establish adverse possession. Article 65 of the Limitation Act, 1963 provides that the period of limitation for a suit for possession of Immovable property or an interest therein based on title is 12 years. The period of 12 years begins to run when the possession of the defendants become adverse to the plaintiffs. Article 65 is a departure from Articles 142 and 144 of the Limitation Act, 1908. In accordance with provisions of Article 65 it is incumbent upon the defendants to specifically set out as to the date on which the defendants started claiming adversely to the plaintiffs. In the written statement filed by defendant No. 5 the claim of adverse possession is dealt in paragraph 11, but defendant No. 5 has failed to mention the date when adverse possession of Dhanaji Patil had commenced. General and vague statements are made in the written statement in respect of the claim of adverse possession. First it is claimed that Dhanaji Patil and his predecessors were in possession from time memorial, but it is not even mentioned as when they were inducted in possession or who inducted them in possession. An alternate claim is made that Dhanaji patil was in occupation from the year 1949, but again the written statement is silent as to who put Dhanaji Patil in possession or in what capacity Dhanaji Patil was occupying the suit lands from the year 1949. A further alternate claim is made that in any event Dhanaji was in occupation from the year 1959. The defendant No. 5 entered the witness box and claimed that prior to the year 1966 when lease was executed by Dhanaji Patil in favour of the firm of which he was one of the partner, he had seen Dhanaji patil occupying the suit lands. Defendant No. 5 did not claim in the witness box as to the capacity or the character of possession of Dhanaji patil. Defendant No. 5 led the evidence of five witnesses who claimed that they had seen Dhanaji Patil on the lands. The trial Judge noticed that there is no specific evidence led by the defendants as to the survey numbers of the lands occupied by Dhanaji Patil, but proceeded to accept the oral testimony at its face value to reach the conclusion that Dhanaji Patil was in possession of the suit lands from the year 1949 till 1969. On the strength of this finding curiously the trial Judge came to the conclusion that Dhanaji Patil had become the absolute owner of the suit lands. Shri Munshi very rightly submitted that even assuming that Dhanaji Patil was in occupation from the year 1949 till the year 1969, the mere possession cannot confer title by adverse possession in favour of Dhanaji Patil. The mere fact that the person is in occupation for a long duration does not necessarily mean that the person is holding the land adversely to the true owner. There is always presumption in favour of the title holder about the holder being in possession of the land and unless and until the defendants lead strong and satisfactory evidence to establish adverse possession, the Court

should be extremely slow in defeating the rights of the title holder. It is not necessary to refer to catena of cases where the Courts have laid down the requirement of the strong evidence from the defendants as the burden to establish adverse possession is extremely heavy. From the evidence led by the contesting defendants, it is impossible to hold that Dhanaji Patil was in adverse possession of the suit lands.

12. Shri Sathe, learned Counsel appearing on behalf of the contesting defendants, relied upon some circumstances to indicate that Dhanaji Patil was in possession of the suit lands and was claiming adversely. We are unable to find any merit in the submission. The first circumstance referred to by the learned Counsel is the statement made by plaintiff No. 1 in the witness box. The attention of plaintiff No. 1 was brought to the averments made in the written statement filed by the trustees in suit No. 682 of 1970 filed on the Original Side of this Court. The suit was instituted against the trustees for specific performance of an agreement of lease dated November 20, 1962 and to this suit Dhanaji Patil was not a party. While filing the written statement the Trustees claimed that the plaintiff was fully aware of the fact that the portion of the property was wrongfully occupied by the trespassers. Plaintiff No. 1 stated in the witness box that by the "trespasser" he meant Dhanaji Patil. The statement made by plaintiff No. 1 at the most indicate that at the time of entering into the agreement on November 20, 1962 a part of the suit property was in possession of Dhanaji Patil and the trustees were treating that Dhanaji Patil was in trespasser. It is a far cry to suggest that the expression "trespasser" means that the trespasser was claiming adverse possession against the true owner. Shri Sathe then referred to the evidence of Narendra Bhansali who was working as Tahsildar, Kurla and was examined to produce the revenue record. Perusal of the revenue record produced by Bhansali clearly knocks out the claim of the contesting defendants that Dhanaji Patil was holding suit lands adversely. The revenue record, and we will immediately refer to Exhibit 39 which are 7/12 extracts, establishes beyond doubt that Dhanaji Patil never claimed possession of the suit lands adverse to the plaintiffs. Exhibit 39, which are the extracts of 7/12, set out that Dhanaji Patil was in possession of the suit lands from the year 1960-61 onwards and was cultivating rice and grass. The name of Dhanaji Patil is entered as cultivator and the mode of cultivation shown is Reet No. 3. Reet No. 3 means occupation of the cultivator as a tenant. This record is a telltale circumstance to establish that Dhanaji Patil was in occupation of the suit lands in the capacity as a tenant and consequently could have never claimed adverse possession against the true owner, that is initially Keni and Billimoria and later the plaintiffs trustees. Exhibit 39, in our judgment, is a clear answer to the claim of the defendants that Dhanaji Patil was holding the suit lands adversely and had perfected adverse possession being in possession from the year 1949 to 1969. The 7/12 extracts running from the year 1960-61 onwards till the year 1970-71 establish possession of Dhanaji Patil merely as a cultivator or a tenant. Reliance was placed by Shri Sathe on copy of the letter dated March 27, 1959 written by

Shri S.M. Abhyankar, Advocate for the plaintiffs, wherein it has been stated that Dhanaji Patil was in occupation of the lands as a tenant. The Trial Judge relied upon this letter to hold that Dhanaji was in possession and his possession was adverse and hostile to the owners. We are surprised how such a conclusion can be drawn. The letter was written by Abhyankar Advocate to the Attorneys of the plaintiffs prior to the date of conveyances executed by Keni and Billimoria. The letter claims that there were two tenants on the lands proposed to be purchased by the trustees and payments have been made to the tenants to vacate the lands and one of the tenants had already vacated and Dhanaji Patil is likely to vacate within a short time. The letter merely establishes that Dhanaji Patil was in occupation as a tenant prior to the date of purchase by the plaintiffs and if that is so, then the letter clearly supports the plaintiffs instead of the contesting defendants. The occupation of Dhanaji Patil as a tenant completely nullifies the claim that Dhanaji was holding possession of the suit lands adverse and hostile to the interest of the plaintiffs. To repeat, the learned Judge was in error in concluding that Dhanaji Patil had perfected his title merely because he was in occupation for more than 12 years. It hardly requires to be stated that possession for duration of 12 years or even 100 years cannot make the person in possession an owner by adverse possession. To establish adverse possession it is necessary for the person in possession to claim adversely and that means openly and intentionally hostile title to the true owner. As Dhanaji Patil was in occupation as a tenant of the suit lands that is indicated not only by Shri Abhyankar advocate's letter but also by the consistent record maintained by the revenue officers, it is futile for the contesting defendants to claim that Dhanaji Patil was holding possession adversely to the plaintiffs.

13. In support of the submission that possession of Dhanaji Patil was adverse to the plaintiffs, Shri Sathe relied upon three circumstances. The first was that Dhanaji Patil had created leases in favour of strangers from the year 1962. We are unable to find any merit in the submission that this action on the part of Dhanaji Patil indicates that Dhanaji was holding out to the world that his possession was adverse to the true owner. In the first instance the alleged deeds executed by Dhanaji Patil are not produced on record. Even assuming that such deeds were executed by Dhanaji Patil, unless Dhanaji Patil had claimed that he was executing the leases in his capacity as owner, that would not advance the case of the defendants any further. It is open for a tenant of the land to create a sub-lease whether law permits it or not. It is also open for a trespasser to part with the property by creation of alleged documents or deeds, but such action cannot conclusively establish that the person in possession was claiming hostile and adverse title to the true owners. The second circumstance relied upon by Shri Sathe is that suits were filed by the plaintiffs in the City Civil Court in which possession of part of the suit lands was sought by joining Dhanaji Patil as one of the defendant and the person in occupation as another defendant. In the suits the plaintiffs claimed that Dhanaji Patil and the person in occupation are trespassers. From these suits, which were instituted in the year 1969, Shri Sathe

wants to contend that the plaintiffs were conscious that possession of Dhanaji Patil was without any authority of law. We are afraid we cannot find any merit in the submission, because there cannot be any confusion between the concept of mere trespasser and the person claiming adverse to the true owner. A trespasser remains on the land without any authority of law, but such a trespasser may not necessarily claim adverse or hostile title to the true owner. The last circumstance relied upon is that in the year 1961 Dhanaji Patil had claimed title to land bearing Survey No. 90 Hissa No. 2 before the Inquiry Officer and that indicates that Dhanaji was claiming adversely to the plaintiffs. The submission is misconceived for more than one reason. In the first instance the claim made by Dhanaji Patil before the Inquiry Officer was in respect of land bearing Survey No. 90 Hissa No. 2 and in respect of that land the finding went against Dhanaji Patil, but Dhanaji thereafter did not lease out this land to defendant No. 5 and consequently the question of defendant No. 5 claiming possession of Survey No. 90 Hissa No. 2 does not arise. It is also interesting to note that in respect of other lands involved in the suit, claim of Dhanaji to the ownership was turned down by the Inquiry Officer and thereafter Dhanaji did not take any steps or proceedings to establish his title. In other words Dhanaji Patil accepted the finding of the Inquiry Officer that he was not owner of the suit lands. In spite of accepting that finding, if defendant No. 5 secured a lease deed from Dhanaji Patil, then it is obvious that defendant No. 5 was not a bona fide transferee but has decided to take advantage of the fact that the trustees were helpless in protecting their possession and grab the lands. Defendant No. 5 claimed that he had engaged one Rule Advocate to take search of the record to find out the title of Dhanaji Patil. The statement is obviously false, because the advocate would have immediately found out by mere perusal of the record that Dhanaji Patil had no title whatsoever to the lands in respect of which defendant No. 5 secured the lease. Defendant No. 5 faced with several inconvenient questions in the cross-examination had to concede that none of the documents to establish that he was in lawful possession are available because everything was lost in raid at his house by persons whom he had inducted on the suit lands. In our judgment, the circumstances relied upon by Shri Sathe do not support the claim of defendant No. 5 that Dhanaji Patil was in adverse possession and had perfected his title to the suit lands. The Trial Judge was clearly wrong in jumping to the conclusion that Dhanaji Patil had perfected title by adverse possession merely because Dhanaji Patil was found in possession from the year 1949 to 1969. We are not sure about the accuracy of the finding of possession of Dhanaji Patil also, but for the purposes of the present appeal we will proceed on the assumption that Dhanaji was in possession, but it is impossible to imagine how possession of Dhanaji as a tenant can ever mature or ripen into the title to the suit lands.

Shri Sathe made a faint attempt to urge that the Khoti rights of Bhandup village were abolished in the year 1952 and thereafter Dhanaji Patil became the owner of the property. We are unable to consider the submission for more than one reason. In the first instance this claim was not pleaded in the written statement.

Secondly, we inquired from Shri Sathe as to whether after abolition of Khoti estate there was any regrant in favour of Dhanaji Patil and the answer was in the negative. Shri Sathe also submitted that if Dhanaji Patil was in occupation as tenant, then transfer in favour of the plaintiffs was invalid in accordance with provisions of section 63 of the Bombay Tenancy and Agricultural Lands Act. There is no merit in this submission also, because apart from the fact that the defendants have not pleaded this contention in the written statement, the contention that Dhanaji Patil was a tenant is not permissible when the defendants have gone to the trial with the claim that Dhanaji Patil was holding adversely to the plaintiffs and was never a tenant. In our judgment, the submission of Shri Sathe on this count are nothing but a desperate attempt to retain the lands secured by illegal activities. In our judgment, the finding of the trial Judge that Dhanaji Patil had perfected his title by adverse possession and therefore the plaintiffs are not entitled to the relief cannot stand and is required to be set aside.

14. That takes us to the cross objections filed by the contesting defendants. Shri Sathe submitted that the plaintiffs have secured consent of the Charity Commissioner for purchase of lands from Dwarkadas Keni on August 6, 1963. The learned Counsel urged that the conveyance was executed on August 14, 1957, while the sanction was secured long thereafter, and therefore, the transfer in favour of the trustees is invalid. The Trial Judge very rightly negated the contention by holding that the post facto sanctioned is perfectly valid and the transfer effected by Keni in favour of trustee cannot be defeated merely because the sanction was granted by the Charity Commissioner at a later date. We are in entire agreement with the conclusion recorded by the Trial Judge. It is interesting to note that while obtaining conveyance from Billimoria the Charity Commissioner had granted sanction prior to the date of execution, but only in case of Keni the sanction came later. The action of the Charity Commissioner in granting sanction at a later date cannot defeat title of the plaintiffs to the lands.

15. The second contention urged by Shri Sathe is that the Trial Judge was in error in holding that the suit was not barred by law of limitation. The complaint is that the suit on behalf of the trustees could not have been filed without joining all the trustees, who claims Mr. Sathe, are the Co-Owner of the suit property. The suit was filed by four trustees by leaving out defendant No. 11 who is a co-trustee. The suit was instituted on March 17, 1974 and when defendant No. 5 raised objection to the maintainability of the suit on the ground of non-joinder of the remaining trustees, the plaintiffs sought amendment and defendant No. 11 was joined as a party defendant in pursuance of the order granting amendment passed by the trial Judge on January 6, 1981 it must be held that the suit was filed only on January 6, 1981 and thereupon the suit should be dismissed as barred by law of limitation. We are unable to find any merit in this submission. The suit instituted by four trustees cannot be dismissed as not maintainable when the remaining trustees was jointed before the date of the decree. Defendant No. 11 very rightly did not resist the suit. Once a co-owner institutes

a suit within the period of limitation, then the suit cannot be dismissed as barred by limitation merely because one of the co-owners left to be joined is added as party defendant at a later stage. Secondly, even assuming that the suit is filed in the year 1981, we fail to appreciate how the suit could be dismissed as barred by law of limitation. The defence to the suit is only that Dhanaji Patil had perfected title to the suit by adverse possession. Once it is found that Dhanaji had not perfected his title by adverse possession to the suit lands even in the year 1974, then the suit even assuming to have been filed in January 1981 cannot be treated as barred by limitation. In our judgment, the trial Judge was perfectly right in overruling the objection raised by the contesting defendants on this count.

16. The last contention urged by Shri Sathe is that the plaintiffs had instituted four suits, being Suit Nos. 3314, 3315, 3316 and 3317 of 1969 in the Bombay City Civil Court and in all these suits Dhanaji Patil was a common defendant. Mali, Chaudhari, Pandit and Kakade were other defendants respectively in the four suits. In each of the suit the trustees claimed that Mali, Chaudhari, Pandit and Kakade were in unauthorised occupation of an area of 2000, 1500, 2000 and 1200sq. yards respectively out of Survey No. 81 Hissa No. 1. In all these suits on the death of Dhanaji Patil sometime in October 1974 City Civil Court passed an order that the suit stands abated against Dhanaji Patil for failure to bring on record his legal representatives. Shri Sathe complains that the area covered by these four suits and included in Survey No. 81 Hissa No. 1 is also the area in respect of which possession is sought in the present suit instituted in the year 1974. Shri Sathe submitted that as the suits had abated against Dhanaji Patil, the claim in the present suit cannot be decreed. The Trial Judge negatived the contention and we are afraid we are unable to appreciate what exactly is the contention of Shri Sathe in this respect. In the year 1969 suits were filed against Patil, Mali, Chaudhari, Pandit and Kakade because at that time they were in wrongful occupation of portion of Survey No. 81 Hissa No. 1. The claim of the trustees was that Dhanaji Patil, Mali, Chaudhari, Pandit and Kakade were in wrongful occupation. Now, death of Dhanaji Patil, who was in wrongful occupation, would make no difference whatsoever to the claim of the trustees against Mali, Chaudhari, Pandit and Kakade. The plaintiffs instituted the present suit in the year 1974 and at that time possession of entire Survey No. 81 Hissa No. 1 was sought, possibly because Mali, Chaudhari, Pandit and Kakade had left and the defendants in the present suit are in occupation of the portions held by them earlier. We are unable to appreciate how the order of abatement of suits filed against Dhanaji Patil can have nay bearing to the claim or relief sought in the present suit. Merely because the suit stands abated against a trespasser that cannot confer title upon the other trespassers or can defeat the title of the plaintiffs to the suit lands. In our judgment, the contention of Shri Sathe that the relief claimed in the present suit in respect of Survey No. 81 Hissa No. 1 is barred by res-judicata is entirely misconceived and is required to be turned down. In our judgment, the cross objections are without any merit and are

required to be dismissed with costs, while the plaintiffs suit is required to be decreed.

17. That takes us to the question about the claim for damages or compensation made by the plaintiffs for a period of three years prior to the date of institution of the suit. The plaintiffs claim that the defendants were in wrongful occupation and were recovering rents from various persons inducted in the lands and the claim was made in the sum of Rs. 7,20,000/-. The Trial Judge in paragraph 113 of the judgment found that according to the list (Exhibit "S") the total rent recovered by defendants Nos. 5 to 7 from the tenants per month was Rs. 7,440/- and consequently the rent received per year was Rs. 89,280/-. The Trial Judge then held that the claim for compensation for the period of three years prior to the date of institution works out at Rs. 2,67,840/-. After recording this finding curiously the trial Judge observed that the plaintiffs have been unable to prove damages to the extent of Rs. 2,67,840/-. We are unable to appreciate what exactly the Trial Judge wanted to convey by this observation. The trial Judge then declined to grant the claim on the ground that the plaintiffs have been unable to show appointment of the damages from the various defendants. The findings is clearly erroneous. It was defendant Nos. 5 to 7 who had inducted large number of persons on the suit lands by executing illegal structures and have recovered rent. Exhibit "S" sets out the rent recovered by defendants Nos. 5 to 7. Defendant No. 5 entered the witness box but did not utter one word about the amounts he had recovered or denied that he had not recovered the rent as set out in Exhibit "S". The conclusion of the Trial Judge that it was necessary for the trustees to establish the apportionment of damages between defendants Nos. 5 to 7 is wholly incorrect. Defendants Nos. 5 to 7 claimed to have formed partnership firm and have obtained lease on June 7, 1966 from Dhanaji Patil. Defendant No. 5 deposed that the firm was dissolved on March 29, 1969 and thereafter the lease properties were divided between defendants Nos. 5 to 7. Defendant No. 6 is the daughter of defendant No. 5 and is the sole proprietress of defendant No. 9, a firm dealing in construction. It is obvious that defendant No. 5 with the help of his daughter and partner, have illegally secured possession and have raised structures and have reaped the benefits. Defendant No. 5 in spite of appointment of Court receiver merely collected rent and there is no reason whatsoever to deprive the plaintiffs of the compensation at Rs. 2,67,840/- as found by the trial Judge for a duration of three years prior to the institution of the suit. The claim as regards mesne profits from the date of institution of the suit till recovery of possession is required to be determined in accordance with Order XX Rule 2(c) of the Code of Civil Procedure.

18. Accordingly, appeal is allowed and judgment dated April 30, 1981 delivered by the learned Single Judge in suit No. 260 of 1974 is set aside and the plaintiffs suit is decreed in the following terms:

(a) It is declared that the plaintiffs as the trustees of Tulsiram Devidayal Charitable Trust are the owners of the suit lands as shown in the plan annexed as

Exhibit "C" to the plaint and shaded with green, blue, violet, orange and yellow colours. The defendants are directed to forthwith hand over quiet, vacant and peaceful possession of the suit lands to the plaintiffs.

(b) The defendants and their family members, servants and agents are restrained by a permanent injunction from entering upon the suit lands after handing over possession to the plaintiffs.

(c) Defendant Nos. 5 to 7 are jointly and severally directed to pay a sum of Rs. 2,67,840/- as damages or compensation to the plaintiffs for wrongful occupation for a period of three years prior to the suit.

(d) The Commissioner for Accounts to hold an inquiry as regards the mesne profits from the date of the suit until delivery of possession to the plaintiffs in accordance with provisions of Order XX, Rule 12(1)(c) of the Code of Civil Procedure.

(e) The respondents Nos. 1 to 10 shall pay the costs of the plaintiffs throughout.

(f) The cross objections filed by the respondents Nos. 5 to 7 stand dismissed with costs.

(g) The Court Receiver, High Court, appointed during pendency of the suit to continue as receiver in execution. The Receiver is directed to remove the defendants from the suit lands and hand over vacant possession. The defendants are at liberty to take away the illegal structures which they had constructed.

Shri Sathe applies for stay of execution of the judgment. Stay refused.

Receiver, High Court, Bombay to act on the Minutes.