

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

SECOND APPEAL NO. 41 OF 2015
WITH
CIVIL APPLICATION NO. 1450 OF 2015

Saheb Miyan s/o. Dada Miyan **Appellant.**

Versus

Sabera Begum w/o. Shainaj Khan
and Ors. **Respondents.**

Mr. Ajit Kasliwal h/f. Mr. A.S. Deshpande, Advocate for appellant.
Mr. H.I. Pathan, Advocate for respondent No. 1.

CORAM : T.V. NALAWADE, J.
DATED : 14th September, 2015.

ORDER :

1. The appeal is filed against judgment and decree of Regular Civil Suit No. 37/2003 which was pending in the Court of Civil Judge, Junior Division, Nanded and also against the judgment and order of Regular Civil Appeal No. 54/2009, which was pending in the Court of Ad-hoc District Judge-1, Nanded. The suit filed by present respondent No. 1/original plaintiff for partition and separate possession of her share is decided in her favour. Both the sides are heard.

2. The suit properties are agricultural lands bearing Gat Nos. 147, 150 and 247 situated at village Ardhapur, Taluka

Ardhapur, District Nanded. These lands were owned by Dadamiya, father of plaintiff. Defendant Nos. 1 and 8 are sisters of plaintiff. Defendant No. 9 was mother of plaintiff and defendant Nos. 2 to 7 are real brothers of plaintiff. After the death of Dadamiya, the names of his heirs viz. plaintiff and defendants were entered in the record of right, but partition had not taken place.

3. It is the case of plaintiff that she asked the defendants to make the partition of the suit properties and lastly, such demand was made on 25.12.2002, but the defendants refused to divide the properties to give the share and so, the suit was required to be filed.

4. Defendant Nos. 1, 7 and 9 have contested the matter. It is their case that during the lifetime, Dadamiya had given some property to plaintiff and also to defendant Nos. 1 to 8 and so, the plaintiff is not entitled to get anything in the suit properties. It is contended that for about 10 years after the death of Dadamiya, no partition was claimed and so, the plaintiff is not entitled to get the relief of partition. It is also contended that some amount was given by deceased to the sisters and property was purchased by them out of this amount and so, the

plaintiff is not entitled to get the share in the suit properties.

5. Legal heirs of defendant No. 2 filed written statement and they contended that the suit is not within limitation. They also made other similar contentions as made by the aforesaid defendants. Defendant Nos. 3 to 5 did not file written statement. Suit proceeded *exparte* against defendant No. 8.

6. Issues were framed by the trial Court. The trial Court held that defendants have failed to prove that the properties were partitioned and Dadamiya had given share to plaintiff during lifetime. The trial Court held that the plaintiff is entitled to get 1/15th share in the suit properties and accordingly, decree is given. The appellate Court has given similar findings.

7. The learned counsel for the appellant mainly submitted that suit was not within limitation and Article 113 of Limitation Act applies to such suit and the period of limitation was three years after the death of Dadamiya. He submitted that accordingly, the substantial questions of law need to be formulated. He placed reliance on the case reported as **2009 (3) Bom.C.R. 2 [Mubarakunnis Mohammed Naseem & Ors. Vs.**

Moinuddin Mohd Usman Khan & Ors.].

8. Parties are Muslims. It is not disputed that the suit properties were owned by Dadamiya, the father of plaintiff and defendants. The revenue record is produced to show that after the death of Dadamiya, names of all the heirs of Dadamiya were entered in the revenue record. Though it is true that after the death of owner, the shares of sharers and residuaries are determined and get fixed as per Muslim Law, that does not mean that they get separate possession of shares on the date of death of owner. They become co-owners and so, the possession of a party, who is in possession at the time of death of the owner is the possession for other co-owners. In view of this circumstance, it cannot be said that there was denial of share to the plaintiff in any way made after the death of the owner. There is no dispute about the extent of share to which plaintiff is entitled. In view of these circumstances, Article 65 of the Limitation Act becomes applicable and the burden lies on the party, who says that cause of action had arisen long back and the suit is not within limitation.

9. This Court has carefully gone through the facts of the case cited *supra* by the learned counsel for the appellant/defendant. The facts were totally different. The plaintiff in that

case, daughter of one partner, was seeking relief of administration of estate of the deceased, who had died before 1955. The suit was filed in the year 1987 and the suit was against the remaining partners. As per the record, after the death of father of plaintiff, the mother of plaintiff was appointed as a partner in place of father and she had retired in December 1955 as such partner and the partnership firms were reconstituted in January 1956. In view of these circumstances, the Court held that Article 113 of Schedule I of the Limitation Act would become applicable. The facts of the present case are altogether different. The case cited *supra* is not at all applicable to the facts of the present case. In view of the aforesaid circumstances, this Court holds that the point of limitation cannot be formulated as substantial question of law. This point was not raised before the trial Court and the first appellate Court rightly so and it can be said that as no other challenge is available, first time the point of limitation is raised in the present proceeding.

10. In the result, the appeal stands dismissed. Civil application disposed of.

[T.V. NALAWADE, J.]

ssc/