

(2022) 01 BOM CK 0003

Bombay High Court (Goa Bench)

Case No: Second Appeal No.164 Of 2005

Sridhar Balkrishna Shenvi Bhobe
(Expired) And Others

APPELLANT

Vs

Evaristo Pinto And Others

RESPONDENT

Date of Decision: Jan. 4, 2022

Acts Referred:

- Portuguese Civil Code, 1867 - Article 1189
- Registration Act, 1908 - Section 17, 17(1)(b), 17(2)(i), 49
- Evidence Act, 1872 - Section 91

Hon'ble Judges: Manish Pitale, J

Bench: Single Bench

Advocate: J.E. Coelho Pereira, B. Fernandes, Irshad Agha, K. Morascar, A.D. Bhobe, Kalpa Govekar

Final Decision: Dismissed

Judgement

Manish Pitale, J

1. The Original Defendants are before this Court challenging concurrent judgments and orders passed by the two Courts below whereby the suit filed

by the Respondent No.1 (Original Plaintiff) seeking partition was decreed in terms of the prayers made in the suit.

2. The Respondent No.1, later represented through his legal representatives as plaintiffs, filed the suit in 1983 for partition of the suit property and

praying for allotment of 1/3rd share in the property on the northern division in which the residential house of the Plaintiff was located. The Original

Plaintiff had purchased undivided 1/3rd share of the property from his vendor by registered sale deed dated 27.02.1980. In the plaint itself, it was

stated that the Plaintiff and Original Defendant No.1 and his wife the Original Defendant No. 2, had entered into an agreement for division of the property, but the said agreement was signed only by the Original Defendant No 1, while his wife did not sign the same. It was also stated in the plaint that the said agreement was never presented for registration before the office of the Sub-Registrar. The said agreement was entered into on 17.07.1980, but according to the Plaintiff, it was never acted upon. On this basis, the Plaintiff sought the decree of partition and allotment of 1/3rd share in the property, which would include the residential house occupied by him.

3. The Original Defendant Nos. 1 and 2 and Defendant Nos. 3 to 14 filed separate written statements. While the Defendant Nos. 1 and 2 referred to and relied upon the said agreement dated 17.07.1980, to claim that the division of the property had already taken place and that therefore, the suit deserved to be dismissed, the Defendant Nos. 3 to 14 denied the claim of the Plaintiff of being joint owner and being in possession of the suit property.

It was claimed that the aforesaid Defendants were in possession and enjoying the said property. On the basis of the pleadings of the rival parties, issues were framed and evidence was led. It is an admitted position that while the Plaintiff entered into the witness box and deposed as a witness, no witness deposed on behalf of the Defendants.

4. By Judgment and Order dated 25.10.2000, the Court of Second Additional Civil Judge Senior Division at Mapusa decreed the suit. It was directed that 1/3rd share in the suit properties of the Plaintiffs was to be partitioned by metes and bounds and the northern side portion of the property consisting of the residential house of the Plaintiffs was to be allotted to them. The Original Defendants had also raised a counterclaim pertaining to the alleged right of pre-emption, but the same was dismissed. Aggrieved by the same, the Original Defendants i.e. the Appellants herein, filed First Appeal before the District Court. By Judgment and Order dated 14.09.2004, the Appellate Court dismissed the appeal and confirmed the decree, passed in favour of the Plaintiffs. Various contentions were raised before the Appellate Court, but on each count, the Appellate Court held in favour of the Original Plaintiffs and dismissed the appeal.

5. The present Second Appeal was admitted on 13.03.2009, on the following substantial question of law: -

“Whether the Courts below fell in error in holding that the agreement dated 17.07.1980 was of no consequence particularly when the Plaintiffs

have not pleaded that the document was void and also particularly when the Defendants did not challenge the document on any count?”

6. Mr. Coelho Pereira, learned Senior Counsel appearing for the Appellants i.e. Original Defendants submitted that the Courts below had proceeded

by ignoring the aforesaid agreement dated 17.07.1980, on the ground that it was not registered. It was submitted that section 17(1)(b) of the

Registration Act, 1908, was applied to the said document and it was held that since the said document was not registered, it could not be looked at by

the Court. The learned Senior Counsel emphasized on the aspect that the said agreement was executed as a composition deed between the parties,

because the Appellants had given up their right to proceed against the Original Plaintiffs on the aspect of illegal construction and extension of the

residential house, in lieu of the Original Plaintiffs restricting their right of 1/3rd share in the suit property to area admeasuring 1400 square meters, as

stated in the agreement dated 17.07.1980. It was submitted that since the said agreement was nothing but a document executed in the nature of a

composition deed, under Section 17 (2) (i) of the Registration Act, it was exempt from registration and the said document ought to have been taken

into consideration by the Courts below.

7. On this basis, the learned Senior Counsel for the Appellants submitted that the Courts below had wrongly applied Section 17 r/w 49 of the

Registration Act, to completely ignore the agreement dated 17.07.1980, executed between the Plaintiff No. 1 and Defendant Nos. 1 and 2. The

learned Senior Counsel further relied upon Explanation (3) to Section 91 of the Indian Evidence Act, 1872, to contend that the findings rendered by the

two Courts below were contrary to law and frivolous. It was further submitted that the Courts below wrongly emphasized on the fact that the

Defendant No. 2, i.e. wife of the Original Defendant No. 1, had not signed the aforesaid agreement, when the Defendant No. 1 as the husband was

administering the assets under Article 1189 of the Portuguese Civil Code.

8. The learned Senior Counsel for the Appellants claimed that the contesting Respondents i.e. Original Plaintiffs were estopped from denying the agreement in question because the agreement was referred in the Plaint itself and the Appellants had not denied the existence of the said agreement.

On this basis, it was submitted that the decree deserved to be set aside and the right of the Original Plaintiffs deserved to be restricted to the area specified in the agreement dated 17.07.1980.

9. The learned Senior Counsel also referred to the contents of the agreement dated 17.07.1980, to contend that it was not a compulsorily registrable

document, as per law laid down by the Hon'ble Supreme Court in the cases of Roshan Singh and Others Vs. Zile Singh and Others (2018) 14 SCC

814, Thulasidhara and Another Vs. Narayanappa and others (2019) 6 SCC 409, Korukonda Chalapathi Rao and Another Vs. Korukonda Annapurna

Sampath Kumar 2021 SCC OnLine SC 847 and judgment of the Madras High Court in the case of Amirthavalli and 9 others Vs. N. Ramasamy (died)

and 10 others 2009 SCC OnLine Mad 1486.

10. On the other hand, Mr. Irshad Agha, learned Counsel appearing for the contesting Respondent No. 1 submitted that the agreement dated

17.07.1980, could not be looked at by the Courts, as it was not a legal or valid document at all. It was submitted that there was no question of the said

agreement being relied upon, on the basis that it was not claimed to be void by the Original Plaintiffs. The learned Counsel submitted that the contents

of the agreement dated 17.07.1980, itself showed that it was a document purporting to divide the property in question by metes and bounds and that

therefore, under Section 17 (1) (b) of the Registration Act, it was indeed compulsorily registrable. By relying upon Section 17 r/w 49 of the

Registration Act, the learned Counsel submitted that the aforesaid document was not admissible and the Courts below correctly held against the

Appellants in that regard. It was further submitted that the agreement was never acted upon and it was not signed by the Defendants, other than the

Original Defendant No. 1. It was further submitted that the Plaintiff No. 1, had entered the witness box and explained the context in which he had

signed the agreement dated 17.07.1980. On the contention raised on behalf of the Appellants pertaining to Section 17 (2) (i) of the Registration Act,

the learned Counsel appearing for the contesting Respondents submitted that the same was not applicable, for the reason that there was nothing to indicate in the contents of the said agreement that it could qualify to be a composition deed. In fact, it was submitted that the agreement was without consideration and that this aspect clearly indicated the dishonest nature of submissions raised on behalf of the Appellants. The learned Counsel appearing for the contesting Respondents relied upon judgment of the Madras High Court, in the case of Saminathan Vs. Sukumar (judgment dated 30.07.2021, passed in C.R.P. (PD) No.578 of 2021 and C.M.P. No.4898 of 2021), which in turn relied upon judgment of the Hon'ble Supreme Court in the case of Yellapu Uma Maheswari and another Vs. Buddha Jagadheeswararao and others (2015) 16 SCC 787, to contend that even if the agreement dated 17.07.1980, was to be considered, in the absence of registration of the said document, it could at best be relied upon to show severance of status and not for partition by metes and bounds, thereby indicating that the suit for partition had to be decided for allotment of shares and that such allotment of shares had to be independent of the contents of such an inadmissible document.

11. Heard learned Counsel for the rival parties and perused the material on record. Although the Appellate Court in the present case adverted to and rendered findings on various aspects of the matter, including the counterclaim raised on behalf of the Appellants, this Court is considering the present appeal only on the aforesaid substantial question of law framed while admitting the appeal. The Appellants also did not raise any contentions with seriousness pertaining to the rejection of the counterclaim as being barred and the entire thrust of submissions on behalf of the Appellants was on the aforesaid substantial question of law.

12. A decision on the said substantial question of law essentially hinges upon the nature of the agreement dated 17.07.1980 and in that backdrop, the question as to whether it could be looked at by the Courts despite admittedly being an unregistered document. The judgments of the Supreme Court relied upon by the learned Senior Counsel appearing for the Appellants in the cases of Korukonda Chalapathi Rao Vs. Korukonda Annapurna

Sampath Kumar (supra), Roshan Singh Vs. Zile Singh (supra) and Thulasidhara Vs. Narayanappa (supra) as also the judgment of the Madras High

Court in the case of Amirthavalli Vs. N. Ramasamy (supra), all pertained to situations where the nature of the document in question was such that it

reduced into writing a settlement or an arrangement between the parties in the past and the very document did not cause division of the properties by

metes and bounds. It is in the context of such a document that the Supreme Court and the Madras High Court, in the aforesaid judgments, have held

that registration was not mandatory and that such document could certainly be taken into consideration. Thus, the nature of the document in question

becomes the most crucial aspect in such cases. There cannot be any quarrel with the proposition laid down in the aforesaid judgments, for the reason

that it is nothing but reiteration of the settled position of law.

13. In this backdrop, it becomes necessary to consider agreement dated 17.07.1980 in the present case. A perusal of the document shows that there is

a reference made to the property in question and it is specifically recorded that from the date of the agreement, a specific division of the property

admeasuring 1400 square meters shall stand exclusively allotted to the Original Plaintiffs and they shall be entitled to possession of the same. This

clause and other clauses of the said document clearly indicate that it is not a document of the nature considered by the Supreme Court and the Madras

High Court in the aforesaid judgments. The said document did not reduce in writing any settlement or an arrangement arrived at in the past, so as to

exempt it from the mandatory requirement of registration under the provisions of the Registration Act. Therefore, the ratio of the aforesaid judgments

is not applicable to the facts of the present case.

14. Once it is found that the said document was compulsorily registrable under section 17 (1) (b) of the Registration Act, the effect of non-registration

under section 49 of the said Act must follow. In this regard, the attempt made on behalf of the Appellants to wriggle out of the mandatory requirement

of section 17 (1) (b) of the Registration Act, by claiming that the agreement dated 17.07.1980 was a composition deed, can also not be accepted. A

perusal of the agreement dated 17.07.1980, does not give any indication that it was a composition deed and that under section 17(2)(i) of the

Registration Act, it could be said to be exempt from the applicability of section 17(1)(b) of the said Act. The contention raised on behalf of the

Appellants on the basis of Explanation (3) to Section 91 of the Evidence Act and the principle of estoppel sought to be invoked under Section 115

thereof, can also not be accepted for the reason that when the said document is wholly inadmissible in the absence of registration, there is no question

of the principle of estoppel applying against the Original Plaintiffs.

15. In the context of the extent to which an unregistered document could be considered for collateral purpose, in the case of Yellapu Uma Maheswari

Vs. Buddha Jagadheeswara Rao (supra), the Supreme Court has clarified that a document compulsorily registrable under the provisions of the

Registration Act becomes an inadmissible document in the absence of registration and the factum of partition cannot be proved on the basis of such an

inadmissible document. A Judgment of the larger Bench of the Andhra Pradesh High Court in the case of Chinnappareddigari Peda Mutyala Reddy

Vs. Chinnappareddigari Venkatta Reddy AIR 1969 AP 242 , is specifically referred to in the said Judgment of the Supreme Court wherein it is laid

down that partition contemplates three phases i.e. severance of status, division of joint property by metes and bounds and nature of possession of

various shares. It is then held that an unregistered document in the context of partition cannot be relied upon to show division of joint properties by

metes and bounds. The learned Counsel appearing for the contesting Respondents is justified in relying upon the said judgments to contend that even in

a worse case scenario, no advantage could be claimed by the Appellants on the basis of the unregistered agreement dated 17.07.1980. Even

otherwise, the Original Defendant Nos. 3 to 14 had clearly stated that they were in possession and enjoyment of the entire property, thereby

completely falsifying the theory of the Appellants that by agreement dated 17.07.1980, partition had already taken place wherein the Original Plaintiffs

had agreed that 1400 square meters of the property was equivalent to their 1/3rd share in the property. In this context, the contention raised on behalf

of the Appellant on the basis of the Portuguese Civil Code becomes irrelevant.

16. A perusal of the Judgment of the Appellate Court shows that various aspects of the matter were discussed in detail, on the basis of appreciation of

the evidence and material on record and the position of law was applied to the facts of the case to arrive at proper conclusions.

17. As noted above, this Court considered the rival submissions which were limited to the aforesaid substantial question of law framed at the stage

when the appeal was admitted. The nature of the document in question i.e. the agreement dated 17.07.1980, clearly shows that it was indeed a

compulsorily registrable document and that in the absence of registration, it was of no consequence, apart from the fact that the Original Plaintiffs

were able to demonstrate that the said agreement was never acted upon. In such a situation and by applying the settled position of law, the aforesaid

substantial question of law is answered against the Appellants and in favour of the contesting Respondents.

18. In view of the above, the appeal is found to be devoid of merit and accordingly, the appeal is dismissed.

19. Pending applications, if any, stand disposed of.