

(1956) 01 BOM CK 0009
In the Bombay High Court
Case No : A.F.O.D. No. 797 of 1951

Vishwanath Vithoba

APPELLANT

Vs

Genu Kisan and Others

RESPONDENT

Date of Decision : 17-01-1956

Acts Referred:

Evidence Act, 1872 — Section 65, 66
Limitation Act, 1908 — Article 144

Citation : AIR 1956 Bom 555

Hon'ble Judges : Vyas, J;Chainani, J

Bench : Division Bench

Advocate : K.B. Sukhtankar and P.G. Kher, for the Appellant; R.B. Kotwal and G.S. Gupte for M.A. Kharkar, for the Respondent

Judgement

Chainani, J.

This is an appeal by defendants 1 and 2. The parties are related to each other as shown In the following pedigree:

RAMJI GHOLAP | ----- | | |
Gyanuji Vithoba Bhausahab Maruti | | | ----- | Kashinat ----- | | |
| Kisan Kondiba ----- Pandurang Sadashiv | | |
Genu(plff.) Vishwauath(D.1) Mulidhar(D.2) Pundalik(D.3)

The plaintiff's grand-father Gyanuji died in 1897. The date of the death of plaintiff's father Kisan is not known, but he died in or about 1923. The branches of Gyanuji's two brothers, Bhausahab and Maruti are now extinct. (2) The dispute between the plaintiff and the defendants relates to three houses, bearing C. S, Nos. 396, 386 and 576. According to the plaintiff their old C. T. S. Nos. are 663, 468 and 520 respectively. The plaintiff's case is that these three houses were purchased by his grand-father, Gyanuji, on 30-9-1889, 17-4-1893 and 17-8-1895 respectively. Along with the plaint he produced certified copies of three sale-deeds exhs. 75, 76 and 77.

The present city survey numbers are not mentioned in these documents. But the plaintiff stated in the plaint that these sale-deeds were in respect of the suit houses. He also mentioned in the plaint the old and the new C. Section numbers of each house. It was also alleged in the plaint that Gyanuji had purchased these houses as manager of the joint family, that after his death, the houses went into the management of the next senior; member of the family, Vithoba, that the plaintiff's father Kisan died as a member of the joint family and that there had been no partition of the family properties.

The plaintiff therefore asked for partition and separate possession of a half share in the three houses. The suit was resisted principally by defendants 1 and 2, who are the appellants in present appeal. They did not deny that the sale-deeds, of which the plaintiff had produced certified copies, Exhibits 75, 76 and 77. related to the suit houses. They stated that the houses were the self-acquired and exclusive properties of their father, Vithoba, and that no other member of the family had any right or interest in them. They also contended that they had acquired title to the three houses by adverse possession. They further contended that the plaintiff's father Kisan had separated from the other members of the family after his marriage.

It was further urged that the defendants had become the exclusive owners of the three houses by adverse possession. The learned trial Judge did not accept these contentions of the defendants. He held that the three suit houses were joint family properties, that Kisan had not separated from the joint family as alleged by the defendants and that there had been no ouster of the plaintiff or his father from the suit properties.

Accordingly, he passed a decree in favour of the plaintiff entitling him to recover possession of his half share in the suit properties. From this decree, defendants 1 and 2 have come in appeal.

3. The first point, which has been urged by Mr. Sukhthankar in this appeal is that the plaintiff has not proved that the three suit houses were purchased by Gyanuji. In order to prove his assertion on this point, the plaintiff has produced the certified copies of three sale-deeds, Exhibits 75 76 and 77.

Mr. Sukhthankar has urged that these copies of the sale-deeds are not admissible in evidence. The plaintiff has stated in his evidence that the original sale-deeds are not in his possession but they are in the possession of defendant 1. The plaintiff did not, however, give any notice to defendant 1 asking him to produce the original sale-deeds.

Mr. Sukhthankar has, therefore, urged that the certified copies are not admissible in evidence as no notice was given to defendant 1 as required by Clause (a) of Section 65, Evidence Act. The proviso to Section 66, however, enables the Court to dispense with such notice in any case, in which the Court so thinks fit. In AIR 1936 15 (Privy Council) Their Lordships observed:

"The only purpose of a notice under Ss. 65 and 66, Evidence Act, is to give the party an opportunity by producing the original document to secure, if he pleases, the best evidence of Its contents, The difference between a certified copy and the original for the purposes of the present case is not very obvious but secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce the original document in reasonable time; and u/s 66 the court has absolute power, when it thinks fit, to dispense with a notice under these sections".

In the present case after the death of Gyanuji, the next senior member of the family was Vithoba. The three sale-deeds therefore in all probability went into the possession of Vithoba and after his death into the possession of the defendants. The plaintiff has stated that the original sale-deeds are not with him. He has also stated that they are in the possession of defendant 1. There was no cross-examination of the plaintiff in regard to his statement on this point.

Defendant 1 in his evidence did not deny that the original sale-deeds were in his possession. It would have been desirable If a question had been put to him on this point in the cross-examination by the plaintiff. But as the record stands, the plaintiff's statement that the original sale-deeds are with defendant 1 remains unchallenged. This is also in accordance with the probabilities of the case.

The certified copies of three sale-deeds Exhs. 75, 76 and 77 were also produced by the plaintiff along with the plaint. He has specifically stated in the plaint that these sale-deeds related to the three suit houses. There was no denial of this statement In the defendants' written statement.

If, therefore, the original sale deeds are in the possession of the defendant 1 as deposed to by the plaintiff and as the plaintiff's statement that the certified copies of the three sale-deeds produced by him related to the suit houses has not been denied by the defendants, we think this would be a proper case in which notice as required under Clause (a) of Section 65, Evidence Act, should be dispensed with. In that case, the three certified copies, exhs. 75, 76 and 77 would be admissible under Clause (a) of Section 65, Evidence Act.

On the other hand if the sale-deeds are not in the possession of the defendants and as they are also not in the possession of the plaintiff, they must be deemed to have been lost. In that case, the certified copies would be admissible under Clause (c) of Section 65. The learned Judge was therefore right in admitting these three documents in evidence,

4. These documents show that the three suit houses were purchased by Gyanuji In 1889, 1893 and 1895. The defendants' contention that these houses were the self-acquired properties of Vithoba cannot therefore be accepted. The defendants have also not produced any document which would show that they had been purchased by Vithoba. Exhibit 78 is a copy of the mortgage-bond executed by Vithoba and Maruti on 23-9-1916. At that time Bhausahab was dead.

By this document! Vithoba and . Maruti together mortgaged a house bearing C. S. No. 479A and an open space of house No. 467. Exh. 79 which is a copy of the City Survey Map relating to C. S. No. 496 shows that the old C. T. S. Number of this house was 470A. One of the properties mortgaged by Vithoba and Maruti therefore was C. S. No. 496.

The recitals in this mortgage-deed are also important. It is stated therein that in the property mortgaged, Vithoba and Maruti had a half share and that the remaining half share belonged to their two brothers, Gyanuji and Bhausahab, who were then dead. These recitals therefore support the plaintiff's case that the three houses were joint family properties.

5. The evidence also shows that the house bearing C.T.S. No. 496 was used as a residential house Exh. 72, which is an extract from the death register maintained by the Poona Municipality, shows that Kondiba, uncle of the plaintiff, died in house No. 479, which corresponds to C.T.S. No. 496. Bhau," the brother of Gyanuji, Sadashiv the son of Maruti and Kashinath son of Bhau also died in this house, Vide Exhs. 72, 70 and 71.

It, therefore, appears that all the four brothers, Gyanuji, Vithoba, Bhausahab and Maruti and their families were formerly living in house C. S. No. 496. Exh. 47, which is an extract from the Property Register relating to house No. 486 shows that till 1949 the house was shown in the names of Vithoba, Maruti and Kashinath.

6. The above evidence shows that the three houses were purchased by Gyanuji between 1889 and 1895 and that they belonged to the joint family consisting of Gyanuji and his three brothers. There is no satisfactory evidence to show that there had been a partition between them or even that after Gyanuji's death his sons had separated from the other members of the family. The plaintiff must, therefore be held to have proved his title to a half share in these houses.

7. Mr. Sukhthankar has also urged that the defendants have become exclusive owners of the houses by adverse possession. He has relied on "Gangadhar v. Parasharam" 7 Bom LR 252 (B), in which it was held that

"to constitute an adverse possession as between tenants in common there must be an exclusion or an ouster".

Jenkins C. J. in his judgment referred to certain English cases, in which it has been held that sole possession by one tenant in common for a long period without any claim or demand by any person claiming under the other tenants in common is evidence from which the jury could presume an actual ouster of the other tenants in common. In "Bhaiji Shamrao v. Hajimiya Mahamad" 14 Bom LR 314 (C) it was observed that

"the possession of joint property by one co-sharer does not - constitute adverse possession against any other co-sharer until there has been a disclaimer of the latter's title by open assertion of a hostile title by the former". To the same

effect is the decision in "Chandbhai v. Hasanbhai" AIR 1922 Bom 150 (D), where it was held that

"The sole possession by one of two joint owners itself is no evidence of his denial of the right of the other joint owner and that time does not run against the joint owner out of possession until the joint owner in possession has done some act to the knowledge of the other joint owner which amounts to a denial of that joint owner's right". See also "Vishnu v. Mahadev AIR 1942 Bom 44 (E). Mr. Sukhthankar's argument, that mere long possession of the houses by Vithoba and defendants by itself is sufficient to prove ouster of the plaintiff and his father, cannot therefore be accepted. The plaintiff has admitted in evidence that he has been living in the house of his mother's father since he was 14 or 15 that is, since about 1926. There is no satisfactory evidence to show that before then the plaintiff or his father, who, died about 1923 Were not living in house No. 496, in which as I have pointed out the other members of the family were then residing.

The fact that the plaintiff has not been residing in this house since about 1926 would not however, entitle the defendants to claim exclusive ownership over the suit properties in the absence of any evidence about the denial by the defendants of the plaintiff's right to a share in these houses. Mr. Sukhthankar has relied on the plaintiff's admission that he has not received any portion of the rent realised by defendants 1 and 2 from house No. 436.

The plaintiff has, however, stated that when he asked the defendants to pay him his share, they pleaded poverty. He does not say that they denied his right to a share in the rent. The defendants have, therefore, failed to prove that there was an ouster of the plaintiff or his father from the suit properties. Mr. Sukhthankar's argument that the defendants have become exclusive owners of these properties by adverse possession cannot, therefore, be accepted.

8. The appeal consequently fails and is dismissed with costs.

Appeal dismissed.