

vks

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

**SECOND APPEAL NO.405 OF 2017
WITH
CIVIL APPLICATION NO.775 OF 2017
IN
SECOND APPEAL NO.405 OF 2017**

ALONG WITH

**SECOND APPEAL NO.404 OF 2017
WITH
CIVIL APPLICATION NO.774 OF 2017
IN
SECOND APPEAL NO.404 OF 2017**

Alka Jeevan Mane and ors ... Appellants.
V/s.

Balasaheb Ambadas Mane
and ors ... Respondents

Mr. Umesh H. Pawar, for the appellants in both the appeals.

Mrs. Anjali Helekar, for respondent No.1 in both the Appeals.

Mr.Shrikant J. Patil, fro respondent Nos. 2, 3 and 5

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 9th JULY, 2018.

P.C. :

1] Heard learned counsels for the appellant and respondents.

2] With consent of both the parties, these appeals are taken

up for for final hearing at the stage of admission itself.

3] These Second Appeals are preferred against the common judgment and decree dated 16.2.2017, passed by District Judge-1, Barshi, in Regular Civil Appeal No.384 of 2014 and Regular Civil Appeal No.390 of 2014.

4] Regular Civil Appeal No.384 of 2014 was preferred by original defendants against the judgment and decree dated 9.1.2014, passed by the Court of Civil Judge Senior Division, Barshi in Regular Civil Suit No.357 of 2012; whereas Regular Civil Appeal No.390 of 2014, was preferred by original plaintiffs against the judgment and decree passed in the said suit.

5] For the sake of convenience, the parties are referred to by their original nomenclature as “plaintiffs” and “defendants”.

6] The plaintiffs have filed the suit for declaration and for injunction, claiming inter alia that the suit property is their ancestral joint family property. In the oral partition, that took place in the year 1990, the suit property was given to the share of the plaintiffs. Since then, they have become the exclusive owners thereof. Respondents, however, started causing obstruction to their possession. Hence they were constrained to file this suit for declaration that they are the owners and in possession of the suit property by virtue of oral partition that took place in the year 1990 and defendants be restrained from causing obstruction to their possession.

7] Defendants resisted the suit denying that plaintiffs are in any way related to them and the suit properties are the ancestral joint family properties. It was contended that the plaintiffs are taking disadvantage of the similarity in the name and on the sole basis thereof claiming ownership and possession over the suit property. It was denied that any such oral partition had taken place in the year 1990. It was denied that the plaintiffs are having any right over the suit property as they are not concerned with the common ancestors. The issue relating to limitation was also raised along with other issues like non joinder of necessary parties etc.

8] The trial Court was, on the basis of evidence adduced before it, pleased to hold that the plaintiffs and defendants are very much related to each other. However, the trial Court held that the plaintiffs had failed to prove the case of oral partition as the date of oral partition was not pleaded nor the names of witnesses, who were allegedly present at the time of oral partition were cited in the plaint. The trial Court, therefore, rejected the prayer for the declaration that the plaintiffs are in possession of property on the basis of oral partition. However, the trial Court, on the appreciation of evidence found that the plaintiffs have proved their possession and hence finding their long standing possession over the suit premises, the trial Court granted them relief of injunction restraining defendants from

causing obstruction or from creating third party interest in the suit properties, without following due process of law. The trial Court also granted liberty to the plaintiffs to file suit for partition. Regarding issue of limitation, the trial Court held that the suit is for injunction and in the clause of “cause of action”, it was specifically stated that just before filing of the suit, obstruction was caused to the possession, hence the suit was filed within the limitation.

9] In view of this partial decree of the suit, both the plaintiffs and defendants preferred separate appeals. The Appellate Court, has allowed the appeal preferred by the plaintiffs and has granted the relief of declaration also along with the relief of injunction which was granted by the trial Court. The Appellate Court, as a result, has dismissed the appeal preferred by the original defendants.

10] This judgment and decree of the Appellate Court is challenged in the present appeals by learned counsel for appellants-the original defendants, by contending that the Appellate Court has not all framed the issue of limitation, though a specific contention to that effect was raised in the written statement and also finding recorded by the trial Court on the said issue, was challenged in the Appeal Memo. Secondly, it is submitted that the Appellate Court has committed an error in setting aside the finding of the trial Court as regards the case of oral partition. Further, it is submitted that there

was no sufficient evidence to prove the relationship between the parties and hence the judgment and decree as passed by the Appellate Court needs to be set aside.

11] Per contra, learned counsel for plaintiffs has supported the said judgment, by submitting that as regards the issue of limitation, no fault can be found in the finding recorded by the trial Court and therefore, even if in the appeal, appellate Court has not framed specific issue to that effect, there is no necessity of either remanding the matter as this Court can very well consider that aspect on the basis of the evidence adduced before the trial Court. Secondly, it is submitted that as regards the relationship between the parties as both the Courts below have properly held the relations between the parties to be proved and in the Second Appeal, this Court cannot interfere in the said finding of fact. In respect of the case of oral partition, it is submitted that there is sufficient evidence brought on record by the plaintiffs by examining two witnesses in whose presence oral partition had taken place. Therefore, in the said finding of fact also, this Court should be slow to interfere..

12] In my considered opinion, the submissions which are advanced at Bar, by learned counsel for both the parties, are themselves sufficient to disclose that no substantial question of law as such is involved in these appeals, except for the contention that the

Appellate Court has not framed the issue of limitation.

13] However, once it is held that it is a suit for injunction, then it follows that the cause of action will arise as and when obstruction is caused by the defendants. The cause of action as mentioned in the plaint is 10.2.1997 and the suit is filed on 24.2.1997. Hence, it has to be held that the suit is not barred by limitation. Hence, merely because the Appellate Court has not framed the said issue, no case is made out, therefore, to remand the matter.

14] As regards the contention raised by the appellant-defendants about the relations between the parties, as stated above both the trial Court and the Appellate Court have concurrently found that the said relationship is proved on record. It can also be proved from the documentary evidence produced on record by the defendants themselves. The relevant document considered by the Appellate Court is namely, property Extract at Exh.135, which clearly shows the name of Bhagwan Appaji, the predecessors of the original plaintiffs to the City Survey record as owner of the property bearing No.798 and said mutation entry is made on 30.3.1870 and the extract is of the year 1914-15. The very case of plaintiffs is that the original owner or ancestor Appaji had two sons by, names, Ganpati and Bhagwan. Ganpati died in the year 1920, leaving behind Laxman, the father of the original defendant Sambhaji; whereas

Bhagwan was survived by original plaintiff Ambadas. The said family had three properties bearing C.T.S.Nos. 796, 798 and 802. Out of that C.T.S.798 and C.T.S. No.802 are already sold long back. Only property that remains is C.T.S. No.796, which is the suit property. It is admitted by defendant that he is residing at Pandharpur; whereas the suit property is situated at Barshi and therefore, it is apparent that respondent-plaintiffs are in possession of the suit property. As two properties have already been sold by the appellant defendant, there is every possibility of the suit property was given to the share of respondent-plaintiffs in the oral partition.

15] It may be true that plaintiff had not stated the exact date when the oral partition took place or the names of witnesses who were present at the time of oral partition, but then the case of oral partition is specifically pleaded in the plaint, coupled with the fact that in the year 1990 itself notice was issued, when the appellant defendant tried to obstruct and create third party rights in the said property. The appellant has not replied to said notice and therefore meeting took place in the village and in that meeting the appellant had given the suit property to the share of the plaintiffs. This oral partition is also proved by the respondent plaintiff by examining two witnesses, namely Viajay Khadsare and Jyotirling Mane. Both of them were present at the time of partition. They are cross examined

any length, but nothing worthwhile is elicited in their cross examination to disbelieve their evidence about their presence at the time of oral partition. In the said oral partition, the appellant had given up his claim over the said property. The Appellate Court has considered this evidence of the witnesses coupled with the other documentary evidence on record and rightly held that the case of oral partition is apparently being proved. Merely on the count that the date and names of witnesses, not stated in the plaint, which is part of the evidence and not the facts which are required to be pleaded, the case of oral partition cannot be disbelieved.

16] In the Second Appeal no perversity is pointed out in the concurrent finding of the fact recorded by the Courts below, so as to interfere therein.

17] Both the Second Appeals, therefore, raise no question of law, far remain substantial question of law.

18] Both the appeals, therefore, stand dismissed.

19] All pending Civil Applications in these Appeals are also disposed off accordingly.

[DR.SHALINI PHANSALKAR-JOSHI, J.]