

(2013) 10 BOM CK 0221

In the Bombay High Court

Case No : First Appeal No. 1380 of 2003 with Cross Objection (Stamp) No. 21759 of 2008 and Civil Application No. 2011 of 2012 and Civil Application No. 3054 of 2012 in First Appeal No. 1380 of 2003

Sajid Ismail

APPELLANT

Vs

Sairabi Abdul Gaffar Shaikh (Mehtab Yunus Khan and Roshanara Abdul Gaffar Shaikh), Aisharbai Fakhruddin Shaikh, Vaijavanti Rajendra Parekh, Rajasaheb Appasaheb Maldar and Rafique Mohammed Ali Balegaonkar

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2014) 1 ABR 597 : (2014) 1 BomCR 339 : (2014) 1 MhLj 182

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : C.G. Gavnekar with Mr. A.M. Kulkarni, Akshay Shinde, for the Appellant; M.D. Adkar with Shri S.R. Ganbavale Advocate for the Respondent Nos. 1a, 1b and 2 and Mr. Rajdeep Khadapkar instructed by . Mr. Sangramsingh Yadav and Mr. Rahul Walvekar, Advocate for Respondent Nos. 4 and 5, for the Respondent

Judgement

A.P. Bhangale, J.—Heard submissions at the Bar at length. This appeal is against the Judgment and order dated 21-08-2003 passed by Jt. C.J.S.D. Pune, in Special Civil Suit No. 2107 of 1997, decreed in favour of the original plaintiffs-respondents, declaring them as owners of 3/4th share of the suit property i.e. Land survey no. 61/9/1 admeasuring 14 gunthas, situated at Mauje Vanvadi, District Pune, and that agreements between the defendant nos. 1 and 2 in favour of the defendant no. 3 or in favour of the defendant no. 4 dated 23.04.1994 and 04.09.1995 respectively are not binding on the plaintiffs and their undivided share. Defendant nos. 1 to 4 were restrained permanently from carrying out any construction in the suit property and from creating any third party interest or encumbrance on the three-fourth share of the plaintiffs over the suit property. While the defendant nos. 5 to 7 were restrained from sanctioning any plan for construction on the suit property without the consent of the plaintiff nos. 1 and 2

in respect of their three-fourth share. The facts stated are:-

Special Civil Suit No. 2107 of 1997 was instituted by the original plaintiffs real sisters namely 1. Smt. Sairabi Abdul Gaffar Sheikh and 2. Smt. Aisharbi Fakhruddin Sheikh. They had real brother Mohammed Ali. According to the plaintiffs their mother Jamalbi owned House property situated upon land Survey No. 737 at Shukrawar Peth, Pune, as also an house situated at land Survey No. 736 at old Shukrawar Peth, Pune. Mohammed Ali with consent of the plaintiffs sold old property and purchased the suit property land Survey No. 61/9/1 at Wanwadi i.e. Suit property. The suit property was purchased under the registered sale deed dated 09-06-1982 in the name of Mohammed Ali and his Wife Zulekhabi. On 23.03.1984 Mohd. Ali died issueless leaving behind his widow Zulekhabi. Zulekhabi died issueless on 13.06.1990. The plaintiffs sisters had filed a Miscellaneous Application No. 357 of 1984 which was granted and numbered as Special Civil Suit No. 518 of 1984 for partition of the suit property. On 01.08.1984, the defendant Zulekhabi was restrained from transferring the suit property to any third person. Thus in the said suit temporary injunction was granted. While suit against Zulekhabi being Suit No. 518 of 1988 was pending, which was defended by Zulekhabi, she died on 13.06.1990. According to the plaintiffs Zulekhabi had died issueless. But then defendant no. 1 Mr. Rajasaheb Appasaheb Maldar and defendant no. 2 Mr. Raffique Mohammed claimed share in the suit property and had applied under Order 22 Rule 4 and 4A of CPC to bring legal representatives of Zulekhabi and to join the suit as party defendants on record. They had claimed that they became entitled to the suit property as they are legatees on the premise that the suit property was bequeathed to them under the alleged last Will by Zulekhabi. On 04.07.1992, Raffique also claimed that he is son of Mohd. Ali through another wife Mariambi in addition to the plea as legatee under the alleged Will by Zulekha. For want of application under Order 22 Rule 1 and 2 of CPC the Suit No. 518 of 1988 was held as abated. On or about 06.10.1995, the plaintiffs had informed Pune Municipal Corporation (PMC) not to grant sanctioned plan of building upon suit property. The City Engineer had informed the plaintiffs that the PMC had temporarily stopped the process of sanctioning a building plan. A Writ Petition No. 609 of 1996 was filed in order to challenge the abatement of the suit. Writ Petition was dismissed on 17.03.2008. The plaintiffs filed the present Suit No. 2107 of 1997 which was decreed as stated above. According to the original plaintiffs they were joint owners with their late brother Mohammed Ali. According to the plaintiffs they along with their brother Mohammed Ali and Zulekhabi had undivided interest of 3/4th and 1/6th +1/6th in the suit property. After death of Mohammed Ali, Zulekhabi as a legal heir under Mohammedan law was entitled to 1/4th of his 1/6th share and the plaintiffs are entitled to remaining 3/4th share of Mohammed Ali by inheritance. After Mohammed Ali died issueless, Zulekhabi was entitled to the 1/4th share of Mohammed Ali's undivided share in the suit property and the plaintiffs were entitled to the remaining undivided 3/4th share by inheritance. The plaintiffs in addition to their 3/4th share were entitled to 3/4th of 1/6th of Mohammed Ali's

share after his demise. Thus share of Zulekhabi undivided share was 1/12th and she was not competent to bequeath it by the testamentary disposition under the General Law, and 1/3rd of 1/12th according to Muslim Personal law as it permits disposition of 1/3rd only and remaining 3/4th devolves as per personal law of inheritance. Thus assuming the validity of the bequest, it would operate to the extent of 1/36th undivided share only. Raffique claimed as adopted son of Zulekhabi. Concept of Adoption is not recognized under Muslim Law. Hence Raffique (defendant no. 2) could not have been recognized as legal heir of Zulekhabi under Muslim Law of inheritance. According to the plaintiffs though Raffique was son of Sayed Abdul Gafoor Sheikh, he also claimed as Son of late Mohammed Ali through his so called another wife Mariambi. Defendant no. 2 claimed that Mariambi was married with late Mohammed Ali at Kolhapur on 08.06.1969 as per Muslim Personal law.

2. According to the plaintiffs, Raffique (defendant no. 2) have not even semblance of legal right. He cannot be recognized as legal heir under Muslim Personal law of inheritance of Mohammed Ali or Zulekhabi as claimed by him. After death of Zulekhabi the defendants nos. 1 and 2 moved an application to the Tahasildar, Pune, and without giving any notice to the plaintiffs got their names mutated in the V.F. VII/XII extracts of the suit land on the basis of alleged Will of scribed in Kannada language without any authentic certificate of the translation in official Marathi language. Tahasildar, Pune, had mechanically without holding any inquiry as contemplated under the Maharashtra Land Revenue Code, mutated names of defendant nos. 2 and 3 in the 7/12 extract. The Mutation was challenged by RTS Appeal no. 104 of 1994 before the Sub-Divisional Officer, who by the Judgment dated 30.10.1995 dismissed the appeal. Second Appeal no. 253 of 1997 is pending before the Collector, Pune. Meanwhile, taking undue advantage of mutation entry in their favour, the defendant nos. 1 and 2 entered in the Development agreement in respect of the suit property with defendant nos. 3 and 4 on 24.03.1994 and 13.09.1995 respectively and a Building plan along with VII-XII extract of the suit property was submitted to the Pune Municipal Corporation through Power of attorney holder and developer. The plaintiffs claimed that the agreement between the defendant nos. 2 and 3 on one hand and 3 and 4 on the other hand regarding the development of the suit property is not binding on them. Under the pretext of the Development agreement the defendant nos. 1 to 4 are trying to develop the suit property to the exclusion of the plaintiffs. The defendants have denied the suit claim and claimed interest in the suit property. Defendant no. 4 filed suit for specific performance being Regular Civil Suit No. 1667 of 1995 against the plaintiffs and defendant no. 3 for declaration and injunction seeking to restrain the plaintiffs and the defendant no. 3 from entering in the suit property. Pune Municipal Corporation is not party to the suit but sanctioned the building plan submitted by the defendant no. 4 after payment of huge amount of Rs. 1,71,000/-. According to Pune Municipal Corporation it had verified the title of the suit property and took indemnity Bond and undertaking from the M/s. Allied Constructions. Further

according to PMC it is dispute as to title to the suit property inter se between the defendant nos. 1 to 4 and the original plaintiffs. As the defendant nos. 1 to 4 have not complied with certain provisions the Building plan was not finally approved. Municipal Corporation contended that it will follow the order of the Court. Defendant no. 3 claimed that he was put in possession of the suit property under the part performance of the contract and his suit for specific performance is pending against the defendant nos. 1, 2 and 4, which was stayed u/s 10 of the Civil Procedure Code.

3. During the pendency of this appeal, the parties filed consent terms. By order of this Court dated 24.02.2011, compromise has attained finality. My Brother Judge Shri A.S. Oka recorded compromise as a result of the agreement evidenced by the consent terms (marked "x" for identification) signed by Appellant Nos. 2 and 3 as well as Respondent Nos. 1-A, 1-B and 2. Since the Appellant No. 1 did not agree with the consent terms (and raised objection to acceptance of the consent terms) his objection was overruled and it was recorded that the consent terms will not bind the Appellant No. 1. Thus we find that there was already a decree binding between Appellant Nos. 2 and 3 and Respondent Nos. 1A, 1-B and 2. The appeal thus remains pending as contest limited between the Appellant No. 1 (now sole appellant) and rest of the parties. Appellant Nos. 2 and 3 were thus transposed as party Respondents at the request of Appellant no. 1. Order XXIII of CPC deals with "Withdrawal and Adjustment of Suits". Rule 3 of Order XXIII speaks about "compromise of suit" which reads as under:

3. Compromise of suit.- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation -- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

It is submitted on behalf of the respondents that in view of the consent terms recorded "X" for identification as above, nothing really would survive in this appeal now continued by the builder and developer who merely intended to gain

pecuniary advantage out of the pending dispute between the co-sharers according to Muslim Personal law who consented to bury their dispute during pendency of the appeal by a compromise recorded by this Court. The Decree by compromise or consent terms is not challenged by the appellant as prescribed by law and therefore in my opinion shall bind him as well because he is seeking to claim under the consenting parties to the compromise namely original defendant nos. 2 and 3.

4. Thus the salutary question in this appeal is as to whether the impugned Judgment and order requires any interference in exercise of the appellate power by this Court? The answer has to be given in the negative for following reasons:

5. The first contention is that the earlier Suit no. 518 of 1988 filed by the Plaintiffs abated by order dated 29.08.1996 and Writ Petition No. 6409 of 1996 was dismissed on 17.03.2000. Hence present suit is barred by the principle of Res Judicata (S. 11 C.P.C.). Admittedly earlier Civil Suit no. 518 of 1988 was not decided on merits. No evidence was recorded as it was disposed of as abated. Defendant no. 1 and 2 as heirs of Zulekhabi were not permitted to come on record. Hence it is not just and proper to say that present suit is not maintainable as barred by the principle of Res Judicata when earlier suit was not decided on merits according to law. In the ruling in Ram Kalap Vs. Banshi Dhar and Others, Division Bench of Allahabad High Court observed thus:

Order XXII, Rule 5 of the CPC provides only a summary procedure for appointing a person to be the legal representative of the deceased party for the purpose of prosecuting the suit and the order appointing the legal representative does not operate as a final determination of the representative character of the person appointed, that is to say, it does not operate as res judicata. Vijayalakshmi Jayaram Vs. M.R. Parasuram and others, it was observed in Para 5 thus:-

A Full Bench of Punjab and Haryana High Court in Mohinder Kaur and Another Vs. Piara Singh and Others, has held that determination of the point as to who is the legal representative of the deceased plaintiff or defendant under Order 22, Rule 5 of the CPC is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Following this decision another Judge of Punjab and Haryana High Court in S. Charanjit Singh and Another Vs. Bharatinder Singh and Others, held that proper course to follow is to bring all the legal representatives on record so that they vouchsafe the estate of the deceased for ultimate benefit of the real legal representatives

6. The case of the original plaintiffs is that their mother Jamalbi was Owner of the old Survey No. 736 from Shukrawar peth and land Survey No. 737 from old Shukrawar Peth. The suit property was acquired out of the Sale proceeds of earlier ancestral property. It is further averred that Jamalbi had allowed Mohammed Ali to reside in the suit property till his death and according to her

Will; the suit property will devolve upon the Son of the Mohammed Ali in case he begets Son from Zulekhabi otherwise entire property would be inherited by the Daughters of Jamalbi. Admittedly Mohammed Ali and Zulekhabi died issueless. Under these circumstances the claim is made that Defendant no. 2 Raffique is adopted Son of Mohammed Ali and Zulekhabi. Exhibit 96 shows that the land City survey no. 737 of Shukrawar Peth was renumbered as 1021 of Budhwar Peth was mutated on 08.03.1967 in the names of the Plaintiff nos. 1 and 2 on the basis of the Will by Jamalbi Dastagir Belgaonkar who expired in the year 1967. The mutation entry remained unchallenged. Let us consider the evidence on record and admissions by the Defendant no. 1 in his cross examination -

a) In Para 4 he admits that he has no personal knowledge as to where from the consideration was paid for purchase of the suit property.

b) No proceeding was initiated regarding the "Vyavastha Patra" from Jamalbi. Land City Survey no. 1021 in Budhwar Peth (Old survey no. 737 of Shukrawar Peth was Mutated in the name of Original Plaintiffs pursuant to the said "Vyavastha Patra" executed by Jamalbi (vide Ex 174). Old City Survey no. 736 of Shukrawar Peth was also owned by Jamalbi. (Mother of the Plaintiffs and Mohammed Ali). Ex 176 is copy of the sale Deed. Original Sale Deed is not on record. The said property was sold by Mohammed Ali and the Plaintiffs Sairabi and Aisharbi etc to Kasabai Hullappa Imnad. Thus Mohammed Ali had limited interest/Share.

c) No documentary evidence is on the record to show that Zulekhabi paid any part of consideration to purchase suit property.

d) Zulekhabi was not having any separate source of income. Merely because her name was shown as joint purchaser by Mohammed Ali it would not lead to safe conclusion that she was only surviving co-owner in her own right to dispose of the property to the exclusion of the original Plaintiffs who are residuary co-sharers under Muslim personal law i.e. Hanafi law of inheritance. The Trial Court in its discussion did consider that Mohammed Ali and his Wife Zulekhabi were Joint purchasers of the Suit property having considered the ostensible title of Zulekhabi.

e) Though Defendant no. 1 claims as Brother of Zulekhabi, he do not know whether Mohammed Ali and Zulekhabi sold property City Survey no. 1021 in Budhwar Peth (old Survey no. 737 of Shukrawar Peth which was owned by Jamalbi) in the year 1982. Defendant no. 1 conveniently feigns ignorance as to the sale proceeds of earlier property in the hand of Mohammed Ali who later used it to purchase the suit property.

f) There was no evidence to show that Mohammed Ali had purchase money from his own source to purchase the suit property. The inference is that the source of purchase money emanated from Sale of ancestral old property owned by his Mother Jamilabi. (Vide Ex 176)

g) The contention of the defendant no. 2 Raffique that he is son of Mohammed Ali seems sheer opportunism. The contention is therefore not acceptable as it has no concrete factual or legal basis in the evidence on record. The conduct of the defendant no. 2 to remain dormant and inactive even after death of Mohammed Ali to get his name entered in the Revenue record within reasonable time speaks volumes against him.

h) Alleged original Will by Zulekhabi is not produced on the record. No explanation is brought on the record as to why original Will document is not produced, although it is claimed that Defendant nos. 1 and 2 were entitled to claim half-share each in the suit property. Onus is upon the propounder of the Will to establish it. Even assuming for the sake of argument that Zulekhabi could have bequeathed the property, under Muslim personal law she could not have bequeathed more than One-third of her own share in the suit property. Merely because the defendant no. 2 told Tahasildar, Pune, that he was accepting Zulekhabi as his Mother, it cannot be legally acceptable evidence to establish disposition by Will without proper proof according to law or the legal validity of the document. There was no acceptable real evidence to prove Zulekhabi's joint legal ownership of suit property in the absence of the proof of her separate source of her income and her contribution to the purchase of the suit property.

i) ME 363 was recorded by the Tahasildar, Pune, on the basis of superficial material mere Xerox copy of alleged Will vide statement Ex. 135. According to the contents of the statement made by the Defendant no. 1 Rajasaheb, Zulekhabi, his maternal aunt died issueless on 13-06-1990. Defendant no. 1 Rajasaheb Appasaheb Maldar claimed that he is legal heir as he is Son of Brother of Zulekhabi along with Defendant no. 2.

j) There is no concept of adoption in Muslim personal law so as to accept claim that Zulekhabi adopted Defendant no. 2 Raffique @ Raffique Sayyad Abdul Gaffar Sheikh as her Son. Learned commentator Mulla in his book "Principles of Mohammedan Law" has observed that Mohammedan Law does not recognize adoption as a mode of filiation. He however states that where a special family or tribal custom of adoption is proved the adoption can be done. The burden of proving custom is on the person who asserts or propounds custom. No such custom has been established in the present suit.

k) Even for the sake of argument if contention of the Defendant nos. 1 and 2 that Mohammed Ali purchased the suit property is accepted, even then since Mohammed Ali died issueless. His Widow Zulekhabi was entitled to 1/8th share of the property owned by Mohammed Ali rest going to the Plaintiffs-his two full sisters. Zulekhabi also died issueless. In the absence of other legal heirs under Muslim Personal law the Plaintiffs were entitled to inherit the property to claim their shares as per Muslim Personal Law.

l) Version of the defendant no. 2 Raffique that he is Son of Mohammed Ali through his alleged wife Mariambi is found without any rational or convincing

basis and appear an afterthought generated by greed, falsely invented, make believe story due to his greed for the suit property. Such artificially manipulated version cannot help him or anybody claiming under him to profess legal right or title in respect of the disputed immovable property.

m) Abdul Kafis Abdul Kadir whose affidavit (Ex 87) was sought to be relied upon is not examined in the trial Court. Merely tendering his affidavit cannot be legal evidence since he was not offered for cross examination of the contesting parties. Original Nikahnama was not produced to prove marriage according to Muslim Personal law between Mohammed Ali and Mariambi.

7. Apart from the observation on merits, it must be borne in mind that the term "compromise" essentially means settlement of differences by mutual consent terms. In such process, the adversarial claims come to an end and the cavil between the parties is given a decent burial. A compromise which is arrived at by the parties puts an end to the litigative battle between them. Sometimes the parties to the longstanding dispute feel that it is an unfortunate long drawn out bitter struggle and allow good sense to prevail over them to amicably resolve the dispute. In certain cases, by intervention of mediator or well-wishers, the conciliatory process commences and eventually, by consensus and concurrence, rights get crystallized for their mutual benefits. A reciprocal settlement with a clear open mind reduced in to writing is regarded as noble way sometimes by fair give & take approach to end the suit controversy. It signifies dignified and majestic facets of the human mind. The mind-set to make peace and not to fight is quintessence of sublime somberness and helps social stability. In the present case, as the factual matrix would reveal, a consent decree came to be passed on the bedrock of a compromise between the consenting parties except for the sole appellant. Consent terms thus leaving nothing to be done between the consenting parties in the future. The curtains were really drawn up between the original plaintiffs and the original defendant nos. 1 and 2. This Court gave the stamp of approval to the same. Thus, the inescapable conclusion is that the compromise/consent terms decree between the parties except the sole appellant herein was a final and enforceable decree between the consenting parties.

8. Barring the consent terms, above mentioned facts indicated that for want of legal evidence Defendant nos. 1 and 2 were not entitled to any share as they are legal heirs of neither Mohammed Ali nor Zulekhabai according to Muslim Personal Law. The persons claiming under Defendant nos. 1 and 2 who merely having ventured to purchase the immovable property on the basis of revenue mutation entry cannot have legal rights, title and interest in the suit property. The sole appellant in Para 17 of his written statement stated thus:-

....the defendant no. 4 has paid the entire monetary consideration to defendant nos. 1 and 2 and has handed over possession of two flats in another building that has been constructed by Defendant no. 4. It is submitted that Defendant no. 4 has fulfilled all his obligations towards Defendant nos. 1 and 2 and is facing considerable hardship and monetary loss due to dilatory tactics of the Plaintiffs.

If that is so, sole appellant cannot escape blame on the ground of conduct of champerty i.e. clandestinely entering in to illegal agreement with the litigant to aid or finance the litigation in return for a share of the proceeds following a successful outcome of the litigation. Champertous litigant can never be encouraged as he cannot claim equity so as to be allowed to continue the litigation endlessly when all other parties have settled the dispute amicably in the suit by means of consent terms recorded to the satisfaction of this court. It is also pertinent to note that the written statement for the defendant nos. 1, 2 and 4 was verified by Altamash Sajid Ismail as their "power of attorney holder". He could not have vouchsafed for the averments made in Para 3 of the Written Statement. He alleged that Nikah between Mohammed Ali and Mariambi took place on 08.06.1969 at Kolhapur as per Muslim Personal law and claimed that the defendant no. 2 is only legal heir for suit property as real Son of Mohammed Ali through Mariambi. No reliable legal evidence was forthcoming to establish tall claims made by him as "power of attorney holder" for defendant nos. 1, 2, and 4. The facts such as happening of Nikah/Marriage ceremony which are within personal knowledge of a witness or facts which relates to a state of mind of a witness cannot be deposed by indirect evidence of an agent of the party concerned, when facts require direct evidence or legal proof by the best evidence available.

9. Furthermore, it is well settled legal proposition that mere revenue mutation entry cannot confer a legal right or title in favour of the person who may have succeeded to obtain it sometimes even by clandestine connivance with revenue official concerned. Revenue Mutation entry obtained in their favour of the defendants nos. 1 and 2 cannot confer any legal right or title to them in the suit property. Mutation entry is not the real evidence of legal title as it is result of merely a fiscal inquiry by Revenue officer to prima facie find out or discover the person by whom revenue is regularly payable. The final decision of the competent Civil Court called upon to decide the legal right or title would alone bind the parties.

10. Learned trial Judge examined the facts in details with reference to well established principles of Muslim Personal law while applying his judicial mind to the facts and circumstances of the case to arrive at logical and correct conclusions. The approach of the learned trial Judge is to deal with all the contentions raised by the parties by a well reasoned and sound judgment. The impugned judgment appears flawless, without any blemish and needs no interference in exercise of the appellate power.

11. Hence appeal by sole appellant has to fail. It is dismissed with costs.

12. Learned counsel for the appellant prayed for continuation of interim order dated 8.4.2013 for a period of eight weeks.

13. Continuation of interim order is objected.

14. The interim order passed on 8.4.2013 will continue for a period of eight

weeks, since the appellant would like to avail of further relief, which will continue for a period of eight weeks. Civil Application No. 2011 of 2012, Cross Objection (Stamp) No. 21759 of 2008, and Civil Application No. 3054 of 2012 do not survive and stand disposed of.