
(2014) 04 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 45 of 2013

Suman

APPELLANT

Vs

Lilabai Appa Wangane

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Citation : (2015) 5 ALLMR 203 : (2014) 6 MhLj 546

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : N.V. Gaware, Advocate for the Appellant

Judgement

T.V. Nalawade, J.—Appeal is admitted. Notice, after admission, made returnable forthwith by consent of both the sides.

2. Heard both the sides for final disposal.

3. Regular Civil Suit No. 91 of 1984 was filed by present respondent Nos. 1 to 6 for relief of partition, declaration and perpetual injunction. It was filed in respect of agricultural lands bearing Block No. 41 (old No. 599) and 44, admeasuring 3 Hectares 61 Ares, situated at village Masalwadi, Tashil Shrigonda, District Ahmednagar.

4. It is the case of the plaintiffs that plaintiff No. 1 is the wife of defendant No. 1 Appa and defendant No. 2 Smt. Suman is the concubine of defendant No. 1. It is contended that due to the relations of defendant No. 1 with defendant No. 2, there was dispute and then defendant No. 1 deserted plaintiff No. 1. Plaintiff No. 2 is son of plaintiff No. 1, born from defendant No. 1 and other plaintiffs are daughters of plaintiff No. 1 born from defendant No. 1. During the pendency of the matter, defendant No. 1 died and two sons born to defendant No. 2 from defendant No. 1, were brought on record as legal representatives of defendant No. 1. The other defendants are purchasers of some portion of the property from defendant No. 1.

5. It is the case of the plaintiffs that the suit property is joint Hindu family property. It is contended that as the suit property is the ancestral property, plaintiff No. 1, plaintiff No. 2 and defendant No. 1 had 1/3rd share each in the suit property. It is contended that defendant No. 1 has sold some portion of suit property to defendant Nos. 3 and 4 under sale deeds dated 12th January, 1982 and 22nd March, 1984. It is contended that there was no need of selling the property and the said property was sold by defendant No. 1 to defendant Nos. 3 and 4 to satisfy his bad vices, there was no legal necessity. It is contended that these sale deeds are not binding on plaintiffs. Declaration to that effect is claimed. Relief of partition and separate possession was claimed by the plaintiffs.

6. Defendant No. 1 contested the suit. He contended that for payment of maintenance to plaintiff No. 1 and for his own medical expenses, he was required to sell the lands. It is his case that he has given some property to defendant No. 2 in lieu of her maintenance.

7. Defendant No. 2 contested the suit and she contended that she is the wife of defendant No. 1. It is her case that in lieu of maintenance defendant No. 1 has given half portion of the suit property to her. It is also her case that the suit is barred by limitation.

8. Defendant Nos. 3 and 5 contested the suit by contending that the suit is bad for non-joinder of necessary parties, and the suit is barred by law of limitation. They contended that defendant No. 1 sold the property to them for the legal necessity and for value. It is their case that out of the sale proceeds defendant No. 1 purchased new property at Kuldharan, Tahsil Karjat.

9. The legal representatives of defendant No. 1 contested the matter. During pendency, defendant No. 5 also died but his legal representatives appeared in the suit. The other defendants have taken similar defence.

10. On the basis of aforesaid pleadings, issues were framed by the trial Court. Both the sides gave evidence. The trial Court held that the property given to defendant No. 2 needs to be taken back from her as the property could not have been given by defendant No. 1. The trial Court gave the decree to set aside a sale deed executed in favour of defendants by defendant No. 1 and held that the sale deed dated 22nd March, 1984 is null and void. However, the trial Court did not give relief in respect of sale deed dated 12th January, 1982 and the suit is dismissed in respect of the said property. The trial Court gave 7/18th share to plaintiff Nos. 1 and 2, each, in the land available for partition. 1/18th share is given to plaintiff Nos. 3 to 6.

11. The purchasers filed Regular Civil Appeal No. 160 of 2004 and defendant No. 2 Sumabai filed Regular Civil Appeal No. 179 of 2004 to challenge the aforesaid decision. Original plaintiffs did not challenge the decision. The first Appellate Court has held that the sale deed of the year 1984 also cannot be declared as null and void. The decree given in that regard is set aside by the first Appellate Court. The first Appellate Court has held that sons of defendant No. 1 from

defendant No. 2 are entitled to succeed to the property of defendant No. 1, his interest in joint family property and they are entitled to have equal share with the plaintiffs in that interest. Defendant Nos. 1A and 1B are given 1/8th share each in 1/3rd share of defendant No. 1. The first Appellate Court has held that defendant No. 2 did not get any property due to the mutation made in her favour at the instance of defendant No. 1.

12. On the basis of the grounds mentioned in the appeal memo, both the sides were allowed to argue. It was told to them that following substantive questions of law will be decided:

"(i) Whether defendant No. 1 had right to give his own 1/3rd share in joint Hindu family property to defendant No. 2, second wife, in lieu of maintenance and for that whether he was entitled to partition the property.

(ii) Whether the position of the property as on the date of mutation made in favour of defendant No. 2 needs to be considered or whether the position needs to be considered as on the death of defendant No. 1?"

13. The first Appellate Court has held that the sale deeds executed in favour of defendant Nos. 3 to 5 are not null and void. That decision is not challenged by original plaintiffs. Present matter is only in respect of remaining portion of the suit property which is in the hands of defendant No. 2 (also defendant Nos. 1A and 1B). In view of provision of section 16 of the Hindu Marriage Act, 1956 defendant Nos. 1A and 1B cannot be called as legitimate issues of defendant No. 1 and so they are called as the sons from second wife.

14. The first Appellate Court has held that by mutation, defendant No. 1 could not have given property to defendant No. 2 in lieu of maintenance. The evidence of defendant No. 2, the second wife, and plaintiff No. 1, the first wife, shows that there was marriage ceremony. Plaintiff No. 1 has not disputed the fact of the marriage between defendant No. 1 and defendant No. 2. It is also admitted by the plaintiffs that till the last breath, after marrying defendant No. 2, defendant No. 1 cohabited with defendant No. 2. Admittedly, defendant No. 1A and 1B were born to defendant No. 2 from defendant No. 1 during this cohabitation. These circumstances are relevant for giving decision on the aforesaid substantive questions of law.

15. From the facts and circumstances of this case, it can be said that the marriage of defendant No. 1 with defendant No. 2 was void and that was due to the provisions of section 5 of Hindu Marriage Act, 1956. However, there was marriage and so defendant No. 2 was entitled to get maintenance from defendant No. 1. From defendant No. 1, defendant No. 2 had two sons on the date of the disputed mutation. Though plaintiff No. 2, son was living separate from defendant No. 1, defendant No. 1 was not only Karta of the joint Hindu family but he was also father in joint Hindu family. In ordinary course if partition had taken place, the property could have been partitioned and three shares could have been prepared as there was father, one son and a wife. Para 323 of Hindu

Law by Mulla (21st Edition) shows that father in a joint Hindu family has the power to divide the family property at any moment during the life time provided that he gives his sons equal share with himself. The consent of the sons for such partition is not necessary and the partition can be effected even if the sons are minor. In the case reported as Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, it is observed by the Apex Court that the father is entitled to effect partial partition of the joint family property by virtue of his right as patria potestas. If in such a partition shares carved are equal the action of the father will be binding on the members of the family as family arrangement if it is acquiesced in by them. Such partition will be good until it is set aside. The partition can be partial either in respect of the property or in respect of persons making it.

16. Even if defendant No. 2 was the second wife, she had the right to claim maintenance from defendant No. 1. A Hindu is under legal obligation to maintain his wife. If he does not maintain her, the wife can get order of maintenance and for recovery of the arrears of maintenance she can proceed against the property of the husband. Karta, Manager is also under legal obligation to maintain the members of the family. Thus, if a Karta alienates some property for maintenance purpose, then it can be said that it was done for legal necessity. Further, the alienation made by Manager of joint Hindu family, without legal necessity, is not void but voidable. According to Mitaksara law, as administered in this area, even a coparcener can sell or otherwise alienate for value his undivided interest in coparcenary property without the consent of other coparceners. Only when the coparcener sells or alienates more than his own interest in the joint family property, the others can have grievance. Similarly, when the Karta alienates the property and it is more than his own interest in joint family property, then only the question of legal necessity arises. In such a case, when there is alienation of more than interest than what Karta had in joint family property, the other members are entitled to file suit to set aside the alienations and only to the extent of interest of such other coparceners the alienation can be set aside. Thus, the alienation cannot be set aside in entirety and the other coparceners cannot have grievance if his own share is given by the father or Karta to somebody like defendant No. 2.

17. The learned counsel for respondents placed reliance on three reported cases-- (i) Ram Vishal (dead) by L.Rs. and others vs. Jagan Nath and another, reported in (2004) 9 SCC 302, (ii) Gulabrao Balwantrao Shinde and Others Vs. Chhabubai Balwantrao Shinde and Others, and (iii) Jamunabai Bhalchandra Bhoir since deceased through her legal heirs and representatives Jamunabai Bhalchandra Bhoir and Others Vs. Moreshwar Mukund Bhoir, . The observations are mainly on section 14 of Hindu Succession Act. In the present case, provision of section 14 of Hindu Succession Act need not be used in view of the fact already mentioned. Further, the mutation was made much after coming into force of the aforesaid Act and on the relevant date, defendant No. 2 was not in possession of the suit property. When the property is given in lieu of maintenance and nothing is

reserved, it becomes absolute property of the transferee.

18. In view of the discussion made above, this Court holds that the defendant No. 1 had right to give his own share to defendant No. 2. Thus, to that extent the property given to defendant No. 2 needs to be protected. This Court holds that the judgment and decree of the first Appellate Court and the judgment and decree of the trial Court needs to be modified accordingly.

19. In the result, the appeal is partly allowed with no order as to costs.

The judgment and decree delivered in Regular Civil Appeal No. 179 of 2004 filed by present Appellant in District Court is modified as under:

(i) The judgment and decree passed in Regular Civil Suit No. 91 of 1994 is modified. It is hereby declared that plaintiff Lilabai and plaintiff Ratnakar together have 2/3rd share in the property which is in the hands of defendant No. 2 Sumabai. The remaining 1/3rd property belongs to Sumanbai.

(ii) The other part of the judgment and decree delivered by the first Appellate Court in aforesaid Regular Civil Appeal No. 160 of 2004 is hereby maintained. Decrees to be prepared accordingly.

In view of the request made by learned counsel for original plaintiffs, stay of eight weeks is given to the execution of the decree which is to be prepared on the basis of this judgment.