
(2010) 06 BOM CK 0145

In the Bombay High Court

Case No : Second Appeal No. 325 of 1992 and Civil Application No. 581 of 2005

Chhabubhai Balkrishna Sutar and Another

APPELLANT

Vs

Panchan Ladha Savala Decd. Thru" Kuvarbai P. Savala and
Others

RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31
Limitation Act, 1963 — Article 110, 56, 57, 58, 65

Citation : (2010) 112 BOMLR 2780

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : R.M. Agrawal, instructed by G.R. Agrawal, for the Appellant; N.V. Walawalkar instructed by V.S. Gokhale, for Respondent Nos. 1A to 1E, A.A. Kumbhakoni, instructed by N.V. Gangal, for Respondent Nos. 5 and 6 and R.D. Soni, for Respondent No. 1H, for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—The Second Appeal has been preferred against the Judgment and Order dated 7th October, 1991 of the Additional District Judge, Pune in Civil Appeal No. 265 of 1984 by which the Judgment and Decree dated 23rd June, 1983 passed by the Joint Civil Judge, Senior Division, Pune in Special Civil Suit No. 131 of 1972 has been confirmed. The Courts below have held that the Suit filed by the plaintiffs, who are the appellants herein, was barred by limitation and have therefore dismissed the Suit.

2. The brief facts involved in the present Second Appeal are as follows:

3. The land bearing Survey No. 113 in Kothrud is the subject matter of the present Second Appeal. According to the appellants, who were the plaintiffs before the trial Court, they have a 1/3rd share in the suit property. The suit land admittedly was owned by one Patlu, Bholu and Dagadu Mathfod who were cousins. After the death of Patlu, his share in the undivided ancestral property

devolved upon his son Baban and wife Laxmi, who were defendant Nos. 3 and 4 in the Suit. Bholu's share devolved on his son Genu after his death and Genu was succeeded by Gangaram and his wife Yamunabai. After the death of Dagadu, his share devolved on Gangubai. The plaintiffs claim that Gangubai sold her undivided 1/3rd share in the suit land to their father, Dhondiba Chavan on 12th July, 1932. The record of rights was mutated and the entry was certified on 19th February, 1934. After the death of Dhondiba, the property devolved on Jeejabai, his wife. The plaintiffs claim that the property then devolved on them when they were minors, after their mother's death. The plaintiffs contend that their names were entered into the record of rights on 5th June, 1946 by mutation entry No. 955 which was certified on 12th October, 1946. Since they were minors, the entry was made in the name of Sunderabai, who was their guardian, being their father's sister.

4. The plaintiffs contend that they were in joint possession of the suit property being entitled to 1/3rd share. On 18th February, 1947, defendant Nos. 3 and 4 sold their share to one Mahadeo Yeshwant Datar by registered Sale Deed. The names of the plaintiffs, it appears, were deleted from the record of rights at that point of time. The plaintiff No. 1 was married and living with her husband in 1947, when the Sale Deed between defendant Nos. 3 and 4 on the one hand and Datar on the other was executed. According to the plaintiffs, defendant Nos. 3 and 4 sold the property to Datar by misrepresenting to him that they were the owners of the entire property. Datar then sold the property to defendant Nos. 1 and 2 who in turn sold it to Maharashtra Corporation. That Body then sold the property to respondent Nos. 5 and 6.

5. The plaintiffs contend that they had initiated proceedings under the Maharashtra Land Revenue Code for restoring their names to the record of rights. These proceedings were initiated in 1961 and continued till 15th April, 1969. The plaintiffs claim that the Collector then directed them to approach the Civil Court to establish their title to the property. According to them the heirs of Genu had already filed Special Civil Suit No. 166 of 1967 which was pending in the Civil Court. Therefore, they did not approach the Civil Court immediately after the observations of the Collector in the R.T.S. Proceedings. The present Civil Suit was filed in the year 1972 only after the Suit No. 166 of 1967 was withdrawn.

6. The relevant prayers in the present Suit are:

(a). for a declaration that the plaintiffs have an 1/3rd undivided share in the suit property;

(b). for a declaration that the Sale Deed executed by Datar in favour of defendant Nos. 1 and 2 on 28th August, 1947 is invalid and not binding on the plaintiffs 1/3rd undivided share;

(bi). That the Sale Deed executed by defendant Nos. 3 and 4 in favour of Datar on 18th February, 1947 is not binding on the plaintiffs 1/3rd share in the suit

property.

(c). for partitioning the plaintiffs' 1/3rd share in the suit property.

7. A written statement was filed by the heirs of defendant No. 1 in which they contended that the suit was bad for non joinder of necessary parties since Datar had not been made a party to the Suit. They further contended that the Suit was barred by limitation as a declaration was sought for cancellation of the Sale Deeds of the year 1947 in 1972. They denied the contention of the plaintiffs that they had any share in the suit land. They have also pleaded that the plaintiffs were never in possession of the suit land. They further contended that they had come into possession of the suit land in view of the registered Sale Deed executed by Datar in their favour in 1947 under which Datar sold the entire suit property being Survey No. 113 in Kothrud. They contended that they were in possession of the suit property ever since 1947 without any interference from the plaintiffs. A written statement was also filed by defendant No. 2 in which she raised similar contentions as those raised by the heirs of defendant No. 1 in their written statement. It appears that defendant No. 3 and defendant No. 4, the heirs of Baban, did not file a written statement, nor were they represented in the trial Court. Hence, the Suit proceeded ex-parte against them.

8. Respondent Nos. 5 and 6 were not parties to the suit. They have been joined as respondents in the present appeal on their application being granted by this Court.

9. The trial Court on the basis of the evidence led before it concluded that the Suit was barred by limitation and that the limitation was not saved by virtue of the provisions of Section 14 of the Limitation Act. Several other issues relating to the merits of the case were framed by the trial Court. Each of those issues has been answered by the trial Court. The trial Court has held that the defendants have proved that Datar and defendant Nos. 1 and 2 were bonafide purchasers of the suit property for value without notice. The trial Court did not accept the contention of the defendants that the property was purchased by defendant Nos. 1 and 2 for and on behalf of a partnership firm M/s. Hill Home Syndicate and therefore held that the other partners were not necessary parties to the suit. The original defendant expired during the pendency of the Suit and his heirs who are on record contended that there were other heirs who ought to have been brought on record by the plaintiffs. This contention has been negated by the trial Court. The contention of the defendants that in any case they had become owners of the suit property by adverse possession, has not been accepted by the trial Court. The trial Court has further held that the Sale Deed executed by Mahadeo Datar and Yashwant Harshe in favour of defendant Nos. 1 and 2 on 20th August, 1947 was binding on the plaintiffs. The trial Court, therefore, dismissed the Suit by concluding that the plaintiffs were not entitled to partition of the suit property.

10. Aggrieved by the decision of the trial Court, the plaintiffs preferred an Appeal before the Additional District Judge, Pune, being Civil Appeal No. 265 of 1984.

The Appellate Court confirmed the decision of the trial Court with regard to limitation. In these circumstances, the appellate Court did not answer the other points framed by it which related to the merits of the case.

11. The present Second Appeal has been admitted on the following substantial questions of law:

(i). Whether the Courts below committed an error of law in concluding that the Suit of the plaintiffs is barred by limitation and is not saved by the provisions of Section 14 of the Limitation Act?

(ii). Whether the Courts below have committed an error in concluding that the husband of appellant No. 1 was aware about the Sale Deed executed by defendant Nos. 3 and 4 in favour of Datar in 1954 itself and, therefore, the period of limitation started running from the year 1954?

(iii). Whether the Courts below had committed an error by concluding that the application preferred by the plaintiffs before the Revenue Authorities did not sufficiently protect them with respect to limitation?

12. Mr. Agarwal appearing for the plaintiffs has submitted that the Appellate Court has committed a serious error in not deciding all issues which arise in the matter and restricting its decision only with regard to the limitation. He submits that even on the question of limitation, both the Courts below have incorrectly applied Article 58 of the Limitation Act instead of Article 65. He points out that the present case was a Suit on the title and, therefore, the period of limitation would be 12 years from the date that the defendant's possession is established to be adverse to the true owner. He further submitted that the plaintiffs had filed proceedings before the Revenue Authorities when they learnt of their names being deleted from the revenue records. Those proceedings were pending till 1969. According to the learned Advocate, the Collector then advised the plaintiffs to file a Suit to establish their title to the suit property. However, at that point of time Suit No. 166 of 1967 which was a partition suit filed by the heirs of Genu was already pending before the trial Court and, therefore, the plaintiffs did not file a separate suit as they were parties to that Suit. The learned Advocate then drew my attention to the fact that the present Suit was filed immediately after Suit No. 166 of 1967 was withdrawn. He then submitted that in any event when the agreement of 1947 was executed, both the plaintiffs were minors; plaintiff No. 1 became a major in 1953 whereas plaintiff No. 2 attained the age of majority in 1962. The learned Advocate then confined the reliefs sought by the plaintiffs in the Suit only to prayers (a) and (c) thereof. He submitted that the plaintiffs did not want to press prayers (b), (b1) and (d). On this statement being made, the learned Advocate submitted that the present Suit was a pure and simple partition suit and therefore the question of limitation did not arise.

13. Mr. Kumbhakoni appearing for the respondent Nos. 5 and 6 who are the present owners of the suit property, having purchased the same from Maharashtra Corporation which was a vendor of defendant Nos. 1 and 2. He

pointed out that the plaintiffs had not cared to join respondent Nos. 5 and 6 as parties to the Suit. However, a Civil Application was filed by respondent Nos. 5 and 6 for joining them as a party to the present Appeal. He pointed out that by an order of 5th April, 2006, this Court directed that they be added as party respondents to the Appeal. According to the learned Counsel, it is in these circumstances that no written statement was filed by respondent Nos. 5 and 6, nor was any evidence led by them. He then drew my attention to the fact that although the agreement executed between defendant Nos. 3 and 4 with Datar in 1947 has been challenged in the Suit, Datar has not been made a party to the Suit. The learned Advocate, submitted that none of the subsequent sales were challenged by the plaintiffs and, therefore, the plaintiffs were not entitled to a decree as claimed by them. He submitted that after respondent Nos. 5 and 6 purchased the suit property, the revenue entries have also been mutated in their favour. He therefore urged that the present Appeal be dismissed as the plaintiffs had not established their case that the Suit was not barred by limitation.

14. Mr. Walawalkar for respondent Nos. 1A to 1E while supporting the submissions of Mr. Kumbhakoni added that both the Courts below have rightly held that the Suit was barred by limitation. He submitted that the plaintiffs were not in possession of the suit property and in fact had lost possession in 1954 itself. The revenue entries had been mutated accordingly. He, therefore, submitted that the limitation would run from 1947 i.e. when the registered Conveyance in favour of Datar was executed by respondent Nos. 3 and 4 or in any event from 1954 i.e. the date on which the revenue records were changed by deleting the names of the plaintiffs. The learned Counsel then submitted that the plaintiffs had not cared to amend the plaint after they lost possession, nor had they filed a separate Suit challenging the action of the defendants in dispossessing them. He further submitted that Section 14(1) of the Limitation Act stipulates that the proceedings must be initiated with due diligence and relevant proceedings would not amount to a Civil Suit as provided u/s 14(1). He then pointed out that although it was argued on behalf of the appellants that Article 65 of the Limitation Act would be applicable while dealing with the issue of limitation, the plaintiffs had not urged this point in their Memo of Appeal or while advancing arguments before the Appellate Court. He therefore urged that the Appeal must be dismissed.

15. I will first deal with the first and third questions of law, as formulated above, which arise in the present case viz. whether the Suit was barred by limitation and whether proceedings before the Revenue Authorities will enable the plaintiffs to avail of the provisions of Section 14 of the Limitation Act. It will be necessary to examine the frame of the Suit which has been filed against the defendants. The prayers sought in the present Suit are for a declaration that the plaintiffs are the owners of the 1/3rd share of undivided suit property. They have also sought a declaration for cancellation of the Sale Deed between Datar and the 1st and 2nd respondents dated 28th August, 1947. A further prayer has been made for cancellation of a Sale Deed dated 18th February, 1947 between defendant Nos. 3

and 4 and Datar. The last prayer sought is for partition of the undivided 1/3rd share of the plaintiffs.

16. Thus, it is evident that the Suit has been filed for cancellation of the Sale Deeds of 1947. This would obviously mean that the Suit is barred by limitation. Both the trial Court and the Appellate Court have correctly held that the plaintiffs were not entitled for a declaration cancelling the Sale Deeds of 1947. Faced with this difficulty, the learned Advocate for the plaintiffs has submitted, on instructions, that the plaintiffs do not desire to press prayers (b), (b-1) and (d) at this stage and are confining the reliefs claimed in the Suit only to prayers (a) and (c). This means that the plaintiffs are today seeking a declaration that they have a 1/3rd undivided share in the suit property and that they are entitled to partition and separate possession of this 1/3rd undivided share.

17. Even assuming the Suit is confined only to the aforesaid prayers, it would still be hit by limitation. Under Article 110 of the Limitation Act, a person who is excluded from a share in a joint family property must file a Suit within 12 years from the exclusion. The witness for the plaintiffs has deposed that the plaintiffs were ousted from the suit property in 1954. Therefore, it was necessary for the plaintiffs to file the Suit within 12 years from their ouster from the suit property. Admittedly, this has not been done. It has been submitted by the learned Advocate for the plaintiffs that Article 65 of the Limitation Act is attracted in the present case and not Articles 56 to 58. He submits that if both the Courts below had considered Article 65, it would be obvious that the Suit has been filed within the period of limitation. He has further submitted that the defendants have not pleaded nor proved adverse possession on a particular date and therefore the plaintiffs are entitled to a declaration as well as partition of the suit property.

18. The submission of the learned Advocate for the plaintiffs that the limitation prescribed in Article 58 need not be considered is incorrect. When the Suit was filed, undoubtedly the prayers in the Suit were for cancellation of the registered Sale Deeds of 1947 and for a declaration that the plaintiffs were the owners of 1/3rd share. The period of limitation is 3 years from the date when the right to Suit first accrued. In the present case the right to sue accrued immediately after the agreement was signed with Datar. Assuming that the plaintiffs were minors at that time, the right to sue for plaintiff No. 1 accrued in 1953 and for plaintiff No. 2 in 1962, when they became majors. Yet the Suit was not filed even in 1962. Therefore, in my opinion, the Suit is hopelessly barred by limitation. The statement that the plaintiffs do not press prayers (b), (b-1) and (d) at this stage does not in any way save the limitation.

19. Mr. Walawalkar has rightly pointed out the judgment of the Supreme Court in the case of *Ambika Prasad Thakur and Ors. v. Ram Ekbal Rai and Ors.* reported in AIR 1966 SC 605. In this judgment the Supreme Court has observed thus:

15. ...that there is no rule of evidence by which one can presume the continuity of things backwards cannot be supported. The presumption of continuity

weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the things and the surrounding circumstances.

20. The Supreme Court in the case of Daya Singh and Anr. v. Gurudev Singh and Ors. reported in 2010 AIR SCW 689, held that the right to sue for a plaintiff accrues when there was clear and unequivocal threat to infringe that right by the defendants by their refusal to admit the claim of the plaintiffs. The question of filing a Suit before the right approved to them by compromise could not arise until the infringement of that right was noticed by one of the parties. The Suit filed within 3 years from the date of the infringement was not barred by limitation. In the present case the infringement had occurred in 1947 itself and therefore the period of limitation would start running from that day. The trial Court and Appellate Court, in my opinion, have rightly concluded that the Suit is barred by limitation.

21. The other contentions raised by the learned Advocate for the appellant is that the appellants were pursuing a wrong remedy to redress their grievance. It is submitted that this was done by invoking the provisions of law by initiating proceedings before the Revenue Authorities. The learned Advocate for the appellant has submitted that the Appellate Court has incorrectly held that the limitation was not saved despite the fact that the plaintiffs had approached the Revenue Authorities. According to the learned Advocate, the time spent in prosecuting other proceedings must be excluded u/s 14 of the Limitation Act. He submits that these proceedings need not be before a Civil Court. He relied on the judgment of the Supreme Court in the case of P. Sarathy v. State Bank of India reported in AIR 2000 SC 2023. On the other hand, Mr. Walawalkar has relied on a judgment in the case of The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur, , and on the judgment of the Division Bench of this Court in the case of Narayan Jivaji Patil Vs. Gurunathgouda Khandappagouda Patil, . The Division Bench while considering the provisions of Section 14 of the Limitation Act has held that merely defending a Suit would not amount to prosecution of a Suit. The Division Bench observed that the conditions for application of Section 14(1) are (1) that the plaintiff in the later Suit was prosecuting with due diligence another civil proceedings and (2) that the civil proceedings being founded upon the same cause of action and being prosecuted in good faith was not entertained by the Court for defect of jurisdiction or a cause of a like nature.

22. In the present case, it must be borne in mind that the property changed hands in 1947 by registered Sale Deeds. These registered Sale Deeds are not challenged today by the plaintiffs. The plaintiffs initiated action before the Revenue Authorities for the first time only in 1961. These proceedings continued upto 1969. Therefore, even if the submission of the learned Advocate for the plaintiffs is accepted that, the Revenue Authorities have the trappings over Court and the proceedings before the Revenue Authorities are in the nature of civil

proceedings, the period of limitation would not be saved. From 1947 to 1961, i.e. for a period of 14 years, the plaintiffs did nothing to establish their claim. The learned Advocate for the plaintiffs submitted that they became aware of the fact that they were required to establish their claim by approaching the Civil Court only after the Collector directed them to do so in 1969. Assuming the period from 1961 to 1969, i.e. when the Revenue Authorities were seized of the matter, is to be ignored while considering limitation, the plaintiffs cannot avail of the provisions of Section 14(1) of the Limitation Act as the revenue proceedings were initiated only after 14 years had elapsed after the property was sold to Datar. The reason for not approaching the Court at that stage is that the Civil Suit No. 166 of 1967 had been filed by the heirs of Genu against defendant Nos. 3 and 4 and the plaintiffs herein were defendant Nos. 5 and 6 in that case. As observed by the Division Bench in the case of Narayan Jivaji Patil (supra), merely defending a Suit would not amount prosecuting a Suit as envisaged in Section 14(1) of the Limitation Act. Therefore, in my opinion, the plaintiffs have not made out any case for interference in the impugned order.

23. Apart from this, when the Appeal was filed before the District Court, the plaintiffs had not raised the plea that Article 65 was applicable in the present case. The question of the defendants pleading and proving adverse possession does not arise as it was their case that they came into possession of the suit property in view of a registered Sale Deed. Moreover, although it is contended that the plaintiffs are not pressing the prayer for cancellation of the registered Sale Deeds which were executed in favour of Datar and later by Datar in favour of defendant Nos. 1 and 2, no relief can be granted to the plaintiffs without those Sale Deeds being set aside. Datar has not been made a party to the Suit, nor have respondent Nos. 5 and 6 been made parties to the Suit although the plaintiffs were aware that the suit property had been sold by defendant Nos. 1 and 2 to respondent Nos. 5 and 6.

24. Therefore, considering the aspect of limitation from any angle, it is apparent that the suit is barred by limitation.

25. The husband of plaintiff No. 1 was examined on behalf of the plaintiffs. He has categorically stated that the plaintiffs had never harvested the suit land and procured the yield. He has admitted that respondent Nos. 1 and 2 were in possession of the suit land. He has further admitted that he became aware in 1954 about the Sale Deeds of 1947 and that the possession of the suit property was not with the plaintiffs. He has further admitted that he did not file a Suit for possession, but instead the plaintiffs applied to the Revenue Authorities for inclusion of their names in the revenue records. He has further admitted that the names of the plaintiffs were not included once they were deleted by the Revenue Authorities.

26. Thus the submission that the Courts below have committed an error in concluding that the husband of appellant No. 1 was aware of the Sale Deed executed by defendant Nos. 3 and 4 in favour of Datar in 1954, is unsustainable.

The admissions of the husband of the plaintiff No. 1 in this regard are categoric and therefore will have to be accepted. As stated earlier, even assuming the limitation did not commence from 1947 as tried to be made out by the learned Advocate for the petitioner, it certainly could be said to have started running from 1954.

27. In these circumstances, in my opinion, both the trial Court and the Appellate Court have committed no error in dismissing the Suit.

28. In my opinion, therefore, it is not necessary for the First Appellate Court to address itself on the merits of the case if it concurs that the view of the trial Court that the Suit was barred by limitation.

29. As an after thought the learned Advocate for the plaintiffs has submitted that just as the trial Court had decided all issues and not merely the preliminary issue of limitation, the Appellate Court ought to have also decided the Appeal on all points. He has pointed out the provisions of Order 41 Rule 31 of the CPC and contended that the Appellate Court ought to have framed all the points for determination and deciding the same. He submitted that the Appellate Court was enjoined to decide all issues and could not therefore shirk its responsibility by deciding the Appeal only with respect to limitation.

30. The learned Advocate for the appellants has buttressed this argument by placing reliance on the judgment of the Division Bench in Khatunbi and Others Vs. Aminabai, and of a learned Single Judge of this Court in the case of Anita M. Harretto Vs. Abdul Wahid Sanaullah, as well as the judgment in the case of Shri Janardan Nago Patil Vs. Shri Ramanand Ramdas Mishra, and of the Supreme Court in the case of Madhukar and Others Vs. Sangram and Others, .

31. The judgments of the Bombay High Court which have been relied on by Mr. Agarwal mainly deal with compliance of Order 41 Rule 31 of the Code of Civil Procedure. The consistent view of the Court has been that the compliance of Order 41 Rule 31 is mandatory and a failure to comply with the same is not a mere irregularity. Therefore, the Courts have observed that the Appellate Court must formulate points for determination while deciding the Appeal. In the present case, there can be no doubt that the Appellate Court has framed the points for determination of the Appeal. However, it has confined its decision to the issue of limitation which goes to the root of the matter and has therefore not considered the other points. In the case of Madhukar and Ors. (supra), the Supreme Court was dealing with a matter where the trial Court had dismissed the Suit inter alia on the ground of limitation and res-judicata. The High Court, in the First Appeal, had not discussed either the documentary or oral evidence on record. The Supreme Court observed that the High Court had not considered the correctness of the grounds on which the trial Court had dismissed the Suit. In these circumstances, it was further observed that it was the duty of the High Court (Appellate Court) to deal with all issues and the evidence led by the parties before deciding the Appeal finally. The Appellate Court had failed to discharge the

obligation placed on it and had given no reasons for its decision. The Supreme Court, therefore, observed that a First Appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the First Appeal must address itself to all issues of law and fact and decide it by giving reasons in support of the findings.

32. In my opinion, the observations of the Supreme Court were made in view the facts and circumstances obtaining in the case before it. The Supreme Court had observed that the Appellate Court i.e. the High Court had ignored certain evidence on record while drawing the conclusions that it had. This judgment, in my opinion, does not in any manner lead to the inference that Mr. Agarwal wants me to draw that in all matters the First Appellate Court must decide the case on merits although it is of the view that the Appeal requires to be dismissed because the Suit was barred by limitation. The judgment in Madhukar's case does not compel the first Appellate Court to decide all issues if it agrees with the decision of the trial Court on the issue of limitation.

33. In these circumstances, the Second Appeal is dismissed.

34. There shall be no order as to costs.

35. In view of the above, Civil Application No. 581 of 2005 pending in the Second Appeal does not survive and the same is dismissed as infructuous.