
(1975) 07 BOM CK 0032
In the Bombay High Court
Case No : Second Appeal No. 309 of 1964

Dilip Singh

APPELLANT

Vs

Dhaniram Narvandas and Others

RESPONDENT

Date of Decision : 17-07-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 16
Evidence Act, 1872 — Section 65, 89

Citation : AIR 1976 Bom 38

Hon'ble Judges : Lalit, J

Bench : Single Bench

Advocate : P.G. Palshikar, for the Appellant; V.R. Manohar, for the Respondent

Judgement

1. This second appeal arises out of regular Civil suit no. 54 of 1961 filed by respondents Nos. 1 to 5 Respondent No. 5 is the mother of respondents Nos. 1 to 4 and respondent No. 6 is the father of respondents Nos. 1 to 4 Respondent No. 6 was original defendant No. 3. The present appellant was defendant No.3. The present appellant was defendant No. 2 in the trial Court and respondent No. 151/1 situate at mouza Nari Nagpur. On 1-3-1937 one Sitaram Ragho Chawan acting for himself and as a guardian of his minor son Eknath made an agreement of sale in favour of original defendant No. 3 Naravandas in respect of 8 acres from field No. 151 . Under that agreement an earnest amount of Rs. 200/- was paid by defendant No.3 to Sitaram. The agreement was that the property should be sold for an amount of Rs. 2,500/- to defendant No. 3. On 19-4-1937 Sitaram acting for himself and his minor son made a sale deed in favour of Antu, the father of the defendant No. 3 Naravandas. That sale deed was for a sum of Rs. 2,500 and the recitals in that sale deed show that the vendor acknowledged the receipt made in favour of defendant No. 3 on 1-3-1937. Under this sale deed 8 acres of land from the field which was then numbered as field survey No. 151/1 was sold to Antu. The Isar -chitti dated 1-3-1937 is Exh. 34. The sale-deed in favour of Antu is Exh. 17. On 29-3-1954 the Defendant No. 3 Naravandas sold to defendant No. 1 by Exh. 31 field survey No. 151/1 measuring 8 acres. The sale-

deed was for a sum of Rs. 4150/- Defendant No. 1 Abdul Rahim in his turn by Exh. 29 dated 4-4-1957 sold the same property field survey No. 151/1 to the present defendant No. 2 for a sum of Rs. 4300/- After the sale was made in favour of defendant No.2 the present suit was filed by the four sons and the wife of Naravandas. They claimed that survey No. 151/1 was the property purchased by Antu on 19-4-1937. (Exh. 29) are not binding on their 5/6th share in the property. The relief, therefore, claimed is for a declaration that the plaintiffs had 5/6th share in the suit field and they have consequently prayed for relief of possession.

2. Defendants Nos. 1 and 2 opposed the suit. Defendant No. 1 filed a written statement at Exh. 14 and written statement filed by defendant No. 2 was at Exh. 10. Defendant No. 3 Naravandas was ex parte. To summarise the contentions taken up on behalf of the defendants Nos. 1 and 2 it may be stated that their case was the sale-deed of 19-4-1937 was really a transaction made by defendant No. 3 Naravandas . According to them in that sale-deed Antu was only a benamidar for defendant No. 3 Defendant No. 3 had purchased this property from out of his self-earnings in the name of his father. It was, therefore, contended that defendant No. 3 was competent to transfer full title to defendant No. 1 under the sale-deed dated 29-9-1954 and consequently defendant No. 1 had obtained full ownership under that sale-deed. The further contention was that the sale-deed in favour of defendant No. 2 on 4-4-1957 also gave full ownership to defendant No. 2. It was, therefore, contended that the plaintiffs could not claim any share in the suit property. On account of the pleadings between the parties issues were framed by the learned trial Judge at Exh. 15. He found that the defendants established that the property purchased in the name of Antu on 19-4-1937 was really a purchase made by defendant No. 23 that field survey No. 151/1 was the self-acquired property of defendant 3. He found that the case of the plaintiffs that the property was of the ownership of Antu was not established. He accordingly held that the defendant No. 3 was competent to transfer the property to defendant No. 1 and therefore, the sale-deeds in favour of defendants Nos. 1 and 2 should not be challenged by the present plaintiffs were not entitled to get any share in the suit property. He accordingly dismissed the suit filed by the plaintiffs.

3. Against that decision the plaintiffs filed Civil Appeal No. 154 of 1963. The learned Extra Assistant Judge, Nagpur, allowed that appeal and held that the property covered by the sale deed of 19-4-1937 was the property purchased by Antu. He also found that it was not the self-acquired property of defendant No.3. He accordingly held that the plaintiffs were entitled to 5/6th share in the property. He therefore set aside the decree of the trial Court and gave a declaration that they were the owners of undivided 5/6th share in the suit field. He also directed defendants Nos. 1 and 2 to put the plaintiffs in joint possession of their 5/6th share in the suit field. It is against that decree that the present decree has been filed.

4. The main question involved in this appeal is whether the property purchased under the sale deed. Exh. 17 on 19-4-1937 was the property of Antu or whether it was the self-acquired property of defendant No. 3 Narayandas. The trial Court made a finding in favour of the defendants Nos. 1 and 2 mainly on account of recitals in a partition-deed at Exh. 35. That is a deed of partition-deed at Exh. 35. That is the deed of partition to which defendant No. 3 Narvandas and his brother Dayaram were parties. There are recitals in that partition deed to show that Dayaram who is the uncle of present plaintiffs Nos. 1 to 4 accepted that field No. 151/1 and some other properties were the self-acquired properties of defendants No. 3. Reliving on the recitals in this partition deed, the learned trial Judge found that the defendant established satisfactorily that the sale deed in the name of Antu was merely a benami transaction in favour of defendant No. 3 Naravandas. The other evidence on which the trial Court relied was a previous Isar Chitti (Exh. 34) in the name of the defendant No. 3 A further circumstance on which reliance was placed by the trial Court was that the present plaintiffs had never had raised any dispute about the nature of the property. The trial Court found that a case of a joint family property was made by the plaintiffs for the first time when this transaction was made in favour of defendant No. 2 Reliving on these and the other circumstances a finding was made by the trial Court that the defendants satisfactorily established that field survey No. 151/1 was the self-acquired property of defendant No. 3. That finding has been reversed by the learned Judge of the lower Appellate Court mainly because he found that the partition deed Exh. 35 was not admissible in evidence. He also found that the Isar -chitti he, therefore, excluded these documents from consideration. So far as the partition deed is concerned the learned Judge of the lower appellate Court found that the original partition deed was not produced in the Court and the defendants Nos. 1 and 2 had only produce at Exh. 35 a certified copy of the partition deed. He felt that secondary evidence of the partition deed, though admissible was not original partition. Therefore, he ultimately excluded the certified copy of the partition deed (Exh. 35) produced on behalf of the defendants Nos. 1 and 2 Alternatively he found that assuming the certified copy of the partition deed would be taken into account, the recitals, therein were not binding on the plaintiffs. He ultimately came to the conclusion that defendants Nos. 1 and 2 failed to established that the sale deed of 19-4-1937 in the name of Antu as really a benami transaction of defendant No. 3 Naravandas. Consequently , he allowed the appeal filed by the present plaintiffs.

5. It may appear that the question in the present case in only whether the sale deed of 19-4-1937 was a benami transaction or not. Apparently this may appear to be a question of fact. However, in the present case I feel that the decision given by the learned Extra Assistant Judge suffers from an informative namely, that he has excluded the certified copy of the partition deed. It also appears to me that he was in error in excluding the agreement of sale of 1-3-1937 from consideration. On account of the exclusion of this material document, the decision arrived at by the learned Extra Assistant Judge will not be binding on me.

6. Mr. Palshikar at first argued that the learned Extra Assistant Judge was not justified in excluding the Isar Chitti of 1-3-1937. That Isar-chitti is proved in the evidence by Ramaswami who was a witness of the present plaintiffs. It is true that the evidence given by this witness is to some extent hesitant. However, in his evidence he has clearly proved that Isar chitti at Exh. 34. In para. No. 2 of his deposition he has clearly made a statement that the Isar-chitti was executed by Sitaram Chawan in his presence. In the immediately following sentence he stated that he did not remember who signed the Isar-chitti. However, he later on stated "It was executed in the name of Antu" In the further part of his evidence the Isar-chitti was shown to him and the statement made by this witness was as follows:--

"One Isar-chitti is now shown to me, I cannot say if it is the same because I cannot read it without aspects and it is matter of very old days. I have not brought my aspects with me. The said Isar-chitti is now read over to me. It is the same which was scribed that time Sitaram Chawan. I do not remember whether it was scribed in the name of Antu or his son Naravandas X X"

Now, the learned trial judge on hearing the parties held that this Isar-chitti was proved by the witness has given evidence which is to some extent inconsistent, he has nevertheless established the execution of the Isar-chitti. After the Isar-chitti was read out to him, he clearly stated that it was the same Isar-chitti which was scribed by Sitaram Chavan. At one place in his evidence he has stated that the Isar-chitti was executed by Sitaram Chavan. It may be remembered that Ramaswami is a witness examined on behalf of the plaintiffs . In my opinion, his evidence clearly establishes the execution of the Isar-chitti Exh. 34. The learned Extra Assistant Judge found that the evidence of witness Ramaswami was not sufficient to prove the execution of the Isar-chitti because according to him the witness Ramaswami did not state that any of the persons who are alleged to have executed the document had put their signatures or thumb marks on the document in their presence. It is not possible for me to agree with this reasoning of the learned Extra Assistant Judge. The evidence of Ramaswami clearly proves the execution and therefore, in my opinion the Isar-chitti Exh. 34 . will have to be taken into account while considering the evidence.

7. The learned Extra Assistant Judge also rejected the certified copy of partition deed (Exh. 35). That finding made by the learned Extra Assistant Judge also appears to be erroneous. It is to be stated that Exh. 35 was in possession of defendant No. 3. Defendant No. 3 is the father of present plaintiffs Nos. 1 to 4. The recitals in Exh. 35, itself show that the document was to remain in possession of defendant Nos. 1 and 2 gave a notice to defendant Defendant No .3 . During the pendency of the suit , defendants Nos. 1 and 2 gave a notice to defendants No. 3 to admit certain documents. One such document is the partition -deed. The application made by defendants Nos. 1 and 2 in this behalf was Exh. 29. A certified copy of this partition -deed. However, defendant No. 3 neither produced the partition-deed. However defendant No. 3 neither produced

partition -deed nor gave any satisfactory reply defendants Nos. 1 and 2 led evidence about the certified copy of the partition deed. Arguments were heard and the learned trial Judge considered the question whether the certified copy of the partition-deed was to be admitted or not. He ultimately admitted the certified copy of the partition-deed at Exh. 35. In these circumstances it appears to me that defendant No. 3 who was in possession of the partition-deed having been called upon to produce that document and he having failed to produce the document defendant Nos. 1 and 2 were clearly entitled to lead secondary evidence. Defendants Nos. 1 and 2 had also given a notice to defendant No.3 to admit this document. In a decision of the Division Bench of this Court reported in Kashibai Martand Vs. Vinayak Ganesh and Others, It has been held that when such a notice is given to a party to produce the document and if the evidence satisfactorily shows that the party was in possession of the document, the party giving such a notice is entitled to lead secondary evidence u/s 65 of the Evidence Act. It is further held that in such circumstances a presumption arises u/s 89 of the Evidence Act about the execution of the document. Section 89 of the Evidence Act says that the Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. This decision is, in my opinion, clearly in favour of the present defendants Nos. 1 and 2 as a property notice was given to defendant No. 3 produce that document and he has failed to prove by producing it. The certified copy of the partition deed produced by defendants Nos. 1 and 2 will be clearly admissible in evidence. That certified copy will prove not only the contents but the execution of the partition-deed. As such that certified copy is clearly admissible in evidence and the finding of the learned Extra Assistant Judge in that behalf cannot be accepted.

8. If Exh. 35 the certified copy of the partition-deed is to be considered in evidence, it appears to me that there are clear recitals in that partition-deed that survey No. 151/1 was the self-acquired property of defendant No 3. It may be said that was a partition between defendant No. 3 and his brother Dayaram. There was some dispute about four items of property mentioned in para. 2 of that partition deed. With regard to these four items the case of Dayaram was that they were the joint family properties whereas the defendant No. 3 Naravandas was claiming to be his self-acquired property. Ultimately Dayaram accepted that these four properties in para. 2 were the self-acquired properties of defendant No. 3 it is to be noted that survey No. 151/1 is one of the four properties in para. 2. The division in the partition deed further shows that these four properties having once been accepted as the exclusive properties of defendant No. 3. the remaining properties were partitioned between him and his brother Dayaram. The remaining properties were equally divided between the two. In para 13 of that partition deed there are clear recitals to show that the value of the entire property which was available for partition was Rs. 10,000/- and the value of each equal share was estimated at RS. 5000/- and the two

brothers were given equal share. It therefrom, it is clear that in 1950, Naravandas defendant No. 3 and Dayaram had made a partition on the footing that Survey No. 151/1 was the self-acquired property of defendant No. 3. Such an admission by Dayaram was clearly against his interest and the fact that he made such an admission and accepted that Survey No. 151/1 was the self-acquired property of defendant No. 3 would clearly be a strong evidence on which the defendants 1 and 2 would be entitled to rely. It may also be stated that in the four properties which were to be accepted as self-acquired properties of defendant No. 3 Naravandas the present plaintiff would be entitled to get larger share as Dayaram had accepted that they were not joint family properties. To this extent the admission given by Dayaram about the four properties. To this extent the admission given by Dayaram about the four properties being advantageous to the present plaintiffs, the recitals in the partition-deed about Survey No. 151/1 would strengthen the case of defendants Nos. 1 and 2 to a substantial extent. In the nature of this partition, it would really be for the plaintiffs to give satisfactory evidence to explain the recitals in the partition deed because it is now the case of the plaintiffs that these recitals are not correct. I may observe that none of the plaintiffs have gone in the witness box -- Neither they have examined defendant No. 3 or Dayaram as their witness. Since the concerned properties were of the family of the plaintiffs it is legitimate to expect that the plaintiffs Nos. 1 to 4 should have been examined to explain these recitals, defendants Nos. 1 and 2 have satisfactorily discharged the burden of showing that the sale in favour of Antu was a benami sale.

9. That conclusion is also strengthened by the fact that the original Isar-chitti Exh. 34 was in the name of defendant No. 3. It may also be stated that when the property was first sold by defendant No. 3 to defendant No. 1 the present plaintiff never raised a dispute that Survey No. 151/1 was a joint family property. Even in the sale-deed made by defendant No. 3 in favour of defendant No. 1 on 29-9-1954 (Exh. 31))there are clear recitals that the property Survey No. 151/1 was the self-acquired property of defendants. On a consideration of this entire material, it appears to me that the finding given by the learned Extra Assistant Judge was clearly unsupportable. That finding could not have been arrived at on the present evidence once the partition-deed and the agreement of sale are accepted in evidence. I feel interference is called for in this second appeal. The interference is justified on account of the erroneous exclusion of material evidence from consideration. The effect of the failure on the part of the plaintiffs to examine plaintiff No. 5 or defendant No. 3 or Dayaram has not been taken into account. The recitals in their partition deed having been established it was for the plaintiffs to explain those recitals. None of the plaintiffs to explain those recitals. None of the plaintiffs have gone into the witness box. On account of these circumstances. I feel that the finding made by the learned Extra Assistant Judge has to be set aside. As indicated above, on the consideration of the entire evidence. It appears to me that the finding made by the trial Court is correct. That finding will have to be allowed and the plaintiff's suit will have to be

dismissed.

10. Second Appeal No. 309 of 1964 is allowed. The decree made by the Extra Assistant Judge. Nagput in Civil Appeal No. 154 of 1963 is set aside and the decree made by the trial Court in Civil Suit No. 854 of 1961 is restored. In the circumstances of the present case, there will be no order as to costs.

11. Appeal allowed.