

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

SECOND APPEAL NO. 176 OF 2021

1. Rohini W/o Ramesh Khawase,
Aged about 60 years, Occ: Retired
R/o Plot No. 44(A), Rajendra Nagar,
KDK College Road, Nandanvan,
Nagpur
2. Mrs. Reema W/o Yogesh Bhoj,
Aged about 46 years, Occ: Housewife
R/o Godawari Colony Near Mehar
Baba Center, MIDC Road, Amravati

...Appellants

// VERSUS //

1. Arvind S/o Narayan Zurmure
Aged about major, Occu. Service
2. Ravindra S/o Narayan Zurmure,
Aged about Major, Occ. Services
Both 1 and 2 R/o Plot No. 4 Rajendra
Nagar, Near Dhyanvikas Vidyalaya
Nandanvan, Nagpur
3. Ku. Vasanti D/o Narayan Zurmure,
Aged about 53 years, Occ. Nil,
R/o Manav Utthan Seva Samiti
Pandharpur, Tq. Pandharpur, Dist.
Solapur

... Respondents

Shri P.P.Kothari, Advocate for the appellants.

Shri S.P.Kshirsagar, Advocate for the respondent nos. 1 and 2.

CORAM : ANIL S. KILOR, J.

DATED : 26th APRIL, 2023.

ORAL JUDGMENT :

This appeal takes exception to the judgment and decree dated 24th January, 2019 passed by District Judge-11, Nagpur in Regular

Civil Appeal No. 171 of 2019, dismissing the appeal and confirming the judgment and decree dated 24th January, 2019, passed in Special Civil Suit No. 274 of 2017 by the trial Court, dismissing the suit filed by the appellant for partition, separate possession, mesne profit, declaration and permanent injunction.

2. The 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 real sisters of defendant No.1 to 3 their father late Narayan died on 03/01/2010 living behind the properties CTS No. 278, area 180.96 square meter, Rajendra Nagar, Nandanwan, Nagpur. In P.R card area of this property is shown as 194.23 square meter and the owners are shown, Narayan Zurmure and Laxman Zurmure. It is claimed that, late Narayan and late Laxman jointly purchased the suit property. Laxman died on 03/12/98 living behind widow Vatsalabai. Vatsalabai died on 14/06/2009 issueless. After death of Narayan, the plaintiffs applied for mutation, as well as defendant No.1 to 3 also applied for mutation before City Survey Office, Nagpur and by order dated 21/01/2012, the application of the plaintiffs was allowed by the City Survey Officer. Defendant no.1 challenged the said order before Superintendent of Land Record alongwith condonation of delay application.

4. It is contended by the plaintiffs that after receipt of notice of appeal filed by defendant no.1, first time the plaintiffs came to know

about the Will of Narayan Zurmure and relinquishment deed of Vatsalabai and on supply of copies of it to the plaintiffs they came to know about the contents of the Will and relinquishment deed.

5. It is contended that, the plaintiffs being daughter of Narayan have equal share in the property alongwith defendant No.1 to 3 and they have also equal share in the property of late Laxman and Vatsalabai who died issueless. The plaintiffs accordingly by filing a suit claimed that they have 1/5th share each in the property and they prayed for partition and separate possession and declaration of Will and relinquishment deed as illegal, bad in law.

6. Defendant No.1 and 2 filed written statement below exhibit 16 and resisted the suit on the ground that suit is barred by limitation. It is contended that, the plaintiffs were knowing about the Will and relinquishment deed, in the proceeding before City survey however the plaintiffs have not challenged the Will and relinquishment deed within 3 years and therefore, it is patently barred by limitation under Article 58 of the Limitation Act.

7. It is contended that late Narayan was the absolute owner of half property and half portion was purchased by his brother namely Laxman, who died and thereafter his widow Vatsalabai succeeded the property. She executed relinquishment deed in the year 2000 in favour of late Narayan Zurmure, which does not require any registration. Therefore, late Narayan being absolute owner had right to execute the

Will and as per the Will, the suit property is given to defendant Nos.1 and 2. Hence, the plaintiffs cannot claim any right, share in the property.

8. Defendant No.3 duly served with suit summons, but she failed to appear.

9. The learned trial Court after recording the evidence and on scrutinizing the same and the documentary evidence available on record, dismissed the suit holding that it is barred by limitation vide judgment and order dated 24th January, 2019.

10. The appellants feeling aggrieved by the same, preferred an appeal, vide Regular Civil Appeal No. 171 of 2019, which came to be dismissed vide impugned judgment and decree dated 26th February, 2021. The same is the subject matter of the present appeal.

11. This Court vide order dated 29th November, 2021 framed the following substantial questions of law.

i. Whether the limitation for filing of the suit challenging the Will would arise on getting knowledge of the execution of Will or after knowing the contents of the Will ?

ii. Whether the courts below erred in law in not considering that the respondents were estopped from claiming entire property on the basis of so called Will when respondents have categorically made statement

before revenue authorities that they are claiming only one-third share and that they will give share at the time of sale ?

iii. Whether the Courts below were right in holding that the relinquishment deed executed by Vatsalabi Laxaman Zurmure does not require registration merely because it was without consideration ?

12. The primary question involved in the present matter relates to limitation.

13. Admittedly, the appellants and respondents are real brothers and sister and the suit property was purchased by their father and uncle having half share each.

14. After the death of Uncle, the appellants and the respondents succeeded the suit property. There is no dispute that the suit property is the self acquired property of the father and uncle of the appellants and the respondents.

15. It is the case of the defendants that their father Narayan Jurmure died on 30th January, 2010 and who executed Will dated 22nd March, 2007 bequeathing the suit property in favour of the respondents. It is further case of the respondents that the fact of Will was known to the plaintiff since 2011, despite the same no suit was filed within three years and as such the suit is barred by limitation.

16. Both the Courts while holding in favour of the defendants have observed that, despite the knowledge to the plaintiffs that their father had executed the Will dated 22nd March, 2007, after the death of the father on 30th January, 2010 the Will was not challenged within three years on the pretext that copy of it was to the plaintiffs not supplied. Both the Courts below have further observed that after getting the knowledge in the revenue proceedings, the plaintiffs could have obtained the certified copy of the Will from the office of Sub Registrar as the Will is a registered document. It is further held that, since the plaintiffs failed to give any explanation as to why they did not secure the certified copy of the Will, the suit is barred by limitation.

17. In the above referred backdrop, I ponder upon the law as regards the limitation. The Hon'ble Supreme Court of India in the case of *Daya Singh and another Vs. Gurdev Singh (Dead) by LRs and others*¹ has held thus:

14. In support of the contention that the suit was filed within the period of limitation, the learned senior counsel appearing for the plaintiffs/appellants before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned senior counsel strongly relied on a decision of the Privy Council reported in AIR 1930 PC 270 [Mt. Bolo vs. Mt. Koklan and others]. In this decision Their Lordships of the Privy Council observed as follows :-

¹ (2010) 2 SCC 194

".....There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

15. A similar view was reiterated in the case of C.Mohammad Yunus vs. Syed Unnissa and others [AIR 1961 SC 808] in which this Court observed : (AIR p.810, para 7)

"7..... The period of 6 years prescribed by Article 120 has to be computed from the date when the right to sue accrued and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."

In C.Mohammad Yunus (supra), this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry into the revenue record cannot give rise to cause of action.

18. The Co-ordinate Bench of this Court in the case of Archana d/o Bhimrao Randaye Vs. Dr. Kavita W/o Dilip Changole², has held thus:

"11. Under Article 58 of the Act of 1963, the limitation begins to run when the right to sue first accrues. It is well settled and requires no reiteration that unless there is a clear and unequivocal threat to infringe the right of a party by the defendant against whom the suit is instituted, there would be no right to sue. Reference in that regard can be made to the decision in Mst. Rukhamabai Vs. Lala Laxminarayan & others [AIR 1960 SC 335] where it has been held that every threat by a party to such right, however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. This decision has been referred in L. C. Hanumanthappa [supra] which was relied upon by the learned counsel for the applicant.

The facts on record indicate that though the non-applicant was aware of execution of Will dated 30th December, 2004 when she signed various documents in the years 2005 and 2009, a clear and unequivocal threat to her legal rights was given by the applicant only in March, 2014 which led her to lodge a report. Hence, mere knowledge of execution of said Will in the present facts cannot be held to be giving rise to the right to sue. On reading the plaint in its entirety, I find that the suit has been filed within a period of three years when the right to sue first accrued in March, 2014. Hence, finding recorded by the trial Court holding the suit to have been filed within limitation does not deserve to be interfered with.”

19. From the above referred observations it is evident that limitation begins to run when the right to sue first accrues. It is a well settled principle of law and requires no reiteration that unless there is a clear and unequivocal threat to infringe the right of a party by the defendants against whom the suit is instituted, there would be no right to sue.

20. Keeping this principle in mind, let us consider the admitted facts of the present matter.

21. Admittedly, the suit property is self acquired property of the father of the appellants and respondents. Father late Narayan died on 30th January, 2010 and the Will deed is dated 22nd March, 2007. After the death of father, on 20th September, 2011 Arvind Narayan Zurmure i.e. respondent no.1 / defendant no.1 filed an application for mutation in the name of appellants and respondents.

22. In the said application for mutation, he categorically stated that there is no Will or any conveyance transferring the suit property.

23. Thereafter, before the Survey Officer in the same proceeding the reference was made to the Will. However, the copy of the Will was not filed on record. In the same proceeding, the appellant applied for supply of copy of Will. However, it was not supplied.

24. Subsequently, in 2015 in the appeal the respondents before the Appellate Authority filed a copy of the Will and that was the date on which the appellants could see the contents of the Will.

25. However, in the present matter it is not relevant when the copy was perused by the appellants, but, it is relevant when the right to sue accrues in favour of the appellants.

26. If we consider the application moved by the respondents in the year 2011, the same cannot be considered as the date on which the right to sue was accrued in favour of the appellants because in the application it has categorically mentioned that there is no Will-deed executed by Narayan Zurmure. However, subsequently the fact of Will was disclosed but no right or interest claimed contrary to the interest of the appellants. However, for the first time in the year 2015 the appeal was filed on 8th July, 2015 and thereby, the respondents claimed one-third share each, in the suit property.

27. Undisputedly, before the City Survey officer, the respondents made a statement that, whenever the suit property would be disposed of, they will give the share of the appellants. Thus, in the year 2012 also there was no infringement of right of the appellants and first time such threat was created in the year 2015.

28. Thus, in the circumstances, I have no hesitation to hold that the right to sue accrues in the present matter first time after filing of the appeal on 8th July, 2015. Admittedly, the suit was filed on 20th March, 2017 i.e. within three years from the date of 8th July, 2015.

29. In that view of the matter, in my considered view, both the Courts committed error in holding that the suit was barred by limitation. Accordingly, I answered the first substantial question of law in above terms.

30. As far as the second and third substantial question of law are concerned, I am of the opinion that since the matter needs to be remanded back to the trial Court to decide the same afresh on merit, the trial Court shall decide all the issues afresh.

31. In the circumstances, the second appeal is **partly allowed**;

32. The judgment and decree dated 24th January, 2019 passed by the learned 5th Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 274 of 2017 and judgment and decree dated 26th February, 2021 passed by learned District Judge-11, Nagpur are hereby quashed and set aside;

33. The matter is remanded back to the trial Court for deciding the same afresh.

[ANIL S. KILOR, J.]

SACHINDANAND
K NAIR

Digitally signed
by
SACHINDANAND
K NAIR
Date: 2023.05.25
15:23:11 +0530