

(2007) 06 BOM CK 0161

In the Bombay High Court

Case No : Second Appeal No. 286 of 1988

Ramchandra Nathu Ghadage and Others

APPELLANT

Vs

Rajaram Nathu Ghadage (since deceased by his LRs. Mr. Vishnu Rajaram Ghadage, Mr. Shankar Rajaram Ghadage, Mr. Uttam Rajaram Ghadage and Sou. Lilavati Dnyandeo Shedge), Krishnabai Dattu Pawar (since deceased through her LRs. Sou. Parvatibai alias Anusaya Pandurang Suryawanshi, Vilas Dattu Pawar and Adhikrao Dattu Pawar) and Yeshwadabai Rajaram Ghorpade

RESPONDENT

Date of Decision : 26-06-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 42 Rule 1, 100(5), 54
Hindu Succession Act, 1956 — Section 23, 29A, 29B, 29C, 6

Citation : (2007) 5 ALLMR 175 : (2007) 5 BomCR 354 : (2008) 2 MhLj 754

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : Sanjay Prabhu, instructed by N.V. Bandiwadekar, for the Appellant; Pradeep Gole, instructed by H.D. Gole, for Respondent Nos. 1a to 1c, 2a to 2c and 3, for the Respondent

Judgement

B.H. Marlapalle, J.—This appeal arises from the decree of partition and possession passed by the learned 5th Joint Civil Judge at Satara on 17/1/1983 in Regular Civil Suit No. 241 of 1981 and confirmed by the Lower Appellate Court as per its Judgment and Order dated 21/4/1988 in Civil Appeal No. 63 of 1983. The substantial questions of law framed while admitting this second appeal are as under:

(a) Was the transfer of the suit from the Court of Joint Civil Judge, J.D. to Vth Joint Civil Judge, J.D. and passing of the ex parte decree without notice to the appellants? If yes, does this omission render the ex parte decree void?

(b) Does the decision in Regular Civil Suit No. 227 of 1959 bar the present suit either on the ground of res judicata or for any other reason?

(c) Have the appellants been illegally deprived of their right to file written statement?

2. The suit properties are agricultural lands and residential houses and they were mentioned in schedule "A" and "B" to the plaint. Nathu Pandu Ghadage was married to Sundarabai and from the said wed-lock, plaintiff No. 1 -Rajaram, son and plaintiff nos.2 and 3 daughters were born. Sudarabai died sometimes in the year 1940 and, therefore, Nathu married to Laxmibai -defendant No. 8. From this second marriage Nathu begot seven children i.e. defendant nos.1 to 5 and 7, sons and defendant No. 6, the daughter. The agricultural land shown as suit property is in excess of 28 acres. Nathu died in the year 1980 and the plaintiff approached the trial court stating that though there was a decree of partition passed in Regular Civil Suit No. 227 of 1959, he was not given his 1/10th share in the suit property as per the said decree and on the contrary, he was put in possession of 1 Acre and 13 Gunthas of land and 3 Khans in the house for his residence by his father and he had respected the same without raising any further dispute but without giving up his claim. The plaintiffs further stated that on the demise of Nathu the defendants and more particularly defendant nos.1 to 5 and 7 refused to give the plaintiffs' share by partitioning the suit properties. Regular Civil Suit No. 241 of 1981 was filed on or about 29/4/1981 and as the defendants did not contest the suit inspite of causing their appearance, the suit was decree ex parte on 17/1/1983 and the trial court held that the plaintiffs were entitled to get partition and possession of 1/11th share each of the suit property described at at Exh.3. This decree passed by the trial court came to be challenged by the defendant nos.1 to 5 and 7 by filing Civil Appeal No. 63 of 1983 and the same came to be dismissed with costs.

3. So far as the first substantial question of law is concerned, it needs to be noted that the suit was transferred from the Joint Civil Judge, J.D. to 5th Joint Civil Judge, J.D. and at the same station. The defendants had appeared on receipt of summons in the suit on 10/9/1981 through an advocate. When the transfer of the proceeding from one court to another court at the same station is done, no notice is required to be given to the parties so long as they have caused their appearance through advocate or in person. Record also indicates that some applications were filed on behalf of the defendants, but no Written Statement was filed inspite of more than 10 opportunities having been given. The learned Trial Judge, therefore, passed an order of no W.S. on 8/7/1982 i.e. after about 10 months of the defendants causing their appearance. The roznama further indicates that the suit was listed before the trial court thereafter on 27/8/82, 16/9/82, 16/10/82, 8/11/82 and none appeared on behalf of the defendants on these dates. On 5/1/1983 defendants as well as their advocate remained absent and the depositions of plaintiff No. 1 were recorded on that day. The suit was adjourned to 11/1/1983, but on 10/1/1983 the suit was taken on board on an application made by the plaintiffs' advocate. On 11/1/1983 again the parties were represented by advocates but the defendants did not take any steps either to cross-examine plaintiff No. 1 or to file any application. Finally on 17/1/1983 the

trial court pronounced its judgment.

4. Under these circumstances, I answered the first substantial question of law against the appellants.

5. Now coming to the decree passed in RCS No. 227 of 1959. It is clear that the certified true copy of the same was brought on record along with an application at Exh.31. As per the said decree the plaintiff No. 1 was granted 1/10th share in the suit property and his 1/10th share to the agricultural land itself to be about 3 acres. In his depositions before the trial court he stated that the decree was not executed by his late father and instead the father allotted him 1 acre and 13 gunthas of land and some portion of the house. As a respect to his father, he took possession of the allotted property. When the decree was not executed by the father, it cannot be said that the plaintiff had given up his share in the suit property. This issue has been dealt with by the Lower Appellate Court in more details and it recorded a finding that though the RCS No. 227 of 1959 was decreed, the decree having not been executed, plaintiff was not estopped from filing a fresh suit for partition along with his two sisters.

6. It cannot be said, having regards to the roznama of the trial court, that the appellants were illegally deprived of their right to file Written Statement. As noted earlier, they caused their appearance on 10/9/1981 and subsequently for about 10 months till the no W.S. order was passed, their advocate appeared on some dates and on remaining dates he remained absent. There was no application made even on 8/7/1982 praying for time to file W.S. On that date when the order of no W.S. was passed, no application was filed subsequently to set aside that order and take the W.S. on record. Hence, the third substantial question of law is also answered against the appellants.

7. By following the law laid down in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , an additional question of law requires to be framed and considered in this second appeal, namely, "Whether the courts below were right in holding that each of the plaintiffs were entitled for 1/11th share in Nathu's property?"

Continued on 26th June, 2007.

8. On the additional substantial question of law as framed above, I have heard both the parties. Mr. Bandiwadekar the learned Counsel for the appellants opposed the framing of such additional substantial question of law mainly on three grounds, (a) the appeal must be confined to the substantial questions of law framed at the time of admission and any other substantial question of law which adversely affects the appellants' interest cannot be framed by this Court, (b) the respondents have not challenged the decree passed by the trial court and duly confirmed by the Lower Appellate Court by filing a cross objection or an appeal and, therefore, they had accepted that the appellants have 1/11th share each of the suit properties and (c) this Court, in the absence of a cross appeal or an independent appeal by the respondents, has no power to frame any other

substantial question of law which will adversely affect the interest of the present appellants and modify the decree accepted by the respondents all along. Mr. Gole, on the other hand, has submitted that the powers of this Court in framing an additional substantial question of law are not circumscribed by any actions of any of the parties before this Court i.e. even if the respondents have failed to challenge the decree impugned, the powers of this Court to frame any additional substantial question of law cannot be curtailed and in support of these contentions he relied upon the following two decisions:

(a) Giasi Ram and Others Vs. Ramjilal and Others,

(b) M/s. Bihar Supply Syndicate Vs. Asiatic Navigation and others, ., Mr. Bandiwadekar, on the other hand, support of hereinabove in his contentions, as referred to has relied upon the decision in the case of Banarsi and Others Vs. Ram Phal, .

9. In fact, the Mr. Bandiwadekar are no more res law laid down in Giani Ram's Supply Syndicate's case (Supra). Section 100(5) of C.P.C. reads as under:

objections raised Integra in view case (Supra) and of the Bihar by

100. Second appeal.

(1)

(2)

(3)

(4)

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Order 42 Rule 1 of C.P.C. states that the Rules of Order 41 shall apply, so far as may be, to appeals from the Appellate decrees. Order 41 Rule 33 of C.P.C. reads as under:

Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits

or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees: Provided that the Appellate Court shall not make any order u/s 35A, in pursuance of any object on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

9A. In the case of Giani Ram (Supra) the Supreme Court held that the expression, "which ought to have been passed" means "which ought in law to have been passed" and if the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the Subordinate Court, it may pass or make such further or other decree or order as the justice of the case may require. In the case of Bihar Supply Syndicate (Supra) their Lordships referred to the earlier decision in Giani Ram's case and the provisions of Order 41 Rule 33 and on the interpretation of the said Rule stated as under in para 29:

29. Really speaking the Rule is in three parts. The first part confers on the appellate court very wide powers to pass such orders in appeal as the case may required. The second part contemplates that this wide power will be exercised by the appellate court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The third part is where there have been decrees in cross-suits or where two or more decrees are passed in one suit, this power is directed to be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

10. There can be no doubt that the instant case falls in the second part of Order 41 Rule 33. In addition, in the case of Santosh Hazari (Supra) their Lordships observed in para 10 as under:

...Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question and (ii) the High Court records reasons for its such satisfaction.

11. Having regards to this well settled position of law and the provisions of Section 100(5) read with Order 42 Rule 1 and Order 41 Rule 33 of C.P.C. the objections raised by Mr. Bandiwadekar are unsustainable and the additional

substantial question of law as has been framed above, is required to be dealt with on merits by overruling the objections raised by Mr. Bandiwadekar.

12. There is no dispute that Nathu, the father of the plaintiffs as well as defendants, was initially married to Sundarabai and from her he begot one son by name Rajaram and two daughters -Krishnabai and Yashodhabai. Sundarabai died in the year 1940 and thereafter he married second time to Laxmibai and from her he begot six sons, namely, Ramchandra, Ramrao, Pandurang, Pralhad, Arjun and Madhukar and one daughter by name Indubai. Nathu died in the year 1980 and at that time all the three daughters were married and his second wife Laxmibai was staying with her six sons. Having regards to the Explanation (1) below Section 6 of the Hindu Succession Act, 1956, Nathu's ancestral property prior to his death would be divided in eight equal parts i.e. $\frac{1}{8}$ th for himself and $\frac{1}{8}$ th each for the seven sons. Each of the sons will get $\frac{1}{8}$ th share in the total property. On the demise of Nathu his $\frac{1}{8}$ th share will go to his widow Laxmibai and it would be only on the demise of Laxmibai, the seven sons and three daughters will get equal share in the share held by Laxmibai. It is stated across the bar that Laxmibai died during the pendency of the second appeal. Consequently, the seven sons and three daughters of Nathu will each get $\frac{1}{10}$ share from the $\frac{1}{8}$ th share of the total property and, therefore, each one of them will have $\frac{1}{80}$ th share in the total property. As against this, the courts below made 11 parts of the total property inherited by Nathu by treating 11 coparceners in all i.e. Nathu, the father, seven sons and three daughters. The married daughters could not get equal shares with the sons prior to the amendment in 1994 i.e. prior to introduction of Chapter II-A consisting of Section 29A to 29C and the daughters would be equal sharers along with sons only in the father's share. Hence the decree passed by the trial court on 17/1/1983 and confirmed by the Lower Appellate Court on 21/4/1988 requires modification.

13. In the premises, this second appeal fails and the same is hereby dismissed. On account of the additional substantial question of law framed and answered in the foregoing paragraphs, the decree impugned in this second appeal is modified as under:

The plaintiff's son is entitled to get partition and possession of $\frac{1}{10}$ th share of the suit property described at Exh.3 and similarly the defendant's sons will also be entitled for $\frac{1}{10}$ th share each. The daughters who were impleaded as plaintiffs and defendant are entitled to get partition and possession of $\frac{1}{80}$ th share of the property described at Exh.3. So far as the suit house properties are concerned, this $\frac{1}{80}$ th share of each of the daughters will be subject to the provisions of Section 23 of the Hindu Succession Act, 1956.

The partition of the land be effected by the Collector or any other officer nominated by him u/s 54 of the C.P.C., whereas the partition of the house be effected by the Court Commissioner in execution proceedings. Costs in cause.

14. At this stage Mr. Bandiwadekar pointed out that during the pendency of this second impugned decree was stayed and, therefore, oral application to continue the stay for eight weeks. Mr. Gole the learned respondents has opposed this oral pointing out that the appellants are in possession all along and beyond their share in the suit property.

Taking into consideration the peculiar facts and circumstances of this case, the prayer appeal these made ana period of counsel for the application by made by Mr.Bandiwadekar deserves to be accepted and it is, therefore, directed that the stay granted earlier in this second appeal shall continue to operate and the modified decree passed hereinabove will remain stayed for a period of eight weeks from today.