

SGA

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 20 OF 2023
WITH
CIVIL APPLICATION NO. 756 OF 2023

Govind Manik Fule

... Appellant

Versus

Venkat Manik Fule
and others

... Respondents

....

Mr.S.P. Urgunde - Advocate for applicant.

Mrs. Madhaveshwari Mhase h/f Lex Aquila – Advocate for
respondent nos.1 to 5.

CORAM : GAURI GODSE, J.

DATE : 9th February, 2023

PER COURT :

1. This second appeal is preferred by original defendant for challenging the concurrent decree for partition and separate possession passed in favour of respondent nos.1 to 3.
2. By judgment and decree dated 11th October, 2022, learned District Judge, Nilanga dismissed Regular Civil Appeal No.81 of 2013 preferred by the present appellant for challenging the judgment and decree dated 2nd July, 2013 passed by learned Civil Judge, Junior Division, Nilanga in Regular Civil Suit No. 250 of 2010. Respondent Nos.1 to 3 had filed the said suit for

partition and separate possession by contending that the suit property was originally owned by their father Manik, hence, they had share in the suit property.

3. It is the contention of the plaintiffs that the present appellant, who is defendant no.1 in the suit was acting as Karta of joint family. After death of Manik, names of all the parties were entered as heirs and legal representatives of deceased Manik and name of defendant no.1 was entered as Karta of the joint family in the revenue record. The said mutation entry is produced at Exhibit-55 in the Trial Court. So far as the sale deed with respect to the suit property is concerned, the same was admittedly in the name of deceased Manik and the same was also produced on record at Exhibit-83. It is also not disputed that after the death of Manik, the names of all the heirs and legal representatives were entered in the revenue record and name of defendant no.1 was entered as Karta of the joint family.
4. Defendant no.1 denied the claim of the plaintiffs on the ground that he had purchased the suit property in the name of father i.e. Manik. He further contended that the part of the land was acquired in the land acquisition proceedings and the award was in his name and he had withdrawn the amount of compensation.

It was thus submitted that it is his self acquired property, and therefore, the plaintiffs were not entitled to claim any share.

5. Trial Court framed issues with respect to the nature of the suit property and also with respect to the contention raised by defendant no.1 that it was his self acquired property. Trial Court after examining all the documents and evidence on record held that the plaintiffs proved that the suit property was ancestral property of the plaintiffs and defendants and that defendant no.1 failed to prove that it was his self acquired property. Thus, by accepting the case of the plaintiffs that deceased Manik was the owner of the suit property, and that, the name of defendant no.1 was entered as Karta of the joint family, the trial court decreed the suit and passed the decree directing that the plaintiffs and defendants were entitled to 1/6th share in the suit property as well as 1/6th share in the amount of compensation pursuant to the land acquisition award.
6. Feeling aggrieved by the decree passed by Trial Court, defendant no.1 preferred Regular Civil Appeal No. 81 of 2013 in the District Court. Learned District Judge also framed the points for consideration with respect to the status of the joint family and nature of the suit property and after examining all the

documents and evidence on record confirmed the findings of the Trial Court that deceased Manik was the owner of the suit property, and that, the name of defendant no.1 was entered as Karta of the joint family after death of Manik.

7. Both the Courts have specifically disbelieved the case of defendant no.1 that it was his self acquired property. Thus, the first appellate Court confirmed the decree of partition and separate possession passed by the Trial Court. Hence, defendant no.1 has preferred present second appeal.
8. Learned counsel for the appellant submitted that the suit was time barred in view of the case made out by the plaintiffs in the suit itself. He further submitted that though there was a specific pleading raised by the appellant in the written statement that the suit is time barred, both the Courts failed to frame the issue with respect to limitation. Hence, the substantial question of law is involved with respect to the suit being time barred. In support of this submission, learned counsel for the appellant relied upon the pleadings in the plaint wherein the plaintiffs have pleaded that on 16th July, 2010, the plaintiffs came to know that pursuant to the award, defendant no.1 had withdrawn the compensation amount and when the plaintiffs requested to effect partition as

well as share in the compensation, he refused to do so, and therefore, the suit was filed. It is submitted that in response to these pleadings defendant no.1 has contended that the suit was time barred, as the amount of compensation was withdrawn in the year 1998. It was further submitted that the contention of the plaintiffs that the suit was within limitation, was specifically denied in the written statement. Hence it was obligatory on the part of both the Courts to frame the issue of limitation and since the issue of limitation is not framed and decided by both the Courts, the same goes to very root of the matter. Hence, it is necessary to examine the second appeal on the point of limitation. Hence, it was submitted that the second appeal requires consideration on the point of limitation.

9. Learned counsel for the appellant also submitted that while passing the decree for partition and separate possession, the learned Trial Court has erroneously directed that the plaintiffs will be entitled to recover the amount of compensation from defendant no.1. He, therefore, submitted that such a decree could not have been passed for directing the recovery of amount of compensation from defendant no.1. Hence, he submitted that the second appeal also raises a substantial question of law with

respect to the said direction and hence the second appeal be admitted.

10. Learned counsel appearing for respondent nos.1 to 3/original plaintiffs appeared in the second appeal on caveat. Learned counsel appearing for the plaintiffs submitted that there is a specific pleading with respect to the cause of action and limitation, thereby contending that the plaintiffs learnt about the withdrawal of the compensation amount in the month of July, 2010 on receipt of the certified copies of the acquisition proceedings and when demanded their share in the compensation amount as well as separate share in the remaining part of the suit property, defendant no.1 refused to give their share and hence the suit was filed and the same is within limitation. She further submitted that defendant no.1 had come up with a theory of being exclusive owner of the suit property, hence, burden was upon respondent no.1 to show ouster of a particular date and specifically plead with respect to the starting point of period of limitation on the point of ouster. She further submitted that except simple denial, there is nothing pleaded by defendant no.1 about date of withdrawal of compensation amount and that the same was withdrawn by him with the

knowledge of the plaintiffs. Hence in such circumstances, there was no reason for framing any issue of limitation. She also submitted that since the defense raised by defendant no.1 was with respect to disputing the nature of the suit property as the same being his self acquired property, the question of limitation would be a mixed question of law and fact and same cannot be dealt with for the first time in the second appeal. It is submitted that the point of limitation goes to the very root of the matter and on the basis of pleadings, same can be dealt with only by framing proper issue, at the first instance. She therefore, submitted that the question of limitation would be a mixed question of fact and law, which in fact never arose in the facts and circumstances of the case, in view of the pleadings of the parties. She therefore, submitted that there is no substantial question of law, hence the second appeal deserves to be dismissed.

11. I have considered the submissions made on behalf of both the parties. I have also perused the pleadings of both the parties as well as the judgments of both the Courts. Suit is filed with a specific assertion that on receipt of the certified copies of the acquisition proceedings, the plaintiffs have learnt about the

withdrawal of the compensation amount by defendant no.1 and then they demanded their share with respect to the compensation amount, as well as partition in the remaining land. It is also pleaded that the defendant refused their request, hence, cause of action arose for the purpose of filing the suit for partition and separate possession. In response to the said pleadings, defendant no.1 has simply denied the contentions that were raised by the plaintiffs. Though there is a pleading on behalf of the defendant no.1 thereby stating that the compensation amount was withdrawn in the year 1998, there is no specific assertion made in the written statement that the amount was withdrawn with the knowledge of the plaintiffs. Hence, learned counsel for respondent nos.1 to 3 is right in submitting that in view of there being no specific assertion with respect to the source and date of knowledge of plaintiffs with respect to withdrawal of the compensation amount, the issue of limitation never arose at the time of trial of the suit. Perusal of the written statement shows that except for denial with respect to the pleadings of the plaintiffs, there is no specific assertion raised as to the ouster of plaintiff, as well as no specific pleading raised as to why the suit would be barred by limitation.

12. Learned Trial Judge has examined all the documents as well as oral evidence. By examining the documentary evidence of the sale deed in the name of deceased Manik, produced at Exhibit-83 and mutation entry at Exhibit-55, wherein the names of all the heirs and legal representatives of deceased Manik were entered and name of defendant no.1 was entered as Karta of the joint family property, the Trial Court has held that the suit property was a joint family property. The findings recorded by the Trial Court shows that after the death of Manik, defendant no.1 himself had made an application for recording the names of all the heirs and legal representatives of deceased Manik and as per the application made by defendant no.1 name of all the heirs and legal representatives were entered into revenue record after the death of deceased Manik. Learned Trial Court has also gone through the admissions given by defendant no.1 that his name was recorded as Manager of the joint family and as per his own contention he never objected to the said mutation entry. Learned Trial Court has thus accepted the case of the plaintiffs that the suit property was ancestral joint family property and defendant no.1 was acting as a Manager of the joint family. These findings of the Trial Court are confirmed by the First Appellate Court

after re-examining the oral as well as documentary evidence. I do not find any illegality or perversity in the reasons recorded by both the Courts for accepting the property as ancestral joint family property and entitlement of the plaintiffs for partition and separate possession of the suit property.

13. With respect to the submission on the point of limitation, I do not find any merit in the same. As stated above, there is a specific pleading raised with respect to the suit being within limitation. The plaintiffs have specifically pleaded that on 16th July, 2010, they learnt that defendant no.1 has withdrawn the compensation amount. Except for plain denial in the written statement, there is no specific assertion that the amount that was withdrawn in the year 1998 by defendant no.1, was with the knowledge of the plaintiffs. It is not the case of the defendant no.1 that the plaintiffs were aware that he had withdrawn the compensation amount in the year 1998. It is not even the case of the defendant no.1 that the compensation amount was withdrawn by him on the basis that award was declared in his name being exclusive owner or that he withdrew the compensation amount in his individual capacity. It has come on record that part of the suit property that was acquired stood in

the name of deceased Manik and the revenue record was also in the name of Manik. It is also brought on record that after death of Manik, name of defendant no.1 was entered in the revenue record as Karta of the joint family. Both the courts on appreciation of the evidence have disbelieved the case of the defendant no.1 that the suit property was self acquired property of the defendant no.1.

14. Question of limitation in the facts of the present case is a mixed question of law and fact. In the present case, date of knowledge of the withdrawal of compensation amount is a crucial fact, which is not brought on record by defendant no.1. Hence, only simple denial of the averments in the plaint did not warrant framing of any issue for deciding whether the suit was barred by limitation. Since the issue of suit being barred by limitation is a question of law, which can be decided at any stage of proceeding, I have examined the pleadings of the parties as well as the evidence on record. For the purpose of deciding whether the suit was barred by limitation, the relevant date with respect to the exclusion of the plaintiffs' right in claiming the amount of compensation, by defendant no.1 would be relevant. On examining the pleadings of the parties and evidence on record, it

is clear that defendant no.1 has not produced on record any material to show that the plaintiffs were made known with respect to withdrawal of the compensation amount by defendant no.1 in the year 1998. In view of section 3 of the Limitation Act, even if objection of limitation is not set up as a defence, the issue of limitation is to be dealt with and decided by the Court. Hence, even though the issue of limitation was not agitated by defendant no.1 during the trial of the suit or during the pendency of the first appeal, the objection raised on behalf of the appellant that the suit was barred by limitation is examined by me as aforesaid.

15. For the reasons stated above, in my view, the suit is not liable to be dismissed as barred by limitation.
16. There is no merit in the second submission made on behalf of appellant that the decree is erroneously passed directing that the plaintiffs are entitled to recover the amount of compensation from defendant no.1. It is not in dispute that the compensation amount is withdrawn by the defendant no.1. Once, the suit property is held to be ancestral joint family property and the plaintiffs are held entitled to a share in the amount of compensation, there is no reason for not recovering the amount

towards share of plaintiffs in the compensation amount withdrawn by defendant no.1 alone.

17. There is no substantial question of law involved in the second appeal. Second Appeal is dismissed. There will be no order as to costs.
18. In view of the dismissal of the Second Appeal, Civil Application dismissed as infructuous.

[GAURI GODSE, J.]