

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

SECOND APPEAL NO.430 OF 2017

Abdul Sayeed Abdul Hamid and others .Vs. Mohammad Akbar S/o
Fattemohammad

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri M.P. Kariya, Advocate for the appellants.

Shri N.P. Singhanian, Advocate for the respondent.

CORAM : ANIL S. KILOR, J.

DATED : 16/02/2023

1. Heard.
2. The present second appeal raises a question to the correctness and legality of the concurrent findings recorded by both the Court below while rejecting the counter claim of appellant/original defendant No.2 on the ground of limitation. Thus, a challenge is raised to the judgment and decree dated 01.10.2016 passed by the Ad-hoc District Judge-1, Achalpur in Reg. Civil Appeal No.5 of 2014, dismissing the appeal arising out of judgment and decree dated 29.11.2013 passed by the 2nd Joint Civil Judge Jr. Dn., Achalpur in R.C.S. No.129 of 2010 decreeing the suit for recovery of possession and damages, and dismissing the counter claim seeking declaration that the partition is not binding on the defendant No.2.
3. The brief facts are as under:

(The parties are referred to as per their status before the trial Court)

The plaintiff/respondent filed a suit for recovery of possession and damages against the defendants/appellants claiming to be the owner of the suit property by way of partition deed executed between his brothers and he himself.

It is stated that the defendant No.2 is in possession of the suit block through defendant No.1. It is further stated that the suit property was given to defendant No.1 on license for temporary occupation and as he was need of the suit property, the notice was issued revoking the license and calling upon him to deliver the vacant possession. However, failure to give the vacant possession and damages as claimed in the notice, the suit was filed.

4. The defendant No.2 by filing written statement resisted the claim of the plaintiff. The defendant No.2 denied the case of the plaintiff that the suit property was given to the defendant No.1 on license for temporary occupation.

5. On the other hand, the respondent claimed that he has inherited the suit property through his mother. It is further stated that the suit property is in his possession since before his birth through his mother.

6. The defendant No.2 also filed a counter claim raising challenge to the partition deed dated 22.12.1986, a

registered document on the ground that no share was given to the mother/Jainubee.

7. The learned trial Court after scrutinizing the oral as well as documentary evidence, decreed the suit filed by the plaintiff for possession and damages and dismissed the counter claim on the ground of limitation vide judgment and decree dated 29.11.2013. On failure on the part of the defendant No.2 to prove his case that, he is in continuous possession of the suit property and he inherited the suit property.

8. Feeling aggrieved by the said judgment and decree, the defendants carried an appeal before Ad-Hoc District Judge-1, Achalpur while Reg. Civil Appeal No.5 of 2014, which came to be dismissed upholding the judgment and decree passed by the trial Court. Hence, this appeal.

9. This Court while issuing notice on 31.07.2017 framed the following substantial question of law:-

“In absence of all co-sharers being party to the Partition-Deed dated 22nd December, 1986, whether the rejection of the counter-claim seeking to challenge that partition-deed can be said to be barred by limitation ?”

10. Shri Kariya, learned counsel for the appellants submits that both the Courts have committed error in holding that the counter claim of the defendant No.2 was barred by limitation. It is submitted that as the partition deed is nonest because no share was allotted to Jainubee, mother of the defendant No.2, no limitation is provided for raising a challenge to such document.

11. On the other hand, learned counsel for the respondent submits that both the courts below have concurrently held against the appellants and as no perversity is committed by both the courts below in holding against the appellants, the appeal needs to be dismissed.

12. I have perused the record, impugned judgment and decree.

13. After going through the record, there is no dispute that the defendant No.2 had a knowledge about the partition deed which was executed and the same was registered in the year 1986.

14. The defendant No.2 is also not denying the fact that on the basis of such partition, the mutation entries were carried out in the revenue record. In the said backdrop, while holding against the defendant No.2 both the Courts below have held that despite having sufficient knowledge about the registered partition deed executed in the year 1986, no challenge was raised to the same.

15. Further both the Courts below have held that though the defendants are claiming through Jainubee however, they have not produced any documentary proof that they are the legal heirs of Jainubee.

16. It is further held that even the document showing continuous possession from the life time of Fattemohammad is not established and prove. Accordingly, the counter claim was rejected.

17. The judgment of the coordinate bench of this Court cited by the learned counsel for the appellants in support of his submissions, in the case of *Ratnakar Pralhad Deoras v. Vyankatesh Shamrao Fulmal*¹, and in the judgment of Karnataka High Court in the case of *Shri. Khirasa S/o Krishna Kathare and ors. Vs. Smt. Shanta Alias Geeta W/o Janardhansa Sahalagar and ors.*², are of no help to the appellants as the same are distinguishable on facts.

18. Even after going through the prayer clause of the counter claim, it is evident that it does not fulfill the requirement of Order VII, Rule 7 of the Code of Civil Procedure and as such, I do not find any error committed by both the Courts below in rejecting the counter claim of the defendant No.2.

19. Accordingly, I have answered the substantial question of law framed by this Court in the above terms.

Hence, second appeal is **dismissed**.

JUDGE

1. 2017 (6) AIR Bom.R 54

2. In Civil Rev. Petition