

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

**SECOND APPEAL NO. 145 OF 2017
WITH
CIVIL APPLICATION NO. 151 OF 2017**

Shri Daulat Kachu Shelar & Ors. ...Appellants / Orig.Defendants
vs.

Shri Abaji Balaji Shelar ...Respondent / Orig.Plaintiff

Mr.S.C. Wakankar for Appellants.
Mr.M.M. Sathaye for Respondent.

CORAM : S.C. GUPTE, J.

21 MARCH 2017

P.C. :

Heard learned Counsel for the parties.

2 The second appeal challenges a judgment and order passed by the District Court at Niphad, Nashik in Civil Appeal No.12/2015. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellants herein and confirmed the decree of partition granted by the trial court in the Respondent's suit.

3 The Respondent (original Plaintiff) filed the present suit against the Appellants (original Defendants) claiming that the properties described in the suit (suit properties) were joint family properties of the Plaintiff and the Defendants, and that the Plaintiff on the one hand and Defendant Nos.1 to 4 together on the other had one-half share therein. The Plaintiff prayed for partition of the suit properties. The Plaintiff's case was that initially the suit properties were held by Balaji Govind Shelar, father of the Plaintiff, and Kachu, deceased father of the Defendants. Balaji had a

brother by the name of Shankar. It is submitted that after the demise of Balaji, the Plaintiff, deceased Kachu and Shankar inherited the suit properties, though these properties were mutated in the name of deceased Kachu as a manager. It is submitted that Shankar sold his one-half share in the suit properties to the Plaintiff and deceased Kachu on 22 January 1965, though the sale deed was executed in the name of deceased Kachu, being the elder brother and manager of the joint family. It is submitted that ever since inception, the Plaintiff and Kachu were having joint possession and cultivation in respect of the suit properties. The Plaintiff, accordingly, applied for partition of the suit properties. The Defendants resisted the suit claiming in their written statement and also the additional written statement filed subsequently that the suit, filed in 2009, was barred by limitation, the Defendants having denied partition in the year 1971, according to the knowledge of the Plaintiff; that the suit was bad for non-joinder of necessary parties; that certain properties, including Gram Panchayat property Nos.675, 676, 677, 679 and some other properties belonging to the joint family, were not included in the joint family properties of which partition was sought; that the particular property, which was bought in the name of deceased Kachu, the predecessor-in-title of the Defendants, by sale deed of 22 January 1965, was the exclusive property of deceased Kachu and not a joint family property which the Plaintiff was entitled to share with deceased Kachu; and that the Plaintiff was not a biological son of deceased Balaji and had accordingly no share in the joint family properties of the family of Balaji. It appears that whilst framing the issues, the trial court considered all aspects on which the parties were at issue, save and except the Defendants' plea as to the entitlement of the Plaintiff to the suit properties, the Plaintiff not being the biological son of deceased Balaji. This, however, appears to be so on the

footing that this issue was not pressed before the trial court, as I have discussed later in this judgment. On all the other issues, the trial court rendered findings in favour of the Plaintiff. The trial court held that the suit properties were joint family properties of the Plaintiff and the Defendants, the Plaintiff having one-half share therein and Defendant Nos.1 to 4 together having the balance one-half. The trial court held that the suit was not barred by the law of limitation; that there was no infirmity in the suit on account of non-joinder of necessary parties; and that the Defendant had not proved that any other joint family properties were left out for claiming partition. Accordingly, the trial court decreed the Plaintiff's suit. The lower appellate court confirmed the findings of the trial court and dismissed the Defendants' appeal from the decree of partition. Being aggrieved, the Defendants have come in the present second appeal before this court.

4 Learned Counsel for the Appellants (original Defendants) advanced the following submissions:

(a) It is submitted that the suit for partition is barred under Article 110 of the Limitation Act, 1963, since it is the Plaintiff's own case (urged in his written statement filed in a previously instituted suit by the Defendants) that the Defendants had denied the Plaintiff's claim for partition of joint family properties in 1971. At any rate, it is submitted that even if one takes the date of the written statement filed by the Plaintiff in the Defendants' prior suit, i.e. 28 April 1982, the suit for partition instituted in the year 2009 is barred by the law of limitation.

(b) It is submitted that some of the properties, which are listed out in the

written statement of the Defendants, were left out and not included in the joint family property for partition. Relying on the judgment of the Supreme Court in the case of **Kenchegowda vs. Siddegowda alias Motegowda**¹ and the decision of our court in the case of **Govindrao s/o. Gangaramji Ajmire vs. Dadarao @ Shrawan s/o. Gangaramji Ajmire**², it is submitted that a suit for partial partition, when all joint family properties are not made the subject matter of the suit or all co-sharers are not impleaded, is not maintainable.

(c) It is submitted that the present suit is bad for non-joinder of necessary parties inasmuch as the sisters of the Plaintiff / legal heirs of predeceased sisters were not made parties to the partition suit.

(d) It is submitted that the present suit is barred under Order 2 Rule 2 of the Code of Civil Procedure.

(e) Neither the trial court nor the appeal court framed and decided the issue as to the entitlement of the Plaintiff to claim partition, when it was expressly urged in the written statement that the Plaintiff was not a biological son of deceased Balaji.

5 Under the Limitation Act, 1963, when a person excluded from a joint family property files a suit to enforce a right to a share therein, under Article 110 of the Limitation Act, 1963, a period of 12 years is provided for such suit from the date when the exclusion becomes known to the plaintiff. Learned Counsel for the Appellants relies on this provision to claim that the suit was barred by the law of limitation. Learned Counsel

1 (1994) 4 SCC 294

2 2004 BCI 82

relies on the judgment of the Supreme Court in the case of **Krishna Pillai Rajasekharan Nair vs. Padmanabha Pillai**³. In this case, the Supreme Court was construing Article 120 of the Limitation Act, 1908. The court held that for the purposes of Article 120, the starting point of limitation was when the right to sue accrued, i.e. when the plaintiff noticed of his entitlement to partition being denied. Learned Counsel relies on the Plaintiff's own statement in his written statement filed in the Defendants' suit instituted in 1982 where the Plaintiff avers that he demanded partition of the property by metes and bounds and separate possession of his one-half share therein and the Defendants denied such partition. It is submitted that this written statement was filed on 28 April 1982. It is submitted that accordingly, it must be held that at least as of 28 April 1982, the Plaintiff had a notice of his entitlement to partition being denied by the Defendants. It is submitted that in the premises, and as per the law laid down by the Supreme Court in **Krishna Pillai Rajasekharan Nair's** case, the suit is completely barred by the law of limitation. At the outset, it is pertinent to note that the case of **Krishna Pillai Rajasekharan Nair** was decided under the Old Limitation Act, i.e., the Limitation Act of 1908. Under this Act, the article considered by the Court was Article 120 of the Limitation Act, which was a residuary article, namely, an article providing for suits for which no period of limitation was provided elsewhere in the schedule. The period was six years running from the date when the right to sue accrued to the Plaintiff. In the present case, on the other hand, what is pressed into service is Article 110 of the Limitation Act, 1963, which provides for a suit by a person excluded from a joint family property to enforce a right to share therein. In case of such suit (and it is the Appellants' own case that this was such a suit), the limitation of twelve years begins to run from the

3 (2014) 12 SCC 754

date when the exclusion becomes known to the Plaintiff. A perusal of the written statement filed by the Plaintiff in the Defendants' suit for perpetual injunction does not show that the Plaintiff was in any way excluded from the joint family property. What the Plaintiff submits, in fact, in the written statement is that the Plaintiff and the Defendants were in joint possession of the suit properties. Even the Courts in the perpetual injunction suit have come to the conclusion that the Plaintiff and the Defendants were in joint possession of the properties and accordingly, denied the relief of perpetual injunction to the Defendants. This being so, it cannot be said that with effect from 28 April 1982, i.e. the date of the written statement, the cause of action accrued to the Plaintiff within the meaning of Article 110 and the time of limitation began to run. Alternatively, the Defendants also rely upon revenue proceedings of 1972 filed by the Plaintiff. By these revenue proceedings, the Plaintiff had challenged a mutation entry in favour of deceased Kachu (the predecessor of the Defendants). The revenue proceedings eventually resulted in cancellation of the mutation in favour of Kachu and entry of the Plaintiff's name in the record of rights. This aspect also has no bearing on the limitation for the purposes of the present suit. There is, accordingly, no merit in the contention of the Defendants that the suit is barred by the law of limitation. Both courts have held this point in favour of the Plaintiff and no substantial question of law arises therefrom for the consideration of this court.

6 Coming now to the Defendants' plea of non-inclusion of other joint family properties, that is to say, a plea of bar of partial partition, it may be noted that both courts have come to concurrent findings of fact that the Defendants were unable to prove that there was any property, which was left out by the Plaintiff in the description of the joint family property

for claiming partition. The trial court has noted that the Plaintiff had amended his suit by including Block Nos. 125, 121 and Gram Panchayat property nos. 655/A, 676/3A and 679/A in the description of the properties in the claim clause and that the Defendants had not adduced any satisfactory evidence to show that there was any other property apart from these properties, which was actually owned and possessed by the joint family and which was not included in the prayer for partition. This issue does not appear to have been pressed before the lower Appellate Court and, accordingly, does not find any mention in the impugned judgment and order of the lower appellate court. Even in the memo of appeal filed before the lower appellate court, this particular ground does not find any mention. In the premises, there is no infirmity in the impugned orders of the courts below. The judgments of the Supreme Court in the case of **Kenchegowda** (supra) and of our court in the case of **Govindrao s/o. Gangaramji Ajmire** (supra) have no application to the facts of the present case, since there is no proof that any particular property was left out from the description of the properties for partition. There is, thus, no case here of any partial partition.

7 As for the plea of non-joinder of other family members as necessary parties to the present suit, the trial court held that the Defendants had not adduced any cogent evidence to show that the sisters or the legal heirs of the deceased sisters were necessary parties to the suit. There are no particulars on record to show that any of the Plaintiff's sisters had any share in the suit properties on the basis of the death of their deceased father Balaji after 1956 or that any heirs of the sisters had any share in the suit properties. There are no particulars whatsoever and, as held by the trial court, mere evasive denial in this behalf in the written

statement cannot be of any help to the Defendants. As in the case of partial partition on account of non-inclusion of properties, even this issue does not appear to have been pressed before the lower appellate court and no substantial question of law arises therefrom.

8 The argument under Order 2 Rule 2 of the Code of Civil Procedure is that since the Defendants had earlier filed a suit for perpetual injunction, at that stage the Plaintiff could have filed a counter claim in addition to his written statement and claimed partition and separate possession of his share. The argument needs only to be stated to be rejected. Order 2 Rule 2 concerns with a suit filed by the Plaintiff by omitting a certain relief, which is claimed subsequently in another suit. There is no application of that law to any possible counter claim by the Defendants.

9 Coming now to the capacity of the Plaintiff to succeed to the properties of the family of Balalji not being a biological son of Balaji, learned Counsel for the Appellants appears to be right in his submission that this issue, though raised in the written statement, was not pressed before the trial court. There is no issue framed by the trial court in this behalf; there appears to be no argument advanced; and naturally no decision is to be found on the issue in the decree of the trial court. The memo of appeal filed by the Defendants before the lower appellate court does not disclose that non-framing or non-consideration of this issue was a ground of appeal before the lower appellate court. No substantial question of law arises from this aspect of the matter for the consideration of this court.

10 In the premises, there is no merit in the second appeal. The second appeal is dismissed. No order as to costs.

11 In view of the dismissal of the appeal, the civil application does not survive and the same is also disposed of.

(S.C. GUPTE, J.)