

(2014) 6 BomCR 643

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 2320/2013

L.Rs. of Pandurang
Dharmadhikari

APPELLANT

Vs

Kusumtai

RESPONDENT

Date of Decision: July 15, 2014

Acts Referred:

- Bombay Stamp Act, 1958 - Section 33, 37
- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 4
- Registration Act, 1908 - Section 17, 17(1)(b), 49, 49(c)

Citation: (2014) 6 BomCR 643

Hon'ble Judges: Z.A. Haq, J

Bench: Single Bench

Advocate: M.G. Bhangde, Senior Advocate and V.V. Bhangde, Advocate for the Appellant;
V.S. Bapat and R.D. Dharmadhikari, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Z.A. Haq, J.

The petition arises out of the order passed by the learned trial Judge in Special Civil Suit No. 3/1998 below Exh. 396 on 1st December, 2011 by which the learned trial Judge has allowed the objection of the respondents, has impounded the document dated 13th May, 1992 as per the provisions of Section 33 of the Bombay Stamp Act and has sent the document to the Collector for necessary action as per the provisions of Section 37 of the Bombay Stamp Act. The petitioners have also challenged the conclusions of the learned trial Judge that the document dated 13th May, 1992 was required to be registered as contemplated by the provisions of Section 17(1)(b) of the Registration Act and as the document is not registered, it is inadmissible in evidence as per the provisions of Section 49(c) of the Registration Act.

2. The respondents 1 and 2 have filed the civil suit against the petitioners and the respondents 3 to 5 praying for the decree for partition by metes and bounds in respect of 1/7th share of respondents 1 and 2 in the suit property. The respondents 1 and 2, in the alternative have prayed for the decree for declaration that they and the original defendants 2 to 5 (collectively), 6(a) to 6(d) (collectively), 7 (a) to 7(c) (collectively) and defendant No. 8 have equal shares in the suit property excluding the original defendant No. 1. By amendment to the plaint, the respondents 1 and 2 have made an alternative prayer seeking decree for declaration that the partition of 1969 between the deceased Mahadevrao and respondent No. 1 in respect of field Survey No. 84 of Kandli, Tq. Achalpur is unequal and is required to be reopened and had sought declaration that respondents 1 and 2 have 1/7th share in the field.

3. The matter proceeded and the original plaintiffs led evidence and closed their side. Original defendant No. 1 Shri Pandurang Mahadeo Dharmadhikari submitted the evidence on affidavit. During the additional examination-in-chief the original defendant No. 1-Shri Pandurang Mahadeo Dharmadhikari tried to exhibit the partition deed dated 13th May, 1992 which was produced on the record, and stated that it bears his signature and its contents are true. At this stage, the learned advocate for the original plaintiffs raised objection for admitting the document on the record on the ground that it was not a memorandum of partition but the partition deed and therefore, it was not admissible in evidence in view of the provisions of Section 17 and Section 49 of the Registration Act. The learned trial Judge observed that the contents of the document showed that it was a partition deed and memorandum of earlier partition and it was not admissible in evidence in view of the provisions of Section 17 and Section 49 of the Registration Act. The learned trial Judge observed that the document was written on stamp paper only. The learned trial Judge issued show cause notice to original defendant No. 1 Shri Pandurang Mahadeo Dharmadhikari as to why the document should not be impounded under the provisions of the Bombay Stamp Act and why the consequences u/s 49 of the Registration Act should not be made applicable to the said document. The learned trial Judge directed that the evidence should proceed further. The original defendants filed their reply to the show cause notice issued by the learned trial Judge. The learned trial Judge heard the parties and by the impugned order concluded that considering the recitals of the document dated 13th May, 1992 the document was a partition deed creating and declaring exclusive rights and title of the parties in respect of the shares allotted to them. The learned trial Judge concluded that the above mentioned document had the effect of limiting or extinguishing the rights of other parties in respect of the shares allotted by the partition to a particular party and had restrained the other party/parties from claiming any title or interest in the property of the party/parties. The learned trial Judge held that the document was inadmissible in evidence as it fell within the purview of Section 17(1)(b) of the Registration Act and it was required to be registered and as it was not registered, it was inadmissible in evidence in view of Section 49(c) of the Registration Act. The learned trial Judge impounded the document and has taken action as stated in the order. The petitioners being aggrieved by the above mentioned order has filed this petition.

4. Shri M.G. Bhangde the learned senior advocate assisted by Shri V.V. Bhangde learned advocate for the petitioners has submitted that the petitioners are not challenging that part of the order by which the document dated 13th May, 1992 is impounded and sent to the Collector for necessary action.

The learned senior advocate has submitted that the order passed by the learned trial Judge concluding that the document dated 13th May, 1992 is not a memorandum of partition but a partition deed and falls within the purview of Section 17(1)(b) of the Registration Act and as it is not registered, it is not admissible in evidence as per the provisions of Section 49(c) of the Registration Act is not proper and is unsustainable in law. The learned senior advocate has submitted that the document dated 13th May, 1992 shows that field Survey No. 115 situated at Kandli was kept by Shri Mahadeo Dharmadhikari the father of the petitioners, respondents 1, 7 and 8 and Shri Prabhakar Dharmadhikari (husband of respondent No. 2 and father of respondents No. 3 to 6). It is submitted that the field Survey No. 10/2A situated at Mouza Khelbari was jointly given to respondents 1 to 7 and 8, their shares being equal. It is submitted that the document records that the respondents 1 to 7 and 8 were required to equally share the expenses incurred for converting the land into plots. It is submitted that the document shows that respondents 1 to 7 and 8 had equal shares jointly in the filed Survey No. 10/2A. The learned senior advocate has pointed out from the document dated 13th May, 1992 that the house property was partitioned earlier and everyone was given his share by Shri Pandurang Mahadeo Dharmadhikari. Pointing out the contents of the document dated 13th May, 1992 the learned senior advocate submitted that it is only a memorandum of partition and it cannot be said to be a partition deed. The alternative submission is made that at the most the document dated 13th May, 1992 can be said to be a partition deed between Shri Pandurang Mahadeo Dharmadhikari on one side and respondents 1 to 7 and 8 on the other side and in any case it cannot be said to be a partition deed carving out the shares of respondents 1 to 7 and 8 by metes and bounds.

5. It is submitted that the learned trial Judge has not considered these aspects and has wrongly concluded that the document dated 13th May, 1992 is a partition deed determining the shares of all the parties concerned. The learned senior advocate for the petitioners has submitted that the document dated 13th May, 1992 being a memorandum of partition and not a partition deed, it does not fall within the purview of Section 17(1)(b) of the Registration Act and is not compulsorily required to be registered and consequently, the provisions of Section 49(c) of the Registration Act cannot prevent the petitioners from getting the document exhibited.

6. The learned senior advocate has submitted that the learned trial Judge has committed an error of jurisdiction by not allowing the petitioners to get the document exhibited while their examination-in-chief is recorded. Relying upon the judgment given by the Full Bench of this Court in the case of [Kushal Pawar Vs. The State of Maharashtra and Others](#), it is submitted that the admissibility of the document in evidence may be broadly classified into three classes :-

(i) If the document which is sought to be proved is insufficiently stamped then objection relating to deficiency of the stamp duty can be raised,

(ii) if the admissibility of the document is not disputed but an objection is taken regarding mode of proof of the document, and

(iii) where the objection is that the document sought to be proved is ab-initio inadmissible in evidence.

7. It is submitted that the Full Bench has laid down that in the document falling under the (iii) category i.e. when the objection is that the document is ab-initio inadmissible in evidence then the document can be tentatively exhibited and the decision thereon can be postponed till the suit reaches the stage of judgment. The submission on behalf of the petitioners is that the objection of respondents to the admissibility of the document in evidence on the ground that it is not registered and therefore as per the provisions of Section 49(c) of the Registration Act, it cannot be received as evidence is unsustainable. The submission is that the learned trial Judge ought to have exhibited the document and should have postponed the decision about the admissibility of the document till the hearing of the civil suit. The learned senior advocate has submitted that the reading and understanding of the document dated 13th May, 1992 is a complex issue and the nature of the document i.e. whether the document is a memorandum of partition or a partition deed can be determined only after recording of the evidence is complete and therefore, the learned trial Judge ought to have followed the procedure as stated above.

8. Shri Bhangde, the learned senior advocate has made an alternative submission relying on the proviso below Section 49 of the Registration Act which lays down that an unregistered document affecting the immovable property and which is required to be registered may be received as evidence for any collateral transaction not to be effected by registered instrument. The learned senior advocate has submitted that after the evidence is recorded, the trial Court will have to determine as to whether the document dated 13th May, 1992 records the earlier event of partition and if it is so then whether the above mentioned document is required to be compulsorily registered as required by the provisions of Section 17(1)(b) of the Registration Act. The submission on behalf of the petitioners is that the impugned order passed by the trial Judge preventing the petitioners from getting the document dated 13th May, 1992 exhibited, is not in consonance with the proviso below Section 49 of the Registration Act and therefore, the impugned order has to be set aside and the petitioners be permitted to get the document dated 13th May, 1992 exhibited subject to the decision about its admissibility which is required to be taken after the recording of evidence is complete and at the time of hearing of the suit.

9. Shri Bapat, the learned advocate for the respondents 1 and 2 has submitted that the document dated 13th May, 1992 is conclusively a partition deed between Shri Pandurang Mahadeo Dharmadhikari on one hand and respondents 1 to 7 and 8 on the other hand and therefore, it falls within the purview of Section 17(1)(b) of the Registration Act and is

required to be registered. It is submitted that the above mentioned document specifically carves out the shares by metes and bounds of Shri Pandurang Mahadeo Dharmadhikari on one hand and respondents 1 to 7 and 8 on the other hand and therefore, it cannot be said that it is memorandum of partition and not the partition deed. The learned advocate for respondents 1 and 2 has submitted that the petitioners are changing their stand at different stages of the proceedings, to suit their purpose. The learned advocate for respondents 1 and 2 has submitted that initially the original defendants 1 to 5 and 8 had pleaded that the document dated 13th May, 1992 is a "will" executed by Shri Mahadeo Dharmadhikari, however, these defendants have amended the written statement and the term "will" is deleted and the term "memorandum of partition" is substituted. It is submitted that the learned trial Judge has considered this conduct of the petitioners in paragraph No. 24 of the impugned order and has rightly come to the conclusions as recorded in the order. The learned advocate for respondents 1 and 2 has pointed out that the entries in the revenue records are mutated as per the legal representative certificate and not on the basis of the alleged will as petitioners and other defendants are trying to make out before the trial Court. The learned advocate has further submitted that the original defendant No. 5 Shri Ajay Prabhakar Dharmadhikari has sworn an affidavit stating that Shri Mahadeo Dharmadhikari has left only following representatives (i) Shri Pandurang Mahadeo Dharmadhikari (ii) Shri Prabhakar Mahadeo Dharmadhikari, (iii) Shri Manohar Mahadeo Dharmadhikari and (iv) Shri Dattatraya Mahadeo Dharmadhikari. It is submitted that the existence of the daughters of Shri Mahadeo Dharmadhikari as legal representatives has been illegally suppressed in the above affidavit and it is with an ulterior motive. It is submitted on behalf of respondents 1 and 2 that the proviso below Section 49(c) of the Registration Act cannot be relied upon by the petitioners as the petitioners want to rely on the document dated 13th May, 1992 which is a partition deed only for the purposes of claiming the decree for partition and for the share of the petitioners by metes and bounds and not for any other collateral purposes. It is submitted that in view of this factual position, the petitioners had not made any submissions on the basis of proviso below Section 49(c) of the Registration Act before the trial Court and it is being relied upon before this Court for the first time. The learned advocate for respondents 1 and 2 has submitted that the admissibility of the document in evidence has to be decided at the stage of admission of the document and it should not be postponed till the hearing of the suit. In support of this submission he has relied on the judgment given in the case of [Shalimar Chemical Works Ltd. Vs. Surendra Oil and Dal Mills \(Refineries\) and Others,](#)

10. With the assistance of the learned advocates for the respective parties, I have examined the document dated 13th May, 1992, the copy of which is annexed to the writ petition. It is clear that the above mentioned document partitions the property between Shri Pandurang Mahadeo Dharmadhikari on one side and respondents 1 to 7 and 8 on the other side. As per this document rights of Shri Pandurang Dharmadhikari in field Survey No. 10/2A situated at Mouza Khelbari are extinguished. Similarly, the rights of respondents 1 to 7 and 8 in field Survey No. 115 situated at Kandli are extinguished as

the field Survey No. 115 was given to the share of Shri Pandurang Mahadeo Dharmadhikari. Thus, the document dated 13th May, 1992 is a partition deed.

11. The submissions made on behalf of the petitioners that the document dated 13th May, 1992 is a memorandum of partition and it does not partition the shares of respondents 1 to 7 and 8 by metes and bounds, is misconceived. The document dated 13th May, 1992 is to be considered in its totality and not in piecemeal. It cannot be expected that for one purpose i.e. for recording the partition between Shri Pandurang Mahadeo Dharmadhikari on one side and respondents 1 to 7 and 8 on the other side, the document can be said to be a partition deed and consequently requires registration compulsorily; and for the purposes of considering the entitlement of respondents 1 to 7 and 8 in respect of their shares in field Survey No. 10/2A situated at Khelbari, it has to be treated as a memorandum of partition and therefore, the document does not require registration. The learned senior advocate for the petitioners has not been able to show any provision which enables the registration of part of the document. If the document dated 13th May, 1992 is a partition deed and partitions the property by metes and bounds between Pandurang Mahadeo Dharmadhikari on one side and respondents 1 to 7 and 8 on the other side then the document compulsorily requires registration as it falls within the purview of Section 17(1)(b) of the Registration Act and if the document which requires registration is not registered then it is not admissible in evidence as per the provisions of Section 49(c) of the Registration Act.

12. The submission on behalf of the petitioners, relying on the judgment given in the case of Kushal S/o. Bapurao Pawar V/s. State of Maharashtra and another (cited supra), is that even if it is found that the document is inadmissible in evidence, it has to be exhibited and its admissibility has to be decided after the evidence of the parties is recorded at the hearing of the suit, is also unacceptable. The Full Bench of this Court while answering the point referred to it, framed the questions as follows :-

35.....

Questions-A.

At which stage, the objection to the admissibility and/or proof of document which may be produced or tendered should be raised; considered and decided by the Court?

Question-B

At which stage, an objection to the admissibility or relevancy of evidence contained in the affidavit filed under Order XVIII, Rule 4 of CPC should be considered and decided by the Court?

The Full Bench has answered these questions as follows :-

92. In view of the above analysis of the statutory provisions and our discussion, we, accordingly, articulate our conclusions as follows:-

Answer to Question-A:

As already noticed, (i) objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such objection must be judicially determined before it is marked as exhibit;

(ii) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit;

(iii) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case.

The Court trying the suit or proceedings as far as possible is expected to decide the admissibility of proof of document as indicated hereinabove. As we have already added a word of caution that while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the Court can always work out its own modality depending upon the peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The aim should always be to prevent miscarriage of justice and expedite trial, which is the dire need of the time.

(Emphasis supplied)

Answer to Question--B :

The objection to the admissibility or relevancy of evidence contained in the affidavit of evidence filed under Order XVIII, Rule 4 of CPC can be admitted at any stage reserving its resolution until final judgment in the case as held in Ameer Trading Corpn. Ltd. vs. Shapoorji Data Processing Ltd. (supra).

13. The learned senior advocate for the petitioners has not been able to point out any provision which casts an obligation on the trial Court to admit all the documents even if they are inadmissible in evidence and reserve the decision about the admissibility of the documents until final judgment of the case. As recorded by the Full Bench, the trial court has to work out its own modality depending upon the facts of each case. If it is possible for the trial Court to come to the conclusion that the document is inadmissible in evidence, then it will be an exercise in futility to require the trial Court to admit the document and reserve its decision on the question of its admissibility until the hearing of the case. Though the learned senior advocate for the petitioners has submitted that the interpretation of the document dated 13th May, 1992 is a complex issue and it can be determined only after recording of the evidence is complete, neither such submission was made before the trial Court nor the learned trial Judge has found that it was not possible

to decide about the admissibility of the document dated 13th May, 1992 in evidence, at this stage.

14. The learned Senior Advocate has tried to distinguish the judgment given in the case of Shalimar Chemical Works Limited V/s. Surendra Oil and Dal Mills (Refineries) and others (cited supra). It is submitted that in the above-mentioned case, the objection was regarding the mode of proof of the document and not regarding the admissibility of the document in evidence. It is submitted on behalf of the petitioners that the Full Bench in the judgment given in the case of Kushal S/o. Bapurao Pawar V/s. State of Maharashtra and another (cited supra) has dealt with the distinction and has categorized the objections regarding the admissibility of the document, in three categories. The learned senior advocate has submitted that the case of Shalimar Chemical Works Limited V/s. Surendra Oil and Dal Mills (Refineries) and others (cited supra) falls in category (ii) and therefore, it cannot be disputed that the objection regarding the proof of document has to be determined when it is exhibited and it cannot be postponed till the hearing of the suit. It is submitted that in the present case the objection falls under the category (iii) and the objection is about admissibility of the document in evidence and therefore, the document can be exhibited at this stage and the objection about the admissibility of the document in evidence can be decided after the recording of the evidence at the time of hearing of the suit. However, as observed above, the admissibility of the document in evidence is not required to be postponed in every case, till the hearing of the suit. The Full Bench itself has cautioned that the trial Court has to exercise the discretion judiciously and has to work out its own modalities depending upon the facts of each case. The learned trial Judge has extensively and properly considered the controversy and has rightly come to the conclusion which cannot be said to be suffering from any infirmity.

15. The submissions made on behalf of the petitioners relying on the proviso below Section 49(c) of the Registration Act is also unacceptable in the facts of the present case. The petitioners have not been able to point out the collateral purposes for which they want to rely on the document. The learned advocate for the respondents 1 and 2 has rightly submitted that the petitioners want to rely on the document only to substantiate their case of partition and for no other purpose. The learned advocate for the respondents 1 and 2 has rightly pointed out that the petitioners have therefore not made submissions relying on the proviso below Section 49(c) of the Registration Act. In the absence of any specific case of the petitioners about the collateral purpose for which they want to rely on the document and without there being any foundation in the pleadings about the collateral purpose, the submissions made on behalf of the petitioners, relying on the proviso below Section 49(c) of the Registration Act, cannot be accepted. The challenge in this petition is to the order passed by the learned trial Judge. I have to examine the legality and validity of the impugned order. I cannot hold that the impugned order suffers from any infirmity, illegality, non-consideration of any material on the record or non-application of mind if the petitioners had not made any submissions before the trial Judge relying on the proviso below Section 49(c) of the Registration Act.

16. Shri Bhangde, the learned senior advocate has pointed out from the judgment given in the case of Shalimar Chemical Works Limited V/s. Surendra Oil and Dal Mills (Refineries) and others (cited supra), the extract from the judgment given in the case of [R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another](#), which is reproduced in Shalimar"s case. In my view, the reliance placed on behalf of the petitioners on the observations in the case of R.V.E. Venkatchalla Gounder (cited supra) is not of any assistance to the petitioners.

17. In view of the above, I find no substance in the challenge as raised on behalf of the petitioners. The impugned order does not suffer from any irregularity or illegality and it does not require any interference in the extraordinary writ jurisdiction. The petition is, therefore, dismissed. In the circumstances, the parties to bear their own costs.