

**(2017) 03 BOM CK 0195**  
**In the Bombay High Court**  
**Case No : 67 of 2012**

Ratnakar Pralhad Deoras (deceased) through L.Rs.:Smt.  
Pushpa Wd/o Ratnakar Deoras, & Ors.

APPELLANT

Vs

Vyankatesh Shamrao Fulmali, (deceased) through L.Rs:Vivek  
Vyankatesh Fulmali, & Ors.

RESPONDENT

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**Date of Decision : 23-03-2017**

**Acts Referred:**

[Code of Civil Procedure, 1908](#), [Order 26Rule 13](#)[Order 26Rule 13](#), [Order 26Rule 14](#) - [Limitation Act, 1963](#), [Article 136](#), [Arti](#)

**Citation : (2017) 03 BOM CK 0195**

**Hon'ble Judges : R. K. Deshpande**

**Bench : SINGLE BENCH**

**Advocate : N.B.Kalwaghe, S.P.Kshirsagar**

**Final Decision : Allowed**

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## Judgement

1. The Special Civil Suit No. 376 of 1993 for partition and separate possession was dismissed by the trial Court on 20.07.2007. The lower appellate Court has dismissed Regular Civil Appeal No. 450 of 2007 on 22.07.2011. Hence, the original plaintiffs are before this Court in this second appeal.

2. On the question of plaintiffs' entitlement to a decree for partition and separate possession, though the trial Court was against the plaintiffs, the lower appellate Court holds that the plaintiffs have established their entitlement for 3/10th share in the suit property. However, the lower appellate Court has concurred with the findings of the trial Court on the question of bar of limitation and therefore, dismissal of the suit is confirmed in appeal.

3. On 03.10.2012, this Court admitted the present matter, framing the substantial question of law as under;

Whether the appellate Court was right in maintaining the finding recorded by the

trial Court that the suit was barred by limitation?

Shri Kshirsgar, the learned counsel appearing for respondent No.5 waived the service of notice and thereafter all other parties were served and the matter was listed before this Court on 17.03.2017, when the following order was passed.

"Put up this matter on Thursday, 23.03.2017 at the end of Board.

If the counsel for the respondent remains absent, the matter shall be decided in accordance with law after hearing the learned counsel for the appellant. No further adjournment shall be granted".

4. Except the respondent No.5, who is represented by Shri S.P.Kshirsagar, the learned counsel, no one appears for the other respondents in spite of service of notice. The matter is, therefore, heard on the aforesaid substantial question of law.

5. The defendant Nos. 1 and 2 were held entitled to 3/10th share in the suit property under a decree passed in earlier Special Civil Suit No. 145 of 1968, decided on 31.08.1972. The decree was not put to execution and on 29.10.1981, the defendant Nos. 1 and 2 sold their undivided 3/10th share in the suit property to the plaintiffs by virtue of registered sale deed dated 29.10.1981, marked as Exh.50.

6. The defendants have not filed any cross objection, challenging the finding of the appellate Court on the title of the plaintiffs on the basis of sale deed at Exh.50 but Shri Kshirsagar, the learned counsel appearing for respondent No.5 has supported the findings recorded by the lower appellate Court that the suit is barred by law of limitation as contained in Article 136 of the Limitation Act. Shri Kshirsagar, the learned counsel, has relied upon the decision of the Apex Court in the case of Dr. Chiranjilal (D) by L.Rs vrs. Hari Das (D) by L.Rs, reported in (2005) 10 SCC 746, for the proposition that if a decree for partition and separate possession is not engrossed on the stamp paper as required by law, it becomes unenforceable and the defendant Nos. 1 and 2 having failed to get the decree passed in Special Civil Suit No. 145 of 1968 executed within the period of 12 years, the suit in question filed on 17.04.1993 is barred by law of limitation.

7. The effect of failure to get a final decree for partition and separate possession engrossed on the stamp paper is that the decree becomes unenforceable and what remains is the determination of share by a judgment delivered in a suit for partition and separate possession. Before expiry of period of 12 years as prescribed under Article 138 of the Limitation Act, the undivided 3/10th share in the property was sold by defendant Nos.1 and 2 to the plaintiffs by registered sale deed dated 29.10.1981. The plaintiffs had issued notices dated 07.09.1982 and 07.09.1992, calling upon the defendants to get the share demarcated. The suit in question was filed on 17.04.1993 for partition and separate possession.

8. This case is not concerned with the execution of a decree and therefore, the applicability of the provision of Article 136 of the Limitation Act is excluded. It is

the suit for partition and separate possession. The limitation for filing the suit may either be governed by Article 65 or Article 113 of the Limitation Act, which prescribes period of 12 years or 3 years respectively, from the date of accrual of cause of action. The plaintiffs have filed the suit on the basis of notices dated 07.09.1982 and 07.09.1992. Even if the period of limitation is to be counted in the present case from 29.10.1981 i.e. the date on which the plaintiff became the owner of the suit property, the suit filed on 17.04.1993 would be within the period of limitation as prescribed under Article 65 of the Limitation Act. Normally, the cause of action for the suit for partition and separate possession arises from the date of receipt of demand for it. In the present case, it would be from 07.09.1982 and the suit filed on 17.04.1983 shall be within a period of 3 years in terms of Article 113 of the Limitation Act. The lower appellate Court has, therefore, committed an error in holding that the suit was barred by the law of limitation. The substantial question of law framed by this Court is answered accordingly.

9. Shri Kshirsagar, the learned counsel appearing for respondent No. 5 submits that the lower appellate Court has held that the plaintiffs have acquired right under the decree passed in Special Civil Suit No.145 of 1968 to get their share separated. But, instead of getting the decree executed, they have filed the suit for partition and separate possession. Shri Kshirsagar submits that the plaintiffs have stepped into the shoes of defendant Nos. 1 and 2 and therefore, the separate suit for partition and separate possession was barred by principle of res judicata.

10. The question of res judicata is a mixed question of law and fact and was required to be raised before the Courts below. The trial Court has not framed any issue on this aspect of the matter, though the lower appellate Court has cursorily deal with this aspect of the matter in paragraph 18 of the judgment. I have already held that in the absence of final and enforceable decree for partition and separate possession, what remains is the determination of share in the joint family property and the plaintiffs being subsequent purchasers were entitled to file a suit for getting a decree for partition and separate possession, which can be enforced in accordance with law.

11. In view of above, the judgment and order passed by the lower appellate Court on 22.07.2011 in Regular Civil Appeal No. 450 of 2007 needs to be quashed and set aside and the Regular Civil Suit No. 3585 of 2001 (Special Civil Suit No. 376 of 1993) filed by the plaintiffs is required to be decreed.

12. In the result, the second appeal is allowed and the decree is passed as under; The plaintiffs are held entitled to 3/10th share in the entire suit property mentioned in para 5 of the plaint.

The Commissioner shall be appointed under Order XXVI Rules 13 and 14 of Civil Procedure Code for effecting the partition by metes and bounds and to put the parties in possession of their respective shares. No costs.