

(2005) 12 BOM CK 0067
In the Bombay High Court
Case No : Second Appeal No. 213 of 1996

Dama Gongale and Others	Vs	APPELLANT
Bija Khobragade		RESPONDENT

Date of Decision : 08-12-2005

Acts Referred:

Citation : (2006) 2 ALLMR 47 : (2006) 3 MhLj 384 : (2006) 2 MhLj 384

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : K.V. Sirpurkar, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—Being aggrieved by the decree passed against them by the learned 2nd Joint Civil Judge, Junior Division, Chandrapur, in Regular Civil Suit No. 330 of 1960 and confirmed in Regular Civil Appeal No. 11 of 1984 by the learned Additional District Judge, Chandrapur, the original defendants have preferred this appeal.

2. One Ramabai, widow of Dharma Khobragade, mother of the respondent and appellant No. 3, had filed the said suit for declaration that the sale-deed executed by appellant No. 1 Dama, original defendant No. 1, in favour of appellant No. 2 Shantabai, original defendant No. 2, in respect of the suit, field and house was null and void and for recovery of possession thereof. Ramabai died during the pendency of the suit and the suit was prosecuted further by her son, respondent-original defendant No. 4 Bija.

3. The relationship of the parties could be stated as under:

Ramabai, original plaintiff, was the wife of Dharma, Dharma had two sons - Bija, respondent/plaintiff, who prosecuted the suit, and Kisan, defendant/appellant No 3. Defendant/appellant No. 2 Shantabai is the wife of Kisan. She had purchased the property from appellant/defendant No. 1 Dama Sakharam Gongale, who

claimed to be the husband of Manjulabai, daughter of Ramabai and Dharma.

4. It is not disputed that Manjulabai lived with her parents even after her first marriage with one Dahu Dahiware, who came to reside at the house of parents-in-law. Dharma was fond of her and she had looked after Dharma and her mother. However, she died before her father Dharma died. After the death of Manjulabai, defendant No. 1 Dama executed the sale-deed in respect of the suit property in favour of defendant No. 2 Shantabai.

5. The plaintiff challenged the sale-deed in favour of Shantabai by filing the suit on the ground that defendant No. 1 was never married to Manjulabai and was not Manjulabai's widower. He had no title in the property and, therefore, could not convey any title to defendant No. 2 Shantabai. The plaintiff, therefore, sought declaration that the sale-deed was null and void and recovery of possession of the suit property.

6. The defendants resisted the suit contending that defendant No. 1 Dama was the husband of Manjulabai. He became the owner of the property after Manjulabai's death and, therefore, had right to sell the property. Hence, sale in favour of defendant No. 2 Shantabai was valid.

7. Upon considering the evidence tendered before him, the learned Trial Judge held the sale to be void, but held plaintiff entitled to only half share in the suit property, the other half share having gone to Manjulabai's other brother Kisan, defendant No. 3. He, therefore, decreed the suit partly. Appeal by the defendants to District Court came to be dismissed. Hence, the defendants have preferred this second appeal, which was admitted for considering the following three substantial questions of law:

1. What is the evidentiary value of the death certificate vis-a-vis names entered in such certificate?

2. In case of positive documentary evidence vis-a-vis vague oral evidence which evidence would prevail to prove a question of fact ?

3. What is the evidentiary value of documents, which are termed as public documents ?

8. I have heard Smt. K.V. Sirpurkar, the learned Counsel for the appellants. None appeared for the respondent, though duly served.

9. The learned Counsel for the appellants submitted that the gift of the field by registered gift-deed dated 20-1-1964 and sale of house by registered sale-deed dated 16-4-1969 could not be assailed. Yet, the learned Trial Judge held that in spite of the gift-deed, donor Dharma had retained possession of the property, impliedly negating passage of title to deceased Manjulabai. According to the learned Counsel for the appellants, this was not proper. Since it could not be said that the donor had reserved any right in the property, which he had gifted to Manjulabai, merely because the donor happened to reside with Manjulabai, his

daughter, it could not be held that the donor had reserved any right for himself. The phraseology of the gift-deed dated 20-1-1964, which is at Exhibit 39, is very clear and unmistakably points to the fact that the donor had divested himself of all rights in the property. Therefore, it is clear that the learned Trial Judge erred in holding that Dharma had retained possession of the property and the learned First Appellate Judge also failed to correct the error.

10. The learned Counsel for the appellants further submitted that the appellants had tendered sale-deed dated 16-4-1969 in evidence. Appellant Dama had stated in his evidence that the document was executed in his presence and that the consideration had also passed in his presence. The evidence of appellant Dama in respect of the sale-deed may be reproduced as under:

... Dharma had sold his only house to Manjula. I was present at that time. Consideration was Rs. 800/-. Rangnath and Kapurdas were the witness. Sale-deed is filed in the Court. Dharma had brought the ready sale-deed. I do not know from where he did so.

In spite of production of original sale-deed by appellant Dama, and his statement that it was executed in his presence, the sale-deed was not marked as an exhibit. It is not clear from the deposition, or the record, that any objection was raised by any party to the receipt of sale-deed in evidence.

11. In para 9 of the judgment, the learned Trial Judge observed. "Now the defendant No. 1 filed the sale-deed on record which was not proved by him and could not be exhibited. I, therefore, ignore it for the purpose of the appreciation of the evidence." It is not clear as to what more defendant No. 1 Dama was expected to do in order to prove the sale-deed. He had tendered the original sale-deed and had stated that it was executed in his presence. This should have been sufficient proof of the sale-deed, unless there was any specific objection from the adversary, which could then have been dealt with. Ignoring this sale-deed seems to have been at the root of the digression that the learned Trial Judge and the learned Judge of the First Appellate Court took.

12. The learned Trial Judge had held that the appellants failed to prove that appellant Dama inherited the property from Manjulabai, holding that there was no marriage between Manjulabai and Dama. The plaintiff had come up with a very strange case of Manjulabai being still married to Dahu Dahiware to counter the defendants' case that she had been divorced from the said Dahu Dahiware. While taking the stand in evidence that Manjulabai was still married to Dahu Dahiware, the plaintiff forgot that in that case it would be Dahu Dahiware, and not the plaintiff, who would inherit the properties of Manjulabai. Instead of entering the witness-box first, the plaintiff had put two other persons in the witness-box before him. PW 1 Bhaurao and PW 2 Deorao had stated that they had witnessed the marriage of Manjulabai with Dahu Dahiware. They also claimed that Dahu Dahiware was the husband of Manjulabai till her death. In cross-examination, PW 1 Bhaurao admitted that Dahu Dahiware left Village Navegaon

after losing his mental balance. The plaintiff himself admitted in his cross-examination that Dahu Dahiware went mad in the life-time of Manjulabai and had left the place. Thus, the fact that Manjulabai and Dahu Dahiware's marriage came to an end, is amply proved by the evidence tendered by the plaintiff himself.

13. The next question is whether after Dahu Dahiware's exit from Manjulabai's life, she married appellant No. 1 Dama. PW 1 Bhaurao stated that he had never seen Dama as the resident-son-in-law in the house of Dharma. In the cross-examination, he had admitted that Dama lived in the house of the father of Manjula and stated that he did not know what was the relationship between Dama and Manjula. PW 2 Deorao was more brazen in coming out with a non-truth. At the end of his examination-in-chief, he stated that Dama was never living in the house of Manjula in her life-time and Manjula was not related to Dama. But in cross-examination, he stated that he did not know whether Manjula had married Dama by a form of marriage known as Pat. He had admitted that Dama was living at the house of the father of Manjula. It is not disputed that Manjulabai and her father were living in the same house, or rather, Manjulabai's father was living with her. Therefore, no credence can be given to the evidence of these two witnesses brought by the plaintiff. Even the plaintiff admitted that Dama used to live with his father, but tried to gloss it over by saying that Dama was his father's servant. All the same, the fact that emerges from the evidence of plaintiff and his witnesses is that Dama was living in Manjulabai's house during her life-time.

14. When Manjulabai died, the intimation of her death was given to the Gram Panchayat by Manjulabai's own mother, the original plaintiff Ramabai. This fact is admitted by PW 3 Bija. The death certificate, which is at Exhibit 29 issued by the Gram Panchayat on the basis of the entry made about the intimation given by Bija's mother Ramabai, describes Manjulabai as wife of appellant Dama. Now if Ramabai had herself given such an intimation to the Gram Panchayat, it is obvious that Ramabai had accepted Dama as her son-in-law.

15. The sale-deed, which was excluded by the learned Trial Judge from consideration, and which was tendered by DW 1 Dama, is just next to the gift-deed Exhibit 39 in the record of the Trial Court. This original sale-deed dated 16-4-1969 categorically describes Manjulabai as wife of Dama. This sale-deed was executed by Manjulabai's own father Dharma as far back as on 16-4-1969. The description of Manjulabai as wife of Dama in a document, which is ante lite motam, has a very high probative value. It shows that Dama was accepted as husband of Manjulabai and, therefore, entitled to succeed to the properties of Manjulabai.

16. The plaintiff and his witnesses do not dispute that Dharma's sons were living separately from him. Therefore, there is nothing inappropriate in Dharma having passed on his property to his daughter Manjulabai, who was staying with him. In view of this, it is clear that the death certificate issued on the basis of an entry

made at the behest of the original plaintiff has a high probative value, which the Courts below ignored. Positive documentary value, particularly the death certificate, which is a public document and sale-deed dated 16-4-1969 outweighed not only vague, but contradictory and unreliable oral evidence tendered by the plaintiff and his witnesses. The findings recorded by the Courts below, therefore, are totally unsustainable, as they are rendered without comprehending the effect of the death certificate Exhibit 29 and the sale-deed dated 16-4-1969.

17. Consequently, the appeal is allowed and the suit is dismissed with costs throughout.