

Maharu Vs. Hemraj and Others

Maharu Vs. Hemraj and Others

SooperKanoon Citation : sooperkanoon.com/1144449

Court : Mumbai Aurangabad

Decided On : Apr-02-2014

Judge : T.V. Nalawade

Appeal No. : Second Appeal No. 1673 of 2005

Appellant : Maharu

Respondent : Hemraj and Others

Judgement :

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.58 of 1998 which was pending in the Court of the District Judge, Jalgaon. The appeal of the present appellant, plaintiff, filed against the decision of Special Civil Suit No.62 of 1994 which was pending in the Court of the Civil Judge, Senior Division, Amalner, is dismissed by the First Appellate Court. Relief of specific performance of contract is refused to the appellant. Both the sides are heard.

2) The suit was filed in respect of agricultural land admeasuring 4 acres which is part of land Gut No.100 which total admeasured at the relevant time, 17 acres and 25 gunthas. The suit portion is the northern portion of Gut No.100/1 and in the agreement it was shown to be separated by East “ West bandh from remaining portion.

3) It is the case of the plaintiff that the defendant is owner of the suit property and he agreed to sell the suit property to the plaintiff under written agreement dated

18-5-1977. It is the case of the plaintiff that the agreed consideration was Rs.30,000/- and on the date of agreement an amount of Rs.17,000/- was paid by the plaintiff to the defendant. It is contended that an amount of Rs.10,000/- was paid before the Sub Registrar and document was registered. It is contended that remaining amount of Rs.3,000/- was to be paid to the defendant on the date of execution sale deed. It is the case of the plaintiff that for execution of sale deed permission was necessary and the defendant was expected to take steps for taking such permission and he was also expected to take steps for division of Gut No.100/1 in the revenue record and sale deed was to be executed within one month thereafter.

4) It is the case of the plaintiff that he requested the defendant many a times orally to execute sale deed but the defendant avoided to do so. It is contended that notice was given in writing to the defendant on 4-4-1979 and this notice was received by the defendant. It is the case of the plaintiff that, the defendant did not reply the notice and avoided to execute the sale deed. It is the case of the plaintiff that second notice was issued on 18-8-1980. To this notice also no response was given by the defendant.

5) It is the case of the plaintiff that he was and he has been ready and willing to perform his part of the contract. It is the case of the plaintiff that the defendant has avoided to perform his part of contract and he is not willing to perform his part of the contract. It is contended that possession of the suit land was given to the plaintiff under the aforesaid agreement and accordingly name of the plaintiff has been entered in the revenue record from 1978-79. It is contended that even division of land Gut No. 100/1 was done in the revenue record to separate the portion given in possession of the plaintiff. The plaintiff had prayed for relief of specific performance of aforesaid contract. In alternative, he had requested for relief of refund of consideration amount with interest.

6) The aforesaid suit was given Special Civil Suit No.5 of 1981. The defendant did not appear even after due service of summons on him. The suit was initially decreed ex parte. Execution Proceeding bearing No.28 of 1982 was filed by the plaintiff. Then the defendant applied for setting aside the ex parte decree. The ex

parte decree was set aside and the suit was given new number as Special Civil Suit No.62 of 1994.

7) It is the case of the defendant that there was no agreement of sale and he did not receive consideration as contended by the plaintiff. He denied that he had given possession of the suit land to the plaintiff. It is his case that behind his back by joining hands with revenue authorities, the plaintiff has created false record of Phalaniof Gut No.100/1 and he has got his name entered in the crop cultivation column.

8) It is the case of the defendant that he has three brothers like Bhagwan, Bhimrao and Doghu. It is his case that they had ancestral property at Hanumantkhede, Tahsil Erandole. It is his case that his mother got some property from her father at Savkhede, Tahsil Amalner. It is the case of the defendant that, after demise of the mother, they succeeded to the property of their mother. It is the case of the defendant that, they treated the properties from Savkhede and Hanumantkhede as joint Hindu family property.

9) It is the case of the defendant that in the year 1966 partition took place amongst him and his three brothers. It is his case that Gut No.100 from Savkhede admeasuring 17 Acres 27 Gunthas was allotted to his share. It is his case that land Gut No.106 of village Savkhede was allotted to the share of brother Bhagwan. It is his case that the properties from village Hanumantkhede were given to the shares of Doghu and Bhimrao. It is the case of the defendant that in the view of these circumstances, the property from Savkhede had become Joint Hindu Family property and his three sons have share in the suit property.

10) It is the case of the defendant that he had taken some amount as hand loan from the plaintiff but the plaintiff has created false record of agreement of sale. It is his case that he is agriculturist and greater hardship will be caused to him if relief of specific performance is given in favour of the plaintiff. It is his case that at the relevant time the price per are of this land was more than 20,000/-.

11) The defendant filed counter claim and prayed for relief of declaration that aforesaid transaction is not binding on him. He also prayed for relief of possession

of the suit property which is in possession of the plaintiff. To this counter claim, the plaintiff filed say and he denied the claim of the defendant.

12) Issues were framed on the basis of the aforesaid pleadings. Both sides gave evidence. The trial Court held that there was agreement of sale. The trial Court also held that the plaintiff was ready and willing to perform his part of contract. The trial Court, however, held that the suit property needs to be treated as Joint Hindu Family property of defendant and his sons. The trial Court held that the plaintiff has failed to prove that there was legal necessity for the transaction. The trial Court has held that the transaction between plaintiff and defendant is not binding on other members of the Joint Hindu Family. The trial Court has given relief of possession to the defendant. The trial Court has directed return of the consideration amount. The First Appellate Court has confirmed this decision of the trial Court.

13) By the order dated 5-9-2006 this Court has decided to formulate substantial questions of law in terms of Ground Nos. IV, V, VI, VII, IX and X of the appeal memo. They are as under :-

(I) whether the defendant is entitled to raise the defence that agreement dated 18-5-1977 was without legal necessity when the other co-parceners of the family had not joined as party and they had not taken such defence?

(II) whether the Courts below are justified in holding that the suit property is Joint Hindu Family property of the plaintiff and his sons?

(III) whether the defendant can take defence in a suit filed for specific performance of contract that he is not the sole owner of the property, relief of specific performance of contract cannot be given against him?

(IV) whether the transaction between plaintiff and defendant can be treated as void ab initio or whether it was only voidable at the instance of other co-parceners ?

(V) whether the plaintiff is entitled to retain possession till non alienating coparceners sue for recovery of possession of the suit property.

14) The documentary evidence shows that the agreement was registered and in the presence of the Sub Registrar consideration of Rs.10,000/- was given by the plaintiff to the defendant on 18-5-1977. The execution of this document is not disputed. In the document at Exhibit 16 there is mention that the portion which was to be sold to the plaintiff was divided, separated by construction of east " west bandh and portion towards northern side of the bandh was to be sold to the plaintiff. At Exhibits 52 and 20 there are copies of mutation entries showing that they were sanctioned on 31-5-1979 as the possession was actually given to the plaintiff (Mutation No.1335). At Exhibit 53 there is copy of other mutation bearing No. 1291 and it was sanctioned on 2-12-1976. This mutation shows that portion admeasuring 1.66 Hectare was earlier sold by the defendant to one Yadav Laxman Kulkarni on 21-8-1976 for consideration of Rs.30,000/- from Gut No. 100. Due to this transaction the land was divided in revenue record and the portion in possession of the defendant was given Gut No.100/1 admeasuring 5.49 Hectares. The portion which was sold to Kulkarni was given Gut No.100/2. Exhibit 53 shows that on the basis of document executed in favour of the plaintiff, further division of land Gut No.100/1 was done. The portion of the plaintiff viz 1 Hectare and 61 R was given Gut No.100/1A. In the 7/12 extract, in crop cultivation column name of the plaintiff was entered. There is copy of order made by the revenue authority at Exhibit 60 in this regard. The revenue record shows that at least from 1980-81 the name of the plaintiff was entered in the revenue record and the crop cultivation column showing that he was actually in the possession. These entries, mutations were never challenged by the defendant or his sons. Similarly the name of Kulkarni was shown in the 7/12 extract and the crop cultivation column of the portion held by him and these entries were also never challenged by the defendant or his sons.

15) Exhibit 69, the 7/12 extract shows that in land Gut No.100/1 there was one pencil entry in favour of Bhalerao Shankar showing that the defendant had agreed to sell 1.61 Hectare portion to him also. The record shows that there was no permission given by the revenue authority to this transaction, this transaction was held as illegal and so the pencil entry was made. It appears that subsequently said Bhalerao returned the land by accepting more money from the defendant and this entry was also cancelled. Bhalerao has given evidence in favour of the defendant

in this regard. But that circumstance can be used against the defendant.

16) Exhibit 56 is copy of Mutation No.1478. It shows that portion of 91 R from same Gut number, Gut No.100/1, was sold subsequently by the defendant to one Ravindra Ramnath Patil.

17) The aforesaid revenue record and more particularly mutation entry shows that the defendant had sold portion of 1.66 H to one Kulkarni. Prior to entering into agreement with the plaintiff he had agreed to sell similar portion to Bhalerao. The land was standing in the name of the defendant and the defendant was not shown as Karta of the Joint Hindu Family. Even after entering into the transaction with the plaintiff, the defendant sold some portion to Ravindra Patil. This transaction was not challenged by the sons of the defendant. This circumstance cannot be ignored in view of nature of defence taken by the defendant. The aforesaid record shows that similar portion was sold by the defendant to Kulkarni. The evidence of Bhalerao on the record shows that Bhalerao was in possession of the land, he enjoyed the land but defendant paid Rs.19,000/- for getting back possession from Bhalerao against the agreed amount of Rs.14,000/-. Record of agreement made with Bhalerao is however suspicious in nature.

18) Mutation Entries 67 and 69 show that the defendant and his three brothers had equal, one forth share in land Gut No.100 from Savkhede. By Mutation No. 1273 names of brothers of the defendant were deleted as per application given by them and so since 26-3-1966 only defendant was shown as the absolute owner of land Gut No.100. After that, the defendant made the aforesaid transactions. The revenue record further shows that there was loan taken by the defendant from Land Development Bank (Mutation No.1227) and the loan was taken from one society also on 5-6-1968. Thus, the defendant was acting as absolute owner of land Gut No. 100.

19) Copy of Mutation No.551 at Exhibit 106 shows that it was sanctioned on 7-1-1963 and the mutation was made on the basis of oral partition amongst the defendant and his brothers dated 12-12-1962. This document shows that under this partition, the defendant was given 4 Hectares 14 Gunthas land form Survey No.9/2 from village Hanumantkhede. Bhagwan and Bhimrao, the two other

brothers, also got land from Hanumantkhede. The portion which was allotted to the defendant was given separate number bearing Sy. No.9/2B. Exhibit 107 is mutation dated 28-10-1963. This mutation was effected on the basis of oral partition dated 13-1-1963 in favour of Doghu, brother of the defendant and separate survey No. 11/1-2 of village Hanumantkhede was given. Copy of Mutation at Exhibit 108 shows that Doghu got share from the land of village Hanumantkhede under oral partition dated 26-3-1963 and survey number 12/3 was given to him. The last two lands were given to Doghu by Rajdhar Rawaji Patil, probably other branch.

20) The aforesaid revenue record shows that partition had already taken place amongst the defendant and his three brothers in 1963. The partition was in respect of ancestral property owned by them and situated at village Hanumantkhede. Admittedly, the land Gut No. 100 from Savkhede was the property of their mother. After demise of mother, names of these four brothers were entered in the revenue record as heirs of their mother. The defendant is relying on Exhibit 67, Mutation dated 26-3-1966 made in respect of land Gut No.100. But this document does not show that it was made on the basis of partition. On the basis of this document it can be said that application was given by these four brothers to the effect that they had done some exchange of lands. Only on the basis of this document it cannot be inferred that the property from Savkhede become Joint Hindu Family property of the defendant and his sons. It was necessary to prove by the concerned, sons of the defendant, that the property at Hanumantkhede was exchanged for getting Gut No.100 (three forth share).

21) The parties are governed by Mitakshara school of Hindu law. Whether all the property is ancestral, joint Hindu family property or not, is question of fact and that needs to be proved like any other fact. Admittedly, one-fourth share in Gut No.100 had come to the share of the defendant from his mother. Under Hindu law, whatever property was received from his mother was his absolute property. Only due to mutation at Exhibit 67 inference cannot be drawn that the property at Savkhede was Joint Hindu Family property of the defendant and his sons. It was necessary for the concerned to prove that property was thrown in the common stock with intention of abandoning all separate claims upon it. Clear intention in

that regard needs to be established and only after that the doctrine of blending can be used. Blending is possible only if coparcenary property is in existence on the relevant date. It is already observed that in the year 1963 itself partition had taken place amongst defendant and his three brothers. Thus if at all some property from Hanumantkhede was given by the defendant to his brothers for getting their shares from land Gut No.100, it was necessary to prove the same by the persons affected.

22) The trial Court and the First Appellate Court have committed error in holding that partition took place amongst the defendant and three brothers in the year 1966 and there was the blending of the suit property. It appears that the Courts below have given undue importance to some admissions given by Dungal, PW 3, examined by the plaintiff. The defendant could not have opposed the suit filed for specific performance of the contract in view of the provisions of law and the aforesaid circumstances. Neither in the revenue record nor in the agreement there was whisper that the property was belonging to the Joint Hindu family.

23) In the cases reported as **AIR 1954 Nagpur 65 (S.K. Buty v. Shriram)** and **AIR 1967 SC 574 (Radhakrishnadas v. Kaluram)** this Court and the Apex Court have discussed the powers of manager, Karta of Joint Hindu family. The observations made show that under the Hindu law, the Karta has power to alienate the joint Hindu family property so as to bind the interest of all coparceners provided the alienation is made for legal necessity. In the cases reported as **AIR 1954 Nagpur 65 (Butty v. Shriram)** it is laid down by this Court that Court may grant relief of specific performance of contract made by manager even if some members are minor.

24) The position of Hindu law is that, the father if he is acting as Karta, he can sell the joint Hindu property for repayment of own debt also if it was not incurred for illegal purpose. Reliance is placed on a case reported as **A.I.R. (29) 1942 Nagpur 66 (Dharamrajsingh v. Chandrashekhar Rao)**. This Court has already observed that there were entries in revenue record showing that loan was obtained by the defendant from Land Development Bank and also from a society. This record shows that the defendant was in need of money. This circumstance could have

been considered by the Courts if the suit was contested by the concerned, the sons of the defendant.

25) In the case reported as **AIR 1971 SC 776 (Raj Kumar v. Ambica Prasad)** and **1964 Mh.L.J. 133 SC (Guramma v. Mallappa)** the Apex Court has laid down that alienation made by the manager without legal necessity is not void but voidable at the instance of the other coparceners. (underline added). In view of the aforesaid position of law and the facts and circumstances of the case it was not open to the defendant to say that transaction was not made for legal necessity. The defendant was living with his sons. If his sons had grievance that the defendant had acted beyond his powers, the sons could have joined as party to the suit if they wished. When the person entitled to get relief of declaration was not party to the suit, there was no question of giving such relief in their favour by the Courts below. The defendant certainly is not entitled to get such relief. Thus the Courts below have committed error in giving relief of declaration that the transaction is not binding on the other members of the Joint Hindi family.

26) When the suit is for specific performance of contract, in view of section 9 of the Specific Relief Act, the defences available under Specific Relief Act and under the provisions of the Contract Act only are available to defend the suit. If no defence is available like in the present case, the Court is not expected to refuse the relief of specific performance of contract when it is in respect of immovable property. At the time of deciding such suit the Court is not expected to consider and decide the issue of capacity of party to contract even if such issue is raised by the party to the contract. There is bar of estoppel against the defendant to raise such issue.

27) In view of the aforesaid position of law and the facts and circumstances of the case, this Court has no hesitation to hold that both the Courts below have committed serious error in refusing the relief of specific performance of contract to the plaintiff and in granting counter claim of the defendant. In the result, the aforesaid substantial questions of law are decided against the defendant and following order is passed.

28) The appeal is allowed with cost. The judgment and decree of the trial Court and the First Appellate Court are set aside. The counter claim of the defendant is

dismissed. The suit of the plaintiff for the relief of specific performance of contract is decreed with costs in the following terms :

(a) The defendant to execute registered sale deed in favour of the plaintiff of the suit property as per the terms of the agreement. The defendant is entitled to get the amount of Rs.3,000/- if already deposited by the plaintiff in the Court. If the amount is already not deposited, it is to be deposited within one month from today.

(b) If the defendant fails or refuses to execute the sale deed, the sale deed is to be executed through officer of the Court.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com