
(1994) 10 BOM CK 0053
In the Bombay High Court
Case No : First Appeal No. 95 of 1978

Pandurang N. Vanarase since deceased by his heirs	APPELLANT
Vs	
Janardhan Narayan Vanarase and Others	RESPONDENT

Date of Decision : 03-10-1994

Acts Referred:

Evidence Act, 1872 — Section 115, 3, 61, 92
Stamp Act, 1899 — Section 36, 36

Citation : (1995) 2 BomCR 424 : (1995) 97 BOMLR 166

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : G.B. Karandikar, for the Appellant; M.A. Rane, for respondent Nos. 1, 2-G, 3 and 9-A, A.V. Datar, for respondent Nos. 3-3, 5 and 7, for the Respondent

Final Decision : Dismissed

Judgement

R.G. Vaidyanatha, J.—This is a defendant's appeal against the judgment and decree dated 2nd November, 1977 in Special Civil Suit No. 52 of 1972 on the file of Civil Judge, Senior Division at Satara. I have heard the learned Counsel appearing for both the parties.

2. The appellant was the third defendant in the Court below. The first respondent to this appeal was the original plaintiff. For the purpose of convenience I refer to the parties as per their rank and title in the Court below.

The plaintiff Janardhan filed a suit against the appellant and other defendants, respondents to this appeal, for a partition and separate possession of his 1/6th share in the joint family properties. His case is that he and defendants 1 to 4 and 9 are brothers. The suit properties are joint family properties. The father of the parties died in 1934 and the mother in 1947. Each brother is entitled to 1/6th share in the suit properties. The father was running a cloth shop.

Subsequently, after the father's death the said shop was converted as a partnership business by the six brothers sometime in 1942.

Sometime in the month of September, 1948 the brothers decided to become separate in order to do independent business and the old joint family partnership firm was closed and each brother got his 1/6th share in the assets of the shop. The employees of the joint family were also divided amongst the brothers. Then the cloth business was started in partnership by the plaintiff and defendants 1 to 3. Defendants 4 and 9 were in Government service. It was also agreed between the brothers that their shares in the immovable properties to be got recorded in the revenue extracts. An agreement to this effect was prepared and signed by all the brothers on 30th of September, 1948. Then an application was given by all the brothers to the concerned officer for recording the shares of each brother. Then it was also agreed that each brother should be given independent and separate possession of different properties for the purpose of management, subject to keeping accounts.

The details of the properties which were to be in charge of each brother are disclosed in the plaint. After this family arrangement each brother was in respective possession and management of the property to be in his charge.

In the new partnership firm started by plaintiff and defendants 1 to 3 in 1978, subsequently defendants 1 and 3 retired from the partnership after taking the amount due to them. The defendant No. 1 was having his own separate and independent business. Then plaintiff and second defendant continued the cloth shop business as surviving partners in their own right and the joint family has nothing to do with this business. Then there is some reference to some Court proceedings which are not necessary to be stated at this stage. The third defendant, the present appellant, was given possession of the agricultural lands of the family and he is continuing in possession of the same. In 1970 an attempt was made by the brothers to sell all joint family properties, but there was no proper offer by any purchaser and hence the idea was dropped. Then the plaintiff got issued an advocate's notice demanding partition. Then subsequently he filed the present suit praying for a partition and possession of his 1/6th share in the suit properties and for accounts from all the brothers regarding the joint family properties which are in their respective possession.

3. The appellant, who was the third defendant in the Court below, was the contesting defendant. His defence is that the family has continued to be joint notwithstanding the writings made in 1949. It is asserted that the business which was continued even after 1949 is a joint family concern and all the brothers are entitled to a share in the same. It is alleged that there was no division of movables as alleged in the plaint. Some documents came into existence in order to avoid Income Tax and other taxes at the instance of the first defendant, who was the eldest brother and the manager of the joint family. That the writings made in September, 1948 are not acted upon, and they are only make-believe documents which came into existence at the instance of first defendant to save or avoid taxes. There was no partition in the family either regarding movables or immovables. The interpretation of the family arrangement alleged in the plaint is

incorrect. It is asserted that number of properties have been acquired by the plaintiff and other members of the family subsequent to 1949 out of the income from the joint family properties and joint family business. Therefore, all those properties should be treated as joint family properties and this defendant is entitled to get his 1/6th share in the same. It is stated that even though defendants 1 and 3 formally retired from the partnership the business that was continued was still a joint family business. That even the business which is being done by the first defendant separately is also a joint family business. Then there is reference to the Court proceedings which is not necessary to be stated at this stage. Then it is also pleaded that this defendant has raised some loans for the improvement of the agricultural lands and other brothers are liable to give their share towards this loan amount. That the plaintiff is not entitled to ask for accounts. He is not entitled to relief of partition. Hence it is prayed that the suit be dismissed with costs.

4. The other defendants have also filed written statement. The written statement of the first defendant almost accepts the plaintiff's case. The written statement filed by defendants 4 to 8 is also on the same lines as that of defendant No. 3 and then there is a prayer that the partition may be effected not only regarding the suit property, but also regarding all other properties which were acquired out of the joint family income.

5. The defendants Nos. 2 and 9 filed a separate written statement and they have practically accepted the plaintiff's case.

6. On the basis of the above pleadings the trial Judge has framed the following issues:-

(1) Does plaintiff prove that there was severance of status of the joint family members on 30th September, 1948 or prior to that?

(2) Do plaintiff and defendants Nos. 1, 2 and 9 prove the family arrangement alleged and detailed in plaint and written statement Exhibits 66 and 67 and the same was acted upon?

(3) Do the plaintiff and defendants Nos. 1, 2 and 9 prove that the shops and other properties which are not joined in the present suit are their separate and self acquired properties?

(4) If not, whether the suit is bad for non-bringing of joint family properties into hotchpot?

(5) Do defendants Nos. 3 and 4 prove that the shops and houses mentioned under their written statements are joint family properties?

(6) Does defendants No. 3 prove that he has incurred loans from defendants Nos. 10 and 11 now deleted in due course of the management of the family lands and these are binding upon the plaintiff and other defendants?

(7) What relief to the plaintiff?

(8) What order and decree?

7. The plaintiff examined himself and one witness and closed his case. Defendants 2 and 3 examined themselves and closed their case. An attempt was made to examine the first defendant on commission, but it could not be effected since he was unwell. After trial, the learned trial Judge held that there was a severance of status of the joint family of these brothers on 30th September, 1948. He also recorded a finding that the writings made in 1948 by them regarding movables and immovables were acted upon. The learned trial Judge rejected the contention of the third defendant that the properties acquired by plaintiff and other members and existing cloth business are joint family properties. The learned trial Judge also accepted the third defendant's version about the loans he had taken for improving the lands. In view of these findings, he granted a decree for partition and possession of 1/6th share to the plaintiff and also a direction to all the brothers to give account of the income of the suit properties which are in their respective possession. Similarly, he granted a decree for partition and possession of 1/6th share to the other brothers viz. defendants 1 to 4 and 9 subject to payment of Court fee by them. He also directed that the debts raised by the third defendant are binding on the other brothers.

8. Being aggrieved by the judgment and decree passed by the Court below, the third defendant has come up with this appeal.

9. The learned Counsel for the appellant raised three points in support of the appeal viz.:

(1) There was no severance of joint status between the parties.

(2) The continued cloth shops by the plaintiff and defendants 1 and 2 are joint family concerns.

(3) The properties purchased by plaintiff and some other brothers are acquired out of the joint family income and should be treated as joint family properties.

It was argued that the findings of the trial Court on the above points are erroneous and are liable to be set aside. On the other hand, the learned Counsel for the contesting respondents supported the judgment of the trial Court. The learned Counsel appearing for respondents 4, 5 and 7 supported the case of the appellant.

I would like to consider the above points urged before me one by one.

POINT NO. 1.

10. It is common ground that the joint family of the parties was running a cloth business and it owned the suit properties. The father died in 1934 and the mother of the parties died in 1947. The plaintiff is relying on some documents which came into force in 1948-49 to prove that there was severance of status. There was an agreement for dividing the immovable properties as per Exs. 186,

187, 188 and 189. Then there are letters to show that the brothers gave retirement letters in favour of the firm as per Exs. 224, 225, 226 and 227. Then there is one more joint letter by four brothers as per Ex. 239 that they do not claim any right in first defendant's firm. Then there is a family arrangement regarding immovable properties which is Ex. 315.

The learned Counsel for the appellants contended that these documents are not admissible in evidence since they were not stamped. He relied upon AIR 1946 51 (Privy Council) . It was a case where a partition deed was written on an unstamped paper and its admissibility had been questioned at the trial stage itself and it was marked only for identification purpose. The Privy Council observed that since it was an unstamped document it cannot be used for any purpose.

As far as the present documents in this suit are concerned, we find that objection was taken to only one document viz. Ex. 315. It is seen that duty and penalty has been collected on this document, and therefore, the argument that it is unstamped no longer survives for consideration.

As far as the other documents are concerned, no objection was taken in the Court below when they were tendered in evidence. They have been marked without objection. To such a situation section 36 of the Indian Stamp Act, 1899 applies. As per that section once a document has been admitted in evidence its admissibility cannot be questioned at any stage of the proceedings. This position of law has been explained by the Supreme Court in *Javer Chand and Others Vs. Pukhraj Surana*, , where it has been held that once a document has been admitted in evidence, its admissibility cannot be questioned at any stage.

For the above reasons my finding is that as far as Ex. 315 is concerned, it has been duly stamped by collecting duty and penalty and as far as other documents are concerned, no objection has been taken about their admissibility, and therefore, it cannot be questioned in this Court in view of section 36 of the Stamp Act.

11. The fact that all these six brothers are married and are living separately prior to 1948 itself is not in dispute. Four brothers were staying in the native town and two brothers were working at different places since they were in service. All the six brothers had been married prior to 1948 and they were living separately with their families. It is also in evidence that the appellant himself was staying with his family in a farm house situated in the agricultural land of the family.

The plaintiff gave evidence as P.W. 1. He has asserted that the family divided the immovable properties in 1948 and entered into an agreement about management of the immovable properties and that the joint family business was closed long back and now he and second defendant are running a partnership business which belongs to them.

Then we have the evidence of second defendant who has also given evidence in

the same manner like plaintiff.

Then we have the evidence of the appellant third defendant who has asserted that the family has never become divided and even the movable were not divided and that the documents of 1948 and 1949 were never acted upon and that they came into existence to evade or avoid Income Tax.

In the very nature of things the evidence of plaintiff and second defendant on the one hand and the evidence of the third defendant on the other, is interested evidence. They are parties to the suit and they have given evidence in their own interest. It is, therefore, difficult to choose as to which version to accept. In the circumstances, we have to rely upon the documentary evidence, the conduct of parties and broad probabilities to find out as to which version is acceptable.

12. Ex. 186 is the agreement dated 30th September, 1948. It is admittedly signed by all the brothers including the appellant. It says that the brothers are living together and in order to have good relationship with each other and in order to do independent business, they have decided to become separate. It is further stated that they have started writing the accounts of the shop separately. Then it reads as follows :---

"We have distributed amongst, ourselves moveable articles.... We have no concern with each other's moveable properties."

In the earlier portion it is clearly mentioned that "we have become separate" and even in the latter portion there is a clear mention that all the moveable properties are divided.

The only explanation by the appellant in his evidence is that this document has not been acted upon and he has signed it at the instance of the first defendant. Such a theory is rejected by the plaintiff and second defendant. It is true that the first defendant has not been examined in this case. The learned Counsel for the appellant contended that an adverse inference should be drawn for non-examination of the first defendant. But a perusal of the record shows that the first defendant wanted to give evidence and since he was not well a Commissioner was appointed and when the Commissioner went to record his evidence, it was noticed that the first defendant was not in a position to give evidence. It is also on record that the first defendant was suffering from heart ailment, blood pressure and diabetes. For some time he had also been admitted to hospital. It is in those circumstances the first defendant could not be examined.

Mere assertion of third defendant that he signed all the papers on the instructions of the first defendant cannot be accepted. As already stated, the brothers were living separately with their respective families. No brother was under obligation to another brother. Hence in the circumstances the theory of the appellant that he signed so many papers just to oblige the first defendant cannot be accepted. He has not produced any evidence to corroborate this version

except his self-serving and interested evidence.

Then there are some documents exchanged in connection with acquisition of the joint family business which I will consider while discussing point No. 2. Then we have two important documents which throw light on the question of partition.

The appellant himself had filed Special Civil Suit No. 7 of 1970 in the Court of Civil Judge, Senior Division, Satara against first defendant's individual shop. In the plaint filed in that suit he has made the following admission :-

"Plaintiff and defendant No. 3 are brothers. Between themselves there was partition in the year 1948. Since then they are residing separately. Their all transactions are individual and separate."

(vide ex. 305)

Again all the five brothers including the appellant filed a suit against the first defendant and another person being Regular Civil Suit No. 147 of 1971. Relevant allegations in the plaint in that suit are as follows :---

"Plaintiffs and defendant No. 2 are real brothers and during the life time of their father and after the death of their father till 30-9-1948 there was a joint family consisting of all the brothers, but from the aforesaid date by mutual consent of all the joint family having come to an end each started residing separately at different places and similarly they separated their all business activities and similarly they divided their moveable properties and handed over to each their respective shares and in respect of all immovable properties the share of each was determined to be 1/6th and accordingly Anewari in respect of 1/6th share was recorded."

(vide ex. 229)

The explanation of the appellant regarding these two plaints is that he signed the plaints without reading them and on the instructions of first defendant. As already stated, there is nothing on record to corroborate the version of the appellant that he was under the thumb and control of first defendant to sign any paper and that too blindly. These two suits were filed in 1970 and 1971 just about one or two years prior to the date of the present suit. The partition was in 1948. That means about 12 or 13 years after the partition and himself living separately with his family in the agricultural land, there was no necessity for the appellant to blindly oblige the first defendant and to sign any paper that is brought by him. Further the above two suits were filed by the appellant himself. Therefore, the theory that first defendant came and took his signature cannot be accepted. In one suit all the remaining five brothers are parties.

14. The recitals about partition deed regarding movables and the two plaints indicate that there was severance in status and partition of movable properties as long back as 1948. The learned trial Judge has considered the evidence in detail and has rightly held that the family has become divided in status long

back. As far as immovable properties are concerned, the parties have entered into a family arrangement as per Ex. 315 under which each brother is given independent possession and management of one property each. The appellant was given management of agricultural lands. It is also in evidence that the six brothers including the appellant have been in respective possession of the properties mentioned in Ex. 315. It is true that Ex. 315 is only an agreement for management of the properties and it cannot create evidence regarding division in status. But the copies of the two complaints and the agreement regarding movables clearly indicate that there was a division in status between the brothers. Hence agreeing with the trial Court I answer point No. 1 against the appellant.

POINT NO. 2

15. Admittedly, the joint family had a cloth shop. During the father's life time it was called as "Narayan Damodar Vanarase Cloth Shop". After the father died in 1934, the said shop continued till 1942. It is in evidence that in 1942 all the six brothers joined together and started a partnership firm in the name of "M/s. Narayan Damodar Vanarase and Co.".

Then it is in evidence that in 1948 the above partnership firm was closed. The firm had a stock-in-trade of Rs. 18,000/- which was divided amongst the brothers at the rate of Rs. 3,000/- for each brother. All the brothers have given letters to this effect as per Exs. 224, 225, 226 and 227. Let me refer to Ex. 226 which is given by the appellant himself on 19th September, 1949 which clearly shows that the appellant has received his share from the profit and relinquished his right as a partner. It is further stated that on closing the said shop the transactions have been stopped and that no other amount is due to him from the said shop.

The learned Counsel for the appellants submitted that the receipt refers to profits and not the assets of the firm. But a reading of the said receipt shows that the shop has been closed and the appellant has relinquished his right as a partner and further no amount is due to him. That is sufficient to show that the appellant and other brothers have agreed that the shop should be closed. Therefore, we can safely hold that the joint family partnership firm came to be closed in 1947.

Then it is in evidence that one more partnership firm by name "M/s. Narahari Narayan Vanarase and Co." was started only by four brothers Narahari, plaintiff Janardhan, first defendant Vishnu and the appellant Pandurang. Then both the appellant and Vishnu retired from this partnership by giving letters Exs. 196 and 197. In Ex. 198 the appellant has stated that he has given up his rights in this partnership firm and in future he has nothing to do with the said shop.

Therefore, we find that the original joint family partnership came to be closed and new partnership firm was started by only four brothers of whom two have retired giving up all their rights in the firm.

The only explanation given by the appellant is that only in order to save Income Tax this was done. I fail to understand how Income Tax can be saved by closing the firm of six members and starting a new firm in the name of four members, and how Income Tax can be saved by two members retiring voluntarily. In my view, the explanation of the appellant has no meaning and cannot be accepted.

16. The appellant gave up all his rights in partnership in 1949. Till this suit was filed he has not taken any action asking the plaintiff or Narahari to give a share in the profits or to call any accounts. He had not issued any notices. He did not even file a suit for partition. It is only Janardhan who filed the suit and the appellant as third defendant has raised so many defences in the suit. It is in evidence that he was not getting sufficient income from the agricultural lands and he was having hand to mouth existence. If that was so and if the joint family business had still continued, he would not have kept silent for a long period from 1949 till 1973, when he filed the written statement without taking any action to get a share in the income of the cloth business.

17. It is also in evidence that the first defendant Vishnu had started his own cloth shops. As far as those shops are concerned, all the remaining brothers including the appellant, have given a letter as per Ex. 239 dated 19th September, 1949 which reads as follows :-

"We, the undersigned....do hereby give in writing that we have no concern with the transactions and profit or loss in respect of the above firms."

It is signed by all the five brothers including the appellant. Therefore, all the five brothers including the appellant have stated that they have nothing to do with the other shops run by the first defendant. Hence it is too late in the day for the appellant to claim that the joint family business has still continued when the appellant himself got a share in the assets and profits of the cloth shop. The finding of the learned trial Judge on this point is fully justified and does not suffer from any infirmity.

The learned Counsel for the appellants contended that a partnership can be dissolved by an agreement as provided in section 40 of the Indian Partnership Act, 1932 and in this case there is nothing to show that such a dissolution took place. What section 40 of the Partnership Act says is that the firm may be dissolved with the consent of all the partners or in accordance with the contract between the parties. The consent of the parties can be oral and it may be in the form of a letter or some agreement. Section 40 does not prescribe the mode in which the consent should be taken. The consent can be express or implied.

When all the brothers have given in writing that they do not claim any share in the old firm, it amounts to dissolving the firm. When the old firm is closed and a new firm is opened and the other brothers put it in writing that they do not claim any right in the new firm, it amounts to giving up their rights whether we call it a dissolution or by any other name. Hence agreeing with the trial Court I hold that the business continued after 1948 was not a joint family concern.

POINT NO. 3

18. Admittedly, some properties are purchased by plaintiff and some by the defendants from 1953 onwards. The question is whether those properties can be treated as joint family properties. The learned Counsel for the appellant contended that the suit properties are acquired from the income of the joint family business and joint family properties.

As far as other properties are concerned, there is no sufficient evidence to show as to what was the income from each property. As far as the agricultural lands are concerned, the appellant himself was in possession of the same. As far as the cloth business is concerned, I have already held that it was no longer a joint family shop and from 1948 onwards it had ceased to be a joint family concern. Hence, income from the cloth shop cannot be taken into consideration at all to decide whether any property is acquired from out of the income from the shop.

Even otherwise in view of my finding on point No. 1 that there was severance in the status of the joint family in 1948, the question of acquiring properties from out of the income from the joint family properties does not arise. The Supreme Court has clearly laid down in *M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others*, that when once severance in status is proved, any subsequent acquisition by members cannot be treated as joint family properties. The only thing the other members can ask for is to ask the other side to account for the income from the properties in their possession.

In AIR 1960 Bom 159, *Gulabrao v. Baburao*, this Court has held that when once severance in joint status is proved, then subsequent acquisition by members in possession of joint property cannot be regarded as joint family property.

Therefore, the appellant cannot be permitted to contend that the properties subsequently acquired by his brothers should be treated as joint family properties. The appellant has a right to ask for accounts from all the brothers regarding the income they have derived from the possession of the joint family properties which were given to them as per the family arrangement Ex. 315. Similarly, even the appellant has to account for the income derived by him from the agricultural lands. In fact, the learned trial Judge has already granted this relief directing the parties to account for the income they got from each of the joint family properties which were in their respective possession. As far as the cloth shop is concerned, the joint family cloth business is no longer in existence, and therefore, the question of calling for accounts from the cloth business does not arise for consideration. Hence in my view, the trial Court has rightly held that subsequently acquired properties are not joint family properties, and therefore, they cannot be included for partition in this suit. Point No. 3 is answered accordingly.

19. In view of my findings on Points Nos. 1 to 3, the appeal has to fail. No other point is urged before me. The brothers are fighting this litigation since 1972. All of them have become very old. Out of six, four brothers have died during the

pendency of this litigation. Only two brother are surviving. I hope this judgment will put an end to long-drawn litigation between the brothers.

20. In the result, the appeal fails and is dismissed. The judgment and decree of the trial Court are confirmed. In the circumstances of the case, there will be no order to costs in this appeal.