

(2009) 09 BOM CK 0150
In the Bombay High Court
Case No : Second Appeal No. 454 of 2002

Balakisan Khandelwal and Others

APPELLANT

Vs

Govinda Udupure (Dead) (Legal representatives Shrinivas
Udupure and Others) and Others

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Limitation Act, 1908 — Article 142, 144, 64, 65

Citation : (2009) 111 BOMLR 3829 : (2010) 1 MhLj 136

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : V.M. Deshpande and S.O. Tapdia, for the Appellant; J.T. Gilda and S.R. Sarda, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—Rule, returnable forthwith. Heard finally with the consent of the parties.

2. These two appeals can be continently disposed of by common judgment since they arise out of the judgment by which two appeals were disposed of. The appeals have been preferred by the original defendant Nos. 1 and 2. The parties shall hereinafter be referred to as the plaintiffs and the defendants.

3. The facts giving rise to the appeals are as follows:

Two sets of plaintiffs instituted two suits against the same set of defendants being Civil Suit Nos. 1079 of 1990 and 1211 of 1990. Defendant No. 1 is the son of defendant No. 2. Defendant Nos. 1 and 2 had prepared a private layout in survey No. 25. The same was known as Shri Khandelwal Nagar. Defendant Nos. 1 and 2 offered the plots in the said layout to the public. The plaintiffs purchased those plots on various dates from defendant Nos. 1 and 2. The dates of said purchase are given in the schedule attached to the plaint. It is the contention of the plaintiffs that some of the plaintiffs are subsequent purchasers. The plaintiffs

were put in possession of their respective plots and they had paid the entire consideration to defendant Nos. 1 and 2. Each of the plaintiffs is therefore owner of the plot out of survey No. 25 sold by defendants No. 1 and 2 to him. Since those plots of land were sold to the plaintiffs, defendant Nos. 1 and 2 do not have any interest in the said plots. Defendant No. 3 is a creditor of defendant Nos. 1 and 2. He had obtained a decree against defendants No. 1 and 2 and had therefore, filed execution case No. 2/72. Survey No. 25 was attached in the said decree and the said survey No. was sold in auction. Defendant No. 3 purchased survey No. 25 in the said auction and sale was confirmed on 27/7/1976 and possession was taken by defendant No. 3 on 24/4/1977. In the meanwhile, children of defendant Nos. 1 and 2 had applied for setting aside the sale on 27/7/1976. The matter went up to Supreme Court. The Supreme Court had remanded the matter to the High Court. When the matter was pending before the High Court, there was a compromise between the objectors and defendant No. 3. Under the said compromise, the auction was restricted to one half share of the unsold portion of Survey No. 25 and the portion which was purchased by plaintiff and others was released from attachment. The plaintiffs submit that, therefore, defendant Nos. 1 to 3 have now no interest in the suit property. All the plaintiffs came together and formed Society known as "Satsang Nagar" and the said Society issued a public notice calling upon all the purchasers to collect together and take possession of the plots. However, defendant No. 2 published another notice on 11/2/1990 that he is the owner and is in possession of the said field and he has also fenced the same. It is contention of the plaintiffs that plot holders had applied to the revenue authority for mutation of their individual names and Resident Deputy Collector had directed to record the names of the plaintiffs against which defendant No. 2 filed a revision and in the said revision defendant No. 1 contended that the field was in possession of defendant No. 3 and now it is in his possession. The plaintiffs, therefore, on account of this filed the suit for possession and an injunction.

4. Defendant Nos. 1 and 2 resisted the suit. Defendant Nos. 1 and 2 by their written statement denied all allegations made by the plaintiffs. They even denied execution of the sale deed in favour of the plaintiffs. The main contention of the defendants is that the plaintiffs were never put in possession. They are the owners of the plots and defendants had perfected the title over the suit property by adverse possession. It is the contention of the defendants that since the date of auction, the plaintiffs have been dispossessed and the defendants have been in possession and therefore, they have perfected title over the suit property. Defendant No. 3 also resisted the suit claim and denied all allegations. The learned judge of the trial court framed issues and found that the plaintiffs have proved their title over the suit properties. He found that the plaintiffs were, however, not entitled to possession since defendant Nos. 1 and 2 had perfected their title by adverse possession. He, therefore, dismissed the suit. Feeling aggrieved thereby, the plaintiffs preferred an appeal before the District Judge. The Joint District Judge, who heard the appeal, found that the plaintiffs have

proved their title and the defendants Nos. 1 and 2 had failed to prove the adverse possession. He, therefore, allowed the appeal and passed a decree for possession and injunction. Feeling aggrieved thereby, defendant Nos. 1 and 2 have preferred this appeal. Defendant No. 3 has not preferred any appeal. The decree, therefore, stands confirmed as against defendant No. 3.

5. I have heard the learned Counsel for the appellants and the respondents.

6. Following substantial questions of law arise -

1. Whether the first appellate court misdirected itself in holding that defendant Nos. 1 and 2 had not perfected title by adverse possession ?

2. Whether the suit falls under Article 64 or 65 of the Limitation Act.

7. At the cost of repetition, a few admitted facts may be stated. Field Survey 25 belonged to family of defendant Nos. 1 and 2. Defendant No. 3 had filed civil suit No. 191B/ 59 against defendant Nos. 1 and 2 and a decree was passed in the year 1960. There was a charge on the suit property i.e. field Survey No. 25 of this decree. The property was put to auction and defendant No. 3 as decree holder purchased the suit property in auction purchase. The sale was confirmed by the court on 28/7/1976. Possession was obtained by defendant No. 3 on 24/4/1977. Narendra and Rakesh - minors, from defendant No. 1's family challenged the same and applied for setting sale aside. The trial court had rejected the application and the appeal was dismissed by High Court. The Supreme Court remanded the matter to the High Court and directed it to rehear the same. During pendency of appeal in the High Court, there was a compromise. The terms relevant for our purpose of the said compromise were as follows:

1. The appellant accepts the auction in favour of the respondent No. 1 in respect of the following described properties:

a) Field S. No. 27, Area 30, Gunthas 29 of Mouza Mhasla, Pragane Nandgaon Peth, Tq. and Distt. Amravati, out of it Acres 24, Gunthas 26 of Northern side with Est West Division.

b) Field S. No. 25, Acre 24, Guntha 5 of Mouja Mhasla, Pragane Nandgaon Peth, Tq. and Distt. Amravati out of it 1/2 share in unsold portion of the field, if any.

Thus the appellant accepts that the respondent No. 1 is the full owner and is in exclusive possession of Acre 24 gunthas 26 out of field S. No. 27 and will get 1/2 share in the unsold portion, if any, of field S. No. 25 as mentioned above. The auction in respect of the portion of the above fields in favour of the respondent No. 1 is and be held to be good and valid auction. The respondent No. 1 may deal with the said property as owner thereof and in the manner they like without any obstruction or objection of the appellant and/or respondent No. 2 and/or of any other person.

2. The respondent No. 1 gives up all the right, title and interest accrued in its

favour under the auction in respect of the portions of the fields described below:

a) Field S. No. 27, Acre 30 Guntha 29 of Mouja Mhasla, Pragne Nandgaon Peth, Tq. and Distt.Amravati, out of it, acre 6, Guntha 3 of Southern side with East West division.

b) Field S. No. 25, acre 24, Guntha 5 of mouja Mhasla, Pragne Nandgaon Peth, Tq. and Distt.Amravati, out of it 1/2 share, in unsold portion of the field, if any.

The appellant and the respondent No. 2 and the other owners of the above referred property mentioned in para 2(a) and (b), may deal with the same as owners thereof free from any right, title or interest of the respondent No. 1 as an auction purchaser in respect of this property.

It is thus clear that respondent No. 3 gave up his right in half the portion sold and retained unsold portion with him. With these admitted facts, let us proceed to decide the controversy.

8. Shri Deshpande, learned Counsel for the appellants, contends that the pleadings of the plaintiffs themselves would show that they were never in possession inspite of the alleged execution of the sale deeds. He also submits that the tenor of the plaint would go to show that the plaintiffs claimed possession and the fact that they claimed possession by suit shows that they were either not put in possession at all at the time of execution of sale deed, or, if put, they were later dispossessed. The sale deeds in fact go to show that all the plaintiffs were put in possession of the respective plot and defendant Nos. 1 and 2 cannot resile from that position at all. It must be assumed that they were put in possession of the plots. It would be worthwhile to reproduce here the pleadings in the plaint so as to ascertain what is the exact pleadings and cause of action in the suit.

10. Plot holders (i.e. the purchasers) from F.S. No. 25 or mouje Mhasla had applied to the Revenue authority for mutation of their individual names in Revenue record. The resident Deputy Collector Amravati in a Rev. Appeal No. RTS/59/Mhasla/233/88.89 decided on 6.2.90 ordered inclusion of their names. The defendant No. 2 has filed the revision against the said order before Addl. Commissioner Amravati Division Amravati. In the memo of revision the defendant No. 1 has stated facts and therein he has stated that the F.S. No. 25 i.e. the suit field was in possession of the defendant No. 3 (i.e. auction purchaser) and from the date of compromise decree i.e. 1.3.1988 he is in possession.

11. It is submitted that only by inserting public notices in newspapers in February, 1990 that the defendants are claiming to be the owners and in possession of the suit land sold by the defendants 1 and 2 to the plaintiff or their predecessors in title.

12. The plaintiffs therefore bring this suit for possession of suit land as described in schedule A and B for mandatory injunction against the defendants for removal

of fence. In the layout open spaces are left out adjoining to the plot for road drains service lanes etc. The plaintiff also claim that they have a right to use them and claim a relief that the defendants should be restrained from transferring or otherwise dealing with these open spaces.

9. Now, if this is read, it is clear that plaintiffs say that they came to know from pleadings raised by defendant Nos. 1 and 2 before the Additional Commissioner in revision that defendants were in possession of the property, they had fenced it and were claiming adversely. The other ground set up by the plaintiffs in the said pleadings is publication of notice by defendant Nos. 1 and 2 and assertion of their possession. If this pleading is seen, the plaintiffs certainly claimed possession because of the fact that the defendants claimed or asserted their possession over the suit property. Thus, it seems that they submit that they were dispossessed.

10. Shri Deshpande, the learned Counsel for the appellants/defendants No. 1 and 2 submits that the defendant No. 3 was in possession from 1977 and thereafter from 1988 defendants Nos. 1 and 2 are in possession. He submits that the period from 1977 to 1988 of possession of defendant No. 3 could be tacked with defendant Nos. 1 and 2's possession. Defendant No. 3 had obtained possession of the entire field S. No. 25 under an auction purchase on 24/4/1977. Obviously, defendant Nos. 1 and 2 were not in possession from 24/4/1977 till the date of compromise in 1988. There was a compromise as is seen earlier between the objectors and defendant No. 3 in the year 1988 and defendant No. 3 gave up his claim to the property which was already sold to the plaintiffs and retained ownership of other half. I have already reproduced terms Nos. 1 and 2 supra. If term No. 2 is read, it would be clear that right in half of the property was given up in favour of the objectors and other persons whom include the present appellants. It is thus further clear that defendant No. 3 did not and could not have any interest in the suit property at all after the date of the compromise although surprisingly defendant No. 3 files written statement denying all allegations made by the plaintiffs. If the written statement of defendant No. 3 is seen, it would be clear that defendant No. 3 nowhere raises a plea of adverse possession as against plaintiffs at all. The question, therefore, would be whether defendant Nos. 1 and 2 could tack the period of possession of defendant No. 3, as is contended by Mr. Deshpande. The answer has to be in the negative. If tacking is to be allowed, even the possession of predecessor in title also has to be shown to be adverse. Here defendant No. 3 does not claim any adverse possession as against the plaintiffs. In the circumstances, defendant Nos. 1 and 2 are not entitled to tack period of possession of defendant No. 3 to their claim of possession.

11. Shri Gilda, learned Counsel for the respondent submits that the suit is necessarily based on the title since all the plaintiffs plead in the plaint specifically that they are the purchasers of the plots and they have paid consideration. They give the entire details of their sale deed. Shri Gilda submits that though plaintiffs

alleged that they are dispossessed they necessarily claimed possession on title and not on previous possession. Shri Deshpande learned Counsel for the appellants, submits that the suit is based on Article 64 of the Limitation Act and plaintiffs do not prove that they were in possession within twelve years. He submits that the lower court has not considered this aspect. It would be necessary to reproduce here the pleadings in paragraph No. 4 of the plaint.

4/ That the plaintiffs 1 to 34 are purchasers from defendant No. 1 having purchased various plots from the field as per the layout plan. The plaintiffs 1 to 27 are the direct purchasers from the defendant No. 1 while plaintiffs 28 to 34 are the transferees from transferees in whose favour the defendant No. 1 had executed the sale deed some of the sale deeds are executed by the defendant No. 2 on behalf of defendant No. 1 and the defendant No. 2 had authority to do so. In Schedule A attached to the plaint the plaintiff have given details of transfers in favour of each of the plaintiffs. The schedule A gives names of Vendee date of transfer Sr. No. , Plot area of plot, total area and the total consideration paid schedule B is the consolidated layout plan of F.S. No. 25 prepared by defendants 1 and 2 and it gives the actual location of each of the plots. The total area of all the plots which are purchased by the plaintiff is 102900 Sq. Ft. The defendants 1 and 2 had sold the plots for consideration and put the vendees in possession of various plots purchased by them.

Although it is alleged that plaintiffs are dispossessed and claimed possession, the suit necessarily would have to be treated as one under Article 65 of the Limitation Act, the same having been based on title i.e. Sale deeds. The time would begin to run against the plaintiff from the date the defendants claim that their possession became adverse. We have already seen that the possession of defendant No. 3 cannot be made use of defendant Nos. 1 and 2. Defendant Nos. 1 and 2, according to the plaintiffs, claimed possession and that too adverse only when defendant Nos. 1 and 2 raised the plea of ownership and possession in revision before the Commissioner. Such a contention was raised by defendant Nos. 1 and 2 only in the year 1990. Defendant Nos. 1 and 2 do not plead that any dispute with regard to ownership and possession had taken place between them and the plaintiff prior to 1990. If there is no evidence and pleadings to that effect at all, the possession does not become adverse. The possession, however, long cannot mature into adverse possession at all unless it is shown that the dispute with regard to possession and ownership had arisen and such a specific time of such dispute is pleaded and made out. Shri Gilda, learned Counsel for the respondents relied on the decision of the Supreme Court in *M. Durai Vs. Madhu and Others*, . Their Lordships of the Supreme Court have observed as follows

7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-à-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff

proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.

Another decision that was cited by Shri Gilda, learned Counsel for the respondents, is reported in P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, . Their Lordships observes as follows -

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change in so far as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim v. Bibi Sakina in the following terms: (AIR p.1256, para 5).

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

In the instant case, the plaintiffs have certainly proved their title and the defendants have not contended as to from which date their possession became adverse nor do they plead that any dispute had arisen between them and the plaintiffs over the possession and ownership and that they had positively asserted their hostile title any time prior to 1990. The suit has been filed within few months from the date the defendants Nos. 1 and 2 for the first time raised such a plea in the revision before the Commissioner. The learned judge of the first appellate court, therefore, rightly held that suit was not barred by limitation. The substantial questions of law are answered accordingly and the appeal is, therefore, dismissed confirming the judgment and decree of the first appellate court. The appellants shall pay costs of this appeal to the respondents and bear their own.