

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

**SECOND APPEAL NO.55 OF 2020
WITH
CIVIL APPLICATION NO.1532 OF 2020
IN
SECOND APPEAL NO.55 OF 2020**

Sudhakar s/o Laxmikant Deshmukh,
Age : 67 years, Occu: Pensioner
R/o. Ardhapur, Taluka : Ardhapur,
District Nanded.

... **APPELLANT**

(Org. Defendant No.1/Appellant in R.C.A.)

VERSUS

1. Ashok s/o. Govindrao Deshmukh,
Age : 67 years, Occ: Agriculture,
R/o. Ardhapur, at and Post:
Waman Nagar, Taroda (Khurd),
Taluka and District Nanded.

2. The Municipal Council, Ardhapur,
through its Chief Officer,
Ardhapur, Taluka Ardhapur,
District Nanded.

... **RESPONDENTS**

(No.1-Orig Plaintiff/Resp. No.1 in
R.C.A. and No.2- Org. defendant
No.2/Respondent No.2 in R.C.A.)

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Advocate for Appellant : Mr. Rajendra S. Deshmukh, Senior advocate i/b.

Mr. Devang R. Deshmukh

Advocate for Respondent No.1 : Mr. S.V. Chandole

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CORAM : MANGESH S. PATIL, J.

DATE : 28.01.2022

PER COURT :

Heard the learned Senior advocate Mr. Rajendra S. Deshmukh
for the appellant and learned advocate Mr. S.V. Chandole for the respondent
No.1.

2. The respondent No.1 is the original plaintiff who filed civil suit for possession of the suit property with a declaration of his title. He described the suit property as House No.1217 corresponding to C.T.S. No.463. According to him it was his ancestral property. His father Govindrao and one Renukadasrao were the joint owners and in a partition the suit property was allotted to his father Govindrao and after his demise it was mutated in his name and he was enjoying exclusive possession since the year 1984 and was paying taxes. He then averred that house property bearing House No.1216 corresponding to C.T.S. No.464 is adjacent to the suit property from west and was owned by Gopinath Deshmukh. Neither Gopinath Deshmukh nor the appellant, who is the defendant No.1, had any concern with the suit property. He then averred that when he inquired with the respondent No.2 Municipal Council regarding Form 8 assessment record of the suit property it was found that name of the appellant was mutated in respect of the suit property on the basis of some gift deed. Hence the suit.

3. The appellant contested the suit by filing a written statement contending that the suit property was nothing but a part and parcel of property bearing House No.1216. The suit property is being used to access property bearing House No.1216 and it is one and the same property. Govind Deshmukh was its exclusive owner who executed a gift deed in his favour on 05.09.1990. The respondent No.1 has no concern with the suit property.

4. The trial court framed necessary issues including the issue regarding limitation and decreed the suit partly. It did not grant declaration but granted the relief of possession based on title.

5. The appellant challenged the judgment and decree before the appellate court. By the judgment and order under challenge the appeal was dismissed. Hence this Second Appeal.

6. The learned Senior advocate Mr. Deshmukh would vehemently submit that the suit essentially was one for declaration of title and the possession was being claimed only as an ancillary relief. Consequently, it was governed by Article 58 from the Scheduled I of the Limitation Act, 1963 and the suit was hopelessly barred since it was not filed within three years from the date when the right to sue first accrued to the respondent No.1. He would submit that the trial court misdirected itself by holding that Article 58 was not applicable and treating the suit to be governed by Article 65. He would then submit that the appellate court even did not independently examine this point much less by framing appropriate point for determination. Therefore a substantial question touching this aspect arises for determination by this Court.

7. Mr. Deshmukh would then submit that though the respondent No.1 is claiming possession he alone is not the exclusive owner of the suit property. He admitted that it is his ancestral property and during cross-examination also admitted that he has got brothers and sisters. He alone

could not have maintained the suit in the absence of his brothers and sisters. The trial court did not consider this plea meticulously and simply brushed it aside by saying that it was merely an irregularity. The appellate court has also fallen in the same error. Therefore a substantial question of law regarding non-joinder of necessary parties namely the brothers and sisters of the respondent No.1 arises for consideration in this Second Appeal.

8. Per contra, the learned advocate Mr. Chandole for the respondent No.1 would submit that this is a second appeal wherein the appellant is challenging the concurrent finding of facts. In view of the provision of Section 100 of the Code of Civil Procedure this Court cannot interfere in such concurrent findings. The conclusion arrived at by the courts below are based on plausible appreciation of the evidence on the record. There is no gross error or infirmity in appreciation of evidence without which, no fresh scrutiny of facts can take place at this stage.

9. The learned advocate Mr. Chandole would further submit that there was no specific and precise pleading in the written statement of the appellant regarding non-joinder of necessary parties and in fact, that was the reason why no issue in that respect was required to be framed by the trial court. Still, the trial court has considered the submissions and has recorded a finding on merits as well. It has rightly considered the fact that the respondent No.1 alone could have maintained the suit for and on behalf of all his brothers and sisters and there was no conflict of interest. He would further submit that this reasoning of the trial court has also been

found favour with the appellate court for the self same reasons.

10. As far as the aspect of limitation is concerned, Mr. Chandole would submit that trial court rightly held that the suit was governed by Article 65 and not by Article 58 of the Limitation Act. He would therefore submit that no error was committed by the trial court in holding the suit to be within limitation.

11. Mr. Chandole would submit that by referring to paragraph No.31 of the appellate court judgment that the issue regarding limitation was not at all agitated before the appellate court.

12. I have carefully considered the rival submissions and perused the papers. It is trite that Section 100 of the Code of Civil Procedure puts fetters on the powers of this Court. The questions of fact can seldom be gone into and decided at the second appellate stage more so, when there are concurrent findings of the court below which are the fact finding courts. Obviously, if there is gross error or perversity in appreciating the evidence by the courts below, even this court in exercise of power under Section 100 can in an appropriate case deal with such disputed questions of fact.

13. Bearing in mind the above proposition, perhaps rightly so, the learned Senior advocate Mr. Deshmukh does not make any submission so far as the question of title decided by the courts below in favour of the respondent No.1.

14. Besides, the reasoning given by the courts below in respect of title does not suffer from any infirmity much less can be called as perverse

or arbitrary. There was evidence in the form of property card of the suit property apart from the tax receipts showing the respondent No.1 to have deposited the property tax consistently over a period of time. As against this, though the appellant was putting forth a contrary claim to the title by contending that the suit property was part and parcel of property owned by Gopinath, his predecessor adjoining to it, no evidence was led firstly regarding title of Gopinath and secondly in respect of the alleged gift deed executed by Gopinath in his favour. The trial court as also the appellate court rightly considered the absence of such registered deed of gift as the basis to refute the claim of the appellant and upheld that of the respondent No.1. Therefore so far as this factual dispute is concerned, I find no sufficient and cogent reason for this Court to undertake any further scrutiny in view of the limitation on its powers.

15. So far as non-joinder of necessary parties is concerned, both the courts below have specifically mentioned that no such issue was ever raised by the appellant in his written statement, albeit, they have considered it.

16. Once it is found that the respondent No.1 is claiming possession on the basis of his title to the suit property, even if it is a matter of evidence now that he has brothers and sisters, the appellant being a third party, it would not be appropriate for him to raise any such issue. If at all the respondent No.1 succeeds in getting a decree, it will have to be assumed that he is securing the property for the benefit of all the co-owners. It is in this sense, I find no error or infirmity in the observations and conclusions of

the two courts below in holding that presence of brothers and sisters of the respondent No.1 was not necessary for just decision of the suit and it was merely an irregularity.

17. It is true that the respondent No.1 has not been coming with any such clear pleading that he was filing the suit for and on behalf of all the other co-owners. However, to my mind, absence of such pleading is inconsequential. Whether a person is a necessary or merely a proper party would depend upon the fact as to if an effective decree can be passed even in his absence. Applying such a parameter one can easily conclude that the suit could have been decreed even in the absence of the brothers and sisters of the respondent No.1 even if it is assumed that they are the co-owners of the suit property. No error, therefore, is committed by the courts below in this respect. No substantial question of law arises in this regard.

18. As regards the question of limitation, though it appears that the respondent No.1 claimed declaration and possession of his ownership, it was his suit essentially for possession. Merely because he would be entitled to claim possession only if it was established that he was the owner, it cannot be said that the relief of declaration was the main relief and the relief of possession was merely ancillary. Going by the pleadings and the aforementioned facts and circumstances, the respondent No.1 was bound to succeed even on the failure of the appellant to establish his title to the suit property. Besides there was ample evidence before the courts below to demonstrate that the title vested in the respondent No.1. It is precisely for

this reason, the trial court merely allowed the suit partly. Conspicuously in paragraph Nos.33 to 36, the trial court has specifically assigned the reasons, and rightly so, that the respondent No.1 having admitted that the suit property was an ancestral property and also the fact of he having six brothers and five sisters, he was not entitled to any declaration about his exclusive ownership, a relief contemplated under Section 34 of the Specific Relief Act, 1963.

19. If such is the state of affairs, as has been rightly pointed out by the trial court, even if the issue has not been considered on merit by the appellate court, the suit cannot be said to be governed by Article 58 of the Limitation Act and would be governed by Article 65. In view of such a conclusion, even no substantial question of law touching the aspect of limitation arises for determination of this Court.

20. Resultantly, no substantial question of law arises for determination of this Court.

21. The Second Appeal is dismissed *in limine*.

22. The pending civil application is disposed of.

(MANGESH S. PATIL, J.)