
(1928) 10 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 904 of 1925

Tuljaram Harkisondas

APPELLANT

Vs

Harkisan Jagjivan

RESPONDENT

Date of Decision : 05-10-1928

Acts Referred:

Citation : (1929) 31 BOMLR 448

Hon'ble Judges : Mirza, J;Fawcett, J

Bench : Division Bench

Judgement

Fawcett, J.—In our interlocutory judgment of June 11, 1928, we directed that Narandas and Chunilal, sons of Khushaldas, be joined as respondents to this appeal at the expense of the plaintiff-appellant. It appears, however, that Chunilal has died long ago and that he has now no male issue. Narandas claims to be the sole heir of his deceased brother Chunilal. In the written statement that he has filed, he further claims to be the owner of the house in suit, as well as of all other property left by Nathabhai, the deceased husband of the original plaintiff Ujarn, and he asks that a decree for possession of the house be passed in his favour in this suit, with mesne profits. In the alternative he submits that this Court should, in any case, allow him joint possession with the plaintiff of the suit house. He states—that he is willing to pay any necessary Court-fees with regard to such relief as may be granted to him.

2. The appellant No. 2 has put in a statement in answer to this written statement in which he entirely contests the claim of Narandas, and alleges that Bai Ujatn became the absolute owner after Bai Dhankore's death under Nathabhai's will and that she had also a title by adverse possession. It is further pointed out that, although Narandas attended the Court at the trial and produced the will of Brijbhukandas, he made no application to the Court to be joined as a party to the suit. Mr. Divatia for Narandas has answered that there was no obligation on Narandas to apply to be joined as a party, and that it was the plaintiff's business really to have joined him and not to have concealed the fact that he had rights in

the property. No doubt, it would perhaps end the litigation if we were to direct that the suit should be remanded for deciding this dispute between Narandas and the heirs of Bai Ujam; but, in our opinion, this would be turning the present suit into one of quite a different nature. It is not, in our opinion, necessary to have this dispute decided before we can give the plaintiff any relief in the suit. We think that in the circumstances of present case, where the plaintiff has borne the brunt of the litigation, presumably to the knowledge of Narandas, it would be unfair, after she has succeeded on the main dispute between herself and Bai Bhuri, that she should be exposed to this further contest before she is given any relief in the present suit. The circumstances under which the claim of Narandas is put forward at this late stage are not in our opinion, such as call for any indulgence towards him on our part; and we think the fairest course is to act upon the view taken by this Court in *Maganlal Dulabhdas v. Budhar Purshottam* I.L.R.(1926) . 51 Bom. 149 and the Madras cases which have been already cited in our previous interlocutory judgment, that the plaintiff alone was competent to sue the defendant who was a trespasser kind that her heirs are entitled to a decree for possession against the defendant. But we make it clear that this is on the assumption that she is either the exclusive owner of the house or a Co-Owner of it with Narandas. We leave that question entirely open, so that it cannot be res judicata in any subsequent litigation between Narandas and Bai Ujam, or rather her heirs the present appellants.

3. We accordingly set aside the decree of the lower appellate Court giving Bai Ujam joint possession of the house with the defendant Bai Bhuri, and instead of that pass a decree in favour of the appellants as heirs of Bai Ujam for the ejectment of the respondents, the heirs of Bai Bhuri, from the house in suit. We further allow the appellants a decree for mesne profits of the suit house from the time that the respondents came into possession of the house as heirs of Bai Bhuri up to the date of delivery of possession to the appellants. We direct an inquiry as to the amount of the mesne profits to be held by the Subordinate Judge in whose Court the suit was brought.

4. As regards costs, we think, that the respondents should bear the costs of the appellants of this second appeal, except the costs of the added fifth respondent for appearing in this appeal. We do not disturb the order as to costs given in the lower appellate Court's judgment; but the respondents will of course only be liable in regard to costs of this litigation to the extent of any assets of Bai Bhuri that have come into their hands.

5. The costs of the added fifth respondent to be borne by the appellants.

6. The Court dismisses the cross objections with costs.