
(2009) 10 BOM CK 0020
In the Bombay High Court
Case No : Second Appeal No. 387 of 1992

Gulab Babalal Ugare and Others

APPELLANT

Vs

Husainalli Dastgir Ugare and Others

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Citation : (2010) 2 BomCR 188

Hon'ble Judges : Mhatre Nishita, J

Bench : Single Bench

Advocate : Anjali Helekar, for the Appellant; P.D. Pise, for the Respondent

Final Decision : Dismissed

Judgement

Mhatre Nishita, J.—The appeal arises from the decision of the Third Additional District Judge, Sangli in Regular Civil Appeal No. 287 of 1986. This judgment confirms the decision of the trial Court in Regular Civil Suit No. 108 of 1979. The appeal has been admitted on the following substantial questions of law:

(1) Whether the appellant-plaintiff could base his claim to 1/4th share in the suit property on documents, namely, the order of the Mirajkar Sarkar at Exh. 159 and tabe patti panchanama at Exhs. 159 and 162?

(2) Whether the above stated documents at Exhs. 158, 159, 162 read with documents at Exhs. 160 and 161 constitute the foundation of the title of the plaintiff as a shareholder in the suit property?

(3) Whether the lower Appellate Court committed an error of law in assuming that the matters of title were not pleaded by the plaintiff, when the pleadings in the suit understood as such by the defendants and the necessary issues were raised by the trial Court and parties had led evidence on the basis of them?

2. The suit properties in the present appeal are City Survey Nos. 1258 and 1259. One Babalal Daval Ugare, who was the appellant's father, purchased the aforesaid properties from one Vantamore. It appears that Babalal expired in the

year 1936. At this point of time he was survived by four sons, 1. Dastgir, 2. Chandulal, 3. Gulab (plaintiff) and 4. Dhurulal. The aforesaid property was resumed by the erstwhile Miraj State. Thereafter, Dastgir purchased City Survey No. 1258 in an auction. According to the appellant, City Survey No. 1259 was also purchased by Dastgir. The appellant claims that Dastgir purchased the aforesaid properties in his fiduciary capacity as the eldest male member of the joint family consisting of himself and three brothers including the plaintiff. Admittedly, the plaintiff and the defendants are Muslims. (hereinafter whenever the word "respondents" appears, it means respondents 1 to 9).

3. After the death of Dastgir. Revenue proceedings were initiated in which the appellant sought to have his name included in the revenue records as owner of the property bearing City Survey Nos. 1258 and 1259. Since the revenue authorities decided against the appellant, he filed an appeal which was also dismissed in the year 1965. Admittedly, no steps were taken by the appellant to challenge the orders passed by the revenue authorities any further and they have thus become final.

4. In the year 1979, the appellant filed the present suit being Regular Civil Suit No. 108 of 1979 against the legal representatives of Dastagir and his brothers. The appellant contended that he was entitled to ? share of the suit property being City Survey Nos. 1258 and 1259. He claimed that he was residing in the property along with his brothers and their respective families. He further pleaded that since they were residing as a joint family, he was entitled to partition and separate possession of the 1/4 of the suit property. The plaintiff was also aggrieved by the fact that the property was being purchased by a third party without his consent and, therefore, arraigned him as defendant No. 10.

5. Defendants filed their written statement contending that the suit property was not owned by Babalal the father of the appellant but was in fact owned by Dastagir. It was denied that Dastgir had acted as a manager of the joint family or that he had acquired the property for and on behalf of all the members of the family. It was pleaded that it was his self acquired property which he purchased in a public auction held by the erstwhile Miraj State. The defendants 1 to 3 also filed a counterclaim contending that they were entitled to possession of the entire suit property after the death of Dastagir. It was, therefore, pleaded that the appellant should be directed to vacate that part of the suit property which was in his possession and that the defendants should be put in possession of the same.

6. The appellant filed a written statement to this counter-claim and denied the claim of the defendants. He pleaded that the enquiry conducted by the erstwhile Miraj State with respect to the suit property was not correct and that the finding of the erstwhile Miraj State that the suit property was not owned by anybody after the death of Babalal, was incorrect as all the sons of Babalal were alive when Babalal expired in the year 1936.

7. Evidence was led by the parties before the trial Court. On assessing the evidence before it, the trial Court held that the suit property did not belong solely to Dastgir and that the suit property was in fact owned by Babalal, the father of the plaintiff and the defendants. The trial Court therefore directed that the suit property be partitioned and declared that the appellant was entitled to ? share of the suit property.

8. Being aggrieved by this judgment, the defendants filed an appeal before the District Judge, Sangli being Regular Civil Appeal No. 287 of 1986. The Appellate Court reversed the findings of the trial Court. It concluded that since the parties were Muslims, the concept of joint family property did not arise. It was also held that there was no pleading indicating that Dastagir had purchased the property for and on behalf of all the members of the family and that the purchase was made using the joint income of the members of the family. The Appellate Court therefore reversed the findings and dismissed the suit. The counter-claim of the defendants 1 to 3 was also dismissed.

9. Mrs. Helekar appearing for the appellant submits that Dastagir purchased the suit property being the eldest male member of the family, for and on behalf of the appellant and other members of the family. She submits that the appellant and the respondents are tenants in common since Dastagir had purchased the property in his fiduciary capacity. She further submits that the very fact that the property was initially owned by their father Babalal indicates that all the sons of Babalal including the appellant and the Dastagir had an equal share to the suit property after the death of Babalal. The learned Advocate emphasizes that the property could not have been resumed by the erstwhile Miraj State on the death of Babalal as his sons had survived him. She therefore urges that in fact the property devolved on the appellant and his brothers and the order of the erstwhile Miraj State, is illegal. Furthermore she submits that the trial Court has correctly assessed the evidence on record and held that the property was purchased by Dastagir for the entire family. She urges that the appellant, Dastagir, Chandulal and Dhurulal were all tenants in common and, therefore, they each had an equal share in the property. Mrs. Helekar relies on the judgment of the Calcutta High Court in the case of Aminaddin Munshi Vs. Tajaddin and Others, , to submit that even amongst Muslims the concept of a joint family is not unknown. She further points out that Dastagir in tenancy proceedings had filed an affidavit indicating that he had purchased the suit property as the manager of the joint family. That affidavit had been produced on record, and the trial Court had accepted that this affidavit indicated the intention of Dastagir while purchasing the property. She further submits that, in the aforesaid judgment, the Calcutta High Court has held that, what a party himself admits to be true must necessarily be presumed to be so, and it is for him to establish by evidence that the admission was made under the circumstances which do not make it binding on him.

10. Mr. Pise appearing for the respondent Nos. 1, 2 and 3 who are the legal

representatives of Dastagir and defendant Nos. 1 to 3, submits that the Appellate Court has rightly dismissed the suit. He points out that there were no pleadings at all which could be considered as a foundation for the argument that the property had been purchased by Dastagir in his fiduciary capacity. He submits that, unless the basic pleadings are included in the plaint, no amount of evidence led with respect to any issue can be accepted by the trial Court. He points out that, in the present case, the question of Dastagir having purchased the property in his fiduciary capacity qua the appellant and their other brothers has not been pleaded in the plaint nor is there any evidence specifically led on this issue. He draws my attention to the fact that there is no specific issue framed by the trial Court in this regard. The learned Advocate has cited the judgments of the Supreme Court in the case of - (1) Rajgopal (Dead) by Lrs. Vs. Kishan Gopal and Another, ; (2) State Bank of India and Others Vs. S.N. Goyal, ; (3) Bharat Singh and Others Vs. State of Haryana and Others, and of this Court in the case of (4) Niwas Builders Vs. Chanchalaben Gandhi (since deceased through legal heirs), , in support of his submission that evidence cannot be considered and accepted by the trial Court in the absence of pleadings. He then submits that, although the counter-claim has been dismissed by the courts below and no appeal has been filed by defendant Nos. 1, 2 and 3, it would be open for them to challenge the findings of the courts below and contend that the counter-claim should be allowed. He buttresses this contention by citing the judgment of the Supreme Court in the case of Jagdish Kumar and Others Vs. State of H.P. and Others, .

11. I have given my anxious consideration to the contentions raised by both the learned Counsel. It is not possible to accept the submissions of Mrs. Helekar that the property having been initially owned by Babalal i.e. the father of the appellant, ought to have been considered as joint family property and that the appellant and his three brothers had an equal share in the property after the death of their father. This is because, after the death of Babalal in 1936, the erstwhile Miraj State had declared that there were no heirs with respect to the suit property and, therefore, auctioned the same in 1937. Thus, the property no longer remained with the family after the death of Babalal. It was purchased in an auction conducted by the erstwhile Miraj State by Dastagir. There is no evidence at all on record to indicate that Dastagir purchased this property with the help of funds obtained from his brothers or that it was purchased by him for and on behalf of his brothers. There is neither any pleading nor any evidence to indicate that he purchased the suit property in his fiduciary capacity. An affidavit of Dastagir filed in tenancy proceedings was produced before the trial Court. He has averred that he purchased the property as a manager of the joint family. However, that affidavit has not been proved. It is no doubt true that, as held by the Calcutta High Court in the case of Aminaddin Munshi (supra), a party making an admission must prove that it was made under the circumstances which are not binding on him. However, in the present case, the affidavit filed by Dastagir itself has not been proved by the appellant in the manner that it is required under law. Therefore the heirs of Dastagir were not expected to prove that an

admission or statement made by Dastagir in the affidavit to the effect that he had purchased the property as a manager of the joint family was not binding on them.

12. Apart from this, as I have already noted, there is absolutely no pleading with respect to the purchase being made by Dastagir in his fiduciary capacity. It is now well settled that evidence adduced on an issue cannot be accepted by the Court unless there is a bed rock of pleadings in respect of such issue. The main reason for the pleadings being necessary is that the opponent must be put to notice about the contentions raised by a party. In the case of *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, , relied on by Mrs. Helekar, the Supreme Court has observed that it is not desirable to place undue emphasis on form and instead the substance of pleadings should be considered. The Supreme Court has observed thus:

The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question.

It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised, the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In *Bhagwati Prasad Vs. Shri Chandramaul*, a Constitution Bench of this Court considering this question observed (at p 738 of A.I.R.):

If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily, disentitle a party from relying upon it if it is satisfactorily proved by evidence. The

general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

13. Thus, although the Court need not be too technical while considering the question with respect to pleadings raised or the form of such pleadings, there can be no doubt that there must be some pleadings to put the adversary to notice about the case of the plaintiff. In the present case, as I have already noted, the case made out by Mrs. Helekar in her arguments that the property was purchased by Dastagir in his fiduciary capacity has neither been pleaded nor proved.

14. In the case of *Bharat Singh (supra)*, the Supreme Court has held that in a plaint or written statement, the facts and not the evidence are required to be pleaded. Similarly, in the case of *Rajgopal (supra)*, the Supreme Court has held that in the absence of pleadings on a particular issue, it cannot be said that there is a *lis* between the parties with respect to that question. In the case of *State Bank of India and Ors. (supra)*, the Supreme Court has held that there can be no adjudication on any issue in the absence of appropriate pleadings on that issue. The Supreme Court has held that if a party is permitted to rely on evidence on an issue/aspect not covered by pleadings, the opponent would be put to a disadvantage. A Division Bench of this Court in the case of *Niwas Builders (supra)*, has held that a plaintiff cannot be allowed to travel beyond the scope of his own pleadings and can succeed or fail on the basis of those pleadings.

15. Adverting to the pleadings in the present case, in my opinion, no case has been made out by the appellant that the suit properties were purchased by Dastagir in his fiduciary capacity, for or on behalf of all the members of the joint family. The evidence led before the trial Court also does not suggest that the intention in purchasing the property was for its enjoyment by all the members of the family and not by Dastagir and his branch of the family. Apart from this, the contention of the appellant that Dastagir had purchased the properties in his fiduciary capacity, is belied from the fact that the property extract with respect to City Survey No. 1259 bears the name of Chandulal as well as the appellant. Had the properties been purchased by Dastagir in his fiduciary capacity, his name

alone would have figured in the property extract.

16. Exh. No. 158 is the order passed by the erstwhile Miraj State declaring that the property had no claimants and Exhs. 159 and 162 are the tabe-patti panchnama, with respect to the suit properties City Survey No. 1258 and City Survey No. 1259, respectively. These documents purportedly indicate that the aforesaid suit properties were purchased by Babalal from Vantmore. The aforesaid panchnama at Exh. 162 indicates the name of Dastagir alias Babu as the owner of the property bearing City Survey No. 1259. Exh. 161 is report of the purchase of City Survey No. 1259 by Dastagir in the auction conducted by the erstwhile Miraj State. In my opinion, none of these documents can be considered as the foundation of the title of the plaintiff/appellant as a shareholder of the suit property. There is no evidence at all to indicate that the appellant had any right to the suit property and therefore the Appellate Court has rightly dismissed the suit.

17. The submission of Mr. Pise that defendants 1 to 3 i.e. respondent Nos. 1 to 3 herein, can agitate their contention in the counter-claim even in the present second appeal, has to be negated. The learned Advocate has relied on the judgment of the Supreme Court in the case of Jagdish Kumar and Others Vs. State of H.P. and Others, , to support his contention. However, on perusing this judgment, it is obvious that it has no application in the present case. The Supreme Court has held that in "appropriate cases" the Supreme Court can permit a non-appealing party to support the impugned judgment even upon the grounds which were negated in that judgment. The Court has to consider whether in the case before it, the non-appealing party should be permitted to do so. However, these observations cannot lead to the inference that the counter-claim which has been dismissed can be agitated in a second appeal without filing cross-objections or an appeal from the rejection of counter-claim.

19. Thus, there is no evidence at all to indicate that the appellant had any right to the suit property or that the property was not owned solely by Dastagir.

20. Second appeal dismissed. No order as to costs.