



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 53 OF 2024

1. Kondabai w/o Bapurao Deshmukh
Age : 51 years, Occu: Agriculttue
& Household, R/o : Dhoksal,
Tq. Mantha, Dist. Jalna
2. Bapurao s/o Appasaheb Deshmukh,
Age : 56 Years, Occu : Agriculture,
R/o : Dhoksal, Tq. Mantha, Dist. Jalna
3. Ganesh s/o Ranganath Kadam,
Age : 24 years, Occu : Education,
R/o : Dhoksal, Tq. Mantha, Dist. Jalna
4. Bhagwat s/o Ranganath Kadam,
Age : 40 Years, Occu : Agriculture,
R/o : Pandhurna, Tq. Mantha, Dist. Jalna
5. Ananta s/o Ashok Kadam,
Age : 32 Years, Occu: Agriculture,
R/o Pandhurna, Tq. Mantha, Dist. Jalna
6. Ashok s/o Gangadhar Kadam,
Age : 61 Years, Occu : Agriculture,
R/o : Pandhurna, Tq. Mantha,
Dist. Jalna

....APPELLANTS

(Ori. Defendants / Appellants)

VERSUS

1. Mandodari Punjaram Deshmukh,
Age : 73 Years, Occu : Household,
R/o : Karla, Tq. & Dist. Jalna

Mr. M. M. Joshi, Advocate for Appellants
Mr. A. P. Avhad, Advocate for Respondent

CORAM : ROHIT W. JOSHI, J.

Dated : 28TH FEBRUARY, 2025

ORAL JUDGMENT :-

. The present Second Appeal is preferred under Section 100 of the Code of Civil Procedure by the original defendants being aggrieved by judgment and decree dated 30.04.2015 passed by the learned Civil Judge Junior Division, Mantha in Regular Civil Suit No.08 of 2012 (old Special Civil Suit No.43 of 2010) and the judgment and decree dated 17.11.2022 passed by the learned District Judge, Jalna in Regular Civil Appeal No.83 of 2015.

2. The appellant No.1 is daughter of real brother of the respondent. The appellant Nos.2 and 3 are her husband and son respectively. The appellant Nos.4 to 6 are purchasers of suit property, who have purchased the same from appellant No.1. The respondent had filed suit for partition and separate possession claiming half share in the suit properties on the ground that the suit properties were joint family properties, in which she also had half share along with father of appellant No.1. The said suit was decreed vide judgment and decree dated 30.04.2015 whereby the respondent was granted half

share in the suit properties by passing a decree for partition and separate possession in her favour. First Appeal preferred by the present appellants, being Regular Civil Appeal No.83 of 2015 was also dismissed against which the present Second Appeal is preferred by the appellants.

3. The learned Advocate for the appellants argues that the suit was liable to be dismissed as barred by limitation.

a. He points out from paragraph 10 and 17 of the written statement that a specific contention with respect to limitation was raised in the written statement, however, the learned Trial Court has not even framed issue on the point of limitation and has not considered the said issue properly. He then contends that the suit properties were inherited by deceased Tryambak, not from his ancestors but from other relatives and therefore, the suit properties were self acquired properties of deceased Tryambak in which the sister could not claim any share. Then, he points out that the plaintiff herself had admitted that the suit properties were separate properties of deceased Tryambak during her cross examination and the said admission is not also properly considered by the learned

Court. Apart from this, he points out that the learned First Appellate Court has erred in not framing points of determination as contemplated by order 41 Rule 31 (a) of the CPC. He placed reliance on the judgments of the Hon'ble Supreme Court in Civil Appeal No.1485 of 2020 decided on 12.02.2020 in support of the said contention and judgment dated 20.04.2001 in Civil Appeal No.2981 of 2001.

4. The defendants have pleaded that the suit for partition should have been filed by the plaintiff within a period of 12 years from the death of her father or in the alternative within a period of 03 years from her attaining majority. The learned Advocate has also drawn my attention to the paragraph 11 of the written statement wherein it is stated that the defendant had become owner by adverse possession.

5. On these grounds, it is then stated in the written statement that the suit was barred by limitation.

6. I am afraid that the contention is misconceived. Limitation for a suit for partition does not begin from the date of death of predecessor of ancestor or from the date of attaining majority. The submission in this regard is absolutely

misconceived and is rejected as such. Limitation starts from the date on which the defendant claims title to the exclusion of the plaintiff. There is no magic in the words “adverse possession”. Possession becomes adverse when hostile title or hostile possession is claimed. The date from which the defendant started claiming hostile possession or hostile title is not mentioned in the written statement. Perusal of the written statement and accepting the contents of the written statements on their face value one cannot make out the date of exclusion of the plaintiff from the suit properties. The contents in the written statement taken on their face value do not make out a case of exclusion and therefore also do not make out a case for adverse possession.

7. The learned Advocate is right that normally issue with respect to limitation ought to have been framed by the learned Trial Court. Section 3 of the Limitation Act provides that a suit barred by limitation must be dismissed, even if limitation is not setup as a defence. However, in cases where it is contended that the suit is barred by limitation on the ground of adverse possession, question of limitation does not even

arise for consideration unless the defendants incorporate proper pleadings, making out a case of adverse possession. This is an exception to the general rule. In the present case, the pleadings in the written statement are absolutely silent as regards the date from which and the manner in which possession of the defendants became adverse to the plaintiff. The defendants have merely stated that suit is barred by adverse possession. Such a plea is absolutely meaningless and not even sufficient to raise a triable issue on the aspect of limitation. Therefore, although, issue regarding limitation is not framed, the same is in consequential and has no material bearing. In fact, the learned Trial Court was right in not framing any issue on limitation, since, there are no pleadings with respect to adverse possession.

8. The other contention by the defendants/appellants is that the suit properties were not ancestral properties in as much as they were inherited by deceased Tryambak from some other relatives and not from common ancestors of plaintiff and Tryambak.

9. The contention, that the properties were inherited from other relatives is liable to be rejected in view of the evidence on record which has been properly considered by the learned Trial Court in paragraph 28 and 29 of the judgment.

10. The learned Trial Court has categorically recorded that the different suit properties were already recorded in the names of common ancestors of plaintiff and deceased Tryambak. Assuming the findings to be flawed, even if the properties were received by Tryambak by inheritance from other relatives, then obviously the plaintiff who is his real sister will also inherit properties simultaneously. It is not the case of defendants that he inherited the properties under any will.

11. As regards alleged admission by the plaintiff that the suit properties were self acquired properties of the deceased Tryambak, the learned Trial Court as well as learned First Appellate Court have rightly discussed that the said admission was a stray admission and at other places in the evidence she has denied similar suggestions. Apart from this, the documentary evidence on record which is discussed by the

learned Trial Court clearly indicates that the property was indeed inherited from common ancestors. The admission by a gullible, illiterate old lady, which is indeed a stray statement will not override the documentary evidence that has come on record.

12. The last contention raised by the learned Advocate is that the learned First Appellate Court has failed in its duty to frame proper points for determination, which is a mandate of order 41 Rule 31 (a) of the CPC. He contends that point for determination is not framed on the aspect of limitation. The learned Advocate has placed reliance upon the said two cases of the Hon'ble Supreme Court. Whereas, the ratio laid down by the Supreme Court in the said judgments cannot be disputed, it needs to be mentioned that although a point for determination on the aspect of limitation is not framed, findings in that regard have been recorded. Even if finding was not recorded on the question of limitation by the First Appellate Court in the present case, it would not have caused any difference in as much as there is no pleading of the ouster in the written statement.

13. In that view of the matter all the contentions raised by the learned Counsel for the appellant stand rejected. The appeal does not give rise to any substantial question of law.

14. Second Appeal is **dismissed** as such, with no order as to costs.

(ROHIT W. JOSHI, J)

Rushikesh/2025