



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD
901 SECOND APPEAL NO. 54 OF 2024

1. Babasaheb s/o. Raghunath Makode,
Age: 43 Years, Occu. : Agri,
R/o. Markenday Nagar, Manwath,
Tq. Manwath, District Parbhani
2. Balasaheb s/o. Raghunath Makode,
Age:41 Years, Occu : Agri,
R/o. Markenday Nagar, Manwath,
Tq. Manwath, District Parbhani.
3. Radhabai w/o. Raghunath Makode,
Age: 66 Years. Occu : Agri.
R/o. Markenday Nagar, Manwath,
Tq. Manwath, District Parbhani.
4. Ratnamala w/o. Jagannath Deshmane,
Age: 51 Years, Occu : Household,
R/o. House No.73, Gondhale Nagar,
Lokhandi Pul Road, Hadapsar, Pune 28,
Tq. & District Pune.
5. Ashabai w/o. Vaijanath Shastri,
Age:49 Years. Occu : Agri,
R/o. Godu Galli, Manwath,
Tq. Manwath, District Parbhani.
6. Ushabai w/o. Bandu Dehadare,
Age; 46 Years, Occu : Household,
R/o. Shevgaon, Tq.Pathardi,
District Ahmednagar.

...APPELLANT
(Ori. Defendant No.1 to 6)

VERSUS

1. Leelabai @ Neelabai w/o. Babulal Deshmane
Age: 72 Years, Occup: Household,
R/o. Pargaon Japti, Tq. & District Beed,
At Present House No.73, Survey No.16,
Gondhale Nagar,, Lokhandi Pul Road,
Hadapsar, Pune 28, Tq . & District Pune.

...RESPONDENT
(Ori. Plaintiff)

...
Mr. Jaju Nikhil Santosh, Advocate for Appellants
Mr. Avinash A. Khande, Advocate for Respondent/sole
...

CORAM : ROHIT W. JOSHI, J.
DATE : 2ND APRIL, 2025

ORAL JUDGMENT :

1. Appellants in the present appeal are original defendants and respondent is the original plaintiff. Respondent/plaintiff is sister of Raghunath who is deceased father of appellant Nos.1, 2, 4 to 6 and husband of appellant No.3. The parties will be referred in the body of the judgment as plaintiff and defendants.

2. The plaintiff has filed a suit for partition and separate possession against defendants who are widow and children of her late brother Raghunath being Regular Civil Suit No.68 of 2013 *inter alia* claiming partition and separate possession with respect to the suit properties which comprise of an agricultural land. She has given up right to seek partition with respect to residential house. The defendants appeared in the matter and opposed the suit contending that the plaintiff had relinquished her share in the properties of the family in the year 1988 and was therefore not entitled to the relief of partition and separate possession.

3. Maruti i.e. father of the plaintiff and deceased Raghunath, is the original owner of the suit property. He expired on 04.05.1981, leaving

behind three class-I legal heirs, namely Thakubai, his widow, plaintiff, his daughter and Raghunath, his son. The contention of the plaintiff and defendants is that the suit property was ancestral property of late Maruti.

4. The learned Trial Court has decreed the suit granting a decree for partition and separate possession in favour of the plaintiff vide judgment and decree dated 06.04.2016. The learned Trial Court has granted $1/4^{\text{th}}$ share to the plaintiff in the suit property and it is held that defendant Nos.1 to 6 are entitled to the remaining $3/4^{\text{th}}$ share. The plaintiff has not challenged this decree passed by the learned Trial Court, however, the defendants filed first appeal being, Regular Civil Appeal No.53 of 2016 which came to be dismissed vide judgment and decree dated 06.01.2024 passed by the learned District Judge-I Parbhani. It will be pertinent to mention that although the plaintiff did not file appeal or cross-objection, the learned District Judge has modified the decree thereby enhancing the share of the plaintiff from one-fourth as was decreed by the learned Trial Court to half.

5. Aggrieved by the said decrees the original defendants have filed the present Second Appeal. The learned advocate for the appellants contends that the plaintiff had relinquished her share in the suit property in the year 1988 itself. It is then contended that the suit is barred by limitation since relinquishment of the property amounts to

exclusion. Apart from this, it was contented that there was a partition with respect to suit property *inter se* between the defendants and therefore suit for partition filed by the plaintiff was not maintainable. The learned Counsel for the appellant contends that the learned First Appellate Court has not framed proper points for determination in as much as point for determination is not framed with respect to question of limitation. He further contends that the issue of limitation is also not discussed by the learned First Appellate Court. Apart this this , he contends that the learned First Appellate Court has erred in law by enhancing the share awarded by the learned Trial Court although, the plaintiff did not challenge the decree passed by the learned Trial Court.

6. As regards the contention raised by learned Counsel for the appellant with respect to relinquishment, it is his case that the plaintiff had relinquished her share in the properties of her father in the year 1988. Assuming that the plaintiff had indeed relinquished her share in the year 1988, as contended, in my considered opinion, the same will not be bar the suit for partition filed by her. The Hindu Succession (Amendment) Act, 2005 has made a sea change to the Hindu Succession Act, 1956 and uncodified Hindu Law. Daughter, who was earlier not considered to be a co-parcener under the uncodified Hindu Law is conferred with status of a co-parcener from the date of her

birth. This right has been conferred by the Hindu Succession (Amendment) Act, 2005 for the first time w. e. f 09.09.2005. It needs to be mentioned that although, the provisions of Hindu Succession (Amendment) Act, 2005 have come into force from 09.09.2005 the status of co-parcener is conferred to the daughter from the date of her birth. In the year 1988 when the plaintiff has allegedly relinquished her share in the suit property she was not a co-parcener. This right is vested with her for the first time w.e.f 09.09.2005, although the date of vesting will be the date of her birth. It is obvious that a right which is not vested in a person cannot be given up or relinquished. In that view of the matter, in my considered opinion, the alleged relinquishment of the year 1988 is inconsequential and will not close the doors on the face of the plaintiff to file a suit for partition and separate possession with respect to ancestral properties of her father.

7. That apart according to the defendants the alleged relinquishment is an oral relinquishment. Placing reliance on the judgment of this Court in the matter of *Ramdas Chimna V/s. Pralhad Deorao & Others.*¹ and *Shailesh Harilal Poonatar Vs. District Collector of Stamps and Ors.*² the learned Counsel for the appellant contends that oral relinquishment is permissible. It is well settled that oral relinquishment is permissible with respect to coparcenary property.

1 AIR 1965 Bombay 74

2 2005 (2) Mh.L.J.

However, if relinquishment is with respect to the other property it has to be by a registered document only.

8. The father of the plaintiff has expired on 04.05.1981. He was survived by two class-I female legal heirs, namely his widow and his daughter-the plaintiff. Section 6 of the Hindu Succession Act as it stood prior to amendment, provides that when a Hindu male dies after commencement of the Hindu Succession Act, 1956, his share or interest in undivided Hindu family will be inherited by his class-I legal heirs, in case he dies intestate or by testamentary disposition if he dies executing a will. It is thus clear that the share of a deceased co-parcener who dies after commencement of the Hindu Succession Act, 1956 leaving behind female Class-I legal heirs, devolves on the Class-I legal heirs by succession or inheritance and not by survivorship. This succession or inheritance is as per Section 8 of the Hindu Succession Act, 1956 or by testamentary disposition. A property which is inherited under Section 8 of the Hindu Succession Act is a separate property of all the legal heirs. It does not have ancestral character. In view of Section 19 of the Hindu Succession Act, 1956, the property is inherited as tenants in common and not as joint tenants. It is well known that tenants in common implies unity of possession and separate title as against joint tenancy which implies unity of possession and unity of title. The legal position

that property inherited under Section 8 of Hindu Succession Act, 1956 in a separate property not a coparcenary property is no legal *res integra* as can be seen from the Judgements of Hon'ble Supreme Court in the matter of *Commissioner of Wealth Tax, Kanpur Vs. Chander Sen*¹, *Yudhishter Vs. Ashok Kumar*², *Makhan Singh Vs. Kulwant Singh*³.

9. Now since the property inherited as a separate property, the alleged oral relinquishment by the plaintiff will not be of any consequence. It is well settled that relinquishment of right in immovable property has to be by a registered document, except relinquishment of joint Hindu family property.

10. In matter of **Ramdas Chimna** (*supra*), the relinquishment was with respect to joint Hindu family property. It is held that relinquishment by a person of share in joint Hindu family property is not necessarily required to be made by a registered document. It will also be pertinent to mention that the said judgment pertains to oral relinquishment of share in joint Hindu family property. In the judgment of **Shailesh Harilal Poonatar** (*supra*) the order passed by the Collector of Stamps was challenged. A release deed was treated as a conveyance and order was passed to pay stamp duty on the said documents as per

1 AIR 1986 SCC 1753

2 (1987) 1 SCC 204

3 (2007) 10 SCC 602

Article 25(b)(5) of Schedule I to the Maharashtra Stamp Act, 1958. The question was whether a release deed under which property was transferred from one co-owner to another co-owner would be assessable to stamp duty as per Article 25 or as per Article 52. In this context, in paragraph 9 of the said judgment it is held that a release/relinquishment deed is not an alienation. Thereafter, reliance is placed on the judgment in the matter of ***Ramdas Chimna*** (supra) which is relied by the learned Counsel for the appellant. Placing reliance on the said judgment it is held that stamp duty for a release/relinquishment deed leviable as per Article 52 and not Article 25. The said judgment does not advance the case of the appellant that relinquishment deed need not be registered. The controversy in this regards is squarely covered by judgment of this Court in the matter of ***Gangaram Sakharam Dhuri Vs. Gangubai Raghunath Ayare***¹, this Court has held in paragraph 22 of the said judgment that when release or relinquishment is with respect to share or interest in joint Hindu Family property the release or relinquishment can be done orally and there is no necessity of executing any written document for the same and registration of written document is also not mandatory. It is further held that however, if the property is self acquired property of the father which has devolved on his daughter by intestate succession, then registration of the relinquishment deed will be compulsory. Therefore,

¹ 2007 (5) Mh.L.J. 136

the answer to the question as to whether the relinquishment deed in the present case was required to be compulsorily registered or not depends upon the nature of the property. The relinquishment deed is of the year 1988. As stated above, the father of the plaintiff had expired in the year 1981 leaving behind him two female class-I legal heirs. Therefore, assuming the suit property to be an ancestral property, his share in the same would devolve on his class-1 legal heirs by succession and not by survivorship. It cannot be disputed now in view of judgments of the Hon'ble Supreme Court referred above, such property which is inherited by class-1 legal heirs is inherited as a separate or self acquired property, the property cannot be said to be a co-parcenary or a joint Hindu family property.

11. Since the property which is allegedly relinquished in the year 1988 was held by the plaintiff by virtue of inheritance by operation of proviso to Section 6 read with Section 8 and Section 19 of the Hindu Succession Act, the said property was held by her as her separate property which could not have been relinquished orally. In that view of the matter, the contention of the learned Counsel for the appellant with respect to alleged oral relinquishment is liable to be rejected.

12. The learned Advocate for the appellant contends that although,

the relinquishment may not have effect in law, still for the limited purpose of limitation the aspect of relinquishment can be taken into consideration. This argument is also liable to be rejected since the plaintiff is entitled to seek share in the property as a co-parcener only from 09.09.2005. This right was not available to her prior to the said date. The suit is filed on 25.10.2013 i.e. after commencement of the Hindu Succession (Amendment) Act, 2005. The limitation for seeking partition of Joint Family Property is governed by Article 110 of the limitation Act which provides for limitation of 12 years and the period of limitation commences from the date on which exclusion from the property becomes known to the plaintiff. Likewise, if it is assumed that the property is not joint Hindu family property then the limitation will be governed by Article 65 for which the limitation prescribed is of 12 years from the date on which the possession of defendant becomes adverse. It is thus filed within the prescribed period of limitation. The contention of the learned Counsel for the appellant is therefore rejected. Perusal of the written statement does not demonstrate any pleading with respect to exclusion or ouster. In that view of the matter the point for limitation does not arise for consideration at all. It is well known that a court of law is bound to dismiss a suit which is barred by limitation, although limitation is not set up as a defence. This is the mandate of Section 3 of the limitation act. However suits for partition

and suits for possession based on title are an exception to the general rule, since the limitation commences from the date of exclusion or from the date on which possession becomes adverse. It is well settled that fact of exclusion and possession becoming hostile has to be pleaded and properly proved. The defendants have miserably failed to plead ouster or possession becoming adverse, in that view of the matter the point for limitation does not even arise for consideration.

13. The learned Counsel for the appellant draws my attention to the points for determination and findings recorded by the learned First Appellate Court to contend that the learned First Appellate Court has not framed any point for determination with respect to limitation and has also not dealt with the said aspect. The learned Counsel is right in his submission, however, as stated above, the point of limitation does not arise in the present case for want of pleadings of exclusion or adverse possession. In that view of the matter although the learned First Appellate Court has not framed point for determination on the aspect of limitation and has also not considered the aspect of limitation, to my mind the question of limitation does not arise for consideration for want of pleadings of exclusion or ouster. Alternatively, even if it is assumed that there is a lapse on the part of the learned First Appellate Court, the same does not cause any prejudice to the appellants. In that

view of the matter, the said contention will also not give rise to any substantial question of law.

14. The last contention raised by the learned Counsel for the appellants is that the learned Trial Court had granted only one-fourth share in the suit property to the plaintiff and although the plaintiff has not filed substantive appeal or cross objection challenging the said decree, the learned First Appellate Court has enhanced the share from one-fourth to half. This, according to me gives rise to the following substantial question of law:-

In the absence of any appeal or cross objection by the plaintiff, could the decree passed by the learned Trial Court be modified by the learned First Appellate Court to enhance the share awarded by the learned Trial Court to the plaintiff ?

15. During the course of hearing of the appeal when the learned Counsel for the appellant advanced submissions on this aspect, a query was put to the learned Counsel for the respondent as to whether he will be prepared to argue this point finally. The learned Counsel for the respondent expressed readiness to argue the point finally and agreed that the substantial question of law can be framed in this regard and decided forthwith. In that view of the matter with the consent of both

the learned counsel, I am framing the question and deciding the same forthwith although normally I would have admitted the appeal on the substantial question of law so framed.

16. It is a well settled proposition of law that a person who does not challenge an adverse decree passed against him is bound by the same. In the event a person is aggrieved by a decree passed against him, he is expected to challenge the same by filing an appeal or by taking recourse to other remedies available in law. A decree, though, may not be legal, will nonetheless bind a party who does not choose to challenge the same. In the present case, the learned Trial Court has granted $1/4^{\text{th}}$ share to the plaintiff. The plaintiff was satisfied with this and did not assail the decree any further. The decree came to be challenged by the defendants by filing a substantive First Appeal. It is well settled that when a party files an appeal he cannot be relegated to a worse position than to the one he would have been had he not filed the appeal. If the appeal was not filed by the defendants, the plaintiff would have got only $1/4^{\text{th}}$ share. This share could not have been enhanced to $1/2$ in the appeal preferred by the defendants. In my considered opinion the plaintiff, having failed to challenge the decree passed in her favour is bound by the decree and cannot seek enhancement in the share in the appeal preferred by the defendants.

The substantial question of law framed above therefore needs to be answered in favour of the appellants/original defendants and against the respondent/original plaintiff. In view of the reasons recorded above, the appeal is disposed of in the following terms:

ORDER

- (i) The decree dated 06.01.2024 passed by the learned District Judge-I Parbhani in Regular Civil Appeal No.53 of 2016 is quashed and set aside and the decree dated 06.04.2016 passed by the learned Civil Judge Junior Division, Manvat in Regular Civil Suit No.68 of 2013 is confirmed.
- (ii) Pending Civil Applications, if any, stand disposed of.

[ROHIT W. JOSHI J.]

Narwade/