

(2013) 07 BOM CK 0023
In the Bombay High Court
Case No : Writ Petition No. 269 of 2013

Bhaskar, Sudhakar and Bhagwat

APPELLANT

Vs

Pandurang and Shrimant

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Bombay Stamp Act, 1958 — Section 33, 34
General Clauses Act, 1897 — Section 3, 3(26)
Registration Act, 1908 — Section 17, 2(6)

Citation : (2014) 2 ABR 729 : (2013) 6 MhLj 564

Hon'ble Judges : R.G. Ketkar, J

Bench : Single Bench

Advocate : M.P. Tripathi, for the Appellant; G.V. Mohekar, for the Respondent

Final Decision : Allowed

Judgement

R.G. Ketkar, J.—Heard Mr. M.P. Tripathi, learned counsel for the petitioners and Mr. G.V. Mohekar, learned counsel for the respondents, at length. Rule. Mr. Mohekar waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

2. A short but interesting question arises in the present petition. The respondents (hereinafter referred to as "the plaintiffs") instituted Regular Civil Suit No. 545 of 2006 on 13th September, 2006 against the petitioners (hereinafter referred to as "the defendants") for declaration that the plaintiffs are the owners and in possession of one mango tree situate in gat no. 152 admeasuring 5 H 65 R situate at Mauje Satephal, Tq. Kalamb, District Osmanabad (for short "the said tree"). The plaintiffs also sought perpetual injunction restraining the defendants from obstructing the plaintiffs from enjoying the said tree.

3. The defendants resisted the suit by filing written statement dated 17th November, 2006. During pendency of the suit, the plaintiffs filed application at exhibit 47 for exhibiting the document dated 4th February, 1980 whereunder,

one Shaikh Faizuddin sold the mango tree to plaintiff no. 2. The defendants resisted the application by contending that the said document is compulsorily required to be registered as per Section 17 of the Indian Registration Act, 1908 (for short "Registration Act") and that in view of Sections 33 and 34 of the Bombay Stamp Act, 1958 (for short "Stamp Act"), the document can not be exhibited.

4. By the impugned judgment, the learned Judge overruled the objections raised by the defendants. The learned trial Judge held that the document does not require registration as under that document, what was sold was, a timber tree which is not an immovable property.

5. In support of this petition, Mr. Tripathi submitted that by document dated 4th January, 1980 styled as a sale deed, Baburao s/o. Dagdu Jagtap, Chandrabhan s/o. Ganpati Jagtap, Subrao s/o. Bhimrao Jagtap, Pandhari s/o. Sitaram Jagtap and Mahadu s/o. Nagu Jatap sold, in all, twelve mango tree, two tamarind trees, and two other trees, to Shaikh Faizuddin s/o. Allaiddin for Rs. 4,200/-. He was permitted to cut those trees and take away the timber. Subsequently, by document dated 4th February, 1980 styled as a sale deed, Faizuddin sold one mango tree to the plaintiff no. 2 for Rs. 700/-. The plaintiffs have instituted suit on 13th September, 2006 for declaration of their ownership and possession in respect of that mango tree.

6. The question that arises in the present petition is whether, the document dated 4th February, 1980 styled as a sale deed, requires compulsory registration in view of Section 17 of the Registration Act and whether, in the absence of registration of said document, the document is admissible in view of Sections 33 and 34 of the Stamp Act. Mr. Tripathi relied upon the decision of the Apex Court in the case of Shantabai Vs. State of Bombay and Others, and in particular, paragraph 27 onwards, to contend that a tree is regarded as immovable property because it is a benefit that arises out of land and also because trees are attached to the earth.

7. On the other hand, Mr. Mohekar relied upon the full bench decision of the Allahabad High Court in the case of Baijnath Vs. Ramadhar and Another, .

8. I have considered the rival submissions made by the learned counsel for the parties. I have also perused the material on record. As noted earlier, Faizuddin had purchased as many as sixteen trees under the sale deed dated 4th January, 1980. He was permitted to cut the trees and take away the timber. Subsequently, Faizuddin executed document styled as a sale deed dated 4th February, 1980 in favour of plaintiff no. 2 and sold one mango tree for Rs. 700/-. The plaintiffs have instituted the suit on 13th September, 2006 for declaration of their ownership and possession over that tree. In other words, the mango tree is standing there right from 1980 till the date of institution of the suit i.e. 13th September, 2006.

9. In the case of Shantabai (supra), Hon"ble Mr. Justice Vivian Bose considered

document dated 26th April, 1948 executed by Balirambhau Doye in favour of his wife - petitioner. The said document was an unregistered instrument and was styled as a Lease. The term of that deed was 26th April, 1948 to 8th December, 1960 and the consideration was Rs. 26,000/-. In paragraph 27 of the judgment, Section 3(26) of the General Clauses Act, 1897 as also Section 2(6) of the Registration Act were considered. Section 3(26) of the General Clauses Act reads as under:-

3.- In this act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,-

(26). "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

Section 2(6) of the Registration Act defines "immovable property" and reads as under:-

2(6)- "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

10. In paragraphs 27 to 35 of the judgment in the case of Shantabai (supra), it was observed thus:-

(27) Under s. 3 (26) of the General Clauses Act, it would be regarded as "immovable property" because it is a benefit that arises out of the land and also because trees are attached to the earth. On the other hand, the Transfer of Property Act says in s. 3 that standing timber is not immoveable property for the purposes of that Act and so does s. 2(6) of the Registration Act. The question is which of these two definitions is to prevail.

(28) Now it will be observed that "trees" are regarded as immoveable property because they are attached to or rooted in the earth. Section 2(6) of the Registration Act expressly says so and, though the Transfer of Property Act does not define immoveable property beyond saying that it does not include "standing timber, growing crops or grass", trees attached to earth (except standing timber), are immovable property, even under the Transfer of Property Act, because of s. 3(26) of the General Clauses Act. In the absence of a special definition, the general definition must prevail. Therefore, trees (except standing timber) are immoveable property.

(29) Now, what is the difference between standing timber and a tree ? It is clear that there must be a distinction because the Transfer of Property Act draws one in the definitions of "immoveable property" and "attached to the earth"; and it seems to me that the distinction must lie in the difference between a tree and timber. It is to be noted that the exclusion is only of standing timber " and not of

" timber trees".

(30) Timber is well enough known to be-"wood suitable for building houses, bridges, ships etc., whether on the tree or cut and seasoned. (Webster's Collegiate Dictionary). Therefore, "standing timber" must be a tree that is in a state fit for these purposes and, further, a tree that is meant to be converted into timber so shortly that it can already be looked upon as timber for all practical purposes even though it is still standing. It is still a tree because, unlike timber, it will continue to draw sustenance from the soil.

(31) Now, of course, a tree will continue to draw sustenance from the soil so long as it continues to stand and live; and that physical fact of life cannot be altered by giving it another name and calling it "standing timber". But the amount of nourishment it takes, if it is felled at a reasonably early date, is so negligible that it can be ignored for all practical purposes and though, theoretically, there is no distinction between one class of tree and another, if the drawing of nourishment from the soil is the basis of the rule, as I hold it to be, the law is grounded, not so much on logical abstractions as on sound and practical common-sense. It grew empirically from instance to instance and decision to decision until a recognisable and workable pattern emerged; and here, this is the shape it has taken.

(32) The distinction, set out above, has been made in a series of Indian cases that are collected in Mulla's Transfer of Property Act, 4th edition, at pages 16 and 21. At page 16, the learned author says "Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immoveable property." At page 21 he says "Trees and shrubs may be sold apart from the land, to be cut and removed as wood, and in that case they are moveable property. But if the transfer includes the right to fell the trees for a term of years, so that the transferee derives a benefit from further growth, the transfer is treated as one of immoveable" property." The learned author also refers to the English law and says at page 21 "In English law an unconditional sale of growing trees to be cut by the purchaser, has been held to be a sale of an interest in land; but not so if it is stipulated that they are to be removed as soon as possible."

(33) In my opinion, the distinction is sound. Before a tree can be regarded as " standing timber " it must be in such a state that, if cut, it could be used as timber; and when in that state it must be cut reasonably early. The rule is probably grounded on generations of experience in forestry and commerce and this part of the law may have grown out of that. It is easy to see that the tree might otherwise deteriorate and that its continuance in a forest after it has passed its prime might hamper the growth of younger wood and spoil the forest and eventually the timber market. But however that may be, the legal basis for the rule is that trees that are not cut continue to draw nourishment from the soil and that the benefit of this goes to the grantee.

(34) Now, how does the document in question-regard this In the first place, the duration of the grant is twelve years. It is evident that trees that will be fit for cutting twelve years hence will not be fit for felling now. Therefore, it is not a mere sale of the trees as wood. It is more. It is not just a right to cut a tree but also to derive a profit-from the soil itself, in the shape of the nourishment in the soil that goes into the tree and maker, it grow till it is of a size and age fit for felling as timber; and, if already of that size, in order to enable it to continue to live till the petitioner chooses to fell it.

(35) This aspect is emphasised in clause (5) of the deed where the cutting of teak trees under 1/2 feet is prohibited. But, as soon as they reach that girth within the twelve years, they can be felled. And clause (4) speaks of a first cutting and a second cutting and a third cutting. As regards trees that could be cut at once, there is no obligation to do so. They can be left standing till such time as the petitioner chooses to fell them. That means that they are not to be converted into timber at a reasonably early date and that the intention is that they should continue to live and derive nourishment and benefit from the soil; in other words, they are to be regarded as trees and not as timber that is standing and is about to be cut and used for the purposes for which timber is meant. It follows that the grant is not only of standing timber but also of trees that are not in a fit state to be felled at once but which are to be felled gradually as they attain the required girth in the course of the twelve years; and further, of trees that the petitioner is not required to fell and convert into timber at once even though they are of the required age and growth. Such trees cannot be regarded as timber that happens to be standing because timber, as such, does not draw nourishment from the soil. If, therefore, they can be left for an appreciable length of time, they must be regarded as trees and not as timber. The difference lies there.

11. In paragraph 35, it was observed that the trees can be left standing till such time as the petitioner chooses to fell them. It means that they are not to be converted into timber at a reasonably early date and that the intention is that they should continue to live and derive nourishment and benefit from soil. In other words, they are to be regarded as trees and not as timber that it standing and is about to be cut and used for the purposes for which timber is meant. It was further observed that such trees cannot be regarded as timber that are standing because, timber, as such, does not draw nourishment from the soil. If, therefore, they can be left for appreciable length of time, they must be regarded as trees and not as timber and the difference lies there.

12. In the case of Baijnath (Supra), the appellant had purchased twenty five Sisham and two Nim trees from one Shankar Bux Singh. Only the trees were sold and not the land on which they stood. In the sale deed, the vendor simply stated that he had sold the trees for Rs. 100/- to the appellant. However, nothing was said about the trees were cut or allowed to remain standing on the land, or about any right granted to the appellant to tend them and the appellant was not

required to remove them within certain time. Hon"ble Mr. Justice M.C. Desai, C.J., observed in paragraph 3 that, "trees are generally divisible into two classes, (1) fruit bearing trees and (2) timber trees. Sisham and Nim trees are essentially timber trees; they are grown not for the sake of fruits, but for the sake of their wood which is used as timber. A fruit bearing tree is meant to remain standing, because it is only when it is standing that it can bear fruits. A timber tree, on the other hand, is meant to be cut down; it is only after it is cut down that its trunk etc. can be used as timber. A standing tree can never be used for timber and a felled tree can never be used for producing fruits. What is meant by standing timber in Section 2(6) is "a standing timber tree". It is only when a tree is standing that the question would arise whether it is movable or immovable property; no such question would ever arise in respect of a tree that has been cut down or fallen down".

13. In paragraph 4 of that report, it was observed that "there are some trees which can be used both for fruits and for timber. A mango tree is such a tree. When a question arises whether, such a tree is standing timber or not, one would have to go into the question whether, it is meant to be used for timber or for fruits. If it is intended to be cut down and to be used as timber it would be held to be a timber tree. If, on the other hand, it is meant to be left standing for the purposes of yielding fruits, it would have to be held to be not a timber tree.

14. In paragraph 8 of that report, decision in the case of The District Board, Banaras Vs. Churhu Rai and Another, was considered and the portion from that judgment was reproduced which was to the following effect:-

the nature of the tree is not the criterion to determine as to whether it is a standing timber or not. A fruit bearing tree e.g. a mango tree, will not come within the definition of timber if purchased by a person with the intention of maintaining it, allowing it to grow and using its fruits in future. But the same tree may become timber and, therefore, movable property, if the intention of the purchaser is to cut and remove it and to use its wood for making planks or to put it to any other use for building purposes.

15. In the instant case, asnoted earlier, the mango tree is standing there right from 1980 till the date of institution of the suit i.e. 13th September, 2006. In other words, the tree is standing for appreciably a long time and therefore, it has to be regarded as a tree and not as timber. In the present case, the mango tree was purchased by the plaintiff with the intention of maintaining it, allowing it to grow and using its fruits in future. I am, therefore, of the opinion that the document requires compulsory registration as per Section 17 of the Registration Act.

16. In the light of this, if the documents dated 4th January, 1980 and 4th February, 1980 are considered, it would be evident that by document dated 4th January, 1980, sixteen trees were sold to Faizuddin and he was permitted to cut the trees and take away the timber. As against this, under document dated 4th

February, 1980, one mango tree was sold by Faizuddin to plaintiff no. 2. In this document, nothing was said about the tree being cut or allowed to remain standing on the land and that the plaintiffs were not required to remove them within certain time.

17. In view of the aforesaid discussion, I am of the opinion that what was sold by Faizuddin to plaintiff no. 2, was a tree and not a timber tree. Therefore, the document requires compulsory registration. The learned trial Judge committed serious error in overruling the objections raised by the defendants. The impugned order dated 6th November, 2012 below exhibit 47 is, therefore, liable to be quashed and set aside. In the result, the petition succeeds. Rule is made absolute in terms of prayer clause (C) with no order as to costs. Application at exhibit 47 made by the plaintiffs stands dismissed.