
(1956) 03 BOM CK 0026

In the Bombay High Court

Case No : Civil Revision Application No. 1073 of 1955

Dagadu Dhondu Patil

APPELLANT

Vs

Trakadu Motiram Patil and Another

RESPONDENT

Date of Decision : 19-03-1956

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1939 — Section 24, 32, 32(5), 35
Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1908 — Article 142, 144, 28
Transfer of Property Act, 1882 — Section 55, 55(4), 55(6)

Citation : AIR 1957 Bom 79 : (1956) 58 BOMLR 734 : (1956) ILR (Bom) 844

Hon'ble Judges : Vyas, J; Shah, J

Bench : Division Bench

Advocate : N.D. Dange, for V.B. Patwardhan, for the Appellant; V.S. Desai, for the Respondent

Judgement

1. The petitioner Dagdu Dhondu Patil filed Miscellaneous Application No. 2775 of 1945 under the Bombay Agricultural Debtors' Relief Act 1939, in the Court of the Civil Judge, Junior Division, Chalisgaon, alleging that an oral sale by him of S. No. 5/5A of the Village of Sarwe Budruk, Taluka Pachora to one Sampat Supdu for a consideration of Rs. 550/- by a yardi given to the village officers, was in the nature of a mortgage and that the debt due thereunder had been satisfied & praying an order for return of the land. Sampat Supdu died during the pendency of the application and his heirs were brought on the record. The heirs of Sampat Supdu, whom I will hereafter refer to as the opponents, contended that the land was sold on 9th June 1935, by an oral sale to Sampat Supdu by the petitioner Dagdu Dhondu and that the transaction was not in the nature of a self redeeming mortgage as alleged by the petitioner. They also denied that there was an agreement to return the land after seven years. They submitted that the petitioner Dagdu Dhondu was not a debtor within the meaning of the B. A. D. 11. Act and that in any event the application having been filed more than 12 years after the date of the sale, Sampat Supdu had become owner of the land by

adverse possession.

2. The learned trial judge held that Dagdu Dhondhu was a debtor within the meaning of the B.A. D.R. Act & that his debts did not exceed Rs. 15,000/-and that he was qualified to obtain the benefit of the B.A.D.R. Act. In the view of the learned judge, it was unnecessary to enter upon an enquiry whether the transfer, dated the 9th June, 1933, was in the nature of a mortgage as alleged by Dagdu Dhondhu. Following the decision of this court in Jibhaoo Harisingh Rajput Vs. Ajab Singh Fakira Rajput, the learned judge held that where Immovable property is alleged to have been sold by An oral sale and an application is filed by the vendor for adjustment of debts under the B.A.D.R. Act the vendor is entitled to obtain an order for return of the property and the consideration received by him will be treated as a debt due to the buyer and liable to be adjusted under the Act. The learned Judge was of the view that the land was orally sold on 27th September 1934, when a Vardi (Intimation to effect mutation entry) was given to the village officer and an entry was made in the record of rights, and as be application for adjustment of debts was filed on the 6th October 1945 the buyer was not in possession adverse!; for a period exceeding 12 years and had not acquired title to the land. He observed: "that being so, there had been no transfer of interest in the property in dispute in favour of the creditor, and the creditor gets a charge for the purchase-money paid by him which becomes a debt that can be adjusted in the present case in view of the ruling in Jibhaoo Harising v. Ajabsing Fakira (A)."

3. The learned Judge made an award declaring that nothing was due to the buyer under the statutory charge for price paid under the oral sale, and he directed the opponents to deliver possession of the land in dispute and also directed an enquiry about future mesne profits.

4. Against the award made by the trial Judge an appeal was preferred to the District Court of East Khandesh at Jalgaon. In appeal the learned Assistant Judge held that the petitioner Dagadu Dhondhu had orally sold S. No. 5/5A to Sampat Supdu on June 9, 1933, for Rs. 550/- and had delivered possession, & by that sale accompanied by possession of the land Sampat Supdu had become owner of the land by virtue of his adverse possession for a period exceeding 12 years prior to the date of the application. The learned Judge also held that the petitioner Dagadu Dhondhu was not a debtor within the meaning of the Bombay Agricultural Debtors Relief Act. On the view taken by him, the learned appellate Judge reversed the order passed by the trial Court and dismissed the application with costs throughout. The petitioner Dagadu Dhondhu has applied to this Court and has invoked the revisional Jurisdiction of this Court u/s 115 of the Code of Civil Procedure.

Mr. Dange, on behalf of the petitioner, contended that the appellate Judge was in error in holding thatthere had been an oral sale of S. No. 5/5A on June 9, 1933. In any event, Mr. Dange contended as an entry was made in the village records upon intimation of the oral sale on September 27, 1934, the period of limitation

commenced to run from that date, and as the application for adjustment of debts due by the petitioner was filed within twelve years from September 27, 1934, the title of the debtor was not extinguished by the buyer's adverse possession. We are unable to accept the contention. The learned appellate Judge has found that the buyer was in possession of the land for a period exceeding 12 years and in fact the oral sale was effected on 9th June 1933. In the view of the learned appellate Judge, that a mutation entry was posted in the record of rights on September 27, 1934, had no bearing on the question of adverse possession by the buyer. " With that view we concur.

5. Mr. Dange then contended that a sale of Immovable property for a consideration exceeding Rs. 100/- must be effected by a registered instrument, and there being no registered instrument, the title of the petitioner Dagdu Dhondur to the land in dispute was not lost even though he parted with possession of the land & gave a vardi to the village officers requesting them to enter the land in the name of the buyer. Mr. Dange submitted that the title to the land continued to remain vested in the petitioner & when the Bombay Agricultural Debtors Relief Act was applied to the area in which the land is situate, the petitioner became entitled to get back the land on repayment of the consideration paid by the buyer which remained charged upon the land. In support of that contention Mr. Dange relied upon the judgment in *Jibhaoo Harising v. Ajabsing Fakira* 54 Bom LR 971.

6. In *Jibhaoo Harising's* case (A) it was held by this Court that

"The word "transfer" in Section 24 of the Bombay Agricultural Debtors Relief Act, 1947 means a transfer which is ex facie a valid one, though the debtor may ask it to be declared as being in the nature of a mortgage." In this case there is no transfer within the meaning of Section 24 of the Bombay Agricultural Debtors Relief Act. The transaction whereby the land was mutated in the name of the buyer was an oral agreement followed by a vardi to the village officers and in *Jibhaoo Harising's* case (A) it was held by this Court that such a vardi given to the village officers cannot be regarded as a transfer within the meaning of Section 24 of the B. A. D. R. Act 1947, which has replaced the B. A. D. R. Act of 1939. But in that case the court observed that "Section 55(6)(b) of the Transfer of Property Act creates a charge in favour of the buyer for the purchase price paid by him, unless he forfeits it by improperly declining to accept delivery of the property. The charge under the" section exists even in cases where the buyer may be in possession of the property intended to be sold." On the view that the price paid by a person in whose name the land is entered under an oral vardi is regarded only as charged upon the property and that the title of the original owner is not affected by the oral sale or vardi the court in that case held that the transaction could properly fall within the purview of the Bombay Agricultural Debtors Relief Act and that the Debt Adjustment court had jurisdiction over the matter. However in *Jibhaoo's* case (A) vardis were given to the village officers in 1935 and 1940 and the debt adjustment application was filed in 1947. It is

evident that 12 years had not elapsed since the date on which the vardis were given for the entering the name of the buyer in the record of the rights as owner of the property. The title of the debtor to the land was not extinguished by adverse possession. In this case Sampat Supdu in whose name the land was entered in the record of the rights consequent upon the vardi has remained in the possession claiming to be the owner of the property for a period exceeding twelve years. Mr. Dange urged that the buyer under the oral sale is liable to be redeemed at the instance of the vendor as a charge holder at any time within sixty years from the date of the oral sale and he may be directed by the court in exercise of jurisdiction under the B. A. D. R. Act to deliver possession of the property to the vendor and the buyer has only a right to receive such amount as may be due for price paid by him with interest thereon after the same is adjusted under the B. A. D. R. Act. In any event, it was urged, the buyer having a charge on the property which is enforceable at any time within 12 years from the date of the oral sale his possession does not immediately become adverse and the title of the owner may if at all be extinguished after 24 years from the date of the oral sale. In support of that contention *Sambhu Bin Hanmanta v. Nama Bin Narayan* ILR 35 Bom 438 (B) was relied upon.

7. Section 55 of the Transfer of Property Act defines the rights and liabilities of the buyer and the seller and by Sub-section (6) of that section it is provided before the sale is completed "the buyer is entitled unless he has improperly declined to accept the delivery of the property, to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery & for the interest on such amount and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission." This right, it is undisputed is available to the buyer before the sale is completed. Again the expression "to accept delivery" in clause (b) of the section 55(6) does not mean "to accept delivery of possession of the property" but "to accept completion of the contract of the sale by the execution of a sale deed where such deed is necessary." It has therefore been held that even if the buyer has entered into possession of the property agreed to be sold in anticipation of completion of the contract he is entitled to a charge upon the property for the price paid by him.

8. In *Lalchand Motiram v. Lakshman Sahadu* ILR 28 Bom 466 (C) the vendor executed a conveyance of Immovable property of the value exceeding Rs. 100/- which was not registered, and received the price and delivered possession of the property to the vendee. The vendor then sued for a decree for possession of the property as owner and it was held by this Court that the suit should be decreed in favour of the vendor and that the vendee was only entitled to a charge for the price paid by him u/s 55(6)(b) of the Transfer of property Act. That view was affirmed in *Jibhadoo Harisingh Rajput Vs. Ajab Singh Fakira Rajput*, . The mere fact, that the prospective buyer has entered into possession of the property does

not affect his right to claim a charge for the price or part thereof paid by him in anticipation of completion of sale. But the charge given to the buyer is primarily for his benefit. If after agreeing to sell Immovable property the vendor seeks to renege from the contract, the buyer may set up his right to claim satisfaction of the price paid by him to the vendor in anticipation of the completion of the contract out of the property. Even if in pursuance of the contract of sale the buyer has been put in possession, the buyer may still claim a charge for satisfaction of the price paid by him. Be it noted however that the right of the vendor to get possession of the property is not founded in the charge which the buyer has for satisfying his claim out of the property agreed to be sold. The right of the vendor is founded in his title and only so long as the title subsists he is entitled to get back possession of the property from the buyer and not thereafter.

9. Section 32 of the B. A. D. R. Act 1947 authorises a Debt Adjustment Court, after determining the amount of debts scaled down in the manner prescribed by Section 31, to pass an order for delivery of possession of any property "notwithstanding any law or contract to the contrary". That provision authorises the Court in recognition of a right or title vested in the debtor to order that possession of property which is held by a creditor or any other person claiming under him be delivered to (he debtor. On first impression it may appear that where property is attempted to be transferred under an oral sale which in law is ineffective and possession is delivered to the buyer and thereafter an attempt is made to get back possession of the property by applying under the B. A. D. R. Act, the question which falls to be determined relates to title and not to adjustment of debts. But it has been held in Jibhaoo Harising's case (A) that even though in such cases primarily the question relates to title of the debtor and does not relate to a debt as the buyer is entitled to claim a charge, which postulates the existence of a debt the transaction may properly fall within the purview of the Debt Adjustment Court. That view has been followed in numerous cases which have come before this Court and it is too late now to throw any doubt upon the correctness of that view. But the Court can pass an order for delivery of possession of property transferred under an oral sale to the debtor only if the title of the debtor subsists. If the title of the vendee is extinguished by expiry of the period of limitation for filing a suit for possession the vendor cannot by having recourse of the provision of the B. A. D. R. Act, claim possession of the property on the plea that there is a subsisting charge which the creditor may if he so desires enforce. The right to obtain possession of the property by the debtor is only founded upon the title which was attempted to be transferred by an oral sale but which was not effectively transferred. If by reason of the expiry of the period of limitation prescribed in that behalf the title is regarded as extinguished then, in our judgment, the Court cannot pass an order u/s 32(5) of the B. A. D. R. Act directing the transferee to deliver the property, to debtor. When an owner purports by an oral "sale to transfer property and delivers possession to another person, the possession of the transferee must be deemed to be adverse to the owner and a suit for recovery of possession must be filed

within 12 years from the date on which possession was delivered. If the right is not so exercised, by the combined operation of Article 144 and Section 28 of the Limitation Act the title must be deemed to be extinguished. If authority is needed in support of that proposition, it is to be found in *Shambhubhai Karsandas v. Shivalal-das Sadhashivdas Desai* ILR 4 Bom 89 (D) and *Dawal Piranshah Vs. Dharma Rajaram Manggarudi*, .

10. The principle of *Jibhaoo Harising's* case (A) must therefore be distinguished in its application to the facts of the present case. In *Jibhaoo Harising's* case (A) the title of the debtor to the land was not extinguished by expiry of the period prescribed under the Limitation Act and the title not having been extinguished, u/s 32(5) of the B. A. D. R. Act the debtor was held entitled to an order for return of the property and the creditor was held entitled to claim the price paid by him" to the debtor. In this case, however, the title of the petitioner *Dagdu Dhondu* is extinguished, as he has failed to take any proceedings within 12 years from the date of delivery of possession and he is not entitled, in our judgment, to an order u/s 32(5) of the B. A. D. R. Act. It is true that when the buyer pays the price in anticipation of delivery of property he acquired for the price paid a charge on the property, whether he be in possession or not. But the right to obtain satisfaction of the amount paid to the Vendor becomes enforceable in the event of a breach of the contract entered into by the vendor. If the vendor accepts the right of the buyer to remain in possession of the property, no occasion arises for the buyer to claim a charge. It is only where an attempt is made by the vendor or any one claiming under him to resile from the agreement that the charge has to be claimed. If, no effective attempt can be made by the vendor after the expiry of the period of limitation prescribed for filing a suit for possession and the consequent extinction of his title, the question whether the charge exists is academic. By the extinction of the title of the vendor the buyer becomes owner of the property and his charge is merged in his title. We are therefore unable to agree with the contention raised by Mr. Dange that because *Sampat Supdu* had a charge for the price paid by him the debt due under the charge was liable to be adjusted under the B. A. D. R. Act and the Court was entitled to pass an order for delivery of possession of property to the debtor even after his title was extinguished by adverse possession. The right of the vendor to get possession of the property has its source not in the charge but in his title and if the title be extinguished no order can be passed directing the vendee to deliver possession of the property to the vendor under the B. A. D. R. Act.

11. The case in *Shambhu Bin Hanmanta v. Nama Bin Narayan* ILR 35 Bom 438 (B), has in our judgment no application to the fact of this case. In *Shambhu Hanmanta's* case (B) certain property was mortgaged with possession by the plaintiff with the first defendant in 1873 and thereafter defendant Nos. 2 to 4 at the request of the plaintiff paid the mortgage money by the first defendant and for the amount paid by the defendants Nos. 2 to 4 and an additional amount of Rs. 50/- the plaintiff sold the property to defendants Nos. 2 to 4. The sale deed was not registered even though the consideration exceeded Rs. 100/- but

defendants Nos. 2 to 4 remained in possession of the property as owners. In 1907 the plaintiff filed a suit to redeem a mortgage of 1873 and defendants Nos. 2 to 4 set up the plea that the suit was barred by the law of limitation. The Court in its case held that redemption having been effected "by the defendants for the plaintiff with his knowledge and consent, they became entitled to hold the property as lienors and the plaintiff could not recover it from them without paying the amount" of the mortgage money. It was also held that the suit filed by the plaintiff was liable to be dismissed as it was not filed within 12 years from the date of redemption by defendants Nos. 2 to 4. In that case the Court was of the view that defendants Nos. 2 to 4 acquired a lien by reason of redemption of the property as the instance of the plaintiffs and so long as the lien subsisted their possession could not be adverse to the plaintiff and it was only on the expiry of the 12 years under Article 134 of the Limitation Act within which period the lien could have been enforced, that the possession of defendants Nos. 2 to 4 became adverse to the plaintiff and the further period of 12 years must elapse, before the title could be extinguished. It is unnecessary to pronounce upon the argument raised by Mr. V.S. Desai that the decision in that case is indefensible in principle and is inconsistent with other decisions of this Court and of Privy Council. It is sufficient to observe that the dictum that the possession of the lien or becomes adverse after the period for enforcing lien has expired was not strictly necessary for the decision of the case. The suit was not filed within 12 years and was not even filed within 24 years from the date on which defendants Nos. 2 to 4 purchased the property under an unregistered sale deed and the suit was barred in any view of the case. Again the Court in that case was not considering the incidents of a statutory charge u/s 55(6)(b) of the Transfer of Property Act. The Transfer of Property Act had not been applied to the Bombay Presidency at the time when the unregistered sale deed was executed by the plaintiff in favour of defendants Nos. 2 to 4 and the Court only considered the effect of the lieu which defendants Nos. 2 to 4 had as persons who had redeemed the property at the instance of the plaintiff. In this case, we are not called upon to decide whether a subsisting lien on Immovable property in possession of the lienor is extinguished on the expiry of twelve years from the date when the lien arises and that the possession of the lienor becomes adverse only after the right to enforce the lien by the suit is extinguished and not before. Sambhu Bin Hanmanta's case (B) in our judgment has no application to the facts of the present case.

12. Mr. Dange then contended that the petitioner Dagdu Dhondhu delivered possession of the property under an agreement to mortgage the land and by 12 years adverse possession Sampat Supdu acquired the lights of a mortgagee and the petitioner Dagdu Dhondhu is entitled to redeem the same. Reliance was placed upon the principle that if a person in possession of property claims only a limited interest and remains in possession" in assertion of that limited interest, by his adverse possession he acquires no more than that limited interest. It is unnecessary to pronounce in this, case upon the argument that when under an

oral agreement to mortgage property the transferee remains in possession he acquires the interest of a mortgagee in possession and does not acquire title thereto. It is sufficient to observe that even if there is substance in the argument advanced by Mr. Dange it must still be held that there is no evidence to establish that there was an agreement to create a mortgage in favour of Sampat Supdu when the property was agreed to be sold and was sold by an oral sale on the 9th June 1933 by the petitioner Dagdu Dhondur to Sampat Supdu. No evidence was led in the trial court in that behalf and the parties went to trial only on the question whether the principle in Jibhaoo's case (A) applied to the facts of this case. In our view therefore in this revision application the petitioner is not entitled to make out for the first time a case that there was an agreement to mortgage the property by the petitioner Dagdu Dhondur to Sampat Supdu on the 9th June 1933.

13. On that view of the case the Rule must be discharged with costs.

14. Rule discharged.