

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

8. SA/157/2015
With
CA/4315/2015 In SA/157/2015

NIMBAJI NATHU KOLI LRS GITABAI AND OTHERS
V/S
RAMDAS NATHU KOLI LRS NABABAI AND OTHERS

Mr. A.G. Talhar, Advocate for appellants.

CORAM : T.V. NALAWADE, J.
DATED : 26th October, 2015.

ORDER :

1. The appeal is filed by original defendants of Regular Civil Suit No. 72/2001, which was pending in the Court of Civil Judge, Senior Division, Jalgaon. The suit filed by respondent - Ramdas for the relief of partition and separate possession of his share is decided in his favour. Heard the learned counsel for the appellants for admission purpose.

2. Plaintiff, defendant Nos. 1 and 2 are real brothers *inter-se*. Defendant No. 3 is son of defendant No. 1. Defendant No. 4 is sister of plaintiff and defendant Nos. 1 and 2. It is the case of plaintiff that Nathu, father of plaintiff, was the owner of suit properties like Block No. 282, Gat Nos. 328, 319 and house properties bearing Nos. 3/1 and 3/2 situated at village

KekatNimbhora. It is contended that Nathu died on 2.11.1957, leaving behind his widow and four issues, who are parties to the suit. It is contended that as the property bearing Gat No. 319 was in possession of father of plaintiff as protected tenant, this property is also Joint Hindu Family Property of plaintiff and defendants.

3. It is the case of plaintiff that defendant No. 1 took undue advantage of the fact that he became manager of the Hindu Joint Family and created some revenue record for grabbing the property. It is contended that behind his back, defendant No. 1 got entered the name of defendant No. 3 in the record of land Gat No. 319. It is contended that no title passed to defendant No. 3 as it is Joint Hindu Family Property and plaintiff has equal share.

4. It is the case of plaintiff that in the year 1968, he was living with the defendants and after that he started living separate, but no partition took place. It is contended that the defendants are now refusing to give the share to plaintiff by separating it, so he is required to file the suit.

5. Defendant No. 2 filed written statement and

admitted that the properties are ancestral properties and defendant No. 1 became *Karta* after the death of Nathu. He contended that Block No. 282 was with him as the family arrangement and no partition has taken place. He admitted that even property bearing Gat No. 319 is Joint Hindu Family Property and defendant No. 1 has illegally transferred the property to defendant No. 3. It is contended that property bearing Gat No. 319 is now acquired and there is possibility that defendant Nos. 1 and 3 will illegally take the entire compensation. Defendant No. 4 also admitted the suit claim and she contended that she is entitled to have equal share in the suit properties.

6. Defendant Nos. 1 and 3 contested the matter. They contended that during the lifetime, Nathu had partitioned the Joint Hindu Family Properties. It is contended that one grocery shop of village Palaskhede was allotted to the share of plaintiff. It is contended that land Gat No. 328 was allotted to the share of defendant No. 1 and land Gat No. 282 was allotted to the share of defendant No. 2. It is contended that house property No. 7/2 of Kekat was allotted to the share plaintiff and house property Nos. 3/2 and 3/1 were allotted to the share of defendant Nos. 1 and 2 equally. They contended that property Gat No. 319 is self-acquired property of defendant No. 1.

7. Issues were framed on the basis of aforesaid pleadings. Both the Courts below held that defendant Nos. 1 and 3 failed to prove that partition had taken place during the lifetime of Nathu. Both the Courts below have held that property Gat No. 319 was with Nathu as he was protected tenant and so, after Nathu, all his successors have equal share, though the certificate under Tenancy Act was given in the name of defendant No. 1. The learned counsel for appellant submitted that the point of limitation can be considered and substantial question of law needs to be formulated on the point of limitation. He submitted that when in the plaint itself, plaintiff has contended that since the year 1968 he started living separate from defendant No. 1 and when defendant No. 2 is admitting that he is in separate possession of land Gat No.282, the Courts below ought to have held that there was partition and the suit is not within limitation.

8. The Courts below have considered the revenue record which include mutation No. 1465 (Exh. 68). The record shows that after the death of Nathu, the names of all the heirs of Nathu, who includes sons and daughters, were entered in the revenue record. Thus, if the partition had taken place and one

shop was allotted to the share of plaintiff, the name of plaintiff could not have been entered in revenue record. This did not happen. Further, there is virtually no record with defendant Nos. 1 and 3 to show that one shop was owned by Nathu and this shop was allotted to the share of plaintiff.

9. The case of the plaintiff that he started living separate from defendant No. 1 in the year 1968 shows that he only started living separate, but inference cannot be drawn that partition had taken place. When there is the record like aforesaid mutation and one more mutation in respect of Gat No. 319 showing that the property came to the family under Tenancy Act, the Court is expected to go with the presumption that all the properties were Joint Hindu Family Properties. Thus, the burden was heavy on defendant Nos. 1 and 3 to prove that partition had taken place. There is virtually no evidence with the defendant Nos. 1 and 3 to show that the partition did take place and accordingly, the names were entered in the revenue record.

10. Only because defendant No. 1 managed to transfer one property in the name of his son, defendant No. 3, inference is not possible that the property was lost to the Joint Hindu Family. Defendant No. 3 was also member of Joint Hindu Family

and also *co-parcener*. Thus, the possession of defendants was not adverse to the plaintiff and there was no question of deciding the point of limitation.

11. As the properties were owned by Nathu and he is succeeded by his four issues, both the Courts below have given equal share to these four issues of Nathu. Thus, there is no mistake in declaring the extent of share also. There is nothing on the record on the basis of which substantial question of law can be formulated. The things will be only protracted if the notice is given to other side and if the appeal is admitted.

12. In the result, the appeal stands dismissed. Civil Application stands disposed of.

[T.V. NALAWADE, J.]

ssc/