

MHNG020064872022



Spl.C.S. No.1347/2022
Abdul Bashir And Others Vs.
Godrej Properties Ltd. And
others.

COMMON ORDER BELOW EXH.51 AND 79

(Passed on 17th August, 2023)

These are the applications filed by defendant nos.1 and 11 under Order VII Rule 11 of the Code of Civil Procedure for rejection of plaint. The application Exh.79 is filed by defendant no.1 whereas the application Exh.51 is filed by defendant no.11. The plaintiffs resisted the application Exh.51 by filing say vide Exh.68 and application Exh.79 by filing say vide Exh.80.

02. Heard both the sides. Apart from oral submissions the learned advocate for the plaintiffs has filed written notes of argument vide Exh.98. Similarly, the learned advocate for the defendant nos.1 and 11 have filed written notes vide Exh.95 and 94 respectively. In support of his submissions, the learned advocate for the plaintiffs has placed reliance on following case laws-

- i) ***Md. Mohammad Ali (Dead) by LRs. Vs. Jagadish Kalita and others, (2004) 1 SCC 271***, wherein it is observed that long and continuous possession itself would not constitute adverse possession. That in a suit for declaration of title to the property, the plaintiff has only to prove his title and not possession. That for ascertaining whether plea of adverse possession was raised, court may construe the entire pleading and cumulative effect of the averments made in written statement.

- ii) *C. Natrajan Vs. Ashim Bai and another, (2007) 14 SCC 183***, wherein it is observed that in terms of articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of article 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession.
- iii) *Saroop Singh Vs. Banto and others, (2005) 8 SCC 330***, wherein it is observed that in terms of article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse.
- iv) *Mohan Lal (Dead) Through LRs. Kachru and others Vs. Mirza Abdul Gaffar and another, (1996) 1 SCC 639***, wherein it is observed that when defendant claims to be in possession of suit property under agreement and continued to be in possession till the date of filing of suit, the plea of adverse possession is not available to defendant.
- v) *Brijesh Kumar and another Vs. Shardabai (Dead) Through LRs. and others, (2019) 9 SCC 369***, wherein it is observed that mere possession does not ripen into possessory title until possessor holds property adverse to true owner. Onus is on claimant to establish when and how he came in possession and what is nature of possession, factum of possession known to and hostile to other parties and continuous undisturbed possession over 12 years. It is further held that plea of adverse possession is not pure question of law but blend of one of fact and law.
- vi) *Yesu Sadhu Nimagre and others Vs. Kundalika Babaji Nimare and another, (1977) Mh.L.J. 130***, wherein it is observed that plea of adverse possession is not always a legal plea. It is based on facts which must be specifically raised.

- vii) K. Gopalan (Dead) Through LRs. And others Vs. Muthulakshmi, 2011 (6) CTC 21*, wherein it is observed that long possession will not become adverse possession and a duty is cast upon the person who claims adverse possession to prove that his possession became adverse to the knowledge of true owner.
- viii) Chootanben and another Vs. Kiritbhai Jalkrushnabhai Thakkar and others, (2018) 6 SCC 422*, wherein it is observed that the date on which plaintiffs gained knowledge of the essential fact, is crucial for deciding the question whether the suit is barred by limitation or not. It becomes a triable issue and thus plaint cannot be rejected in exercise of power under Order 7 Rule 11(d) of CPC.
- ix) Salim D. Agboatwala and others Vs. Shamalji Oddhavji Thakkar and others (2021) SCC OnLine SC 735.*
- x) P.V. Guru Raj Reddy Vs. P. Neeradha Reddy and others, (2015) 8 SCC 331.*

It is observed in above case laws that, rejection of plaint is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court.

- xi) Ibrahim Ashraf Patel and another Vs. Jamrood Bee w/o Nizamoddin Kazi (Dead) Through LRs. And others, (2001) 3 Mh.L.J. 886.* wherein it is observed that the theory of representation is not known to Mahomedan Law. The estate of a deceased person evolves upon his heirs at the moment of his death. The estate vests immediately in each heir in proportion to the share ordained by Mahomedan Law.
- xii) Kewal Krishan Vs. Rajesh Kumar and others, 2021 SCC OnLine SC 1097.*
- xiii) Mohd. Amin and others Vs. Vakil Ahmad and others, AIR 1952 SC 358*, wherein it is observed that under Muhammadan

Law, a person who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a 'de facto guardian' has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant.

- xiv) Bhikaji Ramchandra Shimpi Vs. Ajagarally Sarafally Bohori and others, AIR (33) 1946 Bom57*, wherein it is observed that a Mahomedan mother is entitled to the custody of the person of her minor child but is not the natural guardian and has no powers to deal with her minor child's property than any outsider who happens to have charge of the minor for the time being.
- xv) Meethiyan Sidhiqu Vs. Muhammed Kunju Pareeth Kutty and others, (1996) 7 SCC 436*, wherein it is observed that under Muslim Law father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the court. The mother is not guardian for alienation of the property of the minor.
- xvi) Abdul Majid Khan Salim Ullah Khan and others Vs. Nagorao Parbatrao Umale and others, decided by Hon'ble Bombay High Court in Civil Revision Appln.No.67 of 2018 on 10.10.2018.*

03. On the other hand, in support of his submissions, the learned advocate for the defendant no.1 has placed reliance on following case laws-

- i) Sukhbiri Devi and others Vs. Union of India and others, 2022 SCC OnLine SC 1322.*
- ii) Nusli Neville Wadia Vs. Ivory Properties and others, (2020) 6 SCC 557.*

It is observed in above case laws that if question of limitation can be decided on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b).

iii) *Janardhanam Prasad Vs. Ramdas, (2007) 15 SCC 174.*

iv) *C.S. Ramaswamy Vs. V.K. Senthil and others, 2022 SC OnLine 1330*

In this case, registered sale deed executed prior to 10 years was sought to be cancelled. The application for rejection of plaint came to be filed by defendant on the ground that suit is barred by limitation. The plaintiff resisted the application on contentions that sale deed was executed by fraud, which plaintiff came to know in the year 2015. The application was rejected by the trial court and the order was confirmed by Hon'ble High Court. In appeal, the Hon'ble Apex Court observed that in one of the suits filed in the year 2006, there was reference of the sale deed and after dismissing of said suit present suit was filed. It was held that by clever drafting, plaintiff tried to bring suit within limitation. Thus, the appeal was allowed and plaint was rejected under Order VII Rule 11.

v) *Ravinder Kaur Grewal and others Vs. Manjit Kaur and others, (2019) 8 SCC 729,* wherein it is observed that adverse possession requires all the three classic requirements to co-exist at the same time, namely *nec vi* i.e. adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge. It is further observed that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person or owner against whom he has prescribed.

vi) *Darshan Singh and others Vs. Gurdev Singh, (1994) 6 SCC 585,* wherein it is observed that, though a minor acquiring a cause of action to sue for possession of immovable property within 12 years after attaining majority by virtue of section 6,

but his suit beyond 3 years from the date of his attaining majority would be barred by limitation.

- vii) Maltibai and another Vs. Wamanrao Sheoram and others, AIR 1948 Nag 253*, wherein it is observed that there can be adverse possession against a minor.
- viii) Prem Singh and Others Vs. Birbal and Others, (2006) 5 SCC 353*, wherein it is observed that if a deed was executed by the plaintiff when he was a minor and it was void, he had two options to file a suit to get the property purportedly conveyed thereunder. He could either file the suit within 12 years of the deed or within 3 years of attaining majority. The suit was not filed within 12 years or 3 years, thus it was held to be barred by limitation.
- ix) Ramisetty Venkatanna and Another Vs. Nasyam Jamal Sahab and Others, 2023 SCC OnLine SC 521.*

In this case, the suit was filed for declaration of title, permanent injunction and cancellation of sale deeds and partition deed. The case was based on partition deed dt.11.03.1953 and it was contentions of plaintiff that there was error in said partition deed. But relief in respect of said partition deed dated 11.03.1953 was not sought. It was observed that the partition deed was acted upon and one of the heir executed gift deed in favour of mother of vendors on 24.01.1968. It was held that without challenging the partition deed dated 11.03.1953 and gift deed dated 24.01.1968, the suit was instituted, which is nothing but a clever drafting to get out of the limitation. Thus the plaint was rejected being barred by the limitation.

04. Whereas, the learned advocate for defendant no.11 has filed following case laws in support of his submissions-

- i) Sabir Ali Khan Vs. Syed Mohd. Ahmad Ali Khan and others, 2023 (5) SCALE 643*, wherein it is observed that article 96 of

Limitation Act cannot be invoked in case of an void transaction. It is further observed that adverse possession will apply from the date of transfer.

- ii) ***Anajanabai Vivekanand Kothare and others Vs. Jaswantibai Anantram Parekh and others, 1993 Mh.L.J. 523***, wherein it is observed that the plaintiff deliberately mentioned wrong date of sale deed in order to bring suit within limitation. It was held that the suit was barred by limitation and the purchasers who were put in possession of suit property on date of sale deed perfected their title by prescription.
- iii) ***Thakurjee Deosthan Vs. Viran wd/o Babu Dahat and others, 2015 (2) Mh.L.J. 728***. In this case sale deeds in favour of respondent were executed in the year 1953 and 1956. The suit challenging the sale deeds came to be filed on 08.02.1971 after the minor attained majority on 10.02.1968 on the ground that suit property was land of deosthan. There was no evidence to show that land belonged to deosthan. It was held that period of limitation to file suit for possession starts when possession of respondent became adverse to the appellant when the sale deeds are executed and defendants are put in possession.
- iv) ***Umed Realtors and others Vs. Shobha Mahadeo Deshpande and others, 2017 (3) Mh.L.J. 308***, wherein it is observed that period of limitation for filing suit for possession based on title is 12 years from the date of the possession of defendant becomes adverse to the plaintiff.
- v) ***Utha Moidu Haji Vs. Kuningarath Kunhabdulla and others, (2007) 14 SCC 792***. In this case, sale deed was executed in favour of minor plaintiff's maternal grandfather. The suit came to be filed more than 17 years after execution of sale deed and 6 years after plaintiff attained majority. There was no finding that plaintiff came to know about execution of sale deed at the time of filing of suit. It was held that plaintiff was deemed to have knowledge of execution of sale deed on his attaining majority. Thus the suit was held to be barred by limitation.

- vi) ***Canara Bank Vs. P. Selathal and others, (2020) 13 SCC 143***, wherein it is observed that vague pleadings were made in the plaint in order to get out of the law of limitation. It was held that there must be specific pleadings and averments in th plaint on limitation.
- vii) ***T.P.R. Palania Pillai and six others Vs. Amjath Ibrahim Rowther and another, 1943 Madras Series 1***, wherein it is observed that adverse possession in cases of usufructuary mortgage starts from the date of possession by the mortgagee and not from the date of ouster to the knowledge of the other members.
- viii) ***Mool Chand and another Vs. Sri Gopal, 1999 SCC OnLine All 364***, wherein it is observed that in case of adverse possession against stranger it is sufficient that the adverse possession is overt and without any attempt of concealment. When the adverse possession is open, visible and notorious, if the owner remain ignorant and in different he cannot complain regarding the nature of possession by the person claiming adverse possession.
- ix) ***Nagabhushanammal (Dead) By Legal Representatives. Vs. C. Chandikeswaralingam, (2016) 4 SCC 434***.
- x) ***Rajaram Bhau Kadam and others Vs. Babu Shankar Kadam and another, (1976) Mh.L.J. 425***, wherein it is observed that a litigant cannot assume a position inconsistent to the one which he has taken in the previous proceedings.
- xi) ***Suzuki Parasrampurua Suitings Private Limited Vs. Official Liquidator of Mahendra Petrochemicals Ltd. (In Liquidation) and others, (2018) 10 SCC 707***, wherein it is observed that litigant can take different stand at different times but cannot take contradictory stands in the same case and a party cannot be permitted to approbate and reprobate on the same case take inconsistent shifting stands.

05. I have gone through all the above case laws. The defendant nos.1 and 11 have contended that, the suit is barred by law of limitation. As per defendants, the sale deed dated 29.12.1988 is challenged by the plaintiffs after more than 33 years. That the suit property is in possession of defendants, particularly in possession of defendant no.12 since the execution of sale deed dated 29.12.1988. The limitation for challenging the alienation by guardian is three years after minor attains majority. Thus, as per article 60 and 65 of the Limitation Act, the suit is barred by limitation.

06. On the other hand, the plaintiffs have contended that, the sale deed dated 29.12.1988 was executed by playing fraud. That Abdul Kadir and Rashida Begum were not minor on the date of execution of sale deed. But they were shown as minor and thus the sale deed is not binding on plaintiffs. As per plaintiffs, the main relief sought by them is relief of partition and separate possession and the relief regarding cancellation of sale deeds is ancillary reliefs. Hence, the suit is well within limitation.

07. It is settled principle of law that while adjudicating the application for rejection of plaint, only averments made in the plaint are required to be considered. The defence taken by defendants and documents relied upon by defendants cannot be considered. If the plaint is perused, it can be seen that, the plaintiffs have filed suit for declaration, partition and separate possession and permanent injunction. It is not disputed that sale deed dated 29.12.1988 was executed in favour of defendant no.12, who later on executed

conveyance deed in favour of defendant nos.8 to 11, who later on sold it to defendant no.1. It is also not disputed that on 29.12.1988 itself possession of suit property was handed over to defendant no.12 and at present defendant no.1 is in possession of the suit property.

08. If the copy of sale deed dated 29.12.1988 is perused it can be seen that, it is allegedly executed by Khairunisa i.e. mother of plaintiff no.1 and her eight children. Out of eight children, Abdul Jalil, Fatimabi and Najma Begum are shown as major whereas Abdul Kadir, Rashida, Bismillah Begum, Abdul Bashir and Abdul Jabbar are shown as minor. But if the documents filed by plaintiffs are perused, it can be seen that, Abdul Kadir and Rashida Begum were major on 29.12.1988. Thus though they were major, they were shown as minor in the sale deed. Further, if the last page of sale deed is perused, it appears that, one Madhukar Baburao Purohit has signed the sale deed on behalf of minors. It is a settled principle of Mohammedan Law that only father is a legal guardian and after him a person appointed by the court can act as legal guardian. The mother or any other relative is not legal or lawful guardian. Here though the sale deed appears to have been signed by Madhukar Purohit as legal guardian, but there is no document to show that he was appointed by competent court to be legal guardian of minor plaintiffs. Thus this creates a doubt in execution of the sale deed on the basis of which defendant no.12 and thereafter other defendants are claiming their ownership over suit property.

09. Further, no reason is assigned by defendant no.12 as to why Abdul Kadir and Rashida Begum were shown as minor when they were major on the date of execution of sale deed. It is significant to note here that the defendant no.11 has filed on record one consent deed alleged to be executed between defendant no.12 and predecessor of defendant nos.3 to 7 and 8 to 11. It can be seen that, mother of plaintiff no.1, plaintiff no.1 and his three brothers namely Abdul Jalil, Abdul Kadir and Abdul Jabbar are shown as consenting party thereby giving consent to the sale deed executed in favour of subsequent owners. This consent deed appears to have been executed on 01.07.2003. Now the question arises if the defendant no.12 had become owner and possessor of suit property by virtue of sale deed dated 29.12.1988, then what was the necessity to execute above consent deed in the year 2003. Also, the sale deeds in favour of ancestors of defendant nos.3 to 7 and 8 to 11 was executed prior to execution of this consent deed. This also creates doubt in the sale deed dated 29.12.1988. Thus, the validity of sale deed dated 29.12.1988 can only be decided after parties led evidence to that effect.

10. The law of limitation is very much clear that a minor on attaining majority can challenge the alienation by his guardian within the period of three years from the date of attaining majority. In this case, as mentioned above, Abdul Kadir and Rashida Begum were already major on 29.12.1988 but no suit is filed within a period of limitation to challenge the said sale deed. On perusal of plaint one

can prima facie conclude that the suit filed in the year 2022 challenging the sale deed executed in the year 1988, is barred by limitation. However, before jumping to any conclusion, it is necessary to minutely go through the pleadings made by plaintiffs.

11. The plaintiffs have pleaded that in the year 2022 when defendant no.1 started advertisement of their proposed project and when the other relatives of plaintiffs sold their land to defendant no.1, the plaintiffs came to know that the suit property was originally owned by their family. Thus it can be seen that the plaintiffs have specifically pleaded that they were not having knowledge that suit property belonged to their predecessor and it was sold to defendant no.12. As the plaintiffs were shown as minor on the date of execution of sale deed dated 29.12.1988, it prima facie appears that the execution of sale deed was not within the knowledge of plaintiffs. Also, it is not the case that part of property that came to the share of father of plaintiffs was sold and remaining was/is in possession of plaintiffs. Thus, this also shows that plaintiffs were not aware that suit property belonged to their father. It is pleaded that in partition dated 26.12.1988 descendants of Abdul Wahab received share admeasuring 5.93HR, which was sold to defendant no.12 immediately on 29.12.1988. This execution of sale deed made in hurriedly also creates doubt and goes to show that none of the plaintiffs were aware that property belonged to their ancestor and it was sold to the defendant no.12.

12. Though it is argued on behalf of defendants that some plaintiffs were major, but the pleadings in this aspect made by the plaintiffs cannot be ignored. As property came to be sold immediately after partition by showing major children as minor, how one can presume that some plaintiffs, who were major were aware of the execution of sale deed. Now, whether the limitation starts from the date when minor plaintiffs attained majority, or it starts from the date of knowledge about execution of sale deed or from the date of execution of sale deed in favour of defendant no.12, is the matter of fact which can only be adjudicated after evidence to that effect is adduced by the parties. Thus, here, in my view, the issue of limitation is mixed question of law and fact.

13. So far as issue of adverse possession is concerned, that also cannot be decided at this stage and no conclusion can be drawn that by adverse possession defendant no.12 and later on other defendants become owner of the suit property. Thus, considering above observations, I am of the view that the case laws relied upon by the defendant nos.1 to 11 will not be helpful to them at this stage. Moreover, as stated earlier, the plaintiffs are seeking partition and separate possession of suit property, which means indirectly plaintiffs are claiming title over suit property. Thus in view of observations of the Hon'ble Apex Court in *C. Natrajan's* case (supra) if the plaintiff has filed suit claiming title over suit property, burden will be on defendant to prove that he has acquired title by adverse possession. Thus, this can be decided only on evidence. Also, in the case in hand,

though the plaintiffs have pleaded about partition deed dated 26.12.1988, but said partition is not challenged or disputed. The only dispute raised by the plaintiffs is that sale deed executed by mother after partition of property is void. Thus the observations in *Ramisetty's* case will not be helpful to the defendant no.1.

14. Further the relief regarding sale deeds is an ancillary relief and the main relief of the plaintiffs is of partition and separate possession. Under Muslim Law, the estate of deceased Muslim devolves on his heirs at the moment of his death. The heirs continued to hold the estate as tenants in common without dividing it and one of them can file suit for recovery of his share, the period of limitation thus does not run from the death of deceased but from date of express ouster or denial of title. Thus it cannot be said at this stage that suit is barred by limitation. As two children, who were major are shown as minor and without any reference or document, one Madhukar Purohit is shown as legal guardian, this itself raises triable issue. Further the execution of consent deed in the year 2003 even after execution of sale deed dated 29.12.1988, also raises a triable issue.

15. Thus considering these factors, in my view, the suit cannot be thrown away at threshold. It requires adjudication to decide right of the parties. So far as issue of adverse possession is concerned, that also cannot be decided at this stage and no conclusion can be drawn that by adverse possession defendant no.12 and later on other defendants become owner of the suit property.

Thus in view of above observations, I am of the view that, no case is made out by the defendants for rejection of plaint. The plaint nowhere shows that suit is barred by law of limitation. The applications therefore, are liable to be rejected. Hence, the following order -

ORDER

1. The applications Exh.51 and Exh.79 are rejected.
2. Costs in cause.

Nagpur
Date : 17.08.2023.

(S.M. Padolikar)
12th Jt. Civil Judge (Sr. Dn),
Nagpur.