
(2012) 08 BOM CK 0230
In the Bombay High Court
Case No : Second Appeal No. 195 of 2010

Dhudku Ganpat Mahajan

APPELLANT

Vs

Prabhakar Madhavrao Deshpande and Others

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 32(g), 32(m), 85
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, Order 21 Rule 96, Order 41
Rule 11, Order 41 Rule 11(1), Order 41 Rule 12
Limitation Act, 1963 — Section 28, 3

Citation : (2013) 1 ABR 59 : (2013) 2 ALLMR 662 : (2013) 1 MhLj 809

Hon'ble Judges : S.V. Gangapurwala, J

Bench : Single Bench

Advocate : Girish Rane, for the Appellant; P.S. Shendurnikar, for the Respondent

Final Decision : Allowed

Judgement

S.V. Gangapurwala, J.—The present respondents are the original plaintiffs. They filed suit for possession, declaration and damages. The suit fields are agricultural lands bearing Sy. No. 1/2 and Sy. No. 54/3. It is contended by the plaintiffs that, one Madhav Martand Deshpande was the mortgagee of deceased Ganpat Motiram Mahajan i.e. these properties were mortgaged by Ganpat Motiram to Madhav Martand. Said Madhav Martand filed suit bearing R.C.S. No. 606/1937. The suit came to be decreed. The decree holder filed Regular Darkhast No. 1097/1944. In the darkhast proceedings the said agricultural lands were sold by auction. The plaintiffs purchased the suit agricultural lands in auction held in the said darkhast on 21-3-1955. The sale was confirmed on 25-6-1955 and the sale certificate was issued in favour of plaintiffs. Since then the plaintiffs are the owners of the property purchased in auction.

2. In the said darkhast proceedings bearing R.D. No. 1097/1944, the defendant No. 2 claimed to be the tenant. The plaintiffs moved application to the tenancy Court to declare that the defendant No. 2 is not the tenant. It was held that the

defendant No. 2 is a tress passer. In the meantime, the defendant No. 1 sold the land to the defendant Nos. 2, 3, 4A to 4D and the plaintiffs also claimed declaration with regard to said sale deed. In the darkhast proceeding symbolical possession was given to the purchaser i.e. the present plaintiffs. Thereafter the plaintiffs have filed instant suit.

3. The defendant No. 1 denied the case of the plaintiffs in his written statement. The defendant No. 1 submitted that he allowed the defendant No. 2 to cultivate the land as tenant. The defendant No. 1 denied the Court has jurisdiction to try the suit.

4. The defendant No. 2 vide his written statement states that, the tenancy case filed by the plaintiffs went against the plaintiffs before the Maharashtra Revenue Tribunal and now they cannot contend that the defendant No. 2 is a tress passer. The plaintiffs have no right to claim possession. The Civil Court has no jurisdiction to decide the possession, in view of Sec. 29 and 85 of the Bombay Tenancy and Agricultural Lands Act. According to the defendant No. 2 as he is tenant, the plaintiffs cannot claim possession. The defendant No. 3 also vide his written statement contended that, the defendant Nos. 2, 3, 4A to 4D and 5 are the tenants and according to Sec. 32(g) price was fixed of the suit properties and certificates were given to these defendants as per Sec. 32(m) of the Tenancy Act. The defendant Nos. 4A to 4D and 5 adopted the written statement of the defendant No. 3.

5. The Trial Court decreed the suit of the plaintiffs. In the said judgment and decree, the legal representatives of the defendant Dalpat Vanji, Bahrain Vanji, Narayan and Bansi Vanji were directed to deliver the possession of the suit field.

6. The defendants filed an appeal before the District Court. The plaintiffs also preferred cross-objection, as in the operative part of the judgment, the decree was not passed against the defendant No. 1. The lower Appellate Court partly allowed the appeal and decree to the extent of possession of land gut No. 1 (Sy. No. 1/2) from the defendant No. 2 is set aside. Though the Court held that the defendant No. 1 is not the tenant, however, no formal order was passed allowing the cross-objection.

7. The defendant No. 1 has assailed the said judgment and decree passed by the District Court in the present second appeal.

8. Notice was issued in the present second appeal on April, 23, 2010. Even record and proceedings were called. The plaintiffs filed cross objection in the present second appeal to the" extent of the decree not been passed against the defendant No. 1.

9. I have heard Shri Rane, the learned counsel for the appellant and Shri Shendurnikar, the learned counsel for the respondent No. 1

10. Shri Rane, the learned counsel with all his persuasive skill strenuously canvassed following propositions:--

- a. There is no pleading in the plaint that the plaintiffs secured symbolical possession on 27.4.1956. In view of the fact that, there is no specific pleading about securing symbolical possession in the execution proceedings, the same cannot be considered. The facts not pleaded cannot be considered.
- b. There is no specific pleading about the extension of period of limitation. As per the provisions of Article 180 of the Limitation Act 1908, the period for instituting the suit is three years from the date of sale becoming absolute. In the present case, the sale is confirmed in the year 1955 and the suit is presented in the year 1963. As such, the suit is barred by the limitation. Even period for seeking possession by filing application u/O. 21, Rule 95 of the CPC (hereinafter referred to as "C.P.C." for the sake of brevity) has expired. As per Sec. 28 of the Limitation Act, 1908 after determination of the period prescribed in the Act, right to such property stands extinguished. In the present case, the period of three years stood determined in the year 1958 and hence thereafter the plaintiffs' right to seek possession of the suit properties stood extinguished.
- c. The suit itself is not maintainable. The suit is filed on the basis of sale certificate granted in execution and the suit for possession on the basis of title is not maintainable. The possession can be sought only by way of filing application u/O. 21, Rule 95 of the C.P.C. The separate suit is barred in view of the provisions of Sec. 47 of the C.P.C. as it stood then. More particularly, there is no order of treating a suit as application as contemplated u/Sec. 47(2) of the C.P.C. as it stood then. The learned counsel relies on the judgment of the Apex Court in a case of Harnandrai Badridas Vs. Debidutt Bhagwati Prasad and Others, and in a case of K.R. Laxminarayana Rao v. New Premier Chemical Industries reported in (2005) 9 SCC 354. So also the judgment. So also the judgment of this Court in a case of Baburao Vishwanath Dighe Vs. Kisan Bhivaji Sanap,
- d. Both the Courts failed in discharging their duties by not dismissing the suit, in view of Sec. 3 of the Limitation Act. The Courts ought to have rejected the plaint u/O. VII, Rule 11 of the C.P.C. as the suit is barred by limitation.
- e. The maintainability of suit though not specifically pleaded in the written statement can be raised in the second appeal as it goes to the root of the matter. The learned counsel relies on the judgment of the Apex Court in a case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.,
- f. The cross-objection filed by the plaintiffs in the present second appeal is not tenable, as the second appeal is pending consideration for admission u/O. 41, Rule 11 of the C.P.C., hence the cross-objection is not tenable. The learned counsel relies on the judgment of the Rajasthan High Court in a case of Ram Kripal Vs. Radhey Shyam and Others,
- g. The civil application for correction/modification is still pending consideration, at the same time the cross-objection is preferred. The cross-objector cannot initiate dual proceedings taking different stands. The cross-objector cannot now file a cross-objection, in view of the earlier application for correction/modification.

11. Shri Shendurnikar, the learned counsel for the respondent No. 1 with all lucidity made submissions which can be culled out as under:

a. The defendants nowhere pleaded in the written statement about the non-maintainability of the suit, nor an issue was framed by the Court. No arguments were advanced by the defendants before the Trial Court or before the lower Appellate Court regarding the non-maintainability of the suit. Even no ground was taken in the appeal memo before the District Court. The issue of maintainability of the suit was never the matter at issue, either before the Trial Court or the First Appellate Court. For the first time, the ground of maintainability of the suit is raised after 50 years. The issue of maintainability is a mixed question of law and fact and cannot be raised in the second appeal for the first time.

b. The plaintiffs had filed an application bearing Day Application No. 193/1955 in R.D. No. 1097/1944 seeking possession of the properties u/O. 21, Rule 95 of the C.P.C. In view of the plea of tenancy raised by the defendants, the Court awarded symbolical possession and after awarding symbolical possession disposed of the execution proceedings. The said fact can be gathered from the judgment of this Court in Special Civil Application No. 1811/1976. In view of the fact that, symbolical possession was delivered in the execution proceedings, the present suit for actual physical possession was tenable under Article 65 of the Limitation Act. The learned counsel relies on the judgment of the Apex Court in a case of Dev Raj Dogra and others Vs. Gyan Chand Jain and others,

c. The defendants never pleaded that the suit is barred by limitation, nor the same was argued before the Trial Court. The plea of limitation was raised for the first time before the First Appellate Court that too on the ground of adverse possession without any pleading. Even the Appellate Court negatived the theory of limitation for want of pleadings of adverse possession. The issue of limitation being a mixed question of law and fact cannot be agitated for the first time in the second appeal.

d. Even otherwise the plaintiffs had filed the application in regular darkhast for possession u/O. 21, Rule 95 of the C.P.C. The same was filed within the prescribed period of limitation as per Article 134 of the Limitation Act, 1908 and the executing Court had also awarded symbolical possession. In view of plea of tenancy raised by Sampat Vanji, who was also acting as legal guardian of the present appellant.

e. The delivery of symbolical possession u/ O. 21, Rule 96 of the C.P.C. as distinguished from actual possession u/O. 21, Rule 95 arrest the Continuity of adverse possession. The learned counsel relies on the judgment of the Apex Court in a case of Mamidi Venkata Satyanarayana Manikyala Rao and Another Vs. Mandela Narasimhaswami and Others, and in a case of Nagamalai Thevar Vs. Pandaram and Another,

f. The present suit for actual physical possession in view of the fact that

symbolical possession was only awarded in the execution proceedings was essentially a suit based on title under Article 65 of the Limitation Act.

g. The cross-objection is maintainable as this Court on 23.4.2010 after hearing the learned counsel for the appellant issued notices to respondents and even called for the Record and Proceedings. The appeal was not dismissed u/O. 41, Rule 11(1) of the C.P.C. But the said order is inconsonance with the provisions of the Order 41, Rule 12 read with Rule 14 of the C.P.C. In pursuance to the notice issued by the Court, the present respondent No. 1 has appeared and the cross-objection has been filed in view of Order 41, Rule 22 of the C.P.C. The same is perfectly maintainable. The learned counsel relies on the judgment of the Nagpur High Court reported in AIR 1937 Nag 105.

h. Even the application for correction/modification of the operative part of the order of the District Court can be entertained by this Court u/Sec. 152 read with Sec. 107(2) of the C.P.C. There is an accidental slip or omission on the part of the District Court while passing the operative order, same is manifest from the body of the judgment. Sec. 152 of the C.P.C. can be invoked in the interest of justice for making the operative part of the judgment in consonance with the judgment proper. The learned counsel relies on the judgment of the Apex Court in a case of Lakshmi Ram Bhuyan Vs. Hari Prasad Bhuyan and Others, , in a case of Namdeo Amrut Gohane Vs. Narayan Shamrao Deshmukh and Another, so also the judgment in a case of Khetramohan Baral and Others Vs. Moni Behera and Others,

12. Upon hearing the learned counsel following substantial questions of law arise.

i) Whether the present suit is maintainable in view of Sec. 47 of the Code of Civil Procedure.(as it stood then) and Order 21, Rule 95 of the C.P.C. i.e. prior to the amendment of 1976

ii) Whether the suit is in limitation ?

iii) Whether the rights of the plaintiffs stood extinguished in view of Sec. 28 of the Limitation Act?

iv) Whether this Court can entertain the cross-objection and/or an application u/ Sec. 152 r/w. Sec. 151 of the CPC for correcting operative part of the order of the First Appellate Court?

13. The instant litigation is the illustration of the manner in which the rights of the legitimate owner to enjoy the property can be thwarted and kept at bay by engulfing the owner in procedural intricacies and litigation.

14. The plaintiffs herein are the successful purchasers of the suit properties in an auction held in the execution proceedings. In view of the plea of tenancy been by the judgment debtor in the said execution proceedings, the successful auction purchaser was only given symbolical possession as per O. 21, Rule 96 of the C.P.C. and had to fight upto this Court regarding the issue of tenancy. Symbolical

possession was awarded to the plaintiffs on 27.4.1956, whereas the plaintiffs had purchased the property in auction in the year 1955. Even the issue of tenancy had to be decided by the Tenancy Court and the same attained finality by the judgment of this Court in Spl. Civil Application No. 1811/1976, wherein the contention of the respondent was negated. It was held that, neither the defendant No. 1, nor the defendant No. 2 are the tenants of the property bearing Sy. No. 54/3. The same has now attained finality.

15. Noticing that the defendant has no case on merits, the learned counsel for the defendant tried to canvas his submissions on the aspect of the maintainability of the suit, the limitation and the non-observance of the procedure.

16. It would be explicitly clear from the " pleadings of the defendants that in the pleadings, the defendant at no material point of time raised the plea about the maintainability of the suit, nor raised any plea of limitation. Nor before the First Appellate Court the plea of Maintainability of the suit was raised. The plea of limitation was raised qua the theory adverse possession that too for the first time before the First Appellate Court.

17. At the time the present suit was filed, the provisions of Sec. 47 as it stood then i.e. prior to the amendment effectuated in the year 1976. Sec. 47 of the C.P.C. reads as under:--

Section 47: Questions to be determined by the Court Executing Decree 47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge of satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation. For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit]

18. Perusal of Sec. 47 of the C.P.C. as it stood then, more particularly sub-section (2) of Sec. 47 it is explicitly clear that the Court may subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding. The said provision is specific and gives wide and ample power to the Court to treat a separate suit as a proceeding or vice-versa. The said provision was incorporated with a view that nature of proceeding filed should not be an impediment to do complete justice. The judgment relied by the

learned counsel for title appellant in a case of K.R. Laxminarayana Rao v. New Premier Chemical Industries referred supra is in respect of Sec. 47 of the C.P.C. as amended by Act No. 104 of 1976. wherein sub-sec. (2) of Sec. 47 stood deleted. Even in the said judgment, the Apex Court has held that the power of Court ex debito Justitiae exists, even to convert a separate suit into application u/O. 21, Rule 95. The only reservation is the suit should be within the period of limitation allowed for filing an application u/O. 21, Rule 95. As such, even a separate suit can be considered to be an application under Order 21, Rule 95 of the C.P.C.

19. In the present case, it is not a subject matter of debate that the plaintiffs were awarded symbolical possession after the confirmation of sale in their favour in the darkhast proceedings and thereafter the darkhast proceedings were disposed of. The same is also a matter of record.

20. Once the executing Court exercises its power u/O. 21, Rule 95 and/or 96, the execution proceedings stood determined. The Court could not give actual physical possession. It was only in the year 1980 the proceedings between the parties regarding the adjudication of the status of defendants not being tenants was made by this Court in Spl. Civil Application No. 1811/1976. In view of this fact also the Court can treat the present suit as an application u/O. 21, Rule 95 in view of sub-section (2) of Sec. 47 of the C.P.C. as it stood then. In the present matter such a situation does not arise as symbolical possession u/O. 21, Rule 96 of C.P.C. was delivered.

21. The Apex Court in a case of S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, has observed that, laws of procedure are meant to regulate effectively, assist, aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.

22. Moreover, after the sale certificate is issued the Court has either to proceed under Order 21, Rule 95 or u/O. 21, Rule 96 of the C.P.C. Once the Court has exercised its jurisdiction u/O. 21, Rule 96 of the C.P.C. by delivering the symbolical possession, the execution could not have proceeded further and the execution proceedings has to come to an end. In that case, the plaintiffs/ auction purchasers will have a right to file a suit under its ordinary civil rights in the Civil Court. The plea of limitation in such a case would not be available to the defendants, who was a judgment debtor. Within the prescribed period of limitation the application was filed by the auction purchaser in the execution proceedings for delivery of possession. The Court in view of the facts and circumstances existing then, could not have handed over the actual physical possession, but handed over the symbolical possession. Nonetheless, the possession stood delivered though symbolically. Thereafter, the auction

purchasers got an independent right to file a suit for possession on the basis of title, in such a case the suit would be governed by Article 65 of the Limitation Act and provisions of O. 21, Rule 95 and/or Sec. 47 of the C.P.C. as it stood then would not be applicable. In fact, resort to the said provisions would be without jurisdiction. In view of that the suit was perfectly maintainable.

23. As far as the aspect of limitation is concerned, the question of adverse possession is mixed question of law and fact. The defendants nowhere pleaded about perfecting their title by adverse possession, nor have pleaded any dates since when their possession became hostile. In absence of any pleadings about adverse possession, the said question could not have been considered by the lower Appellate Court for the first time in appeal or by this Court in the second appeal. Sec. 3 of the Limitation Act would be applicable in case the question is a pure question of law on the basis of the admitted facts. In the present case, the suit was based on title. The symbolical possession has been delivered to the plaintiffs in the year 1956. The same would arrest the period of limitation as is envisaged to file an application u/O. 21, Rule 95 of the C.P.C. In view of that, no question of limitation would arise, nor it would amount to extinguishment of right within the meaning of Sec. 28 of the Limitation Act, 1908.

24. The cross-objection as filed by the present respondent No. 1 was perfectly tenable. The Court after hearing the learned counsel for the appellant had issued notices to the respondents and called for Record and Proceedings. The notice issued was not "notice before admission." The Court after having been satisfied that the appeal cannot be dismissed at its threshold after hearing the learned counsel for the appellant had issued notices as per Rule 14 of Order 41 of the C.P.C. The notices were served on the respondent for hearing of appeal. The hearing has taken place as per Rule 16 of Order 41 of the C.P.C.

25. The notice is also served upon the respondents for hearing of the appeal in the prescribed format.

26. Rule 22 of Order 41 of C.P.C. gives right to the respondent to object to the decree if he has not preferred a separate appeal.

27. In view of the above facts, it would be seen that there was no impediment for the respondent No. 1 to file the cross-objection.

28. It would be crystal clear from the judgment of the lower Appellate Court that the lower Appellate Court was convinced that the defendant No. 1 has not become the owner by adverse possession no such plea was taken and further, the defendant No. 1 was not tenant of the land Sy. No. 54/3, but in the operative part of the judgment did not mention anything about the cross appeal. The same was an accidental omission. As the cross-objection is already filed, I am inclined to consider the same. It is clear that the defendant No. 1 has no case on merits, as his contention being tenant has been negated upto this Court in the earlier proceedings. So also has never raised the plea of adverse possession and the said plea is also not tenable in view of the fact that the plaintiffs had purchased

the suit property in an auction in the year 1955, so also are issued sale certificate and thereafter symbolical possession is delivered in the year 1956 and the present suit is filed in the year 1963. The conspectus of the above dates would lead to irresistible conclusion that the suit is not barred by limitations and defendant No. 1 cannot claim adverse possession. In view of the above, the second appeal is dismissed with cost. The cross-objection filed by the present respondents/original plaintiffs deserve to be allowed and is allowed. The appellant in second appeal i.e. the defendant No. 1 shall along with the legal representatives of defendant Dalpat Vanji, Baliram Vanji, Narayan and Bansi Vanji shall deliver the possession of the field gut No. 74 (Sy. No. 54/3) situated at village Borawal (Kh), Tq. Yawal, Dist. Jalgaon to the plaintiffs.