

(2014) 12 BOM CK 0146
In the Bombay High Court
Case No : Second Appeal No. 323 of 2013

Gangadhar Ramsa Gudwar

APPELLANT

Vs

Shridhar Ramsa Gudwar

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 2
Limitation Act, 1963 — Section 3

Citation : (2015) 3 MhLj 78

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : S.C. Bhalerao, Counsel, Advocate for the Appellant; M.P. Kariya, Counsel, Advocate for the Respondent

Judgement

A.S. Chandurkar, J.—Heard finally with the consent of learned counsel for the parties.

2. The following substantial questions of law arise in the present second appeal:

1] Whether the finding recorded by both the Courts that the suit for partition was barred by limitation is correct?

2] Whether the finding recorded by the trial Court that the defendant had acquired title through prescription as maintained by the first appellate Court is in accordance with law?

3. The appellant is the original plaintiff while the respondent is his elder brother. Both the brothers jointly purchased the suit property on 02.01.1978. According to plaintiff, on 21.10.2006 he had sought partition of the suit property but as the same was refused aforesaid suit came to be filed.

4. The respondent defendant in his written statement took the plea that there was an oral partition on 02.10.1982 in which the suit property came to his share. He further stated that the plaintiff had earlier filed a suit for partition in respect

of the very same property but it was withdrawn on 21.04.1987 with liberty to file a fresh suit. However, the present suit was filed on 21.10.2006 and hence the same was barred by limitation.

5. During trial, a preliminary issue was framed as to whether the suit was barred by limitation. The trial Court after observing that the issue of limitation was a mixed question of law and facts held the suit to be within limitation. After the evidence was led, the trial Court found the suit to be barred by limitation on the ground that though liberty was granted to the plaintiff after withdrawal of the earlier suit, the present suit was filed after more than 19 years. It, therefore, held the suit to be barred by limitation. It further held that by remaining in exclusive and open possession the defendant acquired title by prescription. It accordingly dismissed the suit.

6. The first appellate Court on reappreciation of the evidence affirmed the findings of the trial Court that the suit was barred by limitation and hence dismissed the appeal as filed.

7. Shri S.C. Bhalerao, learned counsel appearing for the appellant submitted that the trial Court erred in considering the issue of limitation. He submitted that when the preliminary issue was decided on 08.07.2009, the trial Court had held that the suit was within limitation. It was, therefore, not open for the trial Court to reconsider said issue while deciding the suit. In support of aforesaid submission, the learned counsel relied upon the decision of the Supreme Court in Y.B. Patil and Others Vs. Y.L. Patil, . He further urged that as the suit was for partition, the cause of action would arise once a demand was made for share in the property. As such demand of separate share was made on 21.10.2006, the suit as filed was within limitation. He further submitted that the findings recorded by the trial Court that the defendant had become owner by prescription have been arrived without framing any issue in that regard. He further submitted that if the suit itself was held to be barred by limitation, then there was no occasion for recording such finding. He, therefore, submitted that said finding was without jurisdiction.

8. On the other hand Shri M.P. Kariya, the learned counsel appearing for respondent supported the impugned judgment. He submitted that the plaintiff had suppressed the fact that the earlier suit has been withdrawn. He further urged that though liberty was granted to file a fresh suit by order dated 21.04.1987, the present suit came to be filed on 01.02.2007 and hence the same was rightly held to be barred by limitation. He submitted that there was no explanation for approaching the Court at such a late stage. He supported the findings recorded by the trial Court by stating that the same had been recorded on the basis of evidence on record.

9. I have carefully considered aforesaid submissions. It is not in dispute that plaintiff had earlier filed Regular Civil Suit No. 40 of 1985 for partition and separate possession. In said suit he had moved application vide Ex. 16 for

permission to withdraw the suit with liberty to file a fresh suit. Said permission was granted along with liberty as prayed on 21.04.1987. The cause of action as had been pleaded in said suit was that the defendant had denied the right of plaintiff which led to filing of aforesaid suit. In said suit itself defendant had filed written statement (Ex. 62) and had taken a stand that he was in possession of the entire property.

10. It is in aforesaid background that the issue of limitation would have to be considered. The trial Court had framed preliminary issue as regards the suit being barred by limitation. While considering said preliminary issue it observed as under:

"Apart from above discussed facts, the issue of limitation is a mixed question of law and facts. Hence, it will be proper to grant sufficient opportunity to the plaintiff to prove his case. Therefore, I proceed to pass following order:

ORDER

It is declared that suit is filed within limitation."

From the aforesaid it is clear that the trial Court had observed that the issue of limitation being a mixed question of law and facts, opportunity was required to be granted to the plaintiff to prove his case. It, therefore, cannot be said that the issue of limitation was decided one way or the other. Merely because in the operative order it was stated that the suit was filed within limitation, the same would not be decisive of the matter. The trial Court had observed that limitation was a mixed question of law and facts that could be decided after the evidence was led.

Considering the aforesaid observations of the trial Court, the law as laid down in Y.B. Patil and others (supra) cannot be made applicable to the facts of the present case. The trial Court was not precluded from considering the issue of limitation after the parties had led their evidence.

11. The earlier suit had been filed by the plaintiff seeking very same relief of partition. The cause of action for earlier suit was the denial of share by the defendant to the plaintiff. Though liberty was granted to the plaintiff to file a fresh suit as per order dated 21.04.1987, the present suit came to be filed on 01.02.2007. The share of the plaintiff having already been denied, the plaintiff could not have relied on the subsequent cause of action which according to him arose on 21.10.2006. The suit being for the very same relief of partition, it was not open for the plaintiff to file a fresh suit on the same cause of action after almost 19 years. In Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs. Padmanabha Pillai (D) by Lrs. and Others, , the Supreme Court in para 22 observed as under:

"For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied."

As noted above, plaintiffs share was denied on 21.10.2006 itself. Moreover, under the provisions of Order 23 Rule 2 of the Code of Civil Procedure, the fresh suit instituted after grant of liberty is required to be filed within limitation in the same manner as if the first suit had not been instituted. It is, therefore, clear that the subsequent suit was barred by limitation. Both the Courts have rightly considered the aspect of limitation and have held against the plaintiff. Hence the first substantial question of law as framed is answered by holding that the suit as filed was beyond limitation.

12. Having found that the suit was barred by limitation, the next question that arises is whether the trial Court could have recorded a finding that the defendant had acquired ownership by prescription. It is to be noted that there was no issue framed by the trial Court in that regard. It is well settled that the Court would get the jurisdiction to adjudicate the dispute on merits only if the proceedings are initiated within the prescribed period of limitation. If the Court finds that the proceedings have been filed beyond the period of limitation, then in view of the provisions of Section 3 of the Limitation Act, 1963 the suit would be required to be dismissed. In such contingency, there would be no occasion to consider the rival claims and record any findings on merits. It is, therefore, clear that the finding recorded by the trial Court in para 18 of its judgment that the defendant had acquired ownership on the basis of prescription is without jurisdiction. Though the plaintiff had challenged said finding before the first appellate Court, the same has not been considered at all. The first appellate Court has merely proceeded to confirm the findings of trial Court without adverting to aforesaid jurisdictional aspect. Hence, the second substantial question of law is answered by holding that the finding recorded by the trial Court in para 18 of its judgment that the defendant had acquired ownership by prescription and maintained by the first appellate Court is without jurisdiction.

13. In view of aforesaid answers to the substantial questions, the dismissal of the suit on the ground of limitation is upheld. However, the observations made as regards the defendant's ownership by prescription are without jurisdiction. Second appeal stands disposed of with aforesaid observations. There would be no order as to costs.