

(2000) 12 BOM CK 0007
In the Bombay High Court
Case No : Second Appeal No. 215 of 1988

Gulabrao Maruti Bhagat

APPELLANT

Vs

Bhagwan Nana Bhagat

RESPONDENT

Date of Decision : 08-12-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 43
Hindu Succession Act, 1956 — Section 6, 8
Maharashtra Land Revenue Code, 1966 — Section 157

Citation : (2001) 2 ALLMR 598 : (2001) 3 BomCR 484 : (2001) 3 CivCC 493 :
(2001) 2 MhLj 665

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Suhasini Mutalik, for the Appellant; Suresh Kumbhar, for Respondents No. 1 and 2, Sandesh Patil, for D.B. Bhosale, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—The present Second Appeal arises out of a suit for partition. Before setting out the facts in so far as they are material, it would be necessary to formulate the substantial questions of law which arise for consideration in this appeal u/s 100 of the Code of Civil Procedure, 1908:

i) In view of the presumption (a) of the correctness of entries contained in the Revenue Records u/s 157 of the Maharashtra Land Revenue Code and (b) of jointness in the case of a Hindu Undivided Family, was the First Appellate Court justified and correct in rejecting the suit for partition?

ii) Were the trial Court and the Appellate Court entitled in law to rely upon the judgment in a prior civil suit which was not inter parts, as evidencing the existence of an earlier partition of 1935, having regard to the provisions of section 43 of the Evidence Act ? iii) Is the suit for partition which was filed by the appellant barred by limitation under Article 110 of the Limitation Act, 1963 ?

2. The dispute in the present case arises out of a suit for partition and separate possession filed by the appellant in respect of a 1/3rd share in property which was asserted to belong to a Hindu Undivided Family. The property consists of agricultural land bearing Survey No. 131, 134, 97 and 96 situated at village Shirsuphal, Taluka Baramati in the District of Pune. The genealogy which would be necessary for an appreciation of the facts of the present case is as follows :

3. From the genealogy, it is thus apparent that the common ancestor Maruti had five sons, of whom the appellant, the original plaintiff Gulab, is the fifth son. Maruti died on 27th April, 1945. Bajirao and Rama, two of the other sons of Maruti had expired in 1943 and 1945, without leaving behind any issues. The eldest son Nana expired in 1946 leaving behind him two sons, the original first and second defendants, who are contesting respondents in these proceedings. Gopala, the second son of Maruti died in 1974 and his three sons, original defendants No 3, 4 and 5 have supported the claim of the appellant herein.

4. The appellant instituted a suit in the Court of the Civil Judge, Junior Division, Baramati, claiming that the properties which were the subject matter of the suit belong to the Hindu Undivided Family consisting initially of his father Maruti and the five sons including the appellant. The appellant claimed 1/3rd share in the property of the joint family. According to the appellant, the first and second defendants, respondents No. 1 and 2 herein colluded with the Talathi and got their names mutated to the extent of an 8 Ana share each in the suit property. On the first and second defendants denying the share of the appellant in the properties which were claimed to belong to the Hindu Undivided Family, the suit for partition came to be instituted.

5. In the written statement, the defence which was set up by the first and second respondents was that a partition took place between the members of the Hindu Undivided Family consisting of Maruti and his five sons in 1935 in pursuance of which the appellant was allotted his share. The case of the first and second respondents was that the suit property had fallen to the share of their father Nana and that in so far as the appellant was concerned, he had sold off the property which had been allotted to his share. Reliance was sought to be placed on the proceedings which arose out of a Regular Civil Suit No. 58 of 1958, to which some reference will become necessary in the course of this judgment. It was stated on behalf of the aforesaid defendants that the father of original defendant No. 3, Gopala, disposed of the land which was allotted to his share in 1946 to one Balu Dada Karkade, who, it was stated, had filed Regular Civil Suit No. 58 of 1958 before the Civil Court. Thus, the substantial defence of the first and second respondents was that a partition had already taken place in 1935 and that consequently, the suit which was filed by the appellant was liable to be dismissed.

6. In so far as original defendants No. 3 to 5 were concerned, they supported the claim of the appellant by stating that the property which was the subject matter of the suit was ancestral land. Their case was that after the death of Maruti, the

father, the property came to be mutated in the name of Nana, the eldest son. Defendants No. 3 and 5 supported the claim of the plaintiff and claimed a 1/3rd share in the suit property.

7. The trial Court has accepted the defence of respondents No. 1 and 2 that a partition took place in 1935. The trial Court was, therefore, of the view that the claim for partition which had been made by the appellant was liable to be rejected. The judgment of the trial Court was affirmed in appeal.

8. The learned Counsel appearing on behalf of the appellant placed before the Court for its consideration the relevant extracts from the Revenue Records, which have been produced in evidence and about which there is no dispute or controversy. These Revenue Records have a material bearing on the subject matter of the present proceedings and it would be necessary to briefly advert to the records which have been relied upon in the course of the submissions :

i) Entry No. 1623 certified on 28th August, 1945. This entry in the "Hakkache Patra" (Record of Rights village form No. 6) states that the father Maruti expired on 27th April, 1945 and that he had five sons, Nana, Gopala, Bajirao, Rama and Gulab. Of these sons, the name of Nana has been recorded as the manager of the Hindu Undivided Family. The names of the other co-shares have been confirmed. The aforesaid entry was Exhibit 40 in the evidence before the trial Court.

ii) Entry No. 1731 certified on 15th October, 1946 in the Record of Rights (village form No. 6). This entry is to the effect that on 7th September, 1946, Nana expired leaving behind him two children, Bhagwan and Vishnu (the first and second respondents herein), who were minors and who were represented through their mother Sonubai. The entry records that the other co-sharers as before stood confirmed.

These entries have been relied upon in order to buttress the submission that even as late as in 1945 and 1946, the family was reflected in the Revenue Records as a Hindu Undivided Family. After the death of the father Maruti in 1945, the name of his son Nana came to be recorded as the manager of the family. The entries on 1945 and 1946, however, provided that the names of the other co-sharers were confirmed. Besides these two entries there were certain other entries which have been relied upon in the course of the submissions of the parties in order to demonstrate that both prior to and after 1945, the properties have been dealt with by the members of the family on the basis that they belonged to the Hindu Undivided Family. These entries include :

1) Entry No. 1501 dated 27th September, 1943 (Exhibit 56 in the evidence) by which the father Maruti had purported to alienate certain portion of the land to one Shri Gulumkar ;

2) An entry dated 1st April, 1949 bearing Entry No. 2117 (Exhibit 57 in the evidence) in which it is reflected that Gopala, one of the sons of Maruti had sold

his undivided 1/3rd interests in the property of the Hindu Undivided Family to one Barkade; and

3) Entry No. 1665 dated 13th February, 1946 by which a portion of the land was alienated by the 4 sons of Maruti viz. Nana, Gopala, Rama and Gulab in favour of one Shilimkar.

The first of these entries shows an alienation by the father, who was the Karta of the Hindu Undivided Family. The second entry shows an alienation by one of the sons of his undivided interest, in the properties of the Hindu Undivided Family. The third entry shows an alienation together, by all the four sons of a part of the properties.

9. The learned Counsel appearing on behalf of the appellants further placed before the Court copies of the 7/12 extracts relating to the agricultural lands in question. At the present stage, it would be material to note that two of the aforesaid entries entry Nos. 1623 and 1731 are consistently referred to in the 7/12 extracts.

10. These entries would, therefore, show that the Hindu Undivided Family continued to subsist and was shown as in such in 1945 and 1946 in the revenue records. The lands which have been alienated, were either alienated by Maruti, the father, who was the Karta of the Hindu Undivided Family consisting of himself and his sons or after his death by all the four sons together. In the case of an alienation by one of the four sons, Gopala, the entry in the Revenue Records shows an alienation of the undivided interest of the son of his share in the joint family property.

11. In so far as the evidence in the matter is concerned, reference may be made to the deposition of the first respondent Bhagwan. The relevant extract from his cross examination may be quoted herein below :

"I have no personal knowledge that about partition, but it is hearsay from my mother, and father. I have not produced some of the 7/12 extracts to show that the total land holding of 100 acres. I do not remember the specific survey numbers and block numbers allotted at partition to the co-parceners. I cannot state the particular survey numbers allotted to the share of Gulab. The transaction entered into with Gulumkar is by my grandfather. The transaction entered into by Shilimkar, is by my father and other brothers."

The second witness for the first and second respondents was one Pandharinath Tatyaba Bhagat. In his examination in chief, he claimed that he was present at the time when the alleged partition took place. However, in his cross examination, he has stated thus :

"It is true to suggest that the defendant Nos. 1 and 2, are my next door neighbours, I was not present at the time of actual partition, but my father was present."

The witness has, thus, admitted that he was not present at the time of partition. Neither of the two witnesses was thus present when the alleged partition took place or had any knowledge of the manner in which the properties had been allotted.

12. The trial Court while dismissing the suit filed by the appellants placed a considerable degree of reliance on the judgment which was rendered by the Civil Judge, Junior Division at Baramati, in Regular Civil Suit No. 58 of 1958. This judgment which was delivered on 4th September, 1959 was in a suit which had been filed by a person by name of Balu Dada Barkade claiming to be the purchaser from Gopala, one of the sons of Maruti, of land admeasuring 9 Acres and 3 Gunthas. The suit which was instituted before the trial Court was against the first and second respondents herein and the tenant of the lands. In considering whether the reliance placed by the trial Court on the judgment of the Civil Court in that suit, was proper and correct, it must be stated at the outset that neither the appellant, nor indeed the other respondents, except respondents No. 1 and 2 were parties to the earlier suit. In these circumstances, the provisions of section 43 of the Evidence Act would squarely be attracted in the facts of the present case. Section 43 of the Evidence Act provides as follows :

"43. Judgments, etc. other than those mentioned in sections 40 to 42, when relevant. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act."

Sections 40, 41 and 42 of the Act are not attracted to the present case. Section 40 deals with a case of the existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial. Section 41 deals with a final judgment, order or decree in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. Section 42 deals with judgment, orders or decrees which relate to matters of a public nature relevant to the enquiry. In the present case, the judgment of the Civil Court in Regular Civil Suit No. 58 of 1958 would clearly not be relevant in view of the express provisions of section 43 of the Evidence Act. The law u/s 43 has been considered in several leading judgments, among them, judgments of Division Benches of this Court and of the Calcutta High Court. In *Asaddar Ali Khan Waqf Estate by Mutwali Gajanfor Ali Khan and Another Vs. Province of Assam and Others*, , a Division Bench of the Calcutta High Court held thus :

"Admittedly, the Crown was not a party to this suit at all. In these circumstances the judgments (Exhibits Z, Z-1 and Z-2) in that suit are certainly not judgments inter parts so far as the present plaintiffs, defendant 104 and the defendants claiming through defendant 104 are concerned. Those judgments not inter parts might be admissible in evidence only u/s 13, Evidence Act, as establishing a particular transaction, if any, by which the relevant right was asserted, recognised, etc. Findings of fact in or reasons for the judgment are irrelevant and not admissible in the present case : 58 I.A. 125. As was pointed out by

Mookerjee, J., in 23 C.L.J. 583 at page 585,

"although a judgment not inter parts may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction the recitals in the judgment cannot be used as evidence in a litigation between other parties. The principle is that all judgments are conclusive of their existence, as distinguished from their truth; judgments as public transactions of a solemn nature, are presumed to be faithfully recorded. Every judgment is, therefore conclusive evidence, for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered: in other words, the law attributes unerring verity to the substantive as opposed to the judicial portion of the record."

In a subsequent judgment of a Division Bench of this Court in Ramaji Batanji Vs. Manohar Chintaman and Others, , the Division Bench of this Court held as follows:

"(11) A judgment in another suit which is not inter parts may be evidence u/s 13 of the Evidence Act for certain purposes, namely to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings; to establish the transaction referred to in the judgment; as evidence to show the conduct of the parties or particular instances of the exercise of a right or assertion of title Vide Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others, or to identify property; or to show how property had been previously dealt with; to establish a particular transaction in which a right is asserted and the name of the person, if any, who is declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matters decided in that judgment. AIR 1937 69 (Privy Council) , " The reasons upon which a judgment is founded cannot be regarded as, nor can any finding of fact there come to other than the transaction itself be, relevant in another case". AIR 1931 89 (Privy Council) , Lakshman v. Amrit ILR 24 Bom 591; Dinomon Chowdhrani v. Brojo Mohini Chowdhrani, 29 Ind.App. 24 P.C. and Mahamad Amin v. Husan, ILR 31 Bom. 143."

13. Having regard to the well settled position in law, I am of the view that the trial Court fell into error in relying upon the judgment of the Civil Court in Regular Civil Suit No. 58 of 1958. This was not a judgment inter parts. The appellant was not a party to the earlier suit which was brought by a person who claimed to be a purchaser from Gopala, the brother of the appellant. The Appellate Court in paragraph 13 of its judgment has also relied upon the judgment of the Civil Court as evidencing the fact that a partition had taken place, as contended by the First and Second respondents, in the year 1935. Both the courts below have fallen into error in relying upon the decision of the Civil Court to which appellant was not a party. It was clearly not open to the trial

Court and the Appellate Court in these proceedings to rely upon the earlier judgment as proving the existence of a partition, on the basis of the findings which were arrived at therein.

14. That apart, a careful reading of the judgment of the Civil Court in the earlier proceedings would show that no such inference as was sought to be drawn by the trial Court and by the Appellate Court in the present case can be drawn from the said judgment rendered in Regular Civil Suit No. 58 of 1958. A copy of the judgment, which is Ex. 64 in these proceedings, has been placed for my consideration. The following extracts from the judgment would show that the plaintiff before the Court in the earlier suit had neither pleaded nor proved specifically whether the sons of Maruti were indeed joint or separate:

"In his plaint the plaintiff has very vaguely alleged that the suit land S. No. 45 was the property of sons Gopala Maruti and Nana Maruti. It is not stated whether the property was their ancestral property or joint property. It is not stated whether Nana and Gopala were joint and whether they constituted Joint Hindu Family or whether they were separate. It is not stated whether they held the property as members of the joint Hindu Family or whether they were separated members holding that particular property jointly or whether they hold distinct parcels of the land separately."

The Civil Court noted in the course of its judgment in the earlier suit that the plaintiff before the Court had come with the case that a partition between the members of the Joint Family had taken place, but he was unable to substantiate that his vendor was given any share in respect of any portion of the land which was the subject matter of the said suit. Be that as it may, I am of the view that the merits of the decision in the earlier proceedings need not detain the Court any further because in the view which I have taken, the findings which were arrived at by the trial Court in the earlier suit to which the appellant was not a party, are clearly not relevant on the question as to whether or not there was in fact a partition in 1935.

15. The admitted facts on the record of the present case show that there was in fact a Hindu Undivided Family consisting of Maruti and his five sons. The law provides a presumption of jointness though there is no presumptions necessarily that a Hindu Undivided Family possesses any joint property because the family is joint. Generally speaking, the normal state of every Hindu Family is joint. Presumably, every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption, (Mulla on the Principles of Hindu Law, 16th edition at para 233 page 258). Given a Joint Hindu Family, the presumption is until the contrary is proved, the family continues joint. The presumption is the strongest in the case of a father and sons and becomes weaker, the further one goes from the founder of the family. Similarly, it is now a well settled principle of law laid down by the Supreme Court that though an agreement between all the co-parceners is not essential to the disruption of joint family status, "a definite and unambiguous indication of intention by one

member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status." Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, .

16. In the present case, there was absolutely no material or evidence on the record to substantiate the plea that a partition took place between the members of the Joint Family in 1935. The burden to prove that there was a disruption of the joint status has not been discharged. The alleged partition of 1935 has not been established and, it has to be noted that it was not the case of the First and Second respondents that a partition took place at any time thereafter. The Revenue Records have already been adverted to by me earlier. There is a presumption as regards the correctness of the entries contained in the revenue records. The evidence of the First Defendant was that he was unaware of the circumstances relating to the alleged partition. His knowledge was entirely hearsay. He had no knowledge of the specific survey numbers which were allotted in the alleged partition. The first respondent has admitted that transactions of sale relating to the property of the family had either taken place through his grandfather Maruti or by all the sons of Maruti together. The trial Court while dealing with this aspect of the case held thus:

"It is no doubt that his evidence is hearsay evidence. However, hearsay evidence is also admissible in some cases, like the present one. He has testified that he was cultivating the suit land as a tenant. His evidence is consistent with the evidence of the defendant No. 1. He has stated in so many words that Gopal and Gulab sold out land of their share and deserted their village."

The trial Court was entirely wrong in relying upon the hearsay evidence of the first defendant, respondent No. 1 herein, having regard particularly to the fact that there was no independent or authentic proof of the alleged partition of 1935. Severance of joint status had hence not been proved.

17. In so far as the aspect of limitation is concerned, reference has to be made to the provisions of Article 110 of the Limitation Act, 1963. Article 110 provides a period of limitation of 12 years for a suit by a person excluded from joint family property to enforce a right to a share therein. Time begins to run when the exclusion becomes known to the plaintiff. In other words, for the purposes of Article 110, there has to be a positive act or conduct by which the exclusion from joint family property becomes known to the plaintiff. In the present case, there is absolutely no evidence to suggest that the appellant has been excluded from the property of the joint family more than 12 years prior to the institution of the suit. The properties of the joint family were admittedly in the occupation of tenants. Consequently, there was no question of the actual exclusion of any member of the joint family from cultivation or enjoyment of the suit lands. In the circumstances, the view which has been taken by the trial Court and in an appeal by the Appellate Court is clearly erroneous.

18. In dealing with this matter, regard must be had to the fact that this Court is

seized of a Second Appeal under the provisions of section 100 of the Civil Procedure Code, 1908. There are limitations on the exercise of the jurisdiction of the Court in a Second Appeal and these have been laid down in several judgments of the Supreme Court. In my view, having carefully considered the matter, this is a case where the interference of this Court is necessary and falls within the parameters which have been enunciated by the Supreme Court. It is well settled that it is not ordinarily open to the High Court in the exercise of the jurisdiction in a Second Appeal to reappreciate the evidence and to adopt an alternative view merely because that is a possible view to take. In the recent judgment in *Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.*, , Mr. Justice M. Jagannadha Rao speaking for a Bench of two learned Judges of the Supreme Court enunciated two situations in which the interference with findings of fact is permissible. The first one is when the material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The First Appellate Court is under a duty to examine all the relevant evidence on the record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude, that gives rise to a substantial question of law, the High Court would be justified in setting aside the finding. The second circumstance in which interference with a finding of fact is permissible is where a finding has been arrived at by the Appellate Court by placing reliance on inadmissible evidence. In the present case, both the aforesaid circumstances exist. The courts below have failed to consider the material and relevant evidence which, if considered, would have led to an opposite conclusion. The courts below have placed reliance on the judgment of the Civil Court in the earlier suit, but this was clearly not relevant to the present proceedings. In *Jagdish Singh Vs. Natthu Singh*, , Mr. Justice Venkatachaliah, as the learned Chief Justice then was, speaking for a Bench of the Supreme Court held that where the findings arrived at by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. These observations have been referred to with approval in subsequent judgments of the Supreme Court.

19. Consequently, in the facts and circumstances of the present case, I am of the view that the reasoning and the conclusion of the courts below, is clearly erroneous and is required to be set aside. There is no dispute between the contesting parties that once the property which is the subject of the suit is held to be joint family property, the appellants are entitled to a 1/3rd share in the said property. Respondents No. 1 and 2 would also be entitled to a 1/3rd share together. Similarly, respondents No. 3, 4 and 5, who belonged to the branch of Gopala, would also be entitled to a 1/3rd share together. The Second Appeal is accordingly allowed and the suit for partition is decreed. The following consequential directions are also issued:

ORDER

1. The orders of the Courts below are set aside.
2. The suit filed by the appellant is decreed.
3. The appellant is held entitled to partition and to a 1/3rd share of the suit properties and to actual possession of his share in the suit lands.
4. The Collector, District Pune is directed to effectuate the partition of the suit properties by metes and bounds.
5. The appellant is entitled to past mesne profits determined as per Order 20, Rule 12 of the CPC for a period of three years prior to the date of the filing of the suit.
6. The appellant is further entitled to the future mesne profits from the date of the suit till actual possession of the lands allotted to his share is actually received by him as will be determined under Order 20, Rule 12 of the Code of Civil Procedure.
7. Decree to be drawn up accordingly.
8. Record and proceedings be sent back.
9. No costs.

Certified copy expedited.