
(2008) 09 BOM CK 0049
In the Bombay High Court
Case No : Second Appeal No. 300 of 1989

Equbalbegum and Others

APPELLANT

Vs

Abdul Rahim Fateh Mohammad and Others

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 100

Citation : (2008) 6 ALLMR 804 : (2009) 1 BomCR 612 : (2009) 2 MhLj 547 :
(2011) 1 RCR(Civil) 596 : (2011) 1 RCR(Civil) 596

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.P. Chapalgaonkar, for the Appellant; C.R. Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgment rendered by learned Second Additional District Judge, Beed, in an appeal (RCA No. 415/1984) whereby and where under dismissal of decree in a Civil Suit (RCS No. 144/1979) came to be reversed.

2. Appellants herein are original defendant Nos. 1 to 7 and 9 to 15. Respondent No. 1 Abdul Rahim is the original plaintiff. Respondent No. 2 Banobi is original defendant No. 16, deceased respondent No. 3 Vajirbi is original defendant No. 18, respondent No. 4 Fatemabi is original defendant No. 17 and respondent No. 5 Shaikh Bale is original defendant No. 19 in the context of suit bearing RCS No. 144/1979.

3. The suit was for partition in respect of three house properties bearing M.C. Nos. 1422, 1425 and 1426, situated at Lohargalli, Beed and as described in the plaint. The following pedigree table is mostly uncontroverted, expect the controversy pertaining to branch inherited by Chandbi, through whom the plaintiff claims right of succession.

4. Briefly stated, the plaintiffs case in the trial Court was that the suit properties were owned by common ancestor - Haji Mohommad, who died about 70 years prior, leaving behind him daughter Chandbi and son Mohd Osman. He averred that after the death of Haji Mohd, said Chandbi and Mohd Osman were jointly enjoying possession of the suit properties during their lifetime. Chandbi was dwelling in house No. 1422 whereas Mohd Osman was dwelling in other two houses. The suit house properties were not partitioned amongst themselves. Mohd Osman died prior to about 35 years and predeceased Chandbi. She died about 5 years later, leaving behind two sons i.e. plaintiff and defendant No. 19- Shaikh Bale and three daughters i.e. defendants No. 16 to 18. Defendants No. 1 to 15 are the legal representatives of Mohd Osman and are occupants of other two houses bearing Nos. 1425 and 1426, whereas he and his branch members are occupants of house No. 1422. Father of defendants No. 1 to 3 had filed a suit (RCS No. 65/1968) for possession against the defendant No. 19- Shaikh Bale, which was decreed. An appeal carried by defendant No. 19-Shaikh Bale was dismissed on 10.02.1971. According to plaintiff, he and defendant Nos. 16 to 18 were not parties to the said suit and, therefore, the judgment and decree rendered in the said suit is not binding on them. He, therefore, sought 2/7th share as a successor of deceased Chandbi.

5. The contesting defendants (Appellants herein) resisted the suit. They flatly denied that deceased Chandbi was the daughter of deceased Haji Mohd and was residing in house property bearing No. 1422. They also denied that after the death of Chandbi, plaintiff and defendant Nos. 16 to 19 continued to reside therein. According to them, a portion of house No. 1422 was temporarily given to the plaintiff and defendant No. 19, as licensees. They asserted that a false and vexatious claim is set up by the plaintiff notwithstanding the decree for possession in the previous suit (RCS No. 65/1968) against defendant No. 19 - Shaikh Bale. They would submit that the previous judgments and decree is binding on the plaintiff. Hence, they sought dismissal of the suit with compensatory costs of Rs. 1000/-.

6. The parties went to trial over certain issues struck by the learned Civil Judge. The learned Civil Judge (JD), was pleased to dismiss the suit. He held that the plaintiff failed to prove his lawful possession in respect of house No. 1422 and also the allegation that deceased Chandbi was daughter of original owner, namely, Haji Mohd. He, therefore, held that neither the plaintiff nor defendant Nos. 16 to 18 are entitled to claim any share in the suit properties. Feeling aggrieved, the plaintiff preferred an appeal (RCA No. 415/1984), which came to be allowed. By the impugned judgment, the learned Additional District Judge held that deceased Chandbi was daughter of Haji Mohd and was entitled to claim her share in the suit properties. He held that the judgment and decree in previous suit (RCS No. 65/1968) would not be binding on rights of the plaintiff and the defendants No. 16 to 18. He further held that the plaintiff would be entitled to 2/7th share in the suit properties, defendant Nos. 16 to 18 would be entitled to get 1/7th share out of 1/3rd share of deceased Chandbi and

defendant No. 19 would be entitled to 2/7th share out of the share of deceased Chandbi.

7. Mr. Chapalgaonkar would submit that the First Appellate Court committed patent error while reversing the dismissal decree. He would submit that though the defendant No. 19-Shaikh Bale was held as trespasser in respect of house property No. 1422 as a result of decision in the previous suit, yet by virtue of the impugned judgment, 2/7th share has been allotted to him, which is impermissible. He contended that the plaintiff filed false suit after commencement of execution proceedings in relation to the earlier decree for possession. He would submit that there is no tangible evidence to infer that deceased Chandbi was the daughter of the original owner - Haji Mohd. He would submit, therefore, that the findings of the First Appellate Court are perverse and liable to be interfered with.

8. There is no dispute about the fact that, during pendency of this appeal, original defendant No. 18-Vajirbi, who was respondent No. 3 herein, died. Her legal representatives are not brought on record. Appeal abated against her, as per order rendered by this Court on 15.07.2008. No steps were taken for substitution of the legal representatives and setting aside the abatement. Thus, the partition decree, to the extent of her share, has become final.

9. Before I proceed to consider merits of the matter, let it be noted that unfortunately no substantial question of law was framed when this second appeal came to be admitted. The then Hon'ble Judge (A.D. Mane, J.), passed following order" Admit. Notice, R & P. Shri. Yevtekar advocate waives notice for respondent No. 1"

10. Mr. C.R. Deshpande, learned advocate for the plaintiff / original defendant No. 1, would submit that the Second Appeal has abated in entirety due to non-substitution of the L.R.s of respondent No. 3-deceased Vajirbi. He would submit that since the partition decree has become final to the extent of respondent No. 3-deceased Vajirbi, now passing of any conflicting decree, without taking her legal representatives on record, would not be proper. Hence, he urged that the appeal may be held as abated under Order XXII Rule 3 of the Code of Civil Procedure.

11. There is no substantial question of law, reflected from the appeal memo. The First Appellate Court appreciated the evidence on record. The only disputed question is whether Chandbi was the daughter of deceased Haji Mohd and was in occupation of house property bearing No. 1422 in her own rights as his heir. True, in the previous litigation against defendant No. 19-Shaikh Bale, the Court held that Shaikh Bale was a licensee of the said house property. It is difficult to say that such a finding would be binding upon plaintiff Abdul Rahim and the defendant Nos. 16 to 18, who were not parties to that suit. The concept of joint family, as available in case of real brothers under the Hindu Law, is of no avail in relation to brothers, who are governed by Mohomedan Law. It is well settled that

Mohomedan legal heirs take their share immediately after death of the predecessor. Shares of plaintiff Abdul Rahim and defendant Nos. 16 to 19 were crystallized immediately after death of Chandbi, if it is held that they derived the suit properties from her. If it is found that she is the daughter of deceased Haji Mohd then her share was crystallized immediately after death of said Haji Mohd. There could be no jointness of ownership between Chandbi and Mohd Osman, though they may have been in possession of separate house properties as the legal heirs of deceased Haji Mohd. It is not necessary to enter into the thicket of fact finding process. For, the First Appellate Court duly considered the municipal record and other evidence while concluding that defendant No. 19-Shaikh Bale used to pay municipal taxes of house No. 1422. Rightly or wrongly, the First Appellate Court came to the conclusion that the plaintiff, defendant No. 19-Shaikh Bale and the defendant Nos. 16 to 18, were entitled to decree for partition of their shares. The fact finding process of the First Appellate Court cannot be questioned in the Second Appeal and it is moreso when no substantial question of law was framed while admitting the appeal. The second appeal, therefore, falls outside the pale of Section 100 of the Code of Civil Procedure. I am of the opinion that additional substantial question of law can be framed under Sub clause (5) of Section 100 of the CPC only when already one or more substantial questions of law have been formulated for consideration. However, where there is no substantial question of law framed at all, then there would be no scope for framing additional substantial questions of law by invoking powers under Sub clause (5) of Section 100 of the Civil Procedure Code. Needless to say, the Second Appeal deserves to be dismissed for want of any substantial question of law.

12. For the sake of argument, even if it is assumed that substantial questions of law may be formulated at this stage then also it is difficult to consider this second appeal on merits. For, the appeal is abated against respondent No. 3-deceased Vajirbi. As stated before, the decree for partition in her favour has become final under the impugned judgment due to such abatement. Mr. Chapalgaonkar would rely on "Mahmud Mian (Dead) through LRs. and Anr. v. Shamsuddin Mian (Dead) through LRs. and Ors." (2005) 11 SCC 582. The Apex Court did not lay down any ratio as such in the given case. The Apex Court observed that the appeal was not satisfactorily disposed of by the Division Bench. It is observed that it was a partition suit. It is further observed that on account of death of one of the parties, the appeal could not have abated in its entirety. The Apex Court allowed substitution of legal representatives by condoning the delay. The Apex Court, however, observed:

The respondents plea that the appeal had abated in the High Court itself is kept open.

13. It is explicit, therefore, that the question regarding abatement of the appeal was not foreclosed by the Apex Court. He also seeks to rely on N. Khosla Vs. Rajlakshmi (dead) and Others, and Shahazada Bi and Others Vs. Halimabi (since

dead) by her LRs., . It is held by the Apex Court that if interests of co-defendants are separate, as in case of co-owners, Suit will abate only as regards interest of deceased.

14. Mr. C.R. Deshpande seeks to rely on *Badni (Dead) by L.Rs. and Others, Etc. Vs. Siri Chand (Dead) by L.Rs. and Others, Etc.,* .

Reiterating the tests stated in *The State of Punjab Vs. Nathu Ram*, the Apex Court held that the appeal would be liable to be dismissed where:

a) When the success of the appeal may lead to the Courts coming to a decision which would be in conflict with the decision between the appellant and the deceased respondent and, therefore, which would lead to the Courts passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent;

b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court, and

c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

15. Mr. C.R. Deshpande also seeks to rely on "*Shri Bakshish Singh (dead) by LRs. v. Arjan Singh and Ors.*" 1996 (3) Sc118, *Matindu Prakash (Deceased) by Lrs. Vs. Bachan Singh and Others,* , "*Sri Chand and Ors. v. Jagdish Pershad Kishan Chand and Ors.*" AIR 1966 SC 1427, "*Zilla Singh v. Chandgi*" 1991 SC 263, and "*Deoram Ana Patil and Sonu Puna Patil*" 1974 Mh.L.J.9.

16. If the above referred litmus test is applied, one would see that if the appeal succeeds then it would lead to conflicting decision with the finality of decision in favour of deceased respondent No. 3-Vajirbi. It need not be emphasised that her share has been crystallized and the decision in her favour has become final due to abatement of the appeal against her. So, if the appeal will be allowed then such decision will run counter to the finality attained in respect of the decision of the First Appellate Court in her favour. Passing of the decree in favour of the appellants will be contradictory to the decree, which has become final with respect to the same subject matter between them and deceased respondent No. 3-Vajirbi. Considering the nature of final decree, I am of the opinion that the entire appeal would abate due to abatement of the same as against the respondent No. 3-Vajirbi (original defendant No. 18). For this reason too the Second Appeal must fail.

17. In the result, the appeal is dismissed with no order as to costs.