

Jagdev Daulata Mahadik and Others

Vs

Govindrao Balwantrao Through Lrs. and Others

Civil Appeals Nos. 1925-1926 of 1967

(P. Jagmohan Reddy, M. H. Beg, A. Alagiriswami JJ)

14.08.1974

JUDGMENT

JAGANMOHAN REDDY, J. -

1. These appeals arise out of two suits Nos. C.S. 27 of 1952 and C.S. 190 of 1952 on the file of second Joint Civil Judge (J.D.) Stars. A brief history of the facts leading to this litigation is necessary for a proper understanding of the issues in the case. Narayanrao father of Durgabai and Govindrao were brothers and owned suit properties which were held by them as joint family property. As Narayanrao had borrowed monies from various persons those creditors filed suits against the share of Narayanrao. Accordingly only one half share of Narayanrao was put up for sale. Even before the half share was brought to sale, Govindrao filed suit C.S. No. 313 of 1923 against Narayanrao for partition of the joint family properties and for separate possession of his half share. On October 26, 1923, Narayanrao's half share in 'A' Schedule property was purchased by one Narayanrao who was a brother of Govindrao. On April 20, 1924 symbolic possession was obtained by Narasingarao of that half share. On July 1, 1925, by a registered sale deed Narasingarao sold the half share of Narayanrao in 'A' Schedule properties which he had purchased to Govindrao for Rs. 16,000. In C.S. 313 of 1923 filed by Govindrao for partition a preliminary decree was passed on August 24, 1925. It may be stated that after the purchase of the half share of Narayanrao's property in the auction sale in the creditor's suits Govindrao did not amend his plaint mentioning about the subsequent sale of Narayanrao and his purchasing that half share from Narasingarao.

2. After the preliminary decree was passed Narayanrao died leaving behind him his widow Laxmibai and his daughter Durgabai. They were brought on record. In 1932 the widow Laxmibai died there after Durgabai was the sole legal representative of Narayanrao. In 1941 a final decree was passed and later in execution proceedings Govindrao's half share was separated by metes and he was put in possession of 'B' Schedule properties situated in Nipam and Kausawade. He also obtained means profits through the court. In so far as Narayanrao's half share was concerned, his separate share was shown in 'C' Schedule to that suit. Since some confusion may be created, because in the suits out of which those appeals arise also there is a 'C' Schedule, that Schedule will hereinafter be referred as the suit 'C' schedule. To continue the narrative, out of nine properties that there were sold by Durgabai, two were sold to Raoji Satwaji Mahadik and seven other persons. Out of the Narayanrao's share which was purchased by Govindrao he sold R.S. No. 172/1 and 172/2 for Rs. 2,000 to one Bali Mahadu Jadhav. Inasmuch as Durgabai was exercising the right in respect of suit 'C' Schedule properties in the partition suit, which in fact were ultimately purchased by Govindrao, Govindrao filed C. S. No. 27 of 1952 in respect of items (1) and (7) of suit 'C' Schedule properties and Bali Mahadu Jadhav filed C.S. No. 190 of 1952 in respect of R.S. Nos. 172/1 and 172/2. The case of Bali Mahadu Jadhav was similar to that of Govindrao in C.S. No. 27 of 1952 and the relief

asked for in both the suits were for possession and for awarding mesne profits of the suit 'C' Schedule properties. In C.S. No. 27 of 1952 Durgabai was Defendant No. 1 and the purchasers were Defendants Nos. 2 to 9 but in C.S. No. 190 of 1952 the same defendants as in C.S. No. 27 of 1952 were shown as Defendants 1 to 8, because they got into wrongful possession of the suit lands in or about December 9, 1947 after winning over Daulata Raoji to their side. It was also mentioned that the suit land out of the said R.S. No. 172 was with Daulata Raoji Mahadik as a tenant of Govindrao and the property being sub-division No. 2 was mortgaged by Narayanrao during his life-time to Dnyanu Joti Nigade in the year 1922 under a possessory mortgage-deed and was handed over into his possession. The present plaintiff Bali Mahadu Jadhav therefore filed a suit for redemption of mortgage being Civil suit No. 307 of 1947 against Nigade in the year 1922 under a possessory mortgage-deed and was handed over into his possession. The present plaintiff Bali Mahadu Jadhav therefore filed a suit for redemption of mortgage being civil suit No. 307 of 1947 against Nigade in the Court at Satara. In that suit Nigade contended that Durgabai had a right of ownership over the suit property, but the court held that the said contention was not proved and passed a decree for redemption of mortgage in the plaintiff's favour. The property bearing sub-division No. 172/1 was with Daulata Raoji as a tenant on the condition of giving a half share in the produce. It was alleged that he colluded with the with the defendants and gave them possessions of the said land unauthorisedly. In order to obtain possessions from Daulata Raoji Mahadik as the purchaser in pursuance of the revised Tenancy Act, the plaintiff submitted a Tenancy Application against him to the Mamlatdar and since Daulata Raoji gave evidence in which he stated that the suit property was not in his possessions since 1947-48 and that the same had been handed over into the defendants' possession, the plaintiff as a purchase from Govindrao filed the suit for declaration of title and for possession.

3. Civil suit No. 190 of 1952 was decreed by the trial court and possessions was directed to be the plaintiff. In C.S. No. 27 of 1952, however, the suit of the plaintiff in respect of items (1), (7) and (9) was dismissed and decree in respect of the other suit properties in respect of the other suit properties was passed. The plaintiff Govindrao filed Civil Appeal No. 121 of 1955 in respect of the three items against Defendants 2 to 9, while the defendants filed Civil Appeal No. 117 of 1955 against Govindrao in respect of the decree awarded against them in C.S. No. 27 of 1952. Civil appeal No. 118 of 1955 was filed against the decree in C.S. No. 190 of 1952. The District Judge on March 22, 1957, allowed Civil Appeals Nos. 117 and 118 of 1955 and dismissed civil appeal No. 121 of 1955. In the result both the civil suits Nos. 27 of 1952 and 190 of 1952 were dismissed.

4. The plaintiff in C.S. No. 27 of 1952 filed Second Appeal No. 1471 of 1957 in the High Court against the judgment of the District judge in civil Appeal No. 117 of 1955, while the plaintiff in C.S. No. 190 of 1952 filed Second Appeals No. 1472 of 1957 against the judgment and decree of the District Judge dated March 22, 1957. Pending disposal of these two second Appeals Raoji Satwaji Mahadik Defendant No. 2 died. An application to bring the legal representatives of Raoji Satwaji Mahadik was filed legal representatives were brought on record on January 23, 1962.

5. The High Court allowed the second Appeals, set aside the judgment and decree of the first appellate Court and decreed both the suits, namely, C.S. No. 27 of 1952 and C.S. No. 190 of 1952 as decreed by the trial Court. Against the judgment of the High Court in the second Appeals, these appeals are preferred by special Leave.

6. It may here be mentioned that in both the special leave petitions Nos. 987 and 988 of 1963 against the judgment of the High Court of Bombay in the Second Appeals Nos. 1471 and 1472 of 1957, Raoji Satwaji Mahadik, through he had died, was shown as one of the petitioners. Later on an

application was filed by the appellants for amending the cause title for bringing the legal representatives on record as they had been earlier on record. This application was, however, dismissed on January 23, 1970, with the result that there was no appeal by the legal representatives of Raoji Satwaji Mahadik against whom there was a joint decree.

7. The learned Advocate for the respondents has raised a preliminary objection to the maintainability of these appeals. It is his contention that so far as Govindrao is Concerned, nine properties belonging to Narayanrao to which he claimed a title, two of which items (1) and (7) were sold by Durgabai under one sale deed to Raoji Satwaji Mahadik alone. The other seven properties in the connected appeal regarding R.S. Nos. 172/1 and 172/2 were sold to Raoji Satwaji Mahadik and seven other persons. In respect of those which were sold jointly to Raoji Satwaji and others, as the special leave petition was dismissed because it was filed by a dead person, the joint decree against him had also become absolute. As that decree is a joint against him had also become absolute. As that decree is a joint decree, any relief that would be given in the appeal would be inconsistent with the decree which had already become final and consequently both the appeals should be dismissed.

8. The learned Advocate for the appellants, however, takes support from Or. 41. Rule 4 of the code of Civil procedure and on that analogy he stated that if any one of the joint decree holders can file an appeal, and even through other joint holders are not made parties, the Court can reverse or vary the decree in favour of all the appellants or respondents, as the case may be. No doubt the answer to that questions given by as the respondents' Advocate is that while that may be so, where an appeal has in fact been field and it was dismissed, there would be a decree against Raoji Satwaji Mahadik, and consequently no decree can be given in these appeals which would be inconsistent with that decree.

9. A large number of cases had been cited, but we do not think it necessary to go into that question in these appeals. Even on the assumption that there is no validity in the preliminary objection, on which we do not propose to express our opinion, on merits these appeals have to be dismissed.

10. The learned Advocate for the appellants has drawn our attention to the pleas raised by the defendants in the two suits, firstly, that the plaintiff's suit was barred by res judicata; secondly, by estoppel; thirdly by limitation and fourthly by virtue of Section 41 of the Transfer of Property Act. In so far as the first and second pleas are concerned, namely, res judicata and estoppel, these pleas were given up in the High Court. In so far as the fourth plea based on Section 41 of the Transfer of Property Act is concerned, it was pressed and negatived by the appellate Court, and the third plea of limitation was held against the defendants. The learned Advocate for the appellants has stated at the Bar that he does not wish to press the plea based on Section 41 of the Transfer of Property Act. He has, therefore, confined his arguments to the third plea only, namely, that the suit was barred by limitation as it was not filed within 12 years from the date of dispossession. In our view, this contention has also no substance. We may point out that the trial Court held that Govindrao and Bali Mahadu Jadhav had title to the respective properties by reason of Narasingarao having purchased Narayanrao's share in auction sale and Govindrao in his turn having purchased it on July 1, 1926 from Narasingarao that half share of Narayanrao. It is also clear that a final degree in the partition suit was passed in 1941 and later in 1943 Govindrao's share was separated and he was given possession. Narayanrao's share was shown as 'C' Schedule properties. From the date Govindrao was given possession of his separate property he was also entitled to have separate possession of half share of Narayanrao. From that date, at any rate, he had title to Narayanrao's properties. Till then Govindrao's possession was that of joint owner with Narayanrao, as such no question of any bar of limitation would arise during that period. As we have stated while narrating the facts, the suits were

filed in 1952 and if Govindrao was dispossessed after his joint possession was separated and he was given separate possession in respect of specific property the suits would be well within time. The learned Judge of the High Court, Palekar, J. as he then was, dealt with the contention urged on behalf of the appellant/respondents before him regarding limitation. Negating the pleas urged on their behalf he summed up the position relating to Govindrao's possession thus :

He got his own ancestral half share in the property between 1941 and 1943, and that continued in his possession, admittedly, after that date. But in respect of the other share of Narayanrao, which he had purchased in 1925, he continued in possession of the same till 1941, or thereafter. But, in the meantime, between 1941 and 1947, acts of dispossession with regard to that possession were committed by Defendant No. 1 and the other defendants. In other words, his dispossession, if at all, has taken place after 1941, in which case his suit was clearly within time.

Apart from the evidence which has been led to show the possession of either side, the admitted facts themselves go to show that the plaintiff's suit could not be barred by limitation. The plaintiff Govindrao and Narayanrao were in joint possession of the properties, and Govindrao's half share in the properties was never denied. There was no case also of his exclusion at any time. When he filed Civil Suit No. 313 of 1923, he filed it on the basis that he was in joint possession, and the only reason why he had to bring the suit was that his brother Narayanrao was not willing to a partition. In fact, it appears, the suit was hastened by the fact that Narayanrao's half share in the property had been brought to sale in court auction by one of his creditors. After the suit was filed, his joint possession was continued and the very fact that in 1941, there was a portion by metes and bounds in which Govindrao was allotted the "B" properties in the suit would postulate that he was in joint possession of every unit of the family property in enjoyment of his half share in the property. And if he was in possession till 1941, I do not see how he would be barred by limitation.

No serious challenge has been directed against the view expressed by the learned judge with which we are also entire agreement. As the only point on which submissions have been made are negated, the appeal which have to be dismissed, and accordingly they are dismissed with costs. One set hearing fee.

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