

(2011) 01 BOM CK 0057

In the Bombay High Court

Case No : Second Appeal No. 73 of 1995

Narayan Ramchandra Bhokardankar

APPELLANT

Vs

Sakharam Patilba Sonune, Sakharam Ramchandra
Bhokardankar, Balkrishna Ramchandra Bhokardankar and
Anant Ramchandra Bhokardankar

RESPONDENT

Date of Decision : 14-01-2011

Acts Referred:

Citation : (2011) 2 ALLMR 606 : (2011) 4 BomCR 716 : (2011) 113 BOMLR
457 : (2011) 2 MhLj 388 : (2011) 8 RCR(Civil) 1076

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : S.R. Deshpande, for the Appellant; Sadawarte and V. Oberai, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—This appeal takes exception to the judgment and decree dated 31.08.1994 in Regular Civil Appeal No. 2/1993 passed by the learned Additional District Judge, Buldhana by which, the judgment and decree dated 22.09.1992 in Regular Civil Suit No. 133/1987 by the Civil Judge, Senior Division, Buldhana came to be confirmed. The substantial question of law involved in the above appeal is, as follows:

Whether in the last letter in question which was marked as document "A" to which both the sides have given consent in the context of the oral evidence, the theory regarding waiver of right of preemption of the Plaintiff can or cannot justify the action of accepting it ?

2. The Appellant is the original Plaintiff and the Respondents herein are the original Defendants. The Plaintiff had filed Regular Civil Suit No. 133/1987 for declaration, that the agreement of sale between the Defendant No. 2 Sakharam and the Defendant No. 1 Sakharam Sonune is void. The Plaintiff had

consequently sought possession of the said property. The Plaintiff's case was that the Plaintiff and Defendant Nos. 2 to 4 are brothers. Their father Ramchandra Bhokardankar expired on 08.03.1956 and mother expired on 24.04.1958. It is the case of the Plaintiff that their father was the karta of the family and after the death of father and mother of Plaintiff, the joint Hindu family of the Plaintiff and Defendant Nos. 2 to 4 continued till August, 1978 and that he was the manager of the joint Hindu family. The property belonging to the joint Hindu family was the agricultural land situated at Malvihir, Taluq Chikhili, bearing Survey No. 10, area 11.27 acres with one Well. It is the case of the Plaintiff that the said property was partitioned in August, 1978 amongst the Plaintiff and his brothers i.e. Defendant Nos. 2 to 4 and at the time of partition, there was an agreement between the Plaintiff and Defendant Nos. 2 to 4 that in case of sale of share, by any of the brothers, preference should be given to the other brothers, than a stranger and that the intending seller brother was to give the market price of the land, and in case of refusal by the other brothers, the intending seller brother would be free to sell of his share to any stranger. It is the case of the Plaintiff that the despite the aforesaid agreement, the Defendant No. 2 Sakharam entered into an agreement to sale with the Defendant No. 1 in respect of his 1/4th share in survey No. 10 of village Malvihir. It is his case that the above agreement for sale was at the rate of Rs. 2500/ per acre and that since the Plaintiff had a preferential right over the Defendant No. 2 to purchase the suit land at the same price, as it was agreed to by the Defendant at the time of partition and that he has the right of preemption. The Plaintiff in the suit stated that he is ready to deposit the amount in court. The Plaintiff" therefore, claimed possession and also mesne profit. There are further averments in the plaint as regards how the Defendant No. 1 got his name entered in the revenue record. The said pleadings are not material in the context of the substantial question of law that arise for consideration.

3. The Defendant No. 1 Sakharam filed his written statement and the case of the Defendant No. 1 was that the Defendant No. 2 had asked the Plaintiff whether he is ready to purchase the land, before entering into an agreement with him, and since the Plaintiff has shown disinclination to purchase the said land, he has entered into an agreement for sale with the Defendant No. 2 on 14.04.1980. It is the case of the Defendant No. 1 that there is a partition between the Plaintiff and his brothers i.e. Defendant Nos. 2 to 4 and that the said partition was effected by carrying out measurement and fixing the boundaries and that the land in question which he had agreed to purchase from Defendant No. 2 was in the name of the Defendant No. 2 in the revenue record. It was the case of the Defendant No. 1 that though the Defendant No. 2 as also the Defendant Nos. 3 and 4 have entered into an agreement of sale of land of their share with a stranger Bhagwan, but those sale deeds have not been assailed by the Plaintiff". The Defendant No. 1, therefore, prayed for dismissal of the suit. The Defendant No. 2 Sakharam has also filed his written statement and took a stand that before entering into the said agreement of sale, he had asked the Plaintiff about the

same, but the Plaintiff showed his disinclination to purchase the land and asked the Defendant No. 2 to sell the land to any body he chooses.

4. The trial Court on the basis of the pleadings framed the relevant issues. The trial Court by judgment and order dated 22.09.1992 dismissed the said suit. In so far as the trial Court was concerned, the document marked as Article "A" was not exhibited in view of the objection raised on behalf of the Plaintiff, however, dehors the said document, the trial Court recorded a finding that though the Plaintiff was aware of the transaction between the Defendant Nos. 1 and 2, he had not objected to the same. The trial Court also observed that the said document Article "A", discloses that the Plaintiff was aware of the transaction prior to the said transaction, having actually taking place. The trial Court was of the view that for non-exhibition of the said document, the Plaintiff was only responsible, as the Plaintiff had not proved the same by entering the witness box. The Trial Court, therefore held that the transaction between the Defendant No. 1 and Defendant No. 2 could not be said to be in contravention of the agreement arrived at, at the time of partition i.e. Exh.24, and dismissed the suit.

5. The Plaintiff carried the matter in appeal by filing Regular Civil Appeal No2/1993. In the first Appellate Court the parties filed Pursis through their Advocates, by which Pursis they agreed that the document Article "A" to be taken as proved and marked as Exh.24. The first appellate Court on the basis of the statement in the said document Exh.24, has recorded a finding that the Plaintiff had not asserted his right of preemption, as also from the said recitals, it can be seen that the Plaintiff was more interested in the Defendant No. 2 getting the appropriate price, for which he blamed it on providence. The relevant extracts of the recitals/ statements in the said document "A", are even reproduced in vernacular in the impugned judgment of the first Appellate Court and they are even translated. The first Appellate Court though on the basis of Exh.24 recorded a finding that the trial Court was wrong in coming to the conclusion that the Plaintiff had failed to prove his right of preemption, the first Appellate Court recorded a finding that the Plaintiff infact had the said right. The question only was, whether the said right has been waived by the Plaintiff ? The first Appellate Court on the basis of the excerpts from the document, which it had translated in the impugned judgment, has recoded a finding that the Plaintiff had not asserted his right of preemption at the relevant time, and infact had accepted the sale of the property by the Defendant No. 2 to the Defendant No. 1, but has only questioned the price at which the said property was sold. It is required to be noted that the above proceedings had earlier gone back as the suit was once remanded to the trial Court. The parties were therefore, given sufficient opportunity to adduce necessary material in respect of their respective cases.

6. I have heard the learned Counsel for the parties.

The learned Counsel for the Appellant contends that the first Appellate Court had erred in taking into consideration the Pursis which was signed by the Advocate,

as also the document Exh.24, and thereby has wrongly confirmed the dismissal of the suit. The learned Counsel further contends that there is no material on record to indicate that apart from the Plaintiff, the Defendant No. 2 had offered the suit property to the Defendant Nos. 3 and 4.

7. Per contra, it is submitted on behalf of the Respondent No. 1, that the Plaintiff had not produced any material to indicate that at the relevant time, he was interested in purchasing the property, pursuant to his right of preemption. The learned Counsel contends that the document which was agreed to be accepted as proved by virtue of joint Pursis filed, infact militates against the case of the Plaintiff.

8. After having considered the rival contentions, in my view, there is no merit in the submissions made on behalf of the Appellant. In so far as the Pursis is concerned, it is a joint Pursis filed by the Advocates appearing for the rival parties. It is by the said Pursis, that the document "A" was agreed to be accepted to as proved, and therefore, there was no question of proving the contents of the documents once the Pursis was filed. The challenge to the said Pursis on the ground that it was filed by the Advocates, in my view is in bad taste, as from the grounds of appeal in the above Second Appeal also it can be seen that no specific ground has been raised, questioning the filing of the Pursis by the Advocates. Once the said document came on record as proved at the Appellate Stage, the first Appellate Court was entitled to consider the same as a piece of evidence. The first Appellate Court on considering the recitals/statements in the said document, came to a conclusion that from the said document, it cannot be said that the Plaintiff had asserted his right of preemption. The recitals according to the first Appellate Court only go to show that the Plaintiff was interested on the land being given on theka, and was more concerned about the price at which the land in question was sold to the Defendant No. 1.

Having perused the said document, the findings of the first Appellate Court in my view cannot be faulted with. The said document does not disclose that the Plaintiff was asserting his right of preemption. It is pertinent to note that the said document was first in point of time, immediately after the agreement of sale was arrived at between the Defendant No. 1 and Defendant No. 2. The reaction of the Plaintiff in the said document ought to have been forthright and candid, in as much the Plaintiff" ought to have stated in no unmistakable terms that he had a right to preemption and that the Defendant No. 2 could not sell the said property to the Defendant No. 1.

No such statement can be seen in the said document. It is also pertinent to note that the said letter/Exh.24 also refers to the antecedent discussion which the Defendant No. 2 had with the Plaintiff. Therefore, the said document itself discloses that the Plaintiff was very well aware of the transaction and had chosen not to object to it. In my view, therefore, the Plaintiff had by the said document waived his right of preemption and had accepted the sale, made by the Defendant No. 2 in favour of the Defendant No. 1.

9. The Plaintiff, considering the material on record, which both the Courts below have considered can be said to have waived his right of preemption. In so far as the submission of the learned Counsel for the Appellant is concerned, that there is no material to indicate that the Plaintiff offered the property to the Defendant Nos. 3 and 4, who are the other brothers, prior to the sale of to the Defendant No. 1. In my view, the said submission does not stand to reason. It is required to be noted that the Defendant Nos. 3 and 4, themselves have sold their share to another stranger Bhagwan. Moreover, when the Defendant Nos. 3 and 4 have no grievance about the same, how can the Plaintiff" possibly make a grievance on their behalf.

10. The reliance by the learned Counsel for the Appellant on the judgment of Hon"ble Apex Court, reported in Rambaran Prosad Vs. Ram Mohit Hazra and Others, in my view is misplaced in view of the facts and circumstances of the case, as in the present case the Courts below have held that the Plaintiff has not asserted his right of preemption, whereas in the said case the facts were that the purchaser was not aware of the rights of preemption and therefore the Hon"ble Apex Court held that the sale would be subject to the said right. The question of law, therefore, stands answered accordingly. In my view, there is no merit in the Second Appeal, the same is accordingly dismissed. No costs.