

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.315 OF 2021

SARDALKHAN S/O NAJARKHAN
VERSUS
CHOTEKHAN S/O NAJAR KHAN AND OTHERS

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Advocate for Appellant : Mr. N. K. Kakade i/b Mr. A. N. Kakade
Advocate for Respondents No.1 to 5 : Mr. A. S. Deshmukh

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WITH
CIVIL APPLICATION NO.7847 OF 2021
IN SA/315/2021

WITH
CIVIL APPLICATION NO.7849 OF 2021
IN SA/315/2021

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 11-08-2021.

ORDER :

1. Present appeal has been filed by original defendant No.1 challenging the concurrent Judgment and findings.
2. Present respondents No.1 to 5 are the original plaintiffs who had filed Regular Civil Suit No.53 of 2011, before Civil Judge Junior Division, Jintur, District Parbhani, for partition and separate possession. The said suit came to be decreed on 01-09-2014. The present appellant/original defendant No.1 challenged the said decree

before First Appellate court by filing Regular Civil appeal No.130 of 2014. The said appeal was heard by learned District Judge-4, Parbhani, and partly allowed on 05-02-2020. The learned Trial Judge had declared that the plaintiffs No.1 to 4 and defendants No.1 and 2 are having $1/6^{\text{th}}$ share in the suit property in the share which was allotted to their father Najarkhan. It was also declared that the plaintiff No.5 and defendant No.3 are having $1/12^{\text{th}}$ share. The First Appellate Court modified it and held that plaintiffs No.1 to 4 and defendant No.1 and 2 are having $14/104^{\text{th}}$ share each, plaintiff No.5 is having $7/104^{\text{th}}$, whereas defendant No.3 is having $11/104^{\text{th}}$ share out of $1/5^{\text{th}}$ share of Najarkhan. This was the modification. Hence, defendant No.1 is before this Court in Second Appeal.

3. Heard learned Advocate Mr. N. K. Kakade instructed by learned Advocate Mr. A. N. Kakade for appellant and learned Advocate Mr. A. S. Deshmukh for respondents No.1 to 5. In order to cut short, it is stated that both of them have made submissions in support of their respective contentions.

4. The relationship between the parties is not denied. So also it is not denied that the suit property was originally belonging to one deceased Sharifkhan Pathan. After the demise of Sharifkhan

Pathan, the property was partitioned amongst his five sons. One of whom was Najarkhan who was the father of the plaintiff and defendants. It is also not disputed that share of Najarkhan was recorded in the name of defendant No.1 as on the date of that partition Najarkhan had already expired. It is also almost not disputed especially by the present appellant that plaintiff and defendants have share in the suit property, however, he is coming with a case that they have relinquished their shares in favour of defendant No.1 as he had given consideration to them. If we consider the record then it can be seen that there is no proof about payment of consideration and execution of relinquishment deed which would then be compulsory.

5. Now the learned Advocate for the appellant is harping upon the fact that the point of limitation has not been considered properly by both the Courts below. In fact, it ought to have been held that the suit is beyond the period of limitation. He is also stating that though the document which was produced showing relinquishment was on valid stamp paper of Rs.100/- but sine it was not registered, it has been not considered by both the Courts below. The Muslim Personal Law acknowledges even oral relinquishment and, therefore,

registration of the document ought not to have been insisted. According to him these are the two important substantial questions of law. He also submits that if partition would be effected then it would be in very small pieces and it would be then against the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The decree would be non executable and, therefore, such decree ought not to have been passed. Coming back to the point of relinquishment deed even if we consider that Muslim Personal Law gives liberty to relinquish the share orally, yet there is no proper evidence for the same adduced by the present defendant. The provisions of Indian Registration Act under Section 17 have been rightly considered here.

6. As regards the point of limitation is concerned, it was tried to be contended that in respect of Muslim Succession Act the fixed share would devolve on the heir on the demise of the original owner. The shares would devolve on the heirs as tenant in common and the concept of joint cultivation cannot be imported and, therefore, the holding of one of the heir cannot be said to be holding for another share holder. The suit would be then barred by limitation. It is to be noted that a specific issue was framed by both the Courts below

in respect of limitation. The learned First Appellate Court has considered that the starting point would be when the mutation entry was recorded in the name of defendant No.1 on 07-06-2011 it would start and not prior to that. The First Appellate Court has also taken note of the deposition of the plaintiff and has held that the cause of action arose from 08-06-2011. There is no necessity to deviate from the same as it is not the case of defendant No.1 that since 09-01-2002 he was holding the said property adversely to the share and interest of plaintiff and other defendants. Unless the adverse title is claimed, there cannot be cause of action or unless refusal is there to carve out the share, cause of action will not be there and, therefore, the suit was definitely within limitation.

7. Thirdly, the point that has been raised as regards the Bombay Prevention of Fragmentation and Consolidation of Holdings Act is concerned, the Collector to whom the precept would be sent has every power under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act itself as well as Partition Act to effect the partition, and if it is leading to small pieces then what course of action is available to that authority has already been prescribed in the statute. Therefore, on that point the right of the plaintiff to get

his share separated cannot be denied. Implementation of the decree would take as per the provisions of law. Hence, no substantial question of law as contemplated under Section 100 of the Code of Civil Procedure are arising in his case requiring admission of the second appeal. Hence, the second appeal stands rejected. Pending civil applications stand disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-