

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, directions and orders.	Notes, of Court's orders and Registrar's	Office Coram, Court's or Judge's orders.
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SECOND APPEAL NO. 144 OF 2015
WITH CA/4043/2015 IN SA/144/2015 WITH CA/4044/2015
IN SA/144/2015

VISHWASRAO SANDU PATIL LRS HANSAWATI AND
OTHERS
VERSUS
SHAKUNTALA TRIMBAKRAO DESHMUKH AND OTHERS

...
Advocate for Appellants : Mr. Rane Girish S.
Advocate for Respondent No.1: Mr. S. P. Brahme.

CORAM: T. V. NALAWADE, J.
DATED: 7th SEPTEMBER, 2015.

ORDER:

1. The appeal is filed against the judgment and decree of Civil Appeal No.98 of 2009 which was pending in the Court of Principal District Judge, Jalgaon. The appeal was filed by present Respondent, plaintiff Smt. Shakuntalabai to challenge the judgment and decree of Special Civil Suit No.95 of 2007. The suit was filed by her for relief of partition and separate possession against her brothers and sisters and it was dismissed by the trial Court. The first Appellate Court has set aside the

decision of the trial Court and has held that the plaintiff is entitled to 1/8th share in the suit property. Both the sides are heard.

2. The learned counsel for the Appellant submitted that on the basis of the grounds mentioned in the Appeal Memo substantial questions of law can be formulated and he submitted that the grounds which are mentioned at A to H in Para No.2 of Appeal Memo need to be considered for formulation of substantial questions of law. They are as under:

(A) When the evidence of one of the sister namely Pushpa and Talathi show that notice under Section 150 (2) of MLR Code were issued to the all concerned including the plaintiff before effecting mutation entry No.3694 and copy of such notice so received by the other sister namely Sushilabai is placed on record, then it was duty of plaintiff to displace the presumption of receipt of notice and prove that such notice did not receive by her by producing cogent documentary evidence and/or examining the proper person to show non-receipt of notice? In the absence of any material evidence in rebuttal, whether the learned First Appellate Court was justified to

hold that the notice was not served upon the plaintiff?

(B) Whether the learned First Appellate Court is justified in ignoring the presumption that the acts which was supposed to be performed by the Government official in discharge of official duty are performed in ordinary course of business more particularly when no material evidence is produced on record to displace such presumption?

(C) The specific pleadings and evidence of plaintiff is that through time to time she demanded partition, however, defendant Nos.1 to 3 avoided it on one reason or the other along with the specific admission of the plaintiff that she demanded partition to her mother in the year 1978 itself show that exclusion of the plaintiff from joint family property was known to plaintiff. No evidence is produced on record to show that the suit is filed within 12 years from such avoidance to effect partition by Defendant Nos. 1 to 3 from time to time. Under such set of facts, whether on the basis of artificial cause of action purported to be accrued in 2006, suit for partition can be held in limitation?

(D) The sisters have relinquished their rights in the suit properties on stamp paper of Rs.5/-. They themselves moved an application to the Talathi based upon the said written

relinquishment Deed on Stamp paper and based thereon, the mutation entry No.3694 is effected in the year 1978. One of the sisters admits such relinquishment and recording of mutation entry after following due procedure and issuing notice to all concerned. Under such circumstances, whether the plaintiff has any surviving interest in suit properties and further suit for partition is maintainable?

(E) Whether the partition effected inter-se brothers in the year 2003 by the order of Tahsildar discharging the statutory duty and exercising the power and competence under the MLRC would be affected in view of provisions of Section 6 of Hindu Succession Act?

(F) When the findings are recorded that the plaintiff failed to prove that defendants got deleted the names of sisters illegally, then can it be held that sisters have not relinquished their rights in favour of brothers?

(G) Whether the suit for partition instituted in the year 2007 is in limitation more particularly when on the basis of written relinquishment deed duly signed by all the sisters including plaintiff and making of application for effecting appropriate mutation and this gives clear-cut knowledge to the plaintiff of exclusion of her from the joint family property in the year 1978?

(H) Whether the learned First Appellate Court

has discharged its duties legally and properly while reversing the judgment of the learned Trial Court without going to the close quarters of the reasoning of the Trial Court as contemplated by the Hon'ble Apex Court in the case of Santosh Hajari?"

3. Smt. Shakuntalabai is a daughter of one Shri Sandu. Sandu died on 22nd May, 1972 leaving behind 3 sons and 5 daughters and also his widow. He left behind 2 agricultural lands like land Gat No.354 admeasuring 13 Hectares 89 Ares and land Gat No.371 admeasuring 5 Hectares 28 Ares. Both the lands are situated in Kandari Shivar, Tahsil Jalgaon. According to plaintiff, he had also left behind other landed property and house property. When the suit was filed the mother of plaintiff was also dead.

4. It is the case of plaintiff Smt. Shakuntalabai that the suit property was the ancestral property of Sandu and after his death the property come to his heirs and it is joint family property of plaintiff and defendants. It is her case that behind her back some mutation entries were made in the revenue record and she learnt about

these activities of the brothers first time in October, 2006. It is her case that she contacted Defendant No.3, brother and she asked to partition the property but he refused to do so. It is her case that she then challenged the revenue entries which were against her and she also filed the suit. It is her case that she has equal share in the property.

5. Two brothers like Defendant Nos.2 and 3 filed separate written statement to contest the matter. They denied everything. They contended that all the sisters had relinquished their right in that property by executing a relinquishment deed dated 23rd September, 1978. It is their case that on the basis of relinquishment deed, application was moved to revenue authority and the names of the sisters were deleted from the revenue record. It is contended that in view of this circumstance, plaintiff has no right to claim the partition. They also contended that the suit is not within limitation.

6. One sister also filed written statement to support the defendant Nos.2 and 3 and then two more sisters filed their written statements to adopt the written statement of other defendants.

7. In the trial Court, issues were framed. The trial Court held that the defendants, brothers failed to prove that plaintiff had relinquished her right on 23rd September, 1978. The trial Court also held that the suit was not barred by time due to the entry of mutation made on the basis of the document of relinquishment, but the trial Court held that the suit was barred by law of limitation.

8. The first Appellate Court held that the suit was not barred by law of limitation and there was nothing on record to prove the ouster as mentioned in Article 110 of Limitation Act.

9. In the present proceeding one civil application is moved by original defendants, appellants for permission to produce the so called document of relinquishment. This application is also considered by this Court. The submissions made show that on general stamp of Rs.3.50 some document was written. The date of execution is not mentioned, though there are some endorsements of revenue authority. Even the date of purchase of the stamp is not clear. There is some overwriting over the date of death of Sandu. The

properties are not mentioned specifically and the value of the property is not mentioned. The learned counsel for the Appellants, defendants submitted that when on the basis of such document, mutation was effected by revenue authority and it was shown that all the 5 sisters had relinquished their rights in favour of defendant Nos.1 to 3, it needs to be presumed that after following the due procedure such mutation was effected. It is submitted that it needs to be presumed that the plaintiff and her sisters had relinquished their rights in the suit property. It is submitted that it also needs to be presumed that the cause of action arose for the suit when the mutation was sanctioned, in the year 1978.

10. The learned counsel for the Respondent, plaintiff took this Court through the provisions of Indian Registration Act and he pointed out that the relinquishment document was not registered. He also submitted that proper stamp duty ought to have been paid on the basis of value but nothing of that sort was done and so nothing can be achieved even if the document of relinquishment is considered. There is force in the submission made by learned counsel for original

plaintiff as the document falls under provisions of Section 17 (1) of Indian Registration Act. In any case, the trial Court has held that defendants have failed to prove that there was a relinquishment made by the plaintiff and this finding was not challenged by original defendants by filing appeal or filing cross objection. This point was not agitated in any way in first appeal.

11. The first Appellate Court has considered Article 110 of Limitation Act. While considering the provisions of Limitation Act and the period prescribed, the Courts are expected to keep in mind the substantive law to which the Limitation Act needs to apply. In the present matter the parties are governed by the provisions of Hindu Law. It is not disputed that the property was the ancestral property of Sandu. After the death of Sandu, the property was mutated in the names of all his heirs like widow, 3 sons and 5 daughters and this mutation was effected after 1972. There is no dispute about the extent of share. As the property was ancestral and joint family property, even if the plaintiff was a married sister of defendant Nos.1 to 3, the Court is required to start with the presumption that her possession was joint with

the brothers. Thus, it was necessary for the brothers to prove that there was ouster of co-sharer. For proving such case, it was necessary for defendants to give specific pleading in that regard. It can be said that by contending that there was relinquishment deed, the defendants wanted to show that there was bar of estoppel against plaintiff. When they failed to prove that there was relinquishment, it was necessary for them to show that there was a case of ouster also. The plaintiff has come with specific case that she came to know about the disputed mutation in the year 2004-05 and so it cannot be said that the plaintiff's share was denied or there was total ouster as against the plaintiff from the date of the aforesaid mutation. The learned counsel for the defendants argued much on so called admission given by plaintiff during her evidence. This admission is mentioned in the judgment delivered by the trial Court. The admission is to the effect that in the year 1978 plaintiff had requested her mother to give her share but mother did not give the share. There is also some pleading in the plaint that plaintiff had requested the brothers to give share on many occasions but they have

refused to do so. Thought there is such admission and there are such vague pleadings, from this, it is not possible to infer ouster as mentioned in Article 110 of the Limitation Act. On this point, learned counsel for the original plaintiff relied on a case reported as **A.I.R. 2007 S.C. 204 [Govindammal V/s R. Perumal Chettiar and others]**. The Apex Court has discussed the concept of ouster and it is observed that what is ouster will depend on facts and circumstances of each case and simple possession of a party is not a factor to oust the co-sharer but something more positive needs to be done by the person who is claiming relief on the ground of ouster. There cannot be any dispute over this proposition. Learned counsel for the original plaintiff placed reliance on another case reported as **2013 BCI (O) 751** Bombay High Court [**Santosh W/o Motiram Solanke and others V/s Arjun S/o Asaram Solanke and others**]. In this case, the provisions of Indian Registration Act are discussed. Learned counsel for the plaintiff then placed reliance on the case reported as **2009 (Supp.) Bom.C.R. 1030 [Brijlal Kolsya Kokani and another V/s Poslya Ananda @ Budha**

Kokani] [Aurangabad Bench]. In this case also, the circumstance that the document of relinquishment was written on a stamp paper of Rs.5/- and it was not registered, was considered and it was held that such document cannot be accepted in evidence. Provision of Section 17 of Registration Act was also considered. Similar observations are made by this Court in the cases reported as **2008 (3) Bom. C. R. 282 [Nilkanth Sampat Khandade V/s Bhaurao Sampat Khandade and another]** (Nagpur Bench) and the case reported as **2007 (5) Mh.L.J. 136 [Gangaram Sakharam Dhuri since deceased through L.R. Vishnu and others V/s Gangubai Raghunath Ayare and others]**. In the case reported as **1996 (2) Mh.L.J. 770 [Asha Anilkumar Kataria V/s Ashokkumar S/o Kevalchand bafna and others]** this Court has considered provisions of Articles 65 and 110 of Limitation Act and it is observed that in such a case the possession of one co-owner needs to be treated as possession of all co-owners and burden of proof is on the party who is claiming that there was ouster of one co-owner. There cannot be any dispute over this proposition.

12. In the present matter, there was no specific pleading on ouster and there was no evidence given to prove such ground of defendants. In view of the nature of property there was no other alternative before the Courts below than to give relief. The first Appellate Court corrected the error committed by the trial Court. No substantial question of law as such is involved in the appeal.

13. In the result, appeal stands dismissed.

[T. V. NALAWADE, J.]

Dt.07/09/2015
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