

(2004) 04 BOM CK 0038
In the Bombay High Court
Case No : Second Appeal No. 257 of 1990

Manjulabai Gohate and Others	Vs	APPELLANT
Bhagirathibai Gohate		RESPONDENT

Date of Decision : 23-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 58

Citation : (2004) 4 MhLj 50

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : A.M. Bapat, for the Appellant; A.B. Choudhary, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—By invoking the jurisdiction of this Court u/s 100 of the Code of Civil Procedure, this appeal is directed against the judgment dated 22nd December, 1989 passed by the learned Additional District Judge in Regular Civil Appeal No. 15 of 1988 whereby the appeal has been dismissed with cost and the judgment and decree passed by the trial Court on 31st December, 1987 was confirmed whereby the counter-claim of the plaintiff was decreed and declared that she is owner to the extent of 1/2 share of the suit house purchased by virtue of the sale deed (Exh.47) dated 3-1-1972.

2. Relevant facts are required to be stated as under :

The genealogical tree of the parties is not disputed. It is as under:

Dhyana | |-----| Netram = Saraswatibai Ganeshrao =
Bhagirathabai (Dead) [P- 1(f)] (Dead) (Defdt.) | |-----|

Shalikram = Manjulabai Vitthal (Died) [P-I(a)] P-2 |
|-----|-----|-----| Prakash Gopal Wanmala Dipmala [P-I(b)] [P-I(c)] [P-1(d)] [P-1(e)] 3. The appellant plaintiff filed the suit for possession on

the contentions that the house situated at mouza Nachangaon in Ward No. 190 has been purchased by Netram in the name of his sons Shalikram and Vitthal from Gopikisan s/o Balkisan Jajoo for the consideration of Rs. 4,000/- on 3-1-1972. The defendant is their real aunt and Netram and Ganeshrao are the real brothers whereas the defendant Bhagirathabai is widow of Ganeshrao. At the time of purchase of the suit house, the defendant Bhagirathabai along with her husband Ganeshrao were residing at Arambhi and at that time Ganeshrao was suffering from tuberculosis and wanted to take treatment, at Pulgaon and therefore, he requested the plaintiff and his father to permit him to reside in the suit house, so that it will be convenient to get medical treatment from Pulgaon because the suit house is situated quite close to Pulgaon town. Since Ganeshrao was real brother of Netram, he was allowed to occupy one portion of the suit house shown by letters OPQR in the plaint map annexed with the plaint, in the year 1972. Then, Ganeshrao died after 1 1/2 yrs. And Bhagirathibai continued to occupy the suit portion of the house. She was called upon to vacate the suit house by notice dated 5-3-1979, but she refused to accept the notice sent by registered post with acknowledgment due. The plaintiff further contended that the defendant inherited the house property of Ganeshrao and the said house property is situated at village Arambhi, tahsil Katol and she entered into an agreement of sale of said house with the father of the plaintiffs by virtue of agreement of sale dated 7-6-1976 and in that agreement it has been mentioned that on completion of the said transaction, she would vacate the suit premises which is in her occupation and would shift at Laxminarayanpur Chouki. The defendant did not comply with the said agreement and therefore, she was again served with notice dated 9-4-1979 and called upon to vacate the suit house, but in vain. She gave evasive reply to the notice and claimed that she is joint owner of the suit house.

4. The defendant resisted the claim of the plaintiff by filing written statement and contended that she along with her husband Ganeshrao, were residing in the suit house since the date of her marriage i.e. since last 20 to 25 years. Her father in law Dhyamba was residing in the suit house as a tenant and after him she along with her husband and the brother of her husband started living in that house as a tenant. The mother of the plaintiffs died when they were infants, and therefore, they were brought up by her. During the life time of Ganeshrao, he and the plaintiffs' father decided to purchase the house from the owner i.e. Gopikisan Jajoo and accordingly Ganeshrao contributed the amount of Rs. 2,000/- towards the consideration as his share and Netram also contributed Rs. 2,000/- of his share and the suit house was purchased for the total consideration of Rs. 4,000/-. When the payment of Rs. 2,000/- was made over by Ganeshrao, he was bed ridden and he was suffering from tuberculosis and was not knowing in whose name the sale deed has been got executed by his brother Netram. It is contended that Netram had played fraud and got execution of the sale deed in the name of his sons, i.e. plaintiffs Shalikram and Vitthal. Ganeshrao had no reason to suspect about the bona fides of his brother Netram and he accepted

the communication from him that the suit house was purchased in the joint names of both the brothers. Unfortunately, Ganeshrao died after 1/2 years and the defendant Bhagirathabai came to know about the said fraud practiced upon her husband after the death of her husband Ganeshrao. It is contended that she became the owner of the half portion of the house by virtue of the said sale deed since her husband has paid half consideration of Rs. 2,000/- and therefore, she had put-forth the counter-claim for declaration of her title to the half share in the suit house.

5. On the aforesaid pleadings, several issues were framed by the trial Court. Parties adduced oral as well as documentary evidence in support of their contentions. The trial Court on consideration of the evidence, recorded the finding that the defendant has established the counter-claim and exclusive title to the suit house by virtue of the sale deed dated 3-1-1972 and consistent with this finding, dismissed the suit. However, the trial Court also recorded the findings that the deceased Ganeshrao had contributed Rs. 2,000/- towards the consideration of his share at the time of purchase of the suit house by Netram and since Ganeshrao and his wife Bhagirathabai were occupying half portion of the suit house since the time of their marriage, she became full owner of the half portion of the suit house. Consistent with these findings, he decreed the counter claim put-forth by the defendant and declared her title to the extent of half share of the suit house by virtue of the sale deed dated 3-1-1972. Being aggrieved by this judgment and decree passed by the trial Court, the plaintiffs carried appeal to the District Court. The learned Additional District Judge on hearing the learned counsel for the parties dismissed the appeal and confirmed the findings recorded by the trial Court. This judgment of the appellate Court is challenged in this second appeal.

6. Mr. Bapat, the learned counsel for the plaintiffs contended that the sale deed dated 3-1-1972 (Exh.47) clearly show that the suit house has been purchased for the consideration of Rs. 4,000/- from Gopikisan Jajoo in the name of plaintiffs; Shalikram and Vitthal, sons of Netram and that they were already in possession of the house and therefore, the burden is on the defendant. Bhagirathabai to prove that Ganeshrao was also the owner of the suit house. He contended that the defendant was living in the suit house as a tenant and as such she would not be entitled to claim the ownership. He contended that Bhagirathabai in the sale agreement dated 7-6-1976 (Exh.53) entered into with Netram, agreed to the effect that she will vacate the suit house on the date of the sale deed of her house at Arambhi. It is contended that Netram and his brother Ganeshrao and the third brother Shrawan had partitioned their property long before the purchase of the suit house by the plaintiffs and that Ganeshrao was separate in residence and estate and he has ceased to be the member of joint family and that Ganeshrao was allowed to occupy the suit house as a licensee as he was suffering from tuberculosis and therefore, the plaintiffs are entitled to the possession of the portion of the suit house based on their title. He contended that both the Courts below have committed an error in dismissing the

suit of the plaintiff on misconstruing the evidence adduced on record and as such the impugned judgment cannot be sustained in law.

7. Mr. Bapat further contended that the aspect of payment of Rs. 2,000/- of Ganeshrao has not been duly proved though the said amount is stated to have been paid in presence of the witness Chhatrapal (D.W.4). He pointed out that the evidence of Chhatrapal is not of any relevance to show that Ganeshrao had paid the consideration of Rs. 2,000/- of his share at the time of purchase of the suit house. He contended that the suit house has been purchased from the vendor Gopikisan Jajoo and the said vendor has not been examined to show that he has received half of the consideration from the deceased Ganeshrao. He contended that Bhagirathabai admitted in her cross-examination that she is living in the suit house since 6-7 years only prior to the date of recording of her deposition and her deposition was recorded in the trial Court in the year 1987 and therefore, the counter-claim put forth for declaration of her title has been hopelessly barred by period of limitation in view of Article 58 of the Limitation Act, 1963 because she did not mention in the counter-claim as to when the cause of action accrued to her claim and it has been vaguely mentioned by her in the written statement that the cause of action accrued when she came to know about the plaintiffs' assertion of full right and the ownership over the suit house when house when she received the summons and subsequently thereafter when the plaintiffs continued to deny the right of the defendant. Mr. Bapat further contended that both the Courts below have misconstrued the evidence and recorded erroneous findings in favour of the defendant without there being cogent and reliable evidence to prove her title to the portion of the suit house. Mr. Bapat further contended that the impugned judgments are not sustainable in law and this appeal may kindly be allowed and the counter claim put forth may be dismissed and instead the suit for possession filed by the plaintiffs may kindly be decreed.

8. Mr. Choudhary, the learned counsel for the defendant contended that Ganeshrao along with his widow Bhagirathabai are living in the suit house since their marriage i.e. since about 20 to 25 years and since Ganeshrao was suffering from tuberculosis, Netram took undue advantage of that fact and practiced fraud upon the former and got the sale deed executed in the name of his minor sons Shalikram and Vitthal, even though, Ganeshrao had contributed the amount of Rs. 2,000/- on account of payment of consideration of his half share. He contended that the fact of payment of Rs. 2,000/- by Ganeshrao to Netram has been duly proved through the evidence of Chhatrapal (D.W.4). He contended that the documentary evidence on record in the nature of the assessment list of the Gram Panchayat (Exh.71) for the year 1962 to 1968 show that the suit house was occupied by Netram and Ganeshrao in those years. He pointed out that the entries recorded in the record of rights, the extract of which is at Exh.72 has been placed on record would show that the enquiry was held on 21-7-1969 and the names of both the brothers, i.e. Netram and Ganeshrao were recorded as joint occupiers of the suit house and therefore, he contended that the defendant and her husband Ganeshrao are in occupation of the suit house even before the

execution of the said sale deed and since the husband of the defendant had contributed for payment of consideration of his share to the extent of Rs. 2,000/-, she has become the owner of the half portion of the suit house.

9. Mr. Choudhary further contended that both the Courts below recorded concurrent finding of the fact that Ganeshrao had paid the consideration of his share at the time of purchase of the suit house by virtue of sale deed dated 3-1-1972 and no substantial question of law is involved in this appeal and therefore, there is no reason for this Court to reappreciate the evidence on facts. In support of this submission he relied on the decision of the Supreme Court in the case of Veerayee Ammal Vs. Seeni Ammal, .

10. Mr. Choudhary, the learned counsel further contended that the plaintiffs did not raise the point of limitation either in the trial Court or before the appellate Court and even no counter has been filed to the counter claim put forth by the defendant nor any issue has been framed regarding the point of limitation. He contended that the defendant had no opportunity to meet the point of limitation which is being agitated for the first time in this second appeal and therefore, it is not open for the defendant now to raise the point of limitation as a substantial question of law. Mr. Choudhary, the learned counsel further contended that both the Courts below were perfectly justified in declaring the title of the defendant to the half portion of the suit house and rightly decreed the counter-claim on the basis of the evidence and therefore, no substantial question of law arises in this appeal and the same may kindly be dismissed with costs. In support of these submissions he relied on the decisions of the Supreme Court in the case of Banarsi Das Vs. Seth Kanshi Ram and Others, and also in another case of A.H. Pinto (Dead) by LRs. Vs. V. Chaniyappa and Others, ,

11. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. The relationship between the parties is not disputed as shown in the genealogical tree mentioned above. Admittedly Netram and Ganeshrao are the real brothers who are no more alive and the dispute is between their legal heirs. It is not in dispute that Netram, his brother Ganeshrao and the third brother Shrawan had partitioned the joint family property between themselves before the purchase of the suit house and Netram and Ganeshrao were separate in mess and residence as well as estate and their status as member of the joint family was severed. The agreement of the partition (Exh.48) has been placed on record which would indicate that the partition of the joint property was effected in between three brothers on 14-10-1969. It is also not in dispute that the suit house has been purchased by virtue of the sale deed dated 3-1-1972 from Gopikisan Jajoo for the consideration of Rs. 4,000/- and the recitals of the sale deed would reveal that the suit house has been purchased in the name of plaintiffs Shalikram and Vithal, who were minors, through their legal guardian father Netram.

12. The grievance of the defendant is that Ganeshrao had contributed Rs. 2,000/- for payment of consideration to Gopikishan Jajoo and the said amount

was handed over to Netram in presence of Chhatrapal (P.W.4). The evidence of Chhatrapal would reveal that his house is situated at the distance of about 20 to 25 feet from the suit house and he knew the parties. His evidence further indicate that the husband of the defendant by name Ganeshrao died about 10 to 15 years ago and he was suffering from T.B. and he died of that disease. In the cross examination, Chhatrapal admitted like this; "It is true to say that the earnest deed was written on very day and at the same time when earnest money of Rs. 2,000/-were paid to Gopikishan. There was a term to execute the sale deed after about 2 months from the date of earnest deed. After two months I knew that the sale deed of the suit house was executed. It was my fault that on the day of execution of sale deed I did not accompany with Netram as attesting witness. I cannot remember the date, month or year on which day the said amount was paid" (underline supplied for emphasis).

13. This evidence of Chhatrapal clearly reveal that he really did not know anything about the payment of consideration of Rs. 2,000/- by Ganeshrao to Netram and moreover when Ganeshrao was working as labour in the Brooke Bond Company, it is not possible to accept that he could have contributed the amount of Rs. 2,000/- as a part consideration at the time of execution of sale deed dated 34-1972. This Court, therefore is of the considered view that both the Courts below have misconstrued the evidence adduced on record in support of the contentions of the defendant and it appears that the impugned judgment is a result of misplaced sympathy towards the defendant who was suffering from tuberculosis and was a labour. When the parties were separate in estate, mess and residence, it is not possible to accept that Netram would purchase the suit house out of joint family funds. The defendant also did not make out any case to show that the suit house was purchased from the joint income from the joint family property.

14. It is equally significant to note that the defendant Bhagirathabai had executed one agreement of sale in favour of Netram wherein she had agreed to sell the house situated at village Arambhi which was given to the share of her husband in family partition for the consideration of Rs. 1,600/- and it was agreed by her that she would execute the sale deed of that house by 1-2-1977. The recitals of the agreement of sale (Exh.53) dated 7-6-1976 would clearly reveals that the defendant Bhagirathabai agreed to vacate the suit house after completion of the said transaction. This documentary evidence in the nature of admission has been conveniently ignored by both the Courts below and placed reliance on the oral evidence of Netram which does not appear to be cogent and reliable. If the defendant Bhagirathabai agreed to vacate the suit house by incorporation of the said recital in the agreement of sale, it follows that she did not claim any ownership at that time so far as the suit house is concerned. It is also not the case of the defendant that the suit house has been purchased from the income of the joint family property and therefore, it is not possible to accept the contentions of the learned counsel for the defendant that since the defendant and her husband were living and as they were in continuous possession of the

suit house, they have become the owner of the same, in absence of the evidence of the vendor Gopikishan and in absence of any evidence to show positively that Ganeshrao was able to pay the amount of Rs. 2,000/- as a consideration of his share for the purchase of the suit house, especially when he was suffering from the tuberculosis and was hardly earning his livelihood by doing labour work. Therefore, it is quite obvious that both the Courts below have misconstrued the evidence and based their findings on assumption and presumption and as such cannot be upheld.

15. It is settled law that the entries recorded in the assessment register (Exh.71) of the Gram Panchayat are made as a result of fiscal policy of the Gram Panchayat. The entries would only show that Ganeshrao and Netram were occupier of the suit house since 1962, but it is not the case of the defendant that she or her husband has acquired the title to the suit house by virtue of adverse possession. Consequently the status of the defendant in the suit house would be that of a licensee and since it was a permissive possession. It is not possible to accept that the title has been perfected only on the basis of the possession.

16. So far as the question of limitation is concerned, it is not disputed that the plaintiff did not plead anywhere in the plaint that the counter-claim has been barred by the period of limitation nor any issue was framed by the trial Court. On taking into consideration the circumstances mentioned above. It is not possible to accept the contentions of the learned counsel for the plaintiff that the counter claim has been barred by limitation as per Article 58 of the Limitation Act. In this context the learned counsel for the defendant has rightly relied on the decision of the Supreme Court in the case of Banarsi Das Vs. Seth Kanshi Ram and Others, wherein it is held that; a new plea of limitation which was not purely one of law but a mixed question of law and facts should not have been allowed to be raised for the first time at the stage of arguments in second appeal by the High Court especially when it was raised -by the non-contesting defendant who had not filed a written statement in the suit. If the High Court felt overwhelmed by the provisions of Section 3 of the Limitation Act, it should at least have given an opportunity to the parties which supported the decree of the trial Court to meet the plea of limitation by amending their pleadings. After allowing the pleadings to be amended, the High Court should have framed an issue and remitted it for a finding to the trial Court under Order 41, Rule 25 of the Code of Civil Procedure".

17. In the present case the plea of limitation has not been raised in the pleading nor any issue was framed by the trial Court nor the same question was raised before the first appellate Court and in such circumstances, the plaintiff cannot be allowed to raise new plea of limitation which is not purely the question of law but it is a mixed question of law and facts and therefore, this Court is of the considered view that the counter-claim was not barred by period of limitation.

18. The decision of the Hon''ble Supreme Court in the case of Veerayee Ammal Vs. Seenii Ammal, relied on by the learned counsel for the defendant has no bearing on the facts and circumstances of the present case and the present case

is one in which the substantial question of law arises as to whether the Courts below have misconstrued the evidence which has resulted into the miscarriage of justice and this Court is of the considered opinion that in this case since the judgment of both the Courts has resulted into the miscarriage of justice, in the interest of justice, this Court has to interfere into the judgment passed by both the Courts as those judgments are neither legal nor correct.

19. Though the counter-claim was not barred by period of limitation, it did not follow that the concurrent findings of the Courts below are legal and valid. In fact, the Courts below have made erroneous approach to the entire matter and the judgments appear to be the result of misplaced sympathy and instead of considering the law position coupled with the evidence, both the Courts based their findings on surmises and conjectures and therefore, cannot be sustained in law. It is for this reason, that this Court is required to interfere into the findings recorded by the Court below. Therefore, the appeal is allowed with costs and the impugned judgment and decree passed by the appellate Court is set aside. The suit of the plaintiff is decreed and the defendant is directed to deliver the possession of the suit house to the plaintiff. No costs in the circumstances.