
(1954) 02 BOM CK 0004
In the Bombay High Court
Case No : S.A. No. 369 of 1953

Jehangirji Jamshedji

APPELLANT

Vs

Nariman Burjorji and Others

RESPONDENT

Date of Decision : 24-02-1954

Acts Referred:

Citation : AIR 1955 Bom 136 : (1954) 56 BOMLR 615 : (1954) ILR (Bom) 1212

Hon'ble Judges : Dixit, J

Bench : Single Bench

Advocate : T.N. Walavalkar, for the Appellant; D.V. Patel, for the Respondent

Judgement

1. This appeal arises from a suit for partition and separate possession of a half share in the suit property. The plaintiff also claimed an injunction restraining defendant No. 1 from executing a decree by darkhast No. 159 of 1944. The plaintiff also prayed for other reliefs.

2. The parties belong to a family of the name of Keravala. Their common ancestor was one Jamshedji who had two sons, Jehangirji and Burjorji. Jehangirji is defendant No. 1 in the suit, while plaintiffs Nos. 1 to 4 and defendant No. 3 are the sons of Burjorji. Defendant No. 2 is the son of defendant No. 1. On October 17, 1909, Jamshedji made a will of which a probate was obtained by his widow Bai Dhanbai.

On December 7, 1923, a partition took place between the two branches represented by Jehangirji and Burjorji and at the partition the family property was divided. At that partition certain property which is now in dispute was kept undivided for a common passage. As a good deal of controversy turns upon the language of the partition deed in this appeal, it will, I think, be necessary to set out the terms of the deed of partition with reference to this property:

"That road in between is 16 feet wide and it measures less near the gate with doors for coming out. On the extreme western side of that road, to the north there is a latrine. That latrine has fallen to the share of myself of the first side

and adjoining to it, to the south in eight feet, the parties on the other side have a right to erect a latrine. We persons of both sides have two maps signed by each other showing measurement where the road is narrow at the exit and showing breadth and length. That road is half of myself of the first side and half of us of the other side as stated. No one has a right to construct, a step etc. or anything else and to narrow down the road, nor has anyone a right to discharge dirty water. Both have also to do repairs (!) so that only rain water may pass and so that the right Of daily use may not be interfered with. This whole road is approximately 193 yards."

This description is again repeated in the document and at p. 41 the deed of partition goes on to say as follows:

"If we of the other side at any time sell the land of this share, there is no right to sell this road to others. So the party on the first side has to take in his possession the whole road by paying the proper price for the half share of land out of the whole land of 193 yards, to the parties on the other side. If the parties on the other side sell this property 15 x 10 yards or any part thereof, they have to make their passage, by taking land out of land 6, No. 4 to the south after leaving the land in this compound through the road having two walls east-west."

3. The partition has been signed by defendant No. 1, Bai Dhanbai, Bai Ratanbai, wife of Burjorji, Rustomji (defendant No. 3), Nariman (plaintiff No. 1), Erachsha (plaintiff No. 2) and Bai Dhanbai daughter of Burjorji. This was in 1923.

4. It appears that in 1936 there was a suit (No. 1027 of 1936) and there was a cross-suit and these two suits came up in the High Court in second appeals Nos. 139 of 1941 and 208 of 1941 (A). By a judgment dated August 6, 1942, Mr. Justice Divatia modified the decree of the lower appellate Court in appeal No. 139 and reversed the decree of the lower appellate Court in appeal No. 208 with the result that the decree of the lower appellate Court was modified and the decree of the trial Court restored in one suit and in the other suit the decree of the lower appellate Court reversed and that of the trial Court restored. These two suits arose in consequence of certain projections made by the plaintiffs and a mandatory injunction was granted as regards these projections.

5. On May 6, 1944, the plaintiffs filed this suit for partition and injunction. Their allegation was that the property was the joint and common property of the parties and that they were entitled to have a partition made of the property. The plaintiffs also claimed an injunction restraining defendant No. 1 from executing the decree in suit No. 1027 of 1936 confirmed in second appeal.

6. Defendant No. 1 resisted the plaintiffs' suit and contended that according to the partition deed the "property was kept as a common passage and that the same was not liable to partition.

7. The trial Court dismissed the plaintiffs' suit, but upon appeal by the plaintiffs, the lower appellate Court set aside the decree of the trial Court and directed that

a preliminary decree for partition should be made. The lower appellate Court refused the specific partition claimed by the plaintiffs and also refused the plaintiffs' prayer for a permanent injunction, but allowed the temporary injunction to continue till the suit was disposed of. From the appellate decree defendant No. 1 has come up in second appeal.

8. Mr. Walawalkar who appears for the appellant contends that the property in suit "is not liable to partition. He relies upon the language as used in the deed of partition and also upon, what is described as, the general law. According to Mr. Walawalkar, the deed of partition shows that the parties intended to keep this property, as a common passage, not liable to partition at any time. According to Mr. Walawalkar, the contention raised as a contention of law is that where property is kept as a common passage, it is incapable of partition at any time.

In this connection he relies upon a decision of this Court reported in -- Shantaram Balkrishna Vs. Waman Gopal Wadekar, . If the parties in this case were Hindus, I have no doubt in my mind that the ruling in "Shantaram's case (B)" would apply. But in this case the parties are Parsis and it is not possible to apply to the Parsis a principle of law which is applicable to Hindus. In "Shantaram's case (B)" there was, under similar circumstances, a dispute as regards a common passage. By a decree made in a suit between the parties the passage was kept common and undivided. That was in consequence of an award. There was a suit filed with a view to seek partition of the land kept undivided as a result of the award and the decree, and the question which this Court had to consider was whether the common passage was liable to partition.

In dealing with this question the learned acting Chief justice, first of all, referred at p. 87 to the special rule of Hindu law which says that a common way is not liable to partition. In view of this authority, there can be no doubt that under Hindu law a common passage is not liable to partition. But Mr. Walawalkar on behalf of the appellant has strongly relied upon this ruling and his contention is that this rule of Hindu law should be applied also to Parsis. I am unable to accept this contention. The learned Acting Chief Justice said at p. 89 as follows:

"In view of the rule of Hindu law upon which I base my decision, it is not necessary for me to arrive at any final conclusion on the general question whether, apart from that rule, such a partition as is claimed by the plaintiffs is permissible in law, and even if it be permissible in law, whether under the circumstances of the case it would be right to direct such a partition."

This passage shows clearly that the decision was based upon the rule of Hindu law, according to which a common passage is not liable to partition. This case is, therefore, no authority for the contention that this ruling must apply not merely to Hindus but also to Parsis. It is to be remembered that in that case in spite of the award and the decree encroachments were made and an argument was put forward that the object of the suit was really to avoid the award and decree. In dealing with this question this is what the learned Acting Chief Justice said:

("ibid")

"It is difficult to escape the inference that soon after the decree was passed for the removal of the encroachments, in 1918, against the plaintiffs, they filed this suit with a view to circumvent, if possible, that decree. If it be open to them in law to do so, they are entitled to that remedy. But in my opinion it is not open to them to do so."

It follows, therefore, that if a party is trying to circumvent the effect of a decree, the party will not be permitted to circumvent the decree, unless in law the party can do so. Mr. Walawalkar also relied upon the judgment of Mr. Justice Crump who, at p. 89, said as follows:

"Therefore it seems to me that the suit must of necessity fail, whether it be approached on the basis of the rule of Hindu law or on the basis of any other system of law which could conceivably be applicable to the present case."

It is to be remembered that the Judgment of Mr. Justice Crump is a concurring Judgment, whereas the main Judgment is delivered by the learned Acting Chief Justice, and the case is decided, as will be clear from the quotation already given, upon the rule of Hindu law. If, therefore, there are observations supporting Mr. Walawalkar's contention, they are clearly "obiter" and do not constitute a decision.

9. Apart from this consideration, it seems to me that this contention is not a valid contention. Ordinarily, every property is partible, unless by statute the property is made impartible. In the present instance the property belonged originally to the family of which the plaintiffs and defendants are members. This property was kept undivided and was allowed to be kept as a common passage. The deed of partition shows that the branch of Jehangirji had a half share therein, while the branch of Burjorji had the other half share. The road was 16 feet in width and the idea underlying the partition was that for the convenience of the parties the road as the common passage was kept undivided.

There is nothing in the language of the partition deed to show that the parties intended for all time to keep this common passage as not being liable to partition. On the contrary, the recitals in the deed of partition indicate that the property may be sold. At p. 41 of the record there is a recital about the sale of this road and it provides that if the branch represented by Burjorji wanted to sell their share in this common passage, they could sell it only to the branch represented by Jehangirji.

Now, if the intention was that the property was not to be divided at all and was to be kept as a permanent common passage for all time, it is difficult to understand as to why the parties inserted a provision whereby the branch represented by Burjorji could sell their share in the property and the branch represented by Jehangirji would have a right to purchase it, thus conferring upon that branch a right equivalent to the right of pre-emption. But what is more

significant is that so far as the branch of Burjorji is concerned, that branch had not a similar right as against the branch represented by Jehangirji if that branch was minded to sell the property.

If, therefore, the branch of Jehangirji was minded to sell the property, that branch could sell the property to a stranger. If the property was sold to a stranger and the stranger brought a suit for partition, I find it difficult to understand the argument that the purchaser could not claim a partition of this property. In my opinion, therefore, the parties intended to keep the road as a common passage so long as the parties wished to keep it, but the moment one of the parties chose to ask for a partition of this common passage, there was nothing in law to prevent that party from claiming a partition.

10. This leaves the argument as regards the effect of the decree in the former litigation. Mr. Walawaikar says that the present suit is clearly an attempt on the part of the plaintiffs to get rid of a decree validly passed against them. That no doubt, is the case. There is a mandatory injunction operating against the plaintiffs, and so long as that injunction stands, the plaintiffs must be taken to be governed by the injunction. But this suit is obviously to get rid of the effect of the decree passed in S. A. No. 139 of 1941 (A).

It may well be that the conscience of the Court may be provoked when an attempt is made by a party to get rid of a decree. But whether there is provocation or no, the point has got to be decided as a point of law, and if, in law, a party has a right to get rid of a decree, the party cannot be denied the right merely on the ground that the conscience of the Court may be provoked. In this instance if the property is partible, and I hold the property to be partible, then there is no reason why the plaintiffs should not come to the Court and ask for a partition of the property admittedly kept undivided in the partition of 1923.

11. For all these reasons, I think the view taken by the lower Appellate Court is right. The appeal, therefore, fails and the same will be dismissed with costs.

12. Appeal dismissed.