

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 638 OF 1992

Shrishail Lachappa Poddar

.....Appellant
(Orig. defendant no.2)

V/s.

1. Ballappa Lachhappa Poddar and anr.

....Respondents
(Resp. no.1-Orig. Plff.
And Resp. no.2, Orig. Defd
no.3)

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Mr. Sachin Dhakephalkar h/f. Mr. P.K. Dhakephalkar, Advocate for
the appellants.

Mr. P.M. Mengane, Advocate for the respondents.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 12th MARCH, 2015.

P.C. :-

1). This Second Appeal is directed against the judgment and order dated 31st October, 1991 passed by the District Court, Sholapur in Regular Civil Appeal No. 721 of 1988. It was admitted on 18th November, 1992 for consideration of grounds no. (B), (C) and (J) as substantial questions of law.

“B). The Lower Appellate Court ought to have held and seen that the original Defendant no.2 himself had challenged

and all along contended that the Plaintiff was born out of illicit relations of Defendant no.3 with other persons.

C). Whether it was legal and proper on the part of the Lower Court to come to conclusion ignoring the voluminous evidence on record that the Plaintiff was not the legitimate son of Defendant no.1.

J). The Lower Court ought to have held and seen that in the year 1967 itself the Plaintiff had given notice. However, the original defendant no.1 had rejected the said demand and therefore the suit was barred by limitation.”

2). Respondent no.1, Ballappa filed Regular Civil Suit No. 8 of 1985 against his father Lachappa, brother Shrishail and mother, Indubai for partition of the joint family property. During pendency of the suit, Lachappa died and his name was simply deleted as his heirs were already on record. By the judgment and order dated 31st August, 1988 the trial Court dismissed the suit on the ground that it was barred by the law of limitation. But the issues as regards the status of the parties and the suit properties were decided in favour of Ballappa. The trial Court held that, Ballappa is the legitimate child of Indubai and Lachappa. As such, he was a co-parcener alongwith Lachappa and Shrishail. It also held that, the suit property is an ancestral property. Being aggrieved by the judgment and decree of denial of partition, Ballappa and Indubai preferred Civil Appeal No. 721 of 1988 to the District Court. Shrishail also filed cross-objections to challenge the findings of the trial Court on the status of the parties

and the properties. By the judgment and order dated 23rd October, 1991 the District Court allowed the appeal and dismissed the cross-objections. It decreed the suit by declaring that, each party had one-third share in the suit properties and gave directions for partition. Shrishail then filed the present Second Appeal against Ballappa. During pendency of the appeal, Shrishail expired and the present appellants were brought on record as his heirs and legal representatives. The present appeal challenges all the findings in the suit, i.e. the findings as regards the status of Ballappa as the legitimate son of Lachappa and Indubai, Ballappa's status as co-parcener and finding of the appellate Court that the suit filed is within the period of limitation.

3). The first two substantial questions of law framed at the time of admission of appeal concerned the status of Balappa as the legitimate son of Indubai and Lachappa. Lachappa had, during his lifetime alleged that Indubai had illicit relations with other persons and Ballappa was born from those illicit relations. The trial Court noted that, Lachappa had married Indubai after the demise of his first wife, Ramabai. The fact of marriage is not disputed. It is also not disputed that Indubai is the mother of Ballappa. At the time the suit went for trial, Lachappa was no more. All that Shrishail could say in

his evidence on the relations between Indubai and Lachappa was that, ever since his age of understanding, he had noticed that Indubai did not reside with Lachappa. She was living at Akkalkhot, whereas Lachappa resided at Salghar. According to the evidence of Shrishail, he had gone to Akkalkot in the year 1945 for the purpose of his education. There he resided with his grandmother and that his father, Lachappa used to visit him often. On such visits, the father did not go to the house of Indubai. The Courts below held that, the best evidence about the paternity of Balappa was the evidence of Lachappa himself, which was not available on account of his death. A reference was made to Section 112 of the Indian Evidence Act, which provides for a presumption that any person born during the continuation of a valid marriage between his mother and any man or within 280 days after its dissolution, shall be conclusive proof that he is the legitimate son of the man, unless it is shown that the parties to the marriage had no access to each other at any time and he could not have been begotten. With the death of Lachappa, obviously there was no evidence available as regards the access between him and Indubai. The marital tie between the two were never severed. In the circumstances, in the absence of specific evidence of absence of access, the presumption became operative and Balappa was held to

be the son of Lachappa and as such a co-parcener in respect of the suit property. Thus the findings recorded by the Courts below on the status of Balappa is completely supported by the material on record. Hence, there can be no interference with that finding.

4). The Courts below found that, it is an admitted position that the suit properties were owned and possessed by Lachappa and therefore Balappa had a share therein, being a member of the family of Lachappa. This finding is also a probable view on the evidence available on record. Therefore, the first two substantial questions of law must be answered in the negative.

5). The appellate Court has reversed the finding of the trial Court on the maintainability of the suit on the ground of bar of limitation. Balappa, had on 28th June, 1967 issued notice to Lachappa demanding partition of the suit properties and separate possession of his share therein. According to Shrishail, the notice had been replied to by Lachappa by the letter dated 6th July, 1967 denying the right of Ballappa in the suit properties. It was the case of Ballappa that, he had not received any reply from Lachappa to the notice. The trial Court held that, the fact that Ballappa had demanded partition by notice dated 28th June, 1967 and since then till filing of the suit, partition of the suit properties had not been effected. The reply to the

notice was sent by Advocate, Diwanji. The document of reply was produced by Shrishail through Advocate, Jaripatke who had worked with Advocate Diwanji. Advocate Jaripatke merely identified the signature of Advocate Diwanji on the copy of the notice. He could prove, neither the contents of the reply nor the fact of receipt of the reply by Ballappa. In the circumstance, it could not be held that denial of his share in the suit properties was to the knowledge at the relevant time. Therefore, it cannot be said that cause of action to file the suit for partition had accrued to Ballappa in the year 1967. It is the case of Ballappa that, in the year 1984 he had demanded partition from Lachappa and he had also noticed that Lachappa was likely to dispose off the property and hence filed the suit. These facts being established by Ballappa through his deposition, no exception can be taken to the finding of the appellate Court on the issue of limitation. Therefore, the third substantial question of law is also answered in the negative. The Second Appeal is dismissed.

(SMT. R.P. SONDURBALDOTA, J)