Gojabai W/O Bajirao Kolokhe vs Gangabai Ramchandra Pawar And Anr. on 19 November, 1979

Equivalent citations: AIR1980SC1436, (1980)2SCC329, 1980(12)UJ226(SC), AIR 1980 SUPREME COURT 1436, 1980 UJ (SC) 226, 1980 (2) SCC 329, (1980) 3 MAHLR 117

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Bench: A.P. Sen, D.A. Desai, V.D. Tulzapurkar

JUDGMENT

V.D. Tulzapurkar, J.

1. A compromise decree in a suit for partition (to which the appellant and respondent No. 1 were parties) conferred a right of preemption on all the parties thereto inasmuch as after allotting the different properties to them a provision was made in the decree to the effect that if the plaintiffs or defendants wanted to sell the properties allotted to them they should sell the same among themselves mutually. It appears that under this compromise decree 5 acres of land bearing survey No. 236/1/2 part was allotted to the share of respondent No. 1 Instead of offering the said land to the appellant the first respondent sold the same to the second respondent (her daughter's son-in-law) by registered sale deed dated 25-9-1962 for a price of Rs. 4,000 and upon the execution of the deed the possession was also delivered to the second respondent. On 10th March, 1964 the appellant (who was plaintiff No. 1 in the parities suit) filed a suit being Regular Civil Suit No. 30/64 in the Court of the Civil Judge, Phaltan, seeking to assert her right of pre-emption in respect of the said LAND basing her claim entirely upon the compromise decree. She prayed for revocaion of the sale deed in favour of respondent No 2 execution of a fresh sale deed in her own favour from both the respondent she also prayed for damages of Rs. 1000/- and further claimed means profits upto the date of delivery of possession. The trial Court by its judgment dated 18th August, 1965 upheld the claim of the appellant and decreed the suit in her favour save and except that it negatived the claim for damages and means profits, Against that decree respondent No. 2 (the purchaser under the sale deed dated 25-9-1962) preferred an appeal to the District Court at Satara being Civil Appeal No. 321 of 1965. During the pendency of the appeal the second respondent applied for an amendment of the written statement seeking to raise a plea of the bar of limitation which was granted. The appellant also applied for an amendment of the plaint seeking to introduce in the plaint a new case that there was an agreement of sale in her favour in respect of the land in question and the desired to specifically enforce the same. That amendment application was opposed but notwithstanding the opposition that amendment was allowed by the Assistant Judge on 28th April 1966. Later on 11th June 1966 the learned Assistant Judge allowed the appeal, set aside the decree of

the trial Court and remanded the suit for fresh trial in accordance with law. It appears that the said order of remand was passed upon consent of the parties.

2. Respondent No. 2 preferred an appeal to the High Court against the said remand order, but since the learned Single Judge of the High Court was doubtful whether an appeal lay against the impugned remand order he converted the appeal into a revisional application and proceeded to her the same as such. The High Court felt that the learned Assistant Judge had erred in allowing the amendment sought by the appellant/plaintiff inasmuch as it converted the suit into an entirely new and inconsistent one than what had been instituted initially. On merits it found that the appellant relied upon the compromise decree passed in the partition suit to sustain the plea of agreement of sale and no separate agreement of sale as such was pleaded of which specific performance could be claimed but in its view the compromise decree did not constitute any agreement for sale but merely conferred a right of pre-emption on the appellant/plaintiff. The High Court also felt that the suit as initially filed for enforcement of the right of pre-emption was clearly barred by limitation inasmuch as the suit had been filed long after the expiry of one year from the date of delivery of possession of the land by respondent No. 1 to respondent No. 2 pursuant to the impugned sale. It was true that the plea of limitation had not been raised in the written statement initially and the same was allowed to be raised by way amendment in the appeal. But obviously it would be the duty of the Court to see that the suit if barred by limitation was dismissed irrespective of whether a plea about it was raised or not. In these circumstances the High Court set aside the order allowing the amendment sought by the plaintiff and proceeded to dismiss the suit on the ground of limitation. It is this order passed by the High Court on 17th February 1969 that is sought to be challenge by the appellant before us in this appeal.

3. Counsel for the appellant vehemently contended before us that since the remand order was passed by the learned Assistant Judge upon consent of parties not only would an appeal not lie but even such order could not be interfered with in revision. There is undoubtedly some force in this contention of the Counsel. However on a fair reading of the judgment of the High Court we are clearly of the view that the High Court did not intend to interfere with or set aside the order of remand but actually interfered with the order granting amendment of the plaint sought by the appellant/plaintiff and in that behalf we are satisfied that the case sought to be put forward by way of amendment was not merely a new and inconsistent case as such ought not to have been allowed but such amendment was sought with a view to get over the bar of limitation which clearly lay in the way of the plaintiff getting a decree for pre-emption. We are also satisfied that in the amendment that was sought by her, the appellant/plaintiff had no where averred that any agreement for sale as such had been entered into by the first respondent with her but the self same compromise decree was relied upon for spelling out the agreement for sale. If regard be had to the terms of the compromise decree it is clear that all that the said decree granted to the appellant/plaintiff was merely a right of pre-emption. The relevant petition of that decree run thus:

> If the plaintiffs or defendants want to sell the land in dispute they should sell among them selves mutually.

> It appears that as a result of the compromise decree each of the parties thereto had been allotted certain properties and each one of them seems to have obtained possession of properties so allotted, to him or her without any execution proceedings and that is new the suit property in question fell to the share of respondent No. 1 which she ought to have effored first to the appellant-plaintiff. The relevant portion of the compromise decree quoted above clearly shows that a right of pre-emption was conferred on each one of the parties thereto. The compromise decree did not constitute or comprise any agreement for sale. It is therefore clear to us that on merits the case of agreement of sale and a prayer to seek specific performance thereof was not merely a new and inconsistent case than what had been pleaded initially, but was put forward with a view to get over the bar of limitation which clearly lay in her way of getting pre-emption.

4. Counsel for the appellant further contended that in any event. If the High Court were inclined to set aside the order granting amendment to plaintiff it should not have disposed of the entire suit on the ground of limitation, for by consent order of remand the parties had agreed that the issue arising between them should be sent to the trial Court for disposal according to law. That undoubtedly is true but in our view if the plaint stood as it had been initially filed without the amendment it was purely a suit for enforcement of the right of pre-emption and under Article 10 of the First Schedule to the Limitation Act, 1908, such suit would be barred after a period of one year, period commencing to run from the date when the possession is delivered to the vendee contrary to the right of pre-emption, Counsel urged that there was no clear material before the High Court as to when possession of the property had been delivered by respondent No. 1 to respondent No. 2 We are unable to accept this submission for, in our view, there was ample material on record to show that such possession was delivered by respondent No. 1 to respondent No. 2 immediately after the impugned sale deed has been executed on 25th September 1962. The impugned sale-deed itself contains the recital about the delivery of such possession on the date thereof Respondent No. 2 also deposed that such possession has been delivered to him and in fact he went on to claim improvements in case the plaintiff succeeded. In paragraph 6 of the plaint it self the appellant/plaintiff also made averments suggesting that the property had been handed over by the first respondent to the second respondent seen after the documents was executed on 25th September 1962. In that paragraph after referring to the sale deed which was executed on 25th September 1962. The plaintiff had proceeded to claim damages from the respondent (Which would include the second respondent also) damages which are said to have been suffered by her after the said date meaning thereby after 25th September 1962. In our view there was enough material for the High Court to come to the conclusion that possession of the property had been delivered by the first respondent to the second respondent immediately after the document had been executed, with the result that under Article 10 of the First Schedule to the Limitation Act 1908 the suit was clearly barne. The High Court in our view was right in preventing incurring of further costs by the parties in the trial Court, the District Court and possibly in High Court.

5. In the result we feel that the High Court order should be sustained. The appeal is accordingly dismissed. However, there will be no order as to costs throughout.