



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO. 120 OF 2024

Sau. Rasika Kamlakar Bobate,
Aged about 55 years, Occ. Cultivator,
R/o. Churmura, Tahsil Armori,
District Gadchiroli.

. . . APPELLANT

// VERSUS //

1. Vijay Bhudeo Deshmukh,
Aged about 45 years, Occ. Cultivator
2. Atul Bhudeo Deshmukh,
Aged about 43 years, Occ. Cultivator

Both 1 & 2 R/o. Churmura,
Tahsil Armori, District Gadchiroli.

3. Mahadeo Zingru Raut,
Aged about 79 years, Occ. Cultivator
R/o. Ward No. 6, Shaktinagar, Armori,
Near New Bus Stop, District Gadchiroli.

. . . RESPONDENTS

Shri V. S. Kukdey a/w. Miss R. V. Kukday, Advocate for appellant.
Shri Madhur Deo, Advocate for respondent nos. 1 and 2.

CORAM :- M. W. CHANDWANI, J.

DATED :- 22.07.2025

ORAL JUDGMENT :-

The appeal is heard finally by consent of the learned
counsels for both the parties.

2. This appeal challenges the judgment and decree dated 08.10.2015 in RCS No. 1/2008 passed by the Trial Court thereby decreeing the suit of the respondents which was maintained by the Appellate Court by its judgment and decree dated 21.10.2023 in RCA No. 59/2015.

3. By order dated 26.11.2024, the following substantial questions of law were framed by this Court:-

“(i) Whether suit is barred by the limitation in view of Article 58 of the Limitation Act ?

(ii) Whether Article 58 or Article 65 will apply ?

(iii) Whether the deceased Domaji has any right to alienate the coparcenary property on the basis of a Will executed by him?”

4. The brief facts, which are necessary to dispose of the appeal, are as under:-

Respondent nos. 1 and 2 are the sons of Bhudeo. Domaji and Venkoji were brothers. The appellant is the daughter of Domaji whereas, Bhudeo who is the father of respondent nos. 1 and 2 is the son of Venkoji. Domaji executed a will dated 16.12.1997 in favour of respondent nos. 1 and 2 and died on 09.02.2004. Respondent nos. 1 and 2 applied for mutation of the agricultural land which was bequeathed by Domaji by way of will before the Tahsildar. The appellant objected to the said mutation entry. The Tahsildar, by order

dated 18.02.2005 directed respondent nos. 1 and 2 to get the will proved through the Court and therefore, respondent nos. 1 and 2 filed the suit for declaration that they are the owners of the suit property by virtue of the will dated 16.12.1997 executed by Domaji in their favour. They also sought possession of the agricultural land bequeathed to them by Domaji through the said will. The suit was defended by the appellant on the ground that the will is fabricated and not a genuine one. The Trial Court decreed the suit. The appellant made an unsuccessful attempt before the learned District Judge, Gadchiroli by filing the First Appeal. Feeling aggrieved with the dismissal of the First Appeal, this Second Appeal has been filed.

5. Mr. V. S. Kukday, learned counsel for the appellant submitted that the suit is barred by law of limitation. According to him, Article 58 of the Limitation Act, 1963 (for short, "the said Act") contemplates that a suit for declaration is to be filed within three years from the date when the right to suit accrues. According to him, the will has been executed on 16.12.1997 and Domaji died on 09.02.2004. The suit has been filed by respondent nos. 1 and 2 on 29.01.2008 i.e. beyond the period of three years from the death of Domaji. Therefore, the suit is barred by limitation.

6. Mr. Kukday, learned counsel for the appellant further submits that the findings recorded by the Trial Court as well as the Appellate Court that since the consequential relief of possession is sought therefore, the suit is governed by Article 65 of the Limitation Act and hence, period of limitation will be 12 years is erroneous. More particularly, the findings go against the dictum of the Supreme Court in the case of ***Rajpal Singh Vs. Saroj (dead) through Legal Representative***¹ wherein, in para no. 14, the Supreme Court has held as under:-

“14. The submission on behalf of the original plaintiff (now represented through her heirs) that the prayer in the suit was also for recovery of the possession and therefore the said suit was filed within the period of twelve years and therefore the suit has been filed within the period of limitation, cannot be accepted. Relief for possession is a consequential prayer and the substantive prayer was of cancellation of the Sale Deed dated 19.04.1996 and therefore, the limitation period is required to be considered with respect to the substantive relief claimed and not the consequential relief. When a composite suit is filed for cancellation of the sale deed as well as for recovery of the possession, the limitation period is required to be considered with respect to the substantive relief of cancellation of the sale deed, which would be three years from the date of the knowledge of the sale deed sought to be cancelled. Therefore, the suit, which was filed by the original plaintiff for cancellation of the sale deed, can be said to be a substantive therefore the same was clearly barred by limitation. Hence, the learned Trial Court ought to have dismissed the suit on the ground that the suit was barred by limitation. As such the learned First Appellate Court was justified and right in setting aside the judgment and decree passed by the learned Trial Court and consequently dismissing the suit. The High Court has committed a grave error in quashing and setting aside a well-reasoned and a detailed judgment and order passed by the First Appellate Court dismissing the suit and consequently restoring the judgment and decree passed by the Trial Court.”

7. It is also contended by Mr. Kukday, learned counsel for the appellant that the suit property admittedly, is a coparcenary property and it could not have been disposed off by way of will since Domaji has no right to alienate the coparcenary property. According to him, the Trial Court as well as the First Appellate Court lost sight of this position and erroneously decreed the suit of respondent nos. 1 and 2.

8. Mr. Madhur Deo, learned counsel for respondent nos. 1 and 2 conversely submitted that the Trial Court as well as the First Appellate Court rightly concluded that the suit is within limitation since the relief of possession was sought on the basis of title which accrued through the will executed by Domaji. According to him, the decision of the Supreme Court in the case of ***Rajpal Singh*** (supra) was in respect of Article 59 of the said Act which deals with cancellation of the sale-deed and it cannot be imported to the facts of the present case. He further submitted that the decision in the case of ***Rajpal Singh*** (supra) was considered in the case of ***Mallavva and Another Vs. Kaisammanavara Kamma (dead) through LRs.***² wherein, the Supreme Court has observed that the dictum of ***Rajpal Singh*** (supra) will not be applicable to Article 58 of the said Act and will be restricted only to Article 59 of the said Act. Mr. Deo, learned counsel for respondent nos. 1 and 2 vehemently submitted that though, the Trial

Court as well as the First Appellate Court held that the suit property is coparcenary property but both the Courts recorded the finding that deceased- Domaji was the sole coparcener until the time of his death and therefore, he has validly executed the will in favour of respondent nos. 1 and 2.

9. Having heard the learned counsels for the respective parties and having gone through the impugned judgments, it transpires that the Trial Court as well as the First Appellate Court are of the opinion that since, the consequential relief of possession which is covered by Article 65 of the said Act has been prayed for, the period of limitation applicable will be 12 years and not 3 years. It will be appropriate to refer to the decision in the case of **Rajpal Singh** (supra) wherein, a suit for cancellation of sale-deed and possession was filed. Treating the relief for possession as a consequential relief and cancellation of sale-deed as the substantive prayer, it was held that the limitation period for the substantive relief of cancellation of the sale-deed should be considered, which is 3 years from the date of knowledge of the sale-deed which is sought to be cancelled. This very judgment has been considered by the Supreme Court in the case of **Mallavva** (supra) and after due consideration, in para no. 38 it has been held as under:-

“38. The dictum as laid in Rajpal Singh (supra) cannot be made applicable to the facts and circumstances of the case on hand. The reason is simple. Ordinarily when, a suit is filed for cancellation of Sale Deed and recovery of possession, the same would suggest that the title of the plaintiff has already been lost. By seeking to get the Sale Deed set aside on the grounds as may have been urged in the plaint, the plaintiff could be said to be trying to regain his title over the suit property and recover the possession. In such circumstances, the period of limitation would be three years and not twelve years.”

10. In the present case, respondent nos. 1 and 2 have filed the suit for declaration that they became the owners of the suit property by virtue of the will and also sought possession of the said property bequeathed to them by way of the will. Thus, essentially the suit of respondent nos. 1 and 2 was for possession which was based on the title. As held by the Supreme Court in para no. 31 in the case of ***Mallavva*** (supra), when the plaintiff has based his suit for possession on the basis of title, the plaintiff has to also prove the title for recovering the possession. Therefore, the period of limitation is 12 years which has rightly been considered by both the Courts below. Therefore, no illegality is found in the findings recorded by the Trial Court as well as the First Appellate Court in holding that the suit is well within limitation.

11. This takes me to the question of alienation of the coparcenary property on the basis of the will. Both the Courts have categorically held that deceased- Domaji, at the time of his death, was

the sole coparcener. Therefore, I find substance in the argument of the learned counsel for respondent nos. 1 and 2 that Domaji was competent to alienate the suit property by way of will. Thus, no substantial questions arise in the appeal.

12. Hence, the appeal is dismissed.

(M. W. CHANDWANI, J.)

RR Jaiswal