

(2018) 10 BOM CK 0038

In the Bombay High Court

Case No : Second Appeal No. 669 Of 1990 With Civil Application No. 5894 Of 1990

H.B.Patel D/H Aslam H Patel And Ors

APPELLANT

Vs

Gafur Babu Patel And Ors

RESPONDENT

Date of Decision : 06-10-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 23 Rule 1(3), Section 54, 154
Limitation Act, 1963 — Article 182

Citation : (2018) 10 BOM CK 0038

Hon'ble Judges : A. M. Dhavale, J

Bench : Single Bench

Advocate : P. K. Dhakephalkar, S. V. Dhakephalkar, Sanjay Gunjkar, J. V. Dange, Hemant Ghadigaonkar, Dilip Bodake

Final Decision : Disposed Off

Judgement

Whether both the courts below erred in coming to the conclusion that the plaintiff's suit for partition is maintainable?" ,In the affirmative.

Whether it was legal and proper on the part of the courts below to come to the conclusion that the suit for partition is maintainable even though the suit properties are reÂ?granted in the name of Chamubi?" , "In the affirmative with respect to regrant.

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Whether it was legal and proper on the part of the

courts below to come to the conclusion that the plaintiff has not renounced his right in the suit property, in spite of keeping quiet for about 22 years?" ,In the affirmative.

Whether the suit is barred by res judicata in view of judgment and decree in Regular Civil Suit No. 335 of 1952?" ,In the affirmative.

limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits. So long as the property is jointly held, so long does a right to partition continue."

Her right to a share if possession is a recurring right. If the plaintiff, for any reason, Date of Decision: 2nd April 1946 not to enforce the right",

immediately, she should be deemed to have chosen to continue the tenancy in common for sometime or till she would find it necessary to seek its",

termination. A suit which is barred by withdrawal of the claim under Order 23 Rule 1 (3) is one which is based on the same cause of action but a,

suit for partition and separate possession of the share which may now be brought will be on a cause of action arising upon a demand now made and,

refused : (Radhe Lal vs Mulchand) 4,46 All. 820 : AIR 1924 (11) All.905. If defendant 11 made a promise to give an equal area out of his other lands",

and if that is enforceable in law, the plaintiff can sue for specific performance of that contract and, in the alternative make a claim on the original",

cause of action for share in the lands of her father."

12. Learned senior counsel Mr. Dhakephalkar strenuously argued that these rulings will not govern muslim family as there is no concept of joint family,

in Muslims. It is true that in Muslims, there is no concept of joint family. The present Suit and earlier Suit being Regular Civil Suit No. 335 of 1952",

were also not for partition as contemplated under the Hindu law. Both the Suits were for separation of shares of the plaintiffs and the defendants,

by virtue of succession as per Muslim law. When the parties are jointly enjoying any property left behind by a common ancestor, they may continue",

to hold it jointly or they may seek separation of their shares. Even if there is no concept of joint family in Muslims, the parties can continue to",

enjoy the property jointly. However, in the present case, Regular Civil Suit no.335 of 1952 was filed by the plaintiff. It was between the same",

parties, in respect of same properties, for same right of shares in the properties and it was before a competent Court. The only difference was that",

the agricultural lands belonging to the parties jointly, were in possession of agricultural tenants. Learned advocate for the plaintiff raised two",

contentions.,

(a) The point of resjudicata can be decided only by filing copy of the plaint, written statement and judgment of the trial Court. It cannot be decided",

merely on the basis of judgment. .,

(b) In the peculiar facts of the present case, I find that the said judgment is not applicable. The respondent plaintiff has filed not only copy of the",

judgment but, also copy of the decree at (page 159). It is typed below copy of the plaint and it contains all necessary averments from the plaint.",

The judgment shows that the defendant no.1 had filed written statement of admission, as well as defendant nos. 2 to 9 had not filed any written",

statement at all. The said suit was contested by defendant no.10 who was not a family member. His dispute was regarding the claim for only,

one property bearing survey No.583 of 2003 on the basis of mortgage. The said dispute raised was not in connection with rights of the plaintiffs and,

defendant nos.1 to 9 with regard to the Suit properties. The plaintiffs in the Suit itself has recorded that he had filed Regular Civil Suit No.335 of 1952,

for partition of the same properties. The facts indicate that there was no dispute that previous Regular Civil Suit No.335 of 1952 was in respect of the,

same property and same parties and relating to the same controversy of separation of shares on the death of common ancestral Bapu Patel. In fact,"

after filing of the written statement by the defendants, the plaintiffs amended the plaint and pleaded that even there was execution of the said",

judgment and decree and he had received possession. I therefore, find that there is no manner of doubt that Regular Civil Suit no.335 of 1952 is a",

previous Suit between the same parties.

13. The rulings which laid down that there is no res judicata in case of non execution of a decree of partition are in respect of Hindu families. In,

Hindus, there is a concept of joint family. A coparcener can even after decree can come together and again form a joint family or there can be",

blending of properties or separate shares of the parties. No such concept can be assumed in case of muslims. When a muslim person dies, his legal",

heirs have specified shares. Once the shares are decided by the Court, it becomes a preliminary decree. The further continuation of joint enjoyment by",

co-heirs will not bring any change in the shares determined by the Court. The parties may get their shares separated by filing a final decree,

proceedings but the preliminary decree would bind the parties and as the jointness of the family or properties cannot be equated with joint family,

property and separation of their shares cannot be equated with the principles of partition. I therefore, find that the judgment and decree in Regular",

Civil Suit No.335 of 1952 would be binding on the parties in the present matter, to the extent to which it declares the shares. However, the said",

judgment was a preliminary decree only. With regard to the grounds of final decree, it was observed as follows :"

Looking to the extent of land and use and it was argued before me that the plaintiff will rest content if he has been given the joint possession of,

the share in property. In the alternative, the plaintiffs pleaded for benefit under the Indian Property Act. I, for myself agree and shall like to give",

the plaintiff all the options. This being a Suit for partition, Article 182 of the Indian Limitation Act, will not be applicable and hence, proceedings in",

absence of the decree shall never be barred by limitation.?",

In the order, it has been recorded :"

Point no.3:

If the plaintiff wants separate possession after partition of shares of the property described at serial nos. 1 to 4 and 6, 9, he do get the",

same through the Collector or through the subordinate of him, as the case may be, under section 54 of the Code of Civil Procedure, 1908 and if he",

wants separate possession pertaining to the property at serial no.5, he do the same as above, after recovering the court fee. (last sentence is in",

writing of the Judge and is not wholly legible).

14. I, therefore agree with Mr. Dhakephalkar learned senior counsel that the plaintiff could not have filed separate Suit, and should have gone for final",

decree proceedings to execute the decree in Regular Civil Suit No.335 of 1952. In the facts of the present case, it is not disputed that the Suit",

properties were in possession of the tenants and Chamubi, the step mother of

the plaintiff and real mother of defendant nos.1 to 6 had filed",
proceedings against the tenant and recovered possession much later.,

15. Mr.Dhakephalkar learned senior counsel appearingfor the appellants tried to impress that the decree is comprehensive and it permitted separation,
of the shares of the land in possession of the tenant and the decree could have been executed and constructive possession of the specified shares of,
the plaintiffs could have been carved out. This argument cannot be accepted.,

16. The learned trial Judge had determined the shares and given discretion to the plaintiffs either to hold the joint possession or to go for separation of,
the properties but, the facts on record shows that separation could have been made only through the Collector by sending a precept under section 154",
and no such precept was ever sent.Â The possession receipt and the copies of the execution ApplicationÂ and orders disclose that Chamubi,
received joint possession of all the properties from the tenant through the bailiff andÂ there was no separation of shares and the bailiff could not have,
separated the shares. No such shares were demarcated nor those were given to the plaintiff.Â Â,

17. In the light of the observations made in the judgments, referred to herein above, the plaintiff was entitled to get the final decree proceedings",
initiated with a request for sending a precept to the Collector. At any rate, the cause of action for such a prayer accrued only after physical",
possession, as received from the tenants in the years 1966 and 1973.Â I therefore, find that the Suit in the present form was not maintainable but the",
plaintiff has a right to request the Civil Judge, Senior Division to send a precept for separation of shares. It is needless to state that if the plaintiff",
makes such a request, thedefendants shall be at liberty to take all appropriate defences as may be available inÂ?law.",

18. In view of the above findings, I hold that the Suit inthe present form was hit by the provisions of the resjudicata and was thus not maintainable.",
The substantial question of law framed are answered accordingly.,

19. Another point raised was that the suit property was reÂgranted to Chamubi and therefore, it was not available for partition. The order of reÂgrant",
dated 27.3.1964 itself shows that Chamubi received it as Manager of the joint family. Though, there is no concept of joint family property, the order",
indicates that ChamubiÂ receives it on behalf of all the legal heirs of deceased

Bapu Patel. Therefore, there is no substance in the contention that",

by virtue of regrant, Chamubi became the exclusive owner of the Suit property and the property was not amenable to partition. In this regard",

reliance is rightly placed by the learned advocate for the respondents on the following ratio from Nagesh Bisto Desai vs Khando Tirmal Desai AIR, 1982 SUPREME COURT 887.,

There is no such custom pleaded or proved. Para 16 reads as under :,

16. It has always been the accepted view that the grant of watan to the eldest member of a family did not make the watan properties the, exclusive property of the person who is the watandar for the time being. In order to understand the arguments on this point, it is necessary to deal with", the incidents of a Deshgat watan. In the Bombay Presidency, it has always been treated to be the joint family property. It may be worthwhile to refer", to the decision of the Privy Council in Adrishappa vs Gurshindappa L.R., (1880) 7 I.A. 162 the head note of which is that :",

Deshgat watan or property held as appertaining to the office of Desai is not to be assumed prima facie to be impartible. The burden of proving the, impartibility lies upon the Desai, and on his failing to prove a special tenure or a family or district or local custom to that effect, the ordinary law of", succession applies. Hence, I find no substance in this challenge on this ground.",

There are concurrent findings that there was no right was acquired by the defendants by adverse possession, nor there was renunciation of", the rights by the plaintiff. The evidence on record, shows that there is no scope for interference with the concurrent findings of both the Courts on", these points. Hence, I hold that the Suit is not maintainable only on the ground as it is hit by the principles of res judicata to the extent of determining", the shares of the parties.,

20. The learned trial Court erred in answering the issue of res judicata in negative so also erred in granting mesne profits at the rate of Rs.100/

p.a. without holding any inquiry. In this regard, the first appellate Court erred in coming to the same findings. In this regard, in Ganpati Madhav", Sawant vs Dastur Madhav Sawant 2008 (3) SCC 183 it was held that inquiry into mesne profit is a must, and therefore the judgment of both the",

Courts cannot be sustained.Â,

21. It is also necessary to mention here that the decreepassed in Regular Civil Suit No.335 of 1952Â cannot be implemented in the final decree in the,

sameÂ condition.Â In Regular Civil Suit no.335 of 1952, Baban son of Begum was alive and 7/32th and 7/52th shares were given to him.Â He",

subsequently died in 1957Â?58 as can be seen from the records in the execution proceedings. While there was a final decree and the decree in Regular,

Civil Suit No.335 of 1952, will have to be modified so as to grant shares to the deceased and the plaintiff, and the shares allotted to the deceased",

Baban but, he seems to have died issueÂ? less.",

22. With these observations, the appeal is allowed, TheJudgment and decreeÂ of both the lower Courts are set aside and the Suit is dismissed as",

barred by the principles of resjudicata to the extent of preliminary decree proceedings i.e. for determination of shares. In view of disposal of Second,

appeal, Civil Application No.5894 of 1990 does not survive.",