

(2003) 03 BOM CK 0086

In the Bombay High Court

Case No : Second Appeal No. 107 of 1986

Tukaram Motiram Shinde (dead through L.Rs.) Dattarao
Shinde and Others

APPELLANT

Vs

Vishwanath Khandele

RESPONDENT

Date of Decision : 11-03-2003

Acts Referred:

Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 —
Section 7, 8

Citation : (2003) 4 ALLMR 1015 : (2003) 6 BomCR 389 : (2003) 3 MhLj 182

Hon'ble Judges : J.N. Patel, J

Bench : Single Bench

Advocate : R.R. Deshpande, for the Appellant; Mrinal Shesh, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, J.—Heard the learned Counsel for the Parties.

2. The substantial question of law which is required to be decided in this Second Appeal is; (1) Whether the Lower Appellate Court was right in giving finding that the defendant do not own adjoining land to the suit land, in view of the fact that the defendant has purchased on the same date i.e. on 29-1-1970, the suit land survey No. 65/3 and Survey No. 65/4, together admeasuring 4 Acres 3 Gunthas; (2) whether the transaction between the plaintiff and the defendant would attract Section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as "Fragmentation Act, 1947" for short), and that the Civil Court had no jurisdiction to deal with the issue in view of Section 36(b) of the Fragmentation Act, 1947.

3. The respondent/original plaintiff filed a suit against the appellant/original defendant in the Court of Civil Judge, Junior Division, Pusad which came to be registered as Civil Suit No. 6/1982, and was decided by judgment and order dated 23-8-1982. The suit was for recovery of possession of field survey No. 65/3 (Mouza -- Kalambula, Taluq -- Umarkhed, District Yavatmal). According to

the plaintiff the suit property is an ancestral property of the plaintiff and he executed a nominal sale deed in favour of the defendant as collateral security against the loan of Rs. 1000/- borrowed from the defendant in the year 1970, and therefore, it was a nominal sale deed and was not to be acted upon. It is submitted that as it was a money lending transaction, the plaintiff was to pay interest @ Rs. 250/- per year to the defendant till the loan was repaid. The period for repaying the loan was four years and on repayment of the loan the defendant was to execute sale deed in favour of the plaintiff of the suit land i.e. would reconvey the title. It is with this understanding that the plaintiff executed sale deed in favour of the defendant on 29-1-1970, after receiving Rs. 1000/- from the defendant.

4. It is the case of the plaintiff that he has fulfilled the terms and conditions of the loan by paying interest, but in the year 1972-73 as the plaintiff was unable to pay interest therefore he gave possession of 1 Acre of land out of the said property to the defendant with an understanding that the defendant would appropriate the crops therefrom in lieu of the interest and on repayment of the loan, the defendant would hand over possession of the suit land to the plaintiff. According to the plaintiff he took loan from the Society on the suit field and paid land revenue of the suit field up to the year 1976. In the year 1974 the plaintiff requested the defendant to execute the sale deed in his favour, but the defendant refused to do so and took forcible possession of the remaining land of the plaintiff in the year 1976-77. The incident was reported to the Police. It is the case of the plaintiff that the defendant got the said land mutated in his name with the help of Patwari and behind the back of the plaintiff. It was also pleaded that the sale deed is contrary to the provisions of Fragmentation Act, 1947, and therefore, the defendant cannot become the owner of the suit land. Another contention of the plaintiff was that the market price of the suit land was Rs. 4000/- per acre in the year 1972-73 and under this circumstances, the plaintiff is entitled to possession of the suit land from the defendant.

5. In reply to the plaintiffs claim, the defendant filed his Written Statement and stated that he has purchased the suit land for a consideration of Rs. 1000/-, for which a sale deed came to be executed in his favour on 29-1-1970, and that he is in possession of the suit land. He also took plea that the suit property is not properly valued for the purpose of Court fees and jurisdiction and, that the plaintiff has sold his field survey No. 41(2-C) admeasuring 3.12 Acres to one Anandrao on 29-1-1970.

6. It was also contended by the defendant that on the same day, he purchased the land admeasuring 2 Acres for a consideration of Rs. 1000/- from the brother of the plaintiff. The defendant submitted that there was a delay in the part of the defendant to get the suit field mutated on the revenue papers on the basis of the said sale deed, and taking undue advantage of the situation, the plaintiff has filed this false suit. It is further contended that the plaintiff having failed to repay the loan of Rs. 1800/- over the suit land it was recovered from the defendant, for

which the defendant proposes to file a separate suit for recovery of the said amount from the plaintiff. It is further submitted that the plaintiff did not took any objection to the mutation of the suit field in his favour, and that the suit is false to the knowledge of the plaintiff which deserves to be dismissed with compensatory cost of Rs. 500/-.

7. On the basis of these pleadings, the trial Court framed the following issues :

(1) Does the plaintiff prove that he has borrowed Rs. 1,000/- from the defendant and executed a nominal sale-deed for the security of the said loan as shown in para 2 of the plaint?

(2) Does he further proves that the possession of the defendant over the suit land is wrongful?

(3) Is plaintiff entitled to possession of the suit land from the Defendant?

(4) Is suit valued properly for Court fee and jurisdiction?

(5) Does the Defendant prove that he purchased the suit land from the plaintiff and becomes the owner thereof?

(6) Is defendant entitled to compensatory costs?

(7) Relief and Costs.

The trial Court held that the defendant purchased the suit land from the plaintiff under Sale-deed Exh. 34 on 29-1-1970 for Rs. 1000/- and has become owner thereof and gave a finding on the issue Nos. 1 and 5 in favour of the defendant. As regards issue No. 2 and 3 it also went against the plaintiff. Issue No. 4 and 6 were not pressed, and as the issues raised in the suit came to be decided in favour of the defendant, the suit came to be dismissed.

8. The matter was carried in appeal by the plaintiff. The Appellate Court by its judgment and order dated 11-4-1986 in Civil Appeal No. 211 of 1983, though upheld the findings of the Trial Court as regards the sale transaction, but proceeded to allow the appeal by setting aside the judgment and decree of the trial Court, and decreed the suit of the plaintiff, and directed that the defendant shall hand over the possession of the suit land to the plaintiff. On the point of transfer of the said land under Sale deed dated 29-1-1970, it is observed that the same is hit by the provisions of Section 8 of the Fragmentation Act, 1947.

9. The First Appellate Court examined this point on the basis of the fact that the plaintiff vide Exh. 34 sold agricultural land admeasuring 2 Acres 3 Gunthas to the defendant, and that this was not permissible, as it was hit by the provisions of Section 8 of the Fragmentation Act, 1947 because by Government Notification dated 17-5-1962 the Standard Area of Yavatmal District was fixed at 3 acres for dry crop land and indisputedly the suit land is a dry crop land and further as the defendant has failed to see that the suit land is adjoining to his own land, held that it is evident that the plaintiff has transferred the suit land, less in area than

the standard area fixed by the Government of Yavatmal District so as to create Fragment, and as such the transfer is hit by Section 8 of the Fragmentation Act, 1947.

10. Mr. Deshpande, the learned Counsel appearing for the appellant/original defendant submitted that the whole approach of the First Appellate Court is erroneous both on law and on facts. It is submitted that Section 8 of the Fragmentation Act, 1947 is misconstrued by the Court. It is submitted that the fact plaintiff was owning 2 Acres and 3 Gunthas of agricultural land which was sub-division of Survey No. 65 and given independent survey number as 65/3. It is submitted that this was the total holding of the agricultural land by the plaintiff, and therefore, it cannot be said that the sale transaction executed in favour of the defendant created a fragment. Even if it is accepted that there was a notice under Sub-section (2) of Section 6 of the Fragmentation Act, 1947 and therefore the application of Section 8, is different question and for this reason the sale cannot be held to be void, as by the said transaction what the plaintiff has done is transferred the total holding in favour of the defendant, and if it was already a fragment there was no question of creating further fragment, under this transaction.

11. Mr. Deshpande, the learned Counsel submitted that Section 8 of the Fragmentation Act, 1947 merely prohibits creation of fragmentation. The second line of argument advanced by Mr. Deshpande, is that on the very date appellant also has purchased field survey No. 65/4, owned by the brother of the plaintiff -- Ramrao, adjoining the field survey No. 65/3 and being a recognized sub-division of survey No. 65, therefore it cannot be said that the transaction in favour of the defendant by the plaintiff is void. As the defendant has purchased the two subdivision of survey No. 65 i.e. 65/3 from the plaintiff admeasuring 2 Acres and 3 Gunthas and 65/4 from the plaintiff's brother -- Ramrao, admeasuring 2 Acres, which together admeasures 4 Acres 3 Gunthas, i.e. over and above 2 acre 3 Gunthas, notified as standard area vide Government Notification dated 17-5-1962, and therefore, the transaction was not prohibited under the Fragmentation Act, 1947.

12. Mr. Deshpande, has placed reliance on the case of Ninge Gowda Vs. Jayamma and Others, , under which the Karnataka High Court took a vide (sic; view) that it is clear from the provisions of Section 6 (which is pari-materia of Section 8 of the Fragmentation Act, 1947), that what has been prohibited is a transfer or partition or sub-division as to create fragment. If the land was already a Fragment, Section 6 cannot be a bar. It further held that there is also another reason in support of the alienation. The land as a fragment was not notified as required u/s 4(2), so as to fall out of the scope of Section 5, therefore, the alienation cannot be found faulted with, while dealing with the case under the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966, and therefore, it is submitted that the judgment and decree of the Appellate Court which is under challenge deserves to be quashed and set aside, and that of

the trial Court be restored.

13. Mrs. Mrinal Shesh, the learned Counsel appearing for the respondent/original plaintiff, submitted that the approach of the First Appellate Court is justified in the facts and circumstances of the case. It is submitted that though in strict sense Section 8, may not attract, but still the transaction would be void in view of the Section 7 of Fragmentation Act, 1947. It is submitted that the trial Court did not take notice of this fact and committed an error in overlooking the issue raised by the plaintiff. That the transaction is hit by the provisions of Fragmentation Act, 1947.

14. Mrs. Shesh, the learned Counsel further submitted that even if it is held that Section 8 would not be attracted, in the case Section 7 of the Fragmentation Act, 1947 squarely covers the case. In support of her contentions Mrs. Shesh, has placed reliance on the case of Mallu Taty Suryavanshi Vs. Shripati Rama Gondhali and Others, , wherein it has been held that the transaction of fragment in favour of a person who was neither the adjoining holder or contiguous survey holder, such transfer is hit by Section 7 of the Act, and therefore, on this count also the transaction between the parties will have to be held as void, and as the plaintiff was not competent to convey fragment being hit by Section 7(1) of the Fragmentation Act, 1947 no title would pass in favour of the defendant, and therefore, the plaintiff is entitled to get his land restored as directed by the Lower Appellate Court.

15. The First Appellate Court though arrived at a finding that the sale deed executed by the plaintiff in favour of the defendant was a transaction of sale and having negated the claim of the plaintiff, that he is entitled for reconveyance on the ground that nominal sale deed was executed in favour of the defendant as security for the said land it has allowed the appeal to the extent that the defendant shall hand over the possession of the suit land to the plaintiff, without passing any further orders as to return the amount of consideration and compensate the defendant in the matter. These observations are made only to place on record that the Appellate Court while allowing the appeal fail to consider the equities in the matter. The fact remains that the Appellate Court arrived on a concurrent finding of fact insofar as the sale transaction is concerned, and it is only on the point of transaction being hit by the provisions of Section 8 of the Fragmentation Act, 1947; that it directed the defendant to hand over the possession of the land to the plaintiff.

16. The whole purpose and object of passing the Fragmentation Act 1947 was to prevent fragment of agricultural holding and to provide for better cultivation thereof. The object of the Act is to avoid fragment, which are often brought about by transfers, which is destructive of agricultural efficiency. The Act aims at consolidation of fragments into standard areas so as to achieve more and better agricultural produce and its main purpose is to prohibit transfer of a fragment to persons other than owner of contiguous survey number or an owner of a recognized sub-division of a survey number, and to permit the amalgamation of a

fragment into an adjoining holding so as to make it into a standard holding rather than confer a right on an adjoining holder to purchase the property. The concerned provision aims at achieving maximum agricultural output. (As observed in Mallu's case, cited supra). In the present case, the transaction cannot be said to be void either in terms of Section 7 or Section 8. Section 7 and Section 8 of the Fragmentation Act, 1947 reads as under:

"7. (1) No person shall transfer any Fragment in respect of which a notice has been given under Sub-section (2) of Section 6, except to the owner of a contiguous survey number of recognized sub-division of a survey number:

Provided that the holder of such Fragment may mortgage or transfer it to the State Government or a land mortgage bank or any other Co-operative Society as security for any loan advanced to him by the State Government or such Bank or Society, as the case may be. (2) Notwithstanding anything contained in any law for the time being in force or in any instrument or agreement, no such Fragment shall be leased to any person other than a person cultivating any land which is contiguous to the Fragment."

"8. No land in any local area shall be transferred or partitioned so as to create a Fragment.

8.AA(1) Where, by transfer, decree, succession or otherwise two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed, and the land has to be partitioned among them, such partition shall be effected so as not to create a Fragment.

(2) Where such partition is made by the Court or the Collector, the following procedure shall be adopted :

(a) If, in effecting a partition among several co-sharers, it is found that a co-sharer is entitled to a specific share in the land and cannot be given that share without creating a Fragment, he shall be compensated in money for that share. The amount of compensation shall be determined so far as practicable in accordance with the provisions of Section 23 of the Land Acquisition Act, 1894.

(b) If, in effecting a partition, it is found that there is not enough land to provide for the shares of all the co-sharers in accordance with the provisions of Sub-section (1), the co-sharers may agree among themselves as to the particular co-sharer or co-sharers who should get the share of land and which of them should be compensated in money. In the absence of any such agreement, the co-sharers to whom a share of land can be provided and those to whom money compensation should be given shall be chosen by lot in the manner proscribed.

(c) The compensation shall be payable by each co-sharer in proportion to the excess value of land he gets over the share of land legally due to him, and such co-sharer shall deposit the proportionate amount of compensation in the manner prescribed before taking possession of the share allotted to him. On his failure to do so, his share shall be allotted to any other co-sharer to whom land has not

been previously allotted and who is chosen in the manner provided in Clause (b) subject to the payment of similar compensation to the co-sharers not getting shares of land.

(d) If none of the co-sharers to whom land has been allotted under Clause (c) pays the compensation and takes the share, the share shall be sold in auction to the highest bidder, and the purchase money shall be paid to the co-sharers not getting land in proportion to their respective shares.

(e) Where the parties agree upon any other method of partition which shall not result in the creation of a Fragment, that method shall be followed in effecting partition.

(3) Where a partition is effected in execution of a decree all questions relating to the partition of the land and apportionment of compensation shall be decided by the Court executing the decree or by the Collector effecting the partition, as the case may be, in accordance with the provisions of Sub-section (2).

8A. Nothing in Section 7, 8 and 8AA, shall apply to a transfer of any land for such public purpose as may be specified in this behalf by the State Government by notification in the Official Gazette." 17. Plain reading of Section 7, would indicate that there is prohibition on transfer of any fragment in respect of which a notice has been given under Sub-section (2) of Section 6. In the present case admittedly the competent authority has notified that in case of Dry Crop land in Yavatmal District, the standard area would be 3 acres. There are two exceptions mentioned in the section itself, which permits such transfer i.e. (1) except to the owner of (i) contiguous survey number, or (ii) recognized sub-division of survey number. Further a proviso is also there to provide for mortgage or transfer to the State Government or a Land Mortgage Bank or any other Co-operative Society as security for any land dues to such holder by State Government or Bank of Society, which is not material for the purpose of our case. Sub-section (2) provides in case of prohibition, in the matter of even grant of lease of such a fragment, with exceptions provided therein. It appears that the two agriculture fields came to be subdivided probably in partition in the plaintiffs family, and on such partition sub-division of survey No. 65 came to be carried out and field survey No. 65/3 fell to the share of the plaintiff and field survey No. 65/4 probably fell to the share of his brother --Ramrao. What the defendant has done that on the very same day i.e. on 29-1-1970, he purchased not only the suit land bearing survey No. 65/3 from the plaintiff, but also the survey No. 65/4, together admeasuring 4 Acres 3 Gunthas, which is over and above the area notified in Yavatmal District, vide Government Notification dated 17-5-1962. Having purchased these two sub-divisions of the original survey No. 65, which are situated adjoining to each other i.e. contiguous, the transaction with the plaintiff cannot be held to fall within the mischief of Section 7. There is no evidence of record to show that Ramrao the other brother of the plaintiff has raised any objection under the Fragmentation Act, 1947, or for that reason the Revenue Authorities vested with the jurisdiction to administer the said Act, have objected

to the transaction. Further if the two holdings were itself fragment and accepted by the Revenue Authorities, who permitted the subdivision of Survey No. 65, then in all probabilities it is after coming into force of the notification of the standard area that they became fragment, and therefore the application of Section 8 is ruled out.

18. In case the Lower Appellate Court was of the view that the transaction was hit by Section 8 of the Fragmentation Act, 1947, then the only course open for him was to refer the matter to the Competent Authority as contemplated u/s 36(b), and should have stayed the hearing of the appeal, till such issue was determined by the Competent Authority. Having not done so, it was not vested with the jurisdiction to declare that the transaction was hit by Section 8 of the Fragmentation Act, 1947 and on the strength of this reasonings quashed and set aside the judgment and order of the trial Court and directed restoration of possession in favour of the plaintiff. Therefore, considering the peculiar facts and circumstances of the case, and the fact that plaintiff cannot take advantage of his own wrong this Court finds that the transaction cannot be held to be void and to that extent the impugned order and decree passed by the learned First Appellate Court is quashed and set aside.

19. The appeal is allowed with no order as to costs.