

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 559 OF 2017
WITH
CIVIL APPLICATION NO.1480 OF 2016

Pandit Laxman Jagtap

...Appellant-Applicant.

Versus

Giri Waghu Jagtap and Ors.

...Respondents.

Mr. Nikhil Pujari i/b Mr. P. N. Joshi for the Appellant-Applicant.
Mr. Prashant D. Patil for Respondent Nos.1 to 7.

Coram : Sharmila U. Deshmukh, J.

Date : April 25, 2024.

P. C. :

1. Heard.

2. Being dissatisfied by the judgment dated 7th December 2015 passed by the Appellate Court rejecting the appeal and confirming the judgment of the Trial Court dated 4th March 2008 partly decreeing the suit and determining the share of the parties, the original defendant Nos.1, 6 and 7 are before this Court. For sake of convenience the parties are referred to by their status before the Trial Court.

3. RCS No.184/2001 was instituted by the plaintiff for partition, declaration and for perpetual injunction. The suit properties were described in the plaint as two agricultural lands bearing Gat No.33 and 242 and forest plot No.5 and house property bearing No.196 more particularly described in plaint. The relationship *interse* between the parties is not disputed. Plaintiff and defendant Nos.1 and 2 are full blood brothers and defendant Nos.3 and 4 are the legal heirs of the deceased brother, defendant No.5 is the sister of defendant Nos.1 and 2 and defendant Nos.6 and 7 are the sons of defendant No.1. The case pleaded was suit property mentioned at Sr. Nos.1 and 2 were purchased by their father in the name of defendant No.1 who admittedly was a minor at the time of purchase. The name of defendant No.1 was mutated in the revenue records and even after attaining majority the name of defendant No.1 continued in respect of the said properties. The claim of the plaintiff was that though the property was purchased and stood in the name of defendant No.1 those were joint family properties and the same have been purchased by his father. As regards property mentioned in Sr. No.3 which was the property of the forest department, the property was given to their father and after the death of their father it was cultivated by them along with other properties. About 7-8 years back there was partition effected between the plaintiff, defendant Nos.1 and 2 and

their deceased brother as regards Sr. No.2 and 3 whereas property at Sr. No.1 i.e. land gat No.33 was decided to be partitioned at later point of time. It was contended that after retirement from service plaintiff constructed house on Gat No.33 and was residing thereon and request was made for partition of suit property mentioned at Sr. No.1. Hence suit was filed for partition of suit property at Sr. No.1 and for declaration that properties at Sr. Nos.2 and 3 were partitioned and parties were in respective possession.

4. The suit came to be resisted by the defendant Nos. 1, 6 and 7. It was contended that the suit property mentioned at Sr. Nos.1 and 2 was purchased in the name of defendant No.1 exclusively and plaintiff had no concern with said property and property at Sr. No.3 is separate property of Defendant No.1. It was contended that the plaintiff and defendant No.2 to 5 were separated about 35-40 years back and thereafter the plaintiff had no right to partition as member of the joint family. It was further contended that there was no partition of the property mentioned at Sr. Nos. 2 and 3.

5. The parties went to trial and the Trial Court upon consideration of the evidence held that the suit properties are the joint family properties and the plaintiff had a share in the suit properties. The Trial

Court negated the issue as regards the previous partition. The issue of limitation was answered in favour of the plaintiff.

6. Against the decree of the Trial Court, defendant Nos.1, 6 and 7 filed Regular Civil Appeal No.27/2008. The Appellate Court upon re-appreciation of evidence confirmed findings of the Trial Court and dismissed the appeal.

7. Heard *Mr. Nikhil Pujari for the Appellant and Mr. Prashant D. Patil for Respondent Nos.1 to 7.*

8. Learned counsel submits that substantial question of law which arises in the present case is the question of limitation. He submits that admitted position is that suit property was purchased in the name of defendant No.1 and continued in his name after defendant No.1 attained majority. He submits that at no point of time partition was claimed by the plaintiff, who is now aged about 64 years, and after the defendant No.1 had attained majority, it was open for the plaintiff to claim partition of the property which the plaintiff has not done. He submits that the suit filed in the year 2001 after a period of almost 40-45 years after defendant No.1 has attained majority is barred by limitation. He would further submit that the case of the plaintiff of

the previous partition having been negated by the Courts, decree of partition could not have been passed. Learned counsel has taken this Court minutely through the judgment of Trial Court and the Appellate Court. He would further submit that starting point of limitation would be the date of attaining of majority by the defendant No.1 and even if the period of 12 years is calculated from the date of attaining the majority as per Article 110 of the Limitation Act, 1963 the suit was barred beyond the period of limitation of 12 years.

9. *Per contra*, learned counsel for the respondent would point out that there is no plea of ouster raised by defendant No.1. On the issue of limitation he has invited the attention of this Court to the findings of the Trial Court holding that the plaintiff had constructed the house over the suit property and has produced documentary evidence to substantiate the same. He further points out the admission of defendant No.1's witness that such a house is constructed by the plaintiff 2-5 years back and that name of the plaintiff is entered in the concerned Grampanchayat record.

10. He would further submit that in the absence of any ouster being pleaded, the period of 12 years would not commence and the plaintiff was entitled to claim partition. He submits that negating of

the issue of prior partition will not come in way of the Trial Court decreeing the suit for partition.

11. Considered the submissions and perused the record.

12. The admitted position is that the suit properties were purchased in name of defendant No.1 when he was minor and admittedly out of joint family income. This position is not disputed by either of the parties. It is settled that co-owner has interest in the whole property and also in every parcel of it. The possession of the Defendant No.1 over the suit property being joint family property would be construed in eyes of law as possession of all the co-owners, the exception being where there is ouster of a co-owner. To establish ouster, the possession of co-owner must not only be exclusive but also hostile to the knowledge of other by denying the title of other. From the material which has come on record and especially the written statement there is no specific plea of ouster raised that the plaintiff has been ousted from the joint family property and for the statutory period. Submission is that the period of limitation would commence upon the date of defendant No.1 attaining majority. I am unable to accept the said submission in view of the settled position in law that the possession of a co-owner being joint possession of all the co

owners unless ouster is pleaded. The relevant Article which would be applicable in the present case will be Article 110 of the Limitation Act and the period is of 12 years when exclusion become known to the plaintiff. For the starting point of limitation to commence, it was necessary to show that the plaintiff had been excluded from the enjoyment of the joint family property to his knowledge. The evidence on record is to the contrary. Plaintiff has constructed house over the suit property almost 4-5 years back and same has been established by the documentary evidence in the form of assessment certificate as well as admission of defendant's own witness. Considering that the plaintiff was in enjoyment of the property and has also constructed a house thereon, it cannot be said that at any point of time to the knowledge of the plaintiff he was excluded from the possession of the joint family property. The property though purchased in name of defendant No.1 constituted joint family property. In the present case, the starting point of limitation as sought to be contended by learned counsel for the appellant would not be the date of attaining majority but would be the date when the plaintiff is excluded from the enjoyment of the joint family property.

13. The next submission is that as relief of oral partition is negated, the Trial Court could not have decreed the suit for partition. The

defendants have also come with the case that there was no oral partition between the parties and in such an event considering the pleadings itself, the plaintiffs not being able to establish and plead their case of oral partition, the joint family status continues. Thus, the Plaintiffs were well within their right to claim partition of the joint family properties.

14. In light of above, no substantial question of law arises in the present case. Appeal stands dismissed.

15. At this stage request is made for continuation of ad-interim relief which was operating in his favour for a period of 6 weeks. Learned counsel for respondent opposes the said prayer. As interim relief is operating since long, I am inclined to extend the same for a further period of 6 weeks.

[Sharmila U. Deshmukh, J.]