

(2014) 03 BOM CK 0080
In the Bombay High Court
Case No : Second Appeal No. 250 of 2013

Bhagwat Sheshrao Bhutekar

APPELLANT

Vs

Tulshiram, Baban and Ramdas

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 14 35A

Citation : (2014) 5 ALLMR 613

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

Bench : Single Bench

Advocate : Sawan Alaspurkar, holding for . Mr. Anand Parchure, for the Appellant; Abhay Sambre, for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—Heard Mr. Sawan Alaspurkar, learned Counsel holding for Mr. Anand Parchure, learned Counsel for the Appellant and Mr. Abhay Sambre, learned Counsel for Respondent nos. 1 to 3. This Second Appeal is admitted on the following substantial question of law:

a) Whether the impugned Judgments and Orders are unsustainable and contrary to law requiring interference by this Court?

The answer is in the affirmative for the following reasons:

2. The Second Appeal arises out of Judgment and Order dt. 25.3.2013 passed by the learned Ad hoc District Judge-2, Buldhana in Regular Civil Appeal No. 117 of 2009, which was dismissed. Said appeal arose from the Judgment and Order passed in Regular Civil Suit No. 18 of 2007 on 13.11.2009 by the learned Civil Judge (Jr. Dn.), Chikhali. The suit was filed to recover possession of the encroached land by the defendant. The plaintiff averred that the suit land was encroached upon by defendant. According to plaintiff nos. 1 to 3 in the trial Court, agricultural land bearing Gat No. 58 situated at mouza Sawana, Tq. Chikhali, District Buldhana is owned by the plaintiffs. The plaintiffs claimed that

some portion of the suit land mentioned above was encroached upon by the defendant and therefore, measurements were undertaken in respect of the land in possession of the plaintiffs as well as the defendant to determine the portion encroached upon by the defendant. Thus, the suit so filed is decreed by the Courts below.

3. The grievance of the learned Counsel for the appellant is that there was no whisper in the plaint regarding source of title of the plaintiffs as to how they became owner of the suit land and/or how the suit land came into possession of the plaintiffs as there are three plaintiffs who purchased the land nor there is any whisper in the plaint as to whether it is ancestral property or the property self-acquired by the plaintiffs. There was no such averment at all in the plaint. The plaintiffs relied upon some measurement record which the learned Counsel for the appellant criticised as manipulated record. The trial Court went on to decree the suit against the defendant, though the defendant had denied the contentions by Written Statement filed on 7.7.2007 and prayed for compensatory costs to the tune of Rs. 5,000/- recoverable u/s. 35A of the CPC on the ground that the suit by the plaintiffs is false and vexatious. No issue was framed in respect of the defence pleaded by the defendant. The issue arose as to whether the defendant proved that the suit is false and vexatious and whether it is liable to be dismissed on that count. The learned Counsel for the appellant also contended that though the issue in respect of bar of limitation was framed, it was nowhere dealt with by the Courts below in their judgments. In the suit based on title to the immovable property, it is necessary for the plaintiff to describe the immovable property in the suit clearly giving description sufficient to identify it by boundaries, Gat number etc. Where it is immovable property in respect of which cause of action arose, the plaintiff has to aver title to the immovable property and describe cause of action as to how it arose. The plaint must also aver relevant facts constituting the cause of action to institute the suit.

4. In this case, when the suit was filed on the basis of title seeking relief against the defendant that he must vacate the alleged encroached portion of the suit land, averments were necessary as to how the plaintiffs claimed their title, ownership etc. including averment as to source of the plaintiff's title for seeking relief of possession against the defendant. Under O. VII, R.14 of the Code of Civil Procedure, the plaintiffs are under obligation to produce the document, on the basis of which the suit is filed or atleast to enter the list of such documents on the basis of which suit is filed. The plaintiffs are not expected to take the defendant by surprise in respect of the evidence as to title to the suit land or property. Considering the fact that the Written Statement was also tendered in the suit, it was duty of the trial Court to insist upon production of necessary documents and compliance of provisions of the CPC including the provisions under Order XI regarding discovery and inspection of documents so that the Court is able to frame relevant issues and then to pronounce judgment on all the issues when suit is heard on merits. For all these reasons, in my opinion, looking to the record and proceedings, the trial Court appears to have failed in its duty in

this regard before the suit was fixed for hearing. Hence, the Judgments by the Courts below appear unsustainable and contrary to law. In the absence of averments made by plaintiffs regarding source of their title to the immovable property and non-production of essential documents regarding suit claim and in the absence of averments as to how the plaintiffs came into possession of the suit land, on what basis of title and why and how they are entitled to the relief as prayed for removal of encroachment allegedly made by or on behalf of the defendant. That being so, the Second Appeal is allowed. The proceedings are remanded back to the trial Court. The trial Court shall give an opportunity to the plaintiffs to amend the pleadings in the plaint and after such amendment is made, the plaintiffs shall furnish copy of the amended plaint upon the defendant. The defendant may file additional Written Statement, if defendant so desires, within two weeks of receipt of the amended plaint and then the trial Court shall proceed further in accordance with law so as to hear and decide the suit on merits according to law.

Hence, the impugned Judgment and Order dt. 25.3.2013 passed by the learned Ad hoc District Judge-2, Buldhana in Regular Civil Appeal No. 117 of 2009 and the impugned Judgment and Order passed in Regular Civil Suit No. 18 of 2007 on 13.11.2009 by the learned Civil Judge (Jr. Dn.), Chikhali. Judgment and Order are, therefore, set aside.

The record and proceedings be sent back to the trial Court.

The parties shall approach the trial Court on 21.4.2014.

No order as to costs.