

(2014) 01 BOM CK 0220

In the Bombay High Court

Case No : Second Appeal No. 61 of 2003

Coiro Malgo Velipo, (deceased) represented by LR. and
Others

APPELLANT

Vs

Sociedade Timblo Irmaos

RESPONDENT

Date of Decision : 24-01-2014

Acts Referred:

Citation : (2014) 3 ABR 396 : (2014) 6 ALLMR 136 : (2014) 2 BomCR 470

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : S.D. Lotlikar, Sr. Advocate and C. Padgaonkar, Advocate for the Appellant; D. Pangam and Parikshit Sawant, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Dalvi R.S., J.—This second appeal is filed challenging the judgment of the first Appellate Court in favour of the original plaintiffs, decreeing the suit for injunction which was dismissed by the trial Court. The plaintiffs' suit is for injunction against the defendants restraining them from carrying on with plantation of any nature at a place called Tudou, in village Verlem, and interfering with the plaintiffs' plantation. The plaintiffs claimed to be owning a vast piece of land consisting of various villages of which boundaries were given in the plaint. The plaintiffs claimed to be growing paddy, coconut trees, fruits and having various gardens therein. The plaintiffs claimed their title under a sale-deed dated 26th December, 1952. The plaintiffs claimed that their employee one Surya Shankar Gaunkar used to supervise the property. It was the case of the plaintiffs that the defendants were staying in the place called Tudou. The defendants were allowed to erect their huts for residential purpose and were required to vacate them when called upon by the plaintiffs. The plaintiffs claimed that they had raised a fence in an area of 180 feet x 126 feet in Tudou, about half a mile away from the houses of the defendants for cultivation of coconut trees. The plaintiffs claimed that the defendants uprooted the coconut saplings

and caused damage, against the acts of which the plaintiffs sued the defendants for injunction.

2. The defendants do not claim any right, title or interest in any property other than the fenced portion at the place, Tudou. This fenced portion is, therefore, the property in dispute. It is, therefore, the suit property out of the vast land owned by the plaintiffs. However, the plaintiffs claimed entire land to be the suit property.

3. The defendants denied the plaintiffs' ownership and possession of the entire property, as shown by the plaintiffs. However, the defendants claimed in para 4 of their written statement that they reside in ward Dumivado of Village Tudou, in which they have their 13 houses for more than 100 years. The defendants belong to the members of Velipo, Gaunkar and Bogoto (Bhagat) families. They denied the gratuitous licence claimed by the plaintiffs in respect of their houses. The written statement shows 11 houses of Velipo, one house of Gaunkar and one house of Bogoto. It also shows that the property around the houses is enjoyed by the defendants by cultivation. This is claimed to be joint and ancestral property. The plaintiffs have no quarrel with the houses of the defendants, as also their plantation around the houses.

4. With regard to the claim of fencing a small portion of the property admeasuring 180 x 126 feet in Tudou claimed by the plaintiffs in paragraph 6 of the plaint, the defendants have denied that fact and emphasized that they had constructed the fence during the monsoon of 1976 to grow bananas. They contended that they had sugarcane plantation for 8 years. It could not be raised in the last 3 years due to shortage of water, which is explained in their evidence that it was because the plaintiffs had diverted the water supply. The defendants claimed that after their banana plantation was made, the plaintiffs removed it and put up coconut saplings, which were removed by the defendants. But the defendants denied any damage caused by them. Consequently, the case of the plaintiffs of removal of coconut saplings planted by them by uprooting them is admitted in the written statement itself.

5. The defendants showed their possession in the small portion of plaintiffs' land admeasuring 180 x 126 feet, which is the disputed land, only since 1971 (eight years prior to the written statement which is filed on 30th March, 1979). Thus the cultivation of sugarcane was for 8 years prior to the filing of the written statement and it was not cultivated since 3 years prior to the filing of the written statement. Despite the claim of this cultivation from 1971, the defendants claimed to have fenced that portion of the property only in 1976. The plaintiffs' suit is filed in 1977.

6. The claim of ownership and consequent possession by the plaintiffs of the entire property purchased by them is not the disputed claim, because the defendants claim only 13 houses and the property around the houses which they enjoy. Nevertheless, a large part of the evidence has gone into the plaintiffs

having to show their title to the entire land comprising of various villages and bounded by various villages. The defendants' claim of residence for 100 years in their 13 houses and enjoyment of the property around the houses is not in the suit property fenced as aforesaid.

7. Both the parties examined several witnesses only in respect of the fenced portion of the land and in respect of who cultivated what. The plaintiffs' witnesses were only cross-examined with regard to their knowledge about their entire land, but in which the defendants do not claim any right, title or interest. A part of the evidence is, therefore, wholly inconsequential. The other part of the evidence is pure and simple oral evidence to show possession of either of the parties by cultivation.

8. The learned trial Court dismissed the plaintiffs' suit against the defendants for injunction upon seeing the oral evidence of possession led by both the parties under Judgment

9. The learned first Appellate Court has set aside the judgment of dismissal and decreed the plaintiffs' suit, upon proof of title by the plaintiffs and lack of title by prescription claimed by the defendants.

10. It may be mentioned that since the entire property, of which ownership rights are claimed by the plaintiffs, is not in dispute, it cannot be stated to be the suit property, though it was so described. It may also be mentioned that the property to which any right, title or interest is claimed by the defendants is not upon their purchase, and hence must be a title of adverse possession by prescription, the defendants must show their use, possession and enjoyment for at least 12 years prior to the plaintiffs' suit to non-suit the plaintiffs. The defendants claim possession only after 1971 and upon fencing the property in 1976. The possession claimed by both the parties is by the device of cultivation. All these are only questions of fact. They have been gone into by both the Courts below. They do not arise for consideration in this second appeal at all.

11. The appellants herein (defendants in the suit) sought to raise various substantial questions of law. The questions of law, as raised by the appellants, have been accepted by the Court, so that this appeal came to be admitted and has come up for final hearing. It may be mentioned here that none of these is a substantial question of law, aside from they being rather incomprehensible. It would, therefore, be necessary to set out what the appellants contend as the substantial questions of law required to be answered and decided by the second Appellate Court.

(i) Whether the impugned judgment and decree passed by the Additional District Judge, is vitiated by wrong assumptions on the part of the learned Additional District Judge, viz.

(a) that the property "Tudou" was admittedly covered by the Village Tudou and the neighbouring village;

(b) That the claim of the appellants to the property "Damiavado" was based solely on acquisition of the right by prescription and adverse possession;

(c) That by virtue of the Sale-Deed dated 26/12/1952, the respondent became owner of the property "Tudou";

(d) That because the boundaries of the property purchased by the respondents (wrongly stated as appellants) under the sale-deed dated 26/12/1952 were wide enough to include within those boundaries several villages ipso-facto, the respondent had to be presumed to be owners of all and whatever falling within those boundaries.

(ii) Whether the finding of the ownership of the respondent in respect of the village Tudou could have been reached by the Additional District Judge without scrutinizing the ownership of the predecessor-in-title of the respondent from whom they purchased the so called property known as "Aforamento Perpetua".

(iii) Whether the first Appellate Court was justified in ignoring the possession of the appellants dated back to more than hundred years, on the ground that it was not enough to establish prescriptive title in their favour and whether such possession was liable to be considered in the context of the nature of the suit, viz. Suit for Permanent Injunction Simpliciter, filed by the respondent.

(iv) Whether the first Appellate Court ought to have dismissed the suit of the respondent on the ground that being demonstrably out of possession, they could not maintain a suit for permanent injunction simpliciter against the appellants.

(v) Whether the judgment and decree of the first Appellate Court is vitiated having been based on hearsay upon rejection of relevant documentary evidence as also continuous evidence of possession which if taken into account, would have resulted in a contrary finding to the one arrived at by the first Appellate Court.

12. It is not in dispute that the suit property which is fenced - either by the plaintiffs or by the defendants - called Tudou was covered by the village Tudou. The claim of prescription and adverse possession of the defendants can be seen from the written statement in which they themselves claimed to have cultivated and fenced the property in dispute which is the original suit property. It cannot even be disputed that the plaintiffs acquired ownership under the sale-deed dated 26.12.1952 in view of the production of the sale-deed itself. The boundaries mentioned would have to be seen had there been any dispute with regard to any of the villages in which the proprietary right is claimed by the plaintiffs. Even if the ownership of the plaintiffs is seen after scrutinizing the ownership of the predecessor-in-title of the respondents from whom the plaintiffs purchased the suit property, is a question of fact to be seen from the various inscriptions made in respect of the suit property which shall be considered presently. The possession of 100 years claimed by the defendants would have to be seen by the Court only if it was shown by the defendants and is only a

question of fact. Whether the plaintiffs were out of possession or not, is also similarly only a question fact. Whether hearsay evidence has been considered by the Court which vitiates the decision thereupon, is similarly only a question of fact.

13. At best, therefore, the only question of law which could be considered, as reframed, is whether the plaintiffs" claiming ownership of the vast portion of land called "the suit property" can claim such ownership rights only if they have traced the title of their vendors, or whether the plaintiffs can claim ownership of the entire property without scrutinizing the ownership of their own vendors.

14. Indeed, no party can convey a better title than what he has. No one can transfer the property to which he has no title. Consequently, when title is claimed and if it is disputed, the claimant must trace the title of his own vendor. In this case, the vendors are the predecessor-in-title of the defendants. They owned properties in various villages. They had mortgaged the properties. Since the mortgage amount was not repaid, the property was seized by the Court and auction sale was held. Two groups of persons from the family of Paes and the family Costa purchased 8/9th and 1/9th portions of the entire property. The 8/9th portion of the property belonged to the family of Gaunkars. The 1/9th portion belonged to the property of Velipos. One Bagoto (Bhagat) claimed only a part of the cultivated, land, but not the village land claimed by Gaunkars and Velipos, which was later mortgaged and sold. The plaintiffs purchased 8/9th part of the property from the family of Paes and 1/9th part from the family of Costa. This scrutiny of the title can be done from the old public records, which were Government records contained in the certificates of inscription and description of the aforesaid transfers and acts, produced by the defendants in the suit upon the plaintiffs having produced their own sale-deed.

15. Had there been a dispute with regard to the entire property comprising of various villages, the Civil Court would have certainly scrutinized the ownership of the vendors of the plaintiffs who claimed the title. The suit does not even claim any relief in respect of the entire property purchased by the plaintiffs though it is described as the suit property. The defendants themselves claimed that various lands in villages earlier owned by them have been mortgaged and later sold as per the certificates of inscription produced by the defendants themselves. The right of prescription or adverse possession, if at all has been, and can be only in respect of the small piece of property within the fence admeasuring 180 x 126 feet in which plantations were made by both the parties. Nevertheless, in view of the aforesaid question of law requiring the tracing of title, from the various certificates of inscription, it is seen that the defendants have themselves shown that the plaintiffs" title is duly traced thus:

16. The property purchased by the plaintiffs in villages Verlem, Netorlim, Taluka Sanguem in the province of Astagar and bounded by various villages sold under the sale-deed dated 26/12/1952 is, therefore, the property inscribed in the aforesaid certificates of inscription and description. The inscription of seizure and

inscription of hypothecation show the mortgage/hypothecation made by Gaunkars/Velipos which property came to be seized upon nonpayment of the amount within the prescribed time and later sold by public auction to Paes and Costa. The certificate of inscription shows the various transfers. Upon the death of Paes, the property devolved upon his wife and children in equal shares which is shown by inscription of transmission and also later inscription of transfer. Consequently, out of the 1/9th and 8/9th of the property initially belonging to Gaunkars and Velipos, one half of 8/9th came to be transmitted. 5/9th and 4/9th plus 1/9th constituting the whole came to be sold to the plaintiffs.

17. The inscription showing registration in the Land Registration Office of the aforesaid hypothecation, seizure, transfer, transmission and the consequent sale involve transfer of possession in favour of the person in whose name the inscription is done under Article 953 of the Portuguese Civil Code which has been also considered by this Court in the case of (Silvestre Mascarenhas and ors. Vs. Smt. Shantu Locmu Fotto Dessai and others), Second Appeal No. 11/1964) and in the case of (Narcinva Sinai Nadkarni and ors. Vs. Government of Goa and others), First Appeal No. 177/2005.

18. The possession and transfer of immovable property can be seen only from the documentary evidence since the defendants disputed the plaintiffs' title to the entire property purchased by the plaintiffs. The defendants themselves have produced the various inscriptions made in public records from time to time which carry a presumption of correctness under the Indian Evidence Act. The defendants' claim is disproved by the documents produced by the defendants themselves. It is interesting to note that that relates to the property at Verlem and not at Tudou which forms a small part of the plaintiffs' property. The only property in dispute in the suit is a portion of the property at Tudou, near the houses of the defendants which is fenced either by the plaintiffs or by the defendants and cultivated by either of them. Tracing of title is, therefore, seen. The title would be required to be traced and is traced from the public record. The substantial question of law which falls for determination is, therefore, answered in the affirmative. The plaintiffs had to trace the title of its vendors and have fully traced the title in respect of the entire property purchased, including the disputed fenced property within.

19. The fact of possession and cultivation by either of the parties in the disputed fenced property is only a question of fact. The second Appellate Court cannot interfere with the findings of facts of the first Appellate Court which sets aside the judgment of dismissal of the trial Court and grants a decree in favour of the plaintiffs in respect of the possession of the plaintiffs in the disputed fenced property. In view thereof, the judgments relating to the title by prescription relied upon by the defendants need not be considered. The decree, therefore, stands. The appeal is dismissed.