

(2008) 06 BOM CK 0178
In the Bombay High Court
Case No : Second Appeal No. 572 of 1988

Shri Vijay Balu Wayande

APPELLANT

Vs

Martand Keshav Dabhade, Keru Keshav Dabhade (Since deceased by his heirs Smt. Bharati Keru Dabhade, Aarati Keru Dabhade and Suvarti Keru Dabhade by their guardian Bharati Keru Dabhade) and Smt. Anandibai Dabhade

RESPONDENT

Date of Decision : 02-06-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12(1), Order 20 Rule 18
Partition Act, 1893 — Section 2, 3

Citation : (2008) 4 ALLMR 783 : (2008) 110 BOMLR 2021 : (2008) 5 MhLj 21

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Pai, instructed by S.V. Sadavarte, for the Appellant; M.R. Katikar, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—This is a Second Appeal filed by Original defendant No. 2 against the original plaintiffs- respondents, in whose favour by order dated 30th April, 1985, the Joint Civil Judge, Junior Division, Kolhapur (for short, "Executing Court") in Final Decree Application has passed the following order.

The application is granted.

The Suit property be partitioned through the Court Commissioner according to the directions given in the decree and 3/4th portion of the same be handed over to the plaintiffs-applicants by demolishing the construction, if necessary.

No order as to costs.

2. The same has been confirmed by the Additional District Judge, Kolhapur by order dated 25th October, 1988 and therefore, the present Second Appeal.

3. By an order dated 30th November, 1988 this High Court has framed the following question of law.

Whether the principle of equity should have been applied having regard to the facts and circumstances of the case?

4. The factual background in the matter as recorded by the Executing Court is as under:-

The plaintiffs have filed Regular Civil Suit No. 931/1967 against the Defendants for declaration that the gift deed of the suit property executed by defendant No. 1 in favour of defendant No. 2 be declared void and not binding on the plaintiffs and also for possession of their 3/4th share after an equitable partition, which was decreed in favour of the Plaintiffs having ordered that:-

It is hereby declared that the gift-deeds, dated the 12th August, 1973 and the 4th September, 1954, executed by Keshav Ganpat in favour of Shantabai Davane are void and not binding on the Plaintiffs. It is also declared that the gift-deed, dated the 19th April, 1963, executed by Keshav Ganpat in favour of Balu Laloba is void and not binding on the Plaintiffs. It is also declared that Plaintiffs have got 3/4th share in the suit property. viz., They are entitled to its partition Scheme No. 1. They are entitled to its partition and separate possession. The partition of the property shall be done by a commissioner who will be appointed later on. Defendant No. 2 in both the suits are granted 3 months time to pull down the construction made by them. Defendant No. 2 in both suits, do pay plaintiffs the costs of the suit and do bear their own. No order as to costs of defendant No. 1 in both the suits. Inquiry as regards future mesne profits will be made afterwards under Order 20, Rule 12(1)(c) of Civil Procedure Code.

The Defendants preferred Civil Appeal No. 180/1969 against the decree in Regular Civil Suit No. 931/1967 in the District Court at Kolhapur, which was dismissed with costs.

The Defendant then preferred Second Appeal No. 826/1970 against the decision of the District Court, in which their Lordships of the Bombay High Court ordered that:-

For the reasons stated in the judgment, recorded in S.A.826/1970, the Court directs that in the proceedings for making the final decree, the Court shall appoint a Commissioner who will try to find out whether by amicable settlement between the parties, the rights and equities existing in the property along with the construction can be either adjusted by sale or purchase between them and in case, any amicable settlement is possible, he shall give effect to the same. The Court further directs that if no amicable settlement is possible in this regard, then the defendants shall remove the construction as far as possible so as to make available 3/4th of the plot property viz., final plot No. 434 in Town Planning Scheme No. 1 to the Plaintiff within the period of 3 months. The Court, however, makes it clear that the Commissioner as well as the Court shall be free to

consider the application of the parties so as to apply the provisions of the partition Act in the final decree proceedings. With these directions to be made part of the decree and the consequent modifications, the Court confirms the decree of the trial Court as confirmed by the Lower Appellate Court and dismisses the appeal with costs.

The defendants then preferred SLP (CIVIL) No. 1377/1978 in the Supreme Court, in which their Lordships of the Supreme Court ordered that:-

In view of the fact that at the time of final decree the Commissioner and the Court will take note of equities before passing the final decree there is nothing to interfere at this stage. In view of this the Petitioner is withdrawing this Petition.

Permitted to withdraw the Petition.

In the mean time, the Plaintiffs have filed Regular Execution proceedings No. 420/1969 for execution of the decree in Regular Civil Suit No. 931/1967 on 29/06/1981, the said execution proceeding was dismissed, in view of the direction of the Bombay High Court in Second Appeal No. 826 of 1970. The Plaintiffs have preferred Civil Appeal No. 238/1981 against the said order dated 29/06/1981, in which the District Court ordered that:-

Civil Appeal No. 238 of 1981 is allowed and the order below Exh.1 in Regular Darkhast No. 420 of 1969 is set aside and it is directed that the execution petition shall be proceeded with as if it is a final decree petition under Order 20 Rule 18, Civil Procedure Code. The darkhast shall be proceeded with after the decree-holders take the necessary steps.

and accordingly Regular Execution proceeding No. 420/1969 is treated as Final Decree Application No. 3/1983.

On this background, the Ashok Shripatrao, Junior Engineer in Kolhapur Municipal Corporation was appointed as Court Commissioner to effect the partition of the suit property, which he has submitted his report at Exh. 32, wherein he has stated that as per the provisions of the Building Bye-laws and Development Control Rules of Kolhapur Municipal Corporation -1977. The suit property cannot be partitioned. The said Court Commissioner was then examined on behalf of the Plaintiffs, applications at Exh.46 in Final Decree No. 4/1983, who has admitted that considering the above referred Bye-laws and Rules, he could not tell whether retrospective effect can be given to her the execution of the decree of 1979.

5. Final Decree Application Nos.3 of 1983 and 4 of 1983 moved for execution by the original plaintiffs before the Executing Court at Kolhapur. The defence was to invoke Section 2 and 3 of the Partition Act-1893 if the suit property could not be partitioned. Admittedly, the decree was passed prior to 1977. The Building by-laws and Development Control Rules of Kolhapur Municipal Corporation-1977 therefore could not be extended as there was nothing to suggest that it had retrospective effect. Admittedly, the defendant constructed on the disputed plot

knowing fully the pendency of the matter. Therefore, there was no questions of considering the said construction as a "subsequent events". Taking all these into consideration, therefore, the Executing Court rightly granted the Application.

6. Before the Additional District Judge, Kolhapur in Regular Appeal No. 223 of 1985 filed by the original Defendant No. 2, the point was "whether it is a fit case to apply the provisions of Sections 3 and 4 of the Partition Act as contended by the Appellant?" In the above background the Appellate Court was right in observing that the appeal was against the order passed by the Executing Court. The Executing Court cannot go behind the decree. The Executing Court has to execute the decree as it is. Admittedly, defendant No. 2 carried out the construction in the suit property pending the suit for partition and separate possession of the shares in the said open plot contending that the alleged gift-deed executed by defendant No. 1 in favour of defendant No. 2 is not binding on their share. All the Courts below by confirming the decree noted the above aspects and passed the correction accordingly as noted above. Even the necessary issues were framed with regard to the said construction carried out by defendant No. 2 answering the same in the affirmative i.e. plaintiffs are entitled to mandatory injunction in respect of the said construction. However, directions were issued to the Commissioner to consider the application of partition has to apply the provisions of Partition Act.

7. After considering submissions of both the parties, readwith provisions of Partition Act, it is clear that the Partition Act can be made applicable when the suit was filed for partition of the property. At that time, the suit property was open plot. The construction of the building is carried out by defendant No. 2 at his own risk. The necessary issues and findings have been arrived at to that effect. However, the Court granted freedom to the parties including the Commissioner to settle the matter and if not to demolish the constructed plot/partition if necessary. The provisions of Partition Act invoked in no way can be extended to the construction made by defendant No. 2 knowing fully that the suit/litigation for partition of the respective shares in the said open plot is pending. Such construction or building, pending the litigation for partition unless agreed by both the parties can not claim benefit of the Partition Act, specially in the present case, at the stage of execution. The Appellate Court, therefore is right in dismissing the said appeal filed by the appellant, in view of the above and also for the fact that the cases so cited were distinct and distinguishable on the facts and circumstances of the case, itself.

8. In *R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao*, , where the Supreme Court while considering Sections 2 and 3 of the Partition Act on given facts held that the property was in capable of division into two shares and therefore, the other party was ready and willing to buy the shares. However, such is not the position in the present case. In the present case, the parties have not settled the matter though opportunities were given. The construction was made pending the suit for Partition of open plot. Therefore, also the authorities so cited and referred are of

no assistance to the Appellant. As observed in *Badri Narain Prasad Choudhary and Others Vs. Nil Ratan Sarkar*, that in cases not covered by Sections 2 and 3 of the Partition Act, the power of the Court to partition property by any equitable method is not affected by the said Act, yet same equitable principle is also not applicable in view of the concurrent findings of facts and the circumstances of the present case. There is no question of exercising courts discretion *Aiyar [Supra]*) only at the extent of Appellant when Respondents decree-holder is not consenting and in fact objecting to any equitable relief in view of the confirmed decree as well as impugned orders passed by the Executing Courts confirmed by the Appellate Court.

9. Strikingly, the Supreme Court in *Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs. Padmanabha Pillai (D) by Lrs. and Others*, held that,

27. It was stated at the Bar that even during the pendency of this litigation the property has changed hands and substantial construction has come up on the property which is likely to create insurmountable difficulties in dividing the property by metes and bounds consistently with the entitlement of the parties. The aspect need not detain us at this stage. We have stated the correct position of law which should govern the suit and the parties. In spite of the preliminary decree having been passed, it will be open for the court, at the stage of passing the final decree, to see how the law and the equities are to be adjusted and whether instead of actually dividing the property, it would be more appropriate to adopt some other mode of satisfying the claims of the parties as per their entitlement

10. In the present case, the construction has been made, as noted above, pending the litigation. Therefore, it is always at the risk of the party who make or continue to construct the building. such person cannot claim equity and premium to his own wrong.

11. However, The concerned court/ officer, only subject to consent of both the parties to adopt some suitable mode of satisfying the claims of the respondents/ decree-holder other than actually demolishing the same only if both the parties consent or agree. If parties are not agreeable within a period of three months, the orders passed by the court be executed in accordance with law.

12. In totality, I am of the view that the reasonings given by the Courts below are proper and correct and are not at all perverse, or contrary to the material on the record. The concurrent findings so arrived at need no interference.

13. In view of the above, the question of law so framed, is answered in the negative.

14. The Second Appeal is dismissed.

No costs.