
(1976) 03 BOM CK 0036
In the Bombay High Court
Case No : Appeal No. 79 of 1969

Rajaram Soma Mali and another

APPELLANT

Vs

Kautik Motiram Deshmukh and others

RESPONDENT

Date of Decision : 25-03-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66
Transfer of Property Act, 1882 — Section 119, 53A

Citation : (1977) MhLj 485

Hon'ble Judges : P.M. Mukhi, J

Bench : Single Bench

Advocate : R. V. Desai, for the Appellant; J.M. Baphana for respondents Nos. 1 to 4, for the Respondent

Final Decision : Allowed

Judgement

P.M. Mukhi, J.—This appeal raises an interesting question of law as to adverse possession and limitation arising out of a purported exchange of immovable properties.

2. In order to appreciate the rival contentions, it is necessary to refer to some relevant facts. Some time in 1965 the appellants, Rajaram Soma Mali and Hiralal Soma Mali, the original plaintiffs, (and who will hereinafter be referred to as "the plaintiffs") filed a suit, being Regular Civil Suit No. 121 of 1965 against the respondents-defendants for possession of the suit lands, being Survey No. 288/2 of Betawad, Taluka Sindkheda, District Dhulia, admeasuring 2 acres 20 gunthas and for future mesne profits from the date of the suit and costs of the suit

3. Now, it is the plaintiffs contention that when they were minors their mother Kasubai, who is defendant No. 5, had as their guardian, exchanged on the 30th of June 1949 the suit land i. e. Survey No. 288/2 for another piece of land measuring 1 acre 11 gunthas, being Survey No. 300/3, also situate at Betawad. According to the plaintiffs, this transaction of exchange was obtained from the plaintiffs' mother Kasubai by the father of defendants Nos. 1 to 4, one Motiram,

who by misrepresentation also obtained from the plaintiff's mother Kasubai a Vardi on the 30th of June 1949 in which it is stated that the two lands were being exchanged and that in addition a sum of Rs. 1,000 was paid to Kasubai by the deceased Motiram as part consideration.

4. According to the plaintiffs, the sum of Rs. 1,000 was not paid but the lands were in fact exchanged and possession was taken by both the parties.

5. It would appear that Survey No. 300/3 had originally been purchased by the deceased Motiram from some persons, who had thereafter alleged by an application in Shirpur Court under the Bombay Agricultural Debtors Relief Act, 1947, that the sale of Survey No. 300/3 to Motiram was in the nature of a mortgage. In the events that happened, those persons obtained an award in their favour from Shirpur Court and rested possession of Survey No. 300/3 from the plaintiffs, so that the plaintiffs lost possession of Survey No. 300 /3 which they had got in exchange from the deceased Motiram when Kasubai gave possession of Survey No. 288/2 to the deceased Motiram. The plaintiffs lost possession of Survey No. 300/3 on the 6th of March 1954. Naturally, the plaintiffs demanded the return of their original land, viz. Survey No. 288/2, but the deceased Motiram refused to oblige. After Motiram's death, the plaintiffs demanded possession of Survey No. 288/2 from defendants Nos. 1 to 4 but they also avoided giving possession. According to the plaintiffs, that is how they filed the suit for possession of Survey No. 288/2 on the basis of title.

6. Certain other contentions were also taken by the plaintiffs as to the legality of the exchange and whether it was binding on the plaintiffs who were minors in 1949. It is, however, unnecessary to refer in this appeal to these aspects of the matter.

7. Defendants Nos. 1 to 4 filed their written statement and as is often the case of Mofussil pleadings, there was a denial of almost each and every allegation made by the plaintiff, the basic object of such denials being to defeat the plaintiffs suit in some way or the other.

8. First of all the title of the plaintiffs to the suit land was denied and this denial was in the form that the suit lands were not of the ownership of the plaintiffs. It was then contended that the suit land had been purchased by Kasubai, plaintiffs' mother, by selling some land inherited from her father and from this it was sought to be spelt out that the plaintiffs had no right to file the suit. It was then contended that the suit was not in time. There was an assertion that Rs. 1,000 had in fact been paid at the time of the exchange. Then there was a plea that the defendants were entitled to remain in possession by virtue of section 53A of the Transfer of Property Act. It was also contended in the alternative that because of the Bombay Prevention of Fragmentation and Consolidation of the Holdings Act the suit was not tenable.

9. Then a very interesting defence was taken and it was contended that the plaintiffs had accepted Rs. 900 and given up their right over the suit land. This

was followed by the contention in the alternative that the defendants were the tenants of the suit land, hence they were not liable to be evicted.

10. It is significant that no plea of adverse possession was taken by defendants No. 1 to 4 in any form or manner. It was not even suggested that the exchange of lands was illegal and invalid, even though it is an admitted position that no registered documents were executed in relation to the exchange of the lands.

11. On these pleadings the learned trial Judge framed as many as 24 issues and gave his findings thereon. It is only necessary to refer to some of the basic findings which were that the plaintiffs had proved their title to the suit land; that there had been an exchange of the suit lands in 1949 and that in addition to Survey No. 300/3 the defendants Nos. 1 to 4 had paid Rs. 1,000 in cash as balance consideration at the time of the exchange of the lands. The plea as to bar of suit u/s 53A of the Transfer of Property Act was negatived. On the plea of limitation, the learned trial Judge came to the conclusion that Article 66 of the Limitation Act of 1963 which corresponds to Article 143 of the old Limitation Act was applicable so that the suit was in time because the plaintiffs had become entitled to possession of Survey No. 288/2 on account of breach of the conditions of exchange when Survey No. 300/3 was taken away from them in 1954, that being the date of the plaintiffs' dispossession of Survey No. 300/3.

12. On the question whether the plaintiffs were entitled to get back the possession of the suit land as they had lost possession of the land obtained by them in exchange, the learned trial Judge considered the plaintiffs' case as being based on section 119 of the Transfer of Property Act and held that the plaintiffs were so entitled.

13. In the result the learned trial Judge decreed the suit for possession and ordered that the plaintiffs do deposit Rs. 1,000 to be refunded to defendants Nos. 1 to 4.

14. Being aggrieved by the order and judgment of the trial Court, defendants Nos. 1 to 4 filed an appeal in the District Court, Dhulia, being Civil Appeal No. 184 of 1967. The learned Assistant Judge, Dhulia, who heard the appeal, framed only two points: the first one was whether it was proved by the appellants (defendants) that the transaction of exchange was invalid and void and the second point was whether the suit was in time.

15. It is required to be noticed that neither in the trial Court nor in the lower appellate Court was any issue or point framed as to adverse possession. This is obviously so because as I have stated above the plea of adverse possession was not raised by the defendants Nos. 1 to 4 in their pleadings.

16. Now, as to the transaction of exchange, the learned Assistant Judge came to the conclusion that the purported exchange was invalid and that being so, the plaintiffs could not really avail of section 119 of the Transfer of Property Act. On the second point, which he had raised as to whether the suit was in time, this is

what the learned Assistant Judge said:

According to me Article 65 of the new Indian Limitation Act of 1963 would govern the instant suit and the possession of the appellants became adverse since the date of exchange, because it was invalid as no registered document evidencing the exchange had taken place between the parties. Hence according to me the suit was clearly not in time...

17. It is appropriate at this stage to mention that when the learned trial Judge was dealing with the issue as to whether the suit was within limitation.

The learned trial Judge had applied Article 66 of the Limitation Act of 1963 and considered the suit in time because it was within twelve years from the date on which the condition of exchange was broken, i. e. when the plaintiffs lost possession of Survey No. 300/3 in 1954.

18. It requires to be noticed that both the Courts below did not raise any issue as to adverse possession or give any finding as such and the decision was on the general ground of limitation of the suit.

19. It is settled law that the question of adverse possession is a mixed question of law and fact because such an issue can never be decided without reference to the date on which the possession of the defendants can be said to have become adverse.

20. Mr. R.V. Desai, the learned Advocate for the appellants-plaintiffs, has contended that even though there may have been no valid exchange of properties between the parties it could not be said that defendants Nos. 1 to 4 were in adverse possession of Survey No. 288/2 from the 30th of June 1949 because no such plea was ever taken. Mr. Desai strenuously urged that in a suit based on title as this one, the time from which the period begins to run against the plaintiffs, in the words of Article 65, twelve years from the date "when the possession of the defendants becomes adverse to the plaintiffs". Mr. Desai says that possession by itself without anything more is not the criterion because possession can be of many kinds and it is only when possession is hostile or adverse that the period of limitation begins to run. Mr. Desai also contends that in a suit based on title it is not for the plaintiff to show that he was in possession within twelve years but for the defendants to show that the plaintiff's title is extinguished because he (the defendant) has been in adverse possession for more than twelve years.

21. Mr. J. M. Baphna, the learned Advocate for the defendants, has contended that once it was shown that the purported exchange of properties was invalid in law and that the defendants entered into possession of Survey No. 288/2 in 1949, that possession must be deemed to be adverse to the plaintiffs and since the suit has been filed only in 1965 the Court must consider the title of the plaintiffs, if any, to have been extinguished. He says that it is not necessary for the defendants to take up a specific plea of adverse possession. His argument is

that an invalid exchange is on the same footing as an invalid sale and it has been held, according to him, that in the case of an invalid sale, the period of limitation for adverse possession of the buyer commences to run from the date of the sale. In other words, the contention of Mr. Baphna is that adverse possession need not be pleaded in the case of an invalid transaction and possession becomes forthwith adverse to the original owner.

22. Now, it is not possible to accept the argument of Mr, Baphna that adverse possession need not be pleaded in the case of an invalid sale or exchange. On the contrary, it has been held by the Supreme Court as well as by our High Court that whenever there is a claim for adverse possession then it must be clearly made and proved. Reference may be made to S.M. Karim Vs. Mst. Bibi Sakina, . In that it was argued by the appellant therein that the benami nature of a transaction had been clearly established and it was held that the "appellant"s claim based upon the benami nature of the transaction could not stand because section 66 of the CPC was a bar to such a claim. Now, it would appear that as an alternative it was contended in that case that title was extinguished by long and uninterrupted adverse possession of a certain person and after him of the plaintiff therein. It was held by the Supreme Court that when an alternative claim has been made, it must be clearly made and proved. It was then observed that the High Court had held that the plea of adverse possession was not raised in the suit and had reversed the decision of the two Courts below. The Supreme Court then went on to observe as follows:

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.

23. The Supreme Court also observed that each case must be determined upon the allegation in the plaint in that case and pointed out that in AIR 1940 202 (Privy Council) , the Judicial Committee did not accept the alternative case based on possession after purchase without a proper plea.

24. In a recent case Jankiram v. Ghusya 1974 Mh. L J Note 74 (Second Appeal No. 113 of 1964 decided on 13th of April 1973 at Nagpur), this Court (per Sapre J.) held that where a defendant asserts that he had perfected the title to the suit land by adverse possession, it is for him to state when his possession became adverse to that of the plaintiff. In the absence of such a specific plea in his written statement no amount of evidence adduced to prove his adverse possession can be looked into. The Court also observed that adverse possession was always in relation to a specific person or persons and that there ought to be consciousness in the mind of the trespasser that the land belongs to some one else and he must prove that he had an animus or intention to possess the land

adversely to the owner.

25. Now, in the case before me, there is nothing to show as to what was the nature of the possession of the lands which were exchanged by the parties. In fact, as I have already mentioned there is no plea of adverse possession taken up at all by the defendants who sought to resist the suit on various other grounds which have been set up.

26. Now, so far as the exchange transaction in the suit is concerned, there is no evidence on record as to what were the terms of the exchange and what was the arrangement between the parties and what is more important: what was the nature of the possession of each party. The only document on record is the Vardi, Exh. 34, which shows that the parties were exchanging the two lands Survey No. 288/2 for Survey No. 300/3 plus Rs. 1,000 to equalise the consideration. Beyond that there is nothing. On behalf of the defendants two documents were attempted to be produced but they were not proved and could not be exhibited so that the Court cannot refer to them.

27. We are, therefore, left with a transaction of exchange of properties, the real terms of which are not known. It was clearly for the defendants firstly, to aver that they had entered into possession right from 1949 adversely to the plaintiffs and that their possession was not a permissive possession and that twelve years having passed, the title of the plaintiffs was extinguished.

28. Mr. Baphna has strenuously relied on a judgment of this Court in Dagadu Dhondu Patil Vs. Trakadu Motiram Patil and Another, . for his proposition that when an owner purports by an oral sale to transfer his 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 twelve years from the date on which the possession was delivered,

29. That was a case of an oral sale and what is more important, a plea had been taken that the application having been filed more than twelve years after the date of sale, Sampat Sapdu had become the owner of the land by adverse possession. The exact pleadings in that case are not known, but there is no longer any doubt as now held by the Supreme Court in S. M. Karim v. Bibi Sakina (supra) that, before the question of adverse possession can be considered by a Court, a plea is required at least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

30. If regard be had to Article 65 of the Limitation Act of 1963 it is clear from the wordings thereof that the defendants' possession of the suit land by itself is not decisive. It may or may not be adverse and it is always a question of fact whether the possession of the defendants is adverse or not and from what date if at all it can be said to be adverse. It is not as if there is a deeming provision in the law that when there is an invalid sale or an invalid exchange, the possession of the person taking possession pursuant to such a transaction shall be deemed to be adverse to the other party. The nature of possession is a question of fact

and unless adverse possession is pleaded it cannot be presumed.

31. Mr. Baphna sought to rely on a judgment of the Supreme Court in *State of West Bengal Vs. The Dalhousie Institute Society*, to support his proposition that adverse possession need not be pleaded in the case of an invalid sale or exchange. I am not able to appreciate how this judgment or a previous judgment of the Supreme Court referred to therein helps the ease of Mr. Baphna. Now, that was a case of a grant which was found to be invalid and the dispute related to title to the compensation amount awarded in the land acquisition proceedings to the site of Dalhousie Institute building premises. The State of West Bengal claimed the entire amount as being payable to it and therefore the question of title to the land had to be decided. The evidence clearly established that the respondent had been in continuous and uninterrupted possession and enjoyment of the suit land for over 60 years and there was material documentary evidence to show that the respondent had been treated as the owner of the site even by the appellant-Government. It was in these circumstances that Court observed that the possession of a person having no legal title but nevertheless holding possession of the land under the colour of an invalid grant was *prima facie* adverse to the legal title of the Government as owner of the land from the very moment possession was taken under the invalid grant. Mr. Baphna states that in this case which he has referred to, a plea of adverse possession was not taken. I find it difficult to appreciate how it can be said from a reading of the report that the plea of adverse possession was not taken.

32. In any event, it is obvious that the question as to whether there was or was not a plea of adverse possession taken by the defendants was not considered and as held by The Supreme Court in *Karim's case* (*supra*) such a plea is necessary.

33. It requires to be repeated that not only no plea of adverse possession was taken but the defendants were content to resist the suit by denying the plaintiffs' title; by pleading section 53A of the Transfer of Property Act; by referring to the Fragmentation Act and by raising a plea which would, in my opinion, be inconsistent with any plea of adverse possession that the plaintiffs had accepted Rs. 900 and given up their right over the suit land.

34. The defendants efforts to show that the plaintiffs had no legal title to Survey No. 288/2 failed in both the Courts below, so that there is a finding that the legal title to the suit land, Survey No, 288/2, resided in the plaintiffs. If that was so, then it was for the defendants to plead and establish that the plaintiffs' title had been extinguished by adverse possession. This entailed the necessity of the defendants pleading and establishing on evidence the date from which their adverse possession began. Unless the defendants pleaded and showed that their adverse possession began from the 30th of June 1949, they must fail.

35. In this view of the matter the appeal must be allowed and the order and judgment dated the 20th September 1968 of the District Court, Dhulia, must be

set aside and the order and judgment of the Civil Judge, Junior Division, Sindkheda, dated the 5th of May 1967 restored. The defendant-respondents will pay the costs of the plaintiffs throughout.