

(2008) 10 BOM CK 0086
In the Bombay High Court
Case No : Second Appeal No. 529 of 2003

Bakerao Ulhe

APPELLANT

Vs

Ramkrishna Rajaram Kshirsagar through Guardian his wife
Swaraswatibai Kshirsagar and Pandurang Vitthalrao
Kshirsagar

RESPONDENT

Date of Decision : 24-10-2008

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 30
Hindu Succession Act, 1956 — Section 14, 14(1), 14(2)
Succession Act, 1925 — Section 301, 317

Citation : (2008) 6 ALLMR 535 : (2009) 3 BomCR 889

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : V.M. Deshpande, for the Appellant; S.D. Malke, for the Respondent

Final Decision : Allowed

Judgement

S.R. Dongaonkar, J.—The appellant - original defendant, is taking exception to the judgment in R.C.A. No. 108/1997 rendered by the Additional District Judge, Achalpur on 24-09-2003, in an appeal filed by him against the judgment and decree in R.C.S. No. 07/1993 passed by the Civil Judge, Junior Division, Amravati on 25-07-1997, by which he decreed the plaintiff - respondent No. 1's suit, for possession of the suit property bearing Survey No. 173/2 of Mouje Brahmanwada Thadi, admeasuring 4 acres and also declaring that the sale deed executed by Banabai Rajaram Kshirsagar in favour of defendant No. 1 and the sale deed executed by defendant No. 1 Pandurang - present respondent No. 2 in favour of the appellant, was void and illegal. Needless to say that the appeal preferred by the present appellant was dismissed.

2. Respondent No. 1 Ramkrishna had preferred a suit for declaration that the sale deed executed by deceased Banabai, in favour of original defendant No. 1 and the sale deed executed by original defendant No. 1 in favour of defendant

No. 2 i.e. present appellant were void. There is no dispute as regards the description of the suit property as stated above. Suffice it to say that Banabai - mother of respondent No. 1/plaintiff was in possession of the suit property by virtue of registered document of Vyavastha-patra which was executed by father of plaintiff on 29-01-1960. It was alleged by the plaintiff that the said Banabai had a restricted interest in the suit property and she was not entitled to sell, gift or transfer the suit property in favour of any person, as the same was granted to her by her husband during her life time for maintenance purpose. As such, according to him, Banabai had no legal right to sell the said suit property to defendant No. 1. Consequently, defendant No. 1 had no right to sell the same in favour of defendant No. 2. It is not disputed that the said Banabai is dead. With these contentions, the relevant declaration to declare the sale deeds executed by Banabai in favour of defendant No. 1 and defendant No. 1 in favour of defendant No. 2 were void and illegal was sought. Consequently, plaintiff claimed the possession of the suit property.

3. Defendant No. 1, though appeared did not file any Written Statement, so, he was proceeded in default of W.S. Appellant/Defendant No. 2 however resisted the suit by filing Written Statement and claiming that Banabai was in possession of the suit property, as its full owner. He denied that she was in possession of the same by virtue of Vyavastha-patra with limited interest. He also claimed the defence of limitation. According to him, the sale deeds which were sought to be declared void, were perfectly legal. He claimed the dismissal of the suit. I need not give the details of the other defences raised by him like non - joinder of necessary parties etc., considering the short controversy involved in this appeal.

4. Learned trial judge framed the following issues and recorded his findings as stated on the basis of evidence and after hearing the parties.

Issues Findings

1. Whether the plaintiff is entitled for declaration that sale deed in respect of suit field Sr. No. 173/2 Mouza Brahmanwada Thadi executed by Banabai w/o Rajaram Kshirsagar in favour of defendant No. 1 and sale deed in respect of the suit field executed by defendant No. 1 in favour of the defendant No. 2 are void, illegal and bad in law? ...Yes.

2. Is plaintiff entitled to recover vacant possession of the suit land from the defendant? ...Yes.

3. Is the suit of plaintiff is properly valued? ...Yes.

4. What relief and order ? ... As per final order.

It may be noted that the plaintiff has examined his wife asserting that the plaintiff was not able to understand the things. In fact, it was alleged that he was incapable of understanding the things since his marriage with the plaintiff's witness - wife. Defendant No. 2 examined himself in support of the case. Learned trial judge decreed the suit, by his judgment and order dated 25-07-1997.

5. Appellant/Defendant No. 2 challenged that judgment and decree in appeal before the District Judge, Achalpur. He, by his judgment and order dated 24-09-2003, dismissed the appeal.

That is how the appellant, is in the Second Appeal.

6. The appeal was admitted on the following substantial questions of law.

(1). Could it be said that Banabai was holding suit property as limited or restricted owner?

(2). Could it be said that by virtue of Vyavastha-patra Exh. 48 the absolute right of ownership of Banabai in respect of suit property is extinguished and or restricted right?

(3). What is the scope and ambit of Section 14 of the Hindu Succession Act, 1956 vis-a-vis Exh. 48 the Vyavastha-patra?

Learned Counsel for the appellant has submitted that the suit property was allotted to Banabai by her husband in lieu of maintenance by a registered Vyavastha-patra, long back in the year 1960. Its possession was also given. In view of the provisions of Section 14 of the Hindu Succession Act, she had become absolute owner of the said suit property. According to him, once she becomes owner of the suit property, she could validly sell the same in favour of defendant No. 1, who could further sell the same to defendant No. 2. As such, the sale deed in favour of defendant No. 2 i.e. present appellant was perfectly valid. He has relied on the provisions of Section 14 of the Hindu Succession Act, as well as the judgments of the Apex Court in *Vaddeboyina Tulasamma and Ors. v. Vaddeboyina Sesha Reddi (dead) by L.Rs.* AIR 1977 S.C. 1944, *Smt. Beni Bai Vs. Raghubir Prasad*, , and in *Smt. Palchuri Henumayamma v. Tadikamalla Kotlingam (D)* by LR's and Ors. AIR 2001 SCW 4121. According to him, as there was pre-existing right of the maintenance she being the widow of the said Rajaram i.e. father of the plaintiff, in view of the provisions of Section 14(1) of the Hindu Succession Act, she had become the absolute owner of the suit property, and therefore, she could validly sell the suit property to defendant No. 1, who could consequently, sell the same to defendant No. 2. Therefore, according to him, the judgments of the trial judge as well as the appellate judge are incorrect at law, in as much as they have not considered the application of Section 14(1) of the Hindu Succession Act, by which the said Banabai had perfected her title to the suit property by becoming full and absolute owner, she being in possession of the suit property in lieu of her right of maintenance. Therefore, according to him, judgments of the Courts below are liable to be set aside and the plaintiff's suit is liable to be dismissed. Further according to him, this being material law point, it can be considered in the Second Appeal.

7. Learned Counsel for respondent No. 1 Shri. Malke has submitted that at the time of execution of the said Vyavastha-patra, said Banabai had no existing right of maintenance as her husband was alive and as such, the provisions of Section

14(1) of the Hindu Succession Act would not be applicable and the said Banabai could not become absolute owner of the suit property in view of the provisions of Section 14(2) of the Hindu Succession Act. It is his specific contention that the suit property was placed into possession of the said Banabai for her maintenance but when it was so placed, she had no pre-existing right of maintenance, at the time of execution of that Vyavastha-patra. Therefore, she could not become full owner of the suit property but she could become only the limited owner. He has referred to the judgment of the Apex Court in Sharad Subramanyan Vs. Soumi Mazumdar and Others, , wherein, it was held that at the time of will, there was no pre-existing right of maintenance to the female Hindu and as such, Section 14 of the Hindu Succession Act could not make her absolute owner. He has also referred to the judgments of the Apex Court in Gulabrao Balwantrao Shinde and Others Vs. Chhabubai Balwantrao Shinde and Others, and in Ram Vishal (Dead) by LRs. and Ors. v. Jagan Nath and Anr. : (2004)9SCC302 , to raise the same contentions. Besides this, he has also referred to the judgment of the Calcutta High Court, in Gorachand Mukherjee Vs. Smt. Malabika Dutta, .

8. The provisions of Section 14 of the Hindu Succession Act, 1956 read thus:

14. Property of a female Hindu to be her absolute property.- (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.-In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhana immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

9. It is apparent from the perusal of the judgments referred by the learned Counsel for the parties, that if there is any pre-existing right of maintenance for which possession has been granted to a female Hindu, she would become full and absolute owner thereof. She would be then entitled to dispose of the said property as per her choice. If she has no pre-existing right in the property, the effect would be otherwise.

10. The facts in this case are not at all in dispute. Although, the challenge to the proof of Vyavastha-patra is made by the appellant, that its original had not come on record, the fact remains that its certified copy was placed on record, which is

at Exhibit - 48. It is not disputed that the said Banabai was having possession of the said property during her life time. Said Vyavastha-patra recites that the said Vyavastha-patra was executed by Rajaramji Punjaji Kshirsagar in favour of Banabai Rajaramji Kshirsagar i.e. his wife. It further recites that she was his wife and to avoid her neglect as regards maintenance during her life time, that Vyavastha-patra was executed and the said property was placed in her possession. It specifically states that she would not be entitled to sell, gift, mortgage the said property and after her death, the said property would revert back to his heirs. Relying on this condition, learned trial judge as well as the appellate judge has held that she could enjoy the said property during her life time only and after her death, the same would revert back to the heirs of the said Rajaram. Consequently, it was held by them that the said Banabai was not entitled to sell the same to anybody i.e. to defendant No. 1 and consequently, defendant No. 1 could not sell the same legally to defendant No. 2 i.e. present appellant. With these principal reasons, learned trial judge had decreed the suit and the appellate judge dismissed the appeal.

11. The crucial question would be whether the provisions of Section 14(1) of the Hindu Succession Act would make the said Banabai full and absolute owner of the suit property.

12. In Viddeboyina Tulasamma's case, the Apex Court has observed as under:

Sub-section (1) of Section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property. Sub-section (2) is more in the nature of a proviso or exception to Sub-section (1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of Sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of woman in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in Sub-section (1). It cannot be interpreted in a manner which would rob Sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by Sub-section (1).

Sub-section (2) must, therefore, be read in the context of Sub-section (1) so as to leave as large a scope for operation as possible to Sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of Sub-section (2), even if the instrument, decree, order or award allotting the property

prescribes a restricted estate in the property. The appellant claimed maintenance out of the joint family properties in the hands of the respondent who was her deceased husband's brother. The claim was decreed in favour of the appellant and in execution of the decree for maintenance, a compromise was arrived at between the parties allotting the properties in question to the appellant for her maintenance and giving her limited interest in such properties and Held that since in the present case the properties in question were acquired by the appellant under the compromise in lieu of satisfaction of her right of maintenance, it was Sub-section (1) and not Sub-section (2) of Section 14 which would be applicable and hence the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in the properties.

In Smt. Beni Bai's case, the Apex Court has observed in Para. Nos. 7 and 8 as under:

From the aforesaid pronouncement of law by this Court, it is clear that Sub-section (1) of Section 14 applies to the cases where the conferment of right to a Hindu widow was in lieu of maintenance or in recognition of her pre-existing right as provided under the Shastric Law and Hindu Women's Rights to Property Act.

Sub-section (2) of Section 14 of the Act would apply only to such cases where grant conferred a fresh right or title for the first time and while conferring the said right certain restrictions were placed by the grant or transfer.

In the present case, the widow was conferred the limited right in lieu of maintenance in recognition of her pre-existing right. The limited interest conferred upon her by virtue of the Will being in lieu of maintenance and in recognition of her pre-existing right, the said right transformed into an absolute right by virtue of Section 14(1) of the Act. The said right was not conferred on her for the first time. Thus Sub-section (2) of Section 14 of the Act has no application to the present case. Under such circumstances, the widow became the absolute owner of House No. 27 and was fully competent to execute the Gift Deed in favour of her daughter. The Gift Deed executed by the widow was thus valid.

In Smt. Palchuri Henumayamma's case, the Apex Court has held as under:

it is clear from the recitals that though the testator has not used the words 'in lieu of maintenance', he has certainly intended that the properties settled under the Will were left for the enjoyment of his wife during her life-time towards her maintenance. The fact that testator's wife was made a guardian of the minors would not in any manner deviate from the fact that the property under the Will was given to the wife for her enjoyment in lieu of her maintenance. The wording "my wife, shall enjoy all my moveable and Immoveable properties till her death" clearly shows that no arrangement was made by the testator for vesting of the properties in his daughters.

13. Thus, it is obvious that if Banabai had pre-existing right of maintenance in the suit property and she receives the possession of the same in lieu thereof, she would be absolute owner of the suit property in view of the provisions of Section 14(1) of the Hindu Succession Act.

14. At this stage, it is necessary to see the observations of the Apex Court in *Gulabrao Balwantrao Shinde and Others Vs. Chhabubai Balwantrao Shinde and Others*, wherein it has been observed in Para. 7 as under:

Counsel for the appellants vehemently argued that in the absence of any pleadings and evidence to the effect that Balwantrao Shinde had given the property to Chhabubai in lieu of maintenance, the High Court has erred in recording a finding that the property in possession of Chhabubai was in lieu of maintenance which could be enlarged into full ownership right on her. Counsel for the respondents virtually conceded that Chhabubai did not either raised the plea nor led any evidence to prove that the properties were given to her by way of maintenance by Balwantrao Shinde. It is also not disputed that properties in the hands of Balwantrao Shinde were ancestral in nature. We agree with the plea raised by the Counsel for the appellants that in the absence of any pleadings to the effect that Balwantrao Shinde had given properties to Chhabubai by way of maintenance and in the absence of any evidence to that effect, the finding that the properties were given in lieu of maintenance to Chhabubai which right could be enlarged into full ownership right could not be recorded. The High Court clearly fell in error in recording a finding to the effect that Chhabubai had become absolute owner of the properties left by Balwantrao Shinde. Another factor which persuades us to take this view is that the properties were ancestral in hands of Balwantrao Shinde in which plaintiff No. 1 had a right by birth. The entire property therefore could not have been given to Chhabubai by way of maintenance.

15. Further in *Sharad Subramanyan Vs. Soumi Mazumdar and Others*, the Apex Court has observed in Para. Nos. 18, 19 and 20 as under:

Turning to the facts of the present case, we notice that not only was there no material to indicate to the High Court that the property was given to Reba Mitra in lieu of her right of maintenance, but such an argument was not even advanced before the Court. Even the impugned judgment of the High Court observes:

It is not the case of the appellant that at the time when K.K. Mitra executed the Will, his wife was entitled to enforce her right of maintenance under the provisions of Hindu Adoptions and Maintenance Act or otherwise. She had been undisputedly living with her husband upon her husband's death till the Will was probated, she was enjoying the property as her own. Even in terms of the Will dated 19-03-1991 she had a right of enjoyment in respect of the entire property.

The High Court then noticed Section 30 of the Act which empowers a Hindu possessed of any property to execute a Will; and confer a grant in favour of another either absolutely or to a limited extent; even to the extent of depriving

his natural heirs from enjoying the estate left by him. We think that the High Court was right in taking this view. The High Court also took notice of the fact that there was no material on record from which it could be concluded that the disposition of life estate in favour of Reba Mitra in the Will of her husband, Kamal Kumar Mitra, was in lieu of or in recognition of her right of maintenance. Consequently, we agree with the finding of the High Court that Reba Mitra had only a limited right, namely, the interest in the Suit Property. Thus, she could not have created a long-term lease as she has purportedly done.

Discharge of Executor.

Learned Counsel for respondents then referred to the provisions of the Indian Succession Act. He urged that u/s 301 of the Indian Succession Act "The High Court may, on an application made to it, suspend, remove or discharge any private executor or administrator..." and appoint another person in his place where continuance of the executor is detrimental to the estate of the deceased. Further it was pointed out that, u/s 317 of the Indian Succession Act, and executor had to make an inventory and file periodical accounts of the estate. It is contended that the appellant had failed to do so and was also liable to be removed u/s 301 of the Indian Succession Act. Finally, it is urged that the appellant as an executor had set up a claim in the estate, which was inconsistent with the deed of the executor and, therefore, he was unfit to function as an executor, the High Court had rightly discharged him from his office and appointed an administrator pendente lite.

From the factual circumstances, while the High Court's appointment of an Administrator pendente lite appears to be correct, we need not finally decide as to whether the appellant was unfit to act as an executor of Kamal Kumar Mitra's Will. We are cognizant of the fact that the High Court is still seized of the matter and the order passed is only an interlocutory order based on prima facie, considerations. In our view, there was sufficient justification for the High Court to make the order for appointment of the Administrator pendente lite to protect the estate during the pendency of the petition before it. The question as to whether the appellant as the executor has breached his fiduciary duty, can only be determined at the end of the trial. In our view, therefore, the impugned judgment of the High Court is not liable to be interfered with.

16. Thus, in the present case, it needs to be examined as to whether the said Banabai was holding the suit property towards her pre-existing right of maintenance and whether she had become absolute owner thereof.

17. No doubt, at the time of execution of the said Vyavastha-patra, her husband was alive. However, it clearly appears from the evidence that the said Banabai was in possession of the suit property towards her maintenance even after the death of her husband.

18. Learned trial judge has observed in Para. 14 of the judgment that "it is admitted fact that father of the plaintiff Rajaram has died in the year 1966.

Hence he could not be examined before the Court. Banabai is also dead." It clearly leads to inference that after the death of said Rajaram, Banabai still continued to be in possession of the suit property towards her maintenance for a long time.

19. The evidence of the plaintiff's wife Saraswatibai shows that after the death of her father in law after about 5-6 years, her mother in law i.e. said Banabai started living with defendant No. 1. The said field was being cultivated by her mother in law either by self or on Batai.

20. In cross examination, she has not given the details about the sale deed between Banabai and the defendant No. 1 though there are details on record about the sale deed of defendant No. 2 - appellant. In examination in chief itself, she has stated that Banabai died in the year 1992. This clearly means that even after the death of her husband, she continued to remain in cultivating possession of the suit property for long time in pursuance to the said Vyavastha-patra, which was granted to her, towards maintenance. This evidence clearly supports the inference recorded above.

21. In my opinion, therefore, the instant case cannot be treated as a case of having no pre-existing right of maintenance of the said Banabai in the suit property at the time of getting possession of the same. As such, the authorities referred by the learned Counsel for the respondents, would not be attracted for inviting an inference that she could not become full and absolute owner of the suit property. The facts and the circumstances which emerged are clear to the effect that the said Banabai was holding the suit property towards her maintenance after the death of her husband for considerably long time. As such, she became absolute owner of the suit property in view of the provision of Section 14(1) of the Hindu Succession Act. Needless to then observe, she could sell the property to defendant No. 1, who could consequently sell the same to defendant No. 2 - appellant. In this view of the matter, the inferences drawn by the learned trial judge as well as the appellate judge that Banabai had only limited interest in the suit property and therefore, she could not become the absolute owner of the said property so as to entitle her to sell the same to defendant No. 1 and consequently, sale deed of defendant No. 1 to defendant No. 2, is not in accordance with law are not legal and correct in view of the provisions of Section 14(1) of the Hindu Succession Act.

22. No doubt, this aspect was not considered by the Courts below but the fact remains that this being a mandatory impact of legal provision contained in Section 14(1) of the Hindu Succession Act, the same can be considered in this Second Appeal and acted upon.

23. In sequel, this appeal has to be allowed.

24. The impugned judgments of the trial judge as well as learned appellate judge are hereby set aside and the suit of respondent No. 1 - original plaintiff is dismissed. However, there would be no order as to costs.