

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, orders or Registrar's	Court's or Judge's orders.
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SECOND APPEAL NO. 285 OF 2012
WITH CA/8949/2012 IN SA/285/2012

RAMKISAN ONKARDAS BAGIDYA (DIED) LRS
SHAKUNTALABAI RAMKISHAN BAGDIYA AND ORS
VERSUS
SHRIRAM MOHANLAL AGRAWAL (DIED) LRS KAMLABAI
SHRIRAM AGRAWAL AND ORS

...
Advocate for Appellants : Mr. Gangakhedkar Shailendra S.

Advocate for Respondent Nos.1/1 to 1/3: Mr. B. S. Kudale.

CORAM: T. V. NALAWADE, J.
DATED: 5th OCTOBER, 2015.

PER COURT:

1. The appeal is filed to challenge the judgment and decree of Special Civil Suit No. 400 of 2001 which was pending in the Court of Civil Judge, Senior Division, Hingoli and also to challenge the judgment and order of Regular Civil Appeal No. 39 of 2005 which was pending in the Court of District Judge-1, Hingoli. The suit filed by present Appellant for the relief of declaration of ownership and injunction is dismissed. Both the sides

are heard.

2. The suit was filed in respect of house property bearing No. 16/69, which is given City Survey No.102 and which is situated at Marwad Galli, Hingoli. It is the case of plaintiff Ramkishan Bagadiya that Motilal Laxminarayan was the owner of this house property and he was adopted by Laxminarayan, father of Lodhabai and so he was a brother of Lodhabai. It is contended that Motilal was issueless and so Lodhabai, as his sister, was entitled to succeed to the property of Motilal. Plaintiff is a son of Lodhabai.

3. It is the case of plaintiff that defendant has denied the ownership of the plaintiff over the suit property and so there is a cause of action to file the suit. The tenant Daduram Rathod had taken the possession of the suit property as tenant and his heirs were occupying the suit property at the relevant time.

4. The defendant resisted the claim by filing written statement. He contended that Motilal was his uncle and he was not a brother of Lodhabai. He contended that Motilal was not given in adoption to Laxminarayan. It is contended that as the heir of Motilal he is entitled to

succeed to the suit property and so no declaration can be given against him. He contended that Daduram was inducted as tenant and he was paying rent to the defendant. It is contended that there was suit between legal representatives of Daduram and defendant and this relationship was admitted by the tenant in the said suit. It is contended that Motilal died in the year 1966 and the religious functions relating to death of Motilal were performed in the house of defendant. It is contended that in the year 1966 the name of defendant was entered in the record of ownership of the property and during city survey, Sanad was also issued in his favour in the year 1979.

5. On the basis of aforesaid pleadings, issues were framed. Both the sides gave evidence. It appears that Motilal was using the name of Laxminarayan, uncle of Motilal, as his father and on that basis the plaintiff contends that Motilal was given in adoption to Laxminarayan. Though there was some litigation in the past in respect of property of Motilal between Lodhabai and Shriram, the issue of adoption of Motilal was not specifically framed in the previous litigation. Even in the

present litigation such issue was not framed.

6. On the basis of the decision given in the previous suit bearing Regular Civil Suit No. 127 of 1977, which was filed by Lodhabai against Shriram, the learned counsel for the Appellant submitted that the present defendant had not disputed that Motilal was acting as a son of Laxminarayan in the previous suit and so the adoption issue has become redundant. This submission is not at all acceptable. At least in the present suit it was necessary for the plaintiff to specifically plead with regard to the adoption and give evidence to prove that Motilal was given in adoption of Laxminarayan. No such evidence is given.

7. The rival contentions and the record show that at the time of death, the suit property was standing in the name of Motilal. Defendant Shriram is a nephew of Motilal and due to that relationship Shriram is entitled to succeed to the property of Motilal. Plaintiff could have succeeded only after proving the contention that Motilal was given in adoption to Laxminarayan. Thus, on merits, plaintiff could not have succeeded.

8. Both the Courts below have held that the suit is not

within limitation. This is due to many circumstances. Admittedly, after the death of Motilal the property was entered in the Assessment record and city survey record in the name of defendant. There was a litigation between the defendant and the tenant in respect of the suit property. There was litigation even between Lodhabai and defendant and during the life time, Lodhabai had given notice to the tenants for leaving the property and she had informed that there was a dispute over succession. From the year 1966 the defendant is having control over the property and he got his name entered in the assessment record and CTS record. The suit is filed only for the relief of declaration of ownership and so the Courts below have held that the suit ought to have been filed within 3 years from the date of cause of action. As the suit came to be filed in 2001, both the Courts below have held that the suit is not within limitation.

9. It appears that in previous litigation, Regular Civil Suit No. 27 of 1977 compromise was done and in terms of the compromise, decree was prepared in second appeal in this Court. The nature of decree was such that

some portion, already sold by Lodhabai, was given to her by present defendant and the remaining portion was kept by present defendant with him. In view of the nature of compromise, it can be said that the findings given by both the Courts below cannot be read in the present matter. There is no need to discuss the oral evidence in view of the aforesaid circumstances and burden of proof was on the plaintiff to prove his case. The finding of the Courts below is concurrent and there is no material for formulation of substantial question of law.

10. Learned counsel for the Appellant placed reliance on one case reported as **1971 AIR (SC) 1398 (Kochan Kani Kunjuraman Kani V/s Methevan Kani Sankaran Kani)**. In this case, the Apex Court has laid down that the burden of proof of family custom is on the party who contend that such custom was followed by the family. There cannot be any dispute over this proposition. That question would have arisen only if there was evidence with plaintiff to prove that Motilal was given in adoption to Laxminarayan. As the basic requirement is not fulfilled there is no question of considering defence of the defendant.

11. In the result, appeal stands dismissed.
12. In view of final disposal of the second appeal itself nothing further survives in the civil application for stay and the same stands disposed of accordingly.

[T. V. NALAWADE, J.]

Dt.05/10/2015
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