

**(2014) 09 BOM CK 0027**

**In the Bombay High Court**

**Case No :** Second Appeal No. 625 of 2013 and Civil Application No. 1474 of 2013

Dhondyabai

APPELLANT

Vs

Keda Devman

RESPONDENT

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**Date of Decision :** 29-09-2014

**Acts Referred:**

**Citation :** (2015) 2 ALLMR 881 : (2015) 2 ALLMR 168 : (2015) 3 MhLj 484 : (2015) 2 MhLj 789

**Hon'ble Judges :** A.B. Chaudhari, J

**Bench :** Single Bench

**Advocate :** Satyajeet Dighe, Advocate for the Appellant; Sandeep D. Shinde, Advocate for the Respondent

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## **Judgement**

A.B. Chaudhari, J.—Being aggrieved by the judgment and decree dated 14th July 2009 passed by the learned Civil Judge, Junior Division, Kalwan, Dist. Nasik in Regular Civil Suit No.63 of 1999 and confirmed in Regular Civil Appeal No.167 of 2009 by judgment and decree dated 3rd April 2013 passed by the learned Ad hoc District Judge, Nasik, the present appeal has been filed by the unsuccessful Plaintiff.

2. In support of the appeal, the learned counsel for the Appellants submitted that in the suit filed by the Appellants, the Trial Court held in answering the issue framed by him that the suit property is the ancestral property of the Plaintiff and she is owner thereof, the mutation entry in the name of Defendants is illegal. The suit filed by her was not within limitation and consequently the Appellants were not entitled to the relief of declaration and possession claimed by them. The counsel for the Appellants therefore contended that the Trial Court thus answered all the issues in favour of the Appellants Plaintiff that the Appellants are owner of the suit property and that the mutation entry taken in the name of the Defendants is legal, but then refused to grant declaration as well as possession, only because the suit was found to be barred by limitation in answering issue No.7.

3. The learned counsel for the Appellants emphasized that the issue No.8 framed by the Trial Court as to whether Defendant Nos.1, 2 and 4 become owner of the suit property by adverse possession, has been answered against the Defendants which means that the Defendants failed to prove their plea of adverse possession. Still the Trial Court held that the suit was barred by limitation which is contrary to the law. He relied on the following decisions.

- (i) Yoshita R. Rivankar and Others Vs. Mrs. Sunita Haldankar and Others,
- (ii) Rukhamini Pandurang Sansthan, Yavatmal Vs. The State of Maharashtra,
- (iii) Indira Vs. Arumugam and Another, .
- (iv) M. Durai Vs. Madhu and Others, .
- (v) Roop Singh (Dead) Through LRs Vs. Ram Singh (Dead) Through LRs., .

4. Finally, he prayed for allowing the Appeal and decreeing the suit. He further submits in reply to the arguments made by the learned counsel for the Respondents that admittedly, no cross -objection was filed by the Respondents Defendants before the lower Appellate Court nor had assailed any of the findings which have been answered against the Respondents Defendants. The findings on issue Nos.1, 2 and 8 having been answered in favour of the Appellants in the Trial Court and in the absence of any cross -objection or challenge to the findings during argument before the lower Appellate Court, the same have become final and conclusive between the parties and that cannot be reopened in this second appeal.

5. Per contra, the learned counsel for the Respondents supported the impugned judgment and the reasons recorded by the court below. He submits that the suit was required to be filed within three years from the date of alleged dispossession and said period having been lost, the suit was rightly held to be barred by limitation. According to him, Article 65 of the Limitation Act, 1963 provides for a period of 12 years of limitation for filing a suit for possession and the suit was obviously barred by limitation. In the alternative, the learned counsel for the Respondents contended that the lower Appellate Court did not at all advert to any of the issues answered by the Trial Court in favour of the Appellants Plaintiffs and then there was no adjudication by the lower Appellate Court on those issues except the issue of limitation framed and decided by the lower Appellate Court. That being so, according to him, if this court is inclined to hold that the suit was not barred by limitation by reversing the finding of two courts below, then in that case, the appeal should be sent back to the lower Appellate Court for hearing on issues other than the issue of limitation so that the Respondents will have an opportunity to contest the appeal on merits. He, therefore, prayed for dismissal of the appeal.

6. Heard the learned counsel for the rival parties at length. This court had framed the following substantial question of law at the time of admission of the second appeal on 24th June 2014 and directed the appeal to be placed for final disposal.

"Whether the courts below were right in dismissing the suit for possession on the basis of title as barred by limitation in spite of the fact that the Defendants have failed to establish their adverse possession over the suit property?"

7. It is a fact that the Trial Judge answered the issue that the suit property was ancestral property of the Plaintiffs Appellants and they are owner thereof. He also answered issue No.2 that the mutation entry in favour of the Defendants is illegal. He further answered that the Defendants did not become owner by adverse possession or rather they failed to prove adverse possession. The Trial Court, further dismissed the suit holding that it was not filed within 12 years and was beyond limitation vide issue No.7. I have checked -up the findings on issue Nos.1, 2 and 8 and I find that the answers have been given by the Trial Court on merits on all these issues. Admittedly, the Defendants Respondents did not file cross -objection and that is clear from the following observations made by the lower Appellate Court, which I quote from paragraph 10 of the judgment:

"10.....From entire evidence on record, it is clear that the possession of the suit property is not within the Plaintiff/present appellant since 1969. Further, the trial court has held that although the Defendants are in possession of the suit property, but they have failed to prove that they have acquired title by adverse possession. Moreover, the Defendants have not filed cross -objection; therefore, there is no necessity for this court to go into the legality of the finding given by the trial court except on the point of limitation....."

8. It clearly appears that the Respondents Defendants did not raise any challenge before the lower Appellate Court in respect of other issues viz. issue Nos.1, 2 and 8. The alternate submission made by the learned counsel for the Respondent, that if this court comes to a conclusion that the issue of limitation was wrongly decided against the Appellant Plaintiff then the appeal should be sent back to the lower Appellate Court for fresh hearing, does not appeal to me. The reason is, that the finding on issue Nos.1, 2 and 8 have become final and conclusive between the parties. Insofar as the finding on issue Nos.3 and 4 are concerned, they are consequential to issue No.7 answered against the Appellants and in fact there is no discussion thereon by the courts below because the same was dependent on answer to issue No.7. Be that as it may, since issue Nos.1, 2 and 8 were not put to challenge by the Respondents Defendants, I do not think that the Appellants can be put to prejudice by reopening the findings of facts which have become final and conclusive on those issues. Hence, I am inclined to accept the submission made by the learned counsel for the Respondents.

9. Now, coming to the issue about limitation, I find that it would be relevant to quote paragraph 22 of the Trial Court judgment to understand the relevant dates in finding out the issue of limitation, which is as under:

"22. Perusal of the case and documents as Mahadu was died in 1963 the date of birth of Dhondyabai must be in the year 1963. As per third column of the

schedule the legal disability was ceased in the year 1981, the Plaintiff must have filed the suit on or before 1984 or as per Article 109 she must have challenged the transaction/alienation by Defendant No.1 in favour of Defendant No.2 within 12 years from execution of sale deed, that means she ought to have filed this suit prior to 28.12.1995 but the suit has been instituted on 9.6.1999. It clearly shows that, the suit is not within limitation and hopelessly barred by limitation and she was not dispossessed prior to 2 months of the filing of the suit. She was not in possession any time."

10. It is clear from the dates in the aforesaid paragraph that the Trial Court found that the suit was not filed within 12 years from the date of execution of the sale deed. The lower Appellate Court also committed some error by holding that the Appellant Dhondyabai should have filed the suit at least three years after attaining majority and also within 12 years. I quote paragraph 11 from the judgment of the lower Appellate Court.

"11. Now coming to the point of limitation, the Plaintiffs" contention is that the cause of action has arisen just prior to two months of filing of the suit for the reason that the Defendants have refused to hand over the possession of the suit property. As against this, it is the contention of the Defendants that the Plaintiff was aware that the suit property was transferred to the Defendants way back in 1969 and therefore, the suit is miserably barred by law of limitation. As far as Bhagabai is concerned, she being a major and being aware of the entries in record of right should have filed the suit within the period of limitation i.e. within 12 years. As far as Dhondyabai is concerned, she was a minor at the time of death of Mahadu and at the time when the alleged transaction had taken place. Dhondyabai should have filed the suit after 3 years of her attaining the age of majority and within 12 years. In the year 1969, she was around 9 years of age. She should have filed the suit within 3 years after she attained the age of majority and within 12 years that means after 15 years of the alleged transaction. The suit is filed on 30/07/1999, which is after the period of limitation and therefore the suit is not within limitation.

11. It is an admitted position that the Trial Court held that the Defendants Respondents failed to prove that they were in adverse possession. The suit of the Appellants Plaintiffs was based on title and the Defendants having failed to prove adverse possession, obviously the concept of adverse possession will have to be ruled out in the present case.

12. That finding is complete and binding on the parties. In this behalf, it would be appropriate to refer to the decision of the Supreme Court in the case of Indira (supra) and it would be appropriate to quote paragraph 4 and 5 therefrom, which I quote.

"4. The aforesaid reasoning of the learned Judge, with respect, cannot be sustained as it proceeds on the assumption as if old Article of the earlier Limitation Act was in force wherein the plaintiff who based his case on title had

to prove not only title but also possession within 12 years of the date of the suit. The said provision of law has undergone a metamorphic sea change as we find under the Limitation Act, 1963 Article which reads as under:

5. It is, therefore, obvious that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Unfortunately, this aspect of the matter was missed by the learned Judge and, therefore, the entire reasoning for disposing of the second appeal has got vitiated. Only on that short ground and without expressing any opinion on the merits of the question of law framed by the learned Judge for disposing of the second appeal, this appeal is allowed. The impugned decision rendered is set aside and the second appeal is restored to the file of the High Court with a request to proceed further with the hearing of the appeal with respect to the substantial question aforementioned in accordance with law. No costs."

13. The said view has been further followed in the case of M. Durai Vs. Madhu and Others, therefrom.

"7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-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."

14. The question framed by me therefore, is no more res-integra in the light of the pronouncement made by the Supreme Court as above. In the light of the above, therefore, I must answer question No.2 in the affirmative and hold that the suit was well within limitation and was not barred by limitation. Hence, answering question No.2 in the affirmative in favour of the Appellant and in view of the findings in his favour recorded by the lower Appellate Court on merits of the matter, the following order is inevitable.

#### ORDER

a) Second Appeal No.625 of 2013 is allowed with costs.

b) The impugned judgment and decree dated 3rd April 2013 passed by the learned Ad hoc District Judge, Nasik in Regular Civil Appeal No.167 of 2009 is set aside.

c) The Regular Civil Suit No.63 of 1999 filed by the Appellant Plaintiff is decreed with cost.

i) It is hereby declared that the Appellant Plaintiff is owner of the suit property.

ii) It is hereby declared that Mutation Entry No.5458 in the name of Defendant

No.1 is illegal and consequent transactions based thereon are also illegal.

iii) There shall be decree of possession of the suit property which shall be delivered by the Appellants Plaintiffs to Respondent No.1 within a period of six months from today.

d) In view of disposal of the second appeal, Civil Application does not survive. Hence, same stands dismissed as infructuous.