
(2008) 04 BOM CK 0055

Bombay High Court

Case No: S.A. No. 638 of 1989

Dnyanu Dadu Patil

APPELLANT

Vs

Shripati Dadu Patil
deceased by heirs Smt.
Sakhubai Patil and
Others

RESPONDENT

Date of Decision: April 29, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: AIR 2008 Bom 170 : (2008) 3 ALLMR 796 : (2008) 5 BomCR 427 : (2008) 4 MhLj 931

Hon'ble Judges: Anoop V. Mohta, J

Bench: Single Bench

Advocate: G.R. Rege, for the Appellant; M.R. Katikar, for Respondent Nos. 1(1) to 1(4) and 6, for the Respondent

Final Decision: Dismissed

Judgement

Anoop V. Mohta, J.

The appellant-original defendant being aggrieved by the concurrent judgment and order has preferred the present Second Appeal.

2. The following substantial questions of law are involved:

(1) Whether the present Suit is barred by Order 2, Rule 2 of CPC (CPC) as the respondent-original plaintiff filed the Suit for partition on the ground that he was not aware of the property when earlier Regular Civil Suit No. 408/1964 was decided? - No.

(2) Whether the second Suit for partition is maintainable for the property left out in the earlier suit for partition for want of knowledge? - Yes.

3. The relevant facts are as under:

(1) The respondents are heirs of original plaintiff and the appellant is original defendant No. 1.

(2) Original plaintiff filed a Regular Civil Suit No. 408 of 1964 for partition and possession of the joint family property. The said suit was decreed.

(3) The respondent filed present Suit No. 351 of 1976 in the Court of the Civil Judge Junior Division Kolhapur for partition and possession of only one suit land being R.S. No. 368/5-A admeasuring 0-22 gunthas i.e. the left out property from the earlier suit.

(4) The ground for filing second suit was that it was a joint family property and the original plaintiff had no knowledge of the same.

(5) The trial Court accepted and held that filing of fresh suit does not amount to reopening of the old partition; The second suit is not barred by Order II, Rule 2 of the Civil Procedure Code; the principle of res judicata does not apply. On 29-3-1985 the trial Court granted decree for 1/4th share as prayed for.

(6) The appellant filed Regular Civil Appeal No. 187 of 1985. On 29-9-1989 the Appellate Court upheld the Judgment.

Hence the present Second Appeal.

4. The relevant provision of CPC in this regard is Order II Rule 2 which is reproduced as under:

2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, excepts with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

5. The principle with regard to this has been re-iterated by the Supreme Court in the case of [Shiv Kumar Sharma Vs. Santosh Kumari](#), in the following words:

21. If the respondent intended to claim damages and/or mesne profit, in view of Order 2, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

6. The learned Counsel appearing for the appellant, however, strongly relied on *Moonshee Buzloor Reheem v. Shumsoonnissa Begum* (1867) XI Moore Ind. APP. 551, This judgment was based upon the old provision of Civil Procedure Code. That was not the case of partition. It was a suit for restitution of conjugal rights, based upon Mohomedan Law. In a way, that was a suit for specific performance founded on a contract of marriage under the Mohomedan Law. Section 7 of Act No. VIII of 1859 provides, that if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained. As per this judgment itself, first test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit. The facts and circumstances are totally distinct and distinguishable. In my view, this judgment in no way sufficient to reverse the concurrent finding given by the Courts below on facts specially in view of the Supreme Court decisions and observation as reproduced above.

7. Admittedly, the second suit was filed by the respondent-plaintiff for partition, after knowledge about the excluded property from the earlier proceedings. Both the Courts came to a clear conclusion that the property involved in the second suit was not part of the earlier partition suit and, therefore, it was excluded. The second suit was filed immediately from the date of knowledge about the said exclusion of the property. Therefore, the above questions of law as framed by consent are answered as under:

Answer to Question 1:

8. As observed by the Supreme Court and considering the scheme of

Order II, Rule 2 of Civil Procedure Code, it is necessary that parties must claim all reliefs as available at the time of filing of the suit and/or claim. Any intentional omission bars the second suit and/or claim. There is no dispute that a suit for partition of joint family properties must include the whole of the property jointly held by the parties. Therefore fresh suit for non-included property/omitted items is not permissible. However, it is subject to exception when the omission in the previous suit was due to inadvertence or through ignorance of the omitted items and/or no knowledge about the joint property at the time of the filing of first suit.

9. The submission that once it is omitted whether with knowledge or inadvertence that itself debars the second suit is unacceptable specially in view of the scheme and purpose of Order II, Rule 2 itself and as observed by the Apex Court in the above referred

judgments.

10. The word "omission" itself means that parties at the relevant time has knowledge but still not included that the claim or property in the first suit. What happened in the present Suit as recorded and observed by both the Courts and rightly so. Therefore second suit after the knowledge about the said excluded joint property, is not barred under Order II, Rule 2. There is no question of res judicata applies in the present matter.

11. Apart from this Section 339 of the Hindu Law states that "Where a portion of the joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be the joint property of the family, and it must be divided amongst the persons who took under the partition. It is not necessary in such a case to reopen the original partition." Therefore, it is not foreign where a portion of the joint property if excluded from partition by mistake, accident or fraud such portion continued to be the joint property of the family and it must be divided amongst the persons/coparceners. It is not necessary to re-open the original partition as rightly observed and done in the present case. There is no dispute and as held by the Courts below that the property in question is a Hindu joint family property.

Answer to Question No. 2:

12. In view of the above circumstances and observation, the second suit is maintainable for partition of left out property.

In the result, the second Appeal is dismissed. There shall be no order as to costs.