

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**SECOND APPEAL NO.235 OF 2020
WITH
CIVIL APPLICATION NO.4440 OF 2020
IN SA/235/2020**

SURESH GANGADHAR DHAPTKAR
DECEASED THROUGH HIS HEIRS
VERSUS
GURUPRASAD CHANGDEO DHAPATKAR

.....
Advocate for Appellant : Mr. L. V. Sangeet
Advocate for Respondent : Mr. S. S. Chapalgaonkar
.....

**CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 22-11-2021.**

ORDER :

1. Present appeal has been filed by the original defendants to challenge the Judgment and decree passed by learned District Judge-1, Kopargaon, District Ahmednagar in Regular Civil Appeal No.65 of 2014 dated 16-10-2019, thereby allowing the appeal filed by the present respondent/original plaintiff and decreeing the suit.
2. The present respondent/original plaintiff had filed Regular Civil Suit No.414 of 2010 before Joint Civil Judge, Junior Division, Rahata, District Ahmednagar, for partition and separate possession. It was dismissed on 28-07-2014 and as aforesaid learned First Appellate Court reversed the said finding.

3. Heard learned Advocate Mr. L. V. Sangeet for appellants and learned Advocate Mr. S. S. Chapalgaonkar for respondent.

4. It has been vehemently submitted on behalf of the appellants that the learned First Appellate Court has taken a perverse view and allowed the appeal. The learned Trial Judge had rightly decided the point of limitation as well as non-joinder of necessary parties, however, those findings have been reversed. The relationship between the parties is not denied, however, the fact is that the father of plaintiff and his brother were residing separately since 1970. They were carrying out their business activities separately. Father of plaintiff expired about 40 years ago and since then uncle of plaintiff and his heirs had never given income from the suit property to the plaintiff or to his mother who had also expired about seven years ago. When at any earlier point of time prior to the suit filed on 26-08-2010, there was any attempt by the plaintiff to claim share. It amounts to the ouster and, therefore, the suit was not within limitation. So also though it was contended by the plaintiff that defendant Suresh is having sisters, they have not been made as party. However, the learned First Appellate court has wrongly held that the Gangadhar's branch then would be represented by Suresh

and, therefore, the suit cannot be said to be hit by principles of non-joinder of necessary party. Substantial questions of law are therefore arising in this case requiring admission of the second appeal.

5. Per contra, the learned Advocate for the respondent supported the reasons given by the First Appellate Court and submits that no substantial questions of law are arising in this case.

6. At the outset, it is to be noted that the learned Trial Judge had concluded that the suit properties are the joint family properties of the plaintiff and the defendant. In fact this fact is also admitted to the defendant. It was also held by the learned Trial Judge that the plaintiff has share in the suit property. However, the suit was dismissed on two counts i.e. one, on the point of limitation and another non-joinder of necessary parties. The present appellants had not challenged the findings to issue No.1 and 2 given by the learned Trial Judge before the First Appellate Court either by way of cross-appeal or cross-objection. Even the First Appellate Court then concluded that the plaintiff is entitled to get partition and separate possession in view of the fact that the suit property is the joint Hindu family property.

7. In view of the above fact, the only two points those required consideration are the point of limitation and secondly non-joinder of necessary party. It is, therefore, required to be seen as to whether on these points whether the appellants would be able to show that it is giving rise to substantial question of law and/or the finding given by the First Appellate Court is either perverse or illegal.

8. As regards the point of limitation is concerned, definitely taking into consideration the facts of the case, provisions of Article 110 of the Limitation Act would be applicable. The period for filing the suit would be 12 years and the time would began to run when the exclusion becomes known to the plaintiff. The paper book that has been made available would show that in the pleadings though the plaintiff contended that till recently he was getting income from the suit property, yet in his cross-examination he has stated that his father was residing at a different place in connection with his service since 1960. He himself is also residing there. He admitted that his father Changdeo and uncle Gangadhar were residing separately since 1970 and were carrying out their businesses separately. Merely because one brother goes out of the village or city in connection with his service will not allowed us to infer that he is

severed from the family. Further, he has also admitted that in the year 1985 his uncle sold Grampancahyat property No.248/2 to one Dnyandeo Maruti Rahane and Gangadhar had not given share from that property to Changdeo or the plaintiff. That transaction was not a disputed by Changdeo or the plaintiff. Here, it can also be seen that merely because in respect of one property if the other member of the joint family does not take any objection, that does not mean that he has given up his share. Further, the question was asked that from that property no share was given. The suit property is definitely different. He further admitted that after his father expired, neither Gangadhar nor the defendants had given income from the suit property to plaintiff's mother or to the plaintiff. With respect to the learned Advocate for the appellant this will not amount to exclusion as contemplated under Article 110 of the Limitation Act because the further rider is that the said exclusion should become known to the plaintiff. No specific question to that effect was asked to the plaintiff. We cannot just rely upon the plaintiff's evidence in that respect. When the exclusion is claimed by the defendant, the defendant should show that by his acts / their acts that they had made it known to the plaintiff that they are excluding the member of the joint family. In the cross-examination of the defendant's witness

Ganesh he has claimed ignorance as to whether Suresh and Gangadhar had not given income to Changdeo or Guruprasad. He admits that since Gangadhar was elder, the suit properties were in his name. Under such circumstances, when the full opportunity was there to the defendants to prove the exclusion of the plaintiff, they have not adduced any evidence. It is a fact that the suit properties are presently in possession of the defendants, however, since they had not excluded the plaintiff by making it known to the plaintiff the suit that is filed was within limitation. The First Appellate Court has taken a correct view.

9. As regards the non-joinder of necessary party is concerned, the cross-examination of DW 1 Ganesh is important. He states that his paternal aunts (sisters of Suresh) Latabai, Mandabai and Rohini have given relinquishment deed, and in view of the same, mutation entry No.4367 has been taken. Under such circumstances, they cannot be said to be the necessary party when in view of the said relinquishment deed the defendants are enjoying and claiming that it is their exclusive property, now they cannot say that since the sisters are not made party, the suit is bad. Further, the first Appellate Court has also taken proper note that since Suresh was

representing the branch of Gangadhar, he was also representing the sisters if at all they have any right and, therefore, the suit was not bad for non-joinder of necessary parties.

10. No substantial question of law as contemplated under Section 100 of the Code of Civil Procedure is arising in this case. The second appeal deserves to be dismissed at the threshold, accordingly it is dismissed. Pending civil application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-