

(2011) 02 BOM CK 0067

In the Bombay High Court

Case No : Second Appeal No. 390 of 1990

Bhanudas Maroti Hujdar, since deceased, through L.Rs (Smt. Sushilabai Bhanudas Hujdar and Others) APPELLANT

Vs

Baburao Maroti Hujdar, since deceased, through L.Rs (Sonabai Baburao Hujdar and Others) RESPONDENT

Date of Decision : 08-02-2011

Acts Referred:

Citation : (2011) 2 BomCR 499 : (2011) 4 MhLj 931

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : V.T. Chodhary, for the Appellant; S.R. Barlinge, for Respondent Nos. 1A, 1C to 1H and Appeal abated against Respondent No. 1B, for the Respondent

Final Decision : Dismissed

Judgement

Shrihari P. Davare, J.—This is a Second Appeal filed by the Appellant (original Defendant) challenging the judgment and order, rendered by the learned Additional District Judge, Jalgaon in Regular Civil Appeal No. 152 of 1983 on 31.8.1990, and also assailing the judgment and decree passed by the learned Joint Civil Judge, Junior Division, Jalgaon in Regular Civil Suit No. 292 of 1980 on 3.11.1982, thereby decreeing the said suit in favour of the Plaintiff. Accordingly, there are concurrent findings against the Appellant herein. The parties are hereinafter referred as per their original status as "the Plaintiff" and "the Defendant".

2. The Plaintiff filed suit for possession and separate allotment of 1/3rd share of C.T.S. No. 2168/110/B2 of Jalgaon. The Plaintiff is the brother of the Defendant. It is the case of the Plaintiff that the suit property bearing C.T.S. No. 2168/110/B2, situated at Jalgaon belonged to the uncle of the Plaintiff and the Defendant, namely Rama. A portion of the said house was sold by Rama to one Babu Krishna Katkar and the remaining portion of the said house was gifted to his wife Laxmibai. Rama and Laxmibai died issueless. Therefore, the Plaintiff and the

Defendant survived the suit property, and hence, in the suit filed by him, the Plaintiff claimed 1/3rd share and to be in possession of the suit property. It is also the case of the Plaintiff that on 18.12.1961, a partition took place between the Plaintiff and the Defendant and each of them got possession of their respective shares. The said partition was effected by placing "kud" in their respective portion to indicate their shares. It is alleged by the Plaintiff that about two months prior to filing of the suit, the Defendant dismantled the kud and took possession of excess portion of the said house and trespassed over that portion illegally and the Defendant caused damage to the Plaintiff to the extent of Rs. 10/ per month. Hence, the Plaintiff served notice dated 10.6.1980 to the Defendant, and thereafter filed the suit for possession of 1/3rd share in the above referred suit property, and also claimed damages and costs of the said suit.

3. The Defendant resisted the suit claim of the Plaintiff by filing written statement and denied the contention of the Plaintiff that he has 1/3rd share in the suit property. He also denied that the Plaintiff was in possession of 1/3rd share and he had taken peaceful possession by dismantling the kud. According to the Defendant, there were two tenants introduced by the Plaintiff in the premises as Karta of the joint family. Thereafter, the premises, where they were residing, were insufficient and inadequate due to increase in their family and because the tenants had vacated the premises, the Defendant occupied the same at the instance of the Plaintiff. He denied that he illegally took the possession of the premises which were in possession of the Plaintiff. It is also contended by the Defendant that since the Defendant had filed Regular Civil Suit No. 295 of 1980 for partition of another house, the Plaintiff has filed present false suit, and consequently, the Defendant prayed for dismissal of the present suit imposing compensatory costs upon the Plaintiff.

4. On the basis of the said pleadings, the learned Trial Court framed the issues. Thereafter considering the evidence adduced and produced by the parties and the submissions advanced by the learned Counsel for the parties, the learned Trial Judge decreed the said suit in favour of the Plaintiff and directed that the Plaintiff was entitled for possession of 1/3rd share in the suit property as described in the plaint and further the Defendant was directed to hand over the possession to the Plaintiff thereof, as well as damages of Rs. 10/per month were also granted to the Plaintiff from the date of filing of the suit till the receipt of vacant possession of the suit property as afore said with costs of the said suit.

5. Being aggrieved and dissatisfied by the judgment and decree, the Defendant challenged the same before the District Court, Jalgaon by filing Regular Civil Suit No. 52 of 1983. However, after re-appreciating the evidence and considering the rival submissions advanced by the parties, the learned Additional District Judge dismissed the said appeal by the judgment and order dated 31.8.1990 and thereby confirmed the decree passed by the Trial Court. Thus, since the Defendant lost the battle before both the lower Courts, he has preferred the present Second Appeal assailing the respective judgments, rendered by both the

said Courts.

6. Although no substantial question of law was formulated at the time of admission of the present appeal, the Defendant/Appellant herein has raised the following substantial questions of law.

(i) Whether it is just and legal to hold that there was a partition between the Plaintiff and his two brothers in respect of the suit house, although there is no documentary evidence on record in that respect ?

(ii) Whether the suit is bad in law for nonjoinder of necessary party, namely Kishan Maroti ?

7. At the out set, it is to be noted that the defendant in the present suit, namely Bhanudas, had filed Regular Civil Suit No. 295 of 1980 claiming partition of the house property bearing C.T.S. No. 2168/110/A, and the entire evidence was recorded in the said suit and it was prayed that the evidence recorded in the said suit be read in the present suit i.e. Regular Civil Suit No. 292 of 1980, and accordingly, purshis to that effect was placed on record at Exh.18 in the present suit. Hence, the evidence recorded in Regular Civil Suit No. 295 of 1980 was read while deciding the present suit, and consequently, the appeal therefrom by the First Appellate Court and same is required to be read in the present appeal also.

8. As regards the evidence recorded in Regular Civil Suit No. 295 of 1980, the Plaintiff has stated that his father Maroti and uncle Rama had purchased the house with their joint funds and thereafter they partitioned the same and the shares of both the parties were given numbers as C.T.S. No. 2168/110A and C.T.S. No. 2168/110B, and later property i.e. C.T.S. No. 2168/110B came to the share of Rama. Some portion of the said property was sold by Rama during his life time to one Babu Katkar and remaining portion was gifted by Rama to his wife Laxmibai. However, Rama and Laxmibai died issueless. Therefore, the Plaintiff and the Defendant who are 3 brothers inherited the property left by Rama bearing C.T.S. No. 2168/110B. Hence, needless to say that the Plaintiff and the Defendant who are three members are having 1/3rd share each in the said property of Rama.

9. Moreover, the Plaintiff and Defendant were paying their municipal taxes in respect of their portions separately. Moreover, the Plaintiff Baburao stated in his deposition that their respective portions were divided by erecting Kud and each was put in possession of his share and he had kept a tenant in his portion; whereas his brother Kishan was residing in his portion. He further stated that the Defendant had taken possession of his premises by removing the Kud when the tenant had left and vacated the premises. In the cross-examination, he has admitted that there is no written document except the city survey record about the partition. However, the fact remains that the Plaintiff and the Defendant have been paying their taxes separately and house No. 2168/110/B2, which leads to the position that there was partition and allotment of respective shares between the Plaintiff and the Defendant and his brother. It has also come in the evidence

that an application was given by the Plaintiff and his brother Kishan to the City Survey office for recording their names after the death of Laxmibai. Accordingly, their names were entered in the city survey record after recording their statements and the said aspect supports the case of the Plaintiff.

10. As regards the evidence of Defendant, it is apparent that they are residing separately from 1961 and are paying taxes of their respective portions of the house bearing C.T.S. No. 2168/110B separately. Moreover, the Defendant has also admitted that the Plaintiff had kept a tenant, namely Lahanu Rama in his portion of the said house and there was a kud/partition between his portion and the tenant of the Plaintiff. He further stated that when the tenant vacated the premises, the kud became old and had fallen down, and therefore, the Defendant took the possession of the portion where the tenant of the Plaintiff was residing. The Defendant further admitted that he had never informed to the Plaintiff or his other brother Kishan about falling down the kud and the remaining kud was dismantled by the Defendant himself. The Defendant further admitted that the Plaintiff had asked for giving back the possession of the premises, which he had taken in his possession by dismantling the kud.

11. Hence, it is manifestly clear from the afore said evidence and the admissions of the Defendant that they had inherited the house C.T.S. No. 2168/110B and they had 1/3rd share each and they had partitioned the same by erecting kud and are residing separately and the Plaintiff had let out his portion of the premises i.e. his 1/3rd share to the tenant and after vacating the said premises by the tenant, the Defendant had taken the possession of the allotted share of the house by dismantling the kud, and accordingly, it is apparent that the Defendant is a trespasser and has not been using the said premises with the consent of the Plaintiff, and consequently, the first substantial question of law is required to be answered that there was a partition between the Plaintiff and his two brothers in respect of the suit house.

12. As regards the second substantial question of law, the learned Trial Judge has dealt with the said aspect and observed that this is a suit for recovery of possession by the Plaintiff, and Kishan Maroti had also equal share in the suit property and the Defendant had taken possession of his share also, but the Plaintiff has no concern with the said fact. Hence, it is further observed by the Trial Court that it is open to Kishan to claim possession from the Defendant, if he desires so, and it is rightly observed that the Plaintiff cannot be restrained from filing the suit for recovery of the possession of his premises, which was illegally occupied by the Defendant, and the Plaintiff has no grievance against Kishan Maroti, and hence, he is not the necessary party, since it is not so that in his absence effective decree cannot be passed. Moreover, the Defendant alone has committed the trespass over the Plaintiff's premises and the Defendant is occupying the premises of the Plaintiff, and therefore, the Plaintiff has rightly filed the suit against the Defendant and no relief is sought by the Plaintiff against Kishan Maroti, and therefore, the Plaintiff has not joined Kishan Maroti as party

Defendant in the present suit, since he is not the necessary party. The observations made by the Trial Court in that respect are based upon the legal footing and same cannot be faulted with, and therefore, the next substantial question of law is required to be answered that the suit is not bad in law for nonjoinder of Kishan Maroti as party Defendant to the suit, since he cannot be construed as necessary party in the said suit, as mentioned herein above.

13. In the circumstances, present Second Appeal preferred by the original Defendant against the concurrent finding given by both the lower Courts does not match with the legal tunes, and consequently, the present appeal lacks merits, and therefore, stands dismissed.