
(2008) 06 BOM CK 0103
In the Bombay High Court
Case No : S.A. No. 362 of 1999

Mahadu Appa Wanjole

APPELLANT

Vs

Laxman Veerappa Wanjole and Others

RESPONDENT

Date of Decision : 05-06-2008

Acts Referred:

Evidence Act, 1872 — Section 101, 106

Citation : (2008) 5 ALLMR 206 : (2008) 5 MhLj 680

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : A.S. Khandeparkar, instructed by Khandeparkar and Associates, for the Appellant; None, for the Respondent

Judgement

S.S. Shinde, J.—This matter was on board under the caption of Final Hearing. When the matter was called out for final hearing at 3.15 p.m. on 22nd April, 2008, nobody appeared for the respondents to represent them. Mr. Khandeparkar, the learned Counsel appearing for the appellant, was present. He argued the matter at length till 5.00 p.m. on 22nd April, 2008.

On 22nd April, 2008 itself, Mr. Khandeparkar for the appellant was requested to communicate to the advocate for the respondents the fact that the matter is fixed for final hearing and remained part heard, to be heard on 23rd April, 2008. On 23rd April, 2008, Mr. Khandeparkar for the appellant informed me that accordingly he intimated the said fact to the respondents' advocate through his colleague advocate Mr. Kalake and Mr. Kalake informed him that a message was given to the advocate for the respondents that the matter is fixed for final hearing on 23rd April, 2008. But nobody appeared for the respondents on 23rd April, 2008.

2. This is a second appeal filed by the appellant, who is the original plaintiff, against the judgment and order passed by the Addl. Sessions Judge, Gadhingalaj allowing the appeal filed by the respondents/defendants and setting aside the judgment and decree of the trial Court.

Factual Matrix:

3. The case of the plaintiff, in brief, is as under:

The appellant - original plaintiff had filed a suit for partition in respect of 13 agricultural fields and 7 houses situated at village Uttur, Taluka Ajara against the respondents - original defendants. (For the sake of convenience, I am referring the parties in the appeal as the plaintiff and the defendants.). The plaintiff's father Appa was the real brother of defendant No. 1 Laxman. The suit agricultural fields Gat Nos. 313, 323, 324, 33, 373, 374, 402, 416, 419, 433, 435, 436 and 415 and the suit houses bearing Grampanchayat Nos. 227, 227/1, 228, 229, 230, 662, and 663 situated at village Uttur are the joint family properties of the plaintiff and the defendants. Since defendant No. 1 - Laxman was the Karta of joint family, all the suit properties, mentioned hereinabove, were entered in his name.

4. In the year 1960, the plaintiff and defendant No. 1 had given a wardi for deleting the name of defendant No. 1 as a Karta of joint family from the record of the suit properties and for entering it in their names to the extent of 8 anna share each. Accordingly on the basis of the said wardi, Mutation Entry No. 3104 has been effected and the names of the plaintiff and defendant No. 1 have been entered into the revenue record to the extent of 8 anna share each. Since then they are in possession of the suit properties.

5. It was the case of the plaintiff that a dispute arose between them on account of the trees and, therefore, it was difficult for them to cultivate the suit fields jointly. It is averred by the plaintiff that he is having half share in the suit properties. It is further pleaded by the plaintiff that the suit house bearing Grampanchayat No. 227/1 is also the joint family property of the plaintiff and the defendants though it is in the name of defendant No. 1. As some of the suit properties are in the name of defendant Nos. 2 to 4, they were made parties to the present suit. The plaintiff has, therefore, demanded partition of the suit properties from the defendants in the month of December, 1984, but they have refused for the same. Hence he has filed the present suit bearing Regular Civil Suit No. 5/1985 before the Civil Judge, Junior Division Ajara, at Ajara.

6. The defendants filed their written statement and resisted the claim of the plaintiff. They contended that in the year 1960 the oral partition took place between them through the panchas. After the aforesaid partition, the plaintiff and the defendants have given wardi for recording their names in the record of the suit properties as per their shares of the oral partition of the year 1960. Accordingly their names were entered into in the record of the suit properties to the extent of their respective shares. The defendants have further contended that the partition of the ancestral properties of the plaintiff and the defendants took place between them in the year 1960. Hence according to the defendants, there is no right to the plaintiff. It is the contention of the defendants that they had made huge expenditure on the development of the agricultural fields. After

the partition, the defendant Nos. 2 to 4 have constructed the house bearing Grampanchayat Nos. 227/1, 229 and 230 in the agricultural field and these are not their ancestral properties. They have further contended that the house bearing Grampanchayat Nos. 227 and 662 went to the share of plaintiff and house bearing Grampanchayat Nos. 663 and 228 went to their share in the partition and, since then both the plaintiff and the defendants are residing separately in their respective houses. It is further contended by the defendants that the entire Agricultural Field Gat Nos. 435, 416 and 374 went to the share of the plaintiff and the entire agricultural field Gat Nos. 373 and 433 came to the share of the defendant No. 1. The agricultural Gat Nos. 613, 323, 324, 333, 402, 416, 419 and 515 have been divided in equal half share between the plaintiff and the defendant No. 1 and, since then they are cultivating their respective shares separately. They have further contended that the present plaintiff had filed a suit bearing Regular Civil Suit No. 21/81 against the defendants restraining them from interfering with the possession of the plaintiff in respect of the property in his share. The said suit decided against the plaintiff. Lastly it is contended by the defendants that if the Court comes to the conclusion that no partition took place between the parties, then the portions which are in possession of the parties be allotted to them. The Agricultural Field Gat No. 515 be allotted to them as their houses are standing therein and the suit house Grampanchayat No. 227/1 is their self acquired property, therefore, it should not be partitioned and they prayed for dismissal of the suit.

7. On the basis of aforesaid pleadings, the trial Court framed the following issues:

8. Before the lower Court defendant No. 1 Laxman only examined himself and his evidence is at Exhibit 56. The plaintiff did not enter into the witness box. While considering the issue Nos. 1, 2 and 3 the lower Court relied on the deposition of defendant No. 1 defendant No. 1 Laxman deposed in his evidence that prior to 30 years back the partition took place between himself and the plaintiff through panchas and in the said partition, he received pieces of agricultural fields of different 11 places. He has further deposed that some of the pieces of agricultural lands are divided in equal 1/2 share between them and some of the entire agricultural fields allotted to their shares. As per the pleadings of the defendants the partition took place in the year 1960. According to defendant No. 1, in the above partition, the entire Gat Nos. 435 and 374 are allotted to the share of the plaintiff and the entire Agricultural Field Gat Nos. 373 and 433 are allotted to the share of defendant No. 1. The defendants have further pleaded that agricultural land Gat Nos. 613, 323, 324, 333, 402, 416, 419 and 515 are allotted in equal half shares to the plaintiff and defendant No. 1 in the above said partition of 1960. It was observed by the trial Court that defendant No. 1 has also not stated in his evidence how much pieces of the agricultural fields are divided in equal half share between them. Defendant No. 1 has also admitted in his cross-examination that he cannot tell which of the portion of all the 10 pieces of agricultural fields has been given to the plaintiff and which of the portion of the above said 10 pieces come to his share. The lower Court further observed

that defendant No. 1 Laxman has admitted in his cross-examination that Bhima Nana Savekar and Krishna Nagu Bamma were present as panch at the time of partition. He has also admitted that at present both the above said panchas are alive. The trial Court further came to the conclusion that though these two panchas were alive, they were not examined by the defendant No. 1. In the opinion of the trial Court, the best piece of evidence which was available to prove partition, as alleged by defendant No. 1, was the evidence of both the panchas who were present at the time of partition as deposed by defendant No. 1. After considering the evidence of defendant No. 1, the trial Court came to the conclusion that there is no partition between the parties by taking measurement.

9. After going through the pleadings in the plaint and after considering all the averments in the plaint, the trial Court came to the conclusion that R.C.S. No. 21/81 was not in respect of the properties in question. The trial Court perused the plaint in R.C.S No. 21/81. The said suit was filed by the plaintiff against the present defendant Nos. 1 and 2 for injunction restraining them not to interfere with his possession of Gat No. 490 admeasuring 6 hectares 53 R of village Uttur.

10. The trial Court scrutinized the evidence on record, more specifically, the cross-examination of defendant No. 1, perused the plaint and written statement in the present suit as well as R.C.S. No. 21/81. The trial Court has also perused the order passed in R.C.S No. 21/81. R.C.S. No. 21/81 was in respect of Gat No. 490 which was not the subject-matter of the present suit. Trial Court concluded Issue Nos. 1,2 and 3 in the negative i.e. against the defendants. The trial Court recorded clear finding that there was no partition by metes and bounds in the year 1960 and there is no document on record to show that there was partition in 1960.

11. So far as Issue Nos. 4 and 5 are concerned, the trial Court relied on the deposition of defendant No. 1. After appreciating the evidence on record, the trial Court came to the conclusion that all the suit properties are joint family properties of the plaintiff and defendants and there is no other evidence on record to show that the house properties Grampanchayat Nos. 227/1, 229 and 230 are the self acquired properties of the defendants. The trial Court also concluded these Issue Nos. 4 and 5 against the defendants. Finally the trial Court decreed the suit of the plaintiff.

12. Against the judgment and order of the trial Court, the defendants preferred an appeal before the District Judge, Gadhinglaj bearing Regular Civil Suit No. 217 of 1996. It was the contention of the defendants before the lower Appellate Court that all the properties were in the name of defendant No. 1 as Karta of the joint family. However, in the year 1960 the plaintiff and defendant No. 1 have jointly given an application for deleting the name of defendant No. 1 as Karta of the joint family from the record of rights of the suit properties and for entering the name of plaintiff and defendant No. 1 in the record of right to the extent of 8 annas share each. Accordingly the Mutation Entry No. 3104 has been effected and the name of the plaintiff and defendant No. 1 have been recorded in revenue

record as owners to the extent of 8 annas share each in respect to the properties described in plaint para Nos. 1A and B. It was also contended by the defendants before the lower Appellate Court that thought the partition took place in 1960, the plaintiff had asked the defendants to give his shares in 1984. But they refused for the same, therefore, the plaintiff had filed a suit for partition and separate possession of the properties.

13. In the said appeal, the appellants/defendants as well as the respondent/plaintiff before the lower Appellate Court have filed their written arguments at Exhibit 45 and Exhibit 47 respectively. On the basis of pleadings of the parties in the appeal, the lower Appellate Court framed two points for its considerations, which are as under:

The lower Appellate Court considered both the points together. It was the contention of the defendants in the written arguments before the trial Court that the trial Court has not framed the issues properly and it was incumbent upon the plaintiff to prove the nature of the property but he, neither entered into the witness box nor adduced any evidence to that effect. The lower Appellate Court did not find any illegality in casting the burden of proof upon the defendants to prove the family partition as alleged by them. The lower Appellate Court has referred the Mutation Entry No. 3104 in its judgment and on the face of that document, the lower Appellate Court has seen that, appellant/defendant No. 1 and respondent/plaintiff have jointly moved an application dated 25-3-1960 for deleting the name of appellant No. 1 as Karta of the family and for recording their names to the suit properties to the extent of 8 annas share each and, accordingly, the mutation entry found to have been certified. On the basis of Mutation Entry No. 3104, the lower Appellate Court inferred that this mutation entry is sufficient to indicate the intention of the parties to become the separate owner of a separate share and, ultimately the lower Appellate Court allowed the appeal filed by the appellants/defendants and set aside the judgment and decree of the lower Court. Hence this second appeal filed by the original plaintiff.

14. This Court on 22-12-1999 admitted the appeal on Ground Nos. A, B and C and expedited the hearing. The Ground Nos. A, B and C read as under:

A. Whether the Lower Appellate Court was correct in holding that parting was effected between the Appellants and the Respondents without there being any deed of partition or any substantial proof of partition?

B. Whether the Lower Appellate Court was in error of law in relying upon the Mutation Entry which has no evidentiary value but is passed in summary proceedings.?

C. Whether the Lower Appellate Court was correct in holding the family partition in the absence of any substantial evidence?

Submissions by the Appellant/Plaintiff

15. As already noted above, neither the advocate for the respondents/defendants

nor their advocate was present to represent them at the time of final hearing of this appeal. The learned advocate for the appellant/plaintiff has informed the Court that the advocate for the respondents/defendants have intimated about the hearing of the matter. This appeal is filed and admitted in 1999. Since then it is pending for final hearing. Hence I proceeded to hear the learned advocate for the appellant/plaintiff.

16. The learned advocate for the appellant/plaintiff submitted that the lower Court has rightly placed the burden of proof on the respondents/defendants to prove the partition as asserted by them. According to him, as per the provisions of Sections 101 and 106 of the Evidence Act, the party who asserts the fact, should prove discharge the burden to prove the said fact. According to the appellant/plaintiff, respondents/defendants did not adduced any oral or documentary evidence to prove that there was a partition in 1960. It was further submitted that the defendant No. 1 examined himself and admitted the relationship in his cross-examination. The defendant No. 1 also admitted that he had given wardi to the concerned Talati to remove his name from the revenue records as a karta of the family and to insert his name and his brother's name to the extent of 8 anna share each. According to the appellant/plaintiff, since the fact of oral partition was asserted by the respondents/defendants, the same should have been proved by them by properly adducing the documentary as well as oral evidence on record. It was further argued by the learned advocate for the appellant/plaintiff that there is neither a deed of partition nor any writing setting out the partition ? on record to substantiate the contention of the respondents/defendants. It was further argued that the respondents/defendants have failed to discharge the burden of proof cast upon them to prove that actual physical partition of the properties had taken place in the presence of panchas and that the plaintiff was given the physical possession of his 50% share in the immovable properties. It was further argued that the defendant No. 1, who entered into the witness box, himself admitted in his cross-examination that there was no partition by taking measurement, but the same was effected by taking measurement by rope through panchas. It is further admitted by the defendant that there is no writing in respect of the partition. Both the panchas viz. Bima Nane Savekar and Krishna Negu Bamne, though alive, did not examine by the defendants to corroborate their contention of partition. According to the appellant/plaintiff, indeed it was important for the defendants to examine those panchas in support of their contention that oral partition took place in 1960 in presence of panchas. The learned advocate for the appellant/plaintiff submitted that the defendants have failed to discharge their burden.

17. It was also argued that in any event, the revenue entry does not caste any rights or creates any rights or extinguishes any rights of the parties in respect of any property. It was further argued by the learned advocate for the appellant/plaintiff that the Appellate Court while accepting the proposition of law has placed reliance on two circumstances against the plaintiff (i) Mutation Entry No. 3104 and (ii) Plaint being Regular Civil Suit No. 21 of 1981 filed by the plaintiff

for injunction in respect of trees situated in Gat No. 490. The learned advocate for the appellant/plaintiff submitted that Gat No. 490, which was the subject-matter of R.C.S. No. 21/1981, was not the subject-matter of the suit. Therefore, according to the appellant/plaintiff, there was no question of placing any reliance by the Appellate Court on the judgment and order passed in R.C.S. No. 21/1981.

18. It was further argued on behalf of the appellant/plaintiff that the revenue entry is not a conclusive proof of partition. The mutation entries in the record of rights are made only for the fiscal purpose of recovering revenue and do not constitute a document by which the title is created or has been conferred and hence the Appellate Court could have presumed partition merely on the basis of revenue records which have no evidentiary value to show physical partition and separate possession.

19. The sum and substance of the arguments advanced by the learned advocate for the appellant/plaintiff is that the lower Appellate Court erred in taking into consideration Mutation Entry No. 3104 and outcome of R.C.S. No. 21/1981 and came to the wrong conclusion that there was a partition in 1960.

20. During the course of arguments, the learned advocate Mr. Khandeparkar, appearing for the appellant/plaintiff, clarified that as the alleged partition, as per the defendants, took place in 1960, the present plaintiff has filed the suit in 1984 and therefore the development which took place between 1960 and 1984 more particularly in respect of suit houses, the plaintiff is ready to give up his claim of partition of the suit houses constructed in the property of the defendants/respondents. On 24-4-2008, the appellant has filed his affidavit to that effect wherein he has restricted his claim of partition only to the immovable properties set out in Schedule A to para 1 of the plaint wherein 13 immovable properties are set out. Insofar as house property being House No. 227/1, 229 and 230 are concerned, the defendants had contended that they are not the ancestral house and were constructed by the respondents/defendants from their own income. It is stated in the affidavit by the appellant/plaintiff that in order to put an end to the dispute amicably, the appellant is giving up the claim in respect of the said three houses.

Conclusions and Findings:

21. I have given my anxious consideration to the submissions made by the learned advocate appearing for the appellant/plaintiff. Since there was nobody present for the respondents/defendants, I myself proceeded to examine the evidence on record and their written statement filed before the lower Court. I propose to deal with the Ground Nos. A and C together.

22. It was the case of the appellant/plaintiff before the lower Court that there was no partition in 1960 by metes and bounds and there is no partition deed to that effect. After perusal of the entire evidence on record, I find substance in the contention raised by the appellant/plaintiff that there was no partition in 1960 by metes and bounds and there was no partition deed on record to that effect. The

theory of oral partition in 1960, as alleged by the respondents/defendants, was on the basis of wardi given by the defendant No. 1 to the revenue authorities. According to the defendants, the partition was taken place in 1960 in presence of two panchas and the measurements were taken by rope. However, defendant No. 1, in his deposition, particularly in cross-examination, has admitted that both the panchas are alive. But it reveals from the record that the defendants have not examined the panchas to support their contention of alleged oral partition. In fact the statement of the panchas should have been vital and decisive to prove that there was oral partition in 1960 as claimed by defendant No. 1. Since defendant No. 1 utterly failed to examine any of the panchas and there is no documentary proof in respect of the partition in 1960, it cannot be held that there was partition in 1960 as alleged by the defendants.

23. The lower Court was correct in asking the defendants to discharge their burden of proof since it was their assertion that there was a partition in the year 1960. u/s 101 of the Evidence Act the burden of proof to prove the partition was upon the defendants and u/s 106 of the Evidence Act, the burden was also on the defendants to show that separate possession of one-half share of the suit properties were given to each of the brothers in accordance with their shares. However, in order to establish the said fact, apart from the bare words, the defendants did not adduce any documentary or oral evidence to show that there was a partition in 1960. In his cross-examination, defendant No. 1 admitted the relationship with the plaintiff. Defendant No. 1 also admitted that he had given wardi to the concerned Talati to remove his name from the revenue records as a karta of the family and to insert his name and his brother's name to the extent of 8 anna share each.

24. Admittedly, there is neither any deed of partition on record nor any writing set out any partition in 1960. Under these circumstances, in order to prove the contention of the defendants that there was oral partition in 1960, the defendants should have discharged the burden of proof by proving that actually physical partition of the properties had taken place in the presence of panchas and that the plaintiff was given physical possession of his 50% share in the immovable properties.

25. The 1st defendant, who had entered the witness box, admitted in his cross-examination that there was no partition by taking measurement but the same was effected by taking measurement by rope through panchas. The defendant also admitted in his cross-examination that there is no writing in respect of the partition. He also admitted that one Bima Nane Savekar and Krishna Negu Bamne were the panchas at the time of partition. He also admitted that the panchas were alive but, however, he has not examined the panchas who could have best brought out the evidence with regard to the oral partition and/or separate possession. Thus in my opinion the defendants have miserably failed to discharge their burden caste upon them to prove the partition in 1960 as alleged by them. Therefore, the lower Court was justified in holding that there was no

partition in 1960 as alleged by the defendants. The defendants have utterly failed to prove their contention that there was a partition in 1960. The lower Court was perfectly justified in decreeing the suit of the plaintiff and holding that there was no partition whatsoever in the year 1960. It is true that on the basis of vardi given by defendant No. 1, the mutation entry was recorded in the revenue record. However, that cannot be a conclusive proof of partition.

26. The lower Appellate Court relied upon Mutation Entry No. 3104 and the plaint in R.C.S. 21/1981 and came to the conclusion that there was oral partition in 1960. The lower Appellate Court was not justified setting aside the judgment and order passed by the lower Court since R.C.S. No. 21/1981 was in respect of Gat No. 490 which was not the subject-matter of the suit property. The suit property described in Schedule A in the plaint are 13 in pieces and Gat No. 490 is not the part of the said schedule.

27. The lower Court has properly appreciated the evidence on record and has rightly come to the conclusion that there was no partition at all in 1960. Hence the lower Court was perfectly justified in decreeing the suit filed by the plaintiff. Therefore, I do not find any reason to interfere with the findings given by the lower Court. I find that there was no partition in 1960 since there was no document on record in the nature of deed of partition or any other substantial proof to hold that there was a partition in 1960. The lower Appellate Court was not correct in holding that the family partition took place in 1960. In the absence of any documentary or oral evidence adduced by the defendants, it cannot be held that there was family partition in 1960. Therefore, the question of law i.e. Ground Nos. A and C are answered accordingly.

28. Coming to Ground No. B, I find that the lower Appellate Court was not correct in holding on the basis of mutation entry in the revenue record that there was partition in 1960. As I have already observed above that the mutation entry is not a conclusive proof of the partition. The mutation entries in the revenue record are made only for the fiscal purpose of recovering the revenue and do not constitute a document of which title is created or has been conferred. Hence the mutation entry itself in the absence of other evidence on record would not amount to a document which could be said to prove the partition.

29. This Court had occasion to consider the question whether the mutation entries in the record of rights amount to transfer of title in the property in the case of Abasaheb Bali Gharage and Another Vs. Balaji Ramhari Gharage, . In the said judgment, this Court has held that mutation of entries in record of rights are made only for the fiscal purpose of recovering revenue and do not amount to transfer of title in property. In para 8 of the said judgment, this Court observed that the said entries cannot amount to transfer of the title of the holder of the property in favour of the person in whose name the entries are made. It is further observed by this Court that giving of the vardi application and certification of the said mutation entry would not create any title in favour of the party. Therefore, in my opinion, the lower Appellate Court was not justified in

relying on the Mutation Entry No. 3104 and, therefore, the findings of the lower Appellate Court that there was a partition in 1960 are totally wrong. Mere mutation entry in the revenue record cannot be said to be conclusive proof of the partition. Therefore, the lower Appellate Court erred in holding that there was a partition in 1960.

30. For the reasons stated above, the present second appeal succeeds. The judgment and order passed by the lower Court is upheld. The judgment and order passed by the lower Appellate Court is set aside.

31. However, so far as house property being House No. 227/1, 229 and 230 are concerned, they are newly constructed houses in between 1960 and 1984 by the respondents/defendants. They are excluded from the partition. Rest of the judgment and order passed by the lower Court is confirmed. As ordered by the lower Court, the partition of the suit houses, excluded House No. 227/1, 229 and 230 to be made through the Court Commissioner. The partition of the suit properties which are in possession of the parties be allotted to their share if possible. The second appeal is disposed of accordingly.