

(2008) 07 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 278 of 1987

Shamrao Laxman Wagh	Vs	APPELLANT
Bala Laxman Wagh and Others		RESPONDENT

Date of Decision : 08-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 100

Citation : (2008) 5 BomCR 647

Hon'ble Judges : Kingaonkar V.R., J

Bench : Single Bench

Advocate : S.M. Kulkarni, for the Appellant; S.S. Choudhari, for respondent Nos. 3a to 3g, for the Respondent

Final Decision : Allowed

Judgement

Kingaonkar V.R., J.—Challenge in this appeal is to judgement rendered by learned Additional District Judge, Jalna, in an appeal (R.C.A. No. 276/1981) confirming decree of dismissal of Suit (R.C.S. No. 34/1977).

2. Subject-matter of the Suit comprised of two (2) agricultural lands bearing Survey No. 11/2, admeasuring 2 acres 27 gunthas and Survey No. 48/7, admeasuring 1 acre 23 gunthas, locally called "pandhri" and "ranmala", respectively, situated at village Warud under Bhokardan Tahsil. Appellant is the original plaintiff. Original defendant Nos. 1 to 3 are his step brothers. Original defendant Nos. 4 and 5 are the sons of original defendant No. 2 Kisan. Original defendant No. 6 Bhagwan is a purchaser of the suit land from defendant No. 1 Bala. The father of appellant and respondent Nos. 1 to 3, namely, Laxman Wagh died somewhere in 1964.

3. Briefly stated, the plaintiffs case in the trial Court was that during his lifetime, deceased Laxman Wagh partitioned the ancestral properties including the lands and a house amongst his four (4) sons. He (plaintiff) was then minor. His share was taken by the parents with whom he resided jointly till their death. The

division of agricultural lands was reflected under Mutation Entry No. 20 to the extent of the share allotted to him. He was in possession of four (4) parcels of land allotted to his share as a owner. The defendant Nos. 1 to 3 manipulated false revenue entries after death of Laxman Wagh and, thereafter, dispossessed him from the suit lands. Hence, the Suit.

4. By filing their written statement (Exh-19), the defendants resisted the Suit. They admitted that deceased Laxman effected family partition in 1945. They, however, denied that the plaintiff was allotted the suit lands to his share. They asserted that during the family partition, the agricultural lands and the house came to be divided in five (5) parts and not four (4). They contended that deceased Laxman Wagh (father) was allotted 1/5th share in the house and also in the lands bearing Survey Nos. 48/7 and 68. They alleged that deceased Laxman Wagh alienated Survey No. 68 during his lifetime and the purchaser is in possession thereof. They contended that after death of Laxman, land Survey No. 48/7 was divided amongst the four (4) brothers as shown under Mutation Entry No. 105. They contended that inspite of partition, Survey No. 11/2 was being jointly cultivated by them. According to them, in the year 1962, the plaintiff agreed to alienate his 1/4th undivided share out of Survey No. 11/2 to defendant Nos. 1 to 3 for consideration of Rs. 625/-. He executed an agreement of sale in their favour. They had paid earnest money of Rs. 500/- at the time of execution of the agreement of sale. They paid balance amount of Rs. 125/- towards consideration to the plaintiff on 9th January, 1963 under a receipt executed by him. A contemporaneous agreement was also executed by the plaintiff whereby he ratified the agreement of sale executed by the father, on his behalf, for alienation of the undivided 1/4th share out of Survey No. 11/2. They contended that defendant No. 2 Kisan exchanged his 1/4th share in respect of Survey No. 11/2 to defendant No. 3 Pandu in lieu of the latter's share in Survey No. 48/7. They denied that the plaintiff was dispossessed from the suit lands. On these premises, they sought dismissal of the Suit.

5. The parties went to trial over issues settled by the trial Court. They adduced oral and documentary evidence in support of the rival contentions. The trial Court held that the plaintiff (appellant) failed to prove that the suit lands - Survey Nos. 11/2 and 48/7 were allotted to his share during the family partition which took place in 1945. The trial Court also held that the plaintiff failed to prove alleged dispossession. The trial Court came to conclusion that the plaintiff was having undivided 1 /4th share in Survey No. 11/2 i.e. one of the suit fields, which he agreed to transfer in favour of the defendant Nos. 1 to 3, as alleged. The trial Court further held that the defendant Nos. 1 to 3 were having shares in Survey No. 48/7 and Survey No. 11/2 as pleaded by them and that in all five (5) shares were demarcated at the time of family partition, one of which was allotted to the father - Laxman Wagh. In keeping with such findings, the Suit was dismissed. The first Appellate Court confirmed decree of dismissal of the Suit.

6. This second appeal was admitted on substantial questions of law which are

depicted in ground Nos. 11 and 12 of the appeal memo. For sake of convenience, however, the substantial questions of law are redrafted as follows:

(i) Whether, in the facts and circumstances of the case in hand, both the courts below committed patent error while discarding version of PW Rama on ground that he was a chance witness and hence, the partition as pleaded by the plaintiff was wrongly discarded ?

(ii) Whether, in the facts and circumstances of the present case, the courts below committed patent error while interpreting and appreciating the documents styled as "kararnama" (Exh-59) and the receipt - "bharna pawti" (Exh-60) and thereby wrongly reached conclusion that 1/4th share out of Survey No. 11/2 was agreed to be sold by the plaintiff to the defendant Nos. 1 to 3 ?

7. Mr. Kulkarni, would submit that Laxman Wagh had alienated land Survey No. 68 called "barbhai" during his lifetime and, therefore, it is more probable that the five (5) agricultural lands held by him were divided amongst four (4) sons. He pointed out that though the first Appellate Court came to conclusion that the land Survey No. 11/2 was allotted to the plaintiff, yet, the defendant Nos. 1 to 3 proved the agreement of sale and hence, were entitled to protection. He argued that the agreement of sale and "bharna pawti" (Exh-59 and Exh-60) are apparently fabricated and forged documents in view of difference of the pattern of signatures of the plaintiff appearing on the admitted documents and the disputed one. He contended that both the documents have been misread by the courts below. He argued that the Suit for declaration of ownership and for possession should have been decreed when it was manifest that the defendants failed to prove the agreement of sale and the division of properties into five (5) shares. Hence, he urged to allow the appeal. As against this, Mr. Choudhari, would submit that both the courts rendered concurrent findings based on material evidence and hence, no interference in the impugned judgement is called.

8. Before I proceed to embark upon scrutiny of the evidence, it may be mentioned that the plaintiff gave details of the partition which was effected in the month of April, 1945. According to his pleadings, he was allotted four (4) parcels of the land including the two (2) suit fields. He asserted that in all four (4) shares were drawn by the father in the agricultural lands and the house properties. He categorically alleged that deceased Laxman did not take any share for himself. As stated before, admittedly, there took place family partition in the year 1945. The dispute is as to whether only four (4) shares were drawn and distributed amongst the four (4) sons of deceased Laxman or that five (5) shares were drawn and deceased Laxman retained one (1) of such shares for himself. According to pleadings of the defendants, five (5) shares were drawn and deceased Laxman retained suit field bearing Survey No. 48/7 and Survey No. 68 for himself. They, therefore, expressed no objection to allot 1/4th share out of Survey No. 48/7. admeasuring 1 acre 23 gunthas to the plaintiff.

9. At this juncture, it may be stated that the defendants categorically pleaded in para 1(B) of the written statement that Survey No. 11/2 was allotted to the share of the plaintiff and the defendant Nos. 1 to 3 by deceased Laxman. But it was kept joint amongst themselves. So, each of them held 1/4th undivided share in the suit field bearing Survey No. 11/2. According to them, in the year 1962, the plaintiff agreed to alienate his undivided 1/4th share to the defendant Nos. 1 to 3 i.e. his uncles - Kishan and Pandu for consideration of Rs. 625/-. In pursuance of such agreement, the father (Laxman Wagh) executed a "sawda pawti" in favour of the defendant Nos. 1 to 3 after receiving Rs. 500/- from them. In other words, their specific plea is that suit field bearing Survey No. 11/2 remained joint. This is no short of a partial partition pleaded by them.

10. Once it is admitted that there was family partition in 1945, then it goes without saying that presumption would be in favour of total partition. It was for the defendants to displace such presumption in respect of suit field Survey No. 11/2. They were required to prove that notwithstanding division of five (5) shares at the time of partition, the suit field Survey No. 11/2 was kept joint amongst four (4) brothers. They have not explained as to why only land Survey No. 11/2 was kept joint with the plaintiff and defendant Nos. 1 to 3. This aspect appears to have been overlooked by both the courts below.

11. It has come on record that the plaintiff was aged about 4-5 years at the time of family partition in 1945. His version regarding the partition does not give first hand account thereof. His version reveals that his name was mutated after death of the father as holder of both the suit fields as per the Mutation Entry No. 20 (Exh-7). He denied execution of any agreement of sale in favour of defendant Nos. 1 to 3. His version purports to show that he was in possession of both the suit fields (Survey No. 48/7 and 11/2) after demise of his father till the alleged dispossession. He categorically denied his signature appearing on the agreement of sale dated 9th January, 1963 (Exh-59) and the "bharna pawti" (Exh-60). He admits that he sold land Survey No. 48/6 to son of defendant No. 3 Pandu and further alienated Survey No. 50/2 in favour of three (3) persons. He denied that lands Survey No. 48/6 and Survey No. 50/2 were the only two (2) parcels of agricultural lands allotted to his share. He further denied that field Survey No. 48/7 was allotted to the share of his father. It is true that P.W. 2 Rama is a chance witness. He supported case of the plaintiff as regards the partition of the family property into four (4) shares. It is also true that version of PW Rama is of no much help to the plaintiff. He admits that agricultural land called "mala" is bisected by a "nala" (rivulet) into two (2) portions. He also admits that he had no occasion to see dispossession of the plaintiff. Both the courts rightly held that the plaintiff could not adduce satisfactory oral evidence regarding details of the partition which was effected in 1945 by deceased Laxman Wagh.

12. D.W. 1 Bala states that upper 1/5th portion was given to the father out of field called "ranmala". He asserted that the remaining land called "ranmala" was divided equally in four (4) parts comprising of one (1) acre each. He

corroborated execution of the agreement of sale (Exh-58) by deceased Laxman for and on behalf of the plaintiff to the extent of plaintiff's share in the suit field. This agreement of sale (Exh-58) reveals that 1/4th share was allotted to the plaintiff out of Survey No. 11/2 and the undivided share was subject-matter of the agreement of sale. The agreement of sale is purportedly executed on 14th April, 1972. It is significant to note that the agreement is also said to have been signed by the plaintiff as an attesting witness. The plaintiff's age at the time of family partition in 1945 was approximately five (5) years. Therefore, at the time of agreement of sale (Exh-58), in 1962, he was about 22 years old. I mean to say, he was major and, therefore, it was not probable that deceased Laxman would enter into an agreement on his behalf as a guardian.

13. The recitals of the agreement (Exh-58) indicate signature of the plaintiff in quite strange manner as compared to that of his signature on the plaint and vakalatnama. The plaintiff's signature on the "kararnama" (Exh-59) and the "bharna pawti" (Exh-60) dated 9-1-1963 also does not correspond to the pattern of his admitted signature appearing from the plaint, vakalatnama, purshis (Exh-62) and other documents. Mere comparison will show that the signature of the plaintiff appearing on the agreement (Exh-58) is not his genuine signature. The mode of his admitted signature on the plaint shows that the manner of writing word " " is quite different in the context of the signatures.

14. The version of D.W. Bala reveals that the documents were prepared in presence of Sandu Master and Yashwantrao Police Patil. He admits that there were no "bandhs" in the field called "pandhri". He also categorically admits, "after the partition, we were never in possession jointly on any of the land". This admission blows up the contention of the defendants that Survey No. 11/2 was jointly possessed by the plaintiff and the defendant Nos. 1 to 3. He states that at the time of execution of "sawda pawti" (Exh-58), the plaintiff was 2-3 years old and was being maintained by the father. However, it has come on record that the plaintiff was aged about 22 years at the relevant time. Therefore, there was no reason for the father to execute the document (Exh-58) as guardian of the plaintiff. It is pertinent to note that DW Bala later on changed his version and stated that the plaintiff was 18 to 19 years old at the relevant time.

15. The version of D.W. 2 Madhavrao corroborates execution of the agreement of sale and the "bharna pawti" (Exh-59 and Exh-60). He is attesting witness of these documents. He states that the plaintiff was 20 years of age at the time of execution of the said document. The version of D.W. 4 Sandu corroborates the plea of partition. He further corroborates the execution of agreement of sale (Exh-58) by deceased Laxman in favour of defendant Nos. 1 to 3. He admits that share of the plaintiff was accepted on his behalf by the father (Laxman). According to him, the field called "pandhari" was kept joint amongst four (4) brothers. There is no reason as to why the partial partition was effected in respect of the said field, He further admits that he has no knowledge as to why signature of the plaintiff was obtained as witness on the agreement of sale called

"sawda pawti" (Exh-58). The first Appellate Court observed that age of D.W. Sandu at the time of partition in the year 1945 could be around 20 years. It is difficult to believe that a young lad of 18-20 years of age was called to participate in the process of partition when adult members were available. The first Appellate Court, in fact, came to conclusion that D.W. Sandu is a got-up witness. The first Appellate Court observed:

It appears that the trial Court placed reliance on the evidence of D.W. Sandu. But his own evidence shows that he must not have been present for the partition... .

When adult members were present for the partition, this witness who was hardly aged about 20 years would not have been particularly called for participation in the dealing of immovable property. Even ignoring this evidence of Sandu, there is no reason to disbelieve the say of defendant No. 1 himself who was the party to the partition and has received a share in it... .

16. It is explicit that the first Appellate Court placed implicit reliance on the solitary version of D.W. Bala in the context of oral partition, for the reason that he was a party to the process of division.

17. Clinching question is whether the interested and solitary version of D.W. Bala is sufficient to prove the allegation that the division of properties was made into five (5) shares. In this context, it is worthy to be noted that the defendants failed to prove the sale of Survey No. 68 called "barbhai" after the partition of 1945. The signatures of the plaintiff on the vakalatnama, plaint and other documents do not correspond with the pattern of signature appearing on the disputed documents i.e. the agreement of sale confirmed by him and the "bharna pawti" (Exh-59 and Exh-60). It does not stand to reason that Survey No. 11/2 was retained as joint family property and only the partial partition was effected. It is more probable, therefore, that deceased Laxman had drawn four (4) lots of the family properties and had given three (3) of them to the defendant Nos. 1 to 3 each whereas had retained one of the lots of properties for and on behalf of the plaintiff. Obvious question would be as to why a single lot could have been retained by deceased Laxman Wagh for himself and the plaintiff. The first Appellate Court observed that as to why the parents of the plaintiff had not taken any share, is not explained by the plaintiff. In my opinion, it is more probable that because the plaintiff is the stepbrother of the defendant Nos. 1 to 3, born out of the second marriage of Laxman Wagh, there could be more share held by him and his parents together. In any case, when the defendants failed to prove partial partition and that: the documents relied upon by them (Exh-58 and Exh-60) are of dubious nature, I find it difficult to rely upon their version.

18. So far as the revenue record is concerned, it is pertinent to note that the plaintiffs name was recorded in respect of the suit fields as per the Mutation Entry No. 20 (Exh-7). It appears that the Mutation Entry No. 20 was sanctioned on 15th November, 1964 after notice was served on the concerned sharers. It also appears that subsequently, as per Mutation Entry No. 105 dated 19th

August, 1970, the two (2) suit fields were shown against names of the four (4) brothers. In this context, the copy of Mutation Entry No. 105 (Exh-8) reveals that names of the four (4) brothers were recorded not only in respect of Survey No. 48/7, but also in respect of Survey No. 11/2 as the legal heirs of deceased Laxman Wagh. It is nobody's case that Survey No. 11/2 was allotted to deceased Laxman Wagh. Conversely, it is the case of the defendants that Survey No. 11/2 was kept joint for cultivation of the plaintiffs and defendant Nos. 1 to 3 and had remained undivided in spite of the partition in 1945. Obviously, there was no question of sanction of mutation entry in their names as legal heirs of deceased Laxman Wagh in respect of Survey No. 11/2. I mean to say, they did not inherit Survey No. 11/2, according to the case of the defendants, as heirs of deceased Laxman Wagh. Apart from the inconsistency appearing from the Mutation Entry No. 105 (Exh-8), it cannot be overlooked that the entry was recorded as per the order of Tahsildar which was result of an inquiry. Indeed, if deceased Laxman had executed an agreement of sale (Exh-58) which was confirmed by the plaintiff (Exh-59), then the defendant Nos. 1 to 3 would have produced the said documents before the concerned revenue authority. Neither of the document saw day of the light until it was filed in the trial Court. This circumstance also speaks volume against the defendants in so far as plea of the agreement of purchase is concerned.

19. The revenue entries purport to show that name of deceased Laxman Wagh was shown as holder of both the suit lands until his death. He died in 1964. After his death, name of the plaintiff was recorded in the cultivation column, but it was a pencil entry. It is probable that the plaintiff was later on dispossessed from the suit lands after the Mutation Entry (Exh-8) was sanctioned in the month of August, 1970. Considering these aspects, I am of the opinion that the case of the plaintiff is more probable and acceptable whereas the defendants were and are bent upon denying his rights in respect of the suit field. I decline to countenance version of the defence because the agreement of sale and other two (2) documents (Exh-58 and Exh-60) produced on record appear to be dubious and got-up with a view to deprive the plaintiff from his rights.

20. Though the concurrent findings have been rendered by the courts below, yet, finding of fact may be interfered with because the documents referred to above are relied upon by the courts below without proper verification of the signatures appearing thereon. The courts below failed to see that the plaintiff was aged about 22 years at the time of execution of agreement of sale (Exh-58) and, therefore, ordinarily his father would not have represented him as a guardian. The Apex Court in *P. Chandrasekharan and Others Vs. S. Kanakarajan and Others*, ", observed:

What is prohibited for the High Court while exercising this jurisdiction u/s 100 CPC is to interfere with a finding of fact. This limited jurisdiction, inter alia, would become exercisable when the findings are based on misreading of evidence or so perverse that no reasonable person of ordinary prudence could take the said

view.

21. It need not be reiterated that the finding of fact rendered by the courts below as regards agreement of sale entered into by the plaintiff in respect of Survey No. 11/2 is based on misreading of evidence. I am of the view that both the courts recorded such finding without considering the attending circumstances, and the fact that the said documents were not produced before the revenue authorities at the time of Mutation Entry No. 120 and had not seen the day of light for long many years before those were filed in the trial Court.

22. For the aforestated reasons, I am inclined to hold that the plaintiff's case is more probable. The plaintiff (appellant) is entitled to relief of declaration of ownership and recovery of possession alongwith mesne profits from date of the Suit. In this view of the matter, both the impugned judgements will have to be set aside.

In the result, the appeal is allowed. The impugned judgement and that of the trial Court are set aside. The Suit is decreed. The plaintiff (appellant) is declared as owner of the suit fields. He shall recover possession of the suit fields from the defendants which shall be restored to him within two (2) months. He will be entitled to recover mesne profits from date of the Suit which may be determined after inquiry under Order-XX, Rule-12 of the Civil Procedure Code. He shall receive cost of the Suit and both the appeals from the respondents who shall bear their own costs.