

(2007) 12 BOM CK 0083

In the Bombay High Court

Case No : Second Appeal No. 81 of 1984

Attaur Raheman Fateh Mohmmad

APPELLANT

Vs

Hari Peeraji Burud died through LRs. Neelabai " Chandrakala
Haribhau and Others

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 100(1), 100(2), 100(3), 100(4)
Transfer of Property Act, 1882 — Section 5, 53A, 6, 7, 8

Citation : (2008) 2 MhLj 633

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : M.V. Deshpande, for the Appellant; P.S. Agrawal, for Respondent No. 1-b and Maya Jamdade, for Respondent No. 1-c, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—This appeal was admitted by this Court on following three grounds, involving substantial questions of law:

(A) If the issue regarding partition is not framed whether the Extra Assistant Judge, Parbhani can give a finding that the Defendant has not proved the partition?

(B) The second substantial question of law is that the Plaintiff has to prove his case and if he has not led proper evidence he must fail.

(C) The third substantial questions of law is that if the Defendant proves his agreement and ownership of Peeraji Laxman whether he can take benefit of Section 53-A of the Transfer of Property Act?

2. Heard Shri Deshpande, learned Advocate for the appellant, Shri Agrawal, learned Advocate for respondent 1-b and Smt. Jamdade, learned Advocate for respondent 1-c.

3. This appeal is filed by the plaintiff in Regular Civil Suit No. 107 of 1996, which was for declaration of ownership with recovery of possession of the suit house. The suit, after recording evidence, was dismissed by the learned Civil Judge Junior Division on 29-2-1979. The dismissal of the suit was challenged by the plaintiff by filing Regular Civil Appeal No. 40 of 1979, u/s 96 read with Order XLI of the CPC ("CPC") in the District Court, Parbhani. The learned Extra Assistant Judge, after hearing the parties, allowed the appeal and quashed, set aside the judgment and decree of the trial Court and decreed the suit on 20-3-1984. It is this judgment and decree, which is subject matter of the present second appeal.

4. Apart from the grounds considered at the time of admission, at the time of final hearing of the Second Appeal, Shri Deshpande, learned Advocate for the appellant, urged for framing of one more ground. Respective Advocates were heard on this point i.e. whether a substantial question of law, which was not framed by this Court at the time of admission, can be framed subsequently at the time of final hearing of the appeal?

5. A bare look to Sub-section (1) of Section 100 shows that the second appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Sub-section (2) further lays down that such appeal shall lie from an appellate decree passed ex parte. Sub-section (3) enumerates that in an appeal under this Section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. In Sub-section (4) it has been provided that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. From said Sub-section (4) it appears that jurisdiction lies with the High Court to formulate such substantial question of law, if the High Court is satisfied for such involvement of the substantial question of law. Sub-section (5) on this premise further provides that at the time of hearing of the appeal on the question so formulated i.e. to say "formulated earlier at the time of admission of the second appeal and respondent shall at the hearing of the appeal be allowed to argue the case contending that such second appeal does not involve such a question. In other words, final hearing of the second appeal ordinarily shall be on the grounds or the substantial question of law already formulated by the High Court at the time of the admission. It is also made clear that even at this stage, i.e. at the stage of final hearing of the appeal, after admission, it is permissible for respondent to contend and argue before the High Court that such a second appeal does not involve any substantial question of law.

Sub-section (5) is appended with proviso. This proviso lays down that even if the appeal is admitted on some or specific grounds, allegedly involving substantial question of law, still the jurisdiction and power lies with the High Court for the reasons to be recorded, that any other substantial question of law involves in the appeal and on satisfaction of the High Court such ground or question can be formulated by the High Court. It is, however, for the High Court to record a

reasoning giving proper opportunity to the parties, while deciding the second appeal on such subsequently formulated ground, involving substantial question of law. Thus, it is within the jurisdiction and power of the High Court to formulate the substantial question of law, which was earlier not formulated, if the High Court satisfied that such point is involved in the appeal, at the time of final hearing and accordingly High Court can finally decide the appeal on such substantial point of law along with earlier grounds or substantial questions of law accepted by the High Court. The contention in relation to interpretation of Sub-section (5) of Section 100 was subject matter before the Apex Court, in the matter of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, . The ratio laid down in the said case supports the view, which I have taken.

In this view of the matter, I have accepted the ground raised by Shri Deshpande to be a ground involving substantial point of law, which is reproduced herein below, as ground No. (D).

(D). Whether the judgment of the first Appellate Court in the case on hand is sustainable in view of the provisions laid down under Order XLI, Rule 31 of Civil Procedure Code?

6. On behalf of the plaintiff, only one witness i.e. PW Hari was examined. On behalf of defendants, three witnesses have been examined. Apart from this oral evidence led by the parties, documentary evidence, by way of various bills issued by Basmat Nagar Municipal Council have been produced on record. Exhibit 40 is an agreement, allegedly executed by Peeraji s/o Laxman in favour of the defendant Attau. The first Appellate Court, considering the pleadings of the parties, had framed about eight issues and recorded a finding thereon.

The case of the plaintiff, in substance, was that there was only one house described in the plaint and said house was owned by the plaintiff himself and his brother Gangaram, who died about thirty years prior to filing of the suit. Said house, according to him, was given two house numbers i.e. C-265 and C-264. It is pleaded that house No. C-265 is to the Northern side and is the subject matter of the suit. Another house registered with Municipal Council as C-264 is to the Southern side and it is not subject matter of the suit. These two houses, were divided by a compound wall mentioned by letters A-F. According to plaintiff, both these houses were mutated in the name of plaintiffs son Manika, who predeceased the plaintiff. Name of Manika was mutated since he was the only son. Defendant had no concern with the suit property. However, he dispossessed the plaintiff in the year 1975 and therefore, the suit.

7. The defendant, in the written statement (Exhibit 9) has pleaded that Gangaram, Laxman, Nam and Hari (plaintiff) were four brothers. Plaintiff and three brothers had partitioned the properties in the year 1966 and suit house was allotted to the share of Laxman s/o Peeraji and thereafter, it was mutated by Laxman in the name of his son Peeraji on 16-3-1975. On 5-2-1976, an agreement to sell was executed in favour of the defendant. The plaintiff had no

concern with the title or possession of the suit property. After demise of Gangaram, plaintiff was never in possession of the suit house. Suit house No. C-265 was recorded in the name of Peeraji as owner on 16-9-1975. In paragraph No. 4, it is further pleaded that in the partition of 1965-66, the suit house was partitioned and allotted to the share of Peeraji and he has acquired possession as well as ownership to the property and executed agreement in favour of defendant by accepting Rs. 2500/-. Price of the suit property, in that agreement was agreed to the tune of Rs. 5,000/-. Since then, defendant is in possession of the property as owner thereof. With this material pleadings, further denial is pleaded in the written statement filed by the defendant.

8. The trial Court had framed eight issues, as referred above. From the judgment of the trial Court, it appears that issue Nos. 5 and 6 were not pressed on behalf of the parties. Issue No. 5 was in respect of valuation of the suit and payment of Court fees. Issue No. 6 was in respect of entitlement of the defendant for compensatory costs. Since these issues were not pressed by the defendant, trial Court did not record any findings, and justifiably. Issue No. 7 was in respect of entitlement of the plaintiff for the relief and issue No. 8 was in respect of nature of decree to be passed. In short, issue Nos. 7 and 8 were depending upon the findings on issue Nos. 1 to 4. With this, we are left with four issues framed by the trial Court. Issue No. 1 was in respect of ownership as claimed by the plaintiff in relation to suit property. Burden of proof was on the plaintiff. Issue No. 2 is in relation to occupation of the suit property by the defendant as trespasser in the year 1975. This plea is raised by the plaintiff in his plaint. Naturally burden is on the plaintiff. Issue No. 3 was in respect of alleged ownership of the suit property with Peeraji s/o Laxman. This plea was raised by the defendant and therefore, the burden was on the defendant. Issue No. 4 was in respect of the purchase of the suit property by defendant from Peeraji on 5-2-1976 and his claim of possession on that basis. This issue was not happily worded.

Undisputedly, there was no sale deed in favour of defendant. However, from Peeraji, the defendant cannot claim ownership of the property in the absence of document of sale in relation to suit property. He claimed possession on the basis of agreement of sale, allegedly executed by Peeraji on 5-2-1976. Looking to the nature of issue Nos. 1 to 4, it is apparent that ownership of the suit property was with the plaintiff. The alleged ownership of Peeraji by partition as alleged by the defendant and claim of the plaintiff at the relevant time are the material and important issues. Findings of the Court on these issues, primarily, are important for decision of the Appeal. On all these issues, as noted above, the trial Court has recorded the finding against the plaintiff and dismissed the suit.

9. The ground No. 8(A) is in respect of finding recorded by the first Appellate Court without framing issue for partition. This ground No. 8(A) accepted to be the substantial question of law, can be considered along with ground No. (D) which now is raised as a substantial question of law. Finding on these two

grounds can be conveniently recorded. At the outset, it is to be noted that the first Appellate Court framed only two points for determination. Point No. 1 framed by the first Appellate Court is, as to whether the judgment and decree under appeal merits reversal or variation.

10. It is not in dispute that the plaintiff had filed first appeal No. 40 of 1979 u/s 96 of the Code of Civil Procedure. It is desirable for the first Appellate Court to frame points for determination in accordance with the scheme of Order 41 Rule 31 of the Code of Civil Procedure. The First appeal is valuable statutory right of the party. The learned Counsel Mr. Agarwal for the defendant relied upon the judgment of the Apex Court in the matter of G. Amalorpavam and Ors. v. R.C. Diocese of Madurai and Ors. 2006(3) SBR 190. In the said case the Apex Court held that the question whether in a particular case there has been substantial compliance with the provisions of Order 41, Rule 31 of the CPC has to be determined on the nature of the judgment delivered in the case. Non compliance with the provisions, may not vitiate the judgment making it wholly void and may be ignored if there has been substantial compliance with it, and the second Appellate Court is not in a position to ascertain the findings of the lower Appellate Court.

From this view-point, I have examined the judgment of the first Appellate Court. The first Appellate Court has referred to the oral evidence of the plaintiff Hari (P.W. 1), evidence of D.W. 2 Vasant Jahagirdar and D.W. 3 Rambhau Mulkute. The case of the partition alleged by the defendant in the written statement and the evidence adduced for such case also seems to have been considered by the first Appellate Court. The first Appellate Court has noted the variations in the evidence of D.W. 3 Rambhau Mulkute and D.W. 2 Vasant. The first Appellate Court has also considered the pleadings and found that the evidence and pleadings are not worthy acceptance. The first Appellate Court also found that evidence on the point as to who was party to the said partition; whether Piraji himself or his father i.e. Laxman, also cannot be discernible from the evidence. On appreciation of oral as well as documentary evidence, the first Appellate Court did not accept the alleged partition.

Foundation of the case set up by the defendant in his pleading is that Peeraji acquired the title to the suit property by partition and was the owner of the property and municipal record shows the name of the defendant for couple of months period. This case has not been accepted by the first Appellate Court. The first Appellate Court thus had appreciated oral as well as documentary evidence justifiably and recorded the finding on the controversial issue of partition, in favour of the plaintiff. The first Appellate Court also recorded the finding that the plaintiff was the owner of the property. The first Appellate Court, on appreciation of evidence, did not accept the authority of Piraji Laxman to execute the agreement dated 5-2-1976 in favour of the defendant. Thus, the first Appellate Court has virtually framed only one point for determination covering polemic issues. The judgment of the first Appellate Court shows that all controversial

issues between the parties along with their pleadings and evidence were considered by the first Appellate Court.

11. Thus, ratio of the judgment of the Apex Court in the matter of G. Amalorpavam and ors. (supra) is applicable to the facts obtaining in the case on hand. In my view, therefore, substantial question i.e. Ground 8-A and 8-D needs to be answered accordingly against the defendant/appellants holding that no substantial questions of law are involved in this second appeal to disturb the judgment and decree passed by the first Appellate Court.

12. The learned Counsel for the defendant has also invited my attention to ground 8-B. According to the learned Counsel for the defendant, the plaintiff has not adduced proper evidence and therefore, suit filed by the plaintiff ought to have been dismissed by the first Appellate Court. I have considered the submissions advanced on behalf of the plaintiff. I have also considered the pleading as well as the evidence led on behalf of the parties. I have seen the pleadings of the plaintiff in relation to the ownership which is supported by documentary evidence adduced in the case. The first Appellate Court has referred to the oral evidence for this purpose and has also considered the documentary evidence. Name of the defendant seems to have been recorded with the Municipal record for couple of months. The stray entry in the record maintained by the Municipal Council for couple of months cannot be said to be a proof or document of title. The plaintiff has denied the partition and even the existence of two more brothers. The admission given on behalf of the witnesses for defendant D.W. 2 Vasant and D.W. 4 Rambhau are material. If these admissions are considered in their proper perspectives it can be said that coupled with the evidence of plaintiff, the first Appellate Court has justifiably accepted the ownership of the plaintiff to the suit property. In my view, there is no perversity in the findings recorded by the first Appellate Court in relation to ownership of the plaintiff to the suit property. The first Appellate Court has justifiably observed that Gangaram, brother of the plaintiff, died issueless and the property was thus succeeded by the plaintiff, by survivorship. In my view, there is ample evidence on record, which has been accepted by the first Appellate Court. The findings on this ground 8-B therefore, needs to be recorded against the defendants that the plaintiff proves his case by appropriate evidence and no such substantial question of law involved in this second appeal.

13. The last ground enumerated as ground 8-C in the memo of appeal refers to alleged agreement and ownership of Piraji Laxman as well as claim of the benefit of defendant u/s 53(A) of the Transfer of Property Act. In view of the foregoing observations, it is manifest that Piraji Laxman had never acquired ownership of the said house. Piraji Laxman obviously would not have lawful authority to transfer the suit property in favour of any person. It is well settled that no person can pass on title which he himself does not hold. In the case on hand, in my view, Piraji Laxman was not owner of the suit property and therefore, there was no occasion for him to execute the valid agreement of sale in relation to the suit

property in favour of the defendant.

The alleged agreement to sale is on record Exh.40. The said document is also established and accepted. D.W. 2 Vasant and D.W. 3 Rambhau have referred this agreement to sale Exh.40. Proving of agreement to sale in favour of the defendant and passing consideration is one aspect of the matter. However, in view of my finding that Piraji Laxman was not holding title to the property, such execution of agreement to sale Exh.40 is of no consequence or benefit to the defendant. In my view, Piraji Laxman was not in actual possession of the property at any point of time and there was no occasion, therefore, for Piraji Laxman to hand over the possession of the suit house to defendant. In this view of the matter, the possession of the suit property was never handed over legally by piraji Laxman in favour of the defendant.

14. The learned Counsel for the defendant resorts to Section 53-A of the Transfer Property Act. Section 53-A refers to doctrine of part performance. It can be considered in relation to transfer of immovable property for consideration. A glance to Section 53-A of the Transfer of Property Act makes it clear that there has to be document in writing constituting terms for transfer of immovable property. In case of existence of such document and if such transferee is inducted into possession of the property by way of part performance of the contract, or such transferee being already in possession, continued in possession in part performance of the contract, and has done some act in furtherance of the contract, and the said transferee has performed or is willing to perform his part of the contract, can seek benefits u/s 53-A of the Act. The transfer of immovable property is thus important ingredient. "The transfer of property" is defined u/s 5 of the Transfer of Property Act. It applies to movable property as well as immovable properties. It provided that transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons. Section 6 of the Transfer of Property Act deals with what may be transferred. Persons competent to transfer are mentioned in Section 7 of the said Act. Section 8 of the Transfer of Property Act, is issue in view of the fact and circumstances as well as controversy involved in the case on hand. Section 8 speaks about operation of the transfer. It is provided that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. From Section 8 it is manifest that all interest possessed by the transferor which are capable of passing in the property, can be conveyed by the transfer of property. In other words the transferor can pass-such interest which he himself is holding at the time of effecting such transfer.

15. Here is the case of alleged transfer of property by agreement, by Piraji Laxman. In view of the finding recorded in the foregoing paras, Piraji Laxman was not holding title to the property. Since Piraji Laxman was not holding transferable interest in the property, agreement executed by Piraji Laxman, is of

no legal consequence in relation to plaintiff. In other words, the plaintiff cannot be said to be bound by such agreement even if it has been proved to have been executed by Piraji Laxman. A person, who was not holding transferable interest in the property, cannot transfer the property. In this view of the matter, agreement to sale dated 5-2-1976, was of no material purpose, in relation to suit property and in favour of the defendant. This ground, therefore, cannot be said to be a ground involving substantial questions of law and is to be answered accordingly against the defendant.

16. In the result, the judgment of the first Appellant Court, is based on appreciation of oral as well as documentary evidence. There is no perversity in the judgment of the first Appellate Court. In my view, no substantial questions of law involved in this second appeal filed by the defendant. This appeal therefore, needs to be dismissed and interim relief, if any, granted by this Court, needs to be vacated.

The second appeal therefore, stands dismissed. Parties to bear their own costs. Interim relief, if granted earlier by this Court, shall stand vacated.