

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Second Appeal No. 300 of 2018

Ajabrao S/o Rama Neware and others,

Versus

Smt. Parvatabai W/o Kundlikrao Choudhary and others.

Office Notes, Office Memoranda of
Order

Court's or Judge's

Coram, appearances, Court's Orders
or directions and Registrar's order

Shri P.K. Mishra, Advocate for the appellants

**CORAM : ANIL S. KILOR, J.
DATED : 01 DECEMBER 2021**

This appeal has arisen out of a judgment and decree dated 24/07/2016, maintaining the judgment and decree dated 14/10/2009 passed by the Civil Judge, Junior Division, Kamptee in Regular Civil Suit No. 120/2004 decreeing the suit for declaration, permanent injunction, partition and separate possession.

2. Brief facts of the present case are as follows:
(The parties are referred to as per their status before the trial Court.)

3. The plaintiffs claimed to be the daughters of Gulabrao Rama Neware. Rama Kondu Neware, the father of Gulabrao Neware and the defendants, had purchased land Survey No.229/1 from Mahadeo Maroti vide sale-deed, dated 06/08/1968. Rama Neware died intestate. The suit land was inherited by the defendants and Gulabrao Neware. The defendants deleted the name of Gulabrao Neware from the revenue record. The plaintiffs are the daughters of Gulabrao and they reliably learnt that the defendants had agreed to sell the suit land @ Rs.3,00,000/- per acre to one Mr. Shah. It is contended that the plaintiffs have right in the suit property, being the legal heirs of deceased Gulabrao Neware. During pendency of the suit, the suit land bearing Survey No.229/1 is further divided into Khasra Nos.383/1, 383/2 and 383/3. The plaintiffs had claimed 1/4th share in the suit property and also had prayed for possession of the suit land. The plaintiffs had also prayed for mesne profit and for perpetual injunction restraining the defendants from disposing of the suit property.

4. The defendants had filed their Written Statement [Exh.11] and resisted the claim of the plaintiffs contending that the suit has been filed

suppressing the material facts. It is contended that Gulabrao, after his marriage in the year 1964, started residing with his father-in-law viz. Balaji Raut, as Ghar Jamai at Zullar, Tahsil Mouda, District Nagpur. Gulabrao did not reside with his father and brothers. The suit land was purchased by the defendants out of their own income in the name of deceased Rama. The suit land is partitioned between the defendants. The deceased Gulabrao had voluntarily relinquished his share in Survey No.229/1 i.e. suit land. It is contended that the plaintiffs had sold out Survey No. 63/1, 63/2, P.H. No.25, situated at Zullar, Tahsil Mouda, District Nagpur, to one Ravindra Devidas Gupta. The plaintiffs had share in the said property. It is contended that during life time of Gulabrao, oral partition had taken place between the defendants and deceased Gulabrao. It is contended that the suit barred by the Law of Limitation.

5. The learned trial Court after considering the oral as well as documentary evidence decreed the suit and thereby declared that the plaintiffs are entitled to 1/4th share in the suit property. The defendants feeling aggrieved by the same carried an appeal against judgment and decree of the trial Court dated

14/10/2009 which came to be dismissed vide judgment and decree dated 21/07/2016 passed in Regular Civil Appeal No. 584/2009, by the learned Principal District and Sessions Judge, Nagpur, the same is under challenge in this appeal.

6. I have heard the learned Counsel for the appellants. None for the respondents though served.

7. This Court has framed the Substantial questions of law on 04/07/2018 and thereafter on 18/09/2019 which are as follows:

“Whether the evidence on record led by the defendant is sufficient to conclude that Gulabrao had gone out of the joint family in the year 1964 so as to disentitle the plaintiffs for having share in the suit property?”

“Whether the suit filed by the original plaintiff was within limitation?”

8. The learned Counsel for the appellants states that in this matter Gulabrao has relinquished his right in the suit property as he left the house and started residing at his in-laws' house from the year 1964. Whereas the suit property was purchased in the year 1968. It is submitted that Gulabrao had relinquished his rights in the suit property orally and his conduct

supports the case of the defendants, that he was ousted from the joint Hindu family property.

9. It is further submitted that there was a partition and in the said partition, except Gulabrao, the other brothers have received 1/3rd share each and accordingly mutation entries were carried out. However, Gulabrao never objected to the same. According to him the said fact also supports the case of the defendants that Gulabrao had relinquished his right in the property. It is submitted that both the Courts below have therefore committed error in not considering the case of the defendants that Gulabrao had gone out of the joint family in the year 1964 and therefore plaintiffs are not entitled to claim his share in the suit property.

10. Shri Mishra, learned Counsel for the appellants further points out Article 110 of Schedule-I of the Limitation Act to submit on the additional substantial question of law, that the 12 years' period starts to run from the date when the exclusion becomes known to the plaintiffs. He submits that the exclusion had taken place in the year 1964 and the suit was filed in the year 2004, admittedly not within 12 years. Thus he submits that the suit was barred by limitation.

11. To consider the contentions raised by the appellants, I have gone through the record and also perused the judgments and decree of both the Courts below.

12. Both the Courts below have held that the defendants have not established their case that the suit property was purchased by them from their own income, in the name of father. On the contrary, the learned Trial Court has rightly observed that the defendants' pleadings are self contradictory as at one breathe the defendants are saying that the suit property was purchased by them out of their own income in the name of their father Rama Neware and at the other breathe they contained that deceased Gulabrao has given up his share and he had received land bearing survey nos. 63/1, 63/2 from his father-in-law. Both the Courts below did not accept the story put forth by the defendants that the suit property was purchased by them from their own income.

13. So far as the story of the defendants that Gulabrao had relinquished his share orally, both the Courts have concurrently held that the defendants have failed to establish the said fact by cogent and sufficient evidence. The defendants have failed to prove that

Gulabrao had relinquished his share in the suit property. Moreover, even the defendants have failed to prove and establish partition as they have admitted that there was no written partition. As far as oral partition is concerned, sufficient and cogent evidence was not produced except mutation entries which are not sufficient to establish title in favour of any person as the mutation entries are made for fiscal purposes.

14. Shri Mishra learned Counsel for the appellants has placed heavy reliance upon the judgment of the Hon'ble Supreme Court in the case of Subraya M.N. Vs. Vitthal M.N. and others reported in (2016) 8 SCC 705, and submits that the relinquishment is permissible under the family arrangement by one of the co-sharers.

15. After going through the above referred judgment, the facts of the said judgment are totally different and in the said matter the money was received from the defendant in view of relinquishing their interest in family property in question. Moreover, in this matter the appellants have failed to prove such relinquishment. In that view of the matter, the said judgment is not applicable to the present case.

16. As regards the point of limitation as both the Courts have rightly held that the defendants have failed to establish the fact that Gulabrao had gone out of the joint family in the year 1964. In that view of the matter, Article 110 of Schedule-I of the Limitation Act will not apply to this case.

17. Accordingly, I have answered both the substantial questions of law in the above terms.

18. Having held that the suit was within limitation and the defendants failed to prove that Gulabrao was excluded from the joint family, I do not find any merit in the present appeal. Accordingly, the same is dismissed. No order as to costs.

[ANIL S. KILOR, J.]