

(2015) 06 BOM CK 0184

In the Bombay High Court

Case No : Second Appeal Nos. 358 and 359 of 1990

Kasturabai and Others

APPELLANT

Vs

Chandrakalabai and Others

RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Citation : (2015) 06 BOM CK 0184

Hon'ble Judges : N.W. Sambre, J

Bench : Single Bench

Advocate : A.N. Nagargoje, for the Appellant; Nikhil S. Tekale, Advocate h/f A.S. Gandhi, Advocate and P.V. Mandlik, Senior Counsel, Advocates for the Respondent

Final Decision : Dismissed

Judgement

N.W. Sambre, J—As both the appeals are arising out of common judgment passed by learned 2nd Additional District Judge, Jalna, the present appeals are heard together with the consent of the parties.

2. The appeals were admitted on the following substantial question of law.

"Failure to exercise jurisdiction vested by law in not deciding the issue framed which was necessary for deciding the controversy involves substantial question of law."

3. Few facts as are necessary for deciding the present appeals are as under.

It is not in dispute that the appellant Kasturabai is daughter of Radhabai, who undisputedly was owner of the suit properties.

4. Respondent No. 1 to the appeals namely Chotelal, who is uncle of Kasturabai and husband of Chandrakalabai-respondent No. 2.

5. As late Radhabai, who was mother of Kasturabai died without any male issue, Kasturabai claims to be owner of the suit properties bearing Survey Nos. 61 and 62, which upon implementation of the consolidation scheme in 1970 was given

Block No. 97. Old Survey No. 71 was given Block No. 112.

6. Radhabai, mother of Kasturabai died on 29/12/1965, whereas Kasturabai claimed to have executed sale deed in favour of Chandrakalabai, wife of Chotelal on 19/01/1972. As it is claimed that Kasturabai has succeeded to above referred Survey Nos. 61, 62 and 71 at village Harpala, Taluka Jafrabad, District Jalna.

7. Respondent Chotelal claimed that he was tenant of original owner Radhabai from 1959 and as such was in possession of the property till date of filing of the suit. The sale deed referred supra by Kasturabai has transferred the ownership in favour of Chandrakalabai of Survey Nos. 61 and 71, which is at Exhibit-35 in Regular Civil Suit No. 215 of 1983.

8. Regular Civil Suit No. 215 of 1983 was filed by respondent Chandrakalabai and Chotelal against the appellant, her husband and sons for perpetual injunction restraining them from interfering and obstructing their possession. In the above referred suit, present respondent Nos. 1 and 2 prayed for decree for perpetual injunction based on the above referred sale deed and right of Chotelal as tenant. The said claim of respondent Nos. 1 and 2 was dismissed on 22/08/1984 against which Regular Civil Appeal No. 01 of 1985 was filed by respondent Nos. 1 and 2.

9. Regular Civil Suit No. 236 of 1983 came to be filed by the appellant for perpetual injunction, wherein pleadings were raised in relation to fraud practiced on her by respondent Nos. 1 and 2 in getting sale deed dated 19/01/1972 executed. Learned trial Court by judgment referred supra dated 22/08/1984 partly decreed the suit granting injunction in relation to Gat No. 112, however relief claimed qua Gat No. 97 was rejected.

10. Present respondent Nos. 1 and 2 feeling aggrieved by the judgment referred supra, granting injunction against them in favour of appellant herein, preferred Regular Civil Appeal No. 01 of 1985, whereas Regular Civil Appeal No. 12 of 1985 came to be preferred by present appellant and Regular Civil Appeal No. 197 of 1988 came to be preferred by respondent Nos. 1 and 2. Regular Civil Appeal No. 1 of 1985 preferred by respondent Nos. 1 and 2 was against dismissal of Regular Civil Suit No. 215 of 1983 filed by them for perpetual injunction, which was decided on 22/08/1984, in which present appellant preferred cross objection at Exhibit-10 challenging the findings on certain issues recorded by 2nd Joint Civil Judge, Junior Division, Jalna.

11. In Regular Civil Appeal No. 12 of 1985 the appellants herein, who have chosen to file Regular Civil Suit No. 236 of 1983 for perpetual injunction against respondent Nos. 1 and 2 suffered part dismissal in relation to Block No. 97, which suit of the appellants was decreed in relation to Block No. 112 only.

12. With the consent of the parties, as controversy involved and parties to the proceedings were same, the evidence was led in Regular Civil Suit No. 236 of 1983 and was read in both the suits.

13. Learned 2nd Additional District Judge, Jalna, by his impugned judgment

allowed the appeals preferred by present respondents and set aside the decree passed in Regular Civil Suit No. 215 of 1983 with Regular Civil Suit No. 236 of 1983 by setting aside the same and dismissed Regular Civil Suit No. 236 of 1983 filed by the appellants, whereas the decree in Regular Civil Suit No. 215 of 1983 filed by respondent Nos. 1 and 2 restraining the appellant, her husband and sons from obstructing or interfering with the possession of Chandrakalabai and Chotelal over Block No. 61 as mentioned in the plaint. As such, feeling aggrieved thereby the appellants have preferred present second appeals.

14. Mr. Nagargoje, learned Counsel for the appellants, while questioning the legality and validity of the judgment delivered by the lower appellate Court would urge that, learned lower appellate Court should have gone into all the aspects of issues which were framed and decided by the learned trial Court. In support thereof, he has taken me through the following issues framed by learned trial Court in both the suits at Exhibit No. 24 and 18 and which are answered as under.

15. According to him, learned lower appellate Court by restricting itself to the issue of only settled possession of the parties on the date of filing of the suit, has committed an error of law apparent on the face of record, which call for interference being substantial question of law. In support of his contention, he has invited my attention to the issue of sale deed answered by learned trial Court and would urge that, said issue once was gone into by the trial Court, it was expected of the lower appellate Court to deal with the same instead of restricting itself to the issue of settled possession.

16. So as to appreciate the contentions and demonstrate the perversity of findings recorded by the trial Court in the matter of deciding the issue of settled possession, he has taken me through the evidence of P.W. 1 Chandrakalabai at Exhibit No. 34, P.W. 2 Vijay Magar Exhibit No. 36, P.W. No. 3 Shankar Khambat at Exhibit No. 37, D.W. 1 Kasturabai at Exhibit 39, D.W. 2 Habib Ahmed at Exhibit 45 and D.W. 3 Rambhaji Sormal at Exhibit 46. According to him, over all assessment of the evidence would lead to only conclusion that, the appellant was in settled possession of the suit property.

17. Mr. Tekale, learned Counsel for the respondents would urge that, learned lower appellate Court has rightly restricted itself to the issue of deciding injunction and considerations to be weighed in deciding such issue. He would urge that, for deciding the issue of perpetual injunction, as according to him, the considerations for deciding the said issue are only restricted to settled possession of the parties. While resisting the submissions of the Counsel for the appellant, he has taken me through the observations of lower appellate Court including that of evidence in relation to police complaint at Exhibit No. 43, the application to Tahsildar at Exhibit No. 44, so as to substantiate the possession.

18. Upon rival contentions of the parties and in the light of substantial question of law framed by this Court, I have analyzed the evidence of the parties, particularly such witnesses on whose evidence, the appellants have placed

reliance so as to canvass the issue of perversity in appreciation of evidence.

19. It is required to be noted that, Chandrakalabai - respondent No. 1 to the present appeals, who was examined at Exhibit No. 34 in support of her claim for settled possession, whereas Vijay Magar was examined at Exhibit No. 36, who is witness to the sale deed, Shankar Khambat was examined in the matter of issue of possession, whereas Kasturabai, appellant herein, who is examined at Exhibit No. 39 as D.W. 1 who has sought to place reliance upon the evidence of D.W. 2 Habib Ahmed, D.W. 3 Rambhaji at Exhibit Nos. 45 and 46 respectively, so as to establish the appellant's possession.

20. Perusal of the evidence of the witnesses of the appellant namely Habib Ahmed and Rambhaji at Exhibit No. 45 and 46 reflects that both are claiming to be adjoining land holders of the appellant. The appellant herein, who was examined at Exhibit No. 36, though stated that, she was in possession of Survey No. 61,62 and 71, however has admitted that, she was residing at Malegaon, District Nasik. If the above referred evidence is considered qua location of the suit property, the said property is located in District Jalna. The document at Exhibit No. 40 - letter produced by the appellant herein, which is signed by respondent No. 1 speaks about the condition of crop at the relevant time, which was inferred by the Court below so as to form an opinion that, respondent Nos. 1 and 2 are in settled possession. Apart from above, the evidence of Habib and Rambhaji, though speaks of possession of appellant herein, however, upon detailed scrutiny of the same does not repose any confidence in the evidence of the said witnesses inferring issue of possession in favour of the appellant. Other documentary evidence i.e. certified copy of 7/12 extract of the suit land depicts the possession of Chotelal as a tenant of Survey No. 61 i.e. Block No. 97 upto 1981-82, which was subsequently subject matter of revenue proceedings. The application to the PSO Jafrabad at Exhibit No. 43 written by the appellant herein, depicts that, she has given an admission in the said document that Block No. 97 was in possession of Chotelal as same was handed over on crop share basis, which was having original Survey No. 61 and 62. Exhibit No. 44 - an application given to the Tahsildar by Kasturabai mentioned about handing over of land to Chotelal. Sale deed Exhibit No. 35 which was produced in Regular Civil Suit No. 215 of 1983 speaks of execution of the same in presence of Sub-Registrar.

21. Learned lower appellate Court proceeded to discuss the said evidence, so as to infer possession of the respondents. Amongst other proceedings in Criminal Case No. 360 of 1977 against Chotelal in the Court of Judicial Magistrate, First Class, Jalna, wherein thumb impression of the appellant herein, on the sale deed in question was established resulting into discharge of the respondents. Lower appellate Court noted that, respondents herein remained in possession of the property in question by virtue of sale deed dated 19/01/1972 and the fact that appellant herself admitted to be in possession as tenant.

22. In my opinion, though lower appellate Court has gone into the issue of execution of sale deed, however, lower appellate Court was right in restricting

itself to the issue of settled possession of the parties, so as to decide the controversy as regards grant of injunction claimed by the parties to the present proceedings.

23. The findings recorded by the lower appellate Court, particularly having regard to the oral evidence, analysis thereof, revenue entries, the findings recorded by the Criminal Court and other authorities are rightly appreciated by the lower appellate Court while passing the judgment under challenge.

24. The question of law as is sought to be canvassed that, the issues which are framed by the trial Court should have been reappreciated and re-gone into, in my opinion, are rightly ignored by learned lower appellate Court, particularly, when issue of injunction simplicitor was required to be addressed. Learned lower appellate Court, as such, has rightly restricted itself to the issue of recording findings on the aspect of possession while deciding the issue of injunction raised in the suit.

25. In view thereof, no case for interference is made out. Both the second appeals lack merit, same stand dismissed.