

(1966) 07 BOM CK 0016

In the Bombay High Court

Case No : Second Appeal No. 152 of 1960

Ramchandra Mahadeo Khondre and Others

APPELLANT

Vs

Parasu Dattu Kadam and Others

RESPONDENT

Date of Decision : 27-07-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103
Limitation Act, 1908 — Article 11A, 138, 142

Citation : AIR 1968 Bom 44 : (1967) 69 BOMLR 111 : (1967) MhLj 361

Hon'ble Judges : Wagle, J

Bench : Single Bench

Advocate : Y.S. Chitale, for the Appellant; N.S. Shrikhande, for the Respondent

Judgement

(1) The point that arises in this appeal is whether the plaintiff 's suit filed in 1956 is barred under the provisions of Article 142 of the Limitation Act and also by reason of the conclusive nature of the order passed in execution proceedings under Order 21, Rule 103 of the Civil Procedure Code. The facts of this appeal are the following:-

(2) One Dadu Babaji Dari was the owner of the disputed property. Suit No. 533 of 1937 was filed by the original plaintiff against the said Dadu Babaji Dari to recover a debt owed by his. Ex. 38 is the decree dated July 19, 1939 for Rs. 337-4-6 in favour of the present plaintiff. In execution of this decree, the disputed property was sold by Court in Darkhast No. 176 of 1944 on November 4, 1944. The property was of course sold subject to a mortgage which Dadu Babaji Dari had executed in favour of the plaintiff. But we are not concerned with this mortgage in this proceeding.

(3) The sale was confirmed on December 7, 1944 and Ex, 45 is the sale certificate issued to the plaintiff dated December 13, 1944. During the pendency of this proceeding, namely, the suit and the execution proceedings filed by Nikam for the recovery of the amount of money, Dari sold the disputed property to defendant No. 1 on June 27, 1940. This sale was challenged by plaintiff Nikam

and one other creditor of Dari u/s 53 of the Transfer of Property Act on the ground that this was intended to defeat the creditor's claims. The Appellate Court in Civil Appeal No. 118 of 1949 decreed the suit on February 16, 1951.

(4) While this proceeding was pending, Miscellaneous Application No. 3 of 1945 was made by the present plaintiff to obtain possession of the property for which the sale certificate Exhibit 45 was obtained by the plaintiff. One Yesabai, the mother of the present defendant No. 1, having obstructed the obtaining of possession by the plaintiff, application No. 32 of 1945 was filed by the plaintiff-purchaser to remove obstruction. Ex. 67 is the order on this application dated April 9, 1945 by which plaintiff's application was rejected and was held that he was not entitled to immediate possession as against Yesabai. Plaintiff filed the present suit against the defendants on April 26, 1956. Three different sets of defendants put in written statements. Defendant No. 2 contended that he was in possession of the property from November 13, 1934 when he obtained a sale certificate from a Court for having purchased the property at a Court auction. It was contended by him that the plaintiff's suit as against him was barred. But it was not contended by defendant No. 1 in the written statement that he was in possession of the property that at the date of the suit. What was urged was that defendants Nos. 3 to 12 out of whom Nos. 1] and 12 were the tenants were in possession of the disputed property. In fact, the claim made by defendant No. 2 was that the possession was really of defendants No. 3 to 10 and that their claim had materialised into title in their favour.

(5) Defendants Nos. 3 to 10 adopted this contention of defendant No.2 that they were in possession of the disputed property for a period of more than 12 years next before suit openly as of right and that, therefore, they had become owners of the property. It was also urged to get over the order dated April 9 1945 in the execution proceedings denying possession to the plaintiff was not brought within one year as required under , Article 11-A of the Limitation Act and that therefore, plaintiff had lost his right to contend that he was entitled to possession of this property as against the defendants. The contentions of defendant No. 1 were also similar. He denied that he was in possession . He denied all knowledge of the deed of sale in his favour and he stated that it was defendants Nos. 3 to 10 who were in possession of the property adversely to the plaintiff for a period of more than 12 years and that, therefore, they had become owners. In the alternative, it was pleaded by defendant No. 1 that in view of the fact that the suit was filed more than one year after the order was passed on April 9, 1945, plaintiff's claim was barred. The Appellate Court, however, set aside this dismissal and decreed plaintiff's suit.

(6) Mr. Chitale, who appears for the appellants-original defendants Nos. 1 to 10, urged three points in this case. The first point was that under the provisions of Article 142 of the Limitation Act, the present suit was barred because the plaintiff did not allege and prove that he was dispossessed within 12 years next before the suit. Article 142 of the Limitation Act requires that the suit by a plaintiff for

possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, must be filed within 12 years from the date of dispossession or discontinuance. This postulates that the plaintiff must allege possession and he must also prove that within 12 years next before the suit, he was dispossessed or, in other words, that he was in possession of the disputed property within 12 years next before suit. Reliance was placed by Mr. Chitale upon the decision of the Privy Council in *Dharani Kanta v. Gabar Ali Khan*, 17 Cal WN 389. This was a suit filed by a landlord against the tenant for ejectment. The defence was that the plaintiff-landlord was not at any time in possession of the suit property from 1815 onwards, and that the suit was, therefore, barred by time. Concurrent findings of the lower Courts were to the effect that plaintiffs had entirely failed to prove that they were ever in possession of any of the lands in suit or that they were dispossessed by the defendants. Their Lordships of the Privy Council accepted the concurrent findings of the High Court and the Officiating Subordinate Judge and observed as follows:

"The suit is one for the ejectment of persons who admittedly were at the date of suit in possession of the seven Puras of land from which it is sought to eject them. It lay upon the plaintiff's to prove not only the title as against the defendants to the possession, but to prove that the plaintiff's had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit."

Mr. Chitale urged that this was the law laid down by the Privy Council in respect of a suit for possession filed by a plaintiff. Mr. Chitale urged that in this decision their Lordships of the Privy Council have clearly laid down that in every case where plaintiff comes to Court seeking possession, he must prove that he was in possession of the suit property within 12 years next before suit. It was then urged by Mr. Chitale that the suit being filed on April 26, 1956, the plaintiff must prove that he was in possession of the property some time during the 12 years next before April 26, 1956. This not having been done by the plaintiff, his suit must fail.

(7) Mr. Shrikhande, who appeared on behalf of the respondents Nos. 1 to 8, urged that to a suit of the nature filed by the plaintiff, the relevant article of the Limitation Act would be either Article 137 or 138. If at the date when the plaintiff became the purchaser of the property at a Court auction persons other than judgment-debtor are in possession then the suit is governed by Article 137. If, however, at the relevant date the judgment-debtor is in possession then the suit is governed by Article 138 of the Limitation Act. Mr. Shrikhande's argument was that if there are one or two articles, one general and the other specific, then the specific article must prevail in preference to the general article. There is no doubt that Article 137 or 138 would be specific articles covering the present case. The two articles read as follows:

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

137. Like suit by a purchaser at a "Twelve years When the sale in execution of a decree, judgment debtor is when the judgment-debtor was first entitled to out of possession at the date of possession.a the sale.

138. Like suit by a purchaser at Twelve years The date when the a sale in execution of a decree, sale becomes when the judgment-debtor was in absolute. possession at the date of the sale

The plaintiff satisfies the requirements of the first column both in Article 137 and also in Article 138 in the alternative. Plaintiff's case is that in spite of the dealings with the property by the judgment-debtor in 1940, the possession of the properties remained with the judgment-debtor all the time. The delivery of possession and the passing of the property were only clocks intended to defeat the claims of the creditors. In support of this contention Mr. Shrikhande referred to the judgment, Ex.50 , in Civil Appeal No. 118 of 1949 dated February 16, 1951. In this judgment, the sale was held inoperative against the claims of the creditors. In fact, a finding is given that the delivery of possession was only a clock. Mr. Shrikhande urged that this fact specifically found in Civil Appeal No. 118 of 1949 is clear enough to show that there was no change of possession at any time so far as this property is concerned. It may be that some show of passing of possession was made by the parties so as to make others believe that the possession of the property was with defendant No. 1.

(8) Mr. Shrikhande, therefore, urged that whether the property was in fact with defendant No. 1 or whether it was with the judgment-debtor the whole transaction of 1940 being intended to defeat the creditors would have no bearing upon the rights of the creditors. Article 138, therefore, was according to Mr. Shrikhande , the only article applicable to the present case. The plaintiff became the purchaser when the sale was confirmed on December 7, 1944. It may even be that this confirmation may relate to the date of sale which was November 4, 1944. Plaintiff filed the suit on April 26, 1956. According to the second and the third columns of Article 138, the suit ought to be filed within 12 years of the date when the sale became absolute. The date April 26 1956 being within 12 years from November 1944, the suit was well within time. Mr. Shrikhande, therefore, urged that there was no substance in the argument that the suit was barred by time.

(9) The question really depends upon whether article 138 or 142 would apply. Mr. Chitale urged that there is sample authority to show that the article that would apply even in case where the auction-purchaser files a suit would be Article 142, and not Article 138. In this connection, Mr. Chitale referred to the decision of the Madras High Court in P. Natesa Nattar Vs. J.G. Daniel (Died) and Others, . In this decision, it was held by the Madras High Court that where an auction-purchaser at a sale held in execution of a simple mortgage decree obtained by the mortgagee is obstructed by a third person in taking delivery of possession and the auction-purchaser who is a decree-holder himself, files a suit for possession against the third person, he must establish his possession within the period of 12

years before the suit. To such a case Article 142 applies. The auction-purchaser cannot rest his case on his title alone. If he fails to prove such possession his suit must be held to be barred by time. In that case, the Division Bench of the Madras High Court held that plaintiff must show in such cases that he or his predecessor in title had exercised the rights of ownership by being in possession within 12 years next before the suit. Mr. Chitale urged that the Madras High Court thereby decided that the article that would apply to a suit filed by purchaser at a Court sale would be Article 142, and not Article 138. I can only say that the question which article applied, whether Article 138 or 142, does not seem to have been debated before the Court and it seems to have been conceded by the plaintiff in this case that Article 142 would apply and the case seems to have been considered on that basis.

(10) Mr. Chitale, however, mainly relied upon the decision of the Privy, Council in 17 CNN 389, in support of his contention, that the Article that was applicable was 142. The facts, however, which appear to have been stated at page 390 in the arguments of the Counsel show that the suit in that case was for ejectment and the appellants alleged wrongful dispossession. From this statement of fact, it is clear that the by the defendants and there would be no dispute with regard to this proposition of law that when the plaintiff comes to Court on the ground that he was dispossessed, the article that would apply would be Article 142. To such facts, Article 142 of the Limitation Act would apply. The facts of the Privy Council case, therefore, are somewhat different from the facts of the present case.

(11) It was then urged by Mr. Chitale that one consequence necessarily follows upon a purchase being effected at a Court sale, namely, that the title that is taken by the purchaser at the Court auction is subject to all the infirmities to which the judgment-debtor's title was subject. If, therefore, the judgment-debtor was not in possession of the property at the time the sale was effected by the Court, then the plaintiff takes it with notice that a person other than judgment-debtor is in possession of the property and that the said claim might even be adverse to the claim of the judgment-debtor. Briefly stated, the case could be put that the plaintiff's suit as an auction-purchaser has to be judged on the same merits as a suit by the judgment-debtor filed at the time when the auction-purchaser files the suit. The infirmity that is obtainable against the judgment-debtor if he had filed a suit would effectively be available to the third parties against the auction-purchaser. In this view of things, Mr. Chitale urged that the possession of third parties for a period of 12 years immediately next before the filing of the suit would be an impediment whether considered under Article 142 or under Article 137 of the Limitation Act, even if the latter article would apply. Mr. Chitale's argument, therefore, was that the plaintiff cannot escape proving that he or his predecessor-in-title were in possession of the property within urged that by the sale-dated of June 27, 1940, Dadu Dari not only sold the property to defendant No. 1, but he also delivered possession to defendant No. 1. If this fact of delivery of possession be held proved as against Dadu Babaji Dari, it would equally be held against the plaintiff in the instant

case. If, therefore, a third party was in possession since 1940, then a suit brought in 1956 would not be within a period of 12 years from the date-somebody other than Dadu Dari was in possession of the property . Mr. Chitale, therefore, urged that plied, the infirmity would be the same, namely, that in the instant case, plaintiff failed to prove that he or his predecessor in title were in possession of the property at any time during 12 years next before suit.

(12) In deciding the question the question whether plaintiff has proved that he or his predecessor in-title were in possession of the property within 12 years next before the suit, a reference the facts has to be made. The first fact to be noticed is that the sale that was effected in favour of defendant No. 1 by a deed dated June 27, 1940 was made inoperative as against the creditors by the Appellate Court in Civil Appeal No. 2 were parties. This was a suit u/s 53 of the Transfer of property Act to set aside a sale on the ground that it was in fraud of creditors. It was held to be in fraud of creditors and the normal consequence that would follow from this decision is that possession would not be lawful as against creditors when obtained under such a deed, But whether lawful, or unlawful possession would be a matter of fact and so far adverse possession is considered as factual possession to support a claim by title by adverse possession . But in deciding Civil Appeal No. 118 of 1949, the learned assistant Judge came to the conclusion that even the transfer of possession was a mere cloak to defraud the creditors. In effect, the decision was that possession was only normal and was not in fact transferred. This decision would lead to the inference that defendant No. 1 or his guardian was not put in possession of the property at any time in 1940. This fact that possession had not been transferred by Dari to defendant No. 1 is well supported by the written statements of both defendant No. 1 and defendant No. 2. The person most vitally concerned in regard to this possession is defendant No. 1. The deed was in his favour. The deed was executed during his minority but the suit was filed after he attained majority and he himself claims in the present suit that he was never in possession of the suit property . This fact supports the reasoning adopted by the learned Assistant Judge in disposing of Civil Appeal No. 118 of 1949 that the transfer of possession was a cloak. If a person to who the property is alleged to have been transferred states that he obtained no interest in the property and that he was not in possession of the property , then it would be reasonable to hold that the defendants failed to prove that defendant No. 1 was in possession of the property. An inference can, therefore, arise that the possession continued to be with the original vendor, namely, Dadu Babaji Dari the defendant in Civil Suit No. 533 of 1937.

(13) This factual state of affairs is also admitted to be correct by defendant No. 2 in his written statement, although in the evidence that was given by him, he altered this position a title and contended that possession was with defendant No. 1. The written statement of defendant No. 1 and the judgment in Civil suit No. 533 of 1937 can only lead to one inference that defendant No. 1 was never in possession of this property. The defendants could not therefore, put forward the claim of defendant No. 1 that possession was lost to Dari since 1940.

(14) The next question is about the possession of defendant No. 2. Ex. 64 was produced by defendant No. 2 to show that he had become the purchaser of the disputed property at a Court sale held some time in 1934 and that the sale certificate was issued to him on fore, took up a contention in the written statement that since he was in possession from 1934 onwards, the plaintiff's suit was barred. Plaintiff, however produced Ex 58 dated February 14, 1939 to show that the sale certificate given to defendant No. 2 was canceled on that date. No claim can, therefore, be made by defendant No. 2 that he had a right to be in possession of the property from 1934 onwards. In any case his right to possession of the property was refused from and after February 14, 1939 when by the order of which Ex. 58 is certified copy the sale certificate was canceled. His written statement was early to the effect that defendant No. 3 to 10 were in possession of the property from 1925 onwards. It is also to the effect that defendants No. 1 and 2. The obvious inference that arises is that defendant No. 2 was never in possession of suit property, so as to claim it as against the plaintiff. Since defendant No. 2 was not in possession no claim on his behalf could be pressed to defeat the claims of the plaintiff under Article 142 of the Limitation Act.

(15) The last question about possession is the claim of defendants Nos. 3 to 10. Although in the written statement a claim was made by defendants Nos. 3 to 10 that they were in possession to the exclusion of all other persons as owners for a period of more than 12 years, no one went into the box to prove their claim. Beyond the allegation in the written statement there is nothing on record to show that defendants Nos. 3 to 10 were ever in possession of this property or that they claimed this property at any time. From this discussion it is obvious that none of defendants Nos. 1 to 10 were in possession of the disputed property adversely to the original vendor Dadu Babaji Dari so as to defeat the claims of the present plaintiff. This discussion also shows that even if any of the defendants were in possession they were in possession on behalf of the original vendor judgment-debtor Dadu Dari and, therefore, Article 138 of the Limitation act would apply to the fact of this case. The suit having been filed within 12 years from the date the sale become absolute, the suit is not barred by time.

(16) I have already pointed out that in neither of the two decisions cited by the learned Counsel for the appellants, namely, 17 Cal WN 389 (PC) and P. Natesa Nattar Vs. J.G. Daniel (Died) and Others, , has the point been specifically considered whether Article 137 or 138 applied or 142 applied. Mr. Shrikhande, however, referred to the decision Ningappa Awwappa Vs. Danappa Sharnappa and Others, , wherein Lokur J., specifically dealt with the bar of limitation on the basis that the article that would apply to an auction-purchaser when the judgment-debtor was out of possession would be 137. I have of course, to mention that in that case no attempts seem to have been made by the other side to contend that the article 142. Attempt was, however, made to show that the article that would apply would be 144, but the learned Judge proceeded on the basis that to a suit filed by an auction-purchaser, when the date of the sale.

Article 137 would apply. Since on facts I held that the judgment -debtor was in possession when the sale became absolute and the sale did not become absolute more than 12 years before the filing of the suit is not necessary to consider this question any further.

(17) The next point that was urged by Mr. Chitale was that the provision of Order 21, Rule 103 have to be carefully scrutinised and applied to the instant case. His argument on this point was two-fold. The suit which is obviously not brought within one year from the date of the order refusing possession to the auction-purchaser is barred by reason of Article 11-A of the Limitation Act. The second phase of this argument was that even if nobody except Yesabai was a party to the proceedings in execution, the claim of the plaintiff was barred as against the defendant also because Article, 11-A of the Limitation Act was specific and clear. The relevant words of Article 11-A of the Limitation Act are that a suit by a person against who an order has been made under the Code of Civil Procedure, 1908 upon an application by the purchaser of such property sold in execution of a decree, complaining of obstruction to the delivery of possession has to be brought within one year from the date of the order. The argument advanced by read along with the words of Rule 103 of Order 21 of the Civil Procedure Code. This Rule reads as follows:

"103. Any party not being a judgment debtor against who an order is made under Rule 98, Rule 99 or Rule 101 may institution suit to establish the right which he claims to the present possession of the property ; but subject to the result of such suit (if any), the order shall be conclusive."

A plain reading of this Rule would show that in a particular contingency, the order obtained under Rule 98, Rule 99 or Rule 101 would not be conclusive, but that if such contingency did not occur, then the said order would be conclusive. If this was the only meaning to be given to Order 21, Rule 103, then the consequences of not filing a as contemplated by Order 21, Rule 103 would be that the order in the summary proceedings taken under Order 21, Rule 99, namely refusing possession to the purchaser as against the obstructer, would be conclusive. In other words, the plaintiff would not be able to displace the possession of the obstructer in any proceedings or by a suit. In the instant case, such a possession does not help the defendants. In dealing with the question of limitation, regarding plaintiff 's case either under Article 137, 138 or 142, I discussed the question of possession of the property and I held that neither defendant No. 1 nor defendant No. 2 was in possession of the property . Yesabai never claimed to have a right to possession and she is now dead. Even if , therefore, the order under Order 21, Rule 103 would become conclusive, that would only assist the possession of defendant No. 1 or the possession of Yesabai. I am not going into the question whether Yesabai was contesting the proceedings on her behalf or on behalf of defendant No. 1, who was her minor son. I will assume for the purpose of this argument that the claim was made by Yesabai on behalf of defendant No. 1. The follow that the title was capable of being enforced even to get possession

as against persons other than the obstructer after one year and as against the obstruct or during the course of one year by filing a suit.

(25) The result is that the plaintiff 's claim is not barred either under Article 11-A or under Order 21, R. 103 as against defendants Nos. 3 to 10 and also defendants Nos. 11 and 12. So far as defendants Nos. 1 and 2 are concerned, I have already held that they disclaim possession and that they were not in possession . There is, therefore, no impediment to the plaintiff 's claim for possession by anything done by defendants Nos. 1 and 2.

(26) Lastly it was urged by Mr. Chitale that defendants Nos. 1 to 10 were adversely in possession of the property for more than 12 years openly as of right. None of the defendants Nos. 3 to 10 led evidence to show that they were in possession . As far as actual possession is concerned, I have already held that whoever was in actual possession of the property was holding the same on behalf of the original judgment-debtor Dadu Babaju Dari. There is not proof at all of defendants Nos. 3 to 10 or defendants Nos. 11 and 12 being adversely in possession of the property as of right at any time. The defendants, therefore, also failed to prove that a claim by adverse possession has materialised in favour of defendants Nos. 3 to 10 or defendants Nos. 11 and 12 or incidentally through defendants Nos. 3 to 10 in favour of defendants Nos. 1 and 2.

(27) In the result, the appeal fails and is dismissed with costs.

(28) Appeal dismissed.