

(2014) 01 BOM CK 0020

In the Bombay High Court

Case No : Second Appeal No. 46 of 2008

Devappa Laxman Gaunkar

APPELLANT

Vs

Balkrishna Nilu Gaunkar

RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Evidence Act, 1872 — Section 44

Limited Liability Partnership Act, 2008 — Section 27

Specific Relief Act, 1963 — Section 34

Citation : (2014) 01 BOM CK 0020

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

Bench : Single Bench

Advocate : R.G. Ramani, Advocate for the Appellant; Sudesh Usgaonkar, Advocate for Respondent Nos. 1(A) to 1(L) and Mr. P. Kamat, Advocate for Respondent Nos. 5(a) and 5(b), Advocate for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Mr. R. G. Ramani, learned counsel appearing for the appellants, Mr. Sudesh Usgaonkar, learned counsel appearing for the respondent nos.1(A) to 1(L) and Mr. P. Kamat, learned counsel appearing for the respondent nos. 5(a) and 5(b).

2. The above appeal came to be admitted by an order dated 07.01.2009 on the following substantial questions of law : (1) Whether the Trial Court fell in error in holding that the plaint did not disclose the cause of action ? (2) Whether the Trial Court fell in error in holding that the suit was barred by limitation particularly, when the appellants were claiming only declaration and not possession ?

3. During the course of the hearing of the above appeal, Mr. Ramani, learned counsel appearing for the appellants has pointed out that an additional substantial question of law needs to be framed which is as under :

When the plaintiffs' case was that the plaintiffs were the owners and in

possession of the suit property, the learned Lower Appellate Court was right in holding that without seeking further relief for declaration of ownership and possession in respect thereof on 12.02.1999 was not within limitation since the survey thereof was promulgated in the year 1972 ?

4. By consent, though Mr. Usgaonkar, learned counsel appearing for the respondent nos.1(A) to 1(L) has seriously disputed that such substantial question of law arises in the present appeal considering that the matter is being heard for final hearing the appeal is also being examined on the said substantial question of law.

5. With regard to the first and second substantial 7 by judgment passed today, this Court relying upon the judgment of the Apex Court has observed at para 5 thus :

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Appellant, is justified to contend that the averments in the plaint that the Appellant obtained the certified copy of the survey records only in August, 1996 have not been disputed by the Respondents in the written statement. Be that as it may, the suit filed by the Appellant is for declaration of title. Under the provisions of the Limitation Act, specially Section 27 of the Limitation Act of 1963, the right to immoveable properties stands prescribed as per the period provided in the schedule of the said Act. Article 65 and 66 of the Limitation Act, 1963, provides that title to the property is lost only by adverse possession for the 8 specified period. In the present case, the finding of the learned Judge that the suit for declaration of title is barred by limitation, cannot be accepted. The cause of action to file a suit for declaration of title is continuous and, as such, a suit can be filed as long as the title to the property subsists. In the present case, unless and until the Respondents establish that they have become owners by adverse possession, the findings of the learned Judge that the suit is barred by limitation is unsustainable and deserves to be quashed and set aside. The Apex Court in the Judgment reported in Daya Singh and Another Vs. Gurdev Singh (Dead) by L.Rs. and Others, , has observed at Para 18 has stated thus :

18. In this view of the matter, we do not find any ground to agree with the findings of the high Court that the suit was barred by time because of its filing after 18 years of entering into the compromise. The question of filing the suit before the right accrued to them by compromise could not arise until and unless infringement of that right was noticed by one of the parties. The High Court in the impugned Judgment, in our view, had fallen in grave error in holding that the suit was barred by time and had ignored to appreciate that the rights of the appellants to have the revenue record accrued first arose in 1990 when he appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. In our view, the High Court was not justified in holding that mere existence of a wrong entry in the revenue records

does not, in law, give rise to a cause of action within the meaning of Article 58 of the Act. No other point was urged before us by the learned counsel for the parties.

Considering the ratio laid down by the Apex Court, merely entering the name in the Survey Records by itself would not give a cause of action to the Appellant/Plaintiff to file a suit for declaration unless his right to enjoy the property has been infringed or at least there is a clear and unequivocal threat to infringe the right of the Appellant/Plaintiff in the suit property. As such, the Lower Appellate Court, was not justified to come to the conclusion that the suit for declaration was barred by limitation taking note of the cause of action as pleaded in the plaint. The first substantial question of law is answered accordingly.

Considering the ratio laid down by the Apex Court and on perusal of the pleadings of the parties, the findings of the learned Judge in the impugned judgment that the suit is barred by limitation cannot be sustained. Merely because the name figures in the survey records, by itself does not give a cause of action to the appellants to file a suit for declaration of title. Such suit is to be filed only if there is any interference or otherwise by a party in such immovable property. In the present case, it is contended by the appellants that they learnt about the wrong entry in the survey records on a particular date which could also constitute a cause of action. Such a suit can always be filed by the plaintiffs on the basis of title on the assumption that the defendants wants to dispute the title in the property. In such circumstances, considering the averments in the plaint to that effect, I find that the findings of the learned Judge that the suit for declaration of title was barred by limitation cannot be sustained and deserves to be quashed and set aside. First two substantial questions of law are answered accordingly.

6. With regard to the additional substantial question of law referred to herein above, Mr. Ramani, learned counsel appearing for the appellants has pointed out that it is the case of the appellants that the property which is surveyed under no.120/21 belongs to the appellants as it forms part and parcel of the Land Registration No.12271 of Book 34 as it also includes the property surveyed under no.132/5. The learned counsel further pointed out that the property now surveyed under no.120/21 is inclusive of the property surveyed under no.120/21(A) as part and parcel of the same property which is an extension of the same property surveyed under no.132/5 registered in the said land registration records. The learned counsel further pointed out that the respondents are claiming to be the owners of the said disputed property surveyed under no.120/21 on the basis of decree passed in Regular Civil Suit No.23/94 whereby the property surveyed under no.120/21(A) was allotted to the deceased respondent no.5 and the property surveyed under no.120/21 came to be allotted to respondent nos. 1 to 4. The learned counsel further pointed out that the property allotted to respondent no.5 was identified by letter "A" whereas the property which was allotted to the respondent nos. 1 to 4 was identified by

letter "B" on the plan attached to the said decree. The learned counsel further pointed out that the appellants were not parties to the said proceedings and as such the question of relying upon the said decree to defeat the claim of the appellants would not arise. The learned counsel further pointed out that in any event, the said decree was a consent decree and according to him such decree could not defeat the rights of the appellants with regard to the suit property. The learned counsel further submitted that the learned Judge has misconstrued the pleadings of the appellants and the material on record to come to the conclusion that the appellants were not entitled for a declaration of title. The learned counsel further pointed out that as far as the property surveyed under no.120/21(A) is concerned, the appellants do not dispute that such area belongs to the deceased respondent no.5. The learned counsel has taken me through the impugned judgment of the Lower Appellate Court and pointed out that the learned Judge has misconstrued the evidence to come to such a conclusion.

7. On the other hand, Mr. Sudesh Usgaonkar, learned counsel appearing for the respondent nos. 1(A) to 1(L) has disputed the said contention. The learned counsel pointed out that admittedly there is a decree passed in the said Regular Civil Suit No.23/94 which has not been challenged. The learned counsel further pointed out that there is no declaration sought by the appellants that the said decree is a nullity. The learned counsel further pointed out that the appellants had deliberately not sought such declaration as according to him the appellants in fact accept a part of the decree in the said suit with regard to the allotment of the property surveyed under no.120/21(A) identified by letter "A" in favour of the deceased respondent no.5. The learned counsel further pointed out that despite of such pleadings in the written statement, the appellants chose not to seek any further relief in the suit. The learned counsel further pointed out that there was another suit filed by the respondent no.1 to 4 bearing Regular Civil Suit No.2/2000 wherein there was an injunction granted against the appellants not to dispossess the said respondents otherwise than due process of law. The learned counsel further pointed out that even in the appeal preferred by the appellants being Regular Civil Appeal No. 33/2005 against the said decree the appeal came to be rejected though the appellants were at liberty if so advised to file a suit on the basis of title. The learned counsel further pointed out that considering the said decree is still in operation the appellants chose not to seek any further relief. The learned counsel further pointed out considering that the relief u/s 34 is a discretionary relief, the question of granting any such declaration in favour of the appellants would not arise.

8. I have carefully considered the submissions of the learned counsel and I have also gone through the records. With regard to the said controversy, the Lower Appellate Court while passing the impugned judgment dated 30.11.2007 has observed at para 16 thus :

16. It cannot be lost sight of the fact that plaintiffs have to stand or fall by their pleadings and they cannot base their case on the weakness in the defence case.

It may be mentioned here that in the cross-examination of PW1 by Ld. Advocate for defendant no.5 PW1 has admitted of bifurcation of survey no.120/21 into another survey number which is 120/21-A by further stating that after deducting the property given to defendant no.5 (i.e. the land in survey no.120/21-A) the balance land belongs to the plaintiffs. In this context, a look at written statements filed by defendants no.1, 4 and defendant no.5 reveals that it is all throughout their defence that defendant no.5 along with his wife had filed a suit bearing no.23/94 in respect of survey no.120/21 and by judgment and decree in the suit, plot "B" i.e. survey no.120/21-B was allotted to defendants no.1 and 4 and plot surveyed under no.120/21-A was allotted to 16 defendant no.5. DW1 has produced the certified copy of this judgment and decree dated 18.2.1995 at exbt. 44. Thus, from the nature of above evidence, coupled with the fact of admission by PW1 (in his deposition recorded in 2005) that plot under survey no.120/21-A belongs to defendant no.5, it becomes apparent that the plaintiffs have suppressed this fact from the Court while seeking the relief of declaration that they are the owners in possession of the suit property surveyed under no.120/21, without amending the plaint as required. Thus, Ld. Trial Judge has therefore erred in declaring the plaintiffs as the owners in possession of the suit property surveyed under no.120/21 when a portion of it i.e. survey no.120/21-A admittedly belongs to defendant no.5.

9. On perusal of the said observations, it is evident that the learned Judge has come to the conclusion that the 17 appellants could not seek for the relief of declaration of title without getting the decree in favour of the respondents quashed and set aside. Though u/s 44 of the Evidence Act, a party can avoid a decree inter-alia obtained by collusion or fraud, there is no pleading to that effect by the appellants in the plaint nor any findings rendered by the Courts below. Unless and until, the appellants plead that such decree has been obtained by collusion or fraud, the question of avoiding the said decree without seeking any declaration of nullity or otherwise would not arise. The Lower Appellate Court was as such justified to come to the conclusion that the question of granting any declaration without any challenge to the said decree would not arise. This has also to be considered in the context that the appellants otherwise do not dispute the correctness of the part of the allotment in the said decree in favour of the deceased respondent no.5. Considering the said aspect, the Lower Appellate Court was justified to come to the conclusion that without challenge the said decree, the appellants were not entitled for any declaration of title.

10. Apart from that, it is not in dispute that the appellants are also facing a decree passed in Regular Civil Suit No.2/2000 dated 28.02.2005 wherein the Court has restrained the appellants from disturbing or interfering with the possession of the property otherwise than due process of law. Even after the said decree was passed, the appellants chose not to seek any further relief of possession or otherwise. In such circumstances, considering that Section 34 of the Specific Relief Act is a discretionary relief and no such declaration can be granted without seeking any further relief which the plaintiff would otherwise be

entitled, I find that the Lower Appellate Court was justified to refuse such discretion. In such circumstances, I find that the said additional substantial question of law does not survive and is answered against the appellants.

11. In view of the above, there is no merit in the above appeal which stands accordingly dismissed with no order as to costs.