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(2008) 02 BOM CK 0007

In the Bombay High Court

Case No : Civil Application No. 294 of 2007 in First Appeal No. 289 of 2006

Shri Ranjit Satardekar and Another — APPELLANT

Vs

Smt. Clotildes Fernandes and Others — RESPONDENT

Date of Decision : 14-02-2008

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 41 Rule 5
Registration Act, 1908 — Section 17(1), 17(2)(vi)

Citation : (2008) 02 BOM CK 0007

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : A.F. Diniz, for the Appellant; M.S. Usgaonkar with Mr. A.D. Bhobe, Advocate for Respondent No. 1, Mr. A.N.S. Nadkarni and Mr. H.D. Naik, Advocates for Respondents Nos. 2and 3, for the Respondent

Judgement

N.A. Britto, J.—Heard the learned Counsel on behalf of the parties. The dispute between the appellants and respondents nos. 2 and 3 at present is as regards the construction which is being carried out by respondent no. 2 in property having survey no. 249/1-A which is item/verba no. 86 of the Inventory proceedings bearing no. 310/04/B.

2. To cut a long story short, it may be stated that respondent no.2 was the highest bider at the auction/licitation concluded on 10/02/2006, for the said property having bidded the same for 21 crores. Every effort was made by the appellants to stall the auction but the appellants did not succeed, as can be seen from the orders of this Court dated 7/01/2005, 22/08/2005 and 31/08/2005 and that of the Apex Court dated 27/11/2005 and now 12/08/2006. In the chart of partition drawn initially on 26/03/2006 and confirmed on 18/08/2006, the said property has been allotted to respondent no. 2.

3. Earlier, the appellant Shri Ranjit Satardekar had filed an appeal before this Court, bearing Appeal From Order No. 18/2006 which came to be disposed of by this Court by order dated 13/04/2006, and it was held therein that the

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respondent Smt. Vijaya Satardekar, the wife of appellant Ranjit Satardekar, having participated in the auction by virtue of agreement dated 15/07/2002, with full consent of her husband, the appellant Ranjit Satardekar, had no separate or independent right to participate in the auction/licitation. A petition for special leave to appeal against the said order has been admitted by the Hon''ble Supreme Court bearing Special Leave to Appeal No. 8565/2006 but no stay has been granted, but it has been stated by the Apex Court that the auction proceedings held, would be subject to final decision in the appeal.

4. The respondent no. 2 Shri Joe Mathias has filed an application for engrossing the order/chart of partition dated 18/08/2006 on stamp papers and the said application is pending consideration, being CMA No. 148/06/A before the learned trial Court. It also appears that on the basis of the said order/chart of partition dated 18/08/2006, the respondent no. 2 Shri Joe Mathias approached the Collector and obtained a conversion sanad for conversion of the suit property from agricultural to commercial and residential use. The said sanad dated 1/10/2007, granted by the Additional Collector is under challenge before the learned Administrative Tribunal at Panaji in Revenue Appeal no. 75/2007 and is likely to be disposed of as per order of this Court dated 13/12/2007 in Writ Petition No. 584/2007.

5. The appellants filed an appeal against the said chart of partition dated 18/08/2006 bearing First Appeal No. 289/2006. On 30/11/2006 parties were directed to maintain status quo. On 20/12/2006 the appeal was admitted, but no stay of execution of chart of partition was granted. The order dated 30/11/2006 was vacated.

6. Respondent no. 2 claims that pursuant to letter dated 21/08/2006, the respondent no. 2 has obtained the possession of the suit property (item no. 86) along with item nos. 88 and 89 which together were bided by respondent no. 2 for a sum of Rs. 23 crores, and pursuant to order dated 28/09/2007 of the Additional Collector giving him the conversion sanad, the respondent no. 2 has started the work of construction in the suit property.

7. As per the applicants/appellants, although they had made an application for interim relief, earlier this Court by order dated 20/12/2006 held that the order dated 11/08/2006 of the Hon''ble Supreme Court protected the rights of the applicants and as such the earlier order dated 30/11/2006 in First Appeal no. 289/2007 was substituted by said order dated 20/12/2006 but according to the applicants when the said order dated 20/12/2006 was passed there was no activity whatsoever in the said property. As per the applicants the chart of partition confirmed on 18/08/2006, is still to be engrossed on stamp papers and still to be registered and possession given to the respondent no. 2 and the respondent no. 2 taking advantage of the said order dated 20/12/2006 has changed the circumstances thereby prejudicing the rights of the appellants. As per the applicants, respondent no. 2 has also sold a plot of the suit property to a third party, inspite of respondent no. 2 having not obtained title to the suit

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property pursuant to the chart of partition and order of its confirmation for want of its engrossment on stamp papers and its registration and possession from the Court and as such the said order dated 20/12/2006 no longer protects the rights of the applicants and therefore the applicants have filed the present application, inter alia, praying that no effect be given to further proceedings before the trial Court in CMA No. 148/06 for engrossing the order dated 18/08/2006 on stamp papers or any attempt to register the chart of partition or any proceedings to hand over the possession of the suit property to respondent no.2 and also to restrain respondent no. 2 from carrying out any kind of work in the said property as well as to restrain him from alienating, encumbering, selling or otherwise disposing the said property or any part thereof in any manner whatsoever.

8. We have in force in the State of Goa amongst other laws, the Civil Code, 1867 (Code, for short) and Civil Procedure Code, 1939 (CPC, for short) enacted by then Portuguese Government. The C.P.C. was enforced w.e.f. 01/01/1941.

9. Learned Counsel on behalf of the appellants refers to article 2137 of the Civil Code and contends that the respondent no. 2 was a stranger to the licitation and therefore was required to pay the price of auction or ought to have furnished security for its immediate payment and since the payment of 21 cores in respect of the suit property or 23 crores in respect of all three properties, were not paid by respondent no. 2, the chart of partition could not have been finalized. Learned Counsel referring to article 1423 of C.P.C. further contends that the respondent no. 2 has not obtained either title or possession from the trial Court and therefore could not have started with the work of construction in the suit property. Learned Counsel further contends that since the allotment of the suit property in favour of respondent no. 2 by virtue of the chart of partition, confirmed on 18/08/2006, has not been registered as required under the provisions of the Indian Registration Act, 1908, the said chart of partition could not have conferred any right on respondent no. 2 and in this context learned Counsel has placed reliance on the judgment of the Apex Court in Bhoop Singh Vs. Ram Singh Major and others, and two judgments of this Court in the case of Fernando Jorge Colaco V/s. State of Goa & Ors. (1991 (2) GLT 11) and Shri Victor de Graca Pinto & Anr. V/s. Smt. Lourdes de Graca Pinto e Nazareth & Anr. (1999 (1) GLT 167).

10. On the other hand, the respondents contend that Article 2137 of the Civil Code has undergone fundamental change by Article 1417 of the C.P.C. which was enforced later and which, inter alia, requires that those who have not taken the properties in licitation and those who are to be allotted owelty money due by those who were successful in the licitation, should be notified to demand within three days the payment, if they so desire and if the demand is made, the successful bidder should be notified to deposit the amount failing which the licitation would be of no effect. Article 1417, C.P.C. also provides that where the payment is not demanded, the owelty money shall earn the legal interest from the date of final judgment of partition and the creditors thereof may register the

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legal hypothecation over the properties adjudicated to the debtors. The learned Senior Counsel on behalf of respondent no. 1 contends that the appellants were notified but did not demand the deposit of owelty money and as such there was no obligation cast on the bidder to deposit the money and since the payment was not demanded, the owelty money will only earn legal interest from the date of final judgment of the partition and the creditors thereof may register the legal hypothecation over the property adjudicated to the debtors and in case the applicants want to get any security it was for them to get the legal hypothecation registered over the properties adjudicated to the bidder which the applicants failed, till date. As regards the possession, the respondents contended that the suit property was in possession of the respondent no.1 as Administrator and since the Apex Court had vacated the stay, there was no objection to give possession to the bidder i.e. respondent no.2 which the respondent no. 1 gave to respondent no.2 by letter dated 23/08/2006 pursuant to respondent no. 2''s letter dated 21/08/2006. As regards the chart of partition not being registered, the respondents contend that the same is optional and in that regard, on behalf of the respondents reliance is placed on Karu Mian V/s. Tejo Mian & Ors. (AIR 1918 Pat 139). The respondents have also contended that the Division Bench judgment in the case of Fernando Jorge Colaco (supra) had not decided the point sought to be canvassed on behalf of the applicants and since the judgment of this Court in Victor de Graca Pinto (supra) follows the said Division Bench judgment on a point which is not decided, the same is of no legal consequence. On behalf of the respondents it is contended that the doctrine of precedent as stated by several judgments of the Apex Court, i.e. being bound by the previous decision, is limited to the decision itself and as to what is necessarily involved in it. Reliance is also placed on para 27 of Yeshbai and Another Vs. Ganpat Irappa Jangam and Another, , which reads as follows:

Now, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. These are the commonest illustrations of decision being given per incuriam. In order that a case can be decided per incuriam, it is not enough that it was inadequately argued. It must have been decided in ignorance of a rule of law binding on the court, such as a statute...

11. The first controversy which is required to be settled is with reference to article 2137 of the Civil Code in relation to article 1417 of C.P.C. Article 2137 provides that:

Where the adjudication is done to a stranger, he shall deposit in the same act, the price of the auction or shall furnish security for immediate payment; however, where it is done to any of the parties, he shall be liable to deposit, or

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furnish security, for the value exceeding the share which he is likely to have in the properties to be partitioned.

The sole paragraph further provides that:

The price of the auction whether deposited or not, shall enter into the mass to be partitioned.

Article 1417, C.P.C. deals with the steps to be taken when the gifted properties or properties subject to licitation exceed the share of the party. It provides that:

Where the office finds, at the time of drawing the chart, that the properties gifted or taken by elicitation exceed the share of the respective party or the disposable portion of the deceased, a note shall be recorded in the file, in the shape of a chart, indicating exactly what is the amount of the excess, and thereupon the following shall be observed:

a) Where in between the properties gifted to a co-heir there exists any property not divisible, which does not fit wholly in the share to the donee, such property shall form part of the mass of partible properties as any other property of the inheritance; in other cases, the donee shall be notified to exercise, within three days, his right of choice which is conferred upon him by paragraph 4 of Article 2107 of the Civil Code, failing which his share will be allotted with the properties indicated by the judge;

b) Where the gift made to a stranger is inofficious, the same shall be reduced in terms of Article 1493 onwards of the Civil Code;

c) Those who have not taken the properties in licitation and who are to be allotted the owelty money due by those who were successful in the licitation, shall be notified to demand within three days the payment, if they so desire. If the demand is made the successful bidder shall be notified to deposit the amount failing which the licitation will be of no effect.

Article 1417 further provides that:

Where the payment is not demanded, the owelty money shall earn the legal interest from the date of final judgment of partition and the creditors thereof may register the legal hypothecation over the properties adjudicated to the debtor.

Learned Counsel, on behalf of the appellants, contends that the respondent no. 2, having been a stranger to the licitation was required to deposit the auction price on completion of auction in terms of article 2137 of the Civil Code. He further submits that respondent no.2 not having deposited the auction price, the chart of partition is illegal and cannot be acted upon. He further submits that Article 2137 of the Civil Code confers substantial rights which could not be taken away by procedural law of C.P.C.

12. Learned Senior Counsel, on behalf of the respondent No. 1 contends, on the

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other hand, that by bringing into force the C.P.C. w.e.f. 1/01/1941, the provision of Article 2137 of the Civil Code has undergone fundamental change and therefore it is Article 1417 (c) which is now required to be followed and was followed in this case. Learned Senior Counsel has also referred to the note of the publishers of the C.P.C. which reads thus:

The regime, as contemplated in the Civil Code, differs in fundamental aspects by the scheme provided by the present Civil Procedure Code. In the first place no strangers in principle are allowed to offer the bid in the licitation (Article 1412 of the Portuguese Civil Code). In the second place, the amount payable as the consequences of the licitation is to be effected in the manner indicated in the Article 1417 of the Civil Procedure Code.

A controversy, similar to this, appears to have been dealt with by the trial Court in its order dated 21/04/2005 but learned Counsel on behalf of the parties have not been able to throw any light on the same. Admittedly, if at all the appellant no. 2 or respondent no. 2 participated in the licitation it is not because they were strangers but because they had stepped into the shoes of the legal heirs by purchasing their undivided rights in the suit property. In other words, they were allowed as transferees of the heirs and by virtue of article 1375, C.P.C. It is well understood and otherwise settled in law that licitation is some sort of family auction in which only the heirs and moiety holder spouse are admitted in addition to the donee and legatee in cases specifically provided. Article 1412 is clear on this point and which provides that:

The licitation is an auction to which only the heirs and moiety holder spouse are admitted, except the cases where, in terms of preceding articles, the donee or legatee should also be admitted. It may fall over the properties of the inheritance which are not necessarily to be allotted in any particular party.

13. Licitation is an act by which the interested parties put a certain asset of inheritance to bid between them, so that it is adjudged to the highest bidder or adjudicated to him in the partition on the condition that he pays the owelty to others when its value exceeds the value of his share in the inheritance. As observed by this Court in order dated 07/01/2005 those who purchase the undivided rights from the heirs in the properties of the inheritance ought to know that the logical conclusion in case of partition by inventory is that such share would be allotted by way of licitation. The licitation has an advantage in that the original value which is attributed to the asset in a way gets corrected. Another advantage is that the bidder knows with which asset or assets he will have for his share of inheritance. It has a disadvantage in that a coheir who is financially better off can corner the assets. However, it is not unknown that many a times, the heirs bid for the assets only after keeping a customer ready to buy the same after allotment in their favour is made.

14. In my view, article 2137 of the Civil Code does not confer any substantive right on a party. It deals with aspects of procedure regarding payment of auction

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price. It was contained in the law enacted in 1867. The C.P.C., as already stated, was enforced w.e.f. 1/01/1941 and in the light of new provisions having been made subsequently as to when the payment is to be demanded and by whom and to whom and the consequences which should follow in case of failure to deposit, the provisions of Article 2137 of the Civil Code, in my view would stand impliedly repealed and substituted by the provision of Article 1417(c) of C.P.C. Admittedly, the appellants were notified to demand the payment as contemplated by Article 1417(c) but did not insist that the same should be made and in the light of that the appellants'' challenge to the chart of partition, prima facie, cannot be accepted. It also does not make much sense that the highest bidder should be asked to deposit the entire price of the bid when his own share in the bided property is substantial. The view that the provision of article 2137 of the Civil Code stands impliedly repealed and now article 1417 C.P.C. overrides article 2137 of the Civil Code is a view held by learned authors Fernando Andrade Pires de Lima and Joao De Matos Antunes Varela reproduced herein above. It is also the view held by Supreme Court of Portugal in its decision dated 9/04/1957 in File No. 56.939 wherein the Supreme Court stated:

article 2126 and following of the Civil Code today is in a great part substituted by the respective provisions of the Code of Civil Procedure

15. The next aspect which requires consideration is whether the possession which respondent no. 2 claims to have taken, pursuant to letters dated 21/08/2006 and 23/08/2006, is legal and justified. By first letter, the respondent no. 2 informed respondent no. 1, inter alia, that the chart of partition having been drawn, the same was homologated on 18/08/2006. Respondent no. 2 therefore requested respondent no.1 to hand over the possession of the suit property as well as other two properties to him. The attorney of respondent no. 1 signed the said letter having received the copy only. By the second letter, the respondent no. 2 again informed respondent no. 1 having taken over the possession on 23/08/2006, as per his letter dated 21/08/2006 and the said letter again shows that respondent no. 1 acknowledged the receipt of the letter only. Neither of the two letters show that respondent no. 1 handed over the possession to respondent no. 2. Respondent no. 1 in his reply has stated that since the Apex Court had vacated the stay, there was no objection to give possession to the bidder, respondent no. 1 gave the possession to the bidder and it was by letter dated 23/08/2006.

16. Article 1423 C.P.C. provides that:

Where any of the parties desire to receive the properties fallen to him in the partition, before the judgment becomes final for want of appeal the following shall be observed;

1. In the title deed which is issued for the purposes of registration and possession of the immovable properties it will be declared that the judgment has not become final for want of appeal, and the conservator shall not register the

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transmission without mentioning the above circumstance;

2. The securities subject to annotation will be annotated by the competent entities with the declaration that the party shall not dispose of them whiled the judgment has not become final for want of appeal;

3. Any other properties shall be delivered only if the party gives security, which shall not include the rents, interest and dividends.

There is no doubt that a chart of partition declares the rights of the parties to the properties of inheritance which the parties are entitled to and it is executable. Article 2158 of the Civil Code reiterates that partition of the properties legally made in respect of which there had not been any objection, confers on the coheirs exclusive ownership of the properties partitioned among them. Article 928 of C.P.C. provides that in the execution for the delivery of certain thing application shall be made that the judgment debtor be summoned to deliver the thing within the period of 10 days. It is well settled by now, as held in the case of Zacarias Durate Dmoingos Pereira Vs. Camilo Inacil Evaristo Pereira, that once the inventory proceedings culminate by a final order, any application to enforce the said order or to move the execution for obtaining the assets to whom they are allotted, the proceedings for the said parties will fall under the C.P.C. and not under the provisions of Order 21, C.P.C., 1908. It is well settled that if any party desires to obtain title and possession of any property as per the chart of partition either before it is finalised or thereafter the remedy of the party is to approach the Court and obtain the same. Articles 928 and 1423 C.P.C. provide sufficient indication to this conclusion. Admittedly, the respondent no. 2 has already made an application to engross the final order of partition on stamp papers and the same is pending consideration of the trial Court. The respondents'' contention that since respondent no. 1 was in possession of the suit property as Administrator, for that reason respondent no. 1 handed over the said property to respondent no. 2, is wholly misplaced factually and legally and needs to be rejected. The two letters do not at all suggest that respondent no. 1 has handed over the possession of the suit property to respondent no. 2. Respondent no. 1 could not have done the same. Respondent no. 1 was appointed as Administrator and as the very word suggests, he was appointed to administer the properties pending partition. That administration is done on behalf of all the heirs, pending partition. If at all the Administrator has possession of any of the properties of the inheritance, it is only for a limited purpose of administrating the same till partition is finalised. The said possession is on behalf of all the heirs who are entitled to the said inheritance being partitioned. Article 2067 of the Civil Code, referring to the person of administrator, states that he is the person who is entrusted with the listing and presenting for the description and partition of the properties of the inheritance. Article 2085 of Civil Code makes it clear that the administrator cannot alienate any properties of the estate except the fruits and other objects which cannot be preserved without fear of deterioration, and, Article 2082 further provides that the administrator shall continue in the

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administration of the estate which he had, until the finalisation of the partition, except in respect of properties not to be partitioned, and which devolve to other heirs in preferential manner.

17. Apart from the fact that both the said letters referred to herein above do not suggest that respondent no. 1 had handed over the possession of suit property to respondent no. 2, respondent no. 1 could not have done so after finalisation of partition, in view of Article 2082 of the Civil Code and in case respondent no. 2 wanted to obtain title and possession to the suit property, he had no other option but obtain the same from the trial Court by making appropriate application as held in the case of Zacarias Durate Domingos Pereira (supra). Respondent no.2, therefore, could not have entered the suit property and started construction nor sold a part of it to strangers unless title and possession was given to him by the trial Court. Therefore, in my view, although there is no stay granted against the final order/chart of partition dated 18/08/2006, the only mode available to the respondent no.1 to obtain the title and possession was by making an application to the trial Court and since the same has not been done, the possession of respondent no. 2 has got to be held illegal and unauthorised and therefore till such time the respondent no. 2 obtains the said possession by proper and legal means, he cannot be permitted to continue with the works of construction in the suit property. He is therefore hereby directed to maintain status quo till such time possession is given to him by the trial Court. The order dated 20/12/2007, therefore, shall stand vacated. In the light of that finding, this Court need not even consider the alternate proposal of respondent no. 2 that he would reserve an area of 5544 sq. meter of a place which is not an open space since that would be the ultimate share of 6.6% the appellants would be entitled to.

18. The third aspect that in the absence of registration of the chart of partition, respondent no.2 could not claim any title to the suit property, need not be gone into at this stage. As per the appellants, the registration is compulsory in terms of Section 17(1), while as per the respondents, the registration is optional in terms of Section 17(2)(vi) of the Indian Registration Act, 1908. The respondent no. 2 has already approached the trial Court for engrossing the chart of partition on stamp papers and he would be free to register the same thereafter, after respondent no. 2 obtains title and possession by way of execution.

19. Admission of the appeal is one thing and stay of operation of the impugned order is quite another thing. The first does not follow the second, unless a special case is made out. Article 1421, C.P.C., inter alia, provides that an appeal shall lie against the chart of partition but filing of the appeal will not stay the operation of the judgment. To the same effect are the provisions of Order 41, Rule 5, C.P.C., 1908. The Apex Court has admitted the appeal against the order of this Court dated 13/04/2006 but has stated that the auction proceedings would be subject to final decision in the appeal. This Court has admitted the appeal and has further held that the said order of the Apex Court will sufficiently protect the rights of the parties and further would be subject to the result of the appeal. In

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other words, the title and possession which respondent no.2 may obtain pursuant to application for execution of the chart of partition, needless to say, shall be subject to the result of First Appeal No. 289/2006, admitted by this Court on 20/12/2006.

20. This Court on 20/12/2006 chose not to grant any stay of execution of final chart of partition nor the stay of CMA No. 148/06. Therefore, the appellants/ applicants would not be entitled to renew their request for the grant of the said reliefs. Nevertheless, the respondent no.2 was not entitled to take law in his own hands and enter the suit property without he being put in possession of the same by the trial Court. Hence, the restrain imposed herein above. The respondent no. 2 shall maintain status quo as regards the suit property till respondent no. 2 obtains its possession in accordance with law by applying to the trial Court. The trial Court is also directed to dispose of CMA No. 148/06/A as expeditiously as possible and in any event within a period of 30 days from today. If the execution proceedings are filed, the learned trial Court shall also endeavour to dispose them of in accordance with law and as expeditiously as possible.

21. With the above observations and directions, the application is disposed of. At this stage, learned Counsel on behalf of respondent no. 2, prays for stay of this order. Considering the facts and circumstances of the case, the request for stay is rejected.

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