
(1986) 07 BOM CK 0062
In the Bombay High Court
Case No : Second Appeal No. 448 of 1980

Putalabai Gowali and Others

APPELLANT

Vs

Tatya Sakharam Dhere and Another

RESPONDENT

Date of Decision : 03-07-1986

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 31, 37

Citation : (1987) 1 BomCR 429

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.D. Angal and R.S. Khandekar, for the Appellant; Ajit P. Shah, for the Respondent

Final Decision : Dismissed

Judgement

Sharad Manohar, J.—This second appeal is filed by the original plaintiffs whose suit for possession of the suit land has been decreed by the trial Court but has been dismissed by the District Court in appeal filed by original defendant No. 1.

2. The facts are as follow :-

The subject matter of the suit is land bearing Block No. 64, in village Arjunsond. The land formerly belonged to one Aba Hawale who died on 20th November, 1959, leaving behind him his widow Sundrabai (plaintiff No. 3) and six daughters. Two of the daughters, Putalabai and Chingubai are plaintiffs Nos. 1 and 2. The other four daughter are not parties to the suit and I am required to examine the question as to the effect of their non-joinder in the suit.

There is no dispute that after the death of Aba Hawale his widow, present plaintiff No. 3 (appellant No 3 before me), was in possession of the suit land and was managing the same. There is further no dispute that her son- in-law, defendant No. 2, (respondent No. 2 in these proceeding) was living with Sundrabai herself. There is no dispute at least at this stage that the said

defendant No. 2, Dattu, son- in-law of plaintiff No. 3, Sundrabai was having no occupation except that of agriculture labourer and perhaps that was the reason why he and his wife Malanbai, one of the six daughters of Sundrabai, were staying with Sundrabai.

3. On 5-3-1955, Sundrabai and four of her six daughters namely Bhamabai, Malanbai (wife of defendant No. 2) Rukminibai and Simantabai executed sale-deed, Exhibit-38, in favour of Tatyā Sakharam Dhere, defendant No. 1 (present respondent No. 1 for a sum of Rs. 2000/-. The sale deed was in respect of one half of undivided share in suit land. On the same day they also executed another sale deed (which is not on record) in favour of Dattu, defendant No. 2, as regards the remaining undivided one half share. Not only that the sale-deed is not on record but even the certified copy of the same is not filed and we do not know as to what consideration passed between defendant No. 2 and Sundrabai and her four daughters. This sale-deed is shrouded in some kind of mystery which has not quite some bearing upon the genuine character of the sale-deed.

This mystery and suspicious character of the sale-deed is further enhanced by the fact that on 6-5-1966, said defendant No. 2, Dattu, executed a sale-deed Exhibit-37, in respect of the said undivided one half share in suit land in favour of defendant No. 1. For all practical purposes the defendant No. 1 became the owner in respect of the entire suit land with effect from 5-2-1965. The question is as to whether he got any title to the same.

4. It must have been noticed that the present plaintiffs Nos. 1 and 2 (the other two daughters of plaintiff No. 3) were not signatories to the sale-deed, Exhibit-38. It is nobody's case that they were signatories even to the sale-deed executed in favour of defendant No. 2.

Plaintiff No. 1 Sundrabai and her two daughters, plaintiff Nos. 2 and 3 filed that instant suit for a declaration that both the sale-deed executed by the plaintiff No. 3 and her four daughters in favour of defendant No. 1 and defendant No. 2 on 5-3-1965 were illegal and invalid. Various pleas were advanced in support of the contention about their illegality such as that the transaction evidenced by the sale-deed Exhibit-38 was in fact a money lending transaction and that no sale-deed was intended to be executed in favour of defendant No. 1. The contention was that only a sum of Rs. 1000/- was received from defendant No. 1 by Sundrabai but the sale-deed for a sum of Rs. 2000/- was got executed on the principle of Damduppat. The contention further was that defendant No. 1 was to enjoy the income of the land, was to get the principal amount and interest recovered from the income of the land and was to return the land to the vendor after the monies stood repaid. In other words, their contention was that the sale-deed Exhibit-38 was never intended to be acted upon. But so far as the sale-deed executed in favour of defendant No. 2 was concerned, the contention was that this was the result of the fraud practised by defendant No. 1 upon plaintiff No. 3 in collusion with defendant No. 2 and that in fact no consideration flowed either from defendant No. 2 or defendant No. 1 in connection with the sale-deed

taken by defendant No. 2, from Sundrabai and other vendors. It was contended that the sale-deed was hollow, bogus and void ab initio. Consequently, it was further contended that the sale-deed executed by defendant No. 2 on 6-5-1966 in favour of defendant No. 1 was equally hollow and bogus.

5. But another important ground advanced for challenging the legality of the two sale-deeds was that on the date of the two sale deeds, namely 5-3-1965, the consolidation scheme was made applicable to the village Arjunsond and hence u/s 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "the Fragmentation Act"), the two sale-deeds executed by Sundrabai on the date were void ab initio. The possession of the land was demanded from defendant No. 1 also on this account.

6. Defendant No. 2 did not file any written statement and remained ex parte. Defendant No. 1 filed his written statement and contended that Sundrabai had executed the sale-deed with the consent of her daughters including the plaintiffs No. 1 and 2. He contended that the sale-deed executed by Sundrabai and other four daughters who were not parties to the suit were no doubt binding upon them. It was binding even upon plaintiffs No. 1 and 2 because, as a matter of fact, they had consented to the sale-deed although they were not the signatories to the same. The plea based upon the legal effect of the provision of section 31 of the Fragmentation Act was controverted by defendant No. 1. So far as the land sold to defendant No. 2 was concerned he contended that he was a bona fide transferee for value without notice and that hence whether might be the nature of the transaction between Sundrabai and her four daughters on one hand and Dattu, defendant No. 2, on the other, the sale deed effected by Dattu in favour of defendant No. 1 was saved by the doctrine of bona fide transferee for value without notice.

7. On these pleadings issues were framed and parties went to trial and after examining the entire evidence and legal provisions the learned Judge held that the sale-deed in question was not intended to be acted upon and that the transfer was a money lending transaction so far as the sale-deed Exhibit-38 was concerned. As regards the sale-deed in favour of defendant No. 2, it was held that it was a transaction resulting from fraud and that the sale deed in favour of defendant No. 2 was without consideration. It also appears that defendant No. 1's plea of his being a bona fide transferee for value without notice was not accepted by the learned Judge although to separate issue appears to have been framed by him on that point. On the question of the effect of the Fragmentation Act, he held that the sale-deed was directly hit by the provisions of sections 31 of the Act and that, hence, the plaintiffs were entitled to recover possession of the suit land also on that ground. On all these grounds the learned trial Judge decreed the plaintiff's suit by without any order as to costs.

8. In appeal the learned Assistant Judge negatived the trial courts' finding relating to issue No. 1. He negatived the plaintiff's plea that the sale-deed Exhibit-38 was not intended to be acted upon or that it evidenced in fact a

money lending transaction. He also appears to have negated the plea of the plaintiff that sale-deed in favour of defendant No. 2 was a bogus and hollow sale, not supported by any consideration.

As regards the effect of section 31 of the Fragmentation Act, the learned Assistant Judge took the view that though the two sale-deeds were initially hit by the said provision viz. section 31 of the Fragmentation Act, the sale-deeds were validated by Maharashtra Act No. XLI of 1977 by which the Fragmentation Act was amended. The appeal was, therefore, allowed by the learned Judge and plaintiff's suit was dismissed by him.

9. This appeal is capable of being disposed of on the narrow question as to whether the two transaction dated 5-3-1965 were validated by the Amending Act XLI of 1977. To my mind, the view taken by the learned Assistant Judge is quite unsupportable. The Amending Act (Maharashtra Act No. XLI of 1977) no doubt makes provisions for validation of the sale-deeds hit by section 31 of the main Fragmentation Act, but as per the provisions of the said Amending Act, the necessary proceedings have got to be taken by the purchaser concerned on or before 31-3-1975 and a sum equal to 1% of the consideration had to be paid to the Government and it would be only thereafter that the transaction could be got regularised from the Authorities concerned. It is nobody's case that any such thing was done either by defendant No. 1 or defendant No. 2. The question of regularisation under the Amending Act (Maharashtra Act No. XLI of 1977) therefore, does not arise. It is not disputed before me that if the validating Act had no application because no proceedings for regularisation were instituted by defendants No. 1 and 2, then the provision of section 31 will apply with all its rigour. Mr. Shah appearing before me was fair enough to state that in this state of affairs it cannot be paid-said that the two sale-deeds were directly hit by the section 31 of the Fragmentation Act and hence were void ab initio. The plaintiffs, therefore, have got every right to file a suit for recovery of possession of the suit land.

10. The question then arises is as to whether the plaintiffs are entitled to the possession of the entire land or only in respect of their 3/7 shares in the suit land Mr. Angal contended that if the two sale-deeds are found to be void ab initio no title could be said to have been passed to defendants No. 1 and 2 at all, and the property will continue to belong to the plaintiffs and the remaining four daughters of Sundrabai as co-owners. He contended that any co-owners is entitled to file a suit for recovery of possession of Immovable property not only in relation to the land of his share but also on behalf of the other co-owners in respect of the lands of their shares. In support of this contention, he relied upon the judgment of the Divisional Bench of the Patna High Court, reported in Raju Roy and Others Vs. Kasinath Roy and Others, in the case of Raju Roy & others v. Kasinath Roy & others. The observation of the learned Judge in that case was in fact obiter dicta. This is what the Court has observed in this case :

"(Obiter):---When a common land of several co-shares is possessed by any

person without right and without authority, any one of the co-sharers can maintain an action in ejectment against the trespasser for the simple reason that as a joint owner his right extends to every inch of the joint land and cannot be distinguished from the right of others."

Mr. M.D. Angal also relied upon another judgment of the Divisional Bench of the High Court of Travancore Cochin, reported in AIR 1952 T.C. State, page 195, in the case of Kanakku Raman Pillai & others v. Kanakku Ramakrishna Pillai & others

"(c) Co-sharers---Possession---Nature of suit by one co-owner on his own behalf for possession against trespasser---Maintainability.

On account of the unity of possession which is an essential feature of joint tenancy, as also of tenancy in common, one joint tenant or co-owner who is in possession, is in possession not merely for himself for all others. Those others would be deemed to be in possession. Until partition where that is permissible no one of them can say that he is entitled to any part of the property. A co-owner can, therefore, maintain a suit for possession of the entire property against a trespasser on his own behalf."

11. Mr. Angal, also made a statement that when the plaintiffs recovered possession of the entire land from defendant No. 1 or from any one claiming through defendant No. 1, that would be holding the share of the other four daughters of plaintiff No. 3 as their trustees. He stated that if those daughters (4 sister of plaintiffs No. 1 and 2) claimed possession of their undivided 1/7th share each in the said property, the plaintiffs will be under not only a moral but also a legal obligation to give them their due share in the suit property.

12. In view of this statement made by Mr. Angal, I do not find It necessary to examine any further the question as to whether a decree for possession could be passed in favour of the present plaintiffs in respect of the entire land or not.

13. The appeal is, therefore, allowed.

The decree passed by the lower Appellate Court is set aside and the one passed by the trial Court is restored with an observation that if and when the others daughters of plaintiff No. 3 make a claim for their 1/7th undivided share each in the suit land, the plaintiffs shall give them their due shares in the said land. The plaintiff shall give to them either joint possession or separated possession of their 1/7th share each after the partition as per the desire of the said four daughters of Sundrabai.

Respondent No. 1 shall pay the costs of the appeal and of the appeal in the District Court.