

(2010) 12 BOM CK 0039

In the Bombay High Court

Case No : Second Appeal No. 10 of 2003

Lilavati Narayan Arolkar since deceased, thr. L.Rs. and Others APPELLANT
Vs

Smt. Gohuke alias Bhanumati Nagesh, Housewife and her RESPONDENT
Husband and Others

Date of Decision : 23-12-2010

Acts Referred:

Citation : (2011) 113 BOMLR 319

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : Sudin Usgaonkar, for the Appellant; D.J. Pangam, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Heard Mr. Usgaonkar, learned Counsel for the Appellants and Mr. Pangam, learned Counsel for Respondent Nos. 1 and 2. None for other Respondents.

2. By this Second Appeal, the Appellants take exception to the judgment and decree dated 9th October, 2002 passed by the Additional District Judge, Mapusa in Regular Civil Appeal No. 10/2000 allowing the appeal against the judgment and decree dated 30th November, 1999 by which the Civil Judge, Senior Division, Mapusa dismissed the suit filed by the Plaintiffs for partition.

3. Respondent Nos. 1 and 2, who are the original Plaintiffs filed the above suit against the Appellants and Respondent Nos. 3 to 10 for partition of the suit property. The Plaintiffs claimed 1/6th share in the property "RAINCHO SOROVO" surveyed under Chalta No. 3 of P. T. Sheet No. 100 of City Survey Mapusa ("The suit property"). The Defendant Nos. 1 to 10 and 16 to 21 contested the suit by filing written statement. The trial Court dismissed the suit bearing No. Special Civil Suit No. 187/1990. The Plaintiffs examined one witness and produced several documents. The Defendants examined four witnesses and produced several documents. The trial Court dismissed the suit, whereas the lower

appellate Court has allowed the appeal.

4. The parties shall hereinafter be referred to as per their status before the trial Court. On the basis of the pleadings of the parties, the trial Court framed the following issues:

(i) Whether the Plaintiffs prove that they are entitled to get a declaration that they have 1/6th share in the suit property ?

(ii) Whether the Plaintiffs prove that they are entitled to partition of the suit property by metes and bounds ?

(iii) Whether the Defendant Nos. 1 to 10 and 16 to 21 prove that the suit property originally allotted to Sadashiv Arolkar by the Comunidade. Thereafter, the said Sadashiv had given the suit property to the Defendant No. 16, since that time, the Defendant No. 16 has been in exclusive, peaceful, open and uninterrupted possession of the suit property ?

(iv) Whether the Defendants prove that the Defendant Nos. 16 and 17 are in exclusive enjoyment of the suit property consisting of 10 Banana trees, 1 Bread fruit tree, 2 lime trees, 1 Coconut tree, 50 Bamboo trees, 1 chickoo tree, 1 Zambul tree and other trees for last more than 30 years ?

5. The trial Court upon appreciation of the evidence led by the parties held that the Plaintiffs were not entitled to any share in the suit property and consequently, they are not entitled to partition of the suit property. The trial Court held that Defendant Nos. 16 and 17 were in exclusive, peaceful, open and uninterrupted possession of the suit property and the trees standing thereon. Consequently, the trial Court dismissed the suit.

6. The lower appellate Court held that the suit property was initially allotted to Sadashiv - the father of Plaintiff No. 1 and as such, the Plaintiffs had right to the suit property. The appellate Court held that the defence of the Defendants that late Sadashiv had given the suit property to Sonu Arolkar-Defendant No. 16 was not established, but on the contrary, the documents on record clearly proved that the possession of the suit property was given to late Sadashiv. The lower appellate Court also negated the contention of the Defendants that the suit property was excluded from the inventory proceedings since the property was already allotted to Defendant No. 16. Consequently, the lower appellate Court reversed the decree passed by the trial Court and allowed the suit filed by the Plaintiffs.

7. Mr. Usgaonkar, learned Counsel for the Appellants submitted that the lower appellate Court has not exercised the jurisdiction in accordance with law in reversing the well reasoned findings given by the trial Court. According to Mr. Usgaonkar, the suit property was not included in inventory proceedings since the suit property was given to Defendant No. 16 (Appellant No. 5) in the year 1955 by his father late Sadashiv and since then, he is in possession of the suit property. He further submitted that Defendant No. 16 had paid annuities to the

Communidade as evident from the certificate and, therefore, title vests in Defendant No. 16. He further submitted that the Plaintiffs have acquiesced in the possession of Defendant No. 16 in respect of the suit property and, therefore, the findings given by the lower appellate Court are liable to be set aside. He further submitted that since Defendant No. 16 has been in possession of the suit property for more than 30 years, he has acquired title to the suit property. Mr. Usgaonkar further submitted that in any event, Defendant No. 16 has been in adverse possession over the suit property and, therefore, he has acquired title in respect of the suit property. Mr. Usgaonkar further submitted that although specifically the Defendants have not pleaded the ingredients of adverse possession, from reading of the written statement as a whole, the plea of adverse possession is made out. Mr. Usgaonkar further submitted that the pleadings have to be read as a whole and considering that the pleadings are mofussil pleadings, the same have to be construed liberally. In support of his submissions, Mr. Usgaonkar relied upon the judgment of the Apex Court in the case of Des Raj and Others Vs. Bhagat Ram (Dead) By LRs. and Others, .

8. Per contra, Mr. Pangam, learned Counsel for Respondent Nos. 1 and 2 submitted that the ingredients of adverse possession have not been pleaded by the Defendants in the written statement and even the issue regarding the adverse possession has not been framed and, therefore, the plea of adverse possession taken by the Appellants has to fail. He further submitted that the Defendants in the written statement have not denied the title of the Plaintiffs and have taken a specific plea that late father Sadashiv had allotted the property to Defendant No. 16-Sonu Arolkar, which is difficult to be accepted. He further submitted that mere possession of the suit property by Defendant Nos. 16 and 17 would not confer exclusive title on them in as much as it is well settled that possession of a co-owner is possession on behalf of all the co-owners. In so far as exclusion of suit property from inventory proceedings is concerned, Mr. Pangam submitted that no specific plea has been taken, and, therefore, such a plea is nothing but an afterthought. He further submitted that the plea that the property was allotted to Defendant No. 16 by late Sadashiv is inconsistent with the plea taken by the Defendant that Defendant No. 16 is in adverse possession of the suit property, and since both the pleas are mutually destructive, the Defendants are not entitled to take up such a plea. He further submitted that the judgment dated 25th August, 1981 relied upon by the Plaintiffs clearly proves that even in the year 1981, Defendant No. 16 admitted that title in respect of the suit property vested in late Sadashiv. He, therefore, submitted that no interference is warranted with the impugned judgment and decree. In support of his submissions, Mr. Pangam relied upon the following judgments:

(i) Govindammal Vs. R. Perumal Chettiar and Others, .

(ii) V. Rajeshwari (SMT) v. T. C. Saravanabava (2004)1SCC 511.

(iii) Vidya Devi alias Vidya Vati (Dead by L.R"s) Vs. Prem Prakash and others, .

9. I have carefully considered the rival submissions and perused the record and judgments relied upon.

10. The appeal has been admitted on the following substantial questions of law:

(i) Whether the judgment of the first appellate Court is liable to set aside for ignoring pleadings at paragraph No. 2(a) of the written statement and ignoring the evidence on record that Chalta No. 3 of P.T. Sheet 100 was a distinct property not forming part of the inventory proceedings ?

(ii) Whether on facts and circumstances, the first appellate Court was right in reversing the judgment of the trial Court ?

11. In support of the Plaintiffs' case, the Plaintiffs examined Prabhakar Patre - PW1-constituted attorney of the Plaintiffs and produced several documents. The Defendants examined four witnesses namely-Sonu Arolkar-Defendant No. 16 as DW1, Bhikaji Madgaunkar-DW2, Vijay Arolkar-DW3 and Dashrath Gadekar-DW4. As stated above, the Defendants have taken a specific defence that the suit property was given to Defendant No. 16 by late Sadashiv and since then, he has been in exclusive peaceful, open and uninterrupted possession of the said property. At the outset, it is pertinent to note that in the year 1955, Defendant No. 16 Sonu was hardly 16 years of age as is evident from his evidence. His evidence discloses that he was 59 years old in the year 1998 and as such, he was hardly 16 years old in the year 1955. It is very difficult to believe that late Sadashiv would have given the property to Defendant No. 16-Sonu Arolkar, who was a young boy of 16 years. In any case, since the property was allotted by Comunidade to Sadashiv, there was no question of he further allotting the property to Defendant No. 16 that too orally. The lower appellate Court is right in holding that in the absence of any document evidencing the grant of the property in favour of Defendant No. 16, it is difficult to accept the case of the Defendants that the suit property was given to Sonu by his late father Sadashiv in the year 1955. Even if it is accepted that Defendant No. 16 has been in possession of the suit property since 1955 as claimed by him, the same by itself would not confer any exclusive title on him since it is well settled that possession of a co-owner is on behalf of all the co-owners and he cannot claim exclusive title to the exclusion of other co-owners. In so far as the plea of adverse possession is concerned, no doubt, the lower appellate Court was not justified in holding that such a plea has not been taken by the Defendants in the written statement. The Defendants in paragraph No. 8(a) have taken a plea that Defendant Nos. 16 and 17 have become absolute owners of the suit property by prescription and by adverse possession. However, as rightly contended by Mr. Pangam after placing reliance upon 3 judgments of the Apex Court referred to above, the Appellants have not pleaded necessary ingredients required for taking the plea of adverse possession.

In the case of V. Rajeshwari (supra), the Apex Court held that the Defendants in the suit had not pleaded as to the point of time he started prescribing hostile title, which was necessary for him to plead and as such, the plea of adverse

possession was devoid of any merit.

In Vidya Devi's case (supra), the Apex Court held that normally when the property is joint, co-sharers are the representatives of each other and the co-sharer in possession of the joint property shall be deemed to be in possession on behalf of the co-sharers and as such, it would be difficult to raise the plea of adverse possession. If the co-sharer had been professing hostile title as against the other co-sharers openly and to the knowledge of other co-owners he can, provided hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession. The Apex Court further held that three elements are necessary for establishing the plea of ouster in the case of co-owner they are (i) declaration of hostile animus (ii) long and uninterrupted possession of person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner.

12. In the present case, there is absolute no evidence on record that there was declaration of hostile animus prior to filing of the suit by which it may be said that title by way of adverse possession had crystalised in favour of Defendant No. 16. Moreover, in the present case, no issue was framed by the trial Court regarding adverse possession and in my opinion rightly so. It is pertinent to note that the Defendants have not seriously disputed the relationship of the parties, more particularly the fact that Plaintiff No. 1 is the daughter of late Sadashiv. This being the position, I do not find any infirmity having been committed by the lower appellate Court in holding that the possession of Defendant No. 16 was a possession of a co-owner and as such, would not confer any exclusive title on him. The finding of the lower appellate Court that the suit property was included in the inventory proceedings is a finding based upon proper appreciation of evidence on record. It is pertinent to note that as rightly pointed out by Mr. Pangam, the Defendants in their written statement did not plead about the exclusion of the suit property from inventory proceedings and it is only during the course of evidence, they chose to lead evidence on the said aspect. In any case, even if it is accepted that the suit property was excluded from inventory proceedings, the same by itself would not confer any title on Defendant No. 16 in respect of the suit property since the possession of Defendant No. 16 in respect of the suit property, even if proved would be possession on behalf of the co-owners.

13. The lower appellate Court was right in placing reliance upon the judgment dated 25th August, 1981 with which the witness for the Plaintiffs was confronted. The same judgment delivered by the Enquiry Officer, City Survey, Mapusa discloses that Defendant No. 16-Sonu had himself stated that the property belonged to his father in terms of the certificate dated 29th September, 1964 issued by Comunidade of Mapusa and he claimed to be in possession of the said property and consequently, the said Enquiry Officer declared the title of Sadashiv Arolkar in respect of the suit property and Sonu Arolkar was held to be

in possession of the suit property. In my opinion, the lower appellate Court was perfectly justified in holding that instead of advancing the case of the Defendants, the said document clearly supported the case of the Plaintiffs in as much as in the year 1981 itself, Defendant No. 16 acknowledged title of his father Sadashiv to the said property. As such, the question of Defendant No. 16 acquiring title by prescription or by adverse possession of the suit property does not arise.

14. In so far as certificate dated 3rd April, 1991 issued by the Comunidade certifying that Defendant No. 16 had made payment of tax in respect of "Raincho Sorovo" is concerned, in my opinion, the same would not advance the case of the Defendants in support of their plea that by the said document Defendant No. 16 acquired title to the suit property. Admittedly, the suit property was granted to Sadashiv by the Comunidade and as such, mere payment of tax, if any, in respect of the suit property by Sonu Arolkar to the Comunidade would not confer exclusive title on him.

15. In so far as the judgment in the case of Des Raj (supra) relied upon by Mr. Usgaonkar is concerned, the same does not advance the case of the Appellants. Even if the pleadings in the written statement are liberally construed, the same do not advance the case of the Defendants for the reasons already stated above.

16. In view of the above discussion, I do not find any merit in this appeal. Hence, the substantial questions of law formulated are answered against the Appellants. Consequently, the appeal is dismissed. Considering the facts and circumstances of the case, parties are directed to bear their own costs.