
(2002) 09 BOM CK 0010
In the Bombay High Court
Case No : Family Court Appeal No. 42 of 2000

Smt. Sunita Shankar Salvi	Vs	APPELLANT
Shankar Laxman Salvi		RESPONDENT

Date of Decision : 19-09-2002

Acts Referred:

Evidence Act, 1872 — Section 115
Hindu Marriage Act, 1955 — Section 27

Citation : AIR 2003 Bom 431 : (2003) 1 ALLMR 267 : (2003) 1 DMC 700

Hon'ble Judges : V.C. Daga, J; J.P. Devadhar, J

Bench : Division Bench

Advocate : Seema Sarnaik, for the Appellant; P.S. Dani, for the Respondent

Judgement

V.C. Daga, J.—The source of this appeal is a dispute between husband and wife for the property being flat No. 105, located on the first floor of the building, namely, Sai Chhaya Apartment, Akurly Road, Kandivali (E), Mumbai--400001 (hereinafter referred to as the "said flat" for the sake of brevity).

FACTS IN BRIEF

2. The facts giving rise to the present appeal, in nut shell, are as under :

The appellant (wife) instituted matrimonial litigation by presenting petition u/s 28 of the Special Marriage Act for dissolution of the marriage in Second Family Court, Bandra (Mumbai) being M.J. Petition No. 845 of 1987. The cross petitions were also filed bearing Nos. 847 of 1987 and 701 of 1987. During the pendency of the said proceedings, consent terms were arrived at between the appellant and the respondent, dissolving their marriage u/s 138 of the Hindu Marriage Act. The remaining dispute centered around the said flat, as such, the present appeal is restricted to the said flat in question.

3. In view of the consent terms filed by the parties hereto, the appellant was allowed to amend Petition No. 845 of 1987 and Petition No. 701 of 1987 was allowed to be withdrawn.

4. In view of the amendment to the petition, the appellant (wife) was allowed to claim interest in the property. The appellant (wife) claimed interest in the said flat on the ground that under a registered agreement dated 24th June, 1982 the appellant (wife) and the respondent (husband) have jointly acquired flat No. 105 located on the ground floor of the building known as Sai Chhaya situated at Akurly Road, Kandivali (E), Mumbai-400 101, as such, both of them have a right, title and interest in the said flat in the ratio of 50:50. It is not in dispute that the said flat was allotted to the parties to the present appeal by way of an alternate accommodation to them without any consideration by the builder and developer of the building in lieu of the accommodation surrendered by them which they were occupying as residential accommodation for their residence. The share certificate issued by the Sai Chhaya Co-operative Housing Society Limited ("Society" for short) showing membership of the Society and consequently interest in the said flat is also in the joint name of the appellant and the respondent. In the agreement in question and in the share certificate issued by the Society the appellant and the respondent are shown as joint owners of the said flat. The respondent (husband) admitted the contents of the said documents by filing purshis. As a matter of fact, both of them relied upon the said documents. Based on these documents, the appellant claimed ownership to the extent of her 50% interest in the said flat. She did not lead any oral evidence in view of admission of the said documents and contents thereof by the respondent (husband) .

5. The case of the appellant is that the said flat, which was also her matrimonial home, was jointly owned and possessed by the appellant and the respondent in view of the joint agreement dated 24th June, 1982 showing joint ownership and joint share certificate issued by the Society. She, therefore, claimed to be the joint owner of the said flat and entitled to have 50% share of the said flat.

6. The ease sought to be made out by the respondent (husband) was that, after their marriage they resided at Phulachi Wadi, which was a small chawl in Ashok Nagar, Kandivali (E), Mumbai. It was a rented premises admeasuring 1,200 sq. ft. One A.D. Joshi was the owner of the said premises. As the owner wanted the said premises to be assessed to property tax, the respondent got the said premises assessed in the year 1970 and rent was in the form of payment of assessment tax to the Municipal Corporation. The assessment receipt was to be in the name of the owner Shri Joshi. He further pleaded that one Harsh Builder made a proposal in the year 1978 vide a letter dated 1st August, 1978 and offered to give substitute accommodation in lieu of the premises in occupation of the respondent subject to the respondent's vacating the said premises in chawl and occupying the alternate premises offered by the builder in another building. The proposal made by the builder was accepted. The agreement in respect of substitute accommodation was, accordingly, entered into. Under the said agreement the builder agreed to provide alternate premises to the respondent admeasuring about 500 sq. ft. But it appears that after some prolonged correspondence and negotiations, the builder agreed to provide larger

accommodation consisting of kitchen " with three rooms. With the completion of the building an agreement was executed by the said builder in favour of the respondent and he was provided with the said alternate accommodation. The respondent further pleaded that in the agreement executed by the builder the name of appellant (wife) was incorporated at his instance out of love and affection. The respondent, therefore, contended that the appellant (wife) has no right, title and interest in the said flat and he is the exclusive owner thereof.

Issues tried by the Court below :

7. The Court below, taking into account the rival pleadings, framed additional issues reading as under :

1. Does the Plaintiff prove that the suit flat is jointly owned by the petitioner and the respondent?
2. Is she entitled to realise her claim if upheld in the manner asked for in prayer (b-b)?

Decision of the Court below :

8. The appellant, as already stated above, did not lead any oral evidence. She relied upon the agreement in question and the share certificate issued by the society. The respondent (husband) entered into the witness box and deposed in consonance with his written statement. The Family Court after recording evidence of the respondent (husband), heard rival contentions and was pleased to hold that at the request of the respondent (husband) the name of the appellant (wife) was inserted in the agreement in question, as such the appellant (wife) has no right, title and interest in the said flat. It was also held that the appellant (wife) did not pay any consideration or cost for the acquisition of the said flat, as such, she did not acquire any right to the said flat. The Family Court also held that the right to acquire the said flat arose out of the tenancy rights which the respondent (husband) had surrendered in favour of the builder. Hence the appellant (wife) was not entitled to claim any ownership or for that purpose any right, title and interest in the said flat. The Family Court held that the petition filed by the appellant wife) claiming 50% share in the said flat was devoid of any substance. With the result, her petition was dismissed with no order as to costs.

Appeal to this Court :

9. Being aggrieved by the above judgment and decree, the appellant (wife) has invoked the appellate jurisdiction of this Court to challenge the above verdict of the Family Court being perverse, erroneous and against the settled principles of law.

10. The learned counsel appearing for the respective parties made their respective written submissions and reiterated the same submissions which were already made or advanced before the Family Court. The written submissions filed

by both of them are on record. Both of them relied upon the admitted documents, namely, joint agreement dated 24th June, 1982 and joint share certificate issued by the Society in the joint names of the parties to this appeal.

THE ISSUES

11. The substantial issues on the pleadings of the parties are as under ;

1. Whether the said flat is jointly owned by the appellant (wife) and respondent (husband) ?
2. If yes, whether appellant (wife) is entitled to claim 50% share or to that extent right, title and interest in the said flat?
3. If yes, whether it would be just and proper to direct disposal of the said flat?

FINDINGS

12. At the outset, the admitted fact emerging from the pleadings and evidence of the parties on record is that right from the year 1970 the parties to the present appeal were residing in a tenanted premises located in a small chawl in Ashok Nagar at Phulachi Wadi, Kandivli(E), Mumbai owned by one Shri A.D. Joshi. In the year 1978, one Harsh Builder entered into an agreement with the owner of the tenanted premises to develop the said property which was occupied by different tenants. The said Harsh Builder wanted vacant possession of the chawl for development. The builder, therefore, entered into an agreement with various tenants, who were in occupation of the premises and offered them alternate accommodation so as to get the vacant possession of the chawl for its development. Accordingly, an offer was made to the present respondent, which ultimately, culminated in an agreement dated 6th September, 1978 between Harsh Builder and the present respondent, who was one of the tenants in the said chawl. The builder thus agreed to provide alternate accommodation on ownership basis in view of surrender of tenancy rights by the respondent. When the-alternate accommodation was ready pursuant to the agreement dated 6th September. 1978, after taking possession of the said flat i.e. alternate accommodation provided by the builder, the respondent requested the said Harsh Builder to execute registered written agreement in the joint name of respondent as well as appellant. That is how the said flat came to be transferred in the Joint name of the present appellant and the respondent under conveyance dated 24th June, 1982. In other words, the title deed evidencing title deed dated 24th June, 1982 to the said flat was in the joint name of the respondent (husband) and appellant (wife) and still continues to be so.

13. As already observed hereinabove, the share certificate issued by the Society is also in the joint name. Both of them are the members of the Society. The contention of the respondent (husband) is that the surrender of tenancy rights was the sole consideration in providing the alternate accommodation. Therefore, submission on his behalf is : whoever proves to be a tenant must succeed. It is therefore contended that since the respondent (husband) was the tenant in

respect of the surrendered premises, which was surrendered in favour of the builder, it is the respondent (husband) alone who can have full interest in the said flat. Merely because the name of the wife was inserted in the document of title that itself cannot, give any right to her to claim any right, title and interest in the said flat, As against the above submissions of the respondent, the sole contention advanced on behalf of the appellant (wife) is that looking to the title deed and the share certificate, which stand in Joint names of the appellant (wife) and respondent (husband), both of them are the co-owners of the said flat having equal share. Her submission is that the Court cannot go beyond the said documents.

14. Having heard the parties and having examined the evidence on record, we find it impossible to agree with the submissions canvassed by the respondent (husband). At this juncture, it will not be out of place to mention that the "sale" is defined by Section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." "Promise" means money consideration. A promise made or a thing given could be a consideration for a contract but the making, of a promise to do something or the giving of a thing or the promise to give a thing is not equivalent to the payment of a price or promise to pay a price, Under these circumstances, transaction in question cannot be said to be or treated as "sale". If that be so, Section 45 of the Transfer of Property Act would not be attracted, Therefore, the theory of consideration sought to be put in service cannot be accepted. Exchange Can be effected by one document or by different documents.

15. At this juncture, it will not be out of place to mention that though there was no tenancy in appellant's name in respect of the premises vacated by the respondent, the same was for the benefit of the family. The appellant was also occupying the premises along with the respondent as a member of the family, in other words, both of them were occupying the said premises. The respondent (husband) while reproducing the contents of his own petition (para 3) has given clear admission reading as under :

".....At the request of the petitioner, the name of the 1st Respondent was also inserted as the Co-owner with the Petitioner....."

The above admission given in the pleadings stands on a higher footing than the admission given in evidence as held by the Apex Court in the case of Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, , wherein it was held that evidentiary admission, unless explained, furnishes the best evidence. In the case of Avadh Kishore Das Vs. Ram Gopal and Others, , the Apex Court held that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift burden of proof on to the person making them or representative in interest. Unless shown or explained to be wrong, they are efficacious proof of the facts admitted. The present case stands on a higher footing. Firstly, it is not an admission given in the evidence but the same was given in the pleadings. The Apex Court in the

case of Arjun Khaiamal Makhijani v. Jamnadas C. Tulani, 1990 (1) SCJ 59, has ruled that admissions in the pleadings being Judicial admission stands on a higher footing than evidentiary admissions extracted in the evidence. The observations of the Apex Court in this behalf are as under :

"..... Insofar as the admission that the landlord was bound by his admission in the pleading is concerned, it is true that such an admission being Judicial admission u/s 50 of the Evidence Act stands on a higher footing than evidentiary admission as held by this Court in Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others, ."

The Apex Court in number of cases while dealing with cases arising from admission given by the litigants, has also emphasised the importance of admissions given by the parties.

16. The above admission given by the respondent (husband) is unambiguous and unequivocal. He specifically admits that the appellant (wife) was to be treated as co-owner with the respondent i.e. husband. The admission given by the respondent (husband) will also operate as estoppel against him. He by his conduct is precluded from contending contrary to his admission which is in the form of admitted documents of title. The said flat is in the joint names of the appellant (wife) and the respondent (husband). From the very fact that the name of the appellant was joined as one of the owners in the title deed, it will have to be presumed that the appellant (wife) is entitled to share the said flat equally in the ratio of 50:50 along with the respondent (husband). If that be so, the Family Court was not justified in refusing to recognise the right, title and interest of the appellant (wife) to the extent of her 50% share in the said flat. Consequently, the impugned judgment and decree passed by the Family Court will have to be set aside and the appeal will have to be allowed declaring that the appellant (wife) has 50% share in the said flat. Accordingly, appeal is allowed. The impugned Judgment and decree is set aside and it is hereby declared that the appellant (wife) has 50% right, title and interest in the said flat along with respondent (husband).

17. If that be so, the next question which needs to be considered is as to how the property should be divided and, if the equitable division is not possible, then how the property should be disposed of. In our opinion, the parties to the appeal should be given right to purchase 50% share of the other party, if none of them is able to offer to purchase the share of the other, then the said flat can be put to sale in accordance with law. For that purpose the Family Court is directed to appoint Commissioner and let there be an inter se bid amongst the parties to the appeal, who ever will offer higher price in respect of 50% share of the other in the said flat should be given full ownership of the said flat. For any reason, if it is not possible for either of the parties to purchase 50% share of the other, then in that event the said flat should be sold with intervention of the Court and the sale proceeds thereof be divided between the appellant (wife) and respondent (husband) in the ratio of 50:50 after subtracting the expenses incurred for sale

of the said property.

Order accordingly with no order as to costs. The decree be drawn up accordingly,

At this stage, the learned counsel appearing for the respondent prays for stay of this Judgment for eight weeks. Considering the reasonableness of the request, this judgment shall not operate for a period of eight weeks from today.

Issuance of certified copy is expedited.