(2010) 04 BOM CK 0169

In the Bombay High Court

Case No : Second Appeal No. 354 of 1990

Bhagirath Charkha APPELLANT

Vs

Ramprasad (died) through his legal representatives (Sow. Kunta Navandar (deceased through her L.Rs. Hiralal Navanda and Jagdish Navandar) and Others RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Transfer of Property Act, 1882 — Section 3, 41, 58

Citation : (2010) 5 BomCR 219 : (2011) 1 CivCC 123

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : M.V. Deshpande, holding for B.A. Darak, for the Appellant; S.P. Deshmukh, for the Respondent

Judgement

P.R. Borkar, J.—This second appeal is preferred by original Defendant No. 1 being aggrieved by the judgment and decree passed by the learned III Additional District Judge, Beed, in Regular Civil Appeal No. 151 of 1988 decided on 12.10.1990, whereby he allowed the said appeal and passed decree against present appellant Bhagirath (original defendant No. 1) to deliver possession of the suit property to Respondent Nos. 1 to 11 (original plaintiffs and legal heirs of deceased plaintiffs) on or before 13.11.1990 and also for holding enquiry into mesne profit under Order 20 Rule 12 of the Code of Civil Procedure, 1908. By the said judgment and decree, the learned Additional District Judge set aside the judgment and decree of dismissal of the suit passed by the learned joint Civil Judge, Junior Division, Beed in R.C.S. No. 227 of 1984 decided on 30.4.1988.

2. Briefly stated, it is the case of Respondent Nos. 1 to 11 (Original Plaintiffs and legal heirs of deceased Plaintiffs) that the old house bearing No. 1669 (present house No. 2056) situated at Shani Mandir Road, Beed, bearing CTS sheet No. 76 and Chalta No. 38 fully described in paragraph 1 of the plaint, was purchased by original Plaintiffs and Defendant No. 2 Papalal (present Respondent No. 12) by a

registered sale deed dated 2.12.1963 for consideration of Rs. 10,000/= from original owners, late Hiralal Bhagwandas and his sons. Plaintiffs were in joint possession of the same with Respondent No. 12 Papalal. Supervision and management of the suit house was being looked after by Respondent No. 12 Papalal and he used to let out the suit house on rent and collect the rent on behalf of himself and plaintiffs. Respondent No. 12 used to pay municipal taxes on behalf of holders of the property, but only his name was recorded in the municipal record. However, he had no right other than of supervision and management of the suit property. In 1974, without consent of Plaintiffs, Respondent No. 12 Papalal inducted present appellant in some portion of the suit house. Appellant and Respondent No. 12 attempted to get their names entered into the record of City Survey record, but the concerned authorities rejected the said move and the names of the plaintiffs were entered in the record of City Survey. Whatever transaction that had taken place between Respondent No. 12 Papalal and the present appellant is not binding on the plaintiffs and, therefore, the plaintiffs filed suit for possession and mesne profit.

3. Present appellant-original defendant No. 1 appeared in the suit and filed Written Statement at Exhibit 34. It was his contention that since 1964 onwards, Respondent No. 12 Papalal was dealing with property as if he was the exclusive owner and possessor thereof. The City Survey authorities had no jurisdiction to decide title of the parties to the suit property. The appellant purchased the property for value without notice. Respondent No. 12 Papalal had executed sale deed in favour of the appellant in the year 1974. At that time, Respondent No. 12 was in need of money for improvement of his land at village Loni-Shahajanpur and, therefore, he approached the appellant for hand loan. Respondent No. 12 represented that he wanted to construct a well in his land and also purchase bullocks. Respondent No. 12 Papalal told the appellant that he would execute a conditional sale by way of security for loan and the amount would be repaid. He would not claim any rent in respect of portion of the suit house that was given possession of the present appellant. Respondent No. 12 Papalal further represented to the appellant that he was the exclusive owner of the property as it had fallen to his share. Relying upon the word of Respondent No. 12 Papalal and after verifying the municipal record, the appellant agreed to pay Rs. 15,000/- to Respondent No. 12 as loan and, in turn, Respondent No. 12 agreed to execute a registered sale deed with condition of reconveyance of the suit property on repayment of consideration of Rs. 15,000/- within a period of three years. In case the amount was not repaid as agreed, the sale transaction was to be treated as out and out sale. It is further stated in paragraph 20 of the Written Statement that after expiry of period of three years on 17.2.1977, the appellant approached Respondent No. 12 Papalal on 3-4 occasions and asked him to repay the amount and get the title re-conveyed. However, Respondent No. 12 expressed inability to repay the amount and requested the appellant to treat the transaction as out and out sale. It is thereafter that the name of the appellant was entered in the municipal record as owner and the property was given

separate No. as 2056/1. It is further stated that from 1969-70, the appellant had taken suit property for business on rent at Rs. 50/=, per month, but after sale on 18.2.1974 of half portion of suit house, he was paying rent at Rs. 30/= per month in respect of unsold portion of the suit house. He has also constructed a room of tins. On the basis of these pleadings, the appellant prayed for dismissal of the suit.

4. Respondent No. 12-Defendant No. 2 Papalal filed Written Statement at Exhibit 45 and contended that it was not out and out sale, but it was a sale deed executed as security for loan and the appellant is put in possession as licencee. Respondent No. 12 admitted the contents of plaint.

5. The trial court framed various issues and came to the conclusion that the plaintiffs failed to prove that they were the joint owners with Respondent No. 12 Papalal of the suit property. Respondent No. 12 was exclusive owner and was also ostensible owner with consent of the Plaintiffs. It is also held that Defendant No. 2 Papalal (Respondent No. 12 herein) represented the appellant that he was exclusive owner and therefore the transaction between them had taken place. It is also held that the appellant had been tenant of suit house No. 2056. In the circumstances, the trial court dismissed the suit.

6. The learned Additional District Judge in appeal against said dismissal came to the conclusion that the appellant is not entitled to protection of Section 41 of the Transfer of Property Act as he had not taken reasonable care or acted in good faith while entering into the transaction. He also came to the conclusion that the appellant was not tenant of the suit property and as such had no tenancy right in respect of any portion of the suit property. It is further held that the transaction between present appellant and Respondent No. 12 Papalal is not binding on the plaintiffs and, therefore, the learned Addl. Dist. Judge decreed the suit for possession and mesne profit.

7. This second appeal is admitted on following substantial questions of law which are reformulated by order dated 20.4.2010.

(1) Whether, Defendant No. 1 proves that his transaction with Defendant No. 2 is a purchase from ostensible owner and that he is entitled to protection of Section 41 of the Transfer of Property Act ?

(2) Whether the Plaintiff''s suit for possession and mesne profit is tenable ?

(3) Whether the suit transaction between original defendant No. 1 and defendant No. 2 is of sale with condition of mortgage, or is it a mortgage with conditional sale within the meaning of Section 58(c) of the Transfer of Property Act and what would be effect on the suit in case it is a mortgage ?

8. It is vehemently argued by Shri M.V. Deshpande, learned Counsel for the appellant that in the present case, as admitted in the plaint, Respondent No. 12 (defendant No. 2) Papalal was in exclusive supervision and management of the suit property. He was letting out the suit property and also collecting rent. In the

municipal record, there was only name of Respondent No. 12 as a owner. For that purpose, learned Counsel relied upon Exhibits 72 and 73. He further submitted that he made enquires with Respondent No. 12 Papalal who told him that in partition, he got the property. In the circumstances, according to the learned Counsel, action of the appellant is bonafide and by allowing name of only Respondent No. 12 to appear in the municipal record, there is implied representation by other Respondents that Respondent No. 12 has been ostensible owner of the suit property.

9. On the other hand, as held by the first appellate court, so also according to earned Counsel Shri S.P. Deshmukh for the Respondents, the applications (Exh.72 and 73) on which the appellant wants to rely, clearly indicated that the property was purchased jointly by the plaintiffs and Respondent No. 12 Papalal and name of Papalal was entered in the municipal record with consent of the plaintiffs. It may be noted that the plaintiffs were cousins of Respondent No. 12. It is not mentioned in the application dated 13.7.1964 (Exh.72) that there was partition and in partition, the suit house was allotted to the share of Respondent No. 12 Papalal. Exhibit 73 is the order passed by the Executive Officer of the Municipal Council, Beed, directing that the name of Respondent No. 12 be entered as owner of house No. 1669, Ward No. 1 as it then stood. It is argued that the contents of application Exh.72 show the names of other owners who were joint purchasers and this should have put the appellant to enquiry.

10. So far as applicability of Section 41 of the Transfer of Property Act is concerned, several authorities are cited by Shri S.P. Deshmukh, the learned Counsel for Respondent Nos. 1 to 12.

11. Firstly, he relied upon Sadiq Hussein v. Co-op. Central Bank AIR (1939) Nag 106. In paragraph 7 of the judgment, it has been observed that Section 41 is an exception to the general rule that no person can dispose of an interest in property that is not vested in him and therefore the onus is on the transferee to bring his case within this section. It is further observed in the same para.7 that the transferee has to prove the following elements, namely,

(a) that the transferor is the ostensible owner,

(b) that he is clothed with the insignia of ownership with the consent, express or implied, of the real owner,

(c) that the transfer is for consideration; and

(d) that the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer. If any one of these elements is absent, the transferee is not entitled to the benefit of Section 41.

In that case, it has been further observed in paragraph 14 as follows;

The inspection of the Registration Index for 12 years prior to the date of enquiry is not sufficient, as a rule, to discharge the burden in case of mortgages, though it may be true in case of sale transactions in some cases. Where the mortgage deed was registered in the manner prescribed by the Registration Act, a party cannot be heard to say that he searched the register without finding the necessary entry. He must take the consequences of his want of diligence in making the necessary search. His conduct can only be regarded as willful abstention from search which he ought to have made.

In paragraph 22, it has been further observed;

Representations by ostensible owner as to his title to the property long before its sale are not binding on the real owner. Such representations do not protect the vendor.

12. In Khushalchand Bhagchand Vs. Trimbak Ramchandra and Others, , this Court laid down law as follows.

12.Transferee not making search in index in Sub-Registrar''s office to ascertain power of transferor to make transfer is not entitled to benefit of Section 41. It is true that Section 41, T.P. Act, does not say that the transferee must have taken the transfer "without notice" of the want of title of the transferor. But the question of notice has to be considered in deciding whether the transferee has taken reasonable care to ascertain that the transferor had power to make the transfer. Explanation (1) to Section 3, T.P. Act, fixes every transferee with the possession of the knowledge of all the preexisting transactions regarding the property effected by registered sale deeds. This imposes on every one taking a transfer of immovable property the duty of making a search in the index maintained in the Sub-Registrar''s office, and if he omits to make such a search, he is to be deemed to be guilty of gross negligence in making inquiry into the transferor''s power to make the transfer and cannot be said that he took reasonable care to ascertain the power of the transferor. He is, therefore, not entitled to benefit of Section 41, T.P. Act.

13. Another case cited on the same point is Suraj Ratan Thirani and Others Vs. The Azamabad Tea Co. and Others, . In para. 16 of the judgment, following law is laid down.

In order that Section 41 of the transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make transfer of the full interest. Now, the facts however were that except the property being entered in the revenue records in Ismail''s name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It is manifest that the conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights.

14. Mere verification of municipal record to ascertain title of a person by itself is not sufficient. Municipal record is necessarily for the purpose of collecting property taxes. In present case, the appellant ought to have taken due search in the registration index. In any case, he had come to know from the application given to Municipal Council that besides Respondent No. 12 Papalal, there were other purchasers of the suit property. The appellant, therefore, ought to have verified factum of partition represented to him by Respondent No. 12 Papalal. It is not that he had given any public notice or made enquiries with any of the plaintiffs and that any of them supported the case of partition and allotment of suit property to Respondent No. 12 Papalal in the partition. In the circumstances, in my opinion, the learned Additional District Judge has rightly held that the present appellant is not entitled to protection of Section 41 of the Transfer of Property Act. I answer point No. 1, accordingly.

15. So far as point No. 3 is concerned, the contentions in the Written Statement filed by the appellant herein which are reproduced above extensively, clearly indicate that Respondent No. 12 Papalal wanted to take loan from the appellant and the sale deed was executed as security for loan and that is why, as stated in paragraph 20 of the Written Statement of appellant, after expiry of three years period on 17.2.1977, the appellant had approached Respondent No. 12 on 3-4 occasions and asked him to repay the amount and get the title reconveyed. In this case, the sale deed in question is produced at Exhibit 75. It is styled as "----------------". The contention that in case Rs. 15,000/- were repaid within three years as agreed, the purchaser (appellant) would execute reconveyance deed, is incorporated in the sale deed itself and, therefore, the transaction is clearly of mortgage by conditional sale as defined in Section 58(c) of the Transfer of Property Act. Finding of the learned Additional District Judge to that effect is perfectly correct.

16. That takes us to remaining point i.e. point No. 2. In this case, original plaintiffs did not dispute that Respondent No. 12 Papalal was co-owner with them and he has also equal share with each of the original plaintiffs. Section 44 of the Transfer of Property Act was referred to. However, Section 44 is not applicable in the facts and circumstances of this case inasmuch as it speaks about right of purchaser from one of the co-owners regarding possession. Section 44 reads:

44. Transfer by one co-owner.- Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor''s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house.

17. It is not case even of the plaintiffs that they and Respondent No. 12 formed a joint family or the suit property was dwelling-house of undivided family and, therefore, case of Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, does not apply to the present case. As per case made out by Respondents, there was partition between branches of original plaintiffs and Respondent No. 12 Papalal in the year 1956 in respect of other properties. The suit property was purchased by them jointly in the year 1964. So, they were tenants in common in the suit property. Admittedly, neither the plaintiffs nor Respondent No. 12 was residing in the suit property. In the plaint itself, it is stated that Respondent No. 12 was letting out suit property and collecting rent. So, second paragraph of Section 44 is not applicable to the facts of the present case.

18. In this case, admittedly, the appellant is in possession of the suit property. It is also stated that it was Respondent No. 12 Papalal (one of the co-owners) who had inducted the appellant into possession of the suit property. Therefore, there is no question of transferee claiming any joint possession or common or part enjoyment of property with other co-owners. It is admitted position that from 1974 i.e since ten years prior to filing of suit in the year 1984, the appellant was exclusively enjoying the suit property. In fact, he was in settled possession of the property as on the date of the suit. Under the circumstances, Section 44 is not attracted in the present case. The appellant ought to have filed suit for partition. The Plaintiffs are not entitled to disturb appellant''s possession otherwise than by due process of law.

19. The learned Additional District Judge has come to the conclusion that the appellant has failed to prove that he is possessing any portion of the property as a tenant. Besides his word, there is no other document on record to that effect. Perusal of paras. 20 to 25 of the judgment of the appellate court shows that proper reasons are given by the learned Judge to disbelieve the theory of tenancy over any part of the suit property.

20. Learned Counsel for Respondents-plaintiffs relied upon the case of Ramdas Vs. Sitabai and Others, . However, as can be seen from paragraph 4 of said judgment, Sitabai had filed suit for partition and for recovery of possession and therefore decree of partition and delivery of possession was passed in the identical circumstances of the case.

21. It is argued by learned Counsel for Respondents No. 1 to 11-original plaintiffs that even though the plaintiffs have not claimed partition and separate possession, they have filed suit for possession and mesne profit and, therefore, in case they are not entitled to possession of entire property, relief of partition be considered. Respondent No. 12 Papalal (original defendant No. 2) was admittedly co-owner of the suit property along with the plaintiffs and he had mortgaged his share to the appellant. So, subject to redemption of mortgage, the appellant is entitled to retain possession and enjoyment of the share of Respondent No. 12 in the suit property. In the circumstances he learned Counsel submitted that possession of the share of respondents No. 1 to 11-original plaintiffs may be

given to them as, according to the learned Counsel, compared to relief of possession, relief of partition and separate possession is a lesser relief and the plaintiffs have already paid entire court fee for relief of possession. He submitted that since the transaction between the appellant and Respondent No. 12 is not binding on Respondent Nos. 1 to 11-original plaintiffs, the court can mould the relief and allow partition. He also pointed out that present litigation is pending since the year 1984 and 26 years have elapsed since then and therefore, in the interest of justice this Court may allow the decree for partition and separate possession.

22. Shri M.V. Deshpande, learned Advocate for the appellant resisted above prayer by submitting that no declaration regarding sale deed is sought by plaintiffs; no prayer is made that the sale deed is not binding on the shares of the plaintiffs; the plaintiffs had filed suit for possession on entire property thereby denying share of even Respondent No. 12 Papalal which share was taken over by the appellant herein through transaction between him and Respondent No. 12. Advocate Shri Deshpande, therefore, prayed that the appeal be allowed and the suit be dismissed.

23. Shri M.V. Deshpande, learned Counsel further relied upon following authorities;

(1) Smt. Chanan Kaur and Another Vs. Kartari (Deceased) Represented by her LRs. Darshan Singh and Others, ,

(2) Kaveripatnam Subbaraya Setty Annaiah Setty Charities Trust Vs. S.K. Viswanatha Setty,

(3) Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others,

(4) Rajgopal v. Kishan Gopal 2003 Law Suit (SC) 893

(5) V. Rajeshwari v. T.C. Saravanabava 2003 Law Suit (SC) 1255,

He submitted that there was no prayer by respondents-plaintiffs for partition in the suit as filed and, therefore, this Court cannot allow such prayer in the second appeal. In the cases cited, new plea was taken regarding which there was no issue or opportunity to meet such point. However, in present case, if we consider pleadings of parties, evidence led by them and prayers made by respondents-plaintiffs in the suit, which are for possession on title and for determination of mesne profit, the relief of partition can be given on admitted facts and in view of answer to substantial question of law No. 1 framed as above. No plea of adverse possession is raised by the appellant.

24. Partition would be equitable relief as it is ascertainment of share and delivery of same. All necessary pleadings and evidence required for suit for partition are available in present matter. Apart therefrom, parties have been litigating for last 24 years and if we consider facts of the present case and those involved in the

cases cited, it is abundantly clear that the cases cited are not applicable to the fact-situation obtaining in present matter. The Court has power to mould relief which can be granted on the basis of pleadings and evidence before it. Section 151 of CPC lays down the power of the court to make such orders as may be necessary to meet the ends of justice. This also includes power to give appropriate relief in order to avoid multiplicity of litigations. After hearing both sides and considering totality of the facts and circumstances of the case and law referred to above, in my opinion, relief of partition and separate possession can be granted. It may be noted that the parties have been litigating for considerably long period. Relief of partition and separate possession can be given on the basis of pleadings and evidence before the court. That would also avoid multiplicity of the litigations. In this respect, I am fortified by following observations in paragraph 23 in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, ;

23....

The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

25. In present case, if we refer to original sale deed of 1963, the copy of which is at Exhibit 65, it is clear that there were in all eight purchasers including Respondent No. 12 Papalal. So, each of them had 1/8th share in the property. Original Plaintiffs, therefore, had 7/8th share in the suit property and they are entitled to get possession of the property to that extent as the transaction between present appellant and Respondent No. 12 is not binding on them. The appellant has failed to prove that he is entitled to protection of Section 41 of the Transfer of Property Act.

26. Having regard to the facts and circumstances of the case and since this Court is moulding relief of possession into one of partition and possession, mesne profit can be granted not from the date of filing of suit, but from the date of decree till actual possession.

27. In the result, the appeal is allowed partly. The decree passed by the learned III Additional District Judge, Beed, in Regular Civil Appeal No. 151 of 1988 is set aside and in stead, it is held that the transaction between present appellant and Respondent No. 12 is not binding on Respondent Nos. 1 to 11. It is further held that Respondent Nos. 1 to 11 who represent original plaintiffs have 7/8th share in the suit property and they are entitled to partition and actual separate possession of their 7/8t share. Partition to be effected by the Court Commissioner in final decree proceedings.

The appellant shall be entitled to 1/8th share (of Respondent No. 12) in the suit property, subject to the decision of suit filed by Respondent No. 12 against the appellant for redemption of the mortgage. Enquiry under Order 20 Rule 12 of Code of Civil Procedure, 1908 be held and the plaintiffs (Respondent Nos. 1 to 11) would be entitled to mesne profits from today till actual delivery of possession.

Second Appeal stands disposed of.

