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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL 405 OF 2016
ALONGWITH
CIVIL APPLICATION (ST) NO.3671 OF 2018
IN
SECOND APPEAL NO.405 OF 2016**

Mr. Krishnakumar Narhari Bagul
and Others

.... Appellants

V/s

Shivaji Dattaram Bagul
(Since deceased Through His LRs)

1A) Smt. Kumudini Shivaji Bagul & Ors. Respondents.

Mr. Harshad M. Inamdar for the Appellants.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 6, 2020

P.C.:-

1] Questioning the concurrent findings recorded by the Courts below i.e. 6th Joint Civil Judge, Junior Division, Nashik in Regular Civil Suit No.473 of 1996 which judgment was confirmed in Regular Civil Appeal No. 138 of 2008 by the learned District Judge vide judgment dated 19/9/2015, Appellants/original Plaintiffs have preferred present

Second Appeal on the following questions of law:

“[i] Whether Courts below have committed an error apparent on the face of record in recording finding that Partition Deed-Exhibit-92, an unregistered document, cannot be admitted in evidence to prove a plea of partition?”

“[ii] Whether suit claim was barred by limitation?”

2] Facts necessary for deciding present appeal are as under:-

3] Keru, a common ancestor, was blessed with two sons viz. Narhari and Dattaram. Plaintiffs are successors in interest of Narhari, whereas Defendants are successors of Dattaram. Plaintiffs initiated Regular Civil Suit No. 473 of 1996 alleging that on 25/5/1964, a partition was effected between Narhari and Dattaram. House/structure on the land in City Survey No.200 consisting of three storied building came to the share of Narharhi, whereas land City Survey No. 1809/A, 1810/A and 1810/B was given in partition to the share of Dattaram. It is claimed that though he agreed to handover

possession of ground floor (four rooms) and mezzanine floor (four rooms) of the suit property to Narhari, after effecting partition, he refused, resulting into a suit for mandatory injunction and for possession, not to obstruct possession of the suit property of the Plaintiffs, for declaration that Defendants have no right, title or interest in the suit property and that they are trespassers. Prayer for decree of mesne profit was also made.

4] The suit claim was resisted by Respondents/Defendants by filing Written Statement-Exhibit-52 wherein claim for partition was denied, apart from defence that the suit claim being barred by limitation, as the suit was preferred after a period of 35 years. It is also claimed that theory of partition was not established.

5] Considering rival pleadings, Trial Court framed issues and recorded findings which read as under:-

<u>Sr No.</u>	<u>Issues</u>	<u>Findings</u>
1)	Does plaintiff prove that suit property received by him in partition ?	In the affirmative
2)	Does he prove alleged obstruction caused by defendant to his possession?	Redundant.

3)	Does he prove that defendant Nos 7 and 8 are trespassers of suit property?	Redundant.
4)	Does he prove that defendant Nos.1 to 8 took illegal possession of suit property?	In the Negative.
4-a)	Whether the suit is within limitation?	In the Negative.
4-b)	Whether the suit is properly valued and proper court fees is paid?	In the Negative.
4-c)	Whether the partition-deed dated 25/05/1964 becomes null and void and unexecutable?	In the Negative
4-d)	Whether the suit is barred by principle of estoppel?	In the Negative.
4-e)	Whether the defendant has become the owner by way of adverse possession?	In the Negative.
5)	Is Plaintiff entitled to reliefs sought?	No.
6)	What order and decree?	Suit is dismissed with cost of Rs 5,000/- to defendant No.1 to 6.

6] In support of the suit claim, Appellants/Plaintiffs have examined Plaintiff No.1 i.e. Krishnakumar Bagul (P.W.1) at Exhibit-89 and have produced on record documentary evidence in the form of property card of City Survey No.200, plan of the suit property, Partition Deed dated 25/5/1964 and voluminous documentary evidence. Defendants examined D.W.1 – Suresh Bagul at Exhibit-227 and D.W. 2 – Manjusha Ghate at Exhibit-232. Defendants also produced some

documentary evidence. In this background, claim of the Appellants/Plaintiffs on the questions of law which are sought to be agitated and which are reproduced hereinabove, needs to be appreciated.

7] Exhibit-92 is a Partition Deed which is admittedly an unregistered document. This Partition Deed is claimed to have been executed on 25/5/1964. The said document, if tested in the light of evidence of Plaintiffs' witness i.e. P.W.1 at Exhibit-89, he has deposed that Dattaram i.e. predecessor of Defendants refused to handover possession of portion of the property.

8] Section 17 of the Registration Act contemplates that unregistered Partition Deed cannot be read in evidence. However, such unregistered document can be used for collateral purpose. Appellants in support of aforesaid contention have rightly drawn attention of this Court to the law laid down by the Apex Court in the matter of *Siromani vs. Hemkumar and others*¹ Based on the judgment of Apex Court in the matter of *Darshan Singh vs. Samsher Singh*²,

1 AIR 1968 SC 1299

2 AIR 1988 SC 881

Appellants contended that such unregistered document i.e. Partition Deed-Exhibit-92 can be used for limited purpose of establishing a severance in status in pursuance of the original intention to divide.

9] Though Appellants have produced Exhibit-95 i.e. Application dated 23/4/1966 preferred by Narhari to the City Survey Officer in respect of deletion of name of Dattaram from from City Survey No.200 and deletion of Narhari's name from the record of rights in respect of city Survey Nos. 1809, 1810 and 1810A, fact remains that Dattaram, as is reflected in property card register i.e. Exhibit-143, in regard to City Survey No. 1809B has created third party interest in favour of one Tehumal Sindhi. Similar transactions in regard to other two properties of Dattaram have been noticed vide Sale Deeds at Exhibits 209 and 210. Apart from above, Plaintiffs have admitted that suit was filed by Taibai wife of Gotiram i.e. other Branch of Keru who is a grandfather of Plaintiffs in relation to City Survey Nos.1809 and 1810 which was compromised and land fallen to the share of Dattaram i.e. Survey Nos. 1809, 1810 were agreed to be retained by Taibai during her life time. Taibai bequeathed the said property in favour of Kantabai Dhangar. The said Kantabai became absolute

owner of the property as is reflected in the lower Appellate Court's judgment under challenge.

10] Fact remains that at no point of time any suit was filed for recovery of possession by Narhari who died on 8/3/1994. As such, even if partition was effected between Narhari and Dattaram as reflected in Exhibit-92, same was never acted upon and it was without any legal support. Lower Appellate Court while dealing with the said issue has drawn support from the provisions of Section 20 of the Indian Contract Act, 1872 which reads as under:-

“20. Agreement void where both parties are under mistake as to matter of fact.- Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.- An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.”

Since partition is termed to be a contract between the parties and such contract is entered into in the form of agreement under mistake as to

the matter of fact, it becomes void.

11] As such, findings recorded on the issue of partition are based on the legal principle which does not warrant any interference. As far as issue of limitation is concerned, Plaintiffs in their evidence have relied upon a Deed of Partition-Exhibit-92 so as to establish their case in support of the suit claim. Partition Deed was claimed to have been executed on 25/5/1964. It was the claim of Defendants that if suit is based on title, same is governed by Article 65 of the Limitation Act, 1963. The claim of Defendants is that they are in continuous possession of the suit property uninterruptedly. Article 65 provides for limitation of 12 years.

12] In the aforesaid backdrop, if we appreciate evidence of Plaintiffs and that of Defendants, P.W. 1 in his evidence at Exhibit-89 has deposed that Dattaram, after a lapse of about six months from the date of partition, has refused to handover possession of portion of the property to Narhari. As such, it is quite clear that Dattaram, as a successor of Defendants, continued to be in possession of the property since then. In the wake of above, fact remains that suit claim is

rightly observed to be barred by limitation.

13] In the aforesaid background, no interference is called for in the concurrent findings recorded by the Courts below. As such second appeal fails and same stands dismissed. As a consequence, pending Civil Applications, if any, stand disposed of.

(NITIN W. SAMBRE, J.)