



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

916 SECOND APPEAL NO. 319 OF 2024 WITH
CIVIL APPLICATION NO. 11492 OF 2024
IN SA/319/2024

Balasheb Rangnath Kulkarni
(Deceased through LRs) & othersAppellants

VERSUS

Ramakant Dnyanoba Kulkarni & othersRespondents

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Mr. S. S. Manale, Advocate for Appellants.

Mr. G. L. Deshpande, Advocate for Respondent No. 1.

CORAM : R. M. JOSHI, J.

DATE : 20th FEBRUARY, 2025.

PER COURT :

1. This appeal takes exception to the concurrent findings recorded by the Courts below in Regular Civil Suit No.410/2015 and Regular Civil Appeal No. 106/2018.

2. Parties are referred to as Plaintiffs and Defendants for the sake of convenience.

3. Plaintiffs filed suit contending that the suit plot was allotted to deceased Gopal, uncle of Plaintiffs and Defendants. It is their further case that Gopal had executed will in favour of Dyanoba,

father of Plaintiffs. Gopal died issueless. On the basis of said will, right to the said property is claimed by Plaintiffs. In alternate, it is claimed that if case of Plaintiffs of right on the basis of will is not accepted, the suit property be partitioned between Plaintiffs and Defendants. There is averment in the plaint that Plaintiffs sought partition from the Defendants which is refused and which gave cause of action to the Plaintiffs to file the suit.

4. Defendants filed written statement denying the contentions of the Plaintiffs. It is claimed that the suit is not filed within limitation from the date of filing of Regular Civil Suit No. 577/1996 or from the date of judgment and decree passed in Regular Civil Appeal No. 35/2000.

5. Parties led evidence before the Trial Court. Trial Court upheld the contention of Plaintiffs and directed partition of the suit property. This order came to be unsuccessfully challenged before the First Appellate Court in Regular Civil Appeal no. 106/2018.

6. Learned counsel for Defendants submits that the suit is bared by limitation for the reason that Plaintiff No. 1 was Defendant

in earlier suit. He drew attention of the Court to the judgment and decree passed by Appellate Court in Regular Civil Appeal No. 106/2018. According to him, counter claim filed by Plaintiff No. 1 herein came to be dismissed. In the written statement to the said counter claim, Defendants herein denied partition to Plaintiff No. 1. Thus, it is his contention that the period of limitation has expired for filing of the suit for partition. In alternate, it is his contention that since the suit property is not ancestral or joint family property of Plaintiffs and Defendants and since it was self acquired property of Gopal, the period of limitation shall started from the date of death of Gopal and since the suit is not filed within a period of three years, the same is barred by limitation. It is his further submission that right of Plaintiff No. 1 stood extinguished in view of the fact that atleast for him period of limitation to file suit is expired. To support his submissions, he placed reliance on following judgments :-

- i) Jamarathbee w/o Ibrahim and others vs. Parlhada Dattatraya Dadpe and others, 1978 BCI 28.
- ii) C. N. Arunachala Mudaliar vs. C. A. Muruganatha Mudaliar and another, AIR 1953 Supreme Court 495
- iii) P. Lakshmi Reddy vs. Lakshmi Reddy, AIR 1957 Supreme Court 314.
- iv) N. Varada Pillai and another vs. Jeevarathnammal, 1919 DGLS(PC) 35

- v) Iswar Bhai C. Patel alias Bachu Bhai Patel vs. Harihar Behera and another, AIR 1999 Supreme Court 1341
- vi) Vasantha vs. Rajalakshmi alias Rajam, AIR Online 2024 SC 92
- vii) Des Raj and others vs. Bhagat Ram and others, AIR 2007 SC (Supp) 512
- viii) Puniyavathi and another vs. Pachaiammal and others, AIR Online 2022 Mad 482.

7. Learned counsel for Respondents supported the impugned judgment and decree.

8. At the outset, it needs to be recorded that there is no dispute about the fact that in the previously instituted suit by Defendant herein, the First Appellate Court in Regular Civil Appeal No. 106/2018 has passed decree holding that Defendant herein are holding possession of the suit property for himself as well as on behalf of other co-owners, who are the successors of Gopal. There is no further challenge to the said judgment passed by the First Appellate Court. As such, said judgment and findings have attained finality. It is now not open for the parties to raise challenge to the same in any other proceeding or to call upon any other Court to record contrary findings thereto. Thus, it is to be held that the Defendant was holding the suit property on behalf of himself and

other heirs of deceased Gopal. There is no dispute about the fact that Plaintiffs are legal heirs of deceased Gopal. The cause of action for filing suit for partition would accrue when the partition is denied. Plaintiffs have pleaded and proved the said denial and in view of this, there is no substance in contention of learned counsel for the Defendants that the suit filed by Plaintiffs is beyond period of limitation and hence deserves to be dismissed.

9. With regard to maintainability of suit on ground of previously instituted suit between the parties, it is pertinent to note that Plaintiff Nos. 2 and 3 were never party to the previous suit. As such, question of any cause of action being accrued in their favour to file suit for partition does not arise. In the plaint it is specifically averred that the Defendants have refused to partition the suit property and hence cause of action accrued for them to file the suit.

10. Insofar as contention of learned counsel for the Defendants about extinguishment of right of Plaintiff No. 1 in the suit property is concerned, this submission is not acceptable for the reason that when it is accepted for the sake of argument that Plaintiff No 1's right to file suit for partition was barred by limitation, his right

cannot stand extinguished. In any case, there could not have been any suit filed by Plaintiff Nos. 2 and 3 excluding the Plaintiff No. 1. All the parties for partition of suit property being heirs of deceased Gopal were necessary party. Plaintiff No. 1 being the heir of Gopal was rightly made party to the suit. In the event Plaintiff No. 1 would have been joined as Defendant, in a suit for partition, both sides are Plaintiffs. As such, there is no merit in challenge to the maintainability of suit.

11. By relying upon judgment of Hon'ble Supreme Court in case of P. Lakshmi Reddy (supra) it is sought to be argued on behalf of the Defendants that there is ouster of Plaintiffs from the suit property. Here in this case, it is necessary to take note of the fact that the Defendants have not claimed title in respect of the suit property by way of adverse possession. In order to take plea of ouster, a basic requirement for Defendants is to raise the plea of adverse possession. Even accepting his contention that mofussil pleadings are required to be considered liberally. From perusal of the written statement of Defendants, it cannot be said that a case of ouster of Plaintiffs is sought to be made specifically or even by inference before the Trial Court. In such circumstances, judgment of

Hon'ble Supreme Court would not come to the aid of Defendants. Learned counsel for Defendants has sought to draw attention of the Court to the evidence on record more particularly admission of witness of Plaintiffs i.e. Plaintiff No. 1. In this regard, it is pertinent to note that since there is no pleading with regard to the ouster and question of considering evidence sans pleadings does not arise.

12. Reference is made to judgment of Madras High Court in case of Puniyavathi (supra) wherein though it is held that the suit filed after 31 years of the demise of father, when succession opened the same is not tenable. In the said case, as observed in the judgment no material was placed on record by the Plaintiffs to show that they were in joint possession along with four brothers and sister either before or after death of the father. In the instant case, however, a finding is recorded by the First Appellate Court in Regular Civil Appeal No. 35/2000 to the extent that Defendant is holding suit property for himself and on behalf of other co-sharers. In view of this, the judgment of Madras High Court would have no application to the case in hand.

13. As a result of above discussion, this Court finds no substantial question of law involved herein. Appellants/Defendants can not call upon this Court to reappreciate evidence and record fresh findings on fact. In absence of any perversity being shown in the findings recorded by both Courts below, no interference is called in the impugned judgment and decree. Hence, appeal stands dismissed.

(R. M. JOSHI)
Judge

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