
(2011) 03 BOM CK 0234
In the Bombay High Court
Case No : Second Appeal No. 214 of 1988

Babasaheb Malba (Kadam)	Vs	APPELLANT
Raosaheb Bandgar, (died), through legal representatives Prayagbai Bandgar and Others		RESPONDENT

Date of Decision : 09-03-2011

Acts Referred:

Registration Act, 1908 — Section 17, 49

Citation : (2011) 3 ALLMR 755 : (2011) 6 BomCR 451 : (2011) 113 BOMLR 1019 : (2011) 4 MhLj 699

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : V.G. Mete, for the Appellant; Prashant Deshmukh, for the Respondent

Final Decision : Dismissed

Judgement

Shrihari P. Davare, J.—Heard learned Counsel for the parties.

2. Present second appeal is preferred by the Appellant (Original Defendant No. 1) against the judgment and order of dismissal of Regular Civil Appeal No. 7 of 1987 rendered by the learned Additional District Judge, Osmanabad, on 26.4.1988, confirming the judgment and decree dated 12.12.1986 passed by the learned Civil Judge, Junior Division, Tuljapur, in Regular Civil Suit No. 5 of 1978. Accordingly, there are concurrent findings against the present Appellant. The parties are hereinafter referred to as per their original status as Plaintiffs and Defendants.

3. Plaintiffs filed suit against the Defendants, seeking declaration of their ownership to the agricultural land bearing survey No. 7 admeasuring 2 acres 38 gunthas, situate at village Sindhphal, and that the Plaintiffs are the owners and in possession of the said land ("hereinafter, referred to as "the suit land").

4 Plaintiffs came with the case that, being the owners and possessors of the suit land, they sown chana crop in the suit land, before filing the suit and after

removing paddy crop, they sown wheat and chana crops in the suit land and the said crops were standing in the suit land, having age of about two months and they also watered the said crops. It is also the case of the Plaintiffs that in remaining portion of two gunths of eastern side of the suit land, they cultivated jawar crop and they desired to give second water to the said crops. However, the Defendants interfered and obstructed the ownership and possession of the Plaintiffs over the suit land, on 14.1.1978 without having any concern thereto, as well as denied the ownership and possession of the Plaintiffs in respect of the suit land, and hence, Plaintiffs were constrained to file R.C.S. No. 5 of 1978 against the Defendants, praying for declaration that the Plaintiffs are the owners and possessors of the suit land and also prayed to restrain the Defendants perpetually, by way of injunction, from obstructing peaceful possession and enjoyment of the Plaintiffs over the suit land.

5. Defendant No. 1 Babasaheb filed written statement and resisted the suit claim of the Plaintiffs, and denied the contentions raised by the Plaintiffs that they are the owners and possessors of the suit land. Defendant No. 1 also denied that the Plaintiffs were having any right, title or interest in respect of the suit land, and further stated that the Plaintiffs had no locus standi to file suit. Defendant No. 1 also denied that the Plaintiff had grown wheat and other crops in the suit land, as alleged by them, and also denied that the Plaintiffs had grown jawar crop in remaining two gunthas, as alleged. It is further denied that without having any right, title or interest, Defendant No. 1 obstructed the Plaintiffs' possession on 14.1.1978. Defendant No. 1 came with a specific case that Plaintiff Raosaheb had partitioned the joint family property between himself and his two sons in the year 1975 and allotted the suit land in favour of his son Bharat (Defendant No. 10) and the entries are also effected in the record of rights, accordingly. Thus, it is contended by Defendant No. 1 that the Plaintiff has no right, title or interest in the suit land. It is also the case of Defendant No. 1 that he purchased the suit land, by registered sale deed from Bharat, for the consideration of Rs. 5000/= on 31.12.1977 and obtained possession of the suit land, on the same day from the deceased Plaintiff, namely, Raosaheb Bandgar. Accordingly, it is the contention of Defendant No. 1 that he is lawful owner and in possession of the suit land from the date of the said registered sale deed. Moreover, Defendant No. 1 applied for mutation in the Record of Rights and, accordingly, entries for ownership and possession were also effected by revenue authorities in the Record of Rights, in favour of Defendant No. 1. Accordingly, Defendant No. 1 urged for dismissal of the suit filed by the Plaintiff, since the Plaintiff has no right whatsoever in the suit land.

6. Suit proceeded ex parte against Defendant No. 8, and without written statement against Defendant No. 9.

7. Minor Defendant Nos. 3 to 7 also filed their written statement and contended that 7x12 extract shows that deceased Raosaheb (original Plaintiff) is the owner and possessor of the suit land. They admitted the description of the crops as

mentioned by the Plaintiffs in the plaint at the time of filing of the suit. They also contended that they were not aware about the alleged obstruction caused by Defendant No. 1 to the Plaintiffs' possession over the suit land, on 14.1.1978, and further contended that the suit of the Plaintiffs be decreed, by keeping rights of Defendant Nos. 3 to 7, intact.

8. After considering the rival pleadings and evidence adduced and produced by respective parties, as well as considering rival contentions raised by learned Counsel for the parties, learned trial court decreed the suit, by judgment and order dated 12.12.1986 and it was declared that the Plaintiffs are the owners and possessors of the suit land i.e. survey No. 7 situated at village Sindhaplhal, Taluka Tuljapur, and the Defendants were restrained perpetually from causing obstructions to the peaceful possession of the Plaintiff over the suit land, with costs of the said suit.

9. Being aggrieved and dissatisfied by the said judgment and decree, Defendant No. 1 preferred Regular Civil Appeal No. 7 of 1987 before the District Court, Osmanabad. However, after reappreciating the evidence and considering the rival submissions advanced by the learned Counsel for the parties, learned Additional District Judge, Osmanabad, also dismissed the said appeal, on 6.4.1988. Accordingly, the Defendant No. 1 has filed present second appeal and assailed both the judgments and decrees passed by the courts below, and urged that the present second appeal be allowed.

10. While, admitting this second appeal, by order dated 16.9.1988, it was observed that ground Nos. IV and VIII in the memo of appeal, can be said to be the substantial questions of law involved in the matter, and the ground Nos. IV and VIII are reproduced hereunder, and having regard to the said substantial questions of law, present second appeal is being decided.

IV. That, once there is a partition in between the father, mother and sons and once the Court below accepted the partition in between the father, mother i.e. Plaintiffs Nos. 1 and 2 except another two sons Manik and Anant of the Plaintiffs Nos. 1 and 2 except another son i.e. the original Defendant No. 9 Bharat, relying upon the mutations Entry No. 1549 and 1551. Therefore, how it can be said there is no partition in respect of one son i.e. Bharat, Defendant No. 9. Once there is family partition in between father, mother and two sons, the share of third son by name Bharat i.e. Defendant No. 9 automatically come in force because he is one of the coparceners of family and once the suit land is allotted in partition to Bharat he is entitled to sell the said lands to the Appellant and to hand over the possession to the Appellant by executing the document i.e. the registered sale deed. Accordingly, Bharat, the Defendant No. 9 executed the registered sale deed in favour of Appellant on 31st December 1977 and handed over the possession in favour of the Appellant. Once the handing over of possession is admitted in the registered sale deed by the Defendant No. 9, Bharat, the suit filed later on by the father and mother for declaration and injunction in respect of the suit land is not maintainable at all and, therefore, the

Plaintiffs have no any locus standi to file the suit neither they are the owners nor they are in possession of the suit lands.

VIII. That, once the learned District Judge declared the transaction dated 31st December 1977 out and out sale, whether the learned District Judge has failed in dismissing the Appeal of the present Appellant ?

11. Defendant No. 1 came with the specific case that there was partition between deceased Plaintiff Raosaheb and his three sons, namely, Manik, Anant and Bharat, in the year 1975 and, therefore, burden of proof of alleged partition, was upon Defendant No. 1. To substantiate the said proposition, Defendant No. 1 relied upon oral, as well as, circumstantial evidence. However, at the outset, it may be stated that Defendant No. 1 neither gave particulars of the said partition in his written statement, nor stated whether it was oral or written partition. Moreover, there is no averment in the written statement as to in whose presence the said partition was effected. Pertinently, Defendant No. 1 admitted that neither he had personal knowledge regarding the alleged partition, nor he saw the partition deed, personally and he came to know about the same through Defendant No. 10 Bharat, Accordingly, the oral evidence of Defendant No. 1 does not substantiate his case in respect of alleged partition, and pertinently, Defendant No. 1 did not examine Defendant No. 10 Bharat, to substantiate his theory of partition.

12. Besides that, Defendant No. 1 relied upon two extracts in respect of mutation entry Nos. 1549 and 1551 (Exhibits 90 and 91) respectively. Mutation entry No. 1549 discloses that some field was allotted to Manik's share in partition, and mutation entry No. 1551 reflects that some field was allotted to Anant. However, mutation entry No. 1549 was effected on the basis of application by Manik, whereas mutation entry No. 1551 was made on the application of deceased Plaintiff Raosaheb. Pertinently, there is no reference to partition in the said mutation extracts and, therefore, the said mutation extracts also do not substantiate the case of Defendant No. 1, in respect of alleged partition.

13. Apart from that, Defendant No. 1 also relied upon other two extracts of mutation, namely, mutation entry Nos. 1601 and 1603 (Exhibits 21 and 22 respectively) and the said two mutation entries are the foundation of the alleged theory of partition, advanced by Defendant No. 1. However, it is material to note that the Plaintiff Raosaheb approached the higher authorities for cancellation of the said two entries, and Defendant No. 1 also appeared in the said proceedings and contested the same, but the appellate authorities disbelieved the theory of partition advanced by Defendant No. 1 and cancelled the said mutation entries and it is admitted position that Defendant No. 1 did not prefer any appeal against the said order of cancellation of those entries. Hence, the basis and foundation of the theory advanced by Defendant No. 1 in respect of alleged partition, relying upon the said two mutation entries, also was uprooted by the judgment of the appellate authorities.

14. It was argued by learned Counsel for Defendant No. 1 Appellant herein that the sale deed dated 31.12.1977 (Exhibit 115) executed by Defendant No. 10 Bharat in favour of Defendant No. 1, discloses that the land survey No. 7 is the ancestral property which was partitioned and the same was received by Defendant No. 10 Bharat in the said partition, which he sold to Defendant No. 1 and, therefore, it is submitted that the statement made by Defendant No. 10 Bharat in the said sale deed (Exh.115) proves that the partition had taken place among the coparceners in respect of the suit property.

15. However, learned Counsel for the Respondents rightly invited my attention to the affidavit executed by Defendant No. 10 Bharat, on 23.6.1978 (Exh. 34) wherein, it is categorically stated by Defendant No. 10 that there was no partition between his father deceased Plaintiff Raosaheb and himself, and deceased Raosaheb refused to give partition in respect of the suit property, on the allegation that Defendant No. 10 Bharat was suffering from bad vices and hence, he (Deft. No. 10 Bharat) executed surrender deed of his share in favour his father Raosaheb, on 20.1.1975 (Exh. 98). Even the said surrender deed does not disclose that there was partition between the deceased Raosaheb and his son Bharat and survey No. 7 was allotted to Bharat.

16. Hence, having the comprehensive view of the matter in respect of alleged plea of partition raised by Def. No. 1, it is apparently clear that Deft. No. 1 failed to prove and establish the same, and there is no flaw in the reasoning recorded by the trial court, as well as the first appellate court, regarding finding given by both the courts below, thereby turning down the said plea of Defendant No. 1 Appellant herein and, therefore, no interference therein is called for, in the present second appeal.

17. It was argued on behalf of Defendant No. 1 that, he purchased the suit property for consideration of Rs. 5000/= from Defendant No. 10 Bharat, by way of registered sale deed dated 31.12.1977 and the original sale deed is produced at Exhibit 115, as well as he examined one attesting witness, namely, Vasant Narsing Amrutrao, and accordingly, proved the said alienation of the suit property by Defendant No. 10, in his favour. However, question arises regarding possession of the suit property and Defendant No. 1 contends that he received possession of the suit property from Defendant No. 10 Bharat, on execution of the said sale deed (Exh.115). In the said context, it is important to trace whether Defendant No. 1's vendor, namely, Defendant No. 10 Bharat was, in fact, in possession of the suit property at the time of execution of the said sale deed, i.e. on 31.12.1977, and it is material to note that there is no documentary evidence to indicate that the vendor (Deft. No. 10 Bharat) was in possession of the suit property at the relevant time. Pertinently, affidavit sworn in by Defendant No. 10 Bharat, on 23.6.1978, which is produced at Exhibit 34, categorically discloses that his father Raosaheb was in possession of the suit property as on the date of execution of the said sale deed (Exh.115). The said affidavit further makes it clear that since Defendant No. 10 Bharat was in need of money, he executed sale

deed in respect of survey No. 7 in favour of Defendant No. 1, but Defendant No. 10 never handed over possession of the suit land to Deft. No. 1 and the possession was with his father Raosaheb, only.

18. Defendant No. 1 also referred to an independent agreement executed on the same day on which sale deed (Exh.115) was executed i.e. 31.12.1977, by Defendant No. 1 in favour of Defendant No. 10 Bharat, which is produced at Exhibit 98, and on perusal of the contents thereof, it is apparently clear that even on execution of the said agreement and the sale transaction dated 31.12.1977, the suit property was to be reconveyed, if Defendant No. 10 pays back Rs. 5000/= to Defendant No. 1 within the period of three years and, therefore, real intention behind execution of the sale deed dated 31.12.1977 (Exh.115) comes under the cloud of suspicion, although it has not come on record that Deft. No. 10 filed suit against Deft. No. 1 for specific performance. Apart from that, it is apparent from the surrender deed dated 20.1.1975 (Exh.98) executed by Defendant No. 10 in favour of his father, namely, Plaintiff Raosaheb, that survey No. 7, i.e. the suit property, was not allotted to the share of Defendant No. 10 Bharat and, therefore, it was argued on behalf of the Plaintiffs that the sale deed dated 31.12.1977 executed by Defendant No. 10 in favour of Defendant No. 1 is of no consequence, since Defendant No. 10 Bharat had no right and title to execute the said sale deed.

19. However, on behalf of Deft. No. 1, it was submitted that the said surrender deed dated 20.1.1976 (Exh.98) is not registered u/s 17 of the Indian Registration Act, and therefore, the same cannot be of any aid and assistance to the case of the Plaintiffs. In the said context, learned Counsel for Plaintiffs submitted that Section 49 of the Indian Registration Act, speaks of the effect of non registration of the document which is required to be registered, and further argued that the provisions of Section 49 of the said Act lay down that an unregistered document may be received in evidence only for collateral purposes. It was canvassed that even if a document is compulsorily registrable and ought to have registered, but was not registered, still it would be admissible in evidence only for collateral purposes, which has a limited scope and meaning. However, since there is no reference to the said surrender deed in the plaint, no comments are called for in that respect.

20. In the circumstances, the substantial questions of law raised in ground Nos. IV and VIII of the memo of the second appeal, are answered in the aforesaid terms, and having comprehensive view of the matter, no interference in the concurrent findings given by the trial court, as well as first appellate court, is warranted, in the present second appeal.

21. Accordingly, present Second Appeal bears no substance and the same is devoid of any merits, and hence, stands dismissed. Record and proceedings be sent back to the concerned court.