
(2006) 08 BOM CK 0011
In the Bombay High Court
Case No : Second Appeal No. 304 of 1993

Suryabhan Dhundaji Bawane

APPELLANT

Vs

Bhulabai Chandrabhan Bawane and Others

RESPONDENT

Date of Decision : 10-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 96
Limitation Act, 1963 — Article 64, 65

Citation : AIR 2007 Bom 25 : (2006) 6 ALLMR 570 : (2006) 6 MhLj 807

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; S.U. Nemade, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—The original defendant has challenged the concurrent judgments and decrees passed by the Courts below in this Second Appeal. This Court while admitting the Second Appeal on 2-12-1993 has treated the additional grounds raised in the memo of appeal by way of amendment as substantial questions of law between the parties. No question of law as such has been formulated. After hearing both the counsel, the substantial question of law which arise for consideration is whether the suit as filed was time barred in view of provisions of Article 64 of Indian Limitation Act and whether the appellant/defendant has perfected his title by adverse possession?

2. The original plaintiff was brother of present appellant/defendant. The present respondents are his legal heirs. The suit filed vide Regular Civil Suit NO. 3 of 1986 was for claiming the relief of possession of field Survey No. 89/1 admeasuring 10 acres 33 Gunthas of Mouza - Dhamak. The plaintiffs contended that out of this field 3 acres 24 gunthas of land belongs to him. The trial Court has decreed the suit and ordered partition of 3 Acres and 24 gunthas of land from the suit field and further ordered enquiry into future mesne profit under Order 20, Rule 12 of Civil Procedure Code. The Appellate Court has maintained it.

3. As the question is of limitation and adverse possession, in view of arguments advanced, it will be necessary to briefly state the facts. On 19-4-1948, field Survey No. 89/1 of Dhamak admeasuring total 14 Acres 14 gunthas was jointly purchased by plaintiff - Chandrabhan, defendant Suryabhan, Shankar Bawane and one Ukandya Bhoi. Chandrabhan was having 1/4th share in the field as per his contention. Later on, defendant Suryabhan purchased 1/4th share of Ukandya Bhoi and he became owner of 50% of suit field. Shankar sold his 1/4th share to one Parvati Mahar in 1960. Thus, as a result of these transactions, plaintiffs remained owner of 1/4th share i.e. 3 acres 24 gunthas while defendant became owner of 1/2 share i.e. 7 Acres 9 gunthas and remaining 1/4th share of 3 Acres 24 gunthas is with Parvati Mahar. We are not concerned with the share of Parvati in the present matter. The case of plaintiff was that as defendant forcibly tried to disturb his possession, he filed Regular Civil Suit having No. 133 of 1084 and initially a temporary injunction was granted in his favour on 30-10-1984. The defendant Suryabhan thereafter dispossessed plaintiff. Hence, that suit was withdrawn and Regular Civil Suit No. 3 of 1986 came to be filed for restoration of possession on the ground that defendant has no right, title or interest in the land. Alternatively, the plaintiffs also prayed that if it is held that the land is still joint, a decree for partition and separate possession to the extent of their share of 3 Acres and 24 gunthas should be passed. The suit was resisted by the present appellant/defendant on the ground that the plaintiff was not owner of 3 Acres 24 gunthas and plaintiff was not in possession thereof. He also denied plaintiffs claim for possession and stated that even if it is held that plaintiff - Chandrabhan was owner of 3 Acres 24 gunthas because of his long, continuous and exclusive possession since 1948, that too by posing himself as owner of entire field, he has perfected his title by way of adverse possession. He stated that field was being cultivated by him at his own expenses and he also submitted that he did not give possession to Chandrabhan though he was demanding possession and on each occasion when demand of possession was made by Chandrabhan, he asserted his own exclusive title and he also stated that he has also taken loan against this land from various banks and he also dug a well in it on the strength of said loan. He further stated that on 14-12-1975, Chandrabhan had given a notice through Shri Naigaonkar, Advocate, demanding partition and separate possession of the suit land and as defendant has not given possession, the suit was time barred. The trial Court framed various issues and it found that the plaintiffs and defendant are joint owners, however, it found that plaintiffs could not prove that they were owners of southern portion of suit field. It further found that plaintiffs could not prove their possession on 30-10-1984 when temporary injunction was vacated in earlier Regular Civil Suit No. 133 of 1984. It held that suit was maintainable and further held that defendant did not prove that he has become owner by adverse possession. It, however, accepted the alternate prayer made by the plaintiffs for having 1/4th share in the suit field and granted that decree for partition and possession. The present appellant thereafter filed a Regular Civil Appeal No. 223 of 1988 u/s 96 of CPC before the District Judge, Amravati and District Judge, Amravati has on 5-3-1993 dismissed

that appeal.

4. Heard Shri Khapre, learned Counsel for the appellant and Shri Nemade, learned Counsel for respondents No. 1 to 3.

5. Shri Khapre, learned Counsel has invited attention to the plaint as filed to show that plaintiffs have stated that they were in possession of 3 Acres and 24 gunthas and they were dispossessed in October, 1984 after vacation of injunction by the trial Court in earlier suit. According to them, the suit of present nature is therefore governed by Article 64 of Indian Limitation Act and not by its Article 65. He relies upon the judgment of the Hon"ble Apex Court in the case of Ramiah Vs. N. Narayana Reddy (Dead) by LR., , to state that whenever in a suit based on title, there is no allegation of prior possession and subsequent dispossession, such suit alone fall under Article 65 and when the suit points out previous possession and dispossession, Article 64 is applicable. He states that in view of specific averments in the plaint itself, Article 64 was applicable and both the Courts below have lost sight of this fact. He contends that right from the year 1948, the appellant alone has been exclusively using the suit land and has been posing himself as owner. He points out the 1971 instance in which the defendant had borrowed loan from a bank against the suit land and plaintiff Chandrabhan Bawane had raised objection to the same in the bank. According to him, this constituted ouster of deceased Chandrabhan from suit field and therefore the suit ought to have been filed within 12 years of 1971. He points out that the present suit has been filed in 1986 while the earlier suit was filed by plaintiffs in 1984. Thus, according to him, the suits were time barred. He further states that the second instance of assertion of exclusive title is the notice sent by Chandrabhan vide Exh. 55 through Shri Naigaonkar Advocate in the year 1975. According to him, this notice dated 8-12-1975 and its non-compliance again give a cause of action to present respondents and suit ought to have been filed in any case within 12 years from 1971. He contends that suit has been filed in 1986 and is therefore time barred. In order to demonstrate how the concept of ouster is understood in between co-owners, he has invited attention to the judgment of the Hon"ble Apex Court in the case of Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleswarappa and Another, . He further argues that when the case of present respondents was very specific, the Court below has evolved a totally new case for them in variance with their own pleadings and have granted him relief of partition and separate possession. To show that the Court could not have done this, he has relied upon the judgment of the Hon"ble Apex Court in the case of Tej Narain and Another Vs. Shanti Swaroop Bohre and Another, , to demonstrate this.

6. As against this, Shri Nemade, learned Counsel appearing for respondents No. 1 to 3/original plaintiffs contended that arguments being advanced are totally misconceived and lack merit. He states that suit filed by the plaintiffs was very specific and the Courts below have found that the plaintiffs were not in possession and therefore not dispossessed. The Courts have, therefore,

considered the alternative prayer and granted the relief of partition and separate possession. He states that the fact of joint purchase by brothers i.e. Chandrabhan, Suryabhan and Shankar is not in dispute and therefore, Chandrabhan was admittedly owner. He further argues that the defendant has not committed any act of ouster either in 1971 or in 1975. He argues that in 1975, no notice was issued by Chandrabhan and first suit filed by Chandrabhan in this respect is in 1984. Having failed therein and because of forcible dispossession at that time, second suit was required to be filed. He further states that considering the various difficulties, alternate prayers were made and partition and separate possession was pressed into service on the basis of title. He, therefore, argues that none of the cases on which reliance has been placed by the learned Counsel for the appellant are relevant for adjudication. He states that relevant cases are already considered by the Courts below in this respect and that is the correct position.

7. The perusal of plaint clearly shows that the plaintiffs complained of dispossession after vacation of interim orders in 1984 suit. However, the suit filed also contained a prayer for partition and separate possession on the basis of title. The defendant never accepted that the respondents/plaintiffs were at any time in possession and the trial Court found that the plaintiffs before it failed to show that they were dispossessed by the present appellant at any point of time. It is, therefore, apparent that Article 64 of Indian Limitation Act cannot have any application in these circumstances. Article 64 requires a suit to be filed within a period of 12 years from the date of dispossession. If the arguments of Shri Khapre are to be accepted, date of dispossession given by the plaintiffs is October, 1984 and the suit has been filed in 1986 itself. Hence, the suit cannot be held to be time barred. However, the appellant/defendant never accepted that the present respondents were in possession or that he dispossessed them at any point of time. Therefore, particularly in view of finding reached by the trial Court, there is no question of finding out whether suit has been filed within 12 years of alleged dispossession. The arguments of learned Counsel are therefore misconceived. The reliance upon the judgment of the Hon'ble Apex Court in Ramaiah v. N. Narayana Reddy (supra) is also, therefore, unwarranted. The Hon'ble Apex Court has given the circumstances in which the suit can be treated as suit under Article 64 and the suit can be treated suit under Article 65. In the facts of present case, because the plaintiffs were perhaps not certain of proving their possession and dispossession, they also made a prayer for partition and separate possession and hence for the reasons already disclosed above suit, fell under Article 65 of Limitation Act. The Courts below have considered this issue and found that the suit was not time barred. I do not find any perversity or error in the approach of the Courts below in this respect. The present appellant, if he accepts that suit falls under Article 64, he will also have to accept that the dispossession mentioned therein is of the year 1984 and hence suit is within limitation. The appellant cannot urge that the plaintiffs/respondents were never in possession and he was never dispossessed and still his suit should be treated

as suit falling under Article 64 of the Limitation Act.

8. The contention of appellant is that there was ouster in the year 1971 precisely on 19-3-1971. However, the discussion in this respect reveals that the present appellant had taken loan on suit field from Land Development Bank and he also examined one Bhaiyya Sitaramji Deshmukh to prove this. Shri Deshmukh has proved that appellant obtained loan in 1971 and said loan was of Rs. 8,000/-. However, in cross-examination he stated that on the basis of 7/12 extract, loan was given to the defendant and the clerk of the bank had sent communication to his officer that the defendant obtained the loan by submitting false extract of record of right of the field. The papers of bank also reveal that deceased Chandrabhan has himself produced a document before the said clerk in which 3 Acres 24 gunthas of land from suit field was shown in his name. This, therefore, shows that deceased Chandrabhan had raised a dispute before the bank official. However, by producing a false extract of record of right, it cannot be said that present appellant committed any overt act which amounted to ouster of present respondents. Had the appellant taken any steps to delete the name of present respondents from revenue records, such an inference of ouster could have been drawn. The evidence of Shri Deshmukh shows that even as per revenue records in 1971, 3 Acres and 24 gunthas of land from suit field was in the name of Chandrabhan. The appellant had not taken any steps to remove his name from revenue records. Therefore, merely by raising loan on entire land by deceiving the financial institution, it cannot be said that appellant in any way committed an act of ouster so as to start running the period of 12 years for perfecting his title on the strength of adverse possession. It is to be noted that no such act has been pointed out from 1948 to 1971 by the appellant in any way.

9. The second contention of learned Counsel for the appellant was that on 8-12-1975, Chandrabhan served a legal notice and demanded partition and separate possession. The copy of said notice is produced by present appellant before the trial Court. He has not produced reply, if any, given by him to that notice. The trial Court as also appellate Court have found that the notice is not signed by the deceased Chandrabhan and Shri Naigaonkar, Advocate has not been examined to prove its content. The Courts below have, therefore, refused to accept this notice. If the appellant/defendant wanted to show that any such notice was issued by the deceased Chandrabhan, it was obligatory for him to examine Shri Naigaonkar, Advocate as witness to administer that notice was issued by him as per instructions of deceased Chandrabhan. However, that has not been done. In this view of the matter, it is apparent that the Courts below have rightly refused to accept the evidence of clerk of Shri Naigaonkar, Advocate in this respect and have accepted that the contents of said notice are not proved. In any case it was a notice for partition and separate possession and as per records, it was not replied to by present appellant in any manner. It is, therefore, clear that Chandrabhan in 1975 was aware that he is owner and he is entitled to share in suit land. It does not in any way show that the appellant committed any act of ouster to the prejudice of Chandrabhan in 1975.

10. The ruling in *Chenabasavana v. Mahabaleshwarappa* (supra) shows that the father Shri Nagana of appellant before the Hon''ble Apex Court had entered into a lease deed for a period of 12 years at a rental of Rs. 500/- per year and thereafter in 1934, he instituted a suit as guardian of his minor son to recover sum of Rs. 500/- as rent from lessee. It thereafter appears that said father thereafter obtained loan in 1935 by executing a deed of mortgage by conditional sale in respect of half share of disputed land in favour of defendant No. 2 to secure an advance of Rs. 3,000/-. He thereafter sold his half share to the mortgagee. The purchaser did not get possession and in 1944, he sold the property to plaintiff. The plaintiff thereafter filed a suit against appellant before the Hon''ble Apex Court as defendant No. 1 for recovery of a demarcated half share of disputed property. The defence raised on behalf of defendant No. 1 was that suit of plaintiff was time barred as he was never in possession of property and that defendant No. 1 had acquired good title by adverse possession. The District Judge answered these issues in favour of defendant No. 1 and dismissed the suit. When the matter went to High Court, the High Court reversed the judgment and thereafter the matter came up before the Hon''ble Apex Court the arguments before the Hon''ble Apex Court were that to defeat the claim of plaintiff, it was necessary for the defendant to prove that he held the property adversely to his co-owner for statutory period. The findings in this respect recorded by the Hon''ble Apex Court from paragraph 7 onward are important. The Hon''ble Apex Court found that the acts and conduct of father Nagana in connection with lease deed of 1926 and subsequent granting of receipts in terms thereof pointed out something more than mere non participation in enjoyment or profits of the property or absence of objection to the exclusive enjoyment thereof by Paramma on behalf of infant (defendant No. 1) i.e. appellant before Apex Court. The Hon''ble Apex Court observed that in granting lease on behalf of infant, the father definitely asserted exclusive title of his son to the property and by implication denied his own rights as a co-owner thereto. It further found that once it is held that the possession of a co-sharer has become adverse to the other co-sharer as a result of ouster, the mere assertion of his joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. Such dispossessed co-share must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession. These observations are used by the learned Counsel for the appellant to contend that mere assertion of title by deceased Chandrabhan would be sufficient to justify conclusion that present appellant was not in adverse possession. It is to be noticed that only instance pointed out by present appellant is of 1971 when he obtained loan from Land Development Bank by producing a forged record of right. As already observed above, this does not constitute ouster of deceased Chandrabhan and the appellant has not shown anything else to support his contention that Chandrabhan was ousted at any point of time. On the contrary, perusal of judgments reveal that in his evidence before the Court, for the first time appellant deposed that he had paid the price of share of Chandrabhan and therefore, he is owner of that Vi share also. The trial Court has

considered this evidence and trial Court had found that defendant No. 1 was only relying upon notice at Exh. 55 to contend ouster. The trial Court has further found that Land Development Bank did not disburse complete loan to appellant and only amount of Rs. 4,000/- was paid to him while remaining amount of Rs. 4,000/- was not paid. The Bank had issued notice to appellant and called for his explanation as to why he produced false document. The appellant admittedly did not reply to that notice of Bank and copy of record of rights, on the basis of which he received a loan, did not bear government seal. The trial Court also found that the stand before it was that defendant was exclusive owner while in written statement, he also pleaded perfection of title by adverse possession. It found that a party claiming adverse possession has to first admit the title of other side. The appellate Court has also considered the evidence in this respect and has concurred with the findings reached by the trial Court.

11. The appellant has also contended that trial Court has evolved a new story for original plaintiffs. However, it is to be noticed that the respondents were apprehensive about proving their possession or dispossession and hence they also filed the suit for partition and separate possession on the basis of title. The Courts below have examined the evidence laid by both sides and found that there was no dispossession as contended by present respondents. However, in view of the material on record, the Courts found that plaintiffs are entitled to relief of partition and separate possession. There is nothing wrong with this approach and it cannot be said that by granting such relief, the Courts have evolved any new story in favour of present respondents. The Courts have only granted them relief asked for.

12. I, therefore, find that no substantial question of law arises in this Second Appeal. It is accordingly dismissed. There shall be no order as to costs.