
(2007) 08 BOM CK 0118
In the Bombay High Court
Case No : Writ Petition No. 974 of 2006

Kusum Dashrath Kharmare	Vs	APPELLANT
Popat Madhav Gangarde and Others		RESPONDENT

Date of Decision : 30-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 47 Rule 1, 151, 152, 2(2)
Constitution of India, 1950 — Article 226
Maharashtra Land Revenue Code, 1966 — Section 85
Transfer of Property Act, 1882 — Section 52

Citation : (2008) 1 ALLMR 576 : (2008) 1 BomCR 397 : (2008) 1 MhLj 267

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : S.B. Bhapkar, for the Appellant; N.V. Gaware, for Respondent Nos. 1 to 4 and S.V. Adwant, for the Respondent

Judgement

S.B. Deshmukh, J.—Heard learned Counsel for the parties.

Rule. Rule made returnable forthwith and taken up for final hearing, with the consent of the parties.

This petition takes an exception to the judgment and order dated 30th August, 2005, passed by the learned Civil Judge, Junior Division, Karjat, district Ahmednagar, in Regular Darkhast No. 20 of 2002.

2. The brief resume of facts would suffice. The petitioner had filed Regular Civil Suit No. 22 of 1981 for partition and separate possession of the suit properties. The suit came to be decreed by the trial Court, with costs. It was declared that the plaintiff was having 1/9th share in the suit property. Separate inquiry was directed under Order XX, Rule 12 of the CPC (hereinafter referred as the Code, for short). Preliminary decree, thus, was passed. Further direction was issued to send the precept to Collector for effecting partition. The decree seems to have been passed by the learned Civil Judge, Junior Division, Karjat on 4th July, 1997. This decree was subject-matter of Regular Civil Appeal No. 269 of 1997 before

the District Judge, Ahmednagar, at the instance of some of the defendants. In Regular Civil Appeal No. 269 of 1997 Smt. Shiubai Madhav Gangarde was Appellant No. 3. Said Shiubai was original defendant No. 3. Smt. Shiubai died on 22nd April, 1998 i.e. during the pendency of Regular Civil Appeal No. 269 of 1997. Regular Civil Appeal No. 269 of 1997 came to be dismissed on 22nd April, 2004. The original plaintiff/petitioner in this writ petition, filed Misc. Civil Application for review under Order XLVII, Rule 1 read with Sections 151 and 152 of the Code, in the Court of learned District Judge, Ahmednagar which, after hearing all the parties, came to be dismissed by the judgment and order dated 17th September, 2004. The decree passed in Regular Civil Suit No. 22 of 1981 was put into execution. The District Collector, Ahmednagar, by the letter dated 26th April, 2005, addressed to the learned Civil Judge, Junior Division, Karjat sought guidance. Said letter is in Execution Petition No. 20 of 2002 pending before the Executing Court at Exhibit-37.

3. The petitioner had also filed application Exhibit-17 in Regular Darkhast No. 20 of 2002. In this application, petitioner sought injunction against defendant Nos. 2, 7 and 8 regarding removal of earth from land Gat No. 219 and part of land Gat No. 61 as detailed in that application. This application seems to have been filed on 17th March, 2005. Learned Civil Judge, Junior Division, Karjat passed common order below Exhibit-17 as well as below Exhibit-1 in Regular Darkhast No. 20 of 2002 since he had also received letter from the District Collector, Ahmednagar seeking guidance regarding execution of the decree passed in Regular Civil Suit No. 22 of 1981. Learned Civil Judge, Junior Division directed the District Collector or Gazetted Officer to complete the partition proceeding in the light of decree and as per Section 54 of the Code and Section 85 of The Maharashtra Land Revenue Code, 1966 as soon as possible. It was also informed that no guidelines can be issued from the Court in respect of partition as he is empowered to deal with situation according to law. Application Exhibit-17 came to be allowed and contesting Judgment Debtor Nos. 1, 2, 7 and 8 are restrained from carrying out any type of activity causing damages to the suit property under partition till the partition proceeding is finalised. The petitioner is partly aggrieved by this order, more specifically item No. 2 of the operative part of the order.

4. On behalf of the respondents, affidavit in reply is filed. It is sworn in by Mr. Popat Gangarde. Death of defendant No. 3 Shiubai during the pendency of Regular Civil Appeal No. 269 of 1997, on 22nd April, 1998, is stated. Filing of the Day Application No. 5 of 2004, by the petitioner and rejection thereof is also averred. Copy of this application is annexed with the reply affidavit. Reference is made to the judgment of the Apex Court reported in Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others, and prayer is made for rejection of the petition.

5. It is not in dispute that the petitioner had filed an application on 2nd December, 2004 in a partition proceeding pending before the Revenue Authority.

In this application, petitioner has stated that decree passed by the Civil Court, in her favour, is for 1/9th share of the suit property. Suit properties include agricultural lands, paying revenue to the State. Petitioner claims relationship of daughter-mother with deceased defendant No. 3 Shiubai Madhav Gangarde. Based on this relationship, the petitioner seeks 2/9th share from the share of deceased Smt. Shiubai Madhav Gangarde. According to the petitioner, she is entitled to 1/3rd share out of the suit property i.e. her own 1/9th share, coupled with 2/9th share, which, according to her, she is entitled from the holding of her deceased mother. She further sought directions by this application dated 2nd December, 2004 for measurement by the surveyor for said 1/3rd share. This application of the petitioner dated 2nd December, 2004 motivated the District Collector, Ahmednagar to seek guidance from the Civil Court.

6. Learned Counsel for the respondent has invited my attention to judicial pronouncement in the matter of Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others, . Provision laid down u/s 54 of the Code is considered. The judicial pronouncements have to be read in relation to the facts obtaining in the cited judgment. The Apex Court, in the matter of Khemchand (supra) adverted to the facts enlisted in paras 2 and 3 of the judgment.

7. Two glaring facets of the case of Khemchand can be noted, that it is a case of assignment of rights and disposal of some properties during the pendency of the partition suit. Ultimately, writ petition was filed in High Court under Article 226 of the Constitution questioning the correctness of the partition and that is how the matter was before the Apex Court. The Apex Court, in this context, considered mainly two provisions i.e. Section 54 of the Code and Section 52 of the Transfer of Properties Act (principle of lis pendence). Learned Counsel for the respondent has relied on para 6 and observations of the Apex Court. In my considered view, this judgment is not helpful to the facts obtaining in the case on hand. The Apex Court, while considering the powers of the Collector u/s 54 has held that if there is no dispute in case of death of one of the party to the decree the Collector should not fold up its hand and return the papers to the Civil Court. Adjudication of the civil rights is a matter to be dealt with and decided by the Civil Courts. If, in the facts and circumstances of the case, there is no dispute between the parties regarding succession to the property of deceased, the authority concerned is not required to decide the civil rights of the parties. The authority concerned should proceed with the matter after hearing the parties. However, this judgment would not be applicable if there is a dispute between the parties regarding their respective rights.

8. Now turning to the facts of the present case, it is indisputable that on account of death of Shiubai the present petitioner is claiming enlargement of her original share decreed by the Civil Court. The respondent No. 1, in this writ petition, is claiming the property of deceased Shiubai based on the deed of Will alleged to have been executed by deceased Shiubai after passing of the preliminary decree by the Civil Court. Thus, it is not a case wherein there is no dispute between the

legal heirs of deceased Smt. Shiubai. On this background, in my view, ratio of the judgment of the Apex Court in the matter of Khemchand (supra) has no application, to the facts obtaining in the case on hand.

9. Learned Counsel for the respondent has relied on another judgment of learned Single Bench of this Court in the matter of Anandrao Ganpatrao Belkhode and Ors. v. Azizul Haq Hazi Abdul Ban deceased by L.Rs. and Ors. reported in 1997(3) M.L.J. 419. Here also, history of the litigation is recorded by the learned Single Bench of this Court in its paragraph Nos. 1 to 4.

In my view, considering the fact situation, ratio of this judgment is also not applicable to the facts of the case on hand.

10. Gaware, learned Counsel for the respondent has invited my attention judgment of learned Single Bench of this Court in the matter of Dhansukhbhai Fakirbhai Patel Vs. Fakirbhai Dayabhai Patel and Others, . The learned single Bench of this Court held that Civil Court does not render functus officio after it sends decree to Collector for partition. Court is not entirely deprived of controlling action taken by Collector. Said control is limited and is to be exercised only if Collector contravenes decretal order or transgresses law relating to partition or refuses to execute decree. The Apex Court or this Court, while considering the fact situation in a given case, have passed orders. All that is necessary is that judgments are to be construed in proper perspective.

11. Parties to this petition are Hindu by religion. They are governed by the provisions of Hindu Law. Partition is a severance of joint status and as such it is a matter of individual volition. Under the Hindu Law, partition is of two kinds; (i) separation in status and (ii) separation in interest or estate. Petitioner had filed a suit for partition and had claimed separate possession of her share. Regular Civil Suit No. 22 of 1981, filed by the petitioner, for partition and separate possession, ended in passing of preliminary decree, declaring her 1/9th share out of the suit properties. Petitioner herself, respondent No. 1 Popat Madhav Gangarde and their mother Shiubai were parties to Regular Civil Suit No. 22 of 1981 and were the members of Joint Hindu Family, prior to date of filing of the suit. The expression "decree" has been defined in Section 2(2) of the Code. A "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. In the case on hand, preliminary decree was passed and until there is a final decree in such a suit, the suit, in fact, is pending.

12. The petitioner had brought on record death of her mother Shiubai who was also allotted 1/3rd share in the preliminary decree, by the Civil Court. As noted above, the Collector sought guidance from the Civil Court. There is no prohibition in the Code for passing of more than one preliminary decree, if circumstances justify the same and if it may be necessary to do so, particularly in partition suits. After passing of the decree, some parties to suit, may die and shares of

other parties, thereby may increase. In case of such death of a party to partition suit, augmentation of shares in relation to parties to the suit would be legal and natural. In my opinion, it would be convenient to the Court and advantageous to the parties, especially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a finalisation of the final decree. If such exercise is undertaken, either at the instance of the aggrieved party to the suit or by the authority saddled with the legal responsibility of executing the preliminary decree, it would be justifiable, legal and proper. In a given case, there may be two preliminary decrees. Civil Court, which has passed the earlier preliminary decree, in such fact situation, would be justified for said approach and passing of the subsequent preliminary decree in relation to suit properties. In such case, there is a clear determination of the rights of the parties to the suit on the question in controversy and I see no difficulty in holding that in such cases there is a decree deciding, these disputed rights.

13. So far partition suits are concerned, I have no doubt, in my mind, that subsequent event after passing of the preliminary decree, may necessitate a change in the shares and the Court can and should do so, if there is a dispute in that behalf. The order of the Court, deciding that dispute and making variation in shares specified in the preliminary decree, already passed, is a decree in itself which would be liable to an appeal. However, while saying so, it must be confined to the partition suits and in relation to parties belonging to Hindu religion.

14. There was divergence of opinion on this point in different High Courts. At this stage, it is apropos to make a reference to Division Bench judgment of this Court in the matter of Parashuram Rajaram Tiwari Vs. Hirabai Rajaram Tiwari and Others, . View taken by the Division Bench of this Court in the case of Parashuram (supra) supports my view. The view taken by the Division Bench of this Court in the said matter of Parashuram (supra.) is further approved by the Supreme Court in the matter of Phoolchand and Another Vs. Gopal Lal, . In the case of Phoolchand (supra) suit for partition and possession was decreed by the Court at the first instance by passing preliminary decree on 1st August, 1942. However, before a final decree could be passed, on the report of the Commissioner, in terms of the preliminary decree, one of the defendant Sohan Lal, in the suit, died on 13th May, 1947. Soon thereafter, his widow Smt. Gulab Bai also died on 22nd November, 1947. Dispute arose between parties about the shares allotted to these two deceased persons. One of the defendant Gopal Lal claimed that his father Sohan Lal had made a Will in his favour on 2nd June, 1940. Phoolchand, plaintiff in the suit, challenged the genuineness of the Will. Deceased Gulab Bai had allegedly executed a sale deed dated 19th October, 1947 and registered on 10th January, 1948 in relation to properties allotted to her share by preliminary decree. This sale deed was challenged by one of the defendant Gopal Lal. These disputes were brought before the Civil Court soon after the deaths of Sohan Lal and Smt. Gulab Bai. However, nothing seems to have been done for long years. On 12th July, 1961 trial Court decided the

disputes with respect to the shares of Sohan Lal and Smt. Gulab Bai. Trial Court also passed a verdict regarding the Will that it had not been proved. Sale deed in favour of Phoolchand was upheld by the trial Court. Consequently, the trial Court redistributed the shares indicated in the preliminary decree of 1st August, 1942. Naturally, by this redistribution, the share of Phoolchand was increased from 1/5th to 1/2nd. The share of Gopal Lal was also increased from 1/5th to 1/4th and the share of Rajmal was increased from 1/5th to 1/4th. The trial Court, however, did not prepare another formal decree on the basis of the redistribution of shares. This act of trial Court was not approved by the High Court as well as Supreme Court. The Apex Court, in the matter of Phoolchand (supra) held:

(7) ...We see no reason why in such a case if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the Court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties.

The Apex Court opined that in the circumstances of that case, it was open to the Court to draw a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Since there was dispute between the surviving parties, as to devolution of the shares of the parties, who were dead and that dispute was decided by the trial Court, in that case, and, thereafter, the preliminary decree already passed was amended, such decision, according to the Apex Court, amounted to a decree and was liable to appeal. The Apex Court made it clear that this can only be done so long as the final decree has not been passed.

15. Now, turning to the facts of the present case, it is indisputable that petitioner and respondents are disputing their claims in relation to share of deceased Shiubai. Such dispute has to be adjudicated upon by the Civil Court which has earlier passed the preliminary decree. The Collector, or the authority executing a preliminary decree u/s 54 of the Code and Section 85 of Maharashtra Land Revenue Code, cannot be said to be a competent authority for such adjudication. The Collector or the authority concerned, therefore, have to seek guidance or refer the precept to Civil Court for such resolution of dispute. The Civil Court may amend the earlier preliminary decree or pass fresh preliminary decree varying earlier determined shares in accordance with the provisions of law. A proposition that Civil Court, after passing of the preliminary decree, has no control over the decree, in the premises of three Judge Bench judgment of the Apex Court in the matter of Phoolchand (supra), cannot be accepted. In the case on hand, the trial Court, therefore, ought to have adjudicated upon the claims of the parties and suitably modified and/ or passed fresh preliminary decree.

16. A reference is also made to the order passed by the Appellate Court in Review Application. From the order it appears that the Appellate Court has referred to a judgment of the Apex Court in the matter of Khemchand (supra). The Appellate Court, while rejecting the review application, observed that the

Collector has ample powers in view of citation i.e. Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others, and he should allot the share of the deceased after passing of the decree. Advocate for the respondents Mr. Gaware submits that finality has been attributed so far as decision in Misc. Civil Application No. 5 of 2004 is concerned. However, I cannot ignore the fact that preliminary decree passed by the trial Court is made final by the first Appellate Court in Regular Civil Appeal No. 269 of 1997. In this view of the matter, there is no impediment while considering this writ petition favourably, despite rejection of Day Application No. 5 of 2004 (Review) by the first Appellate Court on 17th September, 2004. It cannot be ignored that the Collector has sought a guidance from the Civil Court. Person holding decree by the competent Civil Court, in law is entitled to seek its ultimate satisfaction in accordance with provisions of law.

17. Mr. Bhapkar, learned Counsel for the petitioner, has relied on a judgment of the learned Single Bench of this Court in the matter of Baban S/o Shamrao Menghare and Anr. v. Madhukar S/o Shamrao Menghare and Ors. reported in 2007(1) M.L.J. 306. I am in agreement with the view taken by the learned Single Bench of this Court in the matter of Baban (supra).

18. In this view of the matter, I am inclined to quash and set aside the order passed by the trial Court. The matter needs to be remanded back to the learned Civil Judge, Junior Division, Karjat for its reconsideration in the light of the observations made by this Court in the foregoing paragraphs. Learned Civil Judge, after hearing the parties, shall pass appropriate orders on reference/letter seeking guidance of the Collector dated 26th April, 2004. Both the parties shall be given opportunity of being heard and after hearing the parties further orders, in accordance with the provisions of law, shall be passed by the learned Civil Judge, Junior Division, Karjat district Ahmednagar.

19. Writ petition is partly allowed. Part of the judgment/order passed by the learned Civil Judge, Junior Division, Karjat - "Inform the Collector, Ahmednagar that no guidelines can be issued from this Court in respect of partition as he is empowered to deal with situation according to law. - is quashed and set aside. The learned Civil Judge, Junior Division, Karjat, district Ahmednagar shall hear the parties and pass appropriate order on the letter of the Collector, adjudicating upon the pleas raised by the parties, expeditiously and as far as possible within two months from the date of appearance of the parties. Considering the fact that the decree passed is in the suit of 1981, if necessary, learned Civil Judge, Junior Division shall hear the matter on day-to-day basis. The parties shall appear before the learned Civil Judge, Junior Division, Karjat, district Ahmednagar on 10th September, 2007 at 11.00 a.m. Rule is made absolute in above terms. No costs.