

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

FIRST APPEAL NO.993 OF 1999

Smt.Radhabai Krishna Sawant ..Appellant
V/s.
Smt.Seetabai Ramchandra Sawant & Ors. ..Respondents

Mr.Mohan D. Dhamal for the Appellant.

Ms.Priyanka Thakur for Respondent No.5.

CORAM : M. S. SONAK, J.

DATE : 16 FEBRUARY 2017.

P.C.

1. Heard Mr.M.N. Dhamal for the appellant. Ms.Priyanka Thakur for the respondent No.5.

2. The appellant challenges judgment and decree dated 17-08-1999 made by the City Civil Court at Mumbai decreeing Suit No.4627 of 1983 for partition of the suit property and other consequential reliefs. The appellant also challenges order dated 28-06-1999 made by the City Civil Court, Mumbai, holding that the suit was not barred by law of limitation.

3. The suit in which the impugned decree was made (S.C.

Suit No.4627 of 1983), was instituted by Seetabai Ramchandra Sawant (Respondent No.1), for self and on behalf of the mentally challenged son. The appellant is the original defendant no.1 in the suit.

4. Mr.Dhamal, the learned counsel for the appellant has made the following submissions in support of this appeal.

- a) That the original plaintiff-Seetabai has no right, title or interest in the suit property;
- b) On the basis of the pleadings, material on record, Seetabai's husband Ramchandra was ousted from the suit property several years ago. Therefore, the suit instituted in the year 1983 was clearly barred by limitation;
- c) The original plaintiffs husband Ramchandra had infact instituted Suit No.1078 of 1962 against his brother Bhaskar Laxman Sawant, who is the father-in-law of the appellant. Such suit was dismissed. Therefore, the present suit was barred by principles of res judicata;
- d) Without prejudice, it is submitted that the present suit is barred under Order 22 Rule 9 of the C.P.C.,

since, the same is based on the cause of action in Suit No.1078/1962 instituted by the plaintiffs husband Ramchandra, which, however, stood abated for failure to bring on record the legal representatives of late Shri.Ramchandra Sawant.

5. There is no evidence on record, whether oral or documentary, to prove the case of the plaintiff. From material on record it is established that the plaintiff was not concerned with the suit property whatsoever from last several years. Rather, the suit property is recorded in the name of the appellant or the predecessor in title. Further, it is the appellant and his predecessor in title who have been looking after the suit property. For this reason also, the suit was not required to be decreed.

6. Ms.Priyanka Thakur, the learned counsel for the respondent No.5 states that she does not have the case papers and therefore, she is not in position to make any submissions in this appeal. However, she submits that she has instructions to oppose this appeal and to support the impugned judgment and decree.

7. This appeal stands dismissed as against respondent

Nos.1a, 2a, 2b, 2c, 2d, 2e, 3, 4, 6a, 6b, 6c, 7, 8a and 8b. This dismissal is because these respondents have expired and no steps have been taken to bring on record their legal representatives. The only surviving respondents to this appeal are therefore respondent nos.1 and 5. As noted earlier, respondent no.1 was original plaintiff in the suit.

8. The impugned judgment and decree, appears to have already attained finality as against legal representatives of the aforesaid respondents against whom the appeals stand dismissed. In such a situation, it is quite doubtful whether the appeal can proceed any further only as against respondent nos.1 and 5. However, in the present appeal, this issue is not being held against the appellant and even otherwise, there is no case made out to interfere with the impugned judgment and decree.

9. In the suit, it was the case of the plaintiff that the suit property belonged to Mr.Laxman Dhaku Sawant (Laxman) who died intestate somewhere in the year 1935 leaving behind two sons i.e. Mr.Ramchandra Laxman Sawant and Mr.Bhaskar Laxman Sawant. Mrs.Seetabai Ramchandra Sawant, is the widow of Ramchandra Laxman Sawant. The appellant is the daughter-in-law of Bhaskar

Laxman Sawant. The remaining defendants to the suit also claim through Ramchandra and Bhaskar. On such basis, the plaintiff has applied for a decree of partition and possession of share in the suit property apart from the mesne profit. In the written statement filed by the present appellant, at the outset, objections based upon res judicata and limitation came to be raised. Further, it was denied that Mr.Ramchandra had 50% rights to the suit property. The appellant states that she was not aware whether Mr.Bhaskar Laxman Sawant has deprived his brother of any rights in the suit property and whether Ramchandra Laxman Sawant has any rights in the suit property. Besides, there are averments to the effect that the original plaintiff has no concern with the suit property and the original plaintiff has taken no steps whatsoever in relation to the suit property which has been in the exclusive possession of the appellant. There is also reference made to the documents with regard to payment of rent, municipal assessments, etc., in relation to the suit property by the appellant or her predecessor in title. On such basis, the appellant urges that the Civil Suit be dismissed.

10. The appellant filed an additional written statement, again, raising the issue of res judicata and limitation and also denying to the daughters of Bhaskar, any right in the suit property.

In this additional written statement, it is also stated that the suit property stands transferred in the name of the appellant who is the only tenant in terms of Section 5(11)(c) of the Bombay Rent Control Act, 1947 insofar as the land is concerned. This contention is in relation to the land on which the house structure (Chawl) stands.

11. On the aspect of limitation, it is to be noted that the right to seek partition is a recurring act. The objection based upon limitation was not really the same objection which was raised before the learned Trial Judge in the Suit. In the suit, it was urged that since the previous suit instituted by Ramchandra in the year 1962 stood abated and since, no steps were taken by the present plaintiff to bring herself on record, within a prescribed period of limitation, the present suit also stands barred under the law of limitation. The learned counsel for the appellant in the present appeal, however, contends that in addition to the aforesaid ground, since, the jurisdiction is ousted, which is evident both from oral and documentary evidence, the suit, which is instituted several years after such alleged oust stands barred by law of limitation. It is noted earlier, that the right to seek partition is a recurring right. The pleadings do not suggest any oust as such. No doubt, the original plaintiff might not have been in possession of the suit property.

However, that by itself, does not imply that the original plaintiff was ousted from the suit property. The possession of one co-owner is possession for and on behalf of the remaining co-owner. It is ultimately established that they are indeed, the co-owners. The pleadings in the present case, does not make out a case of any oust as such.

12. The submission based upon failure to take steps consequent to the abatement of the 1962 suit, also do not attract the bar of limitation. In the order dated 28-06-1999, by which, the issue of limitation was answered against the appellant, reliance was placed by the learned Trial Judge upon the decision of the Division Bench of the Patna High Court in the case of ***Dilo V/s. Munshikunj [AIR 1948 Patna-224]***, in which the facts and circumstances of the present case was aptly applicable.

13. In any case, the material on record indicates that Mr. Ramchandra expired on 09-01-1973 and within a period of 12 years from the date of such demise, the suit has been instituted. There is accordingly, no case made out to interfere with the impugned order on the ground that the suit was instituted beyond the period of prescribed limitation. Similarly, in the facts and

circumstances of the present case, it cannot be said that the bar of res judicata was attracted to the suit wherein the impugned decree is made. Admittedly, earlier suit No.1078/1996 instituted by the original plaintiff's husband was never decided on merits but was abated. The decision of the Patna High Court in the case of Dilo V/s Munshi Kunj (Supra) has held that dismissal of a previous suit on account of abatement does not bar a subsequent suit for partition.

14. The contention that the original plaintiff has absolutely no right or concern with the suit property also cannot be upheld considering the pleadings and the evidence on record. In this case, the appellant, in her written statement, never disputed that the suit property originally belonged to Mr.Laxman Dhaku Sawant. Besides, there was no dispute raised to the effect that the said Laxman was survived by his two sons Ramchandra and Bhaskar. The original plaintiff in her deposition has deposed to these facts. In the cross-examination such deposition was never challenged. Even the appellant, in her evidence does not really dispute that the suit property originally belonged to Laxman. However, once, it is established that the suit property belongs to Laxman, and that Ramchandra and Bhaskar are his two sons, there is no necessity of any further oral and documentary evidence to decree the suit for

partition.

15. The original plaintiff in her examination-in-chief stated that the suit property belonged to her mother-in-law Kashibai Laxman Sawant. She has deposed that her husband was Ramchandra and his brother was Bhaskar. She has deposed that her husband has 50% share in the suit property. She has deposed that her father-in-law had purchased the suit property and constructed the house thereon and that the land was purchased from Mr.Wadia. No doubt, the land was purchased from Mr.Wadia but only tenancy rights were acquired. However, that by itself makes no significant reference. In the course of cross-examination, the suggestions put were general. One of the suggestions was that the plaintiff had no share in the suit property or that she was giving false evidence. No specific suggestions were put denying that the suit property belonged to Laxman or that Ramchandra and Bhaskar were not the two sons of the said Laxman. Such suggestions were not rightly put in the course of cross-examination because, even in the written statement, there was no serious challenge to this fact.

16. The appellant, in her deposition, has basically produced on record several documents to indicate that in several orders the

name of the appellant or her husband came to be entered in various public records in relation to the suit property. However, there is no dent to the main cause that the suit property belonged to Laxman and upon his demise devolved upon Ramchandra and Bhaskar. The plaintiff being the wife of Ramchandra claims share through him. The plaintiff, on the other hand, also claims through Bhaskar being his daughter-in-law.

17. The impugned judgment and decree has considered the entire material on record and in its proper perspective. There is no case made out to interfere with the impugned judgment and decree, accordingly, the appeal is dismissed. The interim order, if any, stands vacated.

(M. S. SONAK, J.)