

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 421 OF 2014
WITH
CIVIL APPLICATION NO. 6949 OF 2014**

- 1) Jagannath S/o Bapurao Malwade,
Age: 82 years, Occu: Agril.,
R/o. Yeshwandi, Tq. Washi,
Dist. Osmanabad.
 - 2) Vikas S/o Jagannath Malwade,
Age: 41 years, Occu: Service,
R/o. Doodhsangha Bhoom,
Tq. Bhoom, Dist. Osmanabad.
 - 3) Vithal S/o Jagannath Malwade,
Age: 45 years, Occu: Agril.,
R/o. Yeshwandi, Tq. Washi,
Dist. Osmanabad.
- ...Appellants

versus

- 1) Shivaji S/o Bapurao Malwade,
Age: 71 years, Occu: Nil,
R/o. Match Factory, Lane Kanji,
Chal No. 134, Room No. 12,
Kurla, Mumbai-70 West.
 - 2) Dattatraya S/o Bapurao Malwade,
Age: 74 years, Occu: Nil,
R/o. As above.
- ...Respondents

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Mr. K. R. Doke, Advocate for appellants.

Mr. A. N. Nagargoje, Advocate for respondent No. 1.

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CORAM : N.W. SAMBRE, J.

DATE : 14th JULY, 2015

ORAL ORDER :

Present appeal is by defendant Nos. 1 to 3 to Regular

Civil Suit No.414 of 2001 preferred by respondents herein for partition and separate possession which came to be decreed by learned Civil Judge, Junior Division, Bhoom on 24/01/2008. The respondents feeling aggrieved thereby preferred Regular Civil Appeal No. 48 of 2008 in the Court of Adhoc District Judge-1, Osmanabad, who has dismissed the same on 24/01/2014. As such, present second appeal.

2. Facts, as are necessary for deciding the present appeal, are as under :

The suit property consists of land Survey No. 35/D area 0H.56 R, situated at village Yeshwandi, land Survey No. 78/H area 0H.37R, situated at village Vizora, Tq. Bhoom and house property bearing Grampanchayat House No. 93 admeasuring east west 56 feet and south north 30 feet.

3. The parties to the present proceedings are real brothers. Defendant Nos. 2 and 3 are sons of defendant No.1 and defendant No. 1 and plaintiffs are real brothers.

4. Bapu Malqwade-father of plaintiff and defendant No.1, who was Karta of family died in 1952 before Hindu Succession Act

came into force. It is claimed that the suit property is the joint family property and as such, sought partition of the same to the extent of 1/3rd share.

5. It is further claimed that they are also entitled for mesne profits.

6. In response to the claim put forth, the defendants filed written statement at Exhibit-18 and admitted the relationship. They denied that the suit land is joint family property and defendant No.1 is Karta of the joint family property.

7. It is further claimed that both the plaintiffs have sold their respective share to defendant No.1 for a consideration of Rs.4000/- i.e. Rs.2000/- each and as such, defendants are enjoying the property in question. It is further claimed by the defendants that the defendants purchased one open plot in the name of defendant No. 2 having Grampanchayat House No. 93 and as such, the said property is self acquired property.

8. It is further claimed that in case partition is effected, same shall infringe the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act.

9. Learned trial Court framed issues at Exhibit-25 and cast burden upon the defendants to prove that whether defendant No.1 purchased suit property from the plaintiffs and answered the same in negative. The trial Court proceeded to observe that the house property was self acquired property of defendant No. 2 and plea of adverse possession of defendant No. 1 was negated. While doing so, learned trial Court noticed that in view of presumption in favour of jointness, the presumption is required to be rebutted by the defendants and upon analyzing the evidence of respective parties i.e. PW-1, DW-1, has noted that the said burden was not rebutted. Learned trial Court then noted that the defendants have not examined witness in support of the contentions as regards sale transaction between the defendants and plaintiff.

10. The defendants also claimed that the plaintiffs purchased the suit property at Mumbai was not formed to be part and parcel of common *hotch potch* and sought dismissal of the suit.

11. Learned trial Court framed the issues at Exhibit-25. Amongst others the issue as regards whether defendant No.1 purchased the share of the plaintiffs was answered as against the defendants, however the property House No. 93 was answered to be

the property purchased by defendant No. 2 and is self acquired property.

12. Plaintiffs in support of their claim examined PW-1 Shivaji at Exhibit-27 and produced 7/12 extracts at Exhibits-5, 6, Gav Namuna No. 8 at Exhibit-7. The defendants examined DW-1 Vikas at Exhibit-32 and relied upon 7/12 extracts of the suit land at Exhibits-40, 41 and Gav Namuna No. 8 at Exhibit-36.

13. Learned trial Court noted that there is presumption as regards Hindu joint family but there cannot be presumption about joint family possession of the joint family properties and proceeded to cast burden on the present appellants to prove that they have purchased shares of the plaintiffs. It is noted that from the evidence of plaintiffs' witness and defendants' witness that the claim for purchase was made 40 years back from the date of written statement, which is of 2002. As such, the trial Court noticed that alleged transaction must have been taken place some time in 1972, however further observed that DW-1 Vikas was not born on the date of alleged sale deed. As such, proceeded to record the finding that the defendants-appellants have not proved the purchase of the share of the plaintiffs. The issue as regards adverse possession was also answered as against defendant No.1.

14. So far as issue as regards House No. 93 self acquired property of defendant No. 2 is concerned, based on the evidence of plaintiffs' witness and the fact that there is no bar to acquire property independently by member of joint family, the trial Court gave finding as regards the said property as that of defendant No. 2's self acquired property.

15. The trial Court also dealt with aspect as regards non joinder of necessary parties i.e. real sisters Ambubai and Kamalbai of the plaintiffs and defendants and observed that Bapurao Malwade, the common ancestor of the parties died in 1952 before Hindu Succession Act came into force and has answered the said issue in the negative.

16. An appeal before Adhoc District Judge-1, Osmanabad at the behest of the present appellants came to be dismissed. Learned lower appellate Court rightly framed the issue as regards nature of the property to be joint Hindu family properties, so also as regards House No. 93 as self acquired property of defendant No. 2 and upon reappraisal of evidence dismissed the appeal.

17. Learned Counsel for the appellants in the above back

ground has tried to raise two grounds in the form of questions of law; (a) that the suit in question was barred by limitation as same should have been filed within period of 12 years as provided under Article 110 of the Limitation Act and (b) incorrect appreciation of evidence, particularly by casting burden on the defendants to prove the fact as regards purchase of the suit property.

18. So far as aspect as regards limitation is concerned, the suit in question was filed by the plaintiffs on 21/12/2001 claiming to be having common ancestor Bapurao through whom the partition and separate possession of the suit property was claimed. It is required to be noted here that Article 110 of the Limitation Act is applicable to the cases where the claimants/parties claimed that they are excluded from the partition and in such cases they will be entitled for initiation of the suit for partition and separate possession.

19. The said Article presupposes existence of partition which case is conspicuously absent in the defence of present appellants. Once it is noted that the case of present appellants was not that of exclusion from partition, the said Article will not be attracted in the present case, particularly when the plaintiffs have neither come out with such case of exclusion from joint family properties. The suit in question was with an intention to enforce right to share in the joint

family properties of the plaintiffs.

20. In view of the fact that the suit in question is amongst real brothers having common ancestor in partition, the issue of limitation as is sought to be raised, in my opinion, will be of hardly any consequences.

21. So far as the aspect as regards shifting of burden on the present appellants as regards purchase of the share of the plaintiffs' property is concerned, it is required to be noted that the said defence of purchase was set up by the appellants-defendants in the suit. If such case is so pleaded by the defendants, in view of Section 101 of the Indian Evidence Act, it was the appellants-defendants who have asserted about existence of the fact as regards sale deed in their favour and has sought judgment from the Court as regards their legal right. As it was the case set up by the defendants, in my opinion, the said claim would have failed if the evidence at all were not given by the appellants-defendants.

22. Admittedly, both the Courts below have gone into details of the said contentions and have appreciated the case of the defendants as regards alleged sale deed, particularly in absence of express title deed to that effect.

23. As both the Courts below have concurrently held against the present appellants on the said aspect of the matter, in my opinion, no case for interference is made out. The appeal fails, same stands dismissed. Consequently, civil application stands disposed of.

[N.W. SAMBRE, J.]