
(2014) 09 BOM CK 0093
In the Bombay High Court
Case No : First Appeal No. 295 of 2012

Multicon Builders	Vs	APPELLANT
Sumandevi		RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 8 Rule 6A
Hindu Succession Act, 1956 — Section 23

Citation : (2015) 4 ABR 396

Hon'ble Judges : Anand Vasant Nirgude, J

Bench : Single Bench

Advocate : A.M. Gordey, Senior Counsel and R.D. Raskar, H.D. Dubey, V.G. Deshmukh, Rohit Joshi, E.W. Nawab and M.A. Vishwarupe, Advocate for the Appellant; V.G. Deshmukh, Rohit Joshi, E.W. Nawab and M.A. Vishwarupe, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Anand Vasant Nirgude, J.—This appeal challenges the judgment and decree dated 27th February, 2012, passed by the learned 4th Joint Civil Judge, Senior Division, Nagpur, in Special Civil Suit No.1017 of 1994.

2. Plaintiff is one Sheela, who filed this suit for partition etc. against her family members and the appellant, a third party, who is interested in the suit property.

[hereinafter, I will call the parties by their designation in the lower Court].

3. The family members of the plaintiff are shown in family tree, as under : -

4. The plaintiff stated that her father Shankarrao inherited number of properties. In 1951, her mother Pushpalata died, and so, in 1956, her father married Sumandevi [defendant no.1]. She stated that during the life time of her father, partition took place between Shankarrao, his wife Sumandevi and his two sons namely Chandrashekhar [defendant no.2] and Chandrakant [defendant no.3]. She enumerated number of properties being the suit properties and claimed that

she was entitled to 1/45th share in them. She added that no partition took place after her father Shankarrao died. She alleged that Chandrashekhar [defendant no.2], her brother is the eldest and influential member of the family. He acted whimsically in the matter of joint family properties. He collected compensation from the State for land acquisition, collected rent from the tenants and sold certain landed property and movable articles without taking consent and without distributing the sale proceeds between the members of his joint family.

5. In addition to the list of the properties mentioned in the plaint, the plaintiff also mentioned that plot no.220 [suit plot] and house on it, situated at Ravinagar, Nagpur, is also ancestral property and she has share in it. She alleged, in December 1991, defendant no.2 entered into an agreement to construct commercial complex on this plot with one M/s. R.B. Patel and Co. He then claimed that he was the absolute owner of the plot. The agreement did not succeed and was canceled.

On 19th May, 1994, an advertisement in a newspaper mentioned that defendant no.9 [M/s. Multicon Builders] were interested in purchasing the suit plot from defendant no.2. They invited objections for the transaction. The plaintiff as well as other defendants raised objections immediately on 25th May, 1994. They asserted that defendant no.2 was not the only owner and, therefore, he cannot enter into any transaction to deal with the suit plot without their consent etc. In the meantime, she alleged that defendant no.9 started construction work on the suit plot in June, 1994. She filed this suit thereafter on 7th October, 1994 and sought an order of temporary injunction from preventing development on the suit plot and creating of third party interest in the suit plot.

6. Defendant nos.1, 4 to 8 in their written statement stated that all the ancestral agricultural lands were sold prior to filing of the suit. They admitted that the suit plot is ancestral property and plaintiff and defendant nos.1 to 8 have certain share in it. Defendant nos. 1, 4 to 8 claimed 1/9th share each in the plot. They added that defendant no.2 in the year 1991 entered into an agreement with the State Bank of India for taking loan for construction of a building on the suit plot. The building would be constructed in such a fashion that the bank's branch would be opened in it and the bank would recover loan through rent.

They stated that certain amount was even taken by defendant no.2 as a loan from the bank and construction of building commenced. When it reached up to 1st floor, it stopped because the defendants withdrew their consent for the agreement. Construction work of the building thus remained incomplete and the bank's branch did not start functioning on the suit plot.

7. They admitted that on 19th May, 1994, they too saw an advertisement given by defendant no.9. They asserted that they too raised objection by making telephone calls to the advocate of respondent no.9 and also raised objection in writing. They stated that inspite of the objections by them, defendant nos.2 and 9 started construction activity on the suit plot. They further alleged that later on

during the pendency of the suit the plaintiff joined hands with defendant nos.2 and 9. She received certain amount from defendant no.9. They further stated that after this settlement between plaintiff and defendant nos.2 and 9, the plaintiff withdrew her application seeking temporary injunction for preventing construction on the plot on 23rd September, 1996. The defendants then asserted that in view of this development between the parties, they apprehended that the plaintiff would withdraw the suit and so they filed a counter -claim with written statement.

In the counter -claim, they prayed for a decree for partition claiming 1/9th share each in the suit plot. This counter -claim was filed on 22nd January, 1996. Later on, in 2004, they got the counter -claim amended. New prayers were made. They were;

[i] declaration that defendant no.9 has no right, title, interest in the suit plot;

[ii] declaration that the transactions between defendant no.1 on one hand and the other defendants on the other hand were illegal and not binding on defendant nos.1 and 4 to 8; and

[iii] a decree for demolition of entire construction made on the plot by defendant no.9 and to restore status quo ante.

8. Defendant no.2 filed written statement and took a stand that the suit plot was purchased by his father Shankarrao for residential use, he was Karta of Hindu undivided family and the entire family reside in this house. After marriage, the daughter of Shankarrao left this house. He and his brother [defendant no.3] continued to reside in it. In view of Section 23 of the Hindu Succession Act, 1956, the plaintiff had no right to claim partition in the suit plot which is residential house.

9. He further alleged that during his life time Shankarrao entered into a transaction of conditional sale -deed of the suit plot/house in favour of one Buty in the year 1953 in lieu of Rs.20,000/-. Thus, the suit plot/house was mortgaged. Subsequently, Shankarrao also agreed to sell the suit plot for a consideration of Rs.40,000/- to one Karkare who filed a suit for possession. In order to save the property, defendant no.2 along with his mother namely defendant no.1, filed another suit in the year 1964 and succeeded ultimately in arriving at a compromise with Karkare and Buty. As per the compromise, he paid Rs.40,000/- and agreed to pay Rs.40,000/- more to Karkare. This all happened prior to Shankarrao's death. According to defendant no.2, on the date of Shankarrao's death, which occurred on 30th November, 1970, he had no property of his own. He said that since he repaid all the loans of Buty and Karkare, he became exclusive owner of the suit plot.

10. Defendant no.3 in his written statement reiterated what is stated by respondent nos.1, 4 to 8. Defendant no.9 M/s. Multicon Builders, in their written statement, admitted the facts mentioned in the plaint regarding issuing of public

notice dated 15th September, 1994. They further admitted that they commenced booking of shops and plots in the building which they proposed to build on the part of suit plot. They also admitted that defendant no.3 also raised objection by issuing public notice. They further admitted that they soon after the transaction of transferred area of 12500 square feet of the suit plot along with certain F.S.I. Regarding Firm namely Multicon Builders and it became owner of the same. They further asserted that area of 4000 square feet of the suit plot was kept for defendant no.3 and area of 2008 square feet of the plot was kept for defendant no.2. They denied having carried out construction illegally. They asserted that defendant no.2 represented the family as karta and entered into the agreement - cum -partnership deed with them. They asserted that they paid substantial amount to defendant nos.2 and 3 and invested substantial amount in the construction. They admitted that the construction work is now stopped as per the Court's order of 1994. They also alleged that defendant no.2 played fraud and relied on forged documents. They asserted that they have filed a separate criminal case against defendant no.2. The trial Court framed issues and allowed the parties to lead evidence.

11. The first and foremost finding recorded by the trial Court was that the plaintiff and defendants could not prove their claim in respect of the properties other than the suit plot. The lower Court nonetheless held that the plaintiff and defendants were entitled to certain shares in the suit plot. The Court further held that defendant no.2 could not have dealt with the suit plot and could not have had said transaction with defendant no.9. It held that this transaction was not binding on plaintiff and other defendants. The Court below further held that defendant no.9 continued construction activity unauthorisedly. The trial Court negated the claim of defendant no.9 that they were lawfully inducted in the suit plot.

The learned judge of the trial Court then partly decreed the suit and the counter - claim of defendant nos.1, 4 to 8 as per the final order, which reads as under : -

Common Order

"Suit and counter-claim is decreed partly in following terms with proportionate costs as referred in above para -

1] It is hereby declared that plaintiff, defendants no.1 to 8 are having joint share in suit property no.220, situated at Ravi Nagar, Nagpur. The shares of respective parties are, plaintiff and defendants no.5 to 8; are having 1/45th share each and defendants no.1, 2, 3 and 4 each are having 10/45th [1/5th plus 1/45th] share.

2] As far as claim and counter-claim as to other landed properties and movable properties is dismissed for the reasons stated above.

3] Plaintiff, counter claimant defendant nos.1, 4 to 8 are entitled for partition and separate possession of their above determined share from the suit property plot no.220. Defendants no.2 and 3 if pay required court fees they shall also entitle

for executing the decree for partition and separate possession.

4] Defendants no.1 to 9 are hereby restrained for alienating the suit property detrimental to the interest of plaintiff till partition takes place by metes and bounds by due procedure of law.

5] It is hereby declared that the defendant no.9 has no right, title or claim in suit property part of plot no.220, as its induction is illegal and accordingly the further activities carried out by it are illegal.

6] Defendants no.2 and 9 are hereby directed to demolish the construction which is in contravention of the Municipal Law. Further, I direct that Nagpur Municipal Council/Nagpur Improvement Trust be informed about finding of illegal construction and rights of parties i.e. plaintiff and defendants no.1 to 8 and if defendants no.2 and 9 fail to demolish the construction as directed, the above local authorities shall carry out demolition work at the costs of defendants no.2 and 9 and it shall be recoverable from them as a part of costs.

7] Preliminary decree be drawn accordingly.

8] Suit disposed off accordingly."

12. After hearing the submissions of the learned counsel for the parties, following points arise for my consideration: -

1. Whether defendant nos.2 and 9 could prove that defendant no.2 acted as karta and his acts were in the interest and benefit to the estate of the joint family? Whether they are binding on other members of his family?

2. Whether the counter -claim of defendant nos.1, 4 to 8 was barred by limitation ?

3. Whether the counter -claim, which is directed against one of the defendants is maintainable ?

4. Whether the construction activity of defendant no.9 was authorized, if not whether the building constructed by them deserves to be demolished and whether status quo ante which prevailed on the date of suit should be restored ?

13. Learned senior counsel Shri Gorde appearing for the appellant asserted that the facts that have come on record and the events that took place earlier in time would indicate clearly that all the family members of defendant no.2 admitted him to be karta of joint family. He pointed out that earlier, defendant no.2 had entered in contract with M/s R.B. Patel and Co. for construction of complex on the suit plot. He also pointed out that he in the capacity of karta entered into series of transactions. According to him, the suit transaction, which is agreement of partnership between defendant no.2 and 9 is binding on all other coparceners.

In order to seek support to this contention, he placed reliance on following part of written statement of defendant nos.1, 4 to 8 : -

"Para 24: That, these defendants learnt from the defendant no.2 that some where in 1991, that the defendant no.2, entered into an agreement with the State bank of India, Branch Ravinagar, Nagpur for advancing finances for the construction of the building, for the use of the said, Bank as a tenant therein, and it was agreed in between the defendant no.2 and the Bank, that the money advanced by the Bank would be adjusted in the rent but the property would be a joint property of the defendant nos.1 to 8 and the plaintiff. Therefore, these defendants did allow him to do so in the capacity of Karta of the family in the interest of the family and all the shares."

There is no doubt that defendant no.2 assumed position of KARTA of this family for quite some time. The learned judge of the trial Court rightly held that the transaction which took place between defendant no.2 and M/s R.B. Patel and Co. is now irrelevant history. Admittedly, the said agreement between defendant no.2 and M.S. R.B. Patel and Co. fizzled out. No further complication arose from it. Neither M/s. R.B. Patel and Co. is party to this suit and have any concern with the suit plot. So, whatever happened at that time has no relevance to the outcome of this case. Nonetheless as per Hindu law, a karta of a Hindu family is expected to act responsibly and for benefit of entire family. The manner in which defendant no.2 in this case acted at the time of suit agreement was not less than committing breach of trust imposed on him by the either members of the family. When the other members of the family immediately denounced the suit agreement by publishing advertisement in newspaper, at -least at that time, he ought to have relented. He ought to have accepted their objection and ought to have stopped the transaction until all members of the family would agree for disposal of the suit property. The question that is relevant for this case is even if defendant no.2 was acting as karta of the family during the relevant time, whether he really acted as bonafide? On careful perusal of the evidence, one finds that defendant no.2 did not mention initially that he was entering into the suit transaction as karta of the family, he publicly announced in the advertisement that he is owner of the suit property. In any case he relented and admitted that whatever he did was as the karta of the family, but the evidence that came on record in respect of the circumstances in which the suit transaction was entered into clearly indicates that defendant no.2's action were not only selfish but were also whimsical. It cannot be held that even though defendant no.2 acted as karta while entering into the suit transaction, the same can be made binding on remaining co -parceners. The act of defendant no.2 as karta was not lawful and cannot be said to be for the benefit of the family estate or for legal necessity. I, therefore, giving finding on point no.1 in negative.

14. So far as point no.2 is concerned, the answer is in negative. On the date of filing of the suit, defendant no.9 had not started construction on the suit plot. Despite orders of the Court preventing any development on the suit plot, defendant no.9 took risk and continued construction till 1994. This gave rise to cause of action for the counter-claim. Amendment to the written statement was moved in or about 2005 and was allowed in 2005. On the face of it, since the

construction activity was continuous, the cause of action arising from it was continuous, and so, even though the counter -claim is moved belatedly, it can safely said to be within time.

15. So far as point no.3 is concerned, learned senior counsel for the appellant contended that the counter -claim filed by respondent nos.1, 4 to 8 is not directed against the plaintiff, it is directed against defendant no.9, and so, it is not maintainable and the Court should ignore it. This submission was also made before the trial Court and the trial Court rejected it. This submission is made on the basis of Order VIII Rule 6-A of the Code of Civil Procedure. Learned senior counsel for the appellant asserted that a counter -claim cannot be directed against a defendant. He also placed reliance on judgment of Supreme Court in the case of Rohit Singh and Others Vs. State of Bihar (Now State of Jharkhand) and Others, He further pointed out that though the counter -claim was filed by defendant nos.1 and 4 to 8, none of these defendants entered the witness -box. No evidence was given by them in support of what they had stated in the counter -claim. He further submitted that in such situation, the defendants who filed counter -claim, could have filed the separate suit. I am afraid, all these submissions are devoid of merit, at -least in reference to the facts of this case. In suits of partition filed amongst coparceners, a counter -claim would be permissible, because coparceners who are made defendants are plaintiffs also. In this case, the plaintiff claimed that she has cause of action because her brother - defendant no.2 and an outsider - defendant no.9 acted in collusion and in derogation of her right to the suit plot. In the counter-claim, similarly placed parties i.e. defendant nos.1, 4 to 8 took similar stand supporting her case and blamed defendant nos.2 and 9. Since the construction of building, despite of orders, continued from 1994 onwards, a new cause of action arose for similarly placed defendant nos.1, 4 to 8 and they had ample scope of filing such counter-claim directing it against the common adversary, namely defendant nos.2 and 9. The above submissions of the defendant no.2 thus were rightly rejected by the learned judge of the lower court and I agree with him. The learned judge of the trial Court discussed this point elaborately and placed reliance on the judgment of our High Court in the case of Mrs. Indira Bhalchandra Gokhale (deceased by LRs) Vs. Union of India and Another, The learned judge also placed reliance on the judgment of Andhra Pradesh High Court in the case of Rapolu Yadagiri Vs. Rapolu Lakshamma and Others, , in which it was held that in a suit for partition, defendant can be permitted to get himself transposed as plaintiff in case the plaintiff tries to withdraw the litigation etc.

16. So far as point no.4 is concerned, learned senior counsel for the appellant pointed out that there was no issue before the trial Court as to whether the construction work done by defendant no.9 on the suit plot was authorized/lawful or otherwise, whether it was constructed as per Municipal permission or otherwise. He also pointed out that Municipal Corporation was not party to the suit, and therefore, the finding recorded by the learned judge of the lower court that the construction work was illegal and directions issued to the Corporation to

demolish it were unwarranted. Indeed, this submission has some substance. All that was required to be decided in respect of construction work that was carried out after filing of the suit was whether it deserved to be demolished and whether status quo ante which prevailed on the date of suit should be restored. The counter - claim sought such relief. The counter -claim did not mention that the construction work was done without permission of Corporation etc. Original counter -claim filed in 1996 did not seek demolition of the building constructed by defendant no.9. This was obvious because at that time construction work was not done. In 1994, defendant no.9 was prevented from developing property, but in 1996, the order of temporary injunction was withdrawn at the request of the plaintiff. It is thereafter the counter -claim was filed. The withdrawal of the application by plaintiff was referred as a cause of action for the counter - claim. In 2004, amendment was sought in the counter - claim and the same was allowed. In the additional paragraphs in the counter -claim, defendant nos.1, 4 to 8 categorically stated that despite of undertaking given by defendant no.9 before the High Court on 7th February, 1997, they in violation of the same continued construction. In the background of this allegation, defendant nos.1, 4 to 8 branded the construction work as illegal, but they also added that the work would be affected by principle of lis pendens. It is in this background, they sought a new prayer in the amended written statement, which reads as under : -

"pass a decree for mandatory injunction thereby ordering demolition of the entire construction done by defendant no.9 on the suit property."

17. Admittedly, defendant no.9 did not file written statement to the amended counter -claim. Defendant no.9 had filed written statement on 11th October, 1996 and made no attempt to amend it. So, whatever is stated in the amended counter -claim has gone unchallenged on record. So, the question is, whether defendant nos.1, 4 to 8 could prove that construction work on the suit plot of defendant no.9 is affected by lis pendens and deserved to be demolished ? The answer is in the affirmative. Despite of orders passed by the Courts, work of construction continued at the sight. This was done by defendant no.9. This activity is thus affected by the outcome of this suit and the learned judge of the trial Court ought have directed demolition of entire building construction work of defendant no.9. Instead as pointed out above, he diluted this drastic order by saying that only such part of the building which was not permitted by Corporation should be demolished. This part of the decree thus is erroneous. What needs to be done is to pass a decree directing demolition of the construction work which was done during the pendency of the suit by defendant no.9. The question is, whether such a decree can be passed now? Order 41 Rule 33 of the CPC gives this court ample power to do what ought to have been done earlier. As said above, the learned judge of the lower court ought to have passed a decree directing demolition of the construction work done by defendant no.9 on the suit plot. Though a counter-claim is filed by defendant nos.1, 4 to 8, since this was a relief sought by them in the counter-claim and since they are entitled to it, (though they did not file cross -objection or appeal), such a relief is a

natural consequence of the decree of partition.

ORDER

Appeal is dismissed.

In place of the impugned operative order of the trial Court, following order stands substituted. Suit and counter -claim are decreed in following terms with proportionate costs.

1] It is hereby declared that plaintiff, defendants no.1 to 8 are having joint share in suit property no.220, situated at Ravi Nagar, Nagpur. The shares of respective parties are, plaintiff and defendants no.5 to 8; are having 1/45th share each and defendants no.1, 2, 3 and 4 each are having 10/45th [1/5th plus 1/45th] share.

2] As far as claim and counter-claim as to other landed properties and movable properties is dismissed for the reasons stated above.

3] Plaintiff, counter claimant defendant nos.1, 4 to 8 are entitled for partition and separate possession of their above determined share from the suit property plot no.220. Defendants no.2 and 3 if pay required court fees, shall also be entitled for executing the decree for partition and separate possession.

4] Defendants no.1 and 9 are hereby restrained for alienating the suit property detrimental to the interest of plaintiff till partition takes place by metes and bounds by due procedure of law.

5] It is hereby declared that the defendant no.9 has no right, title or claim in suit property part of plot no.220, as their induction is illegal and accordingly the further activities carried out by it are illegal.

6] Defendant nos.2 and 9 are hereby directed to demolish building construction on the suit plot by them forthwith.

7] The appellants shall pay cost to the defendant nos.1, 4 to 8.

At the request of learned counsel for the appellant/original defendant no.9, the effect of this order to the extent of demolition of the building is stayed for a period of eight weeks.