
(2002) 10 BOM CK 0043
In the Bombay High Court
Case No : First Appeal No. 402 of 1981

Devendranath Keshrinath Bhiwandkar and Others	APPELLANT
Vs	
Premlabai Bhiwandkar and Others	RESPONDENT

Date of Decision : 03-10-2002

Acts Referred:

Limitation Act, 1963 — Article 136, 137, 138, 140, 141

Citation : AIR 2003 Bom 424

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : M.A. Rane, for the Appellant; C.R. Dalvi, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This Appeal by the original Defendant Nos. 2 to 4 and 6 respectively takes exception to the Judgment and decree passed by the City Civil Court, Bombay dated 27th October, 1980 in Suit No. 5729 of 1967. The Respondent Nos. 1 to 4 are the original plaintiffs. Respondent No. 5 is the original Defendant No. 7 and Respondent Nos. 6 to 9 are the original Defendant Nos. 8 to 11 respectively. The suit property is immovable property situated at 36M. Mugbhat, Cross Lane, Girgaon Bombay. The property was owned by one Moreswar Bhai Rele who died intestate in Bombay on or about 26th August, 1916. The agreed genealogy in respect of the family, as produced on record, is as follows:-

2. The Respondents Nos. 1 to 4 filed Suit for the following reliefs:-

"(a) it may be declared that the Defendants s. Nos. 1 to 6 or any of them have no interest in the said property.

(b) that it may be declared that the Plaintiffs and Defendant No. 7 are entitled to a moiety of the said property and the other moiety belongs to the Defendants Nos. 8 to 11.

(c) that Defendants Nos. 1 to 6 may be ordered to give vacant and peaceful possession to the Plaintiffs and Defendants Nos. 7 to 11 of the portion of the said property forthwith or within such time as this Honourable Court may fix.

(d) that Defendants Nos. 1 to 6 may be ordered to pay to the Plaintiffs and Defendants Nos. 7 to 11 compensation at the rate "of Rs. 80" per month from the 30th April 1964 until possession is delivered to them as aforesaid.

(e) that the Defendants Nos. 1 to 6 or in the alternative Defendant No. 2 may be ordered to account to the Plaintiffs and Defendants Nos. 7 to 11 for the rents collected by them or him.

(f) that Defendants Nos. 1 to 6 may be ordered to pay the costs of this suit.

(g) for further and other reliefs."

3. It is not in dispute that the parties are governed by the law of inheritance as applicable to Bombay city, which is known as "Mayukha". In the circumstances, there can be no dispute that the suit property was inherited by Radhabai as her stridhan property under the Mayukha law, as applicable to the parties. Stridhan is divided in two classes- one technical and second, non technical. In so far as inheritance of the suit property, the same is a non technical stridhan. There is no dispute on this position. It is in this background the suit for the aforesaid reliefs came to be filed before the City Civil Court. The trial court has held that the parties are governed by Mayukha Law and the property was inherited by Radhabai as non technical stridhan. In view of the provisions of Mayukha law, the sons would get precedence for inheritance before the grand sons. The trial court has also found that undisputedly the father of defendants Nos. 1 to 6 had pre-deceased his mother Radhabai, whereas Radhabai died on 14.7.55, leaving behind her surviving two sons Ramnath and Ambernath as her only heirs. Accordingly, Ramanth and Ambernath have inherited the non technical stridhan property of Radhabai in equal shares. The defendants-appellants herein had raised the plea that the suit as filed by the Respondent-plaintiff was barred by limitation. Event hat plea has been considered by the trial court and on analysing relevant materials on record has found that the defendants failed to establish that they had given any notice to the plaintiff or that the plaintiff had knowledge that possession of the defendants Nos. 2 to 6 was in displacement of the rights of the plaintiffs or that the plaintiffs had reason to know that their rights were invaded. Having recorded that opinion, the trial court proceeded to held that the suit as filed by the Plaintiffs in the year 1967 was within limitation and that the defendants failed to establish the plea of adverse possession. Consequently, the trial court decreed the suit in terms of prayer Clauses-(a), (b), (c), (d) and (h) with modification that it should be defendants Nos. 2 to 6 where the words 1 to 6 occurred. This decision is subject matter of challenging in the present appeal.

4. On considering the arguments of both the sides, following points arise for my consideration:-

1. Whether the Suit is barred by law of limitation?

2. Whether the defendants have established their claim of adverse possession in respect of the suit property?

5. In so far as point of limitation is concerned, according to Mr. Rane for the appellants-original defendants, the suit was clearly barred by law of limitation since it was filed after expiry of 12 years from the death of Radhabai who admittedly, died on 14.7.55, whereas the Suit is filed on 24.8.67. According to him the mandate of Article 65, which applies to the present case, required the Plaintiffs to institute Suit within 12 years from the death of Radhabai. He has placed reliance on two decisions to contend that the effect of deeming provision in explanation (b) to Article 65 is that the said provision applied generally to all suits filed by the Hindu plaintiff where right to possession is claimed on the death of a female Hindu. He placed reliance on the decision in the case of *Munusamy Achari Vs. Rajambal Ammal and Others*, and another decision in the case of *Shiv Dass v. Devki* reported in AIR 1978 P& H 285.

6. On the other hand, Mr. Dalvi for the Respondents-original Plaintiffs contends that Article 65 as it presently appears in the new Act i.e. Limitation Act of 1963 is the amalgam of various articles of the old Indian Limitation Act, 1908- being Articles 47, 136, 137, 138, 140, 141, and 144. According to him, explanation (b) is nothing but reiteration of the position which obtained by virtue of Article 141 under the old Act. He submits that it is well settled that in cases where female was holding limited interest in the disputed property only in those cases the provisions of Article 141 would apply and since explanation (b) is reiteration of that position the same principle would apply. He contends that in the present case, however, provision such as Article 141 will have no application. According to him, if that principle is accepted then the Suit as filed was not one referable to Article 141, but Article 144 of the old Act; and, therefore, in such a situation the Suit need not be filed within 12 years from death of the female but only when the defendant sets up a plea of adverse possession against the Plaintiff. He has placed reliance on the decision of the Division Bench of this Court in the case of *Malkarjun Mahadev Belure Vs. Amrita Tukaram Dambare*, to buttress this contention.

7. Having regard to the above said contentions, the first question that arises for my consideration is: whether there is any departure in the legislative intent in enacting the present Article 65? To my mind, present Article 65 of the Limitation Act 1963 (New Act) is the amalgam of Article 47, 136, 137, 138, 140, 141, and 144 of the Old Act. All those articles of the old Act related to suits for recovery of possession of immovable property. The present Article 65 has been clothed in such a manner so as to do away with different Articles as existed in the old Act and the legislative intent is that all suits which formerly fell within the aforesaid Articles should be governed by one Article i.e. Article 65. By introducing explanation to Article 65 in the shape of Clauses-(a), (b) and (c), the legislature has specifically retained the provisions of Articles 140, 141 and 137 respectively

of the old Act. There can be no dispute that explanation (b) to Article 65 of the New Act is referable to Article 141 of the old Act. Article 141 of the old Act reads thus:-

Description of Period of .Time from Suit limitation which period begins to run

141like suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female.

Twelve years

when the female dies

Whereas Article 65 of the present Act reads thus:-

For possession of immovable property or any interest therein based on

Twelve years

When the possession of the defendant becomes title, adverse to the plaintiff.

Explanation- for the purposes of this article- "

(a)

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c).

8. According to Mr. Rane there has been a complete departure in the scheme of Article 65 from the earlier provisions contained in the old Act, in particular Article 141 referred to above. According to him, Article 141 opens with the expression "Like Suit by a Hindu or Muhammadan", whereas Article 65 is specific with reference to suit "for possession of immovable property." He further submits that there was no deeming provision in Article 141 of the old Act, unlike the present provision in the shape of Clause-(b) which provides that the possession of the defendant becomes adverse only when the female dies. He further submits that going by the plain language of Article 65 and explanation (b) thereof, the possession of the defendants became adverse to the plaintiffs only when the female died and that the starting point for limitation would also be when the female died. He submits that so far as Article 65 is concerned, in particular explanation (b) thereto, the same would apply generally to all suits filed for possession of immovable property on the death of Hindu or Muhammadan female and not limited to suits where the female had limited interest in the property, which position obtained in terms of Article 141 of the old Act. According to him, therefore, there is clear departure in the legislative intent of enacting Article 65. To support this contention, he has placed emphasis on the observations made by the Madras High Court, in Munusamy's case cited supra. Emphasis was placed on the observations in paragraph-26 of that decision, which reads thus:-

"We hold in passing that Article 65 of the Schedule to the Lim. Act, 1963, read with Expln.(b) to that Article applied generally to all suits by Hindu plaintiffs, where the right to possession is claimed on the death of a female Hindu. The claim may be that of a reversioner of the last male holder or it may be that of an heir of a deceased female Hindu. Whatever be the case, provided the right of possession in the suit property is claimed on the death of a female Hindu, the deeming provision of Expln. (b) to Article 65 would operate and the suit for possession would be within time if filed within 12 years of the death of the female Hindu on whose death the plaintiff claims possession."

9. With utmost respect to the Madras High Court, I am of the view that there is no departure in the legislative intent in enacting Article 65, from the position which obtained by virtue of Article 141 of the old Act. There is nothing to suggest that the legislature wanted to depart from that situation. On the other hand, the only inference that can be drawn is that the legislature wanted to amalgamate all the different provisions under part VIII of the first Schedule of the old Limitation Act into one, as has been enacted in the form of Article 65 of the new Act. In the first place, the Madras High Court had no occasion to examine the question as to whether any change has been brought about by the Legislature by enacting Article 65 and, has made the above observations in passing. Understood thus, that decision would be of no avail. In any case, that decision cannot be a binding precedent on this court. To my mind, however, Article 65 is a compendium of various provisions which covered the suit for possession of immovable property or any interest therein based on title under the old Act. Moreover, Clauses (a) to (c) of explanation are specifically referable to Articles 140, 141 and 137 of the old Act respectively. By incorporating these Clauses (a) to (c), the legislative intent or relating the rigours of Articles 140, 141 and 137 of the Old Act is in fact reinforced. To put it differently, although the present Article 65 is the amalgam of Articles 47, 136, 137, 138, 140, 141 and 144 of the Old Act, but the Legislature has specifically retained the position as obtained by virtue of Articles 140, 141 and 137 only- by way of Clauses (a) to (c) respectively in the Explanation. We are concerned with Article 141, which is corresponding to Clause (b) of the Explanation to Article 65. That explanation was necessitated because, Article 141 of the Old Act provided that the limitation for filing suits by a plaintiff whose right and title to sue for possession occurs upon the death of a female holding the limited woman's estate would accrue from the date when the female dies. (See *Malkarjun v. Amrita* supra). Whereas, Article 65 as enacted deals generally with all the situations relating to suit for possession of immovable property or any interest therein based on title and the limitation would start when the possession of the defendant becomes adverse to the plaintiff. This is the rule, but cases covered by Clause (b) would stand on a different footing as it would apply to female holding limited women's estate. Clause (b) merely explains as to when the possession of the defendant can be said to have become adverse to the plaintiff in cases covered by Clause (b). The provision will have to be understood in that context only. To my mind, therefore, Clause-(b) of explanation to Article

65 would apply to cases where the suit is for possession occurring upon the death of a female holding the limited woman's estate.

10. In the present case however, Radhabai was not a female holding the limited woman's estate. In such a case, the defendant, to succeed in establishing that the suit for possession of immovable property filed against him was barred by limitation, is obliged to plead and establish that his possession was adverse to the plaintiff for a period of more than twelve years proceeding the institution of the suit. If the defendant fails either to plead and/or prove this fact then the suit cannot be said to be barred by limitation. Therefore, in the case such as the present one, the date of death of the female (Radhabai) would be of no consequence. Whereas, the defendants were obliged to plead and establish that their possession had become adverse to the plaintiff and was so adverse for more than 12 years before the institution of the suit, so as to contend that the suit as filed was barred by limitation.

11. The learned Counsel had also relied on the decision of Punjab & Haryana High Court in Shiv Das v. Devki supra. In the first place, in that case the female was limited owner in respect of the property she had inherited. Naturally, in such a case Clause (b) of explanation to Article 65 of the New Act will be attracted. Accordingly, in paragraph-9 of the said decision it has been observed that explanation lays down that the possession of the defendant becomes adverse fictionally only when the female dies. That is the effect of the deeming provision in Clause-(b) to the explanation. This decision therefore, is of no avail to the Appellants.

12. A priori, Clause-(b) of Explanation to Article 65 will have no application to the present case, for it is not in dispute that Radhabai had inherited the property as non technical Stridhan under Mayukha law and had absolute interest therein. It that be so, the matter was and is governed by the general principles of Article 65 and it was imperative on the defendants to plead and prove that their possession had become adverse to the plaintiffs for more than 12 years prior to the date of institution of the suit so as to contend that the suit is barred by limitation. That is lacking in the present case. The trial court has addressed itself to all the relevant materials on record. The question as to whether defendants had pleaded and proved adverse possession has been considered by the trial court in para-67 to 71 of its Judgment. The same reads thus:-

"67. There can be no discontinuance of possession merely because of the absence of physical possession. Adverse possession must be adequate in continuity, publicity and extent so as to show that it is possession adverse to the true owner. In order that possession may be adverse, there must be (1) a disclaimer of other's right by an open assertion of a hostile title on the part of the co-owner setting up adverse possession and (2) notice thereof to others, direct or to be inferred from notorious acts and circumstances. So, there must be on the part of Defendants Nos. 2 to 6 setting up adverse possession, a disclaimer of other's right by an open and unequivocal assertions of a hostile title.

68. Defendant No. 7 has no doubt stated in cross-examination:

"I do not know what rent the tenants of the ground floor are paying. I personally have not received any moneys from any of the tenants by way of rent, I cannot say whether my father had received any moneys by way of rent from the tenants or not. I have no personal knowledge as to who was collecting the rent."

Defendant No. 7 has been cross-examined by the learned Advocate for Defendants Nos. 2 to 6 to show that they were not in possession of the suit property and that, at the most, they paid casual visits and stayed there for short periods. I have already held that Ambernath gave authority to Defendant No. 2 to recover the rent of the suit property during his lifetime and that Defendant No. 2 was recovering rent under that authority. If my finding on issue No. 13 is correct, then it cannot be stated that Defendant Nos. 2 to 6 have become owners by adverse possession because they were collecting the rent under the authority of Ambernath who has half share in the suit property.

69. Assuming my finding on issue No. 13 is not correct, then mere collection of rent by itself is not sufficient to come to a conclusion that Defendants Nos. 2 to 6 have become owners by adverse possession. As has been stated earlier, there can be no discontinuance of possession merely because of absence of physical possession. As observed in ILR 38 Bom 227 the Defendants must prove that they had an intention to hold adversely so as to acquire an absolute estate. Further, there must also be notice or knowledge or circumstance that could have given notice or knowledge to the Plaintiffs that the Defendants possession was in displacement of their rights. There is nothing on record to show that they had reason to know that their rights had been invaded and until they had a reason to know that there was no necessity for them to take action.

70. Defendant No. 4 has stated in his cross-examination by the learned Advocate for Defendants Nos. 8 and 9 that there was no dispute amongst Radhabai and her three sons regarding the property and none of her sons had made any claim at any time against Radhabai. He has further stated in his cross-examination:

After the death of Radhabai, till the notice was received by us in 1964, (none of the) Defendants i.e. 1 to 6 and not raise any objection regarding the suit property. Similarly Defendants Nos. 1 to 6 did not make any claim in respect of the suit property against either Ambernath or Ramnath or their heirs. During lifetime of Savitribai, Savitribai and Radhabai and Radhabai's children were staying in the suit premises and they were staying so as members of one family....

He has further stated in his cross-examination:

It is true that my father was staying in the suit premises as son of Radhabai and we continued to stay on the first floor of the suit premises as the children of Keshrinath. We continued to stay in the suit premises even after the death of Keshrinath.

He has also stated in his cross-examination that he cannot say as to whether Ramnath and his family, whenever they came to Bombay, resided in the suit property claiming it to be their property and that he does not agree that the heirs of Ramnath and Ambarnath are the only owners of the property after the death of Radhabai. He has nowhere stated in his examination-in-chief that they have become owners by adverse possession. So from what he has stated in his cross-examination by the learned Advocate for Defendants Nos. 8 and 9 there can be no doubt that Keshrinath and or his heirs Defendants Nos. 1 to 6 have not become owners of the suit property by adverse possession.

71. As stated earlier, there is nothing in the evidence of Defendant No. 4 to show that the plaintiffs had notice or knowledge or circumstance that could have given them notice or knowledge that possession of Defendants No. 2 to 6 was in displacement of their rights and that they had reason to know that their rights were invaded. Since there was no such notice or knowledge or circumstance, they had no reason to know that their rights were invaded and until they had a reason to know that, there was no necessity for them to take action. They have come to know for the first time in 1965 that Defendants Nos. 1 to 6 claim to be the owners of the suit property and they have filed the suit in 1967. So, it cannot be said that Defendants Nos. 2 to 6 have become owners by adverse possession as claimed by them. It cannot be also said that the suit is barred by limitation as alleged. So for all that I have stated above. I record my findings on issue Nos. 1 and 16 as above."

13. I find no reason to take a different view of the matter; and, therefore, no hesitation to approve the above reasoning of the trial court in toto. Having regard to the nature of evidence on record, the trial court was right in concluding that there is nothing on record to show that plaintiffs were noticed or had knowledge of the fact that possession of defendants Nos. 2 to 6 was by way of displacement of their rights and that they had reason to know that their rights have been invaded. If that be so, the plea of adverse possession set up by the appellants-defendants would fail and will have to be stated to be rejected.

14. Accordingly, the appellants have failed on both the issue of limitation as well as adverse possession. As a consequence of which the decree passed by the trial court will have to be upheld. It is relevant to note that Mr. Rane for the appellants fairly conceded that no other contention would be relevant for deciding the present appeal because there can be no dispute that Radhabai had inherited the property and she was the absolute owner and further that there were only two surviving sons who could succeed, as held by the trial court. To put it differently, Mr. Rane has not assailed the correctness of the view taken by the trial court that on applying the provisions of Mayukha law, surviving sons of Radhabai inherited the property which was held as non technical Stridhan by Radhabai, after her death on 14.7.55. If that be so, the plaintiffs became the owners of the suit property and the suit as filed by them was based on title. Moreover, the same was within limitation.

15. Accordingly, the appeal fails and the same is dismissed with costs.

16. At this stage, Mr. Rane prays that operation of this order be stayed. Mr. Dalvi has no objection for granting reasonable time provided the appellants and all other adult members in the appellants family to file undertaking in this Court that they shall not part with the possession of the suit property and would hand over vacant and peaceful possession thereof to the plaintiffs on or before 31.12.2002. In view of this submission made by Mr. Dalvi, appellants are granted time on condition that they shall file undertaking as aforesaid within 3 weeks from today, failing which it would be open to the plaintiffs-respondents to get the decree executed.