

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No.334 of 2011

(Shri Dilawar Bal Dange and others v. Shri Babalal Amin Dange, since deceased, through his legal heirs Jaitnbi Babalal Dange and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri S.S. Kulkarni, Advocate for Appellants.

Coram : R.K. Deshpande, J.

Dated : 17th June, 2015

The Trial Court passed a decree for partition and separate possession on 21-4-2008 in Regular Civil Suit No.434 of 2000. The Appellate Court has dismissed Regular Civil Appeal No.84 of 2008 on 20-12-2010. Hence, the original defendant Nos.1 to 4 are before this Court in this second appeal against the concurrent findings of fact recorded by the Courts below.

Shri Kulkarni, the learned counsel for the appellants, submits that the Trial Court has dealt with the question of limitation, but the Appellate Court has not touched this aspect of the matter. He further submits that the cause of action for filing the present suit arose in the year 1982, and hence in terms of Article 110 of the Limitation Act, it is barred by time. He further argues that the earlier Regular Civil Suit No.279 of 1984 for partition and separate possession was dismissed in default, and hence the second suit was barred by the principles of *res judicata*. He also relies on the provision of Order IX, Rule 9 of the Civil Procedure Code to urge that the decree against the plaintiff bars a fresh suit.

The question of limitation has been dealt with by the Trial Court. It has been held that the suit filed was within limitation.

With the assistance of the learned counsel for the appellants, I have gone through the copy of plaint. Para 6 of the plaint in Regular Civil Suit No.434 of 2000 shows that in the month of October 2000, 1/4th share in the suit property was demanded by the plaintiff from the defendants by partition, but it was refused. The suit was filed on 30-10-2000. It is not the defence raised in the written statement that the cause of action arose in the year 1982, and the cause of action shown in October 2000 in the plaint, is not correct. Such disputed question of fact was not raised before the Trial Court. Be that as it may. Even the question of *res judicata* was not raised before the Trial Court, which is a mixed question of law and fact. In order to take benefit of the provision of Order IX, Rule 9 of the Civil Procedure Code, the factual foundation is also required to be laid. There was no insistence before the Trial Court or before the Appellate Court to frame an issue on this aspect and to adjudicate upon it.

Thus, no substantial question of law arises in this second appeal. The second appeal is dismissed.

At the request of the learned counsel for the appellants, the possession of the appellants over the suit property shall not be disturbed for a period of three weeks from today; after expiry of which, this interim protection shall stand automatically vacated without reference to this Court.

Judge.