
(2006) 11 BOM CK 0045

In the Bombay High Court

Case No : Second Appeal No. 61 of 1986

Shekoji Bhimrao and Others

APPELLANT

Vs

Motiram Maruti Maratha and Others

RESPONDENT

Date of Decision : 09-11-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107, 96
Maharashtra Land Revenue Code, 1966 — Section 149, 150, 150(6), 157
Specific Relief Act, 1963 — Section 38

Citation : (2007) 1 ALLMR 593 : (2007) 2 BomCR 164 : (2007) 1 MhLj 747 :
(2007) 5 RCR(Civil) 694

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : M.V. Deshpande, for the Appellant; A.N. Ansari, for the Respondent

Final Decision : Allowed

Judgement

S.B. Deshmukh, J.—This second appeal is directed against the judgment and decree passed by the learned Additional District Judge, Nanded, in Regular Civil Appeal No. 22 of 1982 ("appeal"), which was reversing the judgment and decree passed by the learned Joint Civil Judge (J.D.), Nanded in Regular Civil Suit No. 104 of 1976 ("suit"). Present appellants were the plaintiffs and respondents were defendants. The parties, hereinafter, referred to their original status - i.e. as plaintiffs and defendants.

2. The plaintiffs are sons of defendant No. 7. The plaintiffs have contended in the suit that the joint Hindu family of plaintiffs and defendant No. 7 was holding ancestral agricultural land at village Marlak (Bk.) Taluka and District Nanded. The partition between plaintiffs and defendant No. 7 took place somewhere in the year 1970. In that partition, the suit property was allotted to the share of plaintiffs 1 to 3. Said partition was recorded under mutation entry on 16-12-1970. Said Mutation Entry No. 430 was also certified by the competent authority. The plaintiffs names have been effected in the revenue record and

they are in possession of the suit property since then.

Defendant No. 7 executed sale deed of the suit property on 14-6-1971 in favour of defendant No. 6. In fact, defendant No. 7 was in need of money and therefore, he executed a document in favour of defendant No. 6. Defendant No. 6 was indulged in money lending. Defendant No. 6 was, however, not holding the license for money lending business. Defendant No. 7 has repaid the loan raised from defendant No. 6 and obtained receipt thereof. The suit property was mortgaged long back in favour of Seva Sahakari Society. Marlak Bk. The plaintiffs are in actual physical possession of the suit property since partition and therefore, they have claimed permanent injunction.

3. Defendants after entering into appearance filed written statement. The written statement filed by defendant No. 6 is at Exhibit 87. Defendant No. 6 claims to have purchased the suit property by registered sale deed dated 14-6-1971. He has also contended that thereafter, he had executed an agreement of sale in relation to the suit property in favour of defendant No. 8. According to defendant No. 6, his name is recorded under Mutation Entry No. 448 in the record of rights of the suit property. Defendant No. 6 denied the partition as claimed by plaintiffs on 16-2-1970.

4. The trial Court settled the issues.

5. On behalf of plaintiffs PW 1 Laxmibai their mother. PW2 Manika uncle of plaintiffs, PW3 Shriram and PW 4 Sheshrao are examined. Defendant No. 7- father of plaintiffs had adduced his own evidence in support of the case of the plaintiffs. On his behalf witness Sambhaji is examined. On behalf of defendants 6 and 8, witness Datta is examined. Defendant No. 6 did not enter the witness box in support of the pleadings in the written statement. The trial Court appreciated the oral as well as documentary evidence and decreed the suit.

6. The first Appellate Court did not accept the case of partition alleged by the plaintiffs. The first Appellate Court observed in its judgment paragraph No. 18 that the plaintiffs were of the age of 14, 7 and 4 years respectively at the time of alleged partition. According to the first Appellate Court, ex facie, it did not stand to reason that there could be a partition in between the father and his minor sons but according to first Appellate Court it could happen only in cases where the relations between mother and father are not cordial and that they have withdrawn from society of each others. It appears that Laxmibai and defendant No. 7 had a son born after the alleged partition. This circumstance was also considered by the first Appellate Court while rejecting the alleged partition dated 16-2-1970. According to first Appellate Court, plaintiffs, their mother Laxmibai and defendant No. 7 are not separate in food and residence, in spite of the alleged partition. Mutation Entry No. 430, according to the first Appellate Court is a paper partition and nominal one. The first Appellate Court has also observed that such Mutation Entry No. 430 is not sanctioned by the competent authority i.e. Tahsildar. The first Appellate Court accepted the arguments on behalf of

defendant Nos. 6 and 8 that Mutation Entry No. 430 and the 7/12 extracts placed on record by plaintiffs are anti dated. For these reasons, first Appellate Court refused to accept case of the partition and possession of the plaintiffs over the suit property.

The first Appellate Court has referred to the admission given by PW 1 Laxmibai that she never cultivated the suit land. The first Appellate Court held that name of defendant No. 6 was recorded under Mutation Entry No. 448. The first Appellate Court, however, regretted that Mutation Entry No. 448 is neither placed on record either by defendant No. 6, 8 or plaintiffs. The first Appellate Court at the end of paragraph No. 20 concluded that, "...If we consider the certified copies of 7/12 extracts and the mutation entry produced by the plaintiffs that revenue record produced by the contesting defendants, there is a room to believe that revenue record produced by plaintiffs is suspicious one."

With these findings the first Appellate Court proceeded to reverse the judgment and decree passed by the trial Court, against which the present second appeal is filed.

7. This appeal is admitted by this Court by an order dated 18-6-1986, on the following grounds, which are substantial questions of law, though they are not reproduced in the order of admission of appeal by this Court.

(A) The learned Additional District Judge erred in holding that as there is no partition deed coming forth the plaintiffs cannot be owners because of the partition.

(B) It could have been appreciated that if there is a partition between father and his sons it is not necessary that there should be a partition deed. There can be a oral partition and the same can be informed to the Revenue Officers and the Revenue Officers are bound to take the entries.

(C) After the partition in 1970 the mutation entry was taken in the names of plaintiff/appellants. That is enough to show that there was a partition between the father and his sons. The learned Additional District Judge erred in holding that the evidence of partition led by the plaintiff/appellants is of interested witnesses inasmuch as they are near relative of plaintiffs and their father. In family partition always the relatives of the family only take part.

(D) The learned Additional District Judge erred in holding that the title has passed to defendant No. 6, though it was contended that the sale-deed executed in favour of defendant No. 6 was as a security for loan. (fit That the learned District Judge has erred in holding that the receipt produced by the defendant No. 6 and proved by him may be of some other transaction.

8. The plaintiffs have filed a simple suit for perpetual injunction. Said relief can be granted by the Civil Court u/s 38 of the Specific Relief Act. A person seeking perpetual injunction has to establish a possession over the suit property. The plaintiff or a person seeking perpetual injunction always need not to prove title to

the suit property. All that is required to be proved by the plaintiff in such a suit for perpetual injunction is his possession over the suit property, either as a owner or referable to some lawful right. Enquiry regarding ownership and/or a lawful right claimed by the plaintiffs under such suit is incidental thereto.

In the present case, the plaintiffs have sought perpetual injunction against the defendants. Foundation for such claim, according to the plaintiffs, is partition dated 16-2-1970. The trial Court has referred to this plea raised by the plaintiffs and on appreciation of the oral as well as documentary evidence recorded a finding in favour of the plaintiffs. This finding is upset by the first Appellate Court. The first Appellate Court while considering the appeal u/s 96 of the CPC is exercising the same powers nearly that of the powers of the trial Court. Section 107 refers to the powers of the Appellate Court. The Appellate Court, however, while exercising these powers has to be more careful in case of reversal of the judgment of the trial Court. The evidence led on behalf of the parties and accepted by the trial Court has to be considered by the first Appellate Court. Ordinarily the first Appellate Court would not draw any inference diagonally opposite to that of the trial Court, in the absence of perverse appreciation of the evidence on the part of the trial Court.

9. Here in this case, plea of partition was set up by the plaintiffs in their pleadings itself. The plaintiffs and defendant No. 6 undisputedly were the members of the joint Hindu family. The partition in the joint Hindu family is disruption of the joint family status by definite and unequivocal indication to separate in the interest, although not immediately followed by de facto actual division of the subject-matter. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, parties may divide the property by metes and bounds or they may continue to leave together and enjoy the property in common as before. However, whether they do one or the other, it affects the only mode of enjoyment but not the tenure of the property. The status of the property as joint Hindu family property ceases to be so immediately the shares are defined.

10. Plaintiffs 1 to 3 are male children of Laxmibai and defendant No. 7. The partition is alleged. This partition is dated 16-2-1970. This oral evidence of the plaintiffs regarding partition is reinforced by Mutation Entry No. 430. Undisputedly, under the provisions of Hindu Law, oral partition is permissible. This is an usual mode in agrarian Hindu community of oral partition of the agricultural lands referring to their local names, if parties to the partition are illiterate persons. Such oral partition is being reported to the revenue authorities for effecting the mutation. Such report can be u/s 149 of the Maharashtra Land Revenue Code, 1966 ("Code of 1966"). Such report is an acquisition of right to mutate u/s 150 of the Code of 1966. Such mutation entry, on its due certification u/s 150 of the Code of 1966 gets presumptive value u/s 157 of the Code of 1966. In the present case, grievance is raised on behalf of the defendants that Mutation Entry No. 430 is not certified by the competent authority. Certification

of mutation is provided u/s 150 of the Code of 1966. Relevant provisions of Sections 149 and 150 of the Code of 1966 are reproduced hereinbelow:

149. Acquisition of rights to be reported.:— Any person acquiring by succession, survivorship, inheritance, partition, purchase, mortgage, gift, lease or otherwise, any right as holder, occupant, owner, mortgagee, landlord, Government lessee or tenant of the land situated in any part of the State or assignee of the rent or revenue thereof, shall report orally or in writing his acquisition of such right to the Talathi within three months from the date of such acquisition, and the said Talathi shall at once give a written acknowledgment of the receipt of such report to the person making it:....

Thus, it appears in the present case that the partition between the plaintiffs and defendant No. 7 was reported to the competent revenue authority. The certification of mutation entry is contemplated u/s 150 of the Code of 1966. Relevant provisions is reproduced hereinbelow:

150. Register of mutations and register of disputed cases" -

(1)...

(2)...

(3)...

(4)...

(5)...

(6) Entries in the register of mutations shall be tested and if found correct, or after correction, as the case may be, shall be certified by any revenue or survey officer not below the rank of an Aval Karkun in such manner as may be prescribed:

Provided that, entries in respect of which there is no dispute may be tested and certified by Circle Inspector:

Provided further that no such entries shall be certified unless notice in that behalf is served on the parties concerned.

Section 150 deals with the certification of the mutation. If mutation entry is disputed, it is recorded in the register of mutations and has to be referred to the Tahsildar for decision. Such mutations are to be certified by the officer not below the rank of Aval Karkun. However, the mutation entries which are not disputed, deliberately, have been provided to be certified by the officer, namely; Circle Inspector as provided under the first proviso to Sub-section (6) of Section 150 of the Code. Here, it is not a case of defendant No. 7 that there was/is any dispute regarding partition claimed by the plaintiffs on 16-2-1970. Therefore, there was no occasion for recording Mutation Entry No. 430 in the register of disputed mutations. It was, therefore, a mutation which could be certified by the Circle Inspector. Said Mutation Entry No. 430 is, therefore, legally certified by the Circle

Inspector on 16-12-1970. Here, it is to be noted that this mutation is not challenged by defendant No. 6 or defendant No. 8, even after filing of the suit. The first Appellate Court did not refer to Section 149 and Section 150 of the Code of 1966. The finding of the first Appellate Court regarding Mutation Entry No. 430 is, therefore, perverse.

Thus, the partition alleged by the plaintiffs on 16-2-1970 is oral partition and established with the evidence. Said partition is reinforced with certification of Mutation Entry No. 430 in favour of plaintiffs on 16-12-1970. It follows that the plaintiffs, therefore, are in possession of the suit property since the date of partition on account of such partition. This Mutation Entry No. 430 was accepted.

11. The trial Court has referred to the plea set up by defendant No. 7 regarding nature of transaction as not a loan transaction and repayment of the entire loan. The trial Court has also referred to the evidence of defendant No. 7 and document Exhibit 108, which is referred to as a chit by the trial Court in its judgment. It is written missive addressed by defendant No. 6 to defendant No. 7. The trial Court accepted this document Exhibit 108 and recorded a finding that the entire amount of loan is repaid by defendant No. 7 to defendant No. 6. The first Appellate Court, however, in paragraph No. 16 of its judgment, criticized this document Exhibit 108 and did not accept it. One of the reasons assigned by first Appellate Court is non-mentioning of any date on this document Exhibit 108. Another reason weighed with the first Appellate Court is that date 9-1-1972 is written on the document Exhibit 108 at some distance from the signature of defendant No. 6. At the cost of repetition, it is to be recalled that defendant No. 6 did not enter into the witness box. One can understand if defendant No. 6 enters into the witness box, denies the execution and his signature on the document and offers himself for cross-examination. The first Appellate Court was aware that defendant No. 6 did not enter into the witness box. In this fact situation, it is really difficult to accept the finding recorded by the first Appellate Court that the document Exhibit 108 is not genuine. The finding of the first Appellate Court in my view, is perverse. This missive is something more than the receipt. Receipt issued by the party, may refer to some amount. In this missive, receipt of entire amount, paid by defendant No. 7 is unequivocally accepted by defendant No. 6. Defendant No. 6 could have entered the witness box and explained that this receipt is in respect of some other, different transaction or otherwise. In absence of any such explanation in the written statement i.e. foundation in the pleadings and evidence led on behalf of defendant No. 6 himself, the first Appellate Court ought to have accepted this receipt.

12. Learned Counsel for defendant No. 8 has invited my attention to sale deed Exhibit 109. According to her, defendant No. 6 has purchased the suit property by registered sale deed dated 14-6-1971 and received actual physical possession of the suit property. Since then, defendant No. 6 is in actual physical possession of the suit property. Learned Counsel for the defendant No. 8 has referred to Exhibit 109 i.e. sale deed. From the recital of the sale deed, it appears that the

possession was given to defendant No. 6 by defendant No. 7 earlier to the execution and registration of the sale deed dated 14-6-1971. The point of time or the date on which the possession was given by defendant No. 7 to defendant No. 6 is neither written in the written statement nor any oral evidence is led. It is, therefore, mystery as to when defendant No. 6 was handed over with the possession of suit property by defendant No. 7.

Learned counsel for the defendant No. 8, thereafter, referred to 7/12 extracts - Exhibits 17/2 to 17/7. Exhibit 17/2 is for the year 1970-71 and in the crop cultivation column, name of defendant No. 6 is recorded. Date of sale deed in favour of defendant No. 6 is 14-6-1971. This 7/12 extract also refers to the name of defendant No. 7 as recorded in the occupancy column of 7/12 extract. It seems that said entry was effected under Mutation No. 448. The trial Court has observed that this mutation entry is not produced on record by defendant. The first Appellate Court has also observed that neither party has placed on record this Mutation Entry No. 448. This entry is in the name of defendant No. 6. It is for the defendant No. 6 to explain as to when and why his name was recorded in the occupancy column of the suit property in 1970-71 i.e. prior to sale deed dated 14-6-1971. If this mutation entry is lawfully entered into and at the instance of defendant No. 6, he should have placed on record, said Mutation Entry No. 448. If this mutation entry has no relevance or foundation or is not recorded in accordance with the provisions of Code of 1966, in that circumstances, a person benefited by this mutation entry may avoid production thereof. Apart from this aspect, defendant No. 6 could have explained in his pleadings the evidence that on particular date prior to 14-6-1971 he was inducted into the suit property as purchaser or in any other capacity thereof.

13. The Mutation Entry No. 481 is placed on record and it is at Exhibit 120. This mutation is certified on 24-8-1974. This delay for recording the name of defendant No. 6 could have been explained. Once the partition is accepted to have taken place on 16-2-1970 and possession of the suit property is with the plaintiffs, there could not have been any occasion for handing over possession of the suit property by defendant No. 7 to defendant No. 6. The trial Court, therefore, based on the oral and documentary evidence justifiably held that the plaintiffs are in possession from the date of partition and issued a decree for perpetual injunction. The judgment and decree of the first Appellate Court, therefore, needs to be quashed and set aside.

14. In the light of these findings, substantial questions referred to above have been accordingly answered in favour of the plaintiffs. The judgment and decree passed by the first Appellate Court needs to be quashed and set aside, restoring the judgment and decree passed by the trial Court.

15. In the result. Second Appeal is allowed. The judgment and decree passed by the Additional District Judge, Nanded in Regular Civil Appeal No. 22 of 1982 is quashed and set aside and the judgment and decree passed by the Joint Civil Judge (Junior Division), Nanded in Regular Civil Suit No. 104 of 1976 is restored.

There shall, however, be no order as to costs.