

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL No. 538 OF 1992

Shri Mahadev Anna Mahadik,
Since deceased through his legal heirs
1a. Suresh Mahadev Mahadik and Ors.

...Appellants

Vs.

Smt. Kamalabai W/o. Vithal Bichitkar,
since deceased through legal heirs
1a. Sharda Ankush Mahadik and Ors.

...Respondents

.....

Mr. Vijay Killedar for the Appellants.
Mr. Sujeet P. Bugade for Respondent No.1(a)
Mr. Pandit Kasar for Respondent No.2

.....

CORAM : S.C. GUPTE, J.

DATE : NOVEMBER 18, 2019

ORAL JUDGMENT :

1. Heard learned counsel for the parties.
2. This second appeal challenges an appellate order passed by the District Court at Solapur in a civil appeal. By the impugned order, the District Court allowed the appeal of the Respondents herein (Original Plaintiffs) and declared their 1/3rd share in the suit properties and ordered partition and separate possession of that share in their favour. The second appeal herein has been admitted on two substantial questions of law. These are contained in grounds (D) and (J) quoted below:

“(D) The First Appellate Court committed an error in holding that the principles of lis pendens is applicable to the Appellants as they have purchased the property pending the suit.

(J) The First Appellate Court has further committed an error in holding that the will deed executed by the father of the Respondents Nos.3 and 4 suffers from suspicion and the Appellants could not explain satisfactorily. In fact, the will deed is duly proved by the Respondents Nos. 2 and 3. Moreover, the will deed is a document which has been effected in pursuance with the mutation entry effected on the basis of the application given by the father of the Respondent Nos.3 and 4 in the year 1983. This mutation entry was not challenged by the Respondents Nos.1 and 2 at any time and as such it was conclusive and has got presumptive value.”

3. A brief summary of the facts of the case may be noted as follows:

The Plaintiffs claim to be legal heirs of one Maruti. Maruti had three daughters - Sujata, Lochanabai and Krishnabai. Sujata pre-deceased Maruti and was survived by her son, Shivaji, and her daughter, Kamlabai. Shivaji and Kamlabai were the original Plaintiffs before the Trial Court. The two other daughters of Maruti, viz, Lochanabai and Krishnabai, were originally Defendant Nos.1 and 2, whilst Lochanabai's son, Macchindra, was Defendant No.3. Defendant Nos. 4 and 5 were purchasers of a part of the suit property through Defendant Nos.1 to 3. The Appellant herein was original Defendant No.6, who claimed a share in one of the suit properties,

as noted below. Defendant Nos.7, 8 and 9 were also purchasers of parts of suit properties from Defendant Nos.1 to 3. The Plaintiffs' suit was for partition and separate possession of their 1/3rd share in the property of deceased Maruti. The property consisted of lands at Village Ranjane, being Gat Nos. 32 and 38, and lands at Village Akole, being Gat Nos. 219, 314, 317 and 308. Defendant Nos. 4 and 5 as also Defendant Nos.7, 8 and 9 claimed interest in the lands at Village Akole, being Gat Nos. 314, 317, 308 and 219 (Defendant No.4 claiming in property bearing Gat No. 219, whilst Defendant No.5 claiming in property bearing Gat Nos.314, 317, 308 and Defendant Nos.7,8 and 9 claiming in property bearing Gat No. 219 and Defendant No.9 claiming in property bearing Gat Nos. 314,317 and 308). So far as Defendant No.6 is concerned, he was claiming $\frac{1}{2}$ share of the properties at Village Akole, i.e. lands bearing bearing Gat Nos.219, 314, 317 and 308.

4. The main controversy in the present second appeal pertains to the alleged share, claimed by Defendant No.6 in the suit property at Akole. Defendant No.6 relies on genealogy of the family descending from one Govinda, who is claimed to be a common ancestor. Govinda had two sons, viz, Maruti and Ananta. The Plaintiffs and Defendant Nos.1 to 3 claimed through Maruti, whereas Defendant No.6 claimed through the other son of Govinda, viz. Ananta. (It is not in dispute that Martuti and Ananta, though both were sons of Govinda, were step- brothers, born to Govinda through two different wives.). The suit was filed on the basis that the property belonged exclusively to Maruti (having come to him through his mother) and was to be partitioned between Maruti's heirs, i.e. the Plaintiffs and Defendant Nos.1 to 3. The dispute raised by all Defendants (except

Defendant No.6) revolved around the intestate succession to that property by the Plaintiffs. It was the case of Defendant Nos.1 to 3 and their purchasers, namely, Defendant Nos. 4 and 5, and Defendant Nos. 7 to 9, that Maruti had made a will in respect of the property at Village Akole, bequeathing it to Defendant Nos.1 and 2. Only Defendant No.6 had set up a claim purportedly on the basis of common ancestry through Govinda, that is to say, as legal heir of Ananta, the brother of Maruti. The case of Defendant No.6 before this Court is that he was originally a party defendant to the suit for partition; he had even filed a written statement making it clear that though he had no objection to the Plaintiffs' share being declared and partitioned, the other $\frac{1}{2}$ share of the properties at Village Akole, which belonged to him, should be given to him in partition. It is submitted that by a purshis filed during the pendency of the suit, the Plaintiffs unilaterally dropped Defendant No.6 from the array of parties; Defendant No.6, thus, had no occasion to set up his case or lead evidence in support of his $\frac{1}{2}$ share in the properties at Village Akole or oppose partition exclusively as between the legal heirs of Maruti, i.e. the Plaintiffs and Defendant Nos.1 to 3, in respect of these properties.

5. Mr. Killedar, learned counsel for the Appellants (legal heirs of original Defendant No.6), submits that despite being dropped as a party defendant in the trial court, Defendant No.6 was joined as a respondent to their appeal by the Plaintiffs. Learned counsel submits that originally the trial court had not decreed the Plaintiffs' suit for partition *qua* Akole properties. The trial court had decreed the suit only in respect of Ranjane properties, in which his client did not claim any interest. Learned counsel submits that the Appeal Court, which reversed the original decree of the

trial court, had decreed the Plaintiffs' suit for partition even *qua* properties at Akole. Learned counsel submits that this has resulted in a grave prejudice to his clients, since their predecessor (Defendant No.6) was not before the trial court when the suit was decreed and, therefore, could not lead any evidence at the trial, and yet the finding of the Appellate Court was against him and prejudiced his right to the suit property, viz., lands at Village Akole. Learned counsel submits that it gives rise a substantial question of law concerning his client's arraignment as a party respondent in a civil appeal without his being a party to the original decree and reliefs being yet granted in the appeal which have the effect of prejudicing his rights. This is the only controversy raised on behalf of Defendant No.6 in the present second appeal.

6. The other controversy concerns original Defendant Nos. 7,8 and 9, who were purchasers of parts of the suit property, viz., lands at Village Akole, from Defendant Nos. 1,2 and 3. The case in respect of these sales, both so far as Defendant Nos.1,2 and 3 as also Defendant Nos.7,8 and 9 are concerned, as noted above, was that Maruti had bequeathed these lands to his two daughters, Lochanabai and Krishnabai (Defendant Nos.1 and 2 herein). The Plaintiffs, claiming through his third daughter Sujata, were said to have no right to these properties. Defendant Nos.1 and 2 along with Defendant No.3 (son of Defendant No.1) had transferred these properties to Defendant Nos.7, 8 and 9 by registered sale deeds. It is submitted on their behalf that the lower Appellate Court has come to an erroneous finding on the genuineness and validity of the will. Mr. Killedar, who appears even for these Defendants (Defendant Nos.7, 8 and 9), who are co-appellants with Defendant No.6 in the present appeal, submits that the will

was duly proved and accepted as such by the Trial Court and that the First Appellate Court committed a serious error in holding that there were suspicious circumstances surrounding the execution of the will, which were not explained satisfactorily. Learned counsel submits that there was adequate proof of execution and genuineness of Maruti's will.

7. The third controversy, raised by these defendants, i.e. Defendant Nos. 7,8 and 9, relates to the effect of Section 52 of the Transfer of Property Act. The lower Appellate Court applied Section 52 and held that transfers in favour of Defendant Nos.7, 8 and 9 were not binding on the Plaintiffs on account of the fact that they were executed during the pendency of the suit. Learned counsel submits that Section 52 of the Transfer of Property Act has been amended so as to apply to four regions of the then State of Bombay which included the District of Solapur where these properties are situated. Learned Counsel submits that for application of Section 52, under this Bombay Amendment, to any property falling within these four regions, what is required is not just pendency of a suit, but registration of a notice of such pendency under Section 18 of the Registration Act. Learned counsel submits that it is only in a case where such notice is registered that the property, being the subject matter of a suit, cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of the other party to the suit under any decree or order that may be passed therein.

8. Coming now to the first controversy, i.e. the one raised on behalf of Defendant No.6, concerning his arraignment as a respondent to the appeal before the lower Appellate Court, without being a party to the decree

appealed from, it is important to note, firstly, that the second appeal has been admitted only on the ground of two substantial questions of law, raised on behalf of Defendant Nos.7,8 and 9, which have been noted above. These substantial questions pertain only to the applicability of *lis pendens* and proof of Maruti's will. The case urged on behalf of Defendant No.6, Mahadev, concerning the decree being passed against him at the appellate stage, when he was dropped as a party defendant before the trial court, was not what the appeal was admitted on. Even otherwise, no such question arises in the facts of the present case. It is important to note that it was not the Plaintiffs' case that Mahadev had any share in the suit property, namely, lands at Akole, but in fact, according to the Plaintiffs and Defendant Nos.1, 2 and 3, these properties were owned by Maruti alone. According to the Plaintiffs, these devolved upon them and Defendant Nos.1 and 2 by way of intestate succession, whereas according to Defendant Nos.1 to 3, they were exclusively entitled to the properties at Akole, as these were bequeathed by Maruti in favour of Defendant Nos. 1 and 2 under his last will and testament which they sought to prove in the suit. There was no question of Ananta, the step-brother of Maruti, having any share in the properties, which the Defendant No.6 Mahadev could have succeeded to. It was Mahadev's case, on the other hand, that he had a share in the property. He had, in his written statement, expressed his no objection, subject to his share being recognized and allotted to him in partition. In the purshis filed by the Plaintiffs (Exhibit 44), the Plaintiffs' stand was that at the date of the suit, Defendant No.6 was in possession or cultivation of some portion of the suit properties and his joinder was therefore necessary for seeking possession of those properties; but at the date of the purshis, there being no possession or cultivation on the part of

defendant No.6 Mahadev in respect of these properties, he was not liable to be continued as a party defendant and accordingly, proposed to be dropped from the array of parties. Though this purshis and deletion of Defendant No.6 was unilateral on the part of the plaintiffs, so far Defendant No.6 is concerned, he never objected to it. If it was his case that he had $\frac{1}{2}$ share in the lands at Akole, he should have resisted his deletion from the cause title, since the suit was *inter alia* for partition of Akole properties. He never did that. Even when he was arraigned as a respondent before the lower Appellate Court, he never raised this issue before the Appeal Court either. It was not his case before the Appeal Court that he was prevented from leading any evidence in support of his share in the suit property, viz. lands at Village Akole; he never applied for leave to lead any oral or documentary evidence before the Appeal Court either. He was admittedly represented by an advocate before the Appeal Court and he never put his right in issue as part of the lis before the Appeal Court. If that is so, no substantial question arises in the second appeal *vis-a-vis* either his right to resist the suit or the decree passed against him in appeal in the face of his absence as a party to the original decree passed by the trial court. No substantial question of law thus arises in his case.

9. Coming now to the issue of lis pendens, it may be noted that the original Bombay Amendment, in its application to the pre-reorganization State of Bombay, made it clear that the Amendment Act, viz. Bombay Act No.14 of 1939, was to apply only to notices in respect of suits or proceedings which related to immovable properties situate wholly or partly within the City of Bombay with effect from such date as may be directed by the Provincial Government in this behalf by notification in the Official

Gazette. There was a proviso, which empowered the Provincial Government to direct, by a similar notification, that the provisions of the Act (i.e. Act No.14 of 1939) would apply to notices relating to immovable properties situate within such other area/s as may be specified in such notification. By Bombay Act No.17 of 1945, the words "City of Bombay" in Act No.14 of 1939 were substituted by the words "Greater Bombay". ('Bombay', at that time, was as it stood pre-reorganization of States.) Bombay Act No. 35 of 1958, which was introduced so as to take care of re-organization of States, provided for extension of the provisions, inter alia, of Bombay Act No.14 of 1939 to the reorganised State of Bombay. That, however, does not imply that Bombay Act No.14 of 1939 straightway applied to notices in respect of suits or proceedings relating to immovable properties situate within the entire reorganized State of Bombay, as it then stood, with effect from the commencement of Bombay Act No.35 of 1958. What this extension means is that the power of the Provincial Government (now the State Government) to extend the provisions of Bombay Act No.14 of 1939 to other areas of the State now took within its fold not only areas comprised within the pre-reorganization State of Bombay but all areas within the reorganized State of Bombay. There is actually no notification issued by the Provincial or the State Government, as the case may be, directing that the provisions of Bombay Act No.14 of 1939 shall apply to notices relating to immovable properties comprised within the then State of Bombay or the present State of Maharashtra other than properties in Greater Bombay (now Greater Mumbai). There is, thus, no substance in the submission. The Bombay Amendment (of Act No.14 of 1939) does not apply to the rest of State, i.e. any area outside Greater Mumbai.

10. Mr. Killedar relies on a Judgment of the Supreme Court in **T. G. Ashok Kumar Vs. Govindammal**¹, in support of his contention that amended Section 52 of the Transfer of Property Act (i.e. as amended by Bombay Act No.14 of 1939) now applies to the whole of the State of Maharashtra. The Supreme Court, in that case, was considering the effect of Section 52 of the Transfer of Property Act on the validity of pendente lite transfers, holding basically that such transfers were not void or illegal, but merely not binding on the other parties to the suits; that such transfers were subject to decisions in the pending litigations; they could not affect the rights of other parties to such pending litigations under decrees or orders that might be made in them. Whilst laying down this proposition of law, the Supreme Court made a suggestion to the law-makers. It referred to the inconvenience, risk or hardship caused to a pendente lite purchaser and implored the legislature to find satisfactory ways of avoiding such inconvenience, risk or hardship. In that context, the Court referred to the amendment applicable in Maharashtra making the application of the lis pendens doctrine conditional upon registration of a lis pendens notice, commending the legislative device as a practical way out, which lent itself to due diligence and allowed the purchaser to avoid any risk or inconvenience. Just because, whilst referring to that amendment, the Supreme Court termed it as ‘applicable in Maharashtra’, it cannot be claimed that its applicability pan – Maharashtra was judicially recognized or laid down. That is not what the court set out to do. It was just a passing observation without meaning to consider the issue of applicability; it is certainly not part of the Court’s ratio. Were it to be treated as a ratio, in fact, it would be per incurium, as it does not consider the various

1 (2010) 14 SCC 370

amending Acts referred to above.

11. Coming now to the merits of the case of Defendant Nos.7, 8 and 9 on the basis of their sale deeds, it is pertinent to note that the sale deeds in their favour were not countenanced by the Appeal Court not only for the reason that they were hit by lis pendens under Section 52 of the Transfer of Property Act, but because their vendors, viz. Defendant Nos.1, 2 and 3, did not have right to deal with the properties covered therein to the exclusion of the plaintiffs. Defendant Nos.1 to 3 claimed their right to deal with the property purportedly on the basis of a will executed by Maruti in their favour. The Appeal Court did not accept the proof of execution or genuineness of the will. If this assessment of the Lower Appellate Court is right, the question of lis pendens merely becomes academic.

12. So far as Maruti's will is concerned, it is a pure question of fact, whether Maruti had actually executed it in accordance with the applicable provisions of the Succession Act and whether the will was genuine. Though the Trial Court accepted due execution of the will by Maruti and its genuineness, the Appeal Court disagreed with the Trial Court. The Appeal Court has given elaborate reasons in support of its disagreement. The Appeal Court, firstly, noted that the Defendants had failed to dispel suspicious circumstances surrounding the execution of the alleged will by Maruti. In the light of the law laid down by our Courts concerning the proof of execution of a will, the Appeal Court considered various circumstances bearing on the genuineness of the will. It noted that in 1964, when the will was supposed to have been executed, Maruti used to reside in a house owned by his mother-in-law in village Ranjani. Defendant No.1

Lochanabai used to look after Maruti. The witnesses had testified that Maruti's eyesight was weak; none of the witnesses, however, indicated that after the will was scribed and before Maruti put his thumb impression on it, it was read over to him or he himself had read it and thereafter put his thumb impression on it after verifying its contents. There were other suspicious circumstances as well. In the will, the field properties were referred to by their survey numbers. Before consolidation scheme was implemented in village Akole, Gat numbers were allotted to these fields. So, in 7x12 extracts, these fields were referred to by their Gat numbers. There was no material to show how Maruti had identified the fields by survey numbers. The main witness of the Defendants, Machhindra - Defendant No.3, also could not explain how survey numbers were mentioned, though the fields were identified by Gat numbers. More importantly, the Court noted the suspicious circumstances of defendant No.1 Lochanabai and her son Machhindra having actively participated in the preparation of the will as also Maruti putting his thumb impression to it, when he could very well have signed it. The Court noted, besides, that there was no reason stated in the will why the Appellants, who were children of Sujata - the predeceased daughter of Maruti, were disinherited. No material was placed before the Court on this point. The Court noted that Maruti was an inspector in Irrigation Department; he was receiving pension; so it was obvious that he was expected to put his signature on the will, but there was no signature, only a thumb impression. The Court noted that he was not totally blind; and there was no reason why he should have put his thumb impression. The Court observed that in view of his age, experience and status of being a retired Government servant, Maruti would have ordinarily signed the document, which he meant to execute, and if he

was unable to so sign, it should have been mentioned in the document, why instead of putting his signature he put his thumb impression. In the will, no such reason was given. No such reason was even found in the written statement. In the backdrop of all these facts, the Court found that there were several suspicious circumstances, which had not been satisfactorily explained, and therefore, due execution of the will was not proved. The Appeal Court's order, in this behalf, is clearly supported by evidence; it is based on a probable conclusion; it does not consider any irrelevant or non-genuine material or circumstance, or disregard any relevant or germane material or circumstance. There is no reason, accordingly, to ascribe any perversity to the order. No substantial question of law arises in connection with it.

13. The second appeal is, accordingly, dismissed by answering the substantial questions of law framed in the appeal as follows:

(i) The question of law in ground (D) is answered in the negative. It is, at any rate, academic, since even otherwise the conclusion of the appeal court cannot be faulted; the sale deeds in favour of Defendant Nos.7, 8 and 9 are not valid for want of authority or power on the part of their vendors, namely, Defendant Nos.1 to 3, to execute those deeds to the exclusion of the Plaintiffs;

(ii) The question of law, formulated in ground (J), is answered in the negative, that is to say, against the Appellants.

14. There shall, however, be no order as to costs.

15. At the request of learned Counsel for the Appellants, interim stay on execution of the impugned order of the lower Appellate Court is extended for a period of four weeks from today.

[S.C. GUPTE, J.]

Tikam