

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 425 OF 1993

Vilas Vyankatesh Wadekar & Ors. ... Appellants

V/s.

Padmakar Bapu Wadekar & Ors. ... Respondents

.....
Mr. Madhav Jamdar, Advocate for the Appellants.

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CORAM : R. K. DESHPANDE, J.

DATED : AUGUST 6, 2015.

P.C.

The trial Court passed a decree in Regular Civil Suit No.1080 of 1986 on 20th August, 1987, recording the finding that the suit properties are ancestral properties and the plaintiffs have half share in it. The Lower Appellate Court has reversed this decision on 23rd July, 1992 in Civil Appeal No.27 of 1988. The suit for partition and separate possession has been dismissed hence, the original plaintiff is before this Court in this Second Appeal.

2 The Lower Appellate Court has recorded the finding that the suit for partition and separate possession was barred by law of limitation. The Court has also recorded the finding that

the property was transferred by Vyankatesh, the father of the plaintiffs in favour of Bapu. The basis is CTS No.299 at Exhibit 54. Second Appeal was admitted on 24th September, 1993 on the substantial questions of law mentioned in ground nos. 1 to 12. If one looks at ground nos. 1 to 12 in the Memo of Appeal, it seems that the entire Appeal is required to be heard on its own merits on facts and law. None appears for the respondents.

3 It is apparent that if the decision of the Lower Appellate Court on the question of limitation is reversed in the Second Appeal, then the matter will have to be sent back to the Lower Appellate Court for decision on merits on facts and law both. If the decision of the Lower Appellate Court is confirmed on the question of limitation, then the Second Appeal will have to be dismissed on that sole ground without entering into the merit of the controversy. Hence, I proceed to consider the question of limitation.

4 The Lower Appellate Court has considered this question in paragraph no.12 of its judgment which is reproduced below:

“12. Point No. 2. - Shri Shinde, the learned counsel

for the plaintiffs contended that there is no specific plea of ouster and unless it is so specifically pleaded that plea cannot be looked into. I find myself unable to agree with the submission of the learned counsel. It is enough for defendant to plead that suit is barred by limitation. In this matter, the suit can definitely be said to be barred by limitation. It stated by P.W.1 Vilas in cross examination that Bapu had asserted ownership over the suit property in the year 1973 for the first time. Thus, Bapu had claimed exclusive ownership and had denied any share to the plaintiffs in the matter. Assuming for the sake of argument that the suit property continue to be the joint family property, the present suit has been instituted by the plaintiffs on 27th November 1986. It is thus more than clear that the suit is instituted more than 12 years after Bapu asserted his complete ownership over the property. Since the suit is not brought within 12 years, from the date Bapu denied any share the suit has to be said to be barred by limitation. I therefore, find that the learned Judge committed error in decreeing the suit and in view of my finding points 3, 4 etc. not survive and the appeal will have to be allowed. Hence the Order:"

4 With the assistance of the learned counsel for the appellants, I have gone through the evidence of P.W.1 Vilas and has also seen the documents at Exhibit - 29 referred to in the

evidence of Vilas. I do not find anything in the evidence of P.W. No.1 Vilas to the effect that there was ouster of claim of the plaintiff from the joint family property in the year 1973, as has been held by the Lower Appellate Court. It is mere an entry in the name of Bapu, the father of the defendant showing to be the owner of the property. The mutation entry dated 15th April, 1948 cannot be considered to be a document of title. It is neither the case of the defendant nor there is any evidence brought on record to show that the plaintiff demanded the partition of the suit property in the year 1973 or at any time prior to 16th October, 1986 when the notice at Exhibit - 33 was issued demanding partition for the first time in respect of the suit property. In view of this, the question of ouster of the claim of the plaintiff in respect of the ancestral property prior to 16th October, 1986, does not arise.

5 The Lower Appellate Court has committed an error in holding that the ouster was in the year 1973. The suit in question was filed immediately on 27th November, 1996, which cannot be said to be barred by the law of limitation, as contained under Article 110 of the Limitation Act. Hence, the substantial question of law, as contained in ground no.10 is answered holding that the

Lower Appellate Court has committed an error of law in holding that the suit was barred by limitation. The finding is perverse and it is liable to be set aside and is, therefore, set aside.

6 In the result, the Second Appeal is allowed.

7 The Judgment and order dated 23rd July, 1992, passed by the Lower Appellate Court in Civil Appeal No.27 of 1988 is hereby quashed and set aside.

8 The matter is remanded back to the Lower Appellate Court to decide the said Appeal afresh after hearing all the parties concerned.

9 No orders as to costs.

10 The record and proceedings received by this Court be immediately remitted to the Lower Appellate Court.

JUDGE