

Presented on : 29/06/2004

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Duration Ys. Ms. Ds.

08 06 02

IN THE COURT OF JT. CIVIL JUDGE J. D. KAIJ, DIST. BEED.

(Presided over by : Sunil D. Gawade)

Regular Civil Suit No. 163/2004

Exh. No. 92/A

Subhadrabai W/o Kisan Andhale,
Age – 53 years, Occup. Agri,
R/o Jivachiwadi, Tq. Kaij, Dist. Beed.

... Plaintiff

Versus

1. Rajendra S/o Baburao Kedar,
Age – 50 years, Occup. Agri,
2. Shantabai W/o Sanjivan Choure,
Age 48 years, Occup. Agri,
4. Sakharam S/o Rajendra Kedar,
Age – 38 years, Occup. Agri,

5. Mahadeo S/o Sakharam Kedar,
Age – 3 years, U/g. Deokanya W/o
Sakharam Kedar, Age – 34 years,
Occup. Agri, All R/o Ekurka, Tq. Kaij, Dist. Beed

... Defendants.

Shri. B. B. Warpe Advocate for the plaintiff

Shri. M.S. Lad Advocate for the defendants

JUDGEMENT

(Date 31st December 2012)

1. Present suit is filed by the plaintiff for partition and separate possession of the suit property mentioned in para No. 2 of the plaint.

2. It is admitted fact of the case that, the defendant no.1 is real brother, the defendant no-2 is real sister and defendant no-3 is mother of the plaintiff. Shri. Baburao Eknath Kedar, father of the plaintiff is died in the year 1996 leaving behind him his legal heirs i.e. the plaintiff and defendants No. 1 to 3. It is also admitted that the suit property described in para no-2 of the plaint is ancestral property of the plaintiff and defendants No. 1 to 3. After death of father of the plaintiff mutation entry No. 963/53 is sanctioned in the name of the plaintiff and defendants No. 1 to 3 on 14/04/1998 wherein they are shown as legal heirs of deceased Baburao. It is also admitted that though mutation is sanctioned in the names of the plaintiff and defendants No. 1 to 3, name of defendant No. 1 only appears on 7/12 extract of the suit property.

3. It is the case of the plaintiff that the suit property is joint family property of the plaintiff and defendants. It is not yet partitioned. The plaintiff and defendants have jointly possessed the suit property. The plaintiff has undivided 1/4th share in the suit property. The plaintiff does not want to remain in the joint family therefore she has demanded her separate 1/4 share in the suit property to the defendants on 20/06/2004. At that time the defendants have specifically denied to give her share. Therefore, the present suit is filed by her for partition and separate possession of her 1/4th share in the suit property. Cause of action arose to file the suit on 20/06/2004. Finally the plaintiff prayed to decree her suit.

4. The defendant No. 1 has contested the suit claim by filing his written statement (Exh. 23). The defendants No. 2 and 3 have filed their consenting written statement (Exh. 24) and also prayed for their separate share in the suit property. The defendants No. 4 and 5 have adopted written statement (Exh. 23) of the defendant No. 1 by filing pursis (Exh. 52).

5. It is contended in written statement (Exh. 23) by defendant No. 1 that the plaintiff has not shown land Sy. No. 79/11, 79/7, 79/E/2, 79/4, 79/O/80 situated at village Sangvi in this suit. Similarly, the plaintiff has not shown the house property of the joint family in the suit. Therefore, the suit is not tenable. It is further contended in written statement (Exh. 23) that the plaintiff ought to have impleaded Shri. Karbhari Eknath Kedar and Bhanudas Eknath Kedar who are uncles of the defendant No. 1 in this suit. Therefore the suit is bad for non-joinder of

necessary parties. It is further contended that at the time of partition between the defendant No. 1 and his father separate shares were demanded by defendants No. 2 and 3 but defendant No. 1 refused to give them their shares. Therefore the defendant No. 1 remained in possession of the suit property for a period of more than 12 years by denying the title of defendant No. 2 and 3 and become owner of the suit property by adverse possession. The defendants No. 2 and 3 do not have any concern over the suit property. The defendant No. 1, some 30 years ago refused to give separate share to the plaintiff in the suit property. Therefore, question of demanding partition in the suit property on 26/06/2004 by the plaintiff will not arise. The plaintiff has given wrong cause of action in this suit. Finally, the defendants No. 1, 4 and 5 have prayed to dismiss the suit.

6. On rival pleadings of the parties my Ld. predecessor framed issues (Exh. 25). I have reproduced issues (Exh. 25) and given my findings thereon with reasons as under.

ISSUES

FINDINGS

1. Does the plaintiff prove that she is entitled to claim her $\frac{1}{4}$ share and its possession over the suit property ?
2. Does the defendant No. 1 prove that he is owner of the suit property by adverse possession ?

... In the affirmative to the extent of $\frac{1}{3}^{\text{rd}}$ share.

... In the negative.

3. Whether the suit is bad for non joinder of necessary property and party ? ... In the negative.
4. Whether the suit is time barred ? ... In the negative
5. Cost on whom to be saddled ? ... On defendants No. 1, 4 and 5.
6. What order and decree ? ... The suit is decreed with costs.

REASONS

As to issue no.1:

7. The relation amongst the parties is admitted. Admittedly the suit property is ancestral property of the plaintiff and defendants no. 1 to 3. After demise of Baburao the suit property come in the name of the plaintiff and defendants no.1 to 3 as his legal heirs by way of mutation entry no. 963/53. However revenue record of the suit property stood in the name of defendant no-1. The plaintiff deposed (Exh-57) that, the suit property is joint family property of the plaintiff and defendants no. 1 to 3 and they have 1/4th share each in the suit property. The suit property is not partitioned. The plaintiff does not wish to remain in joint family. Therefore she has demanded her separate 1/4th share in the suit property to the defendants on 20/06/2004 but the defendants no 1to3 have refused to give her separate share. The defendant no.1 during pendency of the suit has alienated some of the suit property in favour of the defendant no. 4 and 5 who are his son and

grandson. Shri Bhanudas (PW-2) has similarly stated in his affidavit for examination in chief (Exh-68).

8. The defendant no-1 has given general power of attorney in favour of his wife Laxmibai to conduct the matter and depose on his behalf in this suit. Smt. Laxmibai filed her affidavit for examination in chief (Exh-80) as per the contents of the W.S. (Exh-24). She deposed that, the partition has taken place between the defendant no.1 and his father, some 30 years back in the presence of the plaintiff and defendant no. 2 and 3. At that time the plaintiff and defendants no. 2 and 3 had demanded their share in the suit property but the defendant no.1 refused to give their separate share to them. Therefore the defendant no.1 alone become the possessor of the suit property. The plaintiff does not have any right to ask for the share in the suit property. The plaintiff has never demanded her share to the defendant no.1 after the demise of her father. The plaintiff has given false cause of action in the suit.

9. Shri Nivrutti (DW-2) deposed (Exh-85) that, he knows the parties of the suit. His land is near to the suit property situated at village Ekurka. The defendant no-1 sold the land situated at village Sangavi and purchased suit property at village Ekurka. The defendant no.1 alone has been cultivating the suit property at village Ekurka since the lifetime of his father and since 25 to 30 years. The defendant no.1 has possessed entire suit property as owner thereof.

10. Ld. Advocate for the plaintiff submits that the relation amongst the parties and description of the property given in the plaint is

admitted by the defendants. The defendants No. 1, 4 and 5 have contended that the defendant No. 1 has become owner of the suit property therefore, the plaintiff is not entitled for the share in the suit property. However, the defendants No. 1, 4 and 5 have not adduced evidence to show as to how the defendant No. 1 has become owner of the suit property. On the contrary, the plaintiff's evidence is sufficient to show that the suit property is ancestral joint family property of the plaintiff and defendants No. 1 to 3 and they have undivided share in it. The plaintiff being daughter of defendant No. 3 is entitled for partition.

11. La. Advocate for the defendant No. 1, 4 and 5 submitted that the plaintiff and defendant No. 2 have married long back. The defendant No. 1 after the demise of his father became full owner of the suit property by denying the share of the plaintiff and defendant No. 2. The defendant No. 1 alone is in possession of the suit property since last 30 years. There is no evidence on record to show that the plaintiff has joint possession in the suit property. The plaintiff does not have birth right in the suit property. She is not entitled for partition and separate possession of the suit property as prayed.

12. I have considered the submissions made by the Ld. Advocates for the parties and gone through the record. As stated earlier the defendant No. 1, 4 and 5 have admitted that the suit property is ancestral property of the plaintiff and defendant No. 1 to 3. The defendant No. 1 does not step into the witness box. He has given general power of attorney to his wife Laxmibai to conduct this matter and depose on his behalf. It is important to mention here that Smt. Laxmibai can not step in

to the shoes of the defendant No. 1 and can not depose on his behalf because the defendant No. 1 alone has a knowledge of his defence. Smt. Laxmibai being a wife of defendant No. 1 does not have personal knowledge about the previous transactions and incidence taken place before her marriage in the joint family of the plaintiff and defendants. Therefore, she can not depose in this case on the basis of power of attorney. The defendants No. 4 and 5 have also avoided to step into the witness box. There is nothing on record to show that the defendant No. 1 is of credulous nature. Therefore, the defence taken by these defendants is not proved.

13. Smt. Laxmibai has admitted her cross examination that the defendants No.1's father and his brothers were living separately during his life time and possessed their respective shares in the ancestral property. The defendant No. 1's father had landed property at Ekurka and Sangvi. Ancestral property at village Sangvi are sold. After the demise of defendant No. 1's father ancestral property is devolved upon the plaintiff and defendant No. 1 to 3. However, the revenue record is maintained in the name of defendant No. 1 alone. This cross examination of Smt. Laxmibai is sufficient to show that the suit property is ancestral joint family property of the plaintiff and defendants No. 1 to 3 and they have undivided share in it. Mutation entry No. 953/53 again shows joint status and joint possession and enjoyment of the plaintiff and defendant No. 1 to 3 over the suit property.

14. As far as evidence of Shri. Nivrutti (D.W.-2) is concerned he is relative of Smt. Laxmibai. He has purchased Laxmibai's land which she

had received from her parents. This witness has specifically admitted in his cross examination that the contents of affidavit for examination in chief (Exh. 85) are written as per the say of Smt. Laxmibai. He is unaware about the contents of his affidavit for examination in chief (Exh. 85). Therefore it can be said that whatever is written in affidavit for examination in chief (Exh. 85) is written as per the say of Smt. Laxmibai. Therefore, it can not be considered in this case.

15. The plaintiff is admittedly born after the commencement of Hindu Succession Act 1956. As per section 6 of The Hindu Succession (amendment) Act 2005 in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son and shall be subject to the same liabilities. Therefore it can be said that the plaintiff being daughter of deceased Baburao has birth right in his ancestral joint family property equal to that of the defendants no. 1 to 3. Admittedly the defendant no.3 is died during pendency of the suit therefore her undivided share again will devolve equally upon the plaintiff and defendants no. 1 and 2. In short though $1/4^{\text{th}}$ share is claimed in the suit the plaintiff is entitled for $1/3^{\text{rd}}$ share in the suit property because undecided share of the deceased defendant no.3 is equally devolved upon the plaintiff and defendants no. 1 and 2. Hence I answer issue no.1 in the affirmative and hold that the plaintiff has $1/3^{\text{rd}}$ share in the suit property.

As to issue no. 2:

16. The defendants No. 1, 4 and 5 have come with a case that the plaintiff and defendant No. 2 and 3 had asked their share in the suit property to defendant No. 1 at that time he refused to give their share in the suit property and possessed the entire suit property continuously for a period more than 12 years and become owner thereof by adverse possession. It is observed in a case of **Mahesh Chand Sharma Vs. Raj Kumari Sharma, reported in AIR 1996 SC 869** that,

The plea of adverse possession is not a pure question of law but a mixed question of fact and law. The party pleading adverse possession must state with sufficient clarity as to when his adverse possession commenced and the nature of its possession. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession.

17. The defendants No. 1, 4 and 5 have not clearly pleaded and established the date on which the possession of defendant No. 1 became adverse to the plaintiff and the nature of defendant No. 1's possession over the suit property. The defendant no.1 does not step into the witness box to depose that he has become owner of the suit property by way of adverse possession. Smt. Laximibai does not depose that the defendant no.1 has become owner of the suit property by adverse possession. Admittedly, there is no partition of the suit property amongst the plaintiff and defendants No. 1 to 3. As per the story of the plaintiff she along with the defendants No. 1 to 3 are in joint possession and enjoyment of the suit property. However, there is no evidence on record that the plaintiff and defendant No. 2 and 3 have waived their rights in the suit property in favour of defendant No. 1. Similarly, the defendant No. 1 can not become

the owner of entire suit property by denying the rights of coparceners in the joint family property. The defendants No. 1, 4 and 5 have failed to prove that the defendant No. 1 has become owner of the suit property by way of adverse possession. Therefore, I answer issue No. 2 in the negative.

As to issue No. 3 :

18. Smt. Laxmibai (D.W.-1) deposed (Exh. 80) that the plaintiff has not included joint family's house property and land Sy. Nos. 79/11, 79/7, 79/E/2, 79/4, 79/O/80 situated at village Sangvi in this suit. She further deposed that the plaintiff has not made party in this suit to defendant No. 1's uncle Karbhari Eknath Kedar and Bhanudas Eknath Kedar. Therefore, the suit is bad for non joinder of necessary parties and property.

19. Smt. Laxmibai (D.W.-1) has admitted in her cross examination that Baburao, Karbhari and Bhanudas have lived separately during the life time of deceased Baburao and possessed their respective landed property. Shri. Nivrutti (D.W.-2) have admitted in their cross examination that he can not tell as to from when father of defendant No. 1 Baburao and his brothers Bhanudas and Karbhari are residing separately. Since last 100 years they have possessed their lands. They have been living separately since they are residing at village Ekurka. He does not know whether their lands are ancestral property or not. He does not know whether the parties had ancestral land at village Sangvi. Ancestral land of Baburao stood in his name till his death. Smt. Laxmibai

(D.W.-1) has admitted in her cross examination that ancestral lands at village Sangvi have been alienated. When Baburao is died his share in the land situated at Ekurka was in his name. Smt. Laxmibai (D.W.-1) has further stated in her cross examination that land Sy. No. 79 and 87 are purchased in the name of her son and grand son from Shri. Karbhari. She can not tell whether that land is purchased by way of registered sale deed or not. Sale deed of that land is not produced on record. Above land is purchased by sanctioning in mutation entry.

20. Perusal of cross examination of Smt. Laxmibai (D.W.-1) and Shri. Nivrutti (D.W.-2) it shows that father of defendant No. 1 Shri. Baburao and his brothers namely Karbhari and Bhanudas have lived separately during the life time of deceased Baburao and possessed their respective shares since long. They were not in joint family. Therefore, they are not necessary parties in this case. The defendants No. 1, 4 and 5 have not adduced any document to show that the defendants No. 4 and 5 have become absolute owner of Sy. No. 79 and 87. They have not produced any document to show that the title of Sy. No. 79 and 87 is passed to them. Ownership of immovable property can not be transferred in the name of defendants No. 4 and 5 by way of mutation entry. When ancestral property situated at Sangvi is already alienated prior to the filing of the suit then the question of including that property in the present suit will not arise. An effective decree can be passed in this case in the absence of Shri. Karbhari and Shri. Bhanudas. The defendants No. 1, 4 and 5 have failed to prove as to how the suit is bad for non joinder of necessary property and parties. Therefore, I answer issue No. 3 in the negative.

As to issue no.4:

21. Partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he/she decides not to keep his share joint with other co-sharers. As per article 113 of The Limitation Act 1963 any suit for which no period of limitation is provided elsewhere in the schedule, the suit can be filed when the right to sue accrues. In the present case the plaintiffs oral evidence is sufficient to show that she had demanded partition in the suit property to the defendants on 20/06/2004 on which the defendants have refused to give her share. Therefore, cause of action arose to the plaintiff on 20/06/2004. Thereafter on 29/06/2004 the plaintiff has presented this suit. Therefore, the suit is within limitation.

22. The defendants No. 1, 4 and 5 have simply raised the defence that the suit is time barred but have not adduced any evidence to that regard. The defendants No. 1, 4 and 5 even does not press this issue at the time of final argument. These defendants have failed to show as to how the suit is time barred. Considering all above circumstances I am of the view that the plaintiff has presented the suit within time. Hence, I answer issue No. 4 in the negative.

As to issue No. 5 and 6 :

23. The plaintiff has proved that she is entitled for a share in the suit property. The defendant No. 3 is died during pendency of the suit

and her undivided share is equally devolved upon the plaintiff and defendant No. 1 and 2. Therefore, she is entitled for 1/3rd share in the suit property. The plaintiff and defendants No. 1 and 2 will get 1/3rd share each in the suit property by per capita and the defendants No. 1, 4 and 5 will get per strip equally from the 1/3rd share of defendant No. 1. The defendants No. 1, 4 and 5 have failed to prove that the defendant No. 1 has become owner of the suit property by way of adverse possession. Similarly, these defendants have failed to prove that the suit is bad for non joinder of necessary property and party. They have further failed to prove that the suit is time barred. The defendants No. 1, 4 and 5 have denied the share of the plaintiff in the suit property and compelled her to file this suit. Therefore, the plaintiff is entitled for a cost of the suit from the defendants No. 1, 4 and 5. Considering all above aspects in answer to issue No. 5 I hold that the cost of the suit shall be saddled on the defendants No. 1, 4 and 5 and in answer to issue No. 6 I pass following order.

ORDER

1. The suit is decreed with costs.
2. It is declared that the plaintiff and defendants No. 1 and 2 have 1/3rd share each in the suit property.
3. The partition of the suit property be effected equitably by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf in accordance with the above declaration of shares in conformity with the law and the plaintiff be delivered possession of the land of her share.

4. The decree be sent to Collector for compliance of the directions given in clause 3 above vide section 54 The Code of Civil Procedure 1908.
5. Preliminary decree be drawn up accordingly.

(Pronounced in open court)

Date : 31/12/2012

Place : Kaij.

(Sunil D. Gawade)

Jt. Civil Judge J. D.,
Kaij, Dist. Beed.