

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.448 OF 2015

Pundlik Ukha Kankhare
Age - 74 years, Occ - Agriculture
R/o Kanalda, Taluka and District - Jalgaon

APPELLANT

VERSUS

1. Thagubai Laxman Kankhare
Age - 77 years, Occ - Labourer
2. Anjanabai Sukdeo Sultan
Age - 52 years, Occ - Housewife
3. Meerabai Sharad Bacchav,
Age - 47 years, Occ - Housewife
4. Sakubai Ankush Borse,
Age - 45 years, Occ - Housewife
5. Mangalabai Sunil Nile (Deceased)
Through her legal heirs
- 5.1 Sunil Vasant Nile
Age - 48 years, Occ - Labourer
- 5.2 Punam Sunil Nile
Age - Minor, Occ - Nil
u/g her father i.e. respondent No.5.1
6. Kavita Laxman Kankhare
Age - 26 years, Occ - Household
All R/o Kanalda,
Taluka & District - Jalgaon
7. Devkabai Damodar Bhalerao (Deceased)
Through her legal heirs
- 7.1 Pandharinath Damodar Bhalerao
Age - Major, Occ - Driver

(Ori. Plaintiffs)

7.2 Sudhakar Damodar Bhalerao
Age - Major, Occ - Labourer

7.3 Madhukar Damodar Bhalerao
Age - Major, OCc - Agriculture

7.4 Shiva Damodar Bhalerao,
Age - Major, Occ - AGriculture

No.7.1 to 7.4 R/o Dhamangaon,
Taluka and District - Jalgaon

8. Revkabai Dhondu Dhamane
Age - Major, Occ - Household
R/o Tade Bamhane, Taluka - Erandol
District - Jalgaon

.....

Mr. Vijay B. Patil, Advocate for the appellant

Mr. Vinod P. Patil, Advocate for respondents No.1 to 6

.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 11th APRIL, 2017

ORAL JUDGMENT :

1. Heard learned advocates for the appellant and respondents No.1 to 6.

2. Question that emerges for consideration in this second appeal is -

“ Whether the two courts hitherto have erred in granting decree of partition of half of suit property in favour of the plaintiffs ? ”

3. Briefly stated, the emanating facts are, suit property bearing Gut No.91, admeasuring about 2 hectare, 5 *aar* situated at Fupnagari, Taluka and District – Jalgaon had been purchased under a registered sale deed dated 26th April, 1947 (Exhibit-66)

by Ukha in his name and in the name of Pundlik. Pundlik was then minor, eleven year old son of Ukha. Plaintiff No. 1 is widow of Laxman, another son of Ukha. Plaintiffs No. 2 to 6 are married daughters of plaintiff No. 1 and deceased Laxman, who expired in 1991. It is the case of the plaintiffs that suit property is their ancestral property and during lifetime of Laxman, he had been cultivating half of the suit property. After his death, since Laxman had not left behind any male progeny and he had only daughters, in order to deprive the plaintiffs of their legitimate share in the ancestral property, they were driven away by Pundlik. Names of plaintiffs came to be recorded in revenue record as legal heirs of deceased Laxman in respect of the suit property. The position continued till 2002, however, around 2002, revenue entries in their favour were tried to be disturbed by making an application before revenue authorities by defendant No. 1 - Pundlik. An order came to be passed, against the interest of the plaintiffs. Thereafter, a notice, through advocate had been issued by the plaintiffs to defendant No. 1 seeking partition and separate possession of suit property. Before that on several occasions, request with defendant No. 1 to partition suit property had not been heeded and, as such, Regular Civil Suit No.72 of 2005 ensued.

4. Plaintiffs' claim was resisted by defendant No. 1 contending that suit property had been purchased in the name of Ukha and Pundlik - defendant No. 1 and as such, complete half share was owned by defendant No. 1 with which the plaintiffs had no concern. It is further contended that the claim of the plaintiffs is not proper. Half the property all along had been owned by defendant No. 1 and after death of Laxman, he had been cultivating entire suit land. It had been denied that either plaintiffs or for that matter Laxman had half share in suit property. While notice was issued in 2004 by the plaintiffs, the same had been replied, however, the reply had not been accepted, and the same had come back to defendant No. 1. It had, however, been broadly accepted that revenue entries in favour of the plaintiffs had been effected after death of Manjabai - wife of Ukha, after 1981 and the same continued to be shown as such. It had further been contended that for want of certified copy of sale deed on record, suit is liable to be dismissed. Alternatively, it has been claimed that defendant No.1 pursuant to sale deed is owner of half of suit property and the balance half belonging to Ukha - father of defendant No. 1 upon his death, would get divided into three shares viz., Manjabai, defendant No. 1 and his brother Laxman and as such, the plaintiffs would not

be entitled to in any case half share as claimed by them in suit property.

5. Trial court, in relation to aforesaid pleadings, framed issues as to whether the plaintiffs prove that the property is ancestral; whether defendant No. 1 proves that he is legally owner of suit property; whether the plaintiffs are entitled to partition and whether they have half share in the same and answered that the property is ancestral, plaintiffs are entitled to partition and they have half share in suit property, whereas defendant No. 1 could not prove that he is owner of entire suit property.

6. The trial court noted that revenue record depicts, till death of Ukha, suit property had been shown in the name of Ukha and after his death, the same started to be shown in the name of Manjabai - wife of Ukha, defendant No. 1 - Pundlik and Laxman. After death of Manjabai, names of defendant No. 1 and the plaintiffs started to be shown in the revenue record. The entries were duly approved by the Additional Collector. Trial court adjudged looking at the background that defendant No. 1 was minor and he had no separate source of income, the property in the hands of legal heirs of Ukha is ancestral property. Suit, as such, was decreed.

7. The matter was taken in regular civil appeal No. 1073 of 2012 by defendant No. 1, wherein similar points as were the issues before trial court, were framed for determination. The appellate court as well held suit property to be ancestral property, defendant No. 1 could not prove his exclusive ownership over half of suit property and further the plaintiffs were held to be entitled to partition and separate possession of half of suit property.

8. Mr. Vijay B. Patil, learned advocate, appearing on behalf of the appellant – defendant No. 1 vehemently submits that in the first place title deed is in favour of defendant No. 1 to the extent of half of the suit property and in such a case in absence of challenge to the title deed, suit to the extent of half of suit property ought to have failed. He submits, without admission, even if it is considered that for half of suit property that would legitimately be held in the name of deceased Ukha, the plaintiffs would not have half share in the same, as the same would be liable for division in accordance with prevailing position of law. Suit property, according to him, would be divided into three shares – one third going to Ukha and remaining two third would be equally divided among defendant No. 1 and his brother Laxman. In the share of deceased Ukha, partition would once

again will have to be effected among all the members of progeny viz., brothers and sisters. In the circumstances, decision rendered about plaintiffs being entitled to half share in suit property is not tenable. He additionally submits that the suit is outside the period of limitation, which question ought to have been looked into by the courts, as Laxman died in 1991 and the suit has been filed in 2005. He submits that issuance of notice would not extend the period of limitation or cause of action.

9. Mr. Vinod P. Patil, learned advocate for respondent – plaintiffs at the outset submits, so far as question that is sought to be posed in respect of absence of challenge to sale deed is concerned, the same is not necessary, as the nature and character of the property being ancestral has been found by the two courts with reference to the evidence on record and that question being a question of fact, stands concurrently decided. It is not the case that said finding given and inference drawn is not borne out from the facts and evidence on record. He submits that it emerges on record that while purchase had been made in 1947, defendant No. 1 had been minor and had no independent source of income and the family, that is to say, defendant No. 1 and his brother Laxman and father Ukha were joint. In the circumstances, it clearly emerges that property was in fact

purchased by father and had shown the same in his own name and in the name of defendant No. 1, who was the eldest son. The burden which has slid on to defendant No. 1 to prove that the property had been purchased by defendant No. 1 has not been discharged absolutely. On the contrary, simply for the sale deed bears his name it cannot be said that property in fact had been purchased by defendant No. 1 and had fallen to his ownership alone while family continued to be joint. He submits that when the nature of the property has been determined to be ancestral property, challenge to the sale deed is absolutely not necessary and no fault can be found on that count. Nor in the written statement, such a defence had ever been taken. He submits that so far as ground of limitation is concerned, at the outset, it will have to be drawn attention to that no such defence had ever been taken in written statement by defendant No. 1. Secondly, he submits that since the property had been ancestral property, in the natural course, property being purchased by father, upon his death, as per prevailing law, the same stood devolved on his two sons, who are male members of the family and as such, since the plaintiffs are successors of brother of defendant No. 1, half of his share would devolve on the plaintiffs. Thus, the contention of defendant No. 1 on this count as well is

unsustainable. As far as limitation is concerned, he submits that after death of Ukha the property came to be recorded in the name of Manjabai, mother of Pundlik and Laxman and after death of Laxman, the property of his share came to be recorded in the names of plaintiffs. The position continued till 2002. There had been no disturbance so far as title derived by the plaintiffs till 2002 and in 2002 while some proceedings were initiated before revenue authorities, a notice came to be issued seeking partition in 2004 and in 2005 the suit came to be filed. As such, it is not a case wherein it can be said that the suit is barred by law of limitation or it is outside the period of limitation. The suit is based on title, and in such a case, the suit as would emerge, is filed within the period of limitation prescribed therefor under the Limitation Act.

10. After hearing learned advocates, it appears that there is a considerable force in the submissions advanced on behalf of the respondent – plaintiffs, so far as their entitlement to partition and the nature of property to be ancestral in their hands, so also, limitation is concerned. It cannot be gainsaid that defendant No. 1 had been minor while purchase was made by Ukha in his own name and in the name of defendant No. 1. Record does not bear anything which would indicate that

defendant No. 1 had any source worth the name to earn income and invest in purchase of land. It emerges that suit property had in fact been purchased by Ukha and as such, after purchase of property, the property stood in the revenue record in Ukha's name.

11. Name of defendant No. 1 started figuring in only after death of Ukha along with Manjabai and Laxman. Till death of Laxman in 1991 or for that matter even upto 2002 defendant No. 1 had not taken any objection to revenue entries so appearing. In the circumstances, two things clearly emerge that the property had been treated as Ukha's property and that title of the plaintiffs had not been tried to be disturbed until 2002.

12. In the circumstances, so far as ancestral nature of property in Ukha's legal heirs hands and the suit being within limitation from cause of action therefor is concerned, would not be a matter of debate. However, so far as division of shares upon partition is concerned, two courts hitherto do not appear to have appreciated the matter pursuant to prevailing position of law. Neither claim of defendant No. 1 appears to be in consonance with said position. Looking at that it was property of Ukha, after his death, him having died intestate would be governed by

statutory law finding codification under Hindu Succession Act, 1956, wherein property of deceased male Hindu dying intestate would devolve on wife and the children. Here it is a case that while Ukha died, Manjabai his wife was alive. His two sons and two daughters also survived. In such a case, Ukha's property is liable to five equal divisions. Further, upon death of Manjabai, her share would equally devolve on four children left behind by her.

13. Sharing pattern as has been directed by the courts is not compatible with the statutory provisions in Hindu Succession Act. Second appeal to that extent thus is required to be considered and stands accordingly considered. Parties will be entitled to the respective shares in accordance with division of property as referred to above. The question so formulated in the second appeal, as such, stands answered. Decree be modified accordingly.

14. With aforesaid, second appeal stands disposed of.

15. In view of disposal of second appeal, pending civil application as well stands disposed of.

[SUNIL P. DESHMUKH, J.]