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

936 SECOND APPEAL NO.832 OF 2018

Bhausahab Trimbakrao Deshmukh (Deceased)
LRs Vijaysing and Others

.. Appellants

Versus

Babanrao Kisanrao Deshmukh (Deceased)
LRs Satish LRs Swati and Others

..Respondents

...

Advocate for Appellants : Mr. Vinayak Sudhakar Bedre
Advocate for Respondent Nos.1A to 1C, 2, 3, 4-A to 4-C :

Mr. H.D. Deshmukh

Advocate for Respondent Nos.5 and 6 : Mr. A.D. Sonkawade i/by.

Mr. A.V. Hon

...

WITH

CIVIL APPLICATION NO.3668 OF 2019

IN

SECOND APPEAL NO.832 OF 2018

.....

CORAM : MANGESH S. PATIL, J.

DATE : 24-03-2022

PER COURT :

. By way of this proceeding styled as a Second Appeal under Section 100 of the Code of Civil Procedure by the original defendants, they are impugning the concurrent findings of the courts below holding the respondents who are the legal heirs of the original plaintiff Babanrao to be entitled to separation of their 1/3rd share in the suit house property to be separated by erecting a north south wall

between their share and that of the appellants.

2. There is no dispute about the fact that one Ganpat was the common ancestor having two sons Kisanrao and Trimbakrao. The respondents – plaintiffs represent the branch of Kisanrao, whereas the appellants that of Trimbakrao. Original plaintiff - Babanrao is the son of Kisanrao, whereas appellant no.1 Bhausahab is the son of Trimbakrao. There is no dispute about the fact that there were several lands and house properties of the joint family. There is also no dispute, and even independently the fact has been duly established, that all the ancestral and joint family properties were partitioned by virtue of a memorandum of partition (Exh.79) on 24-03-1957. Pertinently, even the present suit property was included in that partition and the eastern side $1/3^{\text{rd}}$ portion of the suit property was allotted to the branch of Kisanrao. The remaining $2/3^{\text{rd}}$ was allotted to Ganpat and, Trimbakrao's branch, jointly.

3. The respondents filed the suit averring that in spite of such partition of the suit property, till before filing of the suit no dispute was ever raised by the appellants as regards their $1/3^{\text{rd}}$ share in the suit property. However, when they tried to erect north south wall so as to divide their $1/3^{\text{rd}}$ eastern side portion, the appellants

obstructed and therefore they prayed to enable such separation of their 1/3rd eastern side share by erecting a wall.

4. The appellants contested the suit by taking various pleas.

5. They did not dispute that the suit property along with other properties was partitioned in view of memorandum of partition (Exh.79). They also did not raise any dispute that the eastern side 1/3rd portion was allotted to the share of the respondents. They contended that by accepting some money, Babanrao had relinquished his share in favour of appellant no.3 and he alone thereafter became the owner of that property. They raised a plea of adverse possession in the alternative. They then also raised issues regarding non-joinder of necessary parties, *res judicata* and under valuation.

6. The trial court decreed the suit refuting all the stands and contentions of the appellants and the decree has been confirmed by the lower appellate court by the judgment and order under challenge.

7. Learned advocate Mr. Bedre for the appellants would vehemently submit that though there are concurrent findings of the

courts below, substantial questions of law arise for the determination by this Court. The very fact that in spite of the partition having been effected way back in the year 1957 the suit property was enjoyed jointly by all the sharers should have been noticed by the courts below. If the respondents were to again claim any right therein they ought to have gone for a general suit for partition impleading all the necessary parties particularly, the wives of Kisanrao and Trimbakrao. That being not the case, the lower courts could not have treated the suit property as divided by virtue of the memorandum of partition (Exh.79). He would further submit that in any event, since 1957 the respondents had never put up any claim and the suit was hopelessly time barred. These are some of the substantial questions which call for adjudication in this Second Appeal.

8. Per contra, Mr. A.D. Sonkawade i/by. Mr. A.V. Hon and Mr. H.D. Deshmukh, learned advocates for the respondents would submit that there is no dispute about the fact that the suit property was also divided while effecting the partition and the eastern side $\frac{1}{3}^{\text{rd}}$ share was allotted to their predecessor. They would further submit that the respondents specifically averred that till recent past the appellants had never objected to the fact of they being the owners of the eastern side $\frac{1}{3}^{\text{rd}}$ portion. It is only after they started

putting up an adverse claim that a need was felt to file this suit for getting the share separated by metes and bounds by erecting the north south wall. Nothing new was being claimed by them. It was merely in the nature of putting the specific clause from the memorandum of partition to actual use. There was no question of appellants raising any plea of adverse possession and besides, they miserably failed to prove it. In the absence of which, going by Article 65 in the Schedule to the Limitation Act, 1963 the period of limitation never began to run or at least the period of 12 years had not lapsed since the appellants put up an adverse claim. They would further submit that since the heads of the branch were already the parties to the suit, the suit did not suffer from non-joinder of necessary party. They would further submit that all the factual and legal aspects were considered by the courts below and they have concurred in decreeing the suit.

9. As has been cursorily mentioned herein above, there is not much dispute about the facts. Ganpat was a common ancestor and the parties to the suit inherit the suit property as also several other landed properties through their predecessors Kisanrao and Trimbakrao, who were the sons of Ganpat. There is also no dispute about the fact that all the ancestral and joint family properties were

partitioned in the year 1957 which was evidenced by a memorandum of partition (Exh.79) that too during life time of Ganpat himself. Admittedly, there is no dispute about the rest of the properties except the suit property. There is a specific recital in the memorandum of partition allotting eastern side $1/3^{\text{rd}}$ portion from the suit property to the share of Kisanrao. Even the appellants witness specifically admitted such allotment of eastern side $1/3^{\text{rd}}$ share in that partition to respondents predecessor. Once it is found that there is no escape from the conclusion that the eastern side $1/3^{\text{rd}}$ portion was allotted to the share of the predecessor of the respondents Kisanrao in that partition of the year 1957, the appellants would be estopped from putting forth any other plea.

10. Perhaps realizing the limitations in their stand, the issue regarding non-joinder of necessary parties and even adverse possession was put up. The courts below for the plausible reasons recorded in the respective judgments have rightly refuted the plea of adverse possession. As a result, the logical and legal corollary would be to allow the respondents to enjoy that $1/3^{\text{rd}}$ share from eastern side of the suit property by metes and bounds by erecting a north south compound wall. Though the plaint has not been articulated as if the respondents are claiming the possession of the suit property

based on title, assuming for the sake of arguments that it is their such a claim based on title, the period of limitation would only begin to run once the appellants would become owners by adverse possession. At no point of time they have been able to demonstrate the necessary ingredients which would entitle to justify and prove their such a plea and consequently the period of limitation would not begin to run.

11. Even otherwise, even if it is held that it is not a suit for possession of an immovable property based on title, it would be governed by a residuary article of declaration under Article 58 which provides for a period of limitation of three years from the date the right to sue first accrues. When according to the respondents, till recent past before filing of the suit the appellants were admitting and approving their right to the eastern side 1/3rd share in the suit property and had started putting up an adverse claim only thereafter, it cannot be said that the right to sue first accrued to them no sooner the memorandum of partition (Exh.79) was brought into the existence. At least there is no other evidence led by the appellants, to *prima facie* demonstrate that they had put up an adverse claim to the knowledge of the respondents since after 1957. Therefore even if the courts below have not framed any issue regarding limitation and it is to be taken into consideration, the submission of learned advocate

Mr. Bedre that the suit was barred by limitation is not sustainable.

12. As regards the plea of the appellants about Kisanrao having relinquished his share, admittedly, there was no written relinquishment brought into existence as is required by the law so as to constitute a legal transfer of the property. The courts below have rightly refuted even this plea of the appellants.

13. Bearing in mind the fact that this is a Second Appeal, there are inherent limitations for this court to indulge in an exercise of finding correctness or otherwise of the consistent findings recorded by the courts below based on the evidence that was available before them. This court while exercising this power cannot act as a fact finding Court. As laid down in the matter of **Narayanan Rajendran and another Vs. Lekshmy Sarojini and Ors; (2005) 5 SCC 264** the scope for this court to cause interference is very limited. It is only when a substantial question of law arises for the determination that this Court can step in.

14. Going by the aforementioned discussion, no substantial question of law arises for the determination by this court. The Second Appeal is dismissed.

15. In view of disposal of Second Appeal, nothing survives for consideration in the Civil Application and the same stands disposed of.

(MANGESH S. PATIL)
JUDGE

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Gajanan