

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.563 OF 2017
WITH
CIVIL APPLICATION NO.10834 OF 2017**

Kiran Yashwant Shinde,
Age: 38 years, Occu: Agri.,
R/o. Shirdi, Tal. Rahata,
Dist. Ahmednagar

..APPELLANT
(Orig.Deft.No.2)

VERSUS

1. Kamal Yashwant Shinde,
Age: 58 years, Occu: Household,
R/o. Newasa (Kh.) Bazartal,
In front of Garute Photo Studio,
Tal. Newasa, Dist. Ahmednagar

2. Yashwant Dhondiba Shinde,
Age: 63 years, Occu: Agri.,
R/o. Shirdi, Tal. Rahata,
Dist. Ahmednagar

3. Shobha w/o Raju Pehere,
Age: 36 years, Occu: Household,
R/o. Ranjangaon Devi,
Tal. Newasa, Dist. Ahmednagar

..RESPONDENTS

Mr K. M. Nagarkar, Advocate for appellant;
Mr R. R. Karpe, Advocate for respondent No.1

**SECOND APPEAL NO.562 OF 2017
WITH
CIVIL APPLICATION NO.10833 OF 2017**

Shobha w/o Raju Pehere,
Age: 36 years, Occu: Household,
R/o. Ranjangaon Devi,
Tal. Newasa, Dist. Ahmednagar

..APPELLANT
(Orig.Deft.No.3)

VERSUS

(2)

1. Kamal Yashwant Shinde,
Age: 58 years, Occu: Household,
R/o. Newasa (Kh.) Bazartal,
In front of Garute Photo Studio,
Tal. Newasa, Dist. Ahmednagar
2. Yashwant Dhondiba Shinde,
Age: 63 years, Occu: Agri.,
R/o. Shirdi, Tal. Rahata,
Dist. Ahmednagar
3. Kiran Yashwant Shinde,
Age: 38 years, Occu: Agri.,
R/o. Shirdi, Tal. Rahata,
Dist. Ahmednagar

..RESPONDENTS

Ms Smita S. Kulkarni, Advocate for appellant;
Mr R. R. Karpe, Advocate for respondent No.1;
Mr K. M. Nagarkar, Advocate for respondent No.3

CORAM : NITIN W. SAMBRE, J.

DATE : 18th September, 2017

ORAL ORDER:

The present appellants are defendants no.2 and 3 respectively, in Regular Civil Suit No.239 of 2006 filed by present respondent no.1 – plaintiff for partition of suit property and perpetual injunction restraining the defendants from alienating the suit property. The suit property consists of agricultural land out of Block No.122/11A / 122/22, total area 0 Hectare and 57 Ares, situated at Mouja Shirdi, Taluka Rahata, District Ahmednagar.

2. Parties shall be hereinafter referred to by their status in the civil suit.

(3)

3. It is the case of defendants No.2 and 3 that present plaintiff earlier had filed Regular Civil Suit No.500 of 1989, in which present defendant no.2, then a minor and his mother Kamal were plaintiffs. In the said suit, prayer for partition and injunction was made. The said suit came to be compromised on 16th October, 1989 wherein present plaintiff and her then minor son - defendant no.2 herein were granted half share in the suit property.

4. It is subsequent to compromise in aforesaid suit, plaintiff filed suit in question, which according to defendants was not maintainable being hit by the principle of res judicata, as also barred by limitation. An additional submission is made that in the compromise decree passed in Regular Civil Suit No.500 of 1989 on 16th October, 1989, share of the present plaintiff and that of her husband was crystalized. It is claimed that Yashwant, respondent no.2 in both second appeals before this Court who was defendant no.1 in Regular Civil Suit No.500 of 1989, has relinquished his rights along with defendants no.3, 4, 5 and 6 in the said suit.

5. However, Shobha – present appellant in Second Appeal No.562/2012 – present defendant no.3 in Regular Civil Suit No.239 of 2006 has filed a separate suit claiming partition which is pending adjudication. It is also claimed that in case defendant no.3's suit is decreed, the decree in the present suit will have adverse effect over the share of the appellant-defendant. In the aforesaid backdrop, it is claimed that the judgments and decrees rendered by the Courts below are required to be upset.

(4)

6. The Trial Court, vide judgment and decree dated 23rd June, 2015 decreed the suit of plaintiff herein, holding defendant no.2 to be entitled for half share each in the suit land, with directions to effect partition equitably as per the respective shares. The prayer of the original plaintiff for perpetual injunction against defendant no.2, in view of partition ordered, came to be rejected with an order of inquiry into mesne profits. The said judgment and decree was subject-matter of challenge in Regular Civil Appeal No.61 of 2015, which was preferred by present appellants jointly. The appeal also came to be dismissed vide judgment and decree dated 6th July, 2017. Thus, the present Second Appeal.

7. From the aforesaid submissions, following grounds emerge for my consideration :-

- (a) In view of compromise decree in Regular Civil Suit No.500 of 1989, whether the present suit was hit by the principle of res judicata ?
- (b) Whether the claim of respondent no.1 i.e. original plaintiff was within limitation ?
- (c) Whether the decree under challenge will have effect over the rights of the parties, particularly that of appellant Shobha at whose behest a suit for partition is pending ?

(5)

8. At the outset, it is required to be noted that in the present appeals there are concurrent findings recorded against each of the appellants.

9. In the aforesaid backdrop, if the grounds which are sought to be canvassed as substantial questions of law are appreciated, in my opinion, the issue of res judicata would not arise in the case in hand, for the reason that in earlier round of litigation, particularly Regular Civil Suit No.500 of 1989, the claims of the parties were not adjudicated on merits but were settled between the parties. What was allotted in favour of the plaintiff in said suit i.e. present plaintiff and defendant No.2, is joint share in the suit property without mentioning as to the share of each of the parties to the said compromise decree. In the aforesaid backdrop, if the plea of principle of res judicata is tested particularly having regard to the requirements therefor, it has to be held that the suit in question is not hit by the principle of res judicata.

10. So far as the second contention of the appellants that the claim made for partition is hit by the provisions of Limitation Act is concerned, though the appellants have relied upon the Division Bench judgment of the Gujarat High Court in the matter of **Merani Rupri Vinza and others vs. Malibai Keshav and others**, reported in **(1980) GLR 615** (decided on 12th September, 1979), particularly observations made in paragraphs 9, 11, 18 and 19 of the said judgment, so as to substantiate the plea of limitation of three years, if the aforesaid submissions are appreciated in the backdrop of the cause of action stated in the suit in question, it is required to be

(6)

noted that the suit is brought in action by the plaintiff with a cause cited therein, that defendant no.2 in the suit in whose favour a decree for partition was passed along with the plaintiff, upon having attained majority, all family members have driven appellant – defendant no.3 Shobha out, which was formed to be the basis to claim partition. Such cause is expressly narrated in the suit and if such cause is considered in the light of the compromise decree (Exh.58) dated 16th October, 1989, the parties to the proceedings can be said to have not disputed existence of the same. The only dispute sought to be raised is interpretation of such decree.

11. In the aforesaid backdrop, while considering the cause that has arisen to the plaintiff for institution of the suit in question, it has to be held that the suit was brought within limitation, particularly within a period of three years as prescribed under Article 113 of the Limitation Act. The basis for making such observation is that the decree passed in earlier suit being Regular Civil Suit No.500 of 1989 does not quantify the shares of each of the parties to the compromise decree, as plain reading thereof indicates that the plaintiff and defendant no.2 were held to be entitled for half share in the suit property. As such, it is open for the appellant Shobha to file a suit, seeking quantification of her individual share in the property which is subject-matter of the compromise decree passed in Regular Civil Suit No.500 of 1989 and can be granted if she is found entitled to the same. So far as share in the property of a married daughter or that of wife is concerned, she may have share in the property of her husband but not in the shares of other persons.

12. In the wake of above and having regard to the fact that the suit at the behest of appellant-defendant Shobha is stated to be already pending adjudication, without making any comments on merits of the same, suffice it to say that she may agitate her right in said suit which shall be decided on its own merits, without being influenced by findings in present second appeals.

13. In the aforesaid background, I hardly notice involvement of any substantial question of law in the present appeals. The present appeals against concurrent findings lack merit and accordingly stand dismissed.

14. As observed herein before, this Court has not commented on the entitlement of the share claimed by appellant present defendant no.3 Shobha in her independent suit. It will always be open for her to make appropriate prayer for injunction in the said suit, if such prayer is made, the same be decided on its own merits, independent of and without being influenced by the findings recorded herein.

15. In view of dismissal of second appeals, pending civil applications do not survive and stand disposed of accordingly.

(NITIN W. SAMBRE, J.)