
(1998) 07 BOM CK 0041
In the Bombay High Court
Case No : Second Appeal No. 103 of 1985

Baban Girju Bangar

APPELLANT

Vs

Namdeo Girju Bangar and others

RESPONDENT

Date of Decision : 29-07-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 101, 102, 61
Hindu Succession Act, 1956 — Section 6

Citation : AIR 1999 Bom 46 : (1998) 4 ALLMR 442 : (1998) 4 BomCR 654 : (1998) 3 BOMLR 1 : (1999) 4 CivCC 95 : (1998) 3 MhLj 743

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : B.P. Abhale, for the Appellant; K.Y. Mandlik and D.N. Argade, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—The substantial question of law sought to be raised in this appeal is as to whether the burden of proof relating to the claim of exclusive ownership of the suit property is discharged by the plaintiffs in the civil suit inspite of the failure to produce original sale deed.

2. The facts in brief relevant for the decision of this appeal are that respondent Nos. 1, 2 and 3 filed Civil Suit No. 102 of 1977 in the Court of the Civil Judge, Jr. Division, against the appellant and other respondents for permanent injunction in respect of the suit property bearing Survey No. 142/1 situated in village Nirgudsar, Taluka Ambegaon. The contention of the plaintiffs was that the property was purchased by a deed dated 3-7-1950 for a sum of Rs. 5,000/- out of the income earned by the plaintiff No. 1 from his hotel business as well as from the commission agency business in onion and potatoes at Manchar during the period from 1938 to 1947. It is their further case that in the year 1972 a farm house was constructed therein. The plaintiff Nos. 2 and 3 are sons of the plaintiff No. 1. On the other hand it was the contention of the appellant, who is the defendant No. 3 in the suit, that the suit property was not exclusively owned

and purchased by respondent No. 1 but was a joint family property which was purchased out of the income from the hotel business earned by the appellant and respondent jointly and that there are some other properties though belonging to the joint family but standing in the name of the plaintiff No. 1. It was their further case that the house was constructed from the contribution of all the members in the family and there has been no partition of the ancestral properties. The trial Court on the analysis of the evidence adduced by the parties held that the suit property is a joint family property and, therefore, the appellant cannot be restrained from enjoying the same along with the respondents. Being aggrieved by the Order, the respondent Nos. 1 to 3 herein preferred an appeal being Civil Appeal No. 700 of 1981 which was heard and disposed of by the Extra Asstt. Judge, Pune, by his Judgment and Order dated 20-9-1984. By the said Order, the appeal was allowed and the decree of the trial Court was set aside and the perpetual injunction as prayed for against the appellant herein was granted in favour of the respondent Nos. 1 to 3 herein in respect of the suit property.

3. Shri Abhale learned Advocate appearing for the appellant challenging the impugned decree submitted that the lower Appellate Court while setting aside the decree of the trial Court totally ignored the basic aspect of the case that the respondent Nos. 1 to 3 had failed to produce on record the original sale deed by which the property in question was purchased by the respondent No. 1. Being the best evidence available with the respondent Nos. 1 to 3 regarding the purchase of the property it was necessary for the said respondents to place on record the said deed by which the property was allegedly purchased solely from their own funds and for their benefits and not from the family income. He further submitted that the trial Court on analysis of the evidence on record had found that the fact that other properties which still continue to be in the name of plaintiff No. 1 but belong to the joint family properly was not disputed by the plaintiffs as well as that the plaintiffs did not claim any exclusive right in respect of those properties, and conveniently have chosen to claim exclusive right only in respect of the property in question. He further submitted that the parties to the suit belong to Hindu family and therefore, there is presumption of jointness among the brothers and considering this fact as also considering the fact that the ration card of the parties discloses that all the family members including the plaintiff No. 1 as well as the appellant reside in the same house and therefore, the joint family continues to exist and the plaintiff No. 1 as well as the appellant are the members of such joint family. Taking me through the lower Appellate Court's Judgment, the learned Advocate submitted that the lower Appellate Court has arrived at findings based on certain presumptions which are not borne out from the record and according to the learned Advocate, it is apparent from the fact that the lower Appellate Court has referred to the alleged legal effect of section 6 of the Hindu Succession Act regarding the joint family as well as the alleged gratuitous act on the part of plaintiff No. 1 in respect of residence of the appellant in the house while referring to the ration card.

4. Shri Mandlik, learned Advocate appearing for the respondents on the other

hand submitted that the fact that the property was purchased by the respondent No. 1 was not at all in dispute and what was sought to be claimed was that the said property was purchased out of the common funds of the joint Hindu family and not out of the exclusive income earned by plaintiff No. 1 from his hotel business. The fact that plaintiff No. 1 was engaged in the hotel business as well as in the commission agency business in onion and potatoes during the year 1938 to 1947 was never disputed as also the fact that the father of the plaintiff No. 1 was living at the time the property in question was purchased by the plaintiff No. 1. Considering the fact that the purchase of the property was during the life time of the father of the parties, if goes without saying that the property was not purchased from the funds of the joint family but was purchased by the plaintiff No. 1 from his own earnings who was at the relevant time residing away from the joint family. He further submitted that merely because some of the properties continue to stand in the name of the plaintiff No. 1 in the revenue record that by itself cannot lead to the presumption that the property in question was also purchased out of the common funds of the joint family. According to the learned Advocate even assuming that the plaintiff No. 1 was member of the Joint Hindu Family, there is no presumption that the property purchased by such a member out of his own income would belong to the Joint Hindu Family. He further submitted that the records disclose that the other brother in the family had not disputed the fact that the property in question was purchased by the plaintiff No. 1 out of his own earnings and that it exclusively belongs to him. According to the learned Advocate therefore, the lower Appellate Court after considering the entire evidence on record in proper perspective has rightly set aside the judgment of the trial Court and no fault can be found with the plaintiffs for not producing the original sale deed, more particularly in view of the fact that the property purchased by the plaintiff No. 1 was never disputed by other brothers and only the dispute which was sought to be raised was that the amount spend for the purchase of the property was out of the joint family fund and in that respect the burden was on the defendant No. 3 to establish the same.

5. Upon hearing the learned Advocate & for the parties and on perusal of record, it is seen that a photo copy of the sale deed dated 3-7-1958 was placed on record without any objection of the defendants and was marked as Exhibit 42 in the course of evidence and in fact the trial Court as well as the lower Appellate Court has referred to the said document as being exhibited in the course of evidence. Once a document is allowed to be exhibited in evidence without any objection from any of the parties to the suit during the trial, it is too late at the appellate stage for any party to make any grievance about the non-production of the original of such document. That apart, as rightly submitted by the learned Advocate for the respondents that once it is not disputed that the property in question was purchased by the plaintiff No. 1 by the said deed and only dispute which was sought to be raised by the defendant No. 3 was that the contribution for the purchase of the property was out of the joint family fund, it was for the defendant No. 3 to lead cogent evidence in that regard rather than expecting the

plaintiffs to disprove the same. In this view of the matter, there is no substance in the contention of the appellant that the lower Appellate Court erred in interfering with the judgment of the trial Court ignoring the aspect of non-production of the original sale deed.

6. It is true that the material on record does show that there are certain other joint family properties which stand in the name of the plaintiff No. 1 in the revenue records though they belong to the joint family. Merely because some of the properties continue to stand in the name of the plaintiff No. 1 in the revenue records that by itself cannot lead to any conclusion that the property purchased by any one member of the family would necessarily be a part of the joint family property and more particularly when the evidence on record disclose that the person who has purchased such property had been engaged in an independent business for a sufficiently long period at a place different from the residence of the joint family. The lower Appellate Court as well as the trial Court has clearly held that for a certain number of years particularly between 1938 to 1947, the plaintiff No. 1 had his own business at Manchar doing hotel business as well as commission agency in onion and potato. It is also on record that the father of the plaintiff No. 1 as well as the defendants was alive at the time when the property in question was purchased by the plaintiff No. 1. Thus the learned Advocate for the respondents is well justified in contending that if the property was purchased out of joint family funds, there is nothing brought on record by the defendant No. 3 that as to why the property in question was brought in the name of plaintiff No. 1 even during the life time of the father of the parties who was the Karta of the family. There is nothing on record to show that the other properties which stand in the name of the plaintiff No. 1 were purchased out of the family funds during the life time of the father of the plaintiff No. 1 and the defendants. If it were to be so then perhaps there could have been some substance in the contention sought to be raised by the appellant that the property in question though purchased in the name of the plaintiff No. 1 during the life time of the father but the same was from the family funds. Therefore, in the facts and circumstances of the case, no conclusion can be drawn that the property in question was also purchased from the family funds, merely because some other properties continue to stand in the name of the plaintiff No. 1 in the revenue record.

7. As regards the fact that the ration card does disclose the name of the plaintiff No. 1 along with defendant No. 3 in the common house, the same would not prove that plaintiff No. 1 continued to reside along with the other family members in the said house during the relevant time. It is to be seen that the ration card relates to the period when the evidence was led in the suit before the trial Court. The property in question was purchased in the year 1950. One fails to understand how this ration card show that the plaintiff was residing in the family house when the property was purchased. Added to this, admittedly during the period 1938 to 1947, the plaintiff No. 1 was not residing along with the other members of the family and was residing at Manchar. Apparently, therefore, the trial Court clearly erred in heavily relying upon the ration card to hold that the

property purchased by the plaintiff No. 1 is a joint family property.

8. Nonetheless, the learned Advocate for the appellant is well justified in making a grievance about certain findings arrived at by the lower Appellate Court, particularly by referring to section 6 of the Hindu Succession Act and alleged gratuitous act on the part of the plaintiff No. 1 regarding the residence of the family members and the finding of prima facie appearance that the suit property to be a joint family property. However, those findings cannot affect the case of respondent No. 1 in any manner and the fact that the property was purchased by the plaintiff No. 1 in the year 1950 out of his own income.

9. In these circumstances, it has to be held that the plaintiffs have discharged their burden of the proof relating to their claim that the suit property was purchased by the plaintiff No. 1 out of his own income and the same exclusively belongs to the plaintiffs irrespective of the fact that the original sale deed was not placed on record. In this view of the matter, the substantial question of law as framed above is to be answered in affirmative and the appeal is liable to be dismissed and accordingly the same is hereby dismissed, with no order as to costs.

10. Appeal dismissed.