IN HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CSA No. 7/2006

Reserved on : 12.12.2023
Pronounced on: 30.01.2024

1 Bashir Ahmed Sheikh
2. Mohd Amin Sheikh
3.Gulshan Akhkter
4. Naseema Akhter, sons and daughters of
Gh. Qadir Sheikh, all residents of
Pallapora Tehsil and District Anantnag

.....appellants(s)

Through :- Mr. S.M.Ayoub Advocate

V/s

1 Mohd Yousuf Mir s/o Naba Mir .....Respondent(s)
2. Mst Raja 3. Mst. Jana 4. Mst Atiqa ,
daughters of Maqbool Mir all residents of
Pallapora Tehsil and District Anantnag

Through :- Mr. Mohammad Amin Parray
Advocate with
Mr. P.S.Ahmad Advocate

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1 This Civil Second Appeal by the appellants ['the plaintiffs in the suit before the trial Court'] is directed against a judgment and decree dated 25.05.2006 passed by the Court of learned District Judge, Anantnag ['the 1st Appellate Court'] in File No. 12 (Appeal) titled 'Bashir Ahmad Sheikh and others vs Mohd Yousuf Mir and others, whereby the 1st Appellate Court has upheld the judgment and decree dated 21.08.2002 passed by the Court of learned Munsiff, Anantnag ['the trial Court'] in a

Civil Suit (File No.2009) titled 'Bashir Ahmad Sheikh and others vs. Mohd Yousuf Mir and others'.

2 Instant Civil Second Appeal was admitted on the following questions of law framed by this Court vide order dated 21.02.2008:

1. Whether failure of trial Court to return an issue wise finding in the matter vitiates the judgment in any manner ?

2. Whether finding of first Appellate Court that the prayer sought by the plaintiff in the suit is hit by limitation was proper even while the trial Court had neither heard, nor discussed the question of limitation ?

3 The aforesaid questions have arisen in the backdrop of following factual matrix:

One Naba Mir was owner of land measuring 07 kanals and 1 marla situate at village Palllapora, Anantnag ['the suit property']. He used to visit neighbouring country Pakistan off and on. Naba Mir had a son from his first wife, namely Mohd Yousaf Mir who was residing in another village named Vessu. As is pleaded by the plaintiffs, during one of his visits to village Pallapora, Anantnag, back from Pakistan, Naba Mir married widowed mother of Maqbool Mir who was original defendant No.2 in the suit. Maqbool Mir who was apparently a stepson of Nabir Mir, the estate holder, had been in possession of the suit property. Naba Mir stated to have died somewhere in 1979. His estate including the suit property devolved upon Mohd Yousuf Mir, the real son of late Naba, i.e defendant No.1 in the suit. On the basis of title which defendant No.1 acquired by succession, he sold the suit land to the original plaintiff late Ghulam Qadir Sheikh and his son plaintiff Bashir Ahmad Sheikh by executing a Sale Deed and an Agreement to Sell. Asserting that the plaintiffs were put in possession of the suit property immediately after purchase of the said land and were later on dispossessed by the defendants, a suit for possession came to be instituted by the plaintiffs before the trial Court on 18.01.1982 against the defendants. In the plaint, it was pleaded that plaintiff No.1 and his late father had purchased land measuring 3 kanals and 16 marlas out of the suit land from defendant No.1 through the medium of a sale deed registered on 07.09.1981

against a sale consideration of Rs.15000. It was further claimed that rest of the suit property i.e land measuring 3 kanals and 3 marlas was separately purchased by plaintiff No.1 by virtue of an agreement to sell for a sale consideration of Rs.15000. As is claimed, the plaintiffs were immediately put in possession of the land, but were later on ousted from possession by the defendants and, therefore, a suit for possession and injunction.

4 On being served with the summons of the suit, the defendants filed their written statement. The suit was contested by the defendants on the ground that they had become owner of the suit property by way of adverse possession. It was alleged that the sale deed and the agreement to sell relied upon by the plaintiffs were manipulated and forged and were otherwise not permissible in law, for, the vendor was neither in possession of the suit property, nor were the vendees ever put in such possession. On the basis of pleadings of the parties, the trial Court framed the following issues:

1. Whether plaintiffs have purchased the suit land by way of valid sale deed and also took the possession of the suit land ?OPP
2. In case issue No.1 is proved in affirmative whether after the execution of the sale deed possession was handed over by the vendor to plaintiffs and they are sowing paddy on the disputed land ? OPP
3.Whether the agreement to sell confers any right on the plaintiffs and on this count whether suit is maintainable ?OPP
4.Whether the registered sale deed has been executed by fraud ?OPD
5.Whether defendant No.2 was in adverse possession of the suit land w.e.f 1948 if so what is the effect on the suit property ? OPD
6.Whether this Court has jurisdiction to try this suit?OPD
7.Whether the suit is time barred ? OPD
8.Relief

5 The plaintiffs examined Ghulam Hassan Bhat and defendant Mohd Yousuf Mir as witnesses in support of their case, besides one of the plaintiffs namely Gulshan Akhter also appearing as a witness of the

plaintiffs. On the other hand, the defendants adduced evidence in rebuttal and examined Maqbool Mir father of defendants No. 2 to 4, Ghulam Hassan Bhat, Mohd Yasin Malik, Saif-ud-din Malik and Bashir Ahmed Mir as their witness. The trial Court having heard learned counsel appearing for the parties and considered the evidence on record, decided issues in the following manner:

Issue No.1 was held not proved by the plaintiffs. The trial Court concluded that no valid sale deed could have been executed in favour of the plaintiffs without delivery of possession of the suit property. On the basis of same reasoning, issue No.2 was held not proved by the plaintiffs and was, accordingly, decided against them. With regard to issue No.3, the trial Court concluded that since Mohd Yousaf Mir was never in possession of the suit property and, therefore, there was no question of executing an agreement to sell by him in favour of the plaintiffs. The issue was, thus, decided against the plaintiffs. The trial Court thereafter took up issue No.5 for consideration and came to the conclusion that the plaintiffs had lost title to the property in favour of defendant Maqbool Mir on the ground that the possession of Maqbool Mir was adverse possession. Issues No. 6 and 7 were, however, decided in favour of the plaintiffs and against the defendants. Issue No.4 was not specifically taken up for consideration by the trial Court separately, but appears to have been considered along with issue No.3.

6 Be that as it may, the trial Court finally dismissed the suit of the plaintiffs vide its judgment and decree dated 21.02.2002.

7 Aggrieved, the plaintiffs filed an appeal before the 1st Appellate Court. The matter was considered by the 1st Appellate Court and vide judgment and decree impugned in this appeal, the appeal preferred by the plaintiffs was dismissed and a judgment and decree of dismissal of the suit passed by the trial Court was upheld. The 1st Appellate Court held issue No.1 partially proved to the extent that a part of the suit property was purchased by the plaintiffs through a valid sale deed, but concurred with

the trial Court that the plaintiffs never took over the possession of the purchased property. Issue No.2 was also decided against the plaintiffs. The 1st Appellate Court did not agree with the trial Court that the agreement to sell executed by defendant No.1 in favour of the plaintiffs was as a result of any fraud. The 1st appellate Court, however, held that the agreement to sell was only with respect to a portion of the suit property and, therefore, whether or not such agreement confers any right is not a relevant consideration. Similarly, issue No.4 was held not proved by the plaintiffs. The 1st Appellate Court came to the conclusion that there was a valid sale deeds executed and, therefore, in the absence of any contrary proof on record, the presumption was that the same had been correctly and validly executed. In short, the Court did not find any evidence led by the defendants to prove that the sale deeds were actuated by any fraud played by the plaintiffs. Insofar as issue No.5 is concerned, the 1st Appellate Court, on evaluation of evidence on record, came to the conclusion that defendant No.2 had failed to prove that he was in adverse possession of the suit property and, thus, held issue No.4 decided against the defendants. Similarly, issues No.7 and 8 were also held decided by the 1st Appellate Court against the defendants. The trial Court, after having found that most of the issues deserved to be decided in favour of the plaintiffs, declined to decree the suit of the plaintiffs had failed to prove that they were in possession of the suit property within 12 years next prior to the institution of the suit. The 1st appellate Court, therefore, dismissed the appeal and upheld the judgment and decree passed by the trial Court though on different ground.

8 Interestingly, the 1st appellate Court decided issue No.7 against the defendants. Issue No.7, it may be noted, was an issue;

'whether the suit was time barred ?' OPD. Be that as it may, the 1st Appellate Court, after having held the suit not barred by limitation, still declined to decree the suit on the ground that the plaintiffs had failed to prove that they were in possession of the suit property within 12 years next prior to institution of the suit and, therefore, the provisions of Article 142 of the Limitation Act were attracted. It is this judgment of the 1st Appellate Court which is called in question before this Court in this Civil Second Appeal admitted on the questions of law set out above.

Question No.1:

9 So far as 1st question of law is concerned, suffice it to say that both the trial Court as well as the 1st Appellate Court have dealt with each issue framed in the suit one by one and have returned their findings. It is not understandable as to on what basis the 1st question of law was framed. I have discussed the judgment of the trial Court in detail and from the discussion made, it is abundantly clear that the trial Court has touched each issue in light of the evidence on record and the rival contentions raised on behalf of the parties. The trial Court may not have highlighted the issues framed in the suit by giving separate headings and dedicating separate paras to each issue, but the fact remains that the trial Court has considered and taken up for discussion each one of the issues and decided the same in light of the evidence on record. The first Appellate Court is more specific and has taken up all the issues one by one and has returned its specific findings. As a matter of fact, the 1st appellate Court has reversed the findings returned by the trial Court on almost every issue, but has concluded that the plaintiffs, who were supposed to prove that they were in possession of the suit property within 12 years next prior to institution of the suit, had failed to do so and, therefore, their suit was hit by the

provisions of Article 142 of the Limitation Act. In these circumstances, it cannot be said that the trial Court or for that matter, the first Appellate Court failed to discuss and decide all the issues framed in the suit. The 1st question of law framed, therefore, does not arise out of the pleadings of the parties and material on record, particularly from the judgments of the trial Court and the 1st Appellate Court.

Question No.2:

10 So far as question No.2 is concerned, in my humble opinion, the same too has not been framed correctly. Indisputably, issue No.7 in the suit was an issue dealing with limitation and the same reads thus:

"**7. whether the suit is time barred ?OPD"**.

11 So far as the trial Court is concerned, the issue has been decided in favour of the plaintiffs and against the defendants. The 1st Appellate Court too has decided issue No.7 in favour of the plaintiffs and against the defendants. Having decided all the issues including issue No.7 in favour of plaintiffs, it was not open for the 1st Appellate Court to dismiss the suit on the ground that the plaintiffs were not in possession of the suit property within 12 years next prior to institution of the suit and, therefore, the suit was hit by Article 142 of the Limitation Act. Such findings could not have been returned by the 1st Appellate Court for the simple reason that there were no such pleadings before the trial Court, nor was any issue struck in this regard by the trial Court ordinarily. This would have called for remand of the case to the 1st Appellate Court, but, as is rightly observed by this Court in its order dated 21.02.2008 that remand of the matter would not be practicable as the litigation is very old having been initiated in the year 1982. For the said reason, I am also not inclined to remand the matter. The appeal on this aspect too was, thus, heard on merits, notwithstanding

that such issue was not framed by the trial Court, nor were any pleadings to that extent available before the trial Court. The suit has been held by the first Appellate Court to be hit by Article 142 of the Limitation Act which, for better understanding, is reproduced hereunder:

142.

Description of suit	Period of limitation	Time from which period begins to run
142. For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession	Twelve years	The date of the dispossession or discontinuance

12 From a careful reading of Article 142 reproduced above, it clearly transpires that Article 142 is applicable to a case where the plaintiff while in possession of the property on the basis of title or otherwise has been dispossessed or has discontinued the possession. In the instant case, as is held proved by the 1st appellate Court, the suit property belonged to one Naba Mir and was on his death inherited by defendant No.1, being his son, by way of succession. Prior to death of Naba Mir, the suit property, as is held by the 1st appellate Court, was in permissive possession of his stepson, the defendant No.2 and his father. The plaintiffs purchased the suit property by way of a sale deed and agreement to sell in the year 1981 and filed suit in the year 1982. The suit property was, thus, all along in constructive possession of Naba Mir, the predecessor-in-interest of defendant No.1, Mohd Yousaf Mir, till he died and the same thereafter devolved upon defendant No.1 . It has also come on record that the suit

property belonging to Naba Mir used to be cultivated by defendant No.2 and his father during his absence from Kashmir valley. As is rightly held by the 1st appellate Court, the possession of defendant No.2 and his father during the absence of Naba Mir was permissive. In these circumstances, Naba Mir shall be deemed to be in possession of the suit property till his death. True it is, that after his death, though the suit property devolved upon defendant No.1 Mohd Yousaf Mir, yet defendant No.2 did not allow him to enter into possession. It is, thus, from the date of death of Naba Mir, Mohd Yousuf Mir shall be deemed to have discontinued or his possession could be said to have become adverse.

13 By virtue of sale deed executed by Mohd Yousuf Mir, defendant No.1, in favour of the plaintiffs, the plaintiffs stepped into the shoes of defendant No.1, Mohd Yousuf Mir. Since the predecessor-in-interest of Mohd Yousaf Mir i.e late Naba Mir was in constructive possession of the suit property till his death, as such, defendant No.1 and thereafter by virtue of a sale deed, the plaintiffs shall be deemed to be in possession of the suit property till 1979.

14 The word "plaintiff" used in Article 142 would obviously include his predecessor-in-title as well. It is equally incorrect to say that Article 142 would be attracted only when suit for possession is edificed on possessory title. Plain language of Article does not support such argument. I am, therefore, of the considered opinion that Article 142 would be applicable where plaintiff (which includes his predecessor-in-title) while in possession on the basis of title or possessory rights is dispossessed or discontinued in possession. To bring its suit within limitation, plaintiff is required to show that he was in possession of suit property within twelve years next prior to institution of the suit. It is, therefore, wrong on the part

of the 1st Appellate Court to assume that the plaintiffs were not in possession of the suit property twelve years next prior to institution of the suit. Otherwise also, the plaintiffs became owner of part of the suit property through sale deed only in the year 1981 and, therefore, could not, by any stretch of imagination, be expected to be in possession of the suit property twelve years next prior to institution of the suit. The possession of his predecessor-in-interest in the suit property has to be taken as possession of the plaintiffs for the purpose of Article 142 of Limitation Act. The dispossession/discontinuance of possession in the instant case took place in the year 1979 when after the death of Naba Mir, the original defendant No. 2 denied possession of land to the defendant No.1 which possession the defendant No.2 had till 1979 held for and on behalf of late Naba Mir.

15 Viewed from any angle, the limitation provided under Article 142 of the Limitation Act was not attracted. Otherwise also, since there were no pleadings of the parties, nor was any issue struck in this regard, as such, there was no occasion for the parties to prove or disprove the facts relating to the issue considered for the first time by the 1st appellate Court without notice to the parties. They had, thus, no occasion to argue on this aspect of the matter.

16 For the discussion made above, question No.2 is decided in the following manner:

The 1st Appellate Court having decided issue No.7 i.e issue which pertained to limitation in favour of the appellants, could not have dismissed the suit being barred by limitation, that too, by having resort to Article 142 of the Limitation Act.

17 As discussed above, Article 142 of the Limitation Act was not attracted in the facts and circumstances of the case, nor was there any material to demonstrate that the plaintiffs or his predecessors-in-interest

were not in physical possession of the suit property twelve years next prior to institution of the suit.

18 Much was debated before me that a sale deed in respect of immovable property without actual delivery of possession of property is no sale in the eye of law. Before adverting to the arguments raised by learned counsel for both the sides, I deem it appropriate to refer to and reproduce the definition of 'Sale' given in Section 54 of J&K Transfer of Property Act.

> *"54. '**Sale**' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such transfer, in the case of tangible immovable property or in sale how made the case of a reversion or other intangible thing, can be made only by a registered instrument. A contract for the sale of immovable property is contract that a contract for sale. Sale of such property shall take place on terms settled between the parties, but no such contract shall be valid, unless it is in writing, and signed by the parties. It does not, of itself, create any interest in or charge on such property".*

19 From a bare reading of the aforesaid definition, it becomes abundantly clear and is beyond any pale of doubt that ownership of immovable property can be transferred by way of 'sale' by the vendor in favour of vendee without actual delivery of possession of the property sold. The requirement for conducting a sale of immovable property is that if it pertains to tangible immovable property, it can be made only by a registered instrument and in exchange for a price paid or promised or part-paid and part- promised. There is absolutely no requirement of law that the possession of immovable property, the subject matter of sale, must be transferred simultaneously. The sale is complete and the vendee takes the title the moment it is executed in accordance with provisions of Section 54 of Transfer of Property Act. It is though provided in Section 55 that in the absence of contract to the contrary, the seller is bound to give, on being so

required, the buyer, or such person as he directs, such possession of the property as its nature admits, but simply because the possession of immovable property is not delivered simultaneously with the execution of the sale deed will not render the sale deed *void* or invalid in law. The vendee, who gets title to the property by way of a sale deed, steps into the shoes of the vendor and would be well within its right to sue for possession of the immovable property if it is found to be in possession of a person other than the vendor.

20 Both the sides have relied on case law in support of their arguments. Learned counsel appearing for the appellants relies upon judgments of the Hon'ble Supreme Court in the cases of **Md. Mohammad Ali (dead) by LRs v. Jagadish Kalita & others, (2004) 1 SCC 271,** and **M. Durai v. Muthu & ors., (2007) 3 SCC 114** to lend support to his argument that mere possession, howsoever long, does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner.

21 There is no dispute with regard to the proposition of law put forth by learned counsel for the appellants supported by the judgments (supra). Learned counsel for the appellants next placed reliance on two judgments, one rendered by the Chhattisgarh High Court in the case of **Ram Avatar Kori vs. Mohan Lal Bhardwaj and others, 2020 Legal Eagle (CHH) 441** and another by the Kerala High Court in the case of **G. Hampamma vs Kartigi Sajjivalda Kalingappa and another, 1990 AIR (Kar) 128,** to bring home his argument that the ownership of immovable property is transferred the moment the requirements of Section 54 of Transfer of Property Act are complied with and whether possession is

delivered or not is immaterial. I have already discussed the issue in detail hereinabove and, therefore, do not think it relevant to advert to the judgments aforesaid relied upon by the appellants.

22 *Per contra*, learned counsel for the respondents placed reliance on a judgment of the Supreme Court rendered in the case of **Dr. Luis Proto Barbosa vs Union Of India and others, AIR 1992 SCC 1812** to lend support to his argument that the limitation only bars the remedy, but does not destroy the right. This proposition is, however, subject to an exception that in terms of Section 27 of the Limitation Act where a suit for possession of any property becomes barred by limitation, the right to property itself is destroyed. To the similar extent, the judgment of this Court reported as **AIR 1982 JK 141** lays downs that if the plaintiff fails to file a suit for recovery of possession within a period of twelve years, the possession of the defendant becomes adverse to the owner and cannot be recovered. There is no dispute with regard to this proposition of law as well. However, the case on hand is predicated on different set of facts and circumstances.

23 I have endeavored to discuss the entire matter in the light of specific provisions of Transfer of Property Act and the Limitation Act as applicable to the case on hand and arrived at a conclusion that the judgment of the 1st Appellate Court holding the suit barred by limitation was not correct in law. Most of the other judgments which were cited by learned counsel appearing for the parties at bar were not relevant to the issues on hand and were otherwise clearly distinguishable on facts.

24 Viewed from any angle, I find the judgment of the 1st appellate Court flawed to the extent that it has found the suit of the plaintiffs not maintainable on the ground that the plaintiffs could not prove that they

were in possession of the suit property within twelve years next prior to institution of the suit. This appeal is, accordingly, allowed. The judgment and decree of the 1st Appellate Court to the extent aforesaid is held bad in law and, therefore, set aside. The suit of the plaintiffs is decreed in their favour and against the defendants. The plaintiffs are held entitled to possession of the suit property and, accordingly, the defendants 2 to 4 are directed to deliver the possession thereof to the plaintiffs.

(SANJEEV KUMAR)
JUDGE

Srinagar
30 .01.2024
Sanjeev

Whether the order is speaking : Yes
Whether the order is reportable :Yes