
(1987) 11 BOM CK 0020
In the Bombay High Court
Case No : Suit No. 454 of 1970

N.D. Muthuswamy Rao and others

APPELLANT

Vs

Mewalal Rajaram Dube and others

RESPONDENT

Date of Decision : 02-11-1987

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 34, 63, 84, 88, 88(1)
Transfer of Property Act, 1882 — Section 45

Citation : (1988) MhLj 242

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Advocate : P.L. Nain instructed by M/s. M.V. Jaykar and Co, for the Appellant;
A.Y. Bookwala with J.R. Shah instructed by M/s. Bhatt and Co. for defendants
Nos. 1 to 5, G.J. Desai with Mrs. R. Gupta and Miss Hema Chaurikar instructed
by M/s. Gordhandas and Fozdar for defendants Nos. 11 to 16, 21, 22, 23, 25, 28,
30 and 33 and M.M. Bhatt for defendants Nos. 7 and 18, for the Respondent

Judgement

G.H. Guttal, J.—In this suit the Plaintiffs seek a declaration that they are the owners of the land admeasuring 17,730 Square Yards out of Survey No. 18, Plot No. 1, situated in the Village of Vadhwan, Taluka South Salsette, in the registration Sub-District of Bandra, District Bombay Suburban, in Greater Bombay, and a decree for possession against the Defendants.

In a nutshell the Plaintiffs case is as set out in paragraphs 2 and 3 below :

2. The Defendants 1 to 5 are the sons of Rajaram Dube who once claimed to be a tenant of the property. The remaining Defendants are in occupation of structures alleged to have been erected illegally by Rajaram Dube.

3. The Plaintiffs Nos. 1 and 2 purchased the suit land from Ramkumar Fulchand and others, whose title is not in serious dispute This was done by a Deed of Conveyance dated 30th September 1949. The Plaintiffs' names were duly entered in the record of rights. However, the land was taken over temporarily by the Government of India, Defence Department, for the Central Ordnance Depot,

Kandivali, sometime in 1916. Meanwhile, Rajaram Dube trespassed upon the land, which was in the occupation of the Defence Department in their "Security Zone". On or about 5th March 1951 the Military Police ejected the said Dube from the said security zone. Meanwhile Dube's name was entered in the record of rights as a tenant. On coming to know of this, the Plaintiffs, by Suit No. 19 of 1952/1953 before the Mamlatdar, Borivali, sought an order deleting the name of Dube. After recording evidence of 12 witnesses examined by the Plaintiffs and the said Dube, the Mamlatdar, Borivali, ordered that the name of Rajaram Dube be deleted from the record of rights. After securing this order, the Plaintiffs made an application u/s 84 of the Bombay Tenancy and Agricultural Lands Act, 1948, for eviction of Rajaram Dube. This application made on 28th December 1955 was granted by Mamlatdar on 18th August, 1956. Having failed in the Revenue Courts Rajaram Dube filed a civil suit, being Suit No. 514 of 1956, before the Civil Judge, Borivali, and sought a declaration that the order of the Mamlatdar, ordering deletion of his name was illegal. He also sought a declaration that the sale of the suit land in favour of the Plaintiffs was void. An Injunction restraining the Plaintiffs from executing the order of eviction dated 18th August 1956 was also sought. In 1956 or thereabout the village Wadhwan which was part of Borivali Taluka merged into the limits of Greater Bombay. Consequently, the suit was transferred to the Court of Civil Judge, Junior Division, Bassein, who dismissed it on 17th March 1958. As already stated, it is the Plaintiff case that Rajaram Dube illegally constructed the structures and inducted into them the Defendants Nos. 6 to 35. According to the Plaintiffs, since Rajaram Dube was a trespasser his heirs who are Defendants Nos. 1 to 5 are also trespassers. Since the Defendants Nos. 6 to 35 were inducted by the Defendants Nos. 1 to 5 they are also trespassers.

4. The substance of the Defendants case, in so far as is relevant at this stage, is two-fold. Firstly, they urge that the land purchased by the Plaintiffs is an agricultural land to which the Bombay Tenancy and Agricultural Lands Act, 1948 applies. u/s 63 of the Bombay Tenancy Act, no sale of any agricultural land shall be valid in favour of a person who is not an agriculturist unless the sale has been entered with the permission of the Collector as required under that Section. Since the Plaintiffs are not agriculturists and in the absence of permission from the Collector the sale on the basis of which the suit is filed is void. Secondly, they urge that the Plaintiffs Nos. 1 and 2 are co-owners of the entire land as they have purchased it jointly in their names. This suit was instituted on 2nd March 1976. The Plaintiff No. 2 died on 26-9-1983. The legal representatives of the Plaintiff No. 2 have not been brought on the record of this suit. The Plaintiff No. 1 alone or his legal representatives cannot maintain or continue the suit. Therefore, the suit has abated in its entirety.

5. Sharad Manohar, J., framed the following Issues on 6th October 1987 :

(1) Whether the land in question was an agricultural land within the meaning of the Bombay Tenancy and Agricultural Lands Act, 1948 on 30-9-1949 when the

Plaintiffs purported to purchase the same from the erstwhile owner?

(2) If the answer to the above Issue is in the affirmative, whether the Sale Deed dated 30-9-1949 taken by the Plaintiffs was void and/or invalid on account of the provisions of Section 63 of the said Tenancy Act?

(3) If so, whether the plaintiffs have cause of action to file the suit on the basis of the said Sale Deed?

(4) Whether defendants Nos. 1 to 5, 11, 13, 16 and 33 prove that they have perfected their title to the suit land by adverse possession?

(5) So far as Defendants Nos. 1 to 5 are concerned, whether the plea of acquisition of title by adverse possession is available to them in view of their earlier claim of being tenants in respect of the suit land?

(6) What is the effect of the death of plaintiff No. 2 upon the continuation of the suit? Whether the suit has abated as a whole?

6. By consent of the parties I have tried Issues Nos. 1, 2, 3 and 6 as preliminary Issues. Parties to this suit declined to lead evidence on these Issues. I heard the arguments of Counsel on these Issues.

7. The first question is whether the sale in favour of the Plaintiffs attracts Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948. Section 88 of the Bombay Tenancy and Agricultural Lands Act, 1948 reads thus:

88(1) Save as otherwise provided in, sub-section (2), nothing in the foregoing provisions of this Act shall apply

(a) X X X X X

X X X X X

(b) to any area which the State Government may, from time to time, by notification in the Official Gazette, specify as being reserved for non-agricultural or industrial development

X X X X X

X X X X X

Therefore, if there is a notification by which the lands in suit were reserved for non-agricultural or industrial development "the foregoing provisions" of the Bombay Tenancy and Agricultural Lands Act would not apply to the suit land. The "foregoing provisions" include Section 63 which makes the sale in favour of the Plaintiffs void. On 29th March 1957, the Government of Maharashtra, in Revenue Department, issued Notification No. TNC 5157/31190-M. It was issued in exercise of the powers conferred by Clause (b) of Section 88(1) of the Bombay Tenancy and Agricultural Lands Act, 1948. By this notification the Government of Maharashtra specified the areas in 20 villages as being "reserved for non-

agricultural and industrial development". The suit property is situated in village Wadhwan. The name of village Wadhwan appears at Serial No. 9 of this notification. It is thus clear that on 29th March 1957 the then Government of Bombay excluded the suit lands from the application of Sections 1 to 87A (the foregoing provisions) of the Bombay Tenancy Act. Thus, if the notification applies to the suit land, the provisions of the Bombay Tenancy Act which make the sale in favour of the Plaintiffs illegal, do not apply. Consequently, the Defendants cannot urge that the sale is illegal.

8. But, it is urged by counsel for the Defendants that the Notification was issued on 29th March 1957; whereas the Sale Deed in favour of the Plaintiffs was executed on 30th September 1949. The notification cannot apply retrospectively, and take away the rights created during the interregnum. For this purpose, certain judgments were relied upon to which I will make a reference. Sidram Narsappa Kamble Vs. Sholapur Borough Municipality Another, considered the case which fell u/s 88(l)(a) of the Bombay Tenancy Act. The Supreme Court held that Section 88(l)(d) of the Tenancy Act is retrospective in its operation. Following this judgment, a Division Bench of this Court, in Nilesh Construction Company and Another Vs. Gangubai and Others, held that Notification issued u/s 88(1)(b) operates retrospectively. It is important to note that the Division Bench was considering a notification issued u/s 88(1)(b) of the Act, dated 29-3-1957 which is the very notification by which the lands in this suit were reserved for non-agricultural or industrial development. The judgment is directly applicable to the facts of this case. There is therefore, no doubt that sitting as a single Judge, I am bound to follow the judgment of the Division Bench. The Division Bench has construed the Supreme Court's Judgment in S. N. Kamble vs. Solapur Municipality,"(supra) as laying down a rule that the notification u/s 88(l)(b) operates retrospectively. But, counsel for the Defendants drew my attention to a judgment of the Supreme Court in Navinchandra Ramanlal Vs. Kalidas Bhudarbhai and Another, and urged that the Notification u/s 88(l)(b) of the Tenancy Act cannot operate retrospectively. The Supreme Court, no doubt, distinguished the Judgment in S. N. Kamble vs. Solapur Municipality (supra). But, as already stated, that judgment has been interpreted by a Division Bench of this Court and it has been held that this very notification operates retrospectively. With respect, I am unable to take a view different from one taken by the Division Bench.

9. In my opinion, therefore, having regard to the Judgment of this Court in Messrs Nilesh Construction Co. vs. Mrs. Gangubai, (supra), the Notification operates retrospectively, and consequently, the prohibition imposed by Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 has no application. Therefore, the sale in favour of the Plaintiffs cannot be held to be void.

10. The status of the land as agricultural land has not been disputed during the arguments. Indeed, the arguments proceeded on the basis that the land was agricultural but the provisions of the Bombay Tenancy and Agricultural Lands Act,

1948 did not apply because of the Notification u/s 88(l)(b) of the Act.

11. The next question is whether, by reason of the failure to bring the legal representatives of the deceased Plaintiff No. 2, on the record of this suit, the whole suit which is now being prosecuted by the Plaintiff No. 1, through his legal representatives, has abated.

12. The two Plaintiffs instituted the suit as joint owners, though, their shares in the property in dispute were not specified. Co-ownership of property is a relationship of jointness and necessarily implies that the property is held in common. Inevitably, there is an element of inseparability of interest, inherent in the concept of co-ownership. This feature of co-ownership has to be borne in mind in deciding the question of abatement of suits filed by joint owners, though this factor is by no means conclusive.

A related question is whether, specification of shares of co-owners would make any difference to the decision on this question. This question arises because counsel drew my attention to Section 45 of the Transfer of Property Act Where under the joint owners purchasing property out of joint fund are presumed to own the property in proportion to their interest in the fund. But this presumption applies "in the absence of a contract to the contrary". Where there is no evidence as to the interests in the fund to which the co-owners were respectively entitled, they shall be presumed to be equally interested in the property.

This presumption raises the argument that since the Plaintiff No. 1 and Plaintiff No. 2 are presumed to have equal shares, the Plaintiff No. 1 can continue the suit in regard to his 1/2 share. This submission ignores that the presumption u/s 45 of the Transfer of Property Act applies between co-owners. In a dispute between Plaintiff No. 1 and Plaintiff No. 2, either of them could rely on the presumption created by Section 45 of the Transfer of Property Act. So far as the Defendants are concerned the ownership of the land by the two Plaintiffs is one and indivisible. Therefore, the presumption of equality of shares by itself is not determinative of the survival of the right to sue. Again, the decision on this question would depend on the facts of each case, the nature of the reliefs claimed, the defences adopted and so on. In the words of the Supreme Court *The State of Punjab Vs. Nathu Ram*, the question "will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances" as to when the Court can deal with a suit without the legal representatives of one of the joint owners.

13. The principles relevant for deciding this question were enunciated in *State of Punjab vs. Nathu Ram* (supra). In that case a joint decree in favour of Labhu Ram and Nathu Ram was passed in respect of the compensation for land acquired by the Government. Labhu Ram and Nathu Ram were joint owners of the acquired land. The State of Punjab appealed to the High Court. During the pendency of the appeal Labhu Ram died. His heirs and legal representatives were not brought on the record of the appeal. The Supreme Court held that since the

subject matter -- viz. the land -- for which compensation was calculated was the same, in the absence of the heirs of the deceased, the correct amount could not be assessed and therefore the Court cannot go on with the appeal. Consequently it was held that the appeal abated. The following principles emerge from the Judgment:

(i) The Court should consider whether all the parties necessary for a decision over the controversy were present before the Court. The Court should ask : Can the Court proceed to determine the controversy without the legal representatives of the deceased?

(ii) The suit abates if the surviving Plaintiff could not have sued for the reliefs claimed in the suit, without the legal representatives of the deceased Plaintiffs.

(iii) The suit abates if the decree in favour of the Plaintiff No. 1 alone will derogate from the rights of the deceased Plaintiff No. 2.

(iv) The suit will also abate if the decree in favour of the Plaintiff No. 1 alone cannot be successfully executed.

14. In order to apply the principles set out above, the facts constituting the rival cases may be considered.

The Plaintiffs who allege that Defendants Nos. 1 to Defendants Nos. 5 are trespassers, also allege that Defendants Nos. 6 to Defendant No. 35 are wrongfully in possession of portions of land and the structures erected thereon by Dube. Which structures were erected by Dube and which by Defendant No. 1 to Defendant No. 5 has not been stated. The Defendants Nos. 6 to 35 claim as lessees of different portions of land from Dube. They claim that structures were erected by them.

Now, if the Plaintiff No. 1 succeeds and a decree for possession is made, how will he execute it? His share assumed to be 1/2 cannot be demarcated. Therefore, it will be difficult to evict a specified Defendant in execution of the decree. The Defendants Nos. 6 to the Defendant No. 35 have claimed rights to different but undefined and undemarcated parts of the land. The Plaintiffs have not claimed that specified particular Defendants are answerable to their claims. These facts make it difficult to make an execute decree against the defendants. If the heirs of the Plaintiff No. 2 were on the record of this suit, a joint decree could be made and executed against all the Defendants, because in that event delimitation or specification of the parts of the land or the structures would not be necessary.

The case of the Defendants is of adverse possession. Suppose they prove that they hold the land Adversely to the Plaintiff No. 2, then in that event their title against the Plaintiff No. 2 is proved. Such evidence against the Plaintiff No. 2, if allowed to be led, will be unfair to him in the absence of representation to his estate. If the Plaintiff No. 1 succeeds and a decree is made, the legal representatives of the Plaintiff No. 2 cannot execute it, for, they are not the decree-holders.

The controversy in this suit raises the question of title of both the Plaintiffs. It also raises the question of extinction of title of both the Plaintiffs. A decision is not possible without the presence of both the Plaintiffs.

15. Consider another test laid down by the Supreme Court. Could the Plaintiff No. 1 alone have sued the Defendants for the re(sic) of declaration of title and possession? The Plaintiff No. 1 could not have sought a declaration that he is the owner of the whole land. The joint ownership makes it imperative that both of them seek the declaration of title. Since the Plaintiffs claim to be joint owners, it was impossible for the Plaintiff No. 1 alone to sue the Defendants for the reliefs claimed in this suit.

16. The general principle that the possession of one co-owner is the possession on behalf of all co-owners was also relied upon by the Plaintiffs to urge that the Plaintiff No. 1 alone could sue the Defendants for the relief claimed in the suit. It is true that the co-owner may sue on behalf of other co-owner to ward off a trespass. But this is a suit in ejectment. One co-owner may be able to sue and protect the entire property. This rule should not be confused with the question of representation to the estate of the deceased Plaintiff in a suit for possession against trespassers. The rule applicable in such cases was put in perspective by a Division Bench in *Balkrishna Moreshwar Kunte vs. The Municipality of Mahad*, ILR 10 Bom 32. In that case too one co-owner had sued the Mahad Municipality for recovery of possession. It was held :

Unless there is a special provision?...their property.

of the law, co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property.

In *Navheri and others vs. Shek Jamal*, 5 Bom. L.R. 577, the suit for recovery of possession was instituted by one co-owner. The sale deed which created the title in the co-owners was in the name of the Plaintiff alone. The Division Bench held that the fact that the sale deed is in the name of one co-owner alone is not sufficient to take the case out of the general rule laid down in *Balkrishna Moreshwar Kunte vs. The Municipality of Mahad*, (supra).

The rule laid down by these decisions is that one co-owner cannot bring a suit for recovery of possession. This answers the test laid down by the Supreme Court and negatives the argument that one co-owner can sue on behalf of all the co-owners.

17. Learned counsel for the Plaintiffs drew my attention to *Tuljaram Harkisondas Vs. Harkisan Jagjivan*, *Rama Motibhai Vs. Dalwadi Tupoo Rama and Others*, and *Mahabir Singh and Others Vs. Shayam Nandan Prasad and Others*,

In *Tuljaram Harkisondas vs. Harkisan Jagjivan*, (supra), an earlier decision in *Maganlal Dulabhdas Vs. Bhudar Purshottam*, , was cited to urge that one co-owner can sue to recover possession. The Division Bench in *Tuljaram Harkisondas* pointed out that in *Maganlal vs. Budhar* "the other co-owner was a party to the

suit". The Division Bench did not follow *Maganlal vs. Budhar*, but observed :

Yet, in circumstances like the present, it is certainly desirable that the other co-owners should be parties to any final decree that is passed in this matter".

These observations made, notwithstanding the decision in *Maganlal vs. Budhar*, are consistent with the general rule in *Balkrishna Moreshwar Kunte vs. The Municipality of Mahad and Navheri and others vs. Shek Jamal*

18. Therefore *Tuljaram Harkisondas vs. Harkisan Jagjivan*, (supra) and *Maganlal Durlabhdas vs. Budhar Purshottam*, (supra) do not lay down a rule different from the one propounded in *Balkrishna Moreshwar Kunte vs. The Municipality of Mahad*, (supra) and *Navheri vs. Shekh Jamal* (supra).

Rama Motibhai vs. Dalwadi Tupoor (supra) arose out of an application for possession by landlord against his tenant u/s 34 of the Bombay Tenancy and Agricultural Lands Act. The Division Bench, no doubt, observed that one co-owner can sue on behalf of all the co-owners. But the decision being between a landlord and tenant, the Court hastened to add :

But if an action is to be filed against a tenant, then all the co-owners must be joined.

Therefore, it does not appear that the decision lays down a different rule.

19. In *Mahabir Singh vs. Shyam Nandan Prasad*, (supra), the Patna High Court, following the earlier decision of its Full Bench in *Ram Niranjana Das and Another Vs. Loknath Mandal and Others*, has taken a view contrary to the view of this Court. However, I am bound by the judgments of the Division Bench referred to earlier.

20. It is, thus, the settled view of this Court that one of the several co-owners cannot institute a suit for recovery of possession. This suit is not a suit by one of the two co-owners. This suit was instituted by both the co-owners and therefore the constitution of the suit at the time of its institution was within the rule laid down by *Balkrishna vs. The Municipality of Mahad and Navheri vs. Shekh Jamal*. One of the tests for deciding whether Plaintiff No. 1 can continue the suit is whether he could have alone instituted the suit. The answer, in my view, is in the negative. This answers the test stated at (ii) of paragraph 13 above. Consequently, therefore, the Plaintiff No. 1 or his legal representatives cannot continue the suit without the legal representatives of Plaintiff No. 2.

21. There are two decisions of the Supreme Court which need to be mentioned. They enunciate the principles applicable in the case of suits by one of several co-owners. In *Ram Sarup Vs. Munshi and Others*, appellants Nos. 1 and 2 belonged to one group of purchasers and appellants Nos. 3, 4 and 5 belonged to another group of purchasers. The suit was for pre-emption. During the pendency of the appeal the Appellant No. 1 died. Since the sale was of one entire set of properties in favour of all the appellants and not of a separated item of property

in favour of the deceased appellant, the Supreme Court held that the entire appeal abated.

In Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, , the Supreme Court held that where each of the several claimants was entitled to sue for his own share and could have filed separate suits, the failure to bring on record the heirs of one of the Plaintiffs in appeal will not result in the abatement of the entire appeal. The reason was that the estate of the deceased appellant was represented. In the words of the Supreme Court the principle is :

...Furthermore, the principle that applies to this case is whether the estate of the deceased appellant or respondent is represented. This is not a case where no legal representative of Manmohini was on record.

In the present suit the heirs of the Plaintiff No. 1 who are prosecuting the suit cannot represent the estate of the deceased Plaintiff No. 2. Thus the estate of the deceased Plaintiff has not been represented at all. On the application of this principle also the suit abates.

22. The nature of the suit, the defences raised and the joint ownership of the Plaintiffs require both the Plaintiffs or their representatives for a proper constitution of the suit. In the absence of the legal representatives of the Plaintiff No. 2, the suit is not properly constituted. If a decree is made in such a suit, the result will be inconsistent with the rights of the deceased Plaintiff. In view of the diverse defences raised by the different sets of defendants, a proper adjudication of the dispute demands the representation of the deceased Plaintiff No. 2. Similarly, if the Plaintiff No. 1 alone could not have sued, he could not alone continue the suit. Besides, on the principle emerging from Harihar Prasad Singh and others vs. Balmiki Prasad Singh and others, (supra) since the estate of the Plaintiff No. 2 could not be represented by the Plaintiff No. 1 or his heirs, the entire suit abates.

23. I therefore answer the Issues as follows :

Issue No. 1 : Whether the land in question was an agricultural Sand within the meaning 6f the Bombay Tenancy and Agricultural Lands Act, 1948 on 30-9-1949 when the Plaintiffs purported to purchase the same from the erstwhile owner?

Answer : In the affirmative.

Issue No. 2: If the answer to the above Issue is in the affirmative, whether the Sale Deed dated 30-9-1949 taken by the Plaintiff was void and/or invalid on account of the provisions of Section 63 of the said Tenancy Act?

Answer : In the negative.

Issue No. 3: If so, whether the Plaintiffs have cause of action to file the suit on the basis of the said Sale Deed?

Answer : In the affirmative.

Issue No. 4: Whether Defendants Nos. 1 to 5, 11, 13, 16 and 33 prove that they have perfected their title to the suit land by adverse posSession?

Answer : Not answered as this Issue has not been tried.

Issue No. 5 : So far as Defendants Nos. 1 to 5 are concerned, whether the plea of acquisition of title by adverse possession is available to them in view of their earlier claim of being tenants in respect of the suit land?

Answer : Not answered as the Issue has not been tried.

Issue No. 6: What is the effect of the death of Plaintiff No. 2 upon the continuation of the suit? Whether the suit has abated as a whole?

Answer : The entire Suit abates and has to be dismissed.

24. In view of my findings, the suit is dismissed with costs.

The interim order whereby the Receiver is appointed shall continue for a period of 12 weeks from today.