

A PATEL NARANBHAI MARGHABHAI AND ORS

v-

DECEASED DHULABHAI GALBABHAI AND ORS.

MAY 15, 1992

B [N.M. KASLIWAL AND K. RAMASWAMY, JJ.]

Bombay Agricultural Debtors Relief Act, 1947—Sections 32(2)(v), 38(3), 51-A read with sections 27, 3, Schedule Limitation Act—Suit for recovery of possession of property—Limitation—Determination—Non-prescription of period of limitation—Legislative intention of—Whether Section 27 applicable.

Constitution of India 1950—Article 136—Appeal under—Appreciation of evidence—Plea of auction—Purchase of hypotheca, adverse possession—Proof of—Award of mesne profit by executing Court—Legality of.

D The predecessor of the respondents mortgaged the suit-lands to the predecessor of the appellants, under the provisions of the Bombay Agricultural Debtors Relief Act, 1947.

E The mortgagor/debtor committed default in the payment. The mortgagee initiated an execution to realise the debt due amount of Rs. 3000/-, whereunder a compromise was effected. Pursuant to compromise, though the debt was discharged, the mortgagee continued in possession.

The respondents, the legal representatives of the mortgagor laid execution for recovery of the possession of the hypotheca.

The appellants, the legal representatives of the mortgagee raised objections that the award was barred by limitation; that the mortgagee perfected title by adverse possession; that the lands were sold by the Collector for the recovery of octroi duty in which the mortgagee purchased the property; and that the character of the mortgagee stood transferred into an ownership and thereby the appellants were not liable to surrender possessions.

H The Civil Court allowing the application of the respondents, directed the appellants to deliver the possession and to pay mesne profit at the rate of Rs. 5000 per year from three years preceding the date of application till

the date of delivery of possession.

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When the appellants moved the High Court against the order of the lower Court, the High Court declined to interfere with the finding of the Civil Court.

The appellants challenged the High Court's judgment in the present appeal by special leave, contending that the evidence disclosed that the mortgagee purchased the hypotheca at an auction conducted by the Collector and thereby he became the owner and the appellants were not liable to deliver possession of the lands to the respondents; that the appellants perfected their title by adverse possession; that for possession, the execution should be laid within 12 years and as the respondents laid execution after 22 years, the execution was barred by limitation; and that the executing court had no power to award mesne profits.

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Dismissing the appeal, this Court,

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HELD: 1.01. When a person is obliged to institute a suit for possession of any property then by operation of section 27 of the Limitation Act at the determination of the period thereby limited his right to such property shall be extinguished. Section 3 of the Limitation Act bars institution of his suit after the prescribed period and the suit shall be dismissed though limitation has not been set up as a defence. [390H]

E

1.02. The right to any property would be extinguished only when limitation in that behalf has been prescribed and the owner or person entitled to possession failed to lay the suit by presentation of a plaint to the proper officer within the prescribed period by the schedule to the Limitation Act. [391C]

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1.03. The suit for possession under section 27 of the Limitation Act is a suit in respect of which the period of limitation has been prescribed i.e. computed as per the provisions of the Limitation Act. It is clear from the words 'period hereby limited' in section 27 that it would be applicable to a suit and that the limitation prescribed is the one in the schedule to the Limitation Act. Section 27, therefore, does apply to the suit for possession laid in the specified Civil Court under the Act. [391D]

G

1.04. The words in section 27 that at the determination of the 'period hereby limited' to any person for instituting a suit for possession would

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A imply that the limitation has begun to run against a person for instituting a suit under s.9 of C.P.C. and had expired. The Legislature advisedly did not prescribe any period of limitation for recovery of the possession under the Act which is a beneficial legislation. Section 51A expressly bars the jurisdiction of the Civil Court. It would follow that where a person could not or need not have suit for possession, there is no question of any determination of the period of limitation to his instituting a preceding or a suit for possession. Consequently, no question of the applicability of section 27 would arise. Thereby the legislature manifested, by necessary implication, that the period of limitation is not applicable to an application for recovery of possession under the Act. The application for possession is not barred by limitation. [392B-D]

2.01. The best evidence, namely the notification to conduct sale for arrears; the sale proceedings and the certificate of sale have not been placed on record. When the sale alleged to have been made for recovery of the dues, it would be governed by the Revenue Recovery Act and the procedure prescribed therein should be followed and the sale certificate would have been issued. This material evidence which clearly establishes that the said sale was withheld by the appellants and an adverse inference should be drawn against the appellants. The resultant position would be that the appellants remained in possession as the mortgagees. Once a mortgagee always a mortgagee. Admittedly there is a charge on the property created in the award. Therefore, till the debt is discharged the property remains to be subject to the charge and the mortgagee is entitled to retain possession. [389F-390A]

F 2.02. There is no evidence as to when the appellants asserted adverse title to the property to the knowledge of the respondents and that they acquiesced to it. There is no period of limitation prescribed under the Act for execution. [390B]

G 2.03. A suit for possession by the owner of any property will not be barred if the possession of the defendant is not adverse to him. So hostile title to the knowledge of the plaintiff must be asserted and proved. [392D]

H 2.04. The appellants as successors in interest of the mortgagee continued in possession after the discharge of the debt by the mortgagor, They enjoyed the property and the Civil Court found as a fact that the income derived would be Rs. 5,000 per year. There is no material contra

placed on record. The charge created by the award stands terminated from the date of payment of the award amount. Thereafter the respondents became entitled to claim mesne profits from the appellants from the next day of the discharge of the debt. [393B] A

2.05. The Civil Court awarded from a period of three years preceding the date of the application till date of possession. No appeal or proceedings under Art. 226 or 227 was taken by the respondent. Payment of mesne profit is consequential to the execution of the award for unlawful retention of the possession. Thus the court has power and jurisdiction to award mesne profits as a concomitant of order for delivery of the possession. B

[393C] C

Ramanbhai Trikamlal v. Vaghri Vaghabhai Oghabhai & Anr., (1979) 20 GLR 268, overruled. D

Madhav Laxman Vaikunthe v. State of Mysore, [1962] 1 SCR 886, referred to. D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2413 of 1992. E

From the Judgment and Order dated 20.11.1990 of the Gujarat High Court in Special Civil Application No. 6852 of 1990. E

R.P. Bhatt and H.J. Jhaveri for the Appellants.

B. Dutta (NP), P.H. Parekh and B.N. Agarwal for the Respondents.

The Judgment of the Court was delivered by F

K. RAMASWAMY, J. Special leave granted.

This appeal by special leave arises against the order of the Gujarat High Court dated November 20, 1990 made in Special Civil Application No. 6852 of 1990. The appellants are the legal representatives of Naranbhai Marghabhai — the mortgagee. The respondents are the legal representatives of Dhulabhai Galbabhai — the mortgagor, agriculturist. The lands bearing survey No. 572/2 admeasuring IA.31 Gs. and survey No. 354 admeasuring IA.23 Gs. situated in Bhadra village in Kheda district were hypothecated by the mortgagor to the mortgagee. The mortgage is governed by the Bombay Agricultural Debtors Relief Act 1947 for short H

- A "the Act". Under Section 31 of the Act the debt payable by an agriculturist shall be scaled down in the manner laid in the Act. The debt in excess thereof stands extinguished under section 34. The amount of debt determined after scaling down is an award under section 34 and shall be registered as prescribed under section 38 if a charge of the debt has been created on the properties of the debtors. Under clause (iii) of sub-section (3) of section 38 the award shall be executed as if the court passed an order. Under section 32(2)(v) the court may "pass an order for the delivery of possession of any property, notwithstanding any law or contract to the contrary". "Award" has been defined under section 2(1) to mean an Award made under sub-section (4) of Section 8 or sections 9, 32 or 33 or as confirmed or modified by the court in appeal. "Court" has been defined to mean the Court of the Civil Judge (Sr. Division) having ordinary jurisdiction in the area where the debtor ordinarily resides and if there is no such Civil Judge the Court of the Civil Judge (Jr. Division) having such jurisdiction and includes any Court to which an application may be referred for disposal under section 13 A. Thus it is clear that notwithstanding any law or contract to the contrary the award for delivery of the possession of any property charged or hypothecated shall be executed as if it is the order of the Civil Court.

- E Section 46 provides "save as otherwise expressly provided in this Act, the provisions of the Code of Civil Procedure, 1908 (V of 1908) shall apply to all proceedings under this Chapter." Sections 32 and 38 are part of this chapter of the Act. Section 51A envisages that except as otherwise provided by the Act, and notwithstanding anything contained in any other law, no Civil Court shall entertain or proceed with any suit or proceeding in respect of (i) any matter pending before the Court under the Act, or (ii) the validity of any procedure or the legality of any award, order or decision of the Board established under section 4 of the repealed Act or of the court, or (iii) the recovery of any debt made payable under such award. The Act, therefore, is a complete Code in itself as regards the determination of the debt; the liability fastened thereunder and the recovery of the debt due or the possession of the agricultural lands pursuant to the award. Only the mode of execution has been relegated to the procedure provided in the Civil Procedure Code. The Civil Court found that the award was registered at the behest of the mortgagee and the debt was payable in six annual instalments carrying interest at 6%. The debt due was Rs. 3,000 when the mortgagor/debtor committed default in the payment and execu-

tion was laid whereunder a compromise was effected pursuant to which the debt was completely discharged. Yet the mortgagee continued in possession till date. The respondents laid execution for recovery of the possession of the hypotheca. Several objections were raised but we are concerned in respect of three, namely that the award is barred by limitation, (ii) the mortgagee perfected title by adverse possession, and (iii) the lands were sold by the Collector for the recovery of octroi duty in which the mortgagee purchased the property. The character of the mortgagee stands transferred into an ownership and thereby they are not liable to surrender possession. These contentions were negatived by the Civil Court. The Civil Court while directing delivery of the possession, ordered to pay mesne profit at the rate of Rs. 5,000 per year from three years preceding the date of application till date of delivery of possession. The High Court declined to interfere on the finding that "it is eminently just and proper order".

Shri Bhatt, the learned senior counsel for the appellant raised three contentions before us. It is firstly contended that the evidence do disclose that the mortgagee purchased the hypotheca at an auction conducted by the Collector and thereby he became the owner and the appellants are not liable to deliver possession of the lands to the respondents. We find no force in the contention. It is to note that from Exh. 40 and 41 challans, it would appear that a sum of Rs. 1,968 and Rs. 657 respectively was deposited. But as pointed out by the Civil Court it is not clear that the said payments were made towards the sale price or pursuant to the alleged auction of suit property. The best evidence namely the notification to conduct sale for arrears; the sale proceedings and the certificate of sale have not been placed on record. A letter of 1964 purported to have been written long after the alleged sale made in 1955 that there was no need for issue of sale certificate as the appellants remained in possession. It is difficult to accept this letter. When the sale alleged to have been made for recovery of the dues, it would be governed by the Revenue Recovery Act and the procedure prescribed therein should be followed and the sale certificate would have been issued. As stated earlier this material evidence which clearly establishes that the said sale was withheld by the appellants and an adverse inference should be drawn against the appellants. The Civil Court, therefore, was justified in rejecting the contentions of the appellants. The resultant position would be that the appellants remained in possession as the mortgagees. Once a mortgagee always a mortgagee. Admittedly

A there is a charge on the property created in the award. Therefore, till the debt is discharged the property remains to be subject to the charge and the mortgagee is entitled to retain possession. The contention that the appellants are owners is not tenable and rightly was rejected by the Civil Court.

B The further contention that the appellants perfected their title by adverse possession lacks force. There is no evidence as to when the appellants asserted adverse title to the property to the knowledge of the respondents and that they acquiesced to it. There is no period of limitation prescribed under the Act for execution. The contention placing reliance on a full bench judgment of Gujarat High Court in *Ramanbhai Trikamal v. Vaghri Vaghbhai Oghabhai & Anr.*, (1979) 20 GLR 268 that for possession, the execution shall be laid within 12 years and the respondents laid their applications after 22 years; no relief for possession was asked and that the execution after 22 years is barred by limitation. We find no force in the contention.

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Section 29(2) of the Limitation Act 1963 provides thus:

E "Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law".

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G Therefore, the special or local law should prescribe its own period of limitation different from the one prescribed by the schedule of the Limitation Act. To a prescription of such limitation, section 3 would apply by fiction as if it was prescribed in the schedule. In that event period of limitation prescribed in the local or special law to the suit, appeal or application, sections 4 to 24 inclusive would apply. When a person is obliged to institute a suit for possession of any property then by operation of section 27 at the determination of the period thereby limited his right H to such property shall be extinguished. Section 3 of the Limitation Act bars

institution of his suit after the prescribed period and the suit shall be dismissed though limitation has not been set up as a defence. The word 'suit for possession' referred to in section 27 is a suit in respect of which the period of limitation is prescribed by the schedule to the Limitation Act.

Under Section 2(1) of the Limitation Act suit does not include application. Section 3(2)(i) amplifies that for the purpose of Limitation Act a suit is instituted in an ordinary course when the plaint is presented to proper officer. Section 27 extinguishes the right to property at the determination of the period 'hereby limited' for instituting a suit for possession of any property. Under section 2(j) period of limitation means the period of limitation prescribed for any suit by this schedule. In other words the right to any property would be extinguished only when limitation in that behalf has been prescribed and the owner or person entitled to possession failed to lay the suit by presentation of a plaint to the proper officer within the prescribed period by the schedule to the Limitation Act. The suit for possession under section 27 of the Limitation Act is a suit in respect of which the period of limitation has been prescribed i.e. computed as per the provisions of the Limitation Act. It is clear from the words 'period hereby limited' in section 27 that it would be applicable to a suit and that the limitation prescribed is one in the schedule to the Limitation Act. Section 27, therefore, does apply to the suit for possession laid in the specified Civil Court.

Section 43 of the Act provides a right to appeal against specified orders notwithstanding anything contained in any other law. No appeal from an award under section 32 or 38 was provided for. Sub-section (2) of section 43 prescribes limitation for filing the appeal which reads thus :

"The appeal from the court shall lie to the District Court and the appeal shall be made within 60 days from the date of coming into force of the Bombay Agricultural Debtors Relief (Amendment) Act, 1948, or from the date of order or award, as the case may be, whichever is latter. In computing the period of 60 days the provisions contained in Ss. 4, 5 and 12 of the Indian Limitation Act 1908, shall, so far as may be, applied. Thus, the legislature prescribe a special limitation for the purpose of the appeal and the period of limitation of 60 days was to be computed after taking the aid of Ss. 4, 5 and 12 of the Limita-

A tion Act. To that extent only the provision of the Limitation Act stands extended. The applicability of the other provisions, by necessary implication stands excluded....

B Moreover, the words in section 27 that at the determination of the 'period hereby limited' to any person for instituting a suit for possession would imply that the limitation has begun to run against a person for instituting a suit under s.9 of C.P.C. and had expired. The Legislature advisedly did not prescribe any period of limitation for recovery of the possession under the Act which is a beneficial legislation. Section 51A expressly bars the jurisdiction of the Civil Court. It would follow that where

C a person could not or need not have suit for possession, there is no question of any determination of the period of limitation to his instituting a proceeding or a suit for possession. Consequently, no question of the applicability of section 27 would arise. Thereby the legislature manifested, by necessary implication, that the period of limitation is not applicable to

D an application for recovery of possession under the Act. The application for possession is not barred by limitation. Moreover, a suit for possession by the owner of any property will not be barred if the possession of the defendant is not adverse to him. So hostile title to the knowledge of the plaintiff must be asserted and proved. The contention, therefore, that the appellants perfected title by adverse possession is devoid of substance.

E *Remanbhai Trikamlal's* case concerns limitation to recover the debt crystallised in the award. The Full Bench held that the limitation prescribed under Art. 136 of the Limitation Act, 1963 applies to all awards under the Act whether it relates to an award to recover the money or possession. In *Madhav Laxman Vaikunthe v. State of Mysore*, [1962] 1 SCR 886 this Court held that to recover arrears of salary the period of limitation of three years would be applicable. In a suit, to recover a sum due whether based on contract or tort or under Art. 226 in a master and servant relationship, in the absence of special rule of limitation, this court applied three years' limitation. That may *proprio vigor* would be applicable to recover the debt under the Act. The Full Bench ratio would, therefore, apply to recover money due under the Award. But it would not lead to the conclusion that the doctrine of adverse possession and the period of 12 years prescribed in the Limitation Act to recover possession need be extended to the proceedings to recover possession under the Act when the legislature advisedly omitted to prescribe any such limitations to recover possession

F of the hypotheca or the lands charged in the award. The view of the Full

A Bench in the second part that Art.136 of the limitation Act, 1963 would apply to all awards including "a possession award" is not correct law.

B It is next contended that the executing court has no power to award mesne profits. Admittedly, the appellants as successors in interest of the mortgagee continued in possession after the discharge of the debt by the mortgagor. They enjoyed the property and the Civil Court found as a fact that the income derived would be Rs. 5000 per year. There is no material contra placed on record. The charge created by the award stands terminated from the date of payment of the award amount. Thereafter the respondents became entitled to claim mesne profits from the appellants from the next day of the discharge of the debt. The Civil Court awarded from a period of three years preceding the date of the application till date of possession. No appeal or proceedings under Art. 226 or 227 was taken by the respondent. Payment of mesne profit is consequential to the execution of the award for unlawful retention of the possession. Thus the court has power and jurisdiction to award mesne profits as a concomitant of order for delivery of the possession. Viewed from this perspective we hold that the civil court is right to award mesne profits as integral power to order delivery of possession as this would arise only due to non-delivery of possession. Accordingly the appellants are liable to pay mesne profits.

C D E The appeal is accordingly dismissed with costs quantified at Rs. 3,000. The appellants are directed to pay the said cost to the Supreme Court Legal Aid Committee within a period of three months from today. In default the civil court *suo motu* should execute the decree for cost and make over the amount to the credit of the Supreme Court Legal Aid Committee.

V.P.R.

Appeal dismissed.