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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 137 OF 2017
WITH
CIVIL APPLICATION NO. 1870 OF 2015
IN
SECOND APPEAL NO. 137 OF 2017**

Shri Dattatraya Yashwant Wavare (Thr. POA ... Appellant/Applicant
Sou. Sunanda Dattatraya Wavare

vs.

Sou. Akkatai @ Akku Ramchandra Mane and ... Respondents
Anr

Mr. Chintan Y. Shah for Appellant/Applicant.

CORAM : GAURI GODSE, J.

DATED : 7th JANUARY 2025

ORDER:

1. Heard learned counsel for the appellant. This appeal is filed by defendant no.1 to challenge the concurrent judgments and decrees granting partition and separate possession. The plaintiff and defendant no.1 are brother and sister.

2. Learned counsel for the appellant submits that though defendant no.1 had raised a plea of the suit being barred by limitation, no issue was framed by the trial court. He submits that the point of limitation was also raised before the first appellate court, however, even the first appellate court has not dealt with the point of

limitation. He, therefore, submits that the second appeal would raise substantial question of law on the ground that the suit was barred by limitation.

3. To consider the submissions made on behalf of the appellant, I have perused the pleadings and both the judgments. The plaintiff pleaded cause of action by contending that 15 days prior to filing of the suit, she requested defendant no.1 for partition and separate possession; however, she was denied her share hence, she filed the suit. In response to the said cause of action defendant no.1, denied the contentions raised by the plaintiff. In paragraph 19 of the written statement defendant no.1 contended that after the death of their father on 15th May 1983, the plaintiff never asked for any partition and separate possession. In view of these pleadings, no issue arose about the suit being barred by limitation. Hence, the trial court has rightly not framed any issue of limitation.

4. Learned counsel for the appellant submits that in the cross examination plaintiff admitted that she asked for partition and separate possession in the year 1983, however, she was denied partition. Learned counsel for the appellant therefore, submitted that in view of admission in the cross examination both the courts ought to have framed the point of limitation.

5. Though the point of limitation being the point of law can be dealt with at any stage, the same would not require consideration in the facts and circumstances of the present case. A perusal of the pleadings of the parties indicates that the cause of action pleaded by the plaintiff is not denied by defendant no.1. Defendant no.1 has further pleaded that since, 1983 i.e. since the death of father, the plaintiff never claimed any partition and separate possession. Thus, in view of these facts, no issue arose, to frame the point of limitation. Even otherwise, the suit being for partition and separate possession, the cause of action would arise on refusal to grant partition and separate possession. In the facts of the present case, the issue of limitation would be a mixed question of fact and law which cannot be decided for the first time in the second appeal. The grounds therefore argued on behalf of the appellant would not require consideration by this court.

6. The second appeal does not raise any other substantial question of law.

7. Hence, the second appeal is dismissed. In view of dismissal of the second appeal, the pending civil application is disposed of as infructuous.

(GAURI

GODSE, J.)