
(2010) 06 BOM CK 0158
In the Bombay High Court
Case No : Second Appeal No. 331 of 1996

Balkrishna Pandurang Chunarkar and Others	APPELLANT
Vs	
Vithoba Sahdeo Bandhe	RESPONDENT

Date of Decision : 10-06-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100(4), 3(4)

Citation : (2010) 5 BomCR 714

Hon'ble Judges : Bhangale A.P., J

Bench : Single Bench

Advocate : None, for the Appellant; Masood Sherif, for the Respondent

Final Decision : Dismissed

Judgement

Bhangale A.P., J.—This second appeal is filed at the instance of original defendants challenging concurrent judgment and decree passed by the courts below. Parties are hereinafter referred to as per their original status in the suit.

2. The appeal was admitted by this Court (S.B. Mhase, J. as he then was) vide order dated 18.9.1996. However, questions of law or substantial questions of law were not formulated while admitting the second appeal. Section 100(4) of the CPC enjoins the Court to frame the substantial question on which the appeal has been admitted. However, failure on the part of the Court, though serious, does not affect the process of appeal as is held by this Court in Sonubai Yeshwant Jadhay Vs. Bala Govinda Yadav and Others, . It has been held by this Court in Sonubai's case (supra) that the Court would be entitled to cure such a defect of Court's failure to comply with the mandatory requirements of Sub-section (4) of 3 Section 100 CPC even by formulating such a question at the later stage. None appears for appellant. After going through the memo of appeal and record as also after hearing learned Counsel for respondent, as pleaded, following substantial questions of law arose in this appeal.

(1) After finding that there is no evidence about partition, whether a negative

burden of proving that there is no partition can be on the other side ?

(2) Whether the courts below are entitled to completely ignore to the extent of not even mentioning the legal defence of the right of pre-emption raised by the appellants before both of them?

3. Facts briefly mentioned, are:

First, undisputed facts are, late Pandurang Chunarkar, father of original defendants and Maroti Chunarkar were brothers. Suit house is a single-storeyed house of country tiles comprising of 2 and half tasmās with a Majghar, chhapri, kitchen room; Courtyard in front admeasuring 35 x 25 cubits, situated at Village Bahmani. The plaintiff had sold agricultural field bearing survey Nos. 168-172/2, 160-172 and 173/2 situated at Village Bahmani with total area of 1.51 acres under sale-deed dated 22.6.1971. Plaintiff contended that he had purchased the suit house along with the field under registered sale-deed dated 25.2.1971 for consideration of Rs. 7000/- (Rs. Seven thousand only) and was placed in possession of fields as well as suit house. After about six months, he sold the fields to defendants for consideration of Rs. 15000/- under sale-deed dated 22.6.1972.

3-A It is case of the plaintiff that he had permitted original defendants to occupy the suit house as gratuitous licensees and, therefore, defendants or anybody through them cannot claim any ownership over the suit house or to induct any stranger as sub-licensees in different portions of suit house. Since according to the plaintiff, the defendants had inducted sub-licensees for Rs. 25/- per month, he protested and revoked licence by issuing notice dated 8.1.1983 calling upon them to vacate suit house by 30.1.1983 and also stating that they would be liable to pay damages @ Rs. 10/- per day with effect from 1.2.1983.

4. The defendants by their reply dated 17.1.1983 in response to plaintiff's notice, contended that they have purchased the suit house from Maroti Chunarkar under sale-deed dated 31.8.1971 and also pleaded that it was their ancestral property and claimed title over suit house.

5. The plaintiff contended that Maroti and Pandurang were residing separately in different houses and Maroti had no saleable interest left to execute alleged sale-deed dated 31.8.1971 (Exhibit 63) nor defendants made any application for effecting mutation of their names in revenue record.

6. The trial Court viz. Civil Judge, Junior Division, Saoner in Regular Civil Suit No. 10 of 1983 held in favour of the plaintiff that he had purchased the suit house and obtained possession on 25.2.1971 from Maroti Zolba. The original defendants were held licensees of suit house. It is further held that licence was revoked by notice dated 8.1.1983 while claims of defendants of ownership right in respect of suit house was negatived. Thus, suit for possession was decreed on 19.8.1989.

7. The defendants, dissatisfied with decree, had challenged it in Regular Civil

Appeal No. 241 of 1989 which was dismissed by impugned judgment and order passed by 1st Additional District Judge, Magpur.

8. Learned Advocate for appellants as well as appellants remained absent at the hearings of this appeal. I have heard learned Counsel for the respondent who prayed for dismissal of appeal.

9. I have also perused concurrent judgments and documentary evidence. It does appear that suit house was sold under registered sale deed dated 25.2.1971 to the plaintiff (Exhibit 38) and plaintiff as lawful owner thereof, was entitled to possession of the suit house. The claim agitated by the defendants while resisting suit was duly considered, discussed and rightly rejected by the courts below. It cannot be disputed that the original defendants who were mere licensees were bound to surrender suit house to the plaintiff upon expiry of licence as the licence was duly terminated by notice. The findings and conclusions drawn by the courts below are consistent with admissible evidence on record. The plaintiff claimed ownership of suit house on the basis of exhibit 38, a registered sale-deed and onus shifted upon defendants to disprove plaintiffs version. Defendants failed to discharge onus of proof by satisfactory and acceptable evidence and could not substantiate their contentions by legal and admissible evidence.

10. The evidence of the plaintiff proved upon preponderance of probability that plaintiff is owner of suit house and the defendant could not bring about any contrary evidence to establish that defendants have better title to the suit house. Under these circumstances, the contention of the defendants in their written statement could not be substantiated by any legal and admissible evidence. Therefore, no fault can be found with the findings recorded by the courts below.

11. For the above reasons, neither any substantial questions of law as formulated nor any ground is made out to disturb the concurrent findings recorded by the trial Court and the 1st Appellate Court. Substantial questions of law formulated above are answered accordingly.

12. In the result, second appeal is dismissed with costs.