

Laxmappa Goneppa Vs. Bhimappa Goneppa

Laxmappa Goneppa Vs. Bhimappa Goneppa

SooperKanoon Citation : sooperkanoon.com/343816

Court : Mumbai

Decided On : Mar-28-1944

Reported in : (1945)47BOMLR970

Judge : Sen, J.

Appeal No. : Second Appeal No. 261 of 1942

Appellant : Laxmappa Goneppa

Respondent : Bhimappa Goneppa

Disposition : Appeal allowed

Judgement :

Sen, J.

1. The appellant is defendant No. 1 against whom a suit in ejectment was brought by respondent No. 1, the suit also being against defendants Nos. 2 and 3, the sons of defendant No. 1.

2. The plaintiff's case was that defendant No. 1 was his elder brother, that the property in suit, which is a house, was part of his ancestral property, that there was a partition between him and defendant No. 1 on October 7, 1925, when the house in suit and other properties were allotted to him, defendant No. 1 getting a smaller house to the south of his house, but that defendant No. 1 was allowed to

remain in the house in suit because he wanted to celebrate the marriage of his sons and promised to give it up on constructing a new house. He brought the suit practically on the last date of the period of limitation from the date of the partition. Defendant No. 1 denied that there was a partition in 1925, but he alleged that there was a partition in 1926 in which the house in suit fell to his own share. He also denied the other allegations of the plaintiff.

3. The trial Court found that the plaintiff had proved his case and made a decree in his favour for possession and mesne profits. The lower appellate Court also held that the plaintiff's case was proved and that the defendants' case was not proved, and accordingly, dismissed the appeal.

4. The only point in the present appeal is whether an unregistered document, exhibit 31/1, which was the basis of the plaintiff's case, was rightly admitted in evidence. It is admitted that the value of the property in suit is over a hundred rupees. The said document is headed:

Details of the partition got effected by Laxmappa Goneppa Sawkar and Bhimappa Goneppa Sawkar of Antarwalli in the presence of the below mentioned gentlemen on October 7, 1925. The below mentioned properties and survey numbers have fallen to the share of Bhimappa.

Then follows a list of certain survey numbers, and it is stated that the bigger house along with the cattle shed and a threshing floor had fallen to the share of the plaintiff, defendant No. 1 having got another house and a space lying to the east thereof. It next makes a provision regarding outstandings amounting to Rs. 13,000 and it is stated that,

Laxmappa (defendant No. 1) is entrusted with the responsibility of Rs. 8,800...but that Bhimappa has to shoulder no responsibility of either to pay or to receive any amount;' and the document ends thus ;

We have got divided the remaining moveable property according to our shares. In this way the aforesaid lands, threshing floor and houses have been divided with our consent and the aforesaid property is given in Bhimappa's possession. Such is

the deed of partition got effected. Signed and dated as above. (October 7, 1925).

Then follows the endorsement of the writer and the signature of defendant No. 1. Thereafter four witnesses have affixed their signature to the document.

5. The plaintiff stated in his deposition that he himself executed a document (presumably similar to exhibit 31/1) in favour of defendant No. 1 in respect of the property that fell to his share. He further stated that the lands were divided in the morning, that the houses were divided at 3 p.m. and exhibit 31/1 was executed by defendant No. 1 at 4 p.m. on October 7, 1925. The lower appellate Court came to the conclusion that exhibit 31/1 had been properly admitted in evidence, following the decision in *Sakharam Krishnaji v. Madan Krishnaji* I.L.R (1881) Bom. 232. In its opinion defendant No. 1's signature to the said document was taken 'by way of acknowledgment of the partition already effected and in order to put it out of his power to deny the fact of it'. It came to the conclusion that it was not a document of the type referred to in *Ramchandra v. Dinkar* (1900) 2 Bom. L.R. 800 and that though *Nilkanth Bhimaji v. Hanmant* I.L.R (1920) Bom. 881: 22 Bom. L.R. 992 would at first sight seem to support the contention of the defendants, viz. that the document required registration, that decision did not really support their case.

6. Under Section 17(1)(b) of the Indian Registration Act the following documents must be registered if the property to which they relate is situate in a district in which and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act of 1866, 1871 or 1877, or the present Act came or comes into force, viz. 'non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property'. The word 'declare' in this section was interpreted By West J. as being ejusdem generis with the words 'create' 'limit' or 'extinguish' a 'right, title or interest' and, therefore, implying a definite change of legal relation to the property by an expression of will embodied in the document referred to. This interpretation was approved by the Privy Council in *Bageshwari Charan Singh v. Jagarnath Kuari* . In *Sakharam v. Madan* I.L.R (1881) Bom. 232 it was also held that the terms of Clause (A) of Section 17 of the

Indian Registration Act do not include an acknowledgment of such a fact as that a partition had been effected (headnote):

Had the terms of Clause (b) of that section been satisfied by a mere acknowledgment, Clause (c) would have been superfluous. Its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction.

Following this decision, the lower appellate Court held that in this case exhibit 31/1 constituted an acknowledgment of partition by defendant No. 1, and that, therefore, it did not require registration. Under Section 49 of the Indian Registration Act a document requiring registration under Section 17 of the said Act cannot, if unregistered, be received as evidence of any transaction affecting any immoveable property comprised therein.

7. Mr. Desai on behalf of the appellant has relied on the notes in Sir Dinshah Mulla's Indian Registration Act, 4th edition, at pages 52 and 54, where inter alia the following cases have been cited: Ram Ltd v. Mst. Sita Bai I.L.R (1933) Lah. 635, Ram Gopal v. Tulshi Ram I.L.R (1928) All. 79 ; Nilkanth v. Hanmanth I.L.R (1920) Bom. 881: 22 Bom. L.R. 992 and Rudragouda v. Basangouda : AIR1938 Bom257 .

8. The question that arises in this case is, if a document is executed by the parties to a partition putting on record the details of the partition and the reasons therefor, the document itself being described in the end as a deed of partition, is such a document to be regarded as an instrument of partition or an instrument purporting or operating to create, declare, assign, limit or extinguish, whether in the present or future, any right, title or interest to or in immoveable property? Prima facie it the document is merely a record and is intended to be used as a record of a partition which has already been affected, there can thereby be no creation or assignment of right, title or interest in the present or in future. If the word 'declare' is ejusdem generis with the words 'create' and 'assign' i.e. as involving a change in the legal status of the parties, the same consideration will apply to that word also. The question, therefore, arises, whether the document, exhibit 31/1, was intended to

be merely a record of a past partition? On behalf of the appellant it is pointed out that only an interval of an hour elapsed, according to the evidence of the plaintiff him-self, between the division of the house and the execution of exhibit 31/1 and that the said document is itself described as a deed of partition. His contention, therefore, is that the deed must be held to be an inseparable part of the transaction in which the partition was effected and must, therefore, be held to be an instrument of partition.

9. In *Sakhnram v. Madan* the document which was held to embody merely an acknowledgment of the partition and therefore admissible in evidence without registration was executed in 1877, the defendants having pleaded a partition in 1870. In the circumstances of that case, therefore, it was not possible to hold that the document in question was an instrument of partition, as it was not a document which itself declared a right in immoveable property in the sense intended by Section 17 of the Indian Registration Act. It seems to me, therefore, that this decision does not apply to the facts of the present case, for there no question arose, such as arises in the present case, as to whether the execution of the document should be regarded as a part of the transaction in which the partition was effected. In *Ramchandra v. Dinkar* (1900) 2 Bom. L.R. 800 there was a document which, after reciting the allotment of lands, contained an agreement to act accordingly; and it was held that such a document was compulsorily registrable under Section 17. The facts of that case, again, are different from those in the present case. In *Nilkanth Bhimaji v. Hanmant Eknath* the plaintiff claimed to be entitled to certain property, alleging that the same was allotted to his share on a partition between himself and his brothers ; and for the purpose of proving the alleged partition, he relied upon certain unregistered receipts signed by his brothers in which they acknowledged having accepted certain portions of the family property. It was held that the receipts required registration and were, therefore, inadmissible in evidence. In that case, however, there was practically no other evidence of partition except the receipts, and the learned Assistant Judge who tried the first appeal had held that those receipts required registration and were, therefore, inadmissible in evidence. That conclusion was concurred in by Macleod C. J., who appears to have regarded them as instruments of partition, there being no evidence that the partition had been effected prior to the execution.

Heaton J., however, agreed that the appeal should be dismissed on somewhat different grounds. He held that if the receipts were regarded as instruments of partition, they were clearly inadmissible, but if they were to be regarded as lists of property made after the partition, they would not themselves prove the partition, and, therefore, could be used only as subsidiary papers. But as there was no proof of the partition outside those documents, he agreed that the appeal should be dismissed. It thus appears that both the learned Judges did not hold that the documents were instruments of partition. In *Rudragouda v. Basangouda* certain memoranda arrived at between the parties who agreed to partition their properties were held to be compulsorily registrable under Section 17 of the Indian Registration Act. But it appears that there were certain statements in some of those documents that certain lands which remained to be divided 'should be divided', and, therefore, the said documents were held to be incompatible with prior division. Such, however, is not the case in the present suit.

10. In *Ram Gopal v. Tulsi Ram*, on the death of one Nathua an application for mutation was made by the first cousin of the deceased, and certain relations of the applicant filed objections to the effect that the applicant's father had been adopted into another branch of the family and he had, therefore, lost all his right to succeed to Nathua's property. Thereafter the applicant and the objectors, by a joint application, sated that they had arrived at a compromise and asked for mutation to be made in a particular manner in the name of each other. Thereafter the applicant filed a suit claiming the whole property against the objectors. The lower Courts held that there had been a family arrangement which was binding, and the question arose whether if the oral contract be followed by a joint petition in a mutation Court, containing the terms of the settlement, in the shape of a request to the Court to record the names of the parties in a particular manner, whether that petition, being an unregistered document, might be treated as substantive evidence of the terms of the settlement; and it was held that in the said document the oral arrangement had been formally reduced to writing and as such being inseparable from the said arrangement, i.e. as being the culminating part of the arrangement, was compulsorily registrable under Section 17 of the Indian Registration Act. It seems to me that the same principle must apply to the facts of the present case. It is no doubt true that exhibit 31/1 begins by saying that it

contains 'details of the partition got effected by Laxmappa Goneppa Sawkar and Bhimappa Goneppa Sawkar' and that 'the below mentioned properties and survey numbers have fallen to the share of Bhimappa '. But there are two features of this document which conflict with the theory that it is a record of a past partition. In the first place, when it deals with the question of outstandings and debts of the family, it uses the present tense, e.g. 'Laxmappa is entrusted with the responsibility of Rs. 8,800'. 'The entire responsibility is of Laxmappa alone'; and, secondly, towards the end of the document it is described very clearly as 'a deed of partition.' The evidence of the plaintiff is that the lands were divided in the morning and the homes were divided at 3 p.m.. It seems to me very probable that the arrangements with regard to the outstandings and debts were arrived at when the document itself was written, and there can be little doubt that the document was regarded by the parties themselves as the culminating point of the whole transaction, lasting since the morning of the day, and effecting the partition.

11. In *Ganpat v. Namdeo* [1942] Nag. 73 there was a suit for partition and the plaintiff relied on two documents, one of which was called a receipt in which at certain places the present tense was used with reference to property allotted to one of the parties and with regard to certain items of property which were kept joint it was said, 'We will have the same partitioned on the decision of the appeal'. At the end of the receipt it was stated:

I have written and signed this receipt list at Sakhara with my free will and pleasure and while in full possession of senses.

It was held that the use of the present tense and the concluding portion and the fact that three attesting witnesses were called showed that the document was meant 'to embody the expression of will necessary to effect the change in the legal relation contemplated '. Their Lordships remarked (p. 77):

It has to be remembered that finality is reached orally in nearly every transaction which is reduced to writing and that but for an intention to reduce the matter to writing the oral agreement would in itself constitute a valid and binding contract.

Again they observed (p. 79)

We can find no meaning in this careful and elaborate document which was so solemnly drawn up with a counterpart signed by the other side if the two together were not intended by the parties to embody and legally effect the actual partition between them.

12. Though the facts of that case are not on all fours with those of the present case, it seems that these observations apply almost to the same extent to this case also. In view, particularly, of the fact that the parties themselves regarded the document in question as a deed of partition, it is difficult to take the view either that it is a document recording the fact of a past partition or that it is an acknowledgment taken from defendant No. 1 of a partition already effected. The roznama of the case shows that on October 23, 1939, the plaintiff made an application for permission to produce 'a partition deed'. This is also shown by exhibit 31, where 'the details of papers filed by the plaintiff's pleader' are thus given:

Unregistered original yadi regarding partition of immoveable properties which took place between the plaintiff and the defendant, filed by the plaintiff's pleader on October 23, 1939.

This shows prima facie that the plaintiff himself, when he sought to produce the document, regarded it as a document of partition. That being so, it is difficult to hold that it did not require registration ; and if it did require registration, it is clearly not admissible in evidence. Under Section 91 of the Indian Evidence Act the terms of the partition having been reduced to the form of a document, it was, again, not possible for the plaintiff to adduce any evidence in proof of the terms of the said partition, and the plaintiff would not succeed unless he proved the alleged terms of the partition. That being the position, it seems to me that the plaintiff was precluded from proving the case either on this document or on oral evidence, and his case, therefore, must fail.

13. The appeal will, therefore, be allowed with costs and the suit will be dismissed. There will be no order as to costs in the two lower Courts.

