

(2017) 09 BOM CK 0076
In the Bombay High Court
Case No : 177 of 2017

Sakharam Shrawan Bhise

APPELLANT

Vs

Ramesh Dhannu Rathod

RESPONDENT

Date of Decision : 20-09-2017

Acts Referred:

Transfer of Property Act, 1882, Section 5 -
"Transfer of Property" defined
Maharashtra Land Revenue Code, 1966, Section 29(3), Section 29(3)(a) - Class

Citation : (2017) 09 BOM CK 0076

Hon'ble Judges : A.S. Chandurkar

Bench : SINGLE BENCH

Advocate : V. N. Patre, Amol S. Deshpande

Judgement

1. Admit on the following substantial question of law:-

"The suit property being Class-II occupancy land that was allotted to Tukaram Rathod, whether execution of Will in favour of the plaintiff is hit by provisions of Section 29 (3) (a) of the Maharashtra Land Revenue Code, 1966?"

Heard finally with consent of counsel for the parties.

2. The appellant is the original defendant in the suit filed for declaration by the respondent herein that he was the owner of Field Survey No.2/1/A admeasuring 1 hectare 21 Are on the basis of a Will executed on 18th February, 2006 by one Tukaram Hari Rathod in his favour. According to the plaintiff, said Tukaram was unmarried and the plaintiff being his nephew, such Will was executed bequeathing the suit property to the plaintiff. As the defendant was in possession on the basis of a lease alleged to be granted by said Tukaram, the suit for possession came to be filed.

3. In the Written Statement, it was pleaded that the land in question was found to be excess holding of the erstwhile owner. Under the provisions of the

Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 [for short, "the Act of 1961"] it was treated as excess land and was allotted to Tukaram. Said Tukaram on 5th February, 1992 executed a lease for a period of ninety-nine years in favour of the wife of the defendant - Yashoda and on that basis, the defendant was in possession.

4. Shri V. N. Patre, learned counsel for the appellant-defendant, submitted that both the Courts committed an error in holding that the plaintiff had got title on the basis of Will executed by Tukaram. According to him, in view of provisions of Section 29 (3) (a) of the Maharashtra Land Revenue Code, 1966 [short, "the said Code"], as the suit land was occupancy Class-II land, it could not have been transferred without obtaining prior permission of the competent authority. He submitted that no such permission was obtained by Tukaram before executing the Will. In support of his submissions, learned counsel placed reliance on the decision in *Attaur Raheman Fateh Mohmmad Vs. Hari Peeraji Burud* died through LRs. *Neelabai @ Chandrakala Haribhau & others* [2008 (2) Mh.L.J. 633] and urged that as Tukaram had no authority to transfer the Class-II land, the Will executed in favour of the plaintiff could not have been acted upon. He then submitted that though Tukaram had executed a Will, prior thereto, in the year 1992, he had executed a Lease-Deed in favour of the defendant's wife for a period of ninety-nine years. Without cancelling said Lease-Deed, the possession of the suit property was directed to be delivered to the plaintiff.

5. Shri Amol S. Deshpande, learned counsel for the respondent, supported the impugned judgment. According to him, the plaintiff had become owner by virtue of the Will executed by Tukaram. Disposal of property by means of testamentary disposition would not amount to transfer either under the Act of 1961 or Section 5 of the Transfer of Property Act, 1882. He submitted that this legal aspect is clear from the decision of the Honourable Supreme Court in *Mahadeo (dead) through L.Rs. Vs. Shakuntalabai* [2017 (2) Mh. L.J. 371] as well as the judgment of learned Single Judge in *Prabhakar Chinappa Chavan Vs. State of Maharashtra* [2004 (4) Mh.L.J. 886]. He, therefore, submitted that there was no legal restriction on Tukaram to bequeath the suit property in favour of the plaintiff. As the execution of the Will had been duly proved, the suit was rightly decreed by the trial Court and the appellate Court confirmed said decree.

6. I have heard the learned counsel for the parties and I have perused the material placed on record.

7. The execution of the Will dated 18th February, 2006 by Tukaram in favour of the plaintiff has been held to be duly proved by the trial Court and this finding has been affirmed by the first appellate Court. It is the case of the defendant that on 5th February, 1989, said Tukaram had executed a Lease-Deed in favour of the defendant's wife for a period of ninety-nine years. The question is whether Tukaram could have executed the Will in favour of the plaintiff so as to confer title on him.

8. In Mahadeo (dead) through L.Rs . [supra], the Honourable Supreme Court after considering various earlier decisions has held that a testamentary disposition by executing a Will would not amount to transfer within the meaning of Section 57 of the Bombay Tenancy & Agricultural Lands (Vidarbha Region) Act, 1958. It has been held that disposition by a Will is not a transfer but a mode of devolution. A similar view has been taken earlier in point of time in Prabhakar Chinappa Chavan [supra] while considering the expression "transfer" under the Act of 1961. It is, thus, clear that for the purposes of the Act of 1961 or the Transfer of Property Act, 1882 devolution by a Will would not amount to transfer.

9. In so far as Section 29 (3) of the Code is concerned, the same places a restriction on the right to transfer Occupancy Class-II land. The word "transfer" has not been specifically defined under the Code. In view of provisions of Section 5 of the Transfer of Property Act, 1882, a similar analogy would have to be applied to the expression "transfer" under the Code. Thus, even for the purposes of Section 29 (3) of the Code, the restriction for transfer by executing a Will is not prohibited as testamentary disposition would not amount to transfer. In any event, the land in question was granted to Tukaram under the Act of 1961 and as per provisions of Section 29 (3) of the Act of 1961, transfer does not include disposition by way of a Will. In so far as the decision relied upon by the learned counsel for the appellant is concerned, there cannot be any dispute with regard to the legal proposition that a person not having transferable interest cannot transfer the property in question. In the present case, however, the property has been bequeathed in favour of the plaintiff and the same does not amount to transfer.

10. It can, thus, be seen that Tukaram did not "transfer" the suit property in favour of the plaintiff by executing the Will in his favour. On the contrary, the execution of the lease by Tukaram in favour of the defendant's wife amounted to transfer which, according to the defendant himself, is impermissible. In other words, there is no legal basis for the defendant to contend that his occupation of the suit field is on the strength of a valid "transfer" in favour of his wife. The ground urged by the defendant is self-destructive for his defence.

11. In view of aforesaid discussion, the substantial question of law as framed is answered by holding that execution of Will by Tukaram in favour of the plaintiff was not hit by the provisions of Section 29 (3) (a) of the Code. Hence, there is no reason to interfere with the impugned judgments. Second Appeal is, therefore, dismissed. No costs.

12. The order of status quo shall continue to operate for a period of four weeks from today.