

(1998) 03 BOM CK 0054

In the Bombay High Court

Case No : Second Appeal No. 30 of 1996

Narayan Laxman Sudhir and another

APPELLANT

Vs

Shri Harischandra Babu Sudir and others

RESPONDENT

Date of Decision : 18-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(4), Order 6 Rule 17
Specific Relief Act, 1963 — Section 37, 38
Transfer of Property Act, 1882 — Section 52

Citation : (1998) 3 BomCR 870

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; M.S. Soanak and D. Pangam, for the Respondent

Judgement

R.K. Batta, J.—The appellants are original defendants No. 2 and 3 and hereinafter shall be referred as defendants No. 2 and 3. The respondents No. 1 to 10 are original plaintiffs and shall be hereinafter referred as plaintiffs. The respondent No. 11 is original defendant No. 1 and shall be referred hereinafter as defendant No. 1 and respondent No. 12 is original defendant No. 4 and shall be referred as defendant No. 4. The plaintiffs had filed a suit for declaration, damages and permanent injunction against the defendants. This suit was filed in the backdrop of Suit No. 18236/59 in which defendant No. 1's father-in-law was the plaintiff and present defendants No. 2 to 4 were defendants therein. The said suit was for declaration of ownership of the properties which are" also subject matter of the present appeal. In the said suit present defendants No. 2 to 4 had laid their claim on the basis of Gift Deed dated 30th September, 1950. The said suit was decreed in favour of Baburao Mukund Sudir through whom present defendant No. 1 was claiming right to the said properties as against defendants No. 2 to 4 in the said suit. The present defendants No. 2 to 4 had filed an appeal which was dismissed and then Second Civil Appeal No. 25/1978 was filed by the present defendants No. 2 to 4 before the erstwhile Court of Judicial

Commissioner. The original plaintiffs therein had died and the present defendant No. 1 had stepped into their shoes. When the matter was pending before the erstwhile Court of Judicial Commissioner, the plaintiff in the said suit had withdrawn the suit itself and the suit was permitted to be withdrawn. After the withdrawal of the suit an application was filed on 28-3-80 by the Advocate for the present defendants No. 2 to 4 stating that the original suit had been withdrawn, as a result of which the defendant's say has been vindicated and the possession of the suit properties therein be handed over to them. Prema Babu Sudir as legal representative of the original plaintiff gave no objection. On this application, the Civil Judge passed an order on 31st March, 1980 ordering the delivery of possession of the suit properties to the present defendants No. 2 to 4 after notifying the receiver. In pursuance of the said order, the suit properties were delivered by the Bailiff on 15th April, 1980 to the present defendants No. 2 and 3.

2. The present plaintiffs stake their claim against these properties in pursuance of Sale Deed dated 22-1-1975 which was executed in their favour by the present defendant No. 1. The previous suit had been decreed on 30-1-68 and during the pendency of the appeal, the Sale Deed was executed by the plaintiff in the said suit in favour of the plaintiffs in present suit. The present plaintiffs came to be in possession from the date of execution of the Sale Deed and contended that the previous suit was withdrawn by the present defendants to defeat their rights.

3. The trial Court had dismissed the suit of the plaintiff, but in appeal before the learned Addl. District Judge, Margao the order of dismissal of the plaintiff's suit was set aside and the defendants were restrained permanently from interfering with or trespassing into any of the suit properties. This judgment and order dated 14th August, 1996, is challenged by the appellants namely defendants No. 2 and 3 in this appeal which was admitted on the following substantial questions of law :--

(a) Whether the Appellate Court was correct in relying upon Sale Deed dated 22-1-75 specially when (i) the sale deed was executed during the/ pendency of Suit No. 18236/59 and was hit by section 52 of the Transfer of Property Act, (ii) the seller could not have executed the sale deed in view of prior Gift Deed dated 30-9-1950 by Costurem and Saguna Gune Sudhir, predecessors of the seller, gifting the suit properties to the appellants ?

(b) Whether the Appellate Court could conclude that the respondents were in possession by ignoring (i) that the Quepem Court had delivered possession of the suit properties to the appellants on 15-4-1980 subsequent to the withdrawal of Suit No. 18236/59, (ii) that prior to the delivery of possession to the appellants, the suit properties were in possession of the Court Receiver appointed in the said Suit ?

(c) Whether the present suit is not barred by Order 23, Rule 1(4) of CPC in view of withdrawal of previous Suit No. 18236/59 in respect of the same subject

matter.

(d) Whether the Appellate Court could have relied upon the orders passed in the present suit on the temporary injunction application, to decree the Suit ?

(e) Whether the Appellate Court has not miscast the burden of proof as regards title and possession of the suit properties ?

(f) Whether the Appellate Court could go into the question of illegitimacy of the donors Costurem and Seguna Guno Sudir, when the same was not in issue in the suit, nor was it taken up in the memo of appeal ?

(g) Whether the findings of the Appellate Court that the Gift Deed of 1950 did not relate to the suit properties could not be said to be perverse and based on a misconstruction/misreading of the Gift Deed and ignoring the previous litigation bearing No. 18236/59 and the withdrawal thereof ?

4. Learned Advocate Shri A.F. Diniz, appearing on behalf of the appellants/defendants No. 2 and 3 urged before me that the suit is for declaration and injunction and no relief of possession has been sought; that the Appellate Court was not justified in interfering with the findings of the trial Court to the effect that defendants No. 2 and 3 were in possession; that the Appellate Court erred in rejecting the claim of defendants No. 2 and 3 which was based upon Gift Deed dated 30th September, 1950 which was executed by the daughters of the original owner Guno Sudir on flimsy and irrelevant considerations; that transfer of Sale Deed in favour of the plaintiffs by defendant No. 1 is hit by section 52 of the Transfer of Property Act and that the present suit is barred in view of Order 23, Rule 1(4) C.P.C. Regarding the applicability of the doctrine of Lis pendens, reliance was placed on Amarnath and Others Vs. Deputy Director of Consolidation, Kanpur and Another, . Reliance was also placed on Dhanna Singh and Others Vs. Baljinder Kaur and Others, in support of the contention that once the original plaintiff had withdrawn the previous suit, the present plaintiff would step into his shoes on account of which the doctrine of Lis pendens would apply.

5. On the other hand, learned Advocate Shri Sonak, appearing on behalf of the plaintiffs, has submitted that the prayers for declaration and damages had been given up and the suit is essentially a suit for permanent injunction and possession. It was pointed out that the trial Court's finding that sale deed dated 22-1-75 is null and void and ab initio is wrong and this position was not disputed by the learned Advocate for the defendants No. 2 and 3. It was pointed out further that the doctrine of lis pendens would not apply in the present case as the suit was withdrawn and no decree was passed in the previous suit. It was further urged before me that the handing over of possession by the Bailiff was a mere paper transaction and besides that the defendants had failed to establish that they were in possession of the suit properties, whereas the plaintiffs proved by the evidence of P.W. 1 to P.W. 3 that they were in possession and that the Appellate Court had rightly discarded the Gift Deed on the basis of which defendants No. 2 and 3 were claiming right to the suit properties. It was also

pointed out that the Appellate Court had come to the conclusion that the suit properties were neither specified in the Gift Deed nor the properties therein covered are the suit properties and the finding of the Appellate Court in this respect cannot be assailed.

6. Taking into consideration, the rival contentions, it is to be seen whether the doctrine of *lis pendens* would be attracted to the present proceedings; whether the present suit in question is barred under Order 23, Rule 1 C.P.C. and whether possession has been established by the plaintiffs. In the written statement as originally filed by defendants No. 2 to 4, the right to the suit properties was claimed merely on the basis of withdrawal of the previous suit and the handing over of the property by the Civil Judge to them after the previous litigation was over. The written statement was filed in 1981. After a period of 13 years i.e. in the year 1994 defendants No. 2 to 4, by way of amendment, had placed their claim in respect of the suit properties on the basis of the Gift Deed alleged to have been executed by the daughters of original owner Guno Sudir. As I have already pointed out, in the previous suit the defendants No. 2 to 4 had claimed right to the suit properties as against present defendant No. 1 who was plaintiff in the said suit on the strength of the same Gift Deed. The claim of present defendants No. 2 to 4 was rejected not only by the trial Court in the suit, but also by the Appellate Court. The trial Court in the previous suit, in its judgment dated 30th January, 1968, had clearly come to the conclusion that these defendants had not succeeded to prove the capacity of lawful heirs of the owners of the plots Guno Sudir and the possession which they pretended to exercise over the suit properties was on the basis of juridical act which could not confer any right on them. Defendants No. 2 to 4 had not placed their claim on the basis of the said Gift Deed initially in the present suit, but only introduced the said fact after 13 years of filing of the written statement at the stage when the evidence of present defendant No. 2 as D.W. 4 was in progress. The Appellate Court for very valid reasons which are recorded in paras 7 to 11 had rejected the claim of the defendants No. 2 to 4 based upon the same Gift Deed which had been also earlier rejected by the trial Court in the previous suit vide judgment dated 30-1-1968. First of all, a very belated plea after 13 years was placed by defendants No. 2 and 3 to stake their claim against the suit properties and in spite of that the said defendants failed to place on record the marriage certificate of Guno Sudir with Laxmi. The contention of these defendants is that the said Guno had two wives namely Laxmi and Zaiyu and Costurem and Seguna were their daughters who had gifted the properties in favour of these defendants. A reading of the Gift Deed, gives a clear indication that the properties therein were being gifted by the said Guno Sudir who had died by then due to love and affection out of the disposal quota and the said Costurem and Seguna were merely made parties to the said Gift Deed. The Gift Deed has, therefore, to be discarded on this count and was rightly discarded by the Appellate Court. Moreover, the Gift Deed did not mention the properties and the Appellate Court rightly came to the conclusion that it was not possible to

determine whether the properties gifted by the said Gift Deed are the suit properties in question. In addition to the reasons given by the Appellate Court in paragraphs 7 to 11, a reference to the evidence of D.W. 4 is considered essential in order to demonstrate that defendants No. 2 to 4 are not even sure as to how the said Costurem and Seguna were related to Guno Sudir to whom the property originally belonged. In the examination-in-chief, the case of defendants No. 2 to 4 was that Guno Sudir was married to Zaiyu and Costurem and Seguna were their daughters. In the course of cross-examination, defendant No. 2 (D.W. 4) stated that Guno Sudir was married twice and that he did not know the name of the first wife of Guno Sudir. When he was asked to produce the marriage certificate of Guno with Zaiyu, he stated that he will have to search the same and this certificate was never produced. He further stated that Guno had married twice and after the death of the said wife which means that Guno had married thrice according to this witness. He did not know whether Zaiyu was the legally wedded wife of Guno and he stated that out of the two ladies Seguna was the daughter of Guno Sudir, but he did not know about Costurem Sudir; Ultimately he stated that he did not have marriage certificate of Guno and Zaiyu. At a later stage during cross-examination he stated that Costurem is daughter of Guno by his first wife whose name he did not know and Seguna was the daughter of Zaiyu.

7. In view of the above, obviously the claim put forward by defendants No. 2 to 4 could not be accepted and was rightly rejected by the Appellate Court.

8. Coming to the question of *lis pendens*, the said doctrine is not applicable to the facts of this case. Section 52 of the Transfer of Property Act provides that during pendency of any suit in any Court in which right of immovable property is directly and specifically in question, the said property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. The effect of section 52 is not to wipe out a sale *pendente lite* altogether but it is made subordinate to right based on decree in the suit. As between the parties to the transfer, however, it is perfectly valid and operates to vest the title of the transferor in the transferee. The words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", make it clear that transfer is good except to the extent that it might conflict with rights, decree or order. It is in this view that transfers *pendente lite* have been held to be valid and operative as between the parties thereto. The previous suit had not resulted into any decree and in fact was withdrawn by the present defendant No. 1 who was the plaintiff therein after she had succeeded in establishing her claim as against defendants No. 2 to 4 in two courts. The withdrawal of the suit did not result into any decree and, as such, Sale Deed dated 22-1-1975 does not affect any right of any party under any decree or order made in the previous suit. The ruling of the Allahabad High Court upon which reliance has been placed is not attracted to the facts of the case, for in that case a decree had been passed upon a compromise and, as such, it was held

that the decree founded on compromise was as much binding as a decree founded on merits. In that case one Lakshmi Narayan had compromised the suit with specific understanding that he and the opposite party Suresh Kumar had half share in the suit plots which resulted into decree and recognised the right of the opposite party. The position in respect of withdrawal of a suit is altogether different. In Commentary on Transfer of Property Act by Mulla, Eighth Edition (1995) at page 287, u/s 52 sub-heading "compromise or consent decree" there is a reference to an old case where it is laid down that if the suit is withdrawn and a compromise is then recorded in a conveyance between the parties, such compromise would not be protected by the doctrine of lis pendens. Of course, in the case before me, no compromise is recorded in any conveyance deed between the parties after the withdrawal of the suit. The proposition laid down by the Apex Court in the judgment upon which reliance has been placed by learned Advocate Shri Diniz is not disputed, but that ruling does not in any manner help or advance the case of the defendants No. 2 to 4.

9. The plaintiffs in the suit are claiming rights on the basis of the Sale Deed executed by defendant No. 1 who was plaintiff in the previous suit and, as already held, this Sale Deed is not affected by the doctrine of lis pendens. The claim of the defendants based upon the Gift Deed relating to the suit properties has already been rejected and, as such, there is absolutely no merit in the submission of learned advocate Shri Diniz that the present suit is barred in view of Order 23(1)(4) of C.P.C. In a suit for permanent injunction and possession title has to be looked into. The plaintiffs have established their title in respect of the suit properties wherein defendants have failed to establish the same. The plaintiff had filed a suit on 19-8-80 claiming to be in possession of the suit properties. Defendant No. 2 when examined as D.W. 4 has admitted that the suit property is in possession of the plaintiffs from July, 1980 which means that the defendant No. 2 (D.W. 4) himself admits that the plaintiff was in possession of the suit property prior to the filing of the suit. Moreover, the plaintiffs with the help of evidence of P.W. 1 to P.W. 3 have established their possession of the suit properties which was accepted by the Appellate Court and the said findings by no stretch of imagination can be said to be either perverse or not based upon evidence on record. Of course, the Appellate Court was not right while taking into consideration the findings rendered by the trial Court in the temporary injunction application. Defendants No. 2 and 3 claimed possession on the basis of the order passed by Civil Judge in the previous suit on 31-3-80 in pursuance of which the Bailiff is stated to have handed over possession to defendants No. 2 to 4 on 15th April, 1980. However, as I have already pointed out defendant No. 2 (D.W. 2) has himself admitted that the plaintiffs are in possession of the suit properties from July, 1980. This means that the possession which the defendants No. 2 to 4 obtained from the Court was merely paper transaction. The application which was filed by the present defendants No. 2 to 4 in the previous suit to which no objection was given by one Prema Babu Sudir appeared to be prima facie collusive and it is not understandable as to how the Civil Court could have

ordered handing over possession to defendants No. 2 to 4 due to withdrawal of the suit by defendant No. 1. The plaintiff had specifically alleged in the plaint in paras 4 and 7 that they were in possession of the suit properties except for interruption for a period of four years due to appointment of Receiver. The defendant No. 2 who claimed to have received possession from the Receiver, has not placed any material on record from where it could be made out for which period the Receiver was in possession. The order of Receiver made during the pendency of the trial before the Civil Court would come to an end with the decree in the said suit and no material has been placed on record by the defendants whether any fresh Receiver had been appointed in respect of the suit properties pending appeal after the judgment of the Civil Court dated 30-1-1968. The Appellate Court, in these circumstances, was justified in coming to the conclusion that the plaintiffs had proved not only title, but also their possession of the suit properties.

10. The result is that no interference is called for in the findings of the Appellate Court. In view of the aforesaid discussion substantial questions (a) and (b) are answered in the affirmative. Substantial question (c) is also answered in the affirmative and it is held that the suit is not barred under Order 23, Rule 1 C.P.C. Substantial questions (d) and (e) are answered in the negative. Substantial question (f) is also answered in the affirmative in view of the finding on substantial question (a). Regarding substantial question (g) it is held that the findings of the Appellate Court are not perverse.

11. For the aforesaid reasons, I do not find any merit whatsoever in this appeal and the appeal is hereby dismissed. The judgment and order dated 14th August, 1996 of the Appellate Court is hereby confirmed. Costs shall be borne by defendants No. 2 and 3 namely the appellants.

Order dated 27th February, 1997 passed in Civil Application No. 194/96 stands vacated.

12. Appeal dismissed.