

(2005) 06 BOM CK 0030
In the Bombay High Court
Case No : Second Appeal No. 145 of 1989

Dashrath Ganpat Dhote and Others

APPELLANT

Vs

Gajanan Mahadeorao Wankhede

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : (2005) 4 ALLMR 931 : (2006) 1 BomCR 446 : (2006) 2 CivCC 181 : (2005) 4 MhLj 788

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : Vijaya Thakre, holding for K.R. Lambat, for the Appellant; L.K. Khamborkar, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—This appeal is directed against the judgment dated 16-11-1988 and decree passed by the learned 3rd Additional District Judge in Regular Civil Appeal No. 267 of 1984 whereby the appeal came to be dismissed by confirming the judgment and decree passed by the learned trial Court with a direction that the defendant shall hand over the possession of the suit site as described in para 2 of the plaint to the plaintiff.

2. Brief facts are as under:

The suit site is an open plot which has been purchased by the plaintiff under registered sale-deed dated 22-6-1976 from one Ramarao Shamrao Dhote who is the cousin of defendants No. 1 and 4. The father of plaintiff's vendor Shamrao, Ganpat and Gulab are brothers and they were separate in estate and mess. Defendants No. 1 and 4 are sons and defendants No. 2 and 5 are the wives of defendant No. 1 and 4. Defendant No. 3 is the wife of Ganpat. It is contended that the suit site is in possession of plaintiff by virtue of the aforesaid sale-deed and the defendants have no right, title or interest in it and, therefore, he had

instituted a suit initially for mandatory injunction against the defendant and subsequently amended the plaint and also sought the relief of possession.

3. The defendants resisted the claim of the plaintiff on the contentions that the suit site is the part and parcel of the Courtyard of their residential house which was originally owned and possessed by Ganpat as his self acquired property and had effected partition in the year 1969 dividing his residential house in three parts. The residential house of the defendants was partitioned amongst the defendants and the Court yard of the suit site remained in their joint possession. The bathroom and latrine situated in the suit site was under their joint use. The plaintiff or his father had no right, title or interest in the suit site and they were never in possession of the same. The defendants are in possession of the suit site since 40 years without any obstruction as of right and therefore they have perfected their title to it by virtue of adverse possession.

4. The trial Court on consideration of the evidence negated the contention of the defendants that they have become owner of the suit site by virtue of adverse possession and consequently granted decree in favour of the plaintiff directing the defendant to deliver the possession together with enquiry into mesne profits under Order 20 Rule 12 of the Code of Civil Procedure.

5. Being aggrieved by the judgment of the trial Court, the defendants carried appeal to the District Court. The learned Additional District Judge on re-appreciation of evidence and considering the law position has held that the plaintiff has established his title to the suit site and negated the contention of the defendants that they became owner by virtue of adverse possession. Consistent with these findings, the appellate Court dismissed the appeal. This judgment and decree passed by the appellate Court has been challenged in this appeal by the original defendants.

6. Mrs. Thakre, learned counsel for the appellants contended that the suit site is a part and parcel of the Court yard of the residential house owned by the defendants which was the self acquired property of Ganpat and Ganpat had effected partition in the year 1969 and by virtue of that partition the Court-yard of that house was kept in joint possession and therefore the defendants are in possession of the suit site since last 40 years without any interruption as owners and therefore they have perfected their title to the suit site by virtue of adverse possession. In support of these submissions she placed reliance on the decision of Supreme Court in Bondar Singh and Others Vs. Nihal Singh and Others, and also on the decision of this Court in Jainabai Upre and Others Vs. Ravishankar Vairagade, . She further contended that initially the plaintiff had instituted a suit simpliciter claiming injunction but subsequently amended the plaint and claimed the relief of possession and such course is not open to the plaintiff and, therefore, the substantial question of law that is involved in this appeal is whether the plaintiff who files a suit initially for the purpose of permanent injunction can claim in the same proceeding the relief of recovery of possession.

7. The learned counsel for the plaintiff supports the impugned judgment and decree passed by the appellate Court and contended that no substantial question of law is involved in this appeal as there is concurrent finding recorded by both the Courts below that the defendants did not perfect their title by virtue of adverse possession. He contended that the relief of possession was sought by way of amendment in the plaint and the amendment related back to the date of the suit and, therefore, the question of law does not arise as to whether the plaintiff could claim the relief of possession in the same proceedings which were filed claiming mandatory injunction. Thus, according to him, there is no merit in the appeal and the same deserves to be dismissed.

8. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. The appellate Court has specifically observed in para 20 of its judgment as under :

"It appears more probable that the suit site was owned by deceased Shamrao. It appears that the suit site was lying vacant as Ramrao s/o Shamrao Dhote was moving from place to place due to his transfers as a teacher. The stray use of the suit site by the defendants would not be material for purpose of holding their possession as "adverse" to the interest of said Ramrao. The defendants have not established period of commencement of such adverse possession. Their alternative defence regarding acquisition of title by prescription is quite vague and unacceptable. It is not proved by them as to when Ramrao came to know about their hostile intention. There is no construction in the suit site. Mere use of a pave (ditch) type latrine in the suit site will not be an indication of hostile attitude. The defendants have failed to prove that title of deceased Shamrao or his son Ramrao Dhote has been extinguished."

9. With the aforesaid finding, the appeal was dismissed by the appellate Court and the judgment and decree passed by the trial Court has been confirmed. There is no reason for this Court to take a different view of the matter. The appellate Court is the final Court for fact finding and, therefore, this Court is not required to re-appreciate the evidence and to go into the question of facts. What would reveal from the evidence adduced by the parties is that the defendants did not know as to when their possession had commenced and when they have perfected their title by adverse possession. The plaintiff has purchased the suit site by virtue of the sale-deed dated 22-6-1976 from Ramrao and since then he is in possession and, therefore, it is not possible to accept the contention of the learned counsel for the defendants that the claim for adverse possession has been established. Simply because the defendants are in long standing possession, that per se is not sufficient to draw an inference that their possession has become adverse to the knowledge of the true owner. The authorities on which reliance is placed by the learned counsel for the defendants have no bearing on the facts and circumstances of the present case.

10. It is not disputed that initially the plaintiff had instituted the suit claiming relief of mandatory injunction and subsequently amended the plaintiff and sought

the relief of possession. It is settled law that the amendment relates back to the date of the plaint and, therefore, no question arises as to whether the plaintiff who had filed the suit initially for permanent injunction can claim in the same proceeding the relief of possession also. In the result, this Court is of the considered opinion that no substantial question of law is involved in this appeal. The appeal is devoid of any merit and the same is dismissed. There shall be no order as to costs.