
(2003) 04 BOM CK 0021
In the Bombay High Court
Case No : Second Appeal No. 525 of 1991

Anubai Savant

APPELLANT

Vs

Vithoba Shripati Savant (deceased) and Others

RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Hindu Succession Act, 1956 — Section 6

Citation : (2004) 2 ALLMR 159 : (2004) 1 CivCC 564 : (2004) 1 MhLj 545

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : G.R. Rege and A.L. Desai, for the Appellant; P.S. Dani, For respondent Nos. 2 and 3 and Madhav Jamdar, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—This is a second appeal filed u/s 100 of Code of Civil Procedure, 1908 ("C.P.C." for short) by the original plaintiff challenging the judgment and order passed by the Third Additional District Judge, Sangli in Regular Civil Appeal No. 337 of 1984 dated 13th September 1990; whereunder the 8/28th share (in the suit property) granted by the Civil Judge, Junior Division, Islampur in a Regular Civil Suit No. 173 of 1979 vide his judgment and decree dated 28th February, 1984 came to be reduced to 1/21st share.

THE FACTS :

2. The facts are not in dispute. The relationship between the parties is also not in dispute, The genealogy is as under :

3. Vishnu died in the year 1960. Anubai, widow of Vishnu filed a suit for partition and separate possession claiming 1/3rd share in the suit property which comprises of 8 fragments of Agricultural lands and a residential house situated at village Kasegaon, taluka Walwa, district- Sangli.

4. The plaintiff makes out a case that the suit properties are the ancestral

properties. Shripati, father-in-law of the plaintiff was a common ancestor. Plaintiff claims to be a widow of Vishnu, son of Shripati. Defendant No. 1 Vithoba was the another son of Shripati whereas defendant Nos. 2 to 5 are the daughters of Shripati. Plaintiff claimed 1/3rd share of her deceased husband in the suit properties and alleged that in spite of specific demand the defendant No. 4, who claims to have inherited the entire property under Will alleged to have been executed by Shripati, refused to give her share and execute partition deed.

5. It is alleged in the plaint that the father-in-law, late Shripati was illiterate. That he was not keeping good health. That he never executed any Will. That defendant No. 4 has taken disadvantage of the poor health condition of Shripati and had obtained a document styled as "Will". This Will has been challenged in the suit on the ground of fraud alleged to have been practised by defendant No. 4. The plaintiff claims that the Will needs to be ignored being illegal and bad in law. That is how plaintiff claims 1/3rd share in the suit properties.

6. The defendant No. 4 has filed her written statement. She denied plaintiffs claim. It is alleged that plaintiff has no right to claim any share or interest in the suit properties. She claimed that, on the basis of Will in her favour, executed by her father late Shripati, she has become absolute owner of the properties in question. She thus prayed for dismissal of the suit.

7. The defendant Nos. 1 to 3 and 5 adopted written statement filed by defendant No. 4. Nobody disputed the relationship between the parties.

8. The trial Court framed issues relevant to the pleadings and permitted rival parties to lead their respective evidence. On the Material placed before it, the trial Court came to the conclusion that the Will Deed dated 16th December 1961 did not reflect free will of the deceased Shripati since it is surrounded by various suspicious circumstances. The trial Court held that plaintiff has 8/28th share in the suit properties. The suit, accordingly, came to be decreed to the extent of the shares of the respective parties carved out by the trial Court.

9. Aggrieved by the above judgment and decree, all the original defendants preferred appeal being Regular Civil Appeal No. 337 of 1984 u/s 96 of CPC which came to be heard and decided by the Third Additional District judge, Sangli on 13th September 1990.

10. During pendency of the above appeal, the appellant No. 1/defendant No. 1 (Vithoba) expired. He died issueless and intestate. It was thus urged by the original plaintiff (respondent in first appeal) that the share of the deceased defendant No. 1 Vithoba will have to be taken into account (Exh.32) and distributed amongst his legal heirs; in the event of confirmation of the finding of the trial Court, whereunder the Will of late Shripati has been held to be bad and illegal.

11. The lower appellate Court was pleased to hear the parties to the appeal and confirmed all the findings of the trial Court but found fault with the share of the

plaintiff calculated and carved out by the trial Court.

12. The lower appellate Court held that the trial Court did not consider the effect of Section 6 of the Hindu Succession Act ("Act" for short). The appellate Court held that once it is found that the suit properties were of ancestral nature and the Will deed was held to be invalid, then share of the plaintiff ought to have been determined with reference to Section 6 of the Act. The findings of the lower appellate Court recorded in this behalf are reproduced hereinbelow :

"17. This takes me to consider the question of the share to which plaintiff is entitled. The learned Civil Judge has granted 8/28th share to the plaintiff. It appears that the share is determined on strength of the statement made by parties. I find that the learned Civil Judge did not consider the effect of Section 6 of the Hindu Succession Act. Once it is found that the suit properties are of ancestral nature, and the will deed is invalid, then share of the plaintiff must be determined with reference to Section 6 of the Hindu Succession Act. She is, admittedly, widow of a predeceased son of deceased Shripati, the succession open as soon as said Shripati demised on 16-8-1962. At that time, if no notional partition was effected, deceased Shripati would have received only 1/3rd share. Deceased defendant No. 1 would have received 1/3rd share and wife of Shripati i.e. Girija would have received 1/3rd share. The plaintiff is entitled to claim equal share with deceased Girija, and all the defendants, only from a notional 1/3rd share of deceased Shripati. So, she is entitled to claim 1/7th share out of 1/3rd share of deceased Shripati i.e. only 1/21st share in the suit properties.

18. The share of the plaintiff did not increase as a result of the death of her mother-in-law i.e., Girija who died in 1976. That share would come to the heirs specified in Entry No. I as per provisions of Section 15 of the Hindu Succession Act. The plaintiff is not such a heir. The share of deceased defendant No. 1 Vithoba, similarly, will be inherited by his sisters only. The plaintiffs share is not enlarged, in any way, due to the subsequent deaths of deceased Girija and defendant No. 1 Vithoba. So, the remainder would be equally inherited by the four daughters of deceased Shripati. Thus, each of the original defendants 2 to 5 would be entitled to receive 5/21st share in the suit properties. This answers the point No. 3."

In the result, the plaintiff was held entitled to 1/21st share in the suit properties and decree of the trial Court was accordingly modified by the lower appellate Court.

13. The aforesaid modification of decree by the lower appellate Court is a subject matter of challenge in the present second appeal filed u/s 100 of CPC at the instance of the original plaintiff. ARGUMENTS :

14. At the outset, Mr. Jamdar, learned counsel for respondent Nos. 4 and 5 raised a preliminary objection to the maintainability of the appeal contending that the appeal filed by original defendant Nos. 4 and 5 i.e. daughters of late Shripati, being Second Appeal No. 485/1991, having been dismissed by this Court vide

order dated 21st October 1991, the order of the lower appellate Court stood merged in the order of this Court, as such, in his submission, there cannot be two inconsistent decrees in one suit governing the same subject matter. He submits that when a decree or order passed by an inferior Court, tribunal or authority was subject to remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy, in his submission, once the superior Court has disposed of the lis before it either way; whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order; wherein merges the decree or order passed by the Court, tribunal or the authority below. He, therefore, applying the doctrine of merger, submits that in the instant case the judgment and order of the lower appellate Court has merged into the order of this Court, as such the present appeal cannot be heard and decided on merits which may give rise to the contradictory and inconsistent decrees, as such he prays that the appeal deserves to be dismissed. He relied upon Kunhayammed and Others Vs. State of Kerala and Another, , Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, and Ramkrishna Bajirao Gotmare Vs. Kanhaiyalal Tribhuwanlal Shah, .

15. Mr. Rege, learned counsel for the appellant/original plaintiff submits that Mr. Jamdar is not right in his submission. He contends that the earlier appeal filed by the respondent Nos. 4 and 5 was directed against the finding; whereby the Will was held to be bad. No other contentions were raised. In the present appeal miscalculation of shares of respective parties is under challenge, as such dismissal or rejection of that appeal cannot affect the merits of this case. He further submits that looking to the peculiar nature of the provision of Section 100 of CPC the submission made by Mr. Jamdar cannot be accepted since the former appeal itself was rejected at the stage of admission, for want of substantial question of law. He invited my attention to the order dated 21st October 1981, which reads as under:

"Both the Courts below have held that the Will dated 16-12-1961 was a suspicious document and dissented the same. There was no reason to exclude the plaintiff from getting share. No substantial question of law involved. Dismissed."

Mr. Rege submits that the aforesaid order cannot be said to be a decree, as such theory of merger would not be applicable to such type of order. In his submission had there been a order in the nature of decree adjudicating or determining the rights with regard to the matter in controversy, then the question would have assumed some importance. He thus submits that the preliminary objection raised by Mr. Jamdar has no substance and the appeal needs to be decided on its own merits to the extent of challenges made out in the appeal.

16. Learned counsel for the appellant original plaintiff on merits contends that in the ancestral property of Shripati, both sons had a right by birth, as such

succession will open with the death of Vishnu and in a notional partition, Shripati, Vithoba and Vishnu will get 1/3rd share each. He further submits that upon death of Shripati in the year 1962 his 1/3rd share will get further divided amongst his widow Girija and six children each taking 1/7th share out of his 1/3rd share, which according to him upon calculation would be 1/21st. He further submits that upon death of Girija (widow of Shripati), who died in 1976, her 1/21st share will get further divided amongst her six children, each taking 1/6th share out of 1/21st share, each getting 1/126th share. Appellant/plaintiff being widow of predeceased, she will not be entitled to claim any share in Girija's share in the property.

17. Thus, according to the learned counsel for the appellant, the appellant will be entitled to get 8/21st share i.e. $\frac{1}{3}$ (Vishnu's share) + $\frac{1}{21}$ (out of Shripati's share) = $\frac{8}{21}$ (total share in the suit property). He, thus, contends that the decree of the lower appellate Court needs to be modified to this extent. The appellant did not raise any other contention other than the contention relating to the calculation of the share of the appellant.

18. Per contra, Mr. Dani, learned counsel for respondent Nos. 2 and 3 contended that since the share of Shripati, who was a common ancestor, is being claimed in the suit, notional partition in view of proviso to Section 6 of the Act will have to be done immediately prior to death of Shripati. As per his submission, at the time of notional partition there were only two coparceners i.e. Shripati and Vithoba, since Vishnu was no more alive on the death of Shripati and that the plaintiff cannot replace Vishnu as a coparcener, she being a class-I heir. In his submission, in the notional partition, there would be in all three shares only. In other words, notional partition will be between father Shripati, son Vithoba and mother Girija, each taking 1/3 share. He further submits that by virtue of proviso and explanation to Section 6 of the Act, the share of Shripati will further devolve on all heirs including the plaintiff and defendants. Thus, there would be 7 parts/shares of 1/3rd share of Shripati, each taking 1/21st share. Thus, in his submission, Girija will get $\frac{1}{3} + \frac{1}{21} = \frac{8}{21}$; Vithoba will get $\frac{1}{3} + \frac{1}{21} = \frac{8}{21}$ and other defendants i.e. four daughters and plaintiff i.e. widow of predeceased son will get 1/21st share each.

19. Mr. Dani further contends that after death of Girija, her share will devolve as per Section 15 of the Act. As per Entry-I of that section, property will devolve only on sons and daughters and not on the plaintiff who is widow of predeceased son and, therefore, plaintiff will not get any share from Girijas share in the property. Mr. Dani thus tried to support the judgment and order of the lower appellate Court and prayed for dismissal of this appeal.

20. Mr. Jamdar, apart from his preliminary objection also tried to support the modification of the decree by the lower appellate Court and prayed for dismissal of the appeal with costs.

CONSIDERATION:

21. The preliminary objection raised by Mr. Jamdar has no substance. The decree has been defined in Section 2(2) of Civil Procedure Code. Before the CPC (Amendment) Act, 1976, clause (2) read as under :

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation, -- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Thus, in order that a decision of a Court may be a decree, the following elements must be present:

(i) There must be an adjudication :

(ii) Such adjudication must have been given in a suit.;

(iii) It must have determined the rights of the parties with regard to all or any part of the matters in controversy in the suit:

(iv) Such determination must be of a conclusive nature; and

(v) There must be a formal expression of such adjudication.

To constitute a decision of a Court to be a decree, there must be an adjudication, i.e. a judicial determination of the matter in dispute. If there is no judicial determination of any matter in dispute, it is not a decree. The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit. The Code recognises three classes of decree: (i) Preliminary decree; (ii) Final decree; and (iii) Partly preliminary and partly final decree. A preliminary decree is passed in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hands for the time being, until it is in a position to pass a final decree in the suit. In other words, a preliminary decree is only a stage in working out the rights of the parties which are to be finally adjudicated by a final decree. The preliminary decree adjudicates the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, such decree is called a preliminary decree. The Code provides for passing of preliminary decrees in the suit for partition and separate possession (Order 20, Rule 18). A partition suit in which a preliminary decree has been passed is still a

pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree. As regards the partition suit, the Apex Court in the case of Phoolchand and Another Vs. Gopal Lal, has observed that there is nothing in CPC which prohibits passing of more than one preliminary decree, if circumstances justify the same and it may be necessary to do so. These observations are made by the Apex Court specifically dealing with the partition suit. The preliminary decree is only a stage prior to the passing of a final decree. A final decree can be said to be final in two ways:

(i) when within the prescribed period no appeal is filed against the decree or the matter has been decided by the decree of the highest Court, and

(ii) when the decree so far as regards the Court passing it, completely disposes of the suit. It is in the latter sense that the words "final decree" are used in Section 2.

22. A final decree is one which completely disposes of the suit and finally settles all the questions in controversy between the parties and nothing further remains to be decided thereafter. In this view of the matter, the objection raised by Mr. Jamdar, learned counsel for respondent Nos. 4 and 5 has no force. The preliminary decree is not final so far as the final decree is not passed. Thus in my opinion, the preliminary objection raised by Mr. Jamdar is misplaced and has no merit.

23. So far as calculations and allotments of shares on partition, done by the lower appellate Court are concerned, in my opinion, both the Courts committed serious error in carving out the share of respective parties to the suit including that of the plaintiff. The Mitakshara law does not accord to any female the status of a coparcener, though if a partition takes place certain females, viz., fathers wife, mother and paternal grandmother are entitled to a share. Thus the Section 6 lays down;

(a) the Mitakshara joint family property will continue to devolve by survivorship except when a case falls under (b);

(b) if a Mitakshara coparcener dies leaving behind a female heir or a male heir claiming through a female, then his interest will devolve by succession and not by survivorship;

(c) Explanation 1 to Section 6 provides for the formula of notional partition when (b) comes into operation;

(d) Explanation 2 to Section 6 excludes the partitioned coparcener from taking a share in succession.

The concept of notional partition is one of those fictions of law which are employed to make a provision of law work. Like any other legal fictions the fiction of notional partition is meant for a specific purpose. Notional partition is not a real partition. It neither effects a severance of status nor does it demarcate

the interest of the surviving coparceners or of any females who are entitled to a share on a partition. It is only a legal device used for the purpose of demarcating the interest of the deceased coparcener. Obviously, the demarcation of the interest of the deceased coparcener has to be made from the date of his death which the proviso and Explanation makes it clear. The interest of the deceased will devolve by succession which he would have got had the partition taken place immediately before his death, in short, the share of the deceased coparcener gets fixed at the time of his death, subsequent fluctuations in the fortune of the family does not affect it.

24. When the proviso comes into operation, the following two steps are to be taken :

1. Notional partition should be made in accordance with the rules of Hindu law relating to partition.

2. On the demarcation of that share the rules of intestate succession to Hindu male as laid down in the Act should be applied.

25. It will not be out of place to mention that notional partition emphasized, in fact, with a view to find out the share of the deceased coparcener. The device, is : had there been an actual partition immediately before the coparcener died, what share he would have got? This obviously means that for the implementation of the device of the notional partition the rules of partition as laid down in Hindu law are to be employed. The share of the deceased coparcener can be determined only on the allotment of shares to all members of the family entitled to a share on an actual partition, since that is the only means of individualisation of the share of the deceased coparcener. The share of the deceased coparcener thus demarcated will go by succession. In the rest of the property the family will remain joint. Keeping the aforesaid principles in mind, let me turn to the facts of the present case, so as to carve out the share of the plaintiff/ appellant.

26. In the instant case, Mitakshara joint family consisted of father Shripati, as a head of the family, his wife Girija, two sons (Vithoba and Vishnu) and four daughters (Tarubai, Parubai, Balkabai and Shalubai). Vishnu expired in the year 1960 leaving behind his widow Anubai/plaintiff/appellant. Since Vishnu had left behind his widow Anubai, a female heir falling in class-I, his interest will not be drawn by survivorship but will go by succession. This will bring the fiction of notional partition in operation. Vishnu's interest as individualized in notional partition will be 1/4th share of the suit properties. This has arrived at by effecting notional partition between Shripati, his two sons Vithoba and Vishnu and mother Girija who will be entitled to equal share. Therefore, each will get 1/4th share in the notional partition. Vishnu is a person who first died in the family in the year 1960, with his death succession will open. Hence his widow will inherit his 1/4th share.

The second death in the family is of Shripati, who died on 6th August 1962. His 1/4th share will devolve on all concerned including the plaintiff and the

defendants. Thus, there will be seven parts/shares of $\frac{1}{4}$ th share of Shripati, each taking $\frac{1}{28}$ th share.

The third death in the family is of Girija who expired in 1976. After death of Girija, her $\frac{1}{4}$ th share will devolve as per Section 15 of the Act on sons and daughters and not the widow of the predeceased son and, therefore, the plaintiff will not get share in Girija's share in suit properties. Thus, Girija's share will go by succession to her son Vithoba and four daughters. Thus Girija's share = $\frac{1}{4} + \frac{1}{28} = \frac{2}{7}$ share will have to be divided amongst five sharers (i.e. one son and four daughters). There Will be five parts of her $\frac{2}{7}$ th share, each taking $\frac{2}{35}$ th share.

The fourth death in the family is of Vithoba who expired on 3rd February 1989 i.e. during the pendency of the appeal before the lower appellate Court. Vithoba's total share = $\frac{1}{4} + \frac{1}{28} + \frac{2}{35} = \frac{12}{35}$ share will be inherited by his four sisters in equal share, each taking $\frac{3}{35}$ th share. Plaintiff shall have no share in the share of Vithoba.

27. In view of the aforesaid calculation, Anubai/plaintiff/appellant will get $\frac{1}{4} + \frac{1}{28} = \frac{8}{28}$ share, whereas the daughters/defendant Nos. 2 to 5 will get $\frac{5}{28}$ th share each.

28. In this view of the matter, the judgment of the Court below will have to be modified. Accordingly, the same stands modified and substituted as under:

The plaintiff is entitled to $\frac{8}{28}$ th share in the suit properties by partition. She may be given separate share, if visible having regard to the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, while effecting the partition by metes and bounds, or she may be given a separate fragment equivalent to such share, in the agricultural properties, or may be suitably compensated.

The house property be divided by appointment of Court Commissioner.

The plaintiff is entitled to enquiry into future mesne profits under Order 20, Rule 18 of Civil Procedure Code.

The defendant Nos. 2 to 5 i.e. present respondent Nos. 2 to 5 are entitled to get $\frac{5}{28}$ th share each by way of partition and may be put in separate possession by effecting the partition if necessary Court fee is paid.

The parties shall bear their respective costs of the suit and this appeal.

For the reasons stated hereinabove, appeal stands allowed with no order as to costs.