

(2016) 02 BOM CK 0048

In the Bombay High Court

Case No : Second Appeal No. 35 of 2003

Damodar Dharma Bandodkar and Others

APPELLANT

Vs

Caetano Alberto Fernandes and Others

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2016) 02 BOM CK 0048

Hon'ble Judges : F.M. Reis, J.

Bench : Single Bench

Advocate : A.D. Bhobe, Advocate, for the Appellant; C.A. Coutinho, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—1. Heard Mr. A. D Bhobe, learned Counsel appearing for the appellants and Mr. C.A. Coutinho, learned Counsel appearing for the respondent No. 1.

2. The above appeal came to be admitted on 12/9/2003, on the following substantial question of law :

"Whether the Appellate Court upon coming to the conclusion that (i) Order dated 2/8/1990, partitioning the property is null and void and (ii) Defendant No. 1 is co-occupant of the suit property along with plaintiff Nos. 3 to 5, could have declined relief in terms of prayer clause (b) of the plaint, which was the only relief granted by the Trial Court ?"

3. Mr. A.D. Bhobe, learned Counsel appearing for the appellants has pointed out that the claim of the respondents rests on an order passed by the Survey Authorities in proceedings under the Land Revenue Code which is null and void, as it was passed against a dead person. The learned Counsel further submits that based on such order, which is a nullity, the learned Lower Appellate Court was not justified to come to the conclusion that the respondent No. 1 has established

that they have a right to a portion of the disputed property bearing survey No. 197/3 of Verna Village. The learned Counsel further points out that once the Court came to the conclusion that the order relied upon by the respondent is a nullity, such an order has no basis in law for the Lower Appellate Court to conclude that the respondent No. 1 has a right to the property bearing Survey No. 197/3. The learned Counsel further submits that the Lower Appellate Court while examining the case of the appellants that they had acquired right to the disputed property by prescription and the Lower Appellate Court erroneously found that the appellants have failed to establish their prescriptive title over the suit property. The learned Counsel has thereafter taken me through the findings of the learned Lower Appellate Court to point out that merely because the pleadings are insufficient the claim of prescription was rejected. The learned Counsel further points out that considering that the learned Lower Appellate Court came to the conclusion that the appellants and the respondent No. 1 were co-owners of the property bearing Survey No. 197/3 of Village Verna, the learned Lower Appellate Court was not justified to set aside the Judgment passed by the Trial Judge. The learned Counsel further points out that the learned Trial Judge, based on the material on record, has come to the conclusion that the appellants were entitled for an injunction as prayed for. The learned Counsel further submits that the learned Lower Appellate Court has misconstrued the evidence on record, as well as the oral evidence adduced by the appellants to erroneously come to the conclusion that the respondent No. 1 has a right to the suit property. The learned Counsel has, thereafter, taken me through the pleadings, as well as the material on record to point out that once it is found that the appellants and the respondent No. 1 are co-owners of the property and the order of the Survey Authority dated 2/8/1990 at Exhibit PW.1/G is a nullity, the question of refusing the relief granted by the learned Trial Judge is not at all justified. The learned Counsel as such, points out that without going into the merits of the contentions of the respondent, the learned Lower Appellate Court was not justified to refuse the relief of injunction granted by the learned Trial Judge.

4. On the other hand, Mr. C.A. Coutinho, learned Counsel appearing for the respondent No. 1 has supported the impugned Judgment. The learned Counsel points out that the property of the appellants and the respondent No. 1 is bifurcated by a road from east to west. The learned Counsel further submits that the property of the appellants is registered in the Land Registration Office under No. 21955 and the property of the respondent No. 1 is registered under No. 21933. The learned Counsel further points out that both the Land Registration documents in respect of the respective properties of the appellants and the respondent No. 1 clearly suggest that the northern boundary is of the Comunidade land and the southern is the top of the hill. The learned Counsel further points out that the portions of the property of the appellants, as well as the respondent No. 1 are surveyed separately. The property of the appellants is surveyed under Survey No. 140/1 and that of the respondent No. 1 is surveyed 140/2 of Village Verna. The learned Counsel further submits that the property

towards the southern side of the existing road from east to west is jointly surveyed in the name of the appellants and the respondent No. 1 under No. 197/3. The learned Counsel further submits that the learned Lower Appellate Court has minutely examined the material on record and the admissions of PW.1 to come to the conclusion that the property of the appellants and the respondent No. 1 on the southern side extends upto the top of the hill. The learned Counsel further submits that one boundary of the property bearing Survey No. 197/3 is in fact top of the hill and, as such, it is pointed out that the learned Lower Appellate Court has rightly read the material on record and, as such, there is no case made out for interference in the impugned Judgment and Order. The learned Counsel further submits that the learned Lower Appellate Court has not relied on the order of the Survey Authority whilst examining the claim of title of the appellants and the respondent No. 1 and, as such, according to him, the contention of the learned Counsel appearing for the appellants cannot be accepted. The learned Counsel further submits that as such, the substantial question of law framed by this Court would not arise at all which would call for any interference in the impugned Judgment passed by the learned Lower Appellate Court.

5. I have considered the submissions of the learned Counsel and I have also gone through the record. The contention of Mr. Bhobe, learned Counsel appearing for the appellants that the learned Lower Appellate Court has relied upon the order passed by the Survey Authorities in partition proceedings under the Land Revenue Code to come to examine the claim of title of the respondent No. 1, cannot be accepted. On perusal of the findings of the learned Lower Appellate Court at paras 14, 15 and 16, it clearly emerges that the Lower Appellate Court has relied upon the documents of title, as well as the oral evidence adduced by the parties, coupled with the boundaries shown in the Land Registration documents to come to the conclusion that the property of the respondent No. 1 extends towards the southern side upto the top of the hill, which would include the disputed property surveyed under No. 197/3. This finding of fact arrived at by the learned Lower Appellate Court based on evidence on record, cannot be reappreciated by this Court in the present second appeal. Mr. Bhobe, learned Counsel appearing for the appellants was not in a position to point out that any piece of evidence has been misread by the Lower Appellate Court, nor any document has been left out by the Lower Appellate Court whilst coming to such conclusion. In such circumstances, as there is no perversity in the findings of fact arrived at by the Lower Appellate Court based on correct reading of the evidence on record, the question of any interference in such findings by this Court in Second Appeal under Section 100 of the C.P.C. would not arise at all.

6. Apart from that, on perusal of the Land Registration document of the properties of the appellants and the respondent No. 1, it clearly emerges that the southern boundary of the property is the top of the hill. It is not disputed that the boundary of the portion of the disputed property survey No. 197/3 is also the top of the hill. In such circumstances, the findings of the learned Lower Appellate

Court that the property of the respondent No. 1 extends into the property survey No. 197/3 up to the top of the hill cannot be faulted. In such circumstances, I find that the substantial question of law framed by this Court would not, in any way, assist the case of the appellants to contend that the appellants are entitled for the relief of injunction as granted by the learned Trial Judge.

7. Once it is found that the property of the respondent No. 1 extends into the property survey No. 197/3 which is the subject matter of the dispute in the above suit, there is no question of the appellants getting any injunction against the respondent No. 1 herein. Even, on perusal of the plan produced on record at Exhibit PW.4/A, I find that the house of the appellants is admittedly in the property located on eastern portion of the property surveyed under No. 197/3. The disputed rubble stone wall is located admittedly on the western side of the said house belonging to the appellants. The dispute in the present case is in fact the portion towards the western side of the property claimed by the appellants bearing survey No. 197/3 which appears to be in line with the property towards northern side of the existing road, admittedly belonging to the respondent No. 1. In such circumstances, I find that the substantial question of law framed by this Court is to be answered against the appellants.

8. For the aforesaid reasons, I find no merit in the above second appeal which stands accordingly rejected.