

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

WRIT PETITION NO. 3712 OF 2018

- 1) Vaijinath s/o Govindrao Shinde
Age: 59 years, Occu: Agriculturist,
- 2) Smt. Sindubai w/o Bhaurao Shinde,
Age: 48 years, Occu: Household,
- 3) Ravi S/o Bhaurao Shinde,
Age: 32 years, Occu: Agriculturist,
- 4) Pandurang s/o Bhaurao Shinde
Age: 27 years, Occu: Agriculturist,

All R/o: Warwanti, Taluka and
District Latur

... Petitioners

[Orig. Defendant Nos.1,
2A, 2C and 2E].

VERSUS

- 1) Sau. Arunadevi w/o Vithalrao Bhosle
Age: 53 years, Occu: Household,
R/o. Save-Wadi, Taluka and
District Latur
- 2) Bhaurao s/o Govindrao Shinde - died
Through Legal Heirs

[Orig. Plaintiff]

- 2-B] Sushma W/o Satish Katale died
Through Legal heirs
- 2-B-1) Somnath s/o Satish Katale
Age: 15 years, Occu: Education,
- 2-B-2) Megha D/o Satish Katale
Age: 13 years, Occu: Education,
- 2-B-3) Swati D/o Satish Katale,
Age: 10 years, Occu: Education,

Respondent Nos. 2-B-1 to 2-B-3
 Under guardian of real father and
 Natural guardian by name
 Satish s/o Ramesh Katale
 Age: 38 years, Occu: Agriculturist,
 2-B-1 to 2-B-3 All R/o: Kumbhari,
 Taluka Renapur, District Latur

2-B-4) Satish S/o Ramesh Kale
 Age: 38 years, Occu: Agriculturist,
 R/o. Kumbhari, Taluka Renapur,
 District Latur

2[D] Jaishree D/o Bhaurao Shinde,
 Age: 28 years, Occu: Household,
 R/o. Warwanti, Taluka and
 District Latur.

3] Smt. Ratnabai W/o Govindrao Shinde
 Age: 69 Years, Occu: Household,
 R/o: Warwanti, Taluka and
 District Latur

[Deleted in view of order below Exh.100]

4] Sow. Kamlabai W/o Venkatrao Katle
 Age: 65 years, Occu: Household,
 R/o. Kumbhari, Taluka Renapur,
 District Latur.

5] Sow. Gangabai w/o Rameshrao Katle
 Age: 49 years, Occu: Household,
 R/o. Kumbhari, Taluka Renapur,
 District Latur.

6] Sow. Pushpa w/o Jalindhar Chobe
 Age: 47 years, Occu: Household,
 R/o: Kandargon, Taluke Paranda,
 District Osmanabad

... **Respondents**
 [Orig. Defendants]

....

Dr. R. R. Deshpande, Advocate h/f Mr. Chaitanya C. Deshpande,
Advocate for petitioners.

Mrs. S. G. Chincholkar, Advocate for respondent No.1.

....

CORAM : R. G. AVACHAT, J.

DATED : 11th SEPTEMBER, 2019

ORAL JUDGMENT :-

1. Heard.
2. Rule. Rule made returnable forthwith, heard finally with the consent of the parties.
3. The challenge in this writ petition is to the order dated 21.01.2017 on application below Exhibit-24 and the order dated 05.10.2017 on application below Exhibit-78 in Special Civil Suit No.26 of 2015 passed by the learned Joint Civil Judge, Senior Division, Latur.
4. The petitioners are the original defendant Nos.1, 2-A, 2-C and 2-E, respectively. In the said suit the defendant Nos. 1 to 4 preferred application Exhibit-24 for rejection of the suit/plaint. The learned Judge seized of the suit was pleased to reject the application. Thereafter, they preferred application Exhibit-78, for review of the said order. The said application was dismissed.

5. Respondent No.1 filed the suit, being Regular Civil Suit No. 561 of 1998, for partition and separate possession of immovable property, which is described in the plaint. The said suit was decreed on 11.08.2014. The defendants/present petitioners preferred Regular Civil Appeal No.15 of 2010 against the judgment and decree passed in Regular Civil Suit No.561 of 1998. The appeal was partly allowed, remanding the matter back to the trial Court on 26.06.2013. The plaintiff - respondent No.1 filed application Exhibit-105 seeking withdrawal of the suit with liberty to file a fresh suit on the same cause of action. The petitioners opposed the said application. The trial Court allowed the said application on 29.12.2014. The plaintiff-respondent No.1 filed fresh suit, being Special Civil Suit No.26 of 2015 in April, 2015.

6. Shri Deshpande, learned counsel for the petitioners would submit that the plaint in the suit (R.C.S. No.561 of 1998) would demonstrate that the said suit was filed on the basis of the cause of action, that accrued at the time of Gudipadwa of the year 1998. Learned counsel invited my attention, specifically to paragraph 5 of the plaint in Regular Civil Suit No. 561 of 1998. According to the learned counsel, when the suit was allowed to be withdrawn with permission to

file a fresh suit on the same cause of action, the plaintiff-respondent No.1 filed the Special Civil Suit 26 of 2015 in the year 2015 i.e. 18 years after the cause of action arose for filing the said suit. According to the learned counsel, the plaint in Special Civil Suit No.26 of 2015 was therefore, liable to be rejected solely on the ground of limitation. According to the learned counsel, the plaintiff-respondent No.1 cannot be permitted to unite any other cause of action with the cause of action on the basis of which a fresh suit was permitted to be filed.

Instead of detaining myself to the submissions advanced by the learned counsel, it would be apposite to appreciate the contention of the learned counsel in the light of facts and circumstances of the case.

7. Respondent No.1 – plaintiff filed the suit (R.C.S.No.561 of 1998) for partition and separate possession of her 1/7th share in the immovable properties, namely agricultural lands bearing *Gat* Nos. 45, 46 and 22 and house property standing thereon. The deceased Govindrao was stated to be a common ancestral property. He was survived by his widow (defendant No.3), two sons (defendant Nos. 1 and 2) and four daughters (plaintiff and defendant Nos. 4 to 6). The cause of action for the said suit was stated to be as – the defendant Nos. 1, 2 and 3 who are in possession and enjoyment of the entire property, had denied her right to claim partition of share of the plaintiff

on last Gudhipadwa of 1998. As such, the suit was filed as the defendants denied the plaintiff's right to claim share in the land left behind by her father.

8. The plaintiff-respondent moved application Exhibit-105 for withdrawal of the suit with permission to file fresh suit on the same cause of action. The suit was sought to be withdrawn on the ground that pending the suit some of the suit properties were alienated/transferred by some of the defendants and that the numbers of the suit lands have been changed into *Gat* numbers. It was, therefore, necessary to give detailed description of the lands in the *Gat* numbers. It was also contended that defendant Nos. 1 and 2 had alienated/transferred major portion of the suit property and created third party interest. The purchasers of the suit property were stated to be necessary parties.

9. The learned Civil Judge, Senior Division, Latur by his order dated 29.12.2014 allowed the respondent-plaintiff's application. The plaintiff was permitted to withdraw the said suit with liberty to file fresh suit on the same cause of action. The plaintiff, then, filed a fresh suit, bearing Special Civil Suit No.26 of 2015. The averments made in paragraph 9 of the plaint are as under:

“9/- Defendants unauthorisedly made the alienations within the inter defendants, in collusion with each other behind the back of the plaintiff and without her consent, therefore those alienations against the interest of plaintiff are required to be declared as illegal, false and not binding on plaintiff’s right, title and interest in the suit properties. In view of the denial of rights of the plaintiff, cause of action arose on Gudi Padwa 1998 and even after withdrawal of the suit, plaintiff has requested the defendants on 30/12/2014 to get her share in the suit properties, at that time all the defendants have out frankly denied the rights of the plaintiff & also disclosed the illegal alienations and various fraudulent activities. Plaintiff thereafter searched the record and she has acknowledged all the illegal activities fraud practiced by the defendants in collusion with each other has been acknowledged on 30/12/2014, therefore cause of action already arose and continued to file the present suit with the permission of this Hon’ble Court. As the cause of action since from the accrual is continuing one, suit of the plaintiff is well within limitation. The cause of action arose on Gudi Padwa 1998 and continued up to the last denial of 30/12/14 being continue, plaintiff has right to sue the defendants for her legal right in the suit properties.”

10. The question is, whether the subsequent suit/plaint is liable to be rejected on the ground of limitation, since the suit having been filed 15 years after the cause of action for filing the earlier suit arose in 1998.

11. Order XXIII of the Code of Civil Procedure speaks for withdrawal and adjustment of suits. Sub-rule 3 and 4 of Order XXIII Rule 1 of the Code of Civil Procedure read as under :

“1.(1)

(2)

(3) Where the Court is satisfied, -

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under sub-rule(1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5)”

12. Rule 2 of Order XXIII of the Code of Civil Procedure states that limitation law not affected by first suit. The rule states that in any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. The cause of action for filing the suit was stated to have been accrued way back in March 1998. The suit has been filed in 2015 i.e. 12 years after the cause of action accrued for filing the suit. The cause of action was stated in the nature of denial of the plaintiff, her right to claim share in the property left behind by her father. The submissions made by the learned counsel may appear to be attractive. I am, however, unable to subscribe to it. In my view, the suit for partition of immovable properties, is governed by Article 65 of the Limitation Act, 1963. For ready reference, Article 65 is reproduced herein below;

	<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
65.	<i>For possession of immovable property or any interest therein based on title.</i> <i>Explanation – For the purposes of this article –</i> <i>(a) Whether the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be falls into possession;</i> <i>(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;</i> <i>(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.</i>	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

13. Possession of a co-owner is presumed to be possession for and on behalf of all the co-owners. Article 110 of the Limitation Act, speaks about a suit by a person excluded from a joint family property. Article 110 of the Limitation Act, 1963, reads thus;

	<i>Description of appeal</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
110	<i>By a person excluded from a joint family property to enforce a right to share therein.</i>	<i>Twelve years</i>	<i>When the exclusion becomes known to the plaintiff.</i>

The question is, whether mere denial of the plaintiff, her right to have share, in the joint family property left behind by her father would be barred by limitation, merely on the ground of the suit having been filed 12 years after denial of the plaintiff/respondent's right to claim partition.

14. Perusal of the plaint in the subsequent suit i.e. Special Civil Suit No.26 of 2015 would indicate that the respondent-plaintiff has claimed that her cause of action for filing the suit for partition and separate possession continued until December 2014.

15. Learned counsel for the petitioners has fairly submitted that right to claim partition is a continuing cause of action, since partition is the incident of jointness. Learned counsel, would, however, submit that the respondent-plaintiff has brought the second suit based on the permission to file the same afresh on the same cause of action which accrued way back in 1998. In other words, the learned counsel want to say that the respondent-plaintiff cannot unite any other cause of action

in the suit that has been filed pursuant to the permission granted to withdraw the suit and file afresh on the same cause of action. No provision of the Code of Civil Procedure or any of the law prohibits uniting in one suit several causes of action. Order II Rule 3 of the Code of Civil Procedure states :

“3. Joinder of causes of action – (1) *Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such cause of action in the same suit.*
(2).....”

16. Perusal of the plaint in both the suits would indicate that the mother of the respondent-plaintiff was alive when the first suit was filed. She passed away pending the said suit. In the subsequent suit the plaintiff has specifically averred that on the demise of the mother, the respondent-plaintiff and aforesaid defendants inherited the share of the deceased mother. The respondent-plaintiff, thus, became entitled to claim partition of the share in the suit property, she has inherited on the demise of her mother. As such, the subsequent suit filed for partition and separate possession cannot be said to have been barred by limitation. The plaint was not liable to be rejected. The trial Court has rightly rejected the application Exhibit-24. Therefore, no interference is called for in the impugned orders.

17. The writ petition thus, fails. The writ petition is therefore, dismissed. Rule stands discharged.

[R. G. AVACHAT, J.]

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