

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.717 OF 2017  
WITH  
INTERIM APPLICATION NO.374 OF 2023**

Shankar Bhau Chavare

Age: 70 years, Occ: Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

...Appellant

V/s.

1.Annappa Balu Naikwadi

Since Decd Thr. Heirs and Lrs.

1A. Smt. Sharabai Annappa Naikwadi

Age: 72 years, Occ: Household & Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

1B. Laxman Annappa Naikwadi

Age: 30 years, Occ: Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

1C. Biru Annappa Naikwadi

Age: 36 years, Occ: Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

1D. Irrappa Annappa Naikwadi

Age: 33 years, Occ: Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

1E. Mrs. Shoba Mahipatrao Tarale

Age: 44 years, Occ: Agriculture

R/o. Karve, Taluka, Karad

District Kolhapur

2. Devappa Babu Naikwadi

Age: 73 years, Occ: Agriculture

R/o. Kasaba Sangaon

Taluka Kagal, District Kolhapur

...Respondents

Mr. Chetan G. Patil for the Appellant.

Mr. V. B. Rajure for Respondent Nos.1A to 1E and 2.

**CORAM : SHARMILA U. DESHMUKH, J.**

**RESERVED ON: 25<sup>th</sup> JANUARY 2024.**

**PRONOUNCED ON: 27<sup>th</sup> FEBRUARY 2024.**

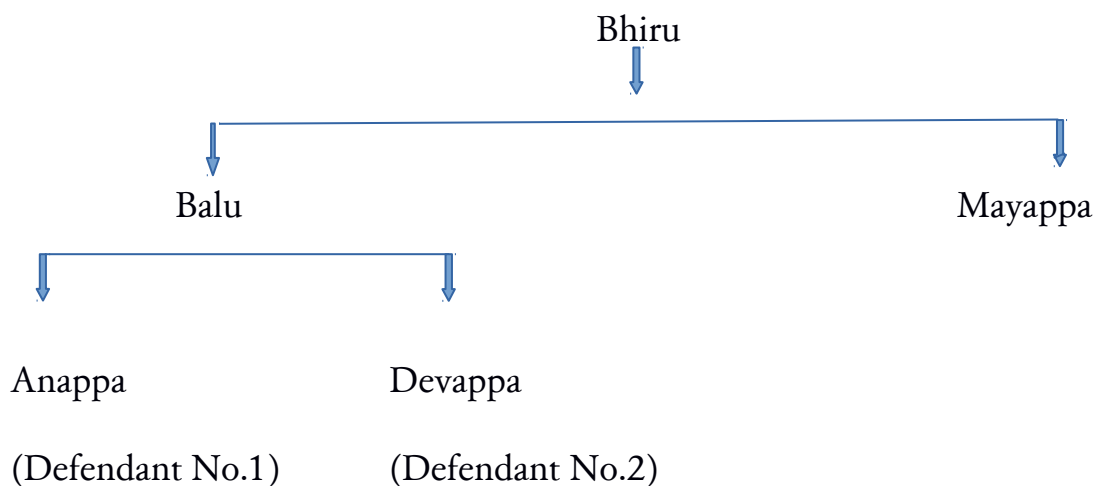
**JUDGMENT :-**

1. *Vide* order dated 30<sup>th</sup> March, 2021, the Second Appeal came to be admitted by this Court. The Appeal has been preferred by the original Plaintiff being dissatisfied by the Judgment dated 20<sup>th</sup> October 2016 passed

by the Appellate Court in Regular Civil Appeal No.175/2015 setting aside the judgment and decree dated 12<sup>th</sup> May, 2015 passed by the Civil Judge, Junior Division , Kagal in RCS No.38/2011 resulting in the suit being dismissed as barred by limitation. For sake of convenience the parties are referred to by their status before the Trial Court.

**BACKGROUND FACTS:**

2. Property bearing land Gat No 886/2 admeasuring 0.63 Are, pot-kharaba 0.02 Are was the ancestral property of Bhiru Naikwadi. It would be useful to reproduce the geneology so as to have a clear picture of the relationship:



3. Upon death of Bhiru, the property devolved upon his two sons

Balu and Mayappa and upon death of Balu, upon the sons of Balu i.e. Anappa and Devappa - the Defendant Nos 1 and 2. Vide registered sale deed dated 7<sup>th</sup> August, 1985, executed between Mayappa and the Plaintiff, Mayappa sold his share in Gat No 886/2 to Shankar Bhau Chavre-the Plaintiff, who was stranger to the family. Subsequently by registered sale deed dated 3<sup>rd</sup> June, 1991, Mayappa sold his share in Gat No 886/2 to the Defendant Nos 1 and 2. On the basis of the sale deed of 3<sup>rd</sup> June, 1991, the Defendant Nos 1 and 2 mutated their names in the revenue records. RCS No 70/1992 was filed by the Defendant Nos 1 and 2 seeking perpetual injunction against the Plaintiff which came to be dismissed on 7<sup>th</sup> October, 1999 as against which Appeal No 295 of 2002 was filed by the Defendant Nos 1 and 2 which came to be allowed on 18<sup>th</sup> February, 2005 restraining the Plaintiff from entering upon the suit property. Against the order of the Appellate Court, the Plaintiff preferred Second Appeal before this Court which came to be rejected on ground of delay as against which the Special Leave Petition preferred in the Apex Court was also rejected on 14<sup>th</sup> December, 2005.

### **PROCEEDING BEFORE THE TRIAL COURT:**

#### **A) PLAINT:**

4. Regular Civil Suit No.38/2011 was instituted by the Plaintiff on 2<sup>nd</sup> March, 2011 seeking relief of declaration of ownership in respect of the suit property being 1/2 share in Gat No.886/2 based on registered Sale Deed dated 7<sup>th</sup> August 1985 and for partition and separate possession of 1/2 share in Gat No 886/2. It was pleaded that 1/2 share in Gut No 886/2 was owned and being cultivated by Mayappa Bhiru Nayakwadi independently. That, the suit property was purchased by the plaintiff vide registered sale Deed dated 7/8/1985 and the Plaintiff was given ownership as well as possession of the suit property. That, after having sold the suit property to the plaintiff, despite not having any right in the suit property and despite being aware of the sale deed executed in favour of the Plaintiff and possession of the Plaintiff, the pre-decessor in title of defendant No.1 and defendant No.2 on the basis of forged and fabricated power of attorney got executed a registered sale deed dated 3/6/1991 in their favour. That, the Defendants taking advantage of the fact that the name of the Plaintiff was not mutated in the revenue records, mutated their names in the revenue records. That, with an intention to grab the suit property, the defendants instituted RCS 70/1992 seeking permanent injunction against the plaintiff, which came to be dismissed by judgment dated 7/10/1999 which was carried in Appeal being Appeal No.295/2002. The Appeal came to be

allowed on 18/2/2005 and the present plaintiff was restrained from entering the suit property. That, due to his illness plaintiff could not prefer Appeal in time before this Court and the Application for condonation of delay came to be rejected by this Court in Second Appeal and SLP against the said order was also rejected.

5. It was pleaded that the Mutation Entry No 1488 mutating the names of the Defendants has been challenged by the Plaintiff before the Sub Divisional Officer and the proceedings are sub-judice. Similarly, proceeding for entering the name of the Plaintiff in the crop cultivation column of 7/12 extract is also subjudice. The cause of action pleaded was that by reason of the injunction order dated 18<sup>th</sup> February, 2005 passed in Regular Appeal No.295/02, the plaintiff is unable to enter into the suit property and has lost possession of the suit property.

**B) WRITTEN STATEMENT:**

6. The defendants denied the execution of the sale deed dated 7<sup>th</sup> August, 1985 as well as possession of the Plaintiff over the suit property. It was contended that the suit property is ancestral joint family property and devolved upon Balu and Mayappa and upon death of Balu

the ownership of the property as well as the possession was with the Defendants. It was contended that Mayappa has sold his undivided 1/2 share to the Defendants *vide* registered sale deed dated 3<sup>rd</sup> June 1991 and as such they had become absolute owners of the suit property. That, the assessment tax in respect of the suit property was being paid by Mayappa and the Defendants jointly till 3<sup>rd</sup> June, 1991 and thereafter by the Defendants. That, based on the registered sale deed, mutation entry 1488 was mutated in favour of the defendants as against which Appeal preferred by the plaintiff is *sub judice*. It was further contended that Regular Civil Suit No.70/1992 was filed by the defendants for injunction against the plaintiff which came to be decreed and the same has attained finality in view of the dismissal of the appeal right up to the Apex Court.

7. It was pleaded that the plaintiff became aware of the sale deed dated 3<sup>rd</sup> July, 1991 executed in favour of the defendant 1991 during the proceedings of RCS No.70/1992 and despite thereof no counter claim was filed nor any independent suit was filed. As such the Suit of the plaintiff was barred by limitation.

### C) FINDINGS OF TRIAL COURT:

8. Parties went to trial and the Trial Court framed and answered

the issues as under:

| Sr. No. | ISSUES                                                                                                            | FINDINGS            |
|---------|-------------------------------------------------------------------------------------------------------------------|---------------------|
| 1.      | Whether plaintiff proves his title over ½ portion out of land Gat No.886/2 basing sale deed dated 7/8/1985 ?      | Yes.                |
| 2.      | Whether plaintiff is entitled for declaration that he is owner of ½ portion out of land Gat No.886/2, as prayed ? | Yes.                |
| 3.      | Whether plaintiff is entitled for recovery of possession of ½ portion out of land Gat No.886/2, as prayed ?       | Yes.                |
| 4.      | What Order and Decree ?                                                                                           | As per final Order. |

9. The Trial Court on consideration of evidence held thus:

a) That the execution of the Sale Deed dated 7<sup>th</sup> August, 1985 was duly proved by the Plaintiff and resultantly the Plaintiff is purchaser of suit property from deceased Mayappa.

b) That Mayappa had executed the Sale Deed on 7<sup>th</sup> August, 1985 in favour of the Plaintiff and thereafter executed the second Sale Deed on 3<sup>rd</sup> June, 1991 in favour of Defendants and in view of Section 48 of Transfer of Property Act, the Plaintiff has established his title over the suit property.

c) That the Plaintiff is entitled to declaration of ownership and the suit is not barred by limitation under Article 65 of Limitation Act as the suit is based on title and no plea of adverse possession has been taken by the Defendant.

d) That the Plaintiff being purchaser is entitled to ask for possession of ½ portion out of Gat No 886/2.

#### **D) PROCEEDINGS BEFORE THE APPELLATE COURT:**

10. The Appellate Court framed and answered the points for determination as under:

| <b>Sr. No.</b> | <b>ISSUES</b>                                                                                                                                                                                                                                              | <b>FINDINGS</b> |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1.             | Whether the appellants/original defendants establish that the findings of the Ld. Trial Court regarding the limitation of the suit holding that the suit is filed within limitation is erroneous and against the provisions of law ?                       | ..Affirmative   |
| 2.             | Whether the appellants establish that the findings of the learned Trial Court that the plaintiff has become the owner of the half portion of the land on the basis of the sale deed dated 7/8/1985 is erroneous and without appreciation of the evidence ? | ..Negative      |
| 3.             | Whether the appellants establish that the Trial Court erred in holding that the plaintiff is entitled for recovery of half portion of the land Gat No.886/2 ?                                                                                              | ..Negative      |
| 4.             | Whether the appellants establish that, the learned Trial Court erred in directing the partition of the property without framing the issue to that effect and without their being the prayer of the plaintiff ?                                             | ..Affirmative   |

|    |                                                                                                                                                                 |                      |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------|
| 5. | Whether the appellants establish that the Trial Court erred in ignoring the aspect of adverse possession although it is not specifically mentioned in defence ? | ..Affirmative        |
| 6. | What Order and Decree ?                                                                                                                                         | ..Appeal is allowed. |

### **FINDINGS OF THE APPELLATE COURT:**

11. a) That the suit was filed for declaration of ownership on basis of sale deed and would be governed by Article 54 to 58 of Limitation Act.

b) That in RCS No 70 of 1992, the Defendants had claimed title on basis of sale deed of year 1991 and the cause of action arose in 1992 and the suit not being filed within three years is barred by limitation.

c) That, for applicability of Article 65, the starting point for limitation would commence from date of Plaintiff's dispossession and from the Defendants possession becoming adverse.

d) That there is no evidence to show Plaintiff's possession over the suit property after execution of sale deed in his favour and that he was dispossessed after the Appellate Court's order on 18<sup>th</sup> February, 2005 arising out RCS No 70 of 1992.

e) That the Defendant's possession became adverse since 1991 and the suit was required to be filed within period of 12 years and the suit filed in the year 2011 is barred by limitation.

**SUBSTANTIAL QUESTION OF LAW FRAMED:**

12. The Second Appeal was admitted *vide* order dated 30<sup>th</sup> March, 2021 on the following substantial questions of law:

*“i. That whether the learned lower Appellate Court is justified in holding that the Suit filed by the Appellant is barred by limitation, when in fact that the Suit was filed by the Appellant well within the period of limitation ?*

*ii. That the learned lower Appellate Court ought to have seen that it is settled by a catena of judgments of the Hon’ble Apex Court as also of this Court that when the Suit is filed for title and a consequential relief for possessing is sought, the said Suit would be governed by Article 65 of the Indian Limitation Act, 1963 and hence the suit filed by the appellant was well within the period of limitation as per the provisions of Article 65 of the Indian Limitation Act, 1963 ?*

*iii. That whether the learned Lower Appellate Court is justified in holding that the Respondents herein have established that they are possessing the suit property adverse to the title of the appellant continuous for more than 12 years when the said proposition is neither pleaded nor proved by the Respondents herein ?”*

13. During the hearing of the Second Appeal the learned counsel for the appellant pointed out that the Appellate Court has held that the plaintiff had only claimed possession of the property and not claimed partition of the suit property and without the share being carved out upon partition the plaintiff could not claim possession of half share. Drawing attention to the prayers in the plaint, he submits that prayer clause (b) is the specific prayer of the Plaintiff seeking partition and separate possession and the finding rendered by the Appellate Court is contrary to the record. He would therefore urge that additional substantial question of law on the erroneous finding contrary to the record should be framed.

14. As one of the grounds on which the Appellate Court has reversed the findings of the Trial Court is that only upon claiming partition by the plaintiff, the decree of partition can be passed and possession could have been delivered, in my view, additional substantial question of law is required to be framed as under:

*“(iv) Whether the finding of the 1<sup>st</sup> Appellate Court that the Trial Court has granted a decree for partition without there being a prayer to that effect in the suit is incorrect in view of prayer clause (b) of the plaint seeking specific prayer for partition and separate possession.”*

**SUBMISSIONS:**

15. Heard Mr. Chetan G. Patil, learned counsel for the Appellant and Mr. V. B. Rajure, learned counsel for Respondent Nos.1A to 1E and 2.

16. Mr. Patil, learned counsel appearing for the appellant submits that the suit was filed for recovery of possession based on title and is governed by Article 65 of the Limitation Act, 1963. He submits that the Trial Court has considered that in a Suit based on title the defendants can succeed only if they prove that their possession had become adverse to the plaintiff beyond 12 years and there is no plea of adverse possession and as such Suit cannot be held to be barred by limitation. He submits that the findings of the Appellate Court that Article 58 of the Limitation Act would apply is erroneous as the Suit is for recovery of possession based on title. He submits that the findings of the Appellate Court that the possession of the defendant would become adverse since 1991 is erroneous inasmuch as the defendants claim ownership on the basis of their Sale Deed of the year 1991 and has not put forth any case of adverse possession in their written statement. He relies upon the following decisions:

1. *Sopanrao and Anr. vs. Syed Mehmood and Ors., (2019) 7 Supreme Court Cases 76;*
2. *Santosh Hazari vs. Purushottam Tiwari (Decd) by Lrs.,*

*(2001) 3 Supreme Court Cases 179.*

17. *Per contra*, Mr. Rajure, learned counsel appearing for the respondent submits that the suit was not one for partition as is evident from the valuation clause of the plaint. He submits that there was no issue of partition framed by the Trial Court and possession could not be claimed without seeking partition. He would contend that for the purpose of applicability of Article 65 of the Limitation Act the plaintiff has to prove adverse possession of the defendants. He submits that in the year 1992 Suit was filed by the defendants based on previous possession and pointing out to the averments in the plaint, he submits that it is specifically pleaded that the plaintiff is not in possession. He submits that the relevant article is Article 58 of the Limitation Act and not Article 65. He submits that the plaintiff has failed to show that in 2005 he was dispossessed and as such suit filed in 2011 was barred by limitation. He submits that there is no substantial question of law arising in the present case.

18. In rejoinder, Mr. Patil, submits that there is no case of adverse possession in the written statement. Drawing attention to the valuation clause he submits that necessary court fees have been paid under Section

6(viii) and Section 6(v) (b) of the Court Fees Act. He submits that the prayers would indicate that the suit was filed seeking partition and separate possession.

### **ANALYSIS:**

19. The substantial questions of law arising in the present case is that in a suit filed by a purchaser of undivided interest in the coparcenary property seeking partition and separate possession, whether Article 58 of Limitation Act, 1963 which deals with suit for obtaining any other declaration prescribing period of three years from the date when the right to sue first accrues would apply or Article 65 of the Limitation Act, 1963, which deals with possession of immovable property or any interest therein based on title and prescribes period of twelve years when the possession of the Defendant becomes adverse to the Plaintiff. The consequential question to be determined would be whether in facts of the present case, the suit is within limitation and whether the reliefs have been correctly sought by the Plaintiff.

20. I will firstly deal with the additional question of law framed during the hearing of the Appeal. The Appellate Court has held that the

Plaintiff has only claimed possession of the suit property and has not claimed partition. The Appellate Court has held that the Plaintiff would be entitled to possession only when he files the suit for partition. Plain reading of the plaint discloses that in paragraph 11 of the Plaint, it is specifically pleaded that the suit is filed for partition and possession of the suit property. The valuation clause of the plaint makes it clear that necessary Court fees had been paid under Section 6(viii) and Section 6(v) (b) of the Court Fees Act. By virtue of Prayer Clause (b), specific prayer for partition and possession of  $\frac{1}{2}$  share of Gat No 886/2 was sought. The Appellate Court was therefore not correct in holding that the Trial Court erred in directing partition and delivery of the property without any relief of partition being sought.

21. I shall now consider the issue of limitation. The genealogy reproduced above shows that Bhiru was the common ancestor and upon his death the property being Gat No 886/2 devolved upon Balu and Mayappa. The evidence on record establishes that there was no partition between Mayappa and his brother Balu and upon execution of sale deed with Mayappa in respect of  $\frac{1}{2}$  share in Gat No 886/2, the Plaintiff has purchased undivided  $\frac{1}{2}$  share of Mayappa in the coparcenary property.

22. The Plaintiff has prayed for declaration of his ownership rights in  $\frac{1}{2}$  share of Gat No 886/2 and for partition and separate possession of his  $\frac{1}{2}$  share. By reason of seeking of declaration of ownership, the Appellate Court has held that applicable Article would be Article 58 of Limitation Act, 1963 and that the cause of action arose upon the denial of title by the Defendants in the earlier round of litigation i.e. RCS No 70 of 1992. As the instant suit was filed in the year 2011, the Appellate Court has held that the suit was barred by limitation. However, the Appellate Court has further considered the applicability of Article 65 of Limitation Act, 1963 and has held that the possession of Defendant would become adverse since 1991 and the suit filed in the year 2011 would be beyond the period of 12 years and as such barred by limitation.

23. It would therefore be necessary to consider as to whether the suit is essentially for declaration of ownership rights or for partition and separate possession. If it would be the latter, the suit would be governed by provisions of Article 65 of Limitation Act, 1963. It needs to be noted that there is no particular provision in Limitation Act, 1963 prescribing the period of limitation in respect of suit filed by stranger alienee of undivided interest in coparcenery property.

24. So as to consider the remedy available to the purchaser of undivided interest in coparcenary property, it will be profitable to refer to the principles of Hindu Law in that respect. In the treatise on Principles of Hindu Law - Mulla (24<sup>th</sup> Edition) the author has stated thus:

*“257: According to Mitakshara law as administered in Bombay and Madras States, a coparcener may sell, mortgage or otherwise alienate for value, his undivided interest in coparcenary property without the consent of the other coparceners....”*

*259: According to Mitakshara law as administered in Bombay, Madras, Madhya Pradesh and some other States, a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in a specific property forming part of the joint family properties, however he has no right to alienate, as his interest, any specific property belonging to the coparcenary, for no coparcener can, before partition, claim any such property as his own.....”*

*Right to partition: In Bombay and Madras, the purchaser of undivided interest of a coparcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, for his vendor himself could not have claimed it, unless the other*

*coparceners consent to it. He can only enforce his rights by a suit for a general partition...”*

25. The law as stated by the learned author would indicate that the remedy of purchaser of undivided interest in coparcenary property is to enforce his right by filing suit for partition. In the present case as there was denial by the Defendants to the right of the Plaintiff claimed under the registered sale deed dated 7<sup>th</sup> August, 1985, by putting up rival sale deed of 3<sup>rd</sup> January, 1991, the Plaintiff had claimed the relief of declaration of ownership. There is no counter claim filed by the Defendants seeking ownership rights based on their sale deed of the year 1991 or seeking cancellation of the sale deed of the year 1985. As such the instant suit was one for partition and separate possession of the share which would be allotted to Mayappa upon partition. In the absence of any challenge to his sale deed, the Plaintiff stepped into the shoes of Mayappa and could enforce his right for general partition.

26. The issue as to the relevant applicable Article of Limitation in suits initiated by purchaser of undivided interest in coparcenary property came up for consideration of Apex Court in the case of **M.V.S Manikayala**

**Rao vs M. Narasimhaswami & Ors AIR 1966 Supreme Court 470** , which was three bench judgment. Two learned Judges (Coram: Sarkar J and Raghubar J) proceeded upon the assumption without deciding that Article 144 of Limitation Act, 1908 was applicable. The majority decision noted that it was well settled that the purchaser of coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased and his only right is to sue for partition of property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased and his right to possession would date from the period when a specific allotment was made in his favour. It was held that being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he is entitled to possession. The third judge ( Coram : Ramaswami J) concurring held in paragraph 18 , 19 and 20 as under:

*“18. Before dealing with the question as to which Article of the Limitation Act applies to the present case it is necessary to examine the legal position of persons like Sivayya who purchase shares of some of the coparceners of the Hindu Joint Family. It is well settled that the purchaser does not acquire any interest in the property sold and he cannot claim to be put in possession of any definite piece of family property. The purchaser acquires only an*

*equity to stand in the alienor's shoes and work out his rights by means of a partition. The equity depends upon the alienation being one for value and not open any contractual nexus. The purchaser does not become a tenant in common with the other members of the joint family. He is not entitled to joint possession with them. The alienee's suit for partition must be one for partition of the entire property and not for the partition of any specific item of, or interest in, the family property. Such a suit, however, will not be technically on a par with a suit for partition filed by a coparcener.. Such a suit would not have the necessary effect of breaking up the joint ownership of the members of the family in the remaining property nor the corporate character of the family. (Mayne's Hindu Law, eleventh edition, page 489)."*

19. *On behalf of the appellants learned counsel put forward the argument that the right of the alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right. In my opinion, there is no warrant for this argument. A suit for partition filed by the alienee from a coparcener is not, in a technical sense, a suit for partition and, as already stated, such a suit will not have the necessary effect of breaking up the joint ownership of the members of the family in the joint property nor the corporate character of the family. As observed by Bhashyam Ayyangar, J. in Aiyvagar Venkataramayya v. Aiyvagar Ramayya ILR 25 Mad 690 (FB) at p. 717)*

*"The vendee's suit to enforce the sale by partition is not a suit for 'partition', in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu law. A suit for partition, in the technical sense,*

*can be brought only by an undivided member of the family. The right to such partition is personal to him and not transferable. Such a suit can be brought only in the lifetime of the coparcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of Court, breaks up not only the joint ownership of property, but also the family union, ie the corporate character of the family. Each member thereafter becomes a divided member with a separate line of heirs to himself. An undivided member of a family, though he may alienate either the whole (Gurulingapa v. Nandappa, ILR 21 Bom 797), or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred.... The transferee, however, does not step into the shoes of the transferor as a member of the family and there will be no community of property between him and all or any of the members of the family in respect either of the property transferred to him or the rest of the family property”*

*In my opinion, a suit like the present one will fall within Article 144 of the Limitation Act. It is true that an alienee of an undivided interest of a Hindu coparcener is not entitled to joint possession with the other coparcener and he is also not entitled to separate possession of any part of the family property. But the alienee is entitled to obtain possession of that part of the family property which might fall to the share of his*

*alienor at a partition. What the alienee acquires by a purchase is not any interest in specific family property but only an equity to enforce his right in a suit of partition and have the property alienated set apart for the alienor's share, if possible. In the present case the alienee has instituted a suit for general partition with the prayer that he may be put in possession of that part of the family property which may be allotted to his alienor. It is not right to consider such a suit as a suit for mere partition. The main relief sought by the plaintiff is the relief for possession of that part of the property which may be allotted to the alienor's share and a relief for partition is only a machinery for working out his right and ancillary to the main relief for possession of the property allotted to the alienor's share. What the plaintiff seeks is actual delivery of possession. In my opinion, such a suit falls within the purview of Article 144 of the Limitation Act and the law on this point is correctly stated in Thani v. Dakshinamurthy ILR (1955) Mad 1278. (AIR 1955 Mad 288)*

20. *If Article 144 is the proper article applicable, when does time commence to run? According to the third column of Article 144, time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. As I have already pointed out, the possession of the non-alienating members of the family cannot be deemed to be possession on behalf of the alienee also, because the purchaser-alienee does not acquire any interest in the property sold and does not become tenant-in common with the members of the family nor is he entitled to joint possession with them. It is clear that in the absence of a clear*

*acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the non-alienating coparceners would be adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inconsistent with the conception of adverse possession of that interest. As Lord Radcliffe observed in Sudarsan Das v. Ram Kirpal Das AIR 1950 PC 44 at p. 47.*

*"Now it is the respondents' case it is in fact their main contention on this issue that the appellant has never at any time had 'adverse' possession against them because, the disputed property being a four-anna undivided share, his possession has been throughout no more than a joint possession with them. And the joint possession which co-parceners enjoy in respect of the undivided property involves that, prima facie, the exclusive possession of any one of them is not adverse to the others. Their Lordships have no doubt of the validity of this general rule: but they are unable to think that it will be in any way departed from if they hold that in respect of the disputed property itself the appellant's possession has been adverse to the owners of the other shares. In truth there is some confusion involved in the argument. What is in question here is not adverse possession of the block of property in which the various undivided interests subsist but adverse possession of one undivided interest. Article 144 certainly extends the conception of adverse possession to include an interest in immovable property as well as the property itself nor*

*was it disputed in argument by the respondents that there could be adverse possession of an undivided share, given the appropriate circumstances."*

*In the present case, therefore, adverse possession began to run from the date of purchase of the undivided share i.e from December 21, 1936 but it was submitted on behalf of the appellants that Prakasalingam obtained symbolic delivery and possession of the undivided share on November 6, 1939 after notice to Defendants 2 to 5 and there was a fresh cause of action to sustain the present suit for possession. It was contended on behalf of the respondents that the symbolic delivery was illegal and the executing court was not competent to make an order of delivery of possession, either symbolic or actual with regard to the sale of an undivided interest of joint family property. In support of this argument reliance was placed on the decision in Yelumalai Chetti v. Srinivasa Chetti ILR 29 Mad 294, in which it was held that the purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member and the Court cannot, on a mere application for execution by such purchaser, enforce his right by an order for partition. It was further held that no such order can be made under Section 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under Section 318 cannot be a bar to a suit by the purchaser for partition. Even assuming that the grant of symbolic delivery of*

*possession ought not to have been made and that the executing court acted illegally in making such an order, it cannot be argued that the executing court had no jurisdiction to make the order or that the act of symbolic possession was a nullity in the eye of law. I am, therefore, of the opinion that the grant of symbolic possession by the court in favour of Prakasalingam after notice to the Defendants 2 to 5 was tantamount in law to delivery of actual possession and, therefore, sufficient to break up the continuity of adverse possession in favour of the defendants. In Sri Radha Krishna Chanderji v. Ram Bahadur AIR 1917 PC 197 it was held by Lord Sumner that symbolic possession was available to dispossess a party sufficiently where he was a party to the proceedings in which it was ordered and given. I am accordingly of the opinion that the suit of the plaintiff is not barred by limitation under Article 144 of the Limitation Act and the view taken by the High Court on this part of the case is not correct and must be overruled.”*

27. In the above noted decision of the Apex Court, the majority judgment expressed doubt about the applicability of Article 144 of Limitation Act, 1908 and the minority judgment applied Article 144 of Limitation Act, 1908 but the decision was unanimous. The judgment of third judge (Coram: Ramaswami J) was not a dissent but concurring judgment and in my opinion, constitutes law declared by the Apex Court under Article 141 of Constitution of India and binding on this Court. The

above noted decision of Apex Court holds that the suit for possession by alienee of an undivided interest in coparcenary property will fall within Article 144 of Limitation Act, 1908 (corresponding to Article 65 of Limitation Act, 1963). In the instant case declaration of ownership was sought in view of the rival claim of ownership raised by the Defendants by virtue of the subsequent registered sale deed of the year 1991. However, the suit was essentially for possession of the  $\frac{1}{2}$  portion of the property which would fall to Mayappa's share upon partition. The relevant Article would therefore be Article 65 of Limitation Act, 1963 (corresponding to Article 144 of Limitation Act of 1908) and not Article 58 of Limitation Act, 1963.

28. Having held that Article 65 of Limitation Act, 1963 would apply, the next issue is the starting point of limitation. The third column of Article 65 of Limitation Act, 1963 provides that the period of limitation begins to run when the possession of the Defendant becomes adverse to the Plaintiff and the suit will have to be filed within period of 12 years from the date from which the possession of the Defendant becomes adverse to that of the Plaintiff. In case of purchase of undivided share of coparcenary property, the purchaser is not entitled to possession of any portion of the property and his only right is to sue for partition. That being so, when does

the possession of non alienating coparceners become adverse to that of the purchaser. In the above noted decision of **M.V.S Manikayala Rao vs M. Narasimhaswami & Ors** (supra), it was held by minority judgment (Coram: Ramaswami J) that the possession of non alienating coparceners would be adverse to the alienee from the date on which he becomes entitled to sue for general partition and possession of his alienor's share and held that the adverse possession began to run from date of purchase of undivided share.

29. Applying the enunciation of law laid down by the above noted decision of Apex Court to the facts of the present case as the Plaintiff had purchased the undivided share of Mayappa by registered sale deed dated 7<sup>th</sup> August, 1985, the adverse possession would begun to run from the date of purchase i.e. from 7<sup>th</sup> August, 1985. While deciding the starting point of limitation, the aspect of possession of the purchaser will also have to be taken into account for the reason that if the possession would have been handed over at the time of execution of sale, the same would constitute joint possession alongwith the non alienating coparcener and hence there would be no question of the possession of non alienating coparceners becoming adverse to that of the purchaser. If the possession was handed over and then the purchaser was dispossessed, the same would have the effect of breaking

the period of adverse possession of the non alienating coparceners.

30. The case of the Plaintiff is that upon execution of the sale deed in the year 1985, he was put in possession of the portion being cultivated by Mayappa and upon the Appellate Court reversing the finding of the Trial Court in the year 2005 in appeal arising out of RCS No 70/1992 filed by the Defendants seeking injunction, the Plaintiff has been restrained from entering the suit property and the suit filed in the year 2011 is within limitation being filed within 12 years as provided under Article 65 of Limitation Act. On the other hand the case of the Defendants is that the Plaintiff was never in possession of the property and his title was denied in the year 1992 upon the suit being filed and the suit filed in the year 2011 was barred by limitation not being instituted within period of 12 years.

31. The Defendants herein had filed RCS No 70 of 1992 seeking decree of perpetual injunction against the Plaintiff herein. *Vide* Judgment dated 7<sup>th</sup> October, 1999, the Trial Court had answered the issue of legal title and ownership over the suit land against the Defendants herein however had held that the Defendants herein were in possession of the suit property and had dismissed the suit declining to grant discretionary relief of

injunction holding that the Defendants herein had not approached the Court with clean hands as they claimed full title over the suit property and not as coparceners. Against the judgment of Trial Court, the Defendants herein had preferred appeal being RCA No 295 of 2002 and the Appellate Court *vide* judgment dated 18<sup>th</sup> February, 2005 held that the Defendants herein are in settled possession of Gat No 886/2 and the remedy of the Plaintiff herein is to claim his share in the suit field. The said finding has attained finality as the challenge upto the Apex Court has failed.

32. The finding on the settled possession of the Defendants herein has attained finality in the earlier round of litigation. The Plaintiff has not been able to establish that he was put in possession of the suit property upon the execution of the sale deed on 7<sup>th</sup> August, 1985. That being the position, the adverse possession of the non alienating coparceners would begun to run from the date of sale deed i.e. 7<sup>th</sup> August, 1985. As the Plaintiff has not been able to establish that he was put in possession, there is no break in the adverse possession of the non alienating coparceners and the suit had to be filed within period of 12 years from 7<sup>th</sup> August, 1985. Even assuming that he was put in possession, upon the Defendants filing the earlier suit i.e. RCS No 70 of 1992, the possession of the non alienating coparceners would

become adverse from the said date. The cause of action as per the plaint arose upon the Plaintiff being restrained from entering the suit property upon passing of the injunction order in RCA No 295 of 2002 vide judgment dated 18<sup>th</sup> February, 2002. It was contended that the suit filed in the year 2011 is within period of 12 months as per Article 65 of Limitation Act, 1963. However Article 65 of Limitation Act, 1963 prescribed limitation period of 12 years from the date when the possession of the Defendant becomes adverse and not from the date of dispossession. The possession of the non alienating coparceners became adverse upon the execution of the sale deed on 7<sup>th</sup> August, 1985 and in any event upon the filing of RCS No 70 of 1992 seeking injunction. The instant suit filed in the year 2011 is therefore clearly barred by limitation.

33. The starting point of limitation as indicated by third column of Article 65 of Limitation Act, 1963 is when the possession of the Defendant becomes adverse to the Plaintiff. In the case of purchaser of undivided share of coparcenery property as held by the Apex Court in **M.V.S Manikayala Rao vs M. Narasimhaswami & Ors** (supra), in absence of clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the non alienating

coparceners would become adverse to the alienee from the date on which he became entitled to sue for general partition and possession of his alienor's share. The suit for partition filed by purchaser of undivided share in coparcenary property stands on different footing than a suit filed by owner with title seeking recovery of possession. In the later case it is necessary for the Defendant to plead and establish adverse possession to protect his possession or to seek title by prescription. However in suit for partition by alienee of undivided interest in coparcenary property, by virtue of principles of Hindu Law, the interest of non alienating coparceners become adverse to that of the purchaser from the date of purchase for purpose of third column of Article 65 of Limitation Act, 1963. It is not necessary for the non alienating coparceners to plead and establish a case of adverse possession in a suit for partition.

34. Now coming to the decisions relied upon by Mr. Patil, learned Counsel for Defendants, the decisions in *C. Natrajan vs Ashim Bai & Anr*, *Sopanrao & Anr vs Syed Mehmood & Ors*, *Shivram Mahadev Shinde vs Maharashtra Housing and Area Development Authority & Anr* (supra) have held that in a suit where the main relief is for possession Article 65 of Limitation Act is applicable. There is no quarrel with the said proposition,

however in the present case the issue is as regards the starting point of limitation in suit filed by a purchaser of undivided interest in coparcenary property. The decision of *M.V.S. Manikayala Rao* (supra) relied upon by Mr. Rajure, learned Counsel for Defendants is squarely applicable to the present case.

### **CONCLUSION:**

35. In suit for partition filed by an alienee of undivided interest in coparcenary property, the relevant provision for purpose of limitation is Article 65 of Limitation Act, 1963. For purpose of third column of Article 65 of Limitation Act, 1963, the possession of non alienating coparceners would become adverse to that of the alienee from the date on which the alienee became entitled to sue for general partition and possession of his alienor's share. It is not necessary for the non alienating coparceners to plead and establish defence of adverse possession as the sale is of undivided share of coparcenary property.

36. In the instant case as discussed above, the suit filed in the year 2011 is barred by limitation under Article 65 of Limitation Act, 1963 as the possession of the Defendants would be adverse to the Plaintiff from the date

on which the Plaintiff became entitled to sue for general partition and possession of Mayappa's share i.e. from the date of purchase on 7<sup>th</sup> August, 1985 and in any event upon the filing of RCS NO 70/1992 by the Defendant seeking injunction. The suit was therefore required to be filed within a period of 12 years from the year 1992 and the instant suit being filed in the year 2011 was clearly barred by limitation.

37. The Appellate Court failed to notice that by specific prayer clause (b), the Plaintiff had sought partition and separate possession of ½ share of Mayappa in Gat No 886/2 and erred in holding that the Trial Court has directed partition without any prayer for partition.

38. The substantial questions of law are answered accordingly. In view of the issue of limitation answered against the Appellant, the Appeal stands dismissed. Interim Application does not survive and is accordingly disposed of.

**(SHARMILA U. DESHMUKH, J.)**

