
(2014) 06 BOM CK 0122

In the Bombay High Court

Case No : Second Appeal No. 77 of 2008

Kusuma Manguesh Tirodkar

APPELLANT

Vs

Dilip Satardekar

RESPONDENT

Date of Decision : 20-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 3

Citation : (2014) 4 ABR 634 : (2015) 3 ALLMR 551

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : J.E. Coelho Pereira, Senior Advocate and Vledson Braganza, Advocate for the Appellant

Final Decision : Allowed

Judgement

U.V. Bakre, J.—Heard Mr. Coelho Pereira, learned Senior Counsel appearing on behalf of the appellants. The respondents, though duly served after admission, are absent.

2. This Second Appeal is directed against the judgment, order and decree dated 18/02/2008 passed by the learned District Judge-II, South Goa Margao (First Appellate Court, for short) in Regular Civil Appeal No. 72 of 2007, by which the Judgment and Decree dated 25/09/2007 passed by the learned Civil Judge, Junior Division, Vasco-da-Gama (Trial Court, for short) in Regular Civil Suit No. 11/2006/B, has been confirmed.

3. The appellants were plaintiffs in the said suit whereas the respondents were the defendants No. 1 and 2. M/s. Dempo Properties & Investment Pvt. Ltd., Dempo House, Campal, Panaji-Goa was the defendant no 3 but its name was struck off in terms of order dated 19/10/2006, passed by the Trial Court. The parties shall hereinafter be referred to as per their status in the said suit.

4. The plaintiffs had filed the said suit for directions to be given to the defendants No. 1 and 2 to restore possession of the suit portion encroached by

them from the suit property and identified in the plan annexed to the plaint, to the plaintiffs, by demolishing the construction put up by them therein; for permanent injunction to restrain the said defendants from blocking the holes left in the compound wall on the western side of the suit property or from in any way damaging the same; and mandatory injunction directing the defendants No. 1 and 2 to open holes in the compound wall on the western side of the suit property so as to permit the free flow of water through the said holes.

5. Case of the plaintiffs, in short, was as follows:

The plaintiffs are owners in possession of the suit property, admeasuring 340 square metres identified as Plot D of the entire property named "Orulem" or "Victquelem" bearing land registration No. 20193, Matriz No. 798, old survey (cadastro) No. 273 and recently surveyed under chalta No. 1 of P.T. Sheet No. 131. The suit property is bounded on the east by the property of Comunidade or 25 metres proposed road, on the west by property of defendant no 3, on north by plot E of the entire property and on the south by plot C of the entire property. The plaintiffs constructed a building known as "Mauli Prasad Building" in the suit property wherein some shops and flats have been sold/agreed to be sold and the plaintiffs reside in a flat on the second floor and are running a cell phone spare parts shop and general store on the ground floor. The plaintiffs constructed a compound wall on the northern and southern side of the suit property but while doing so they left out a portion of land along the western boundary of the suit property having width of 2.10 metres on the southern side and 1.50 metres on the northern side which portion was left out for the flow of water. However, the said portion of the suit property lying to the western side of the compound wall which has been left out by the plaintiffs continues to be part and parcel of the suit property and is the suit portion. The defendants No. 1 and 2 have constructed a house in the property of the defendant No. 3, lying to the west of the suit property. The suit property is surveyed under chalta No. 261 of P.T. Sheet No. 131 and the names of the plaintiffs are shown as holders thereof. Sometime in or around May, 2000 the defendants No. 1 and 2 unauthorizedly and abusively encroached in the suit portion of the suit property lying out side the compound wall on the western side and occupied an area of 31 square metres thereof as shown on the plan annexed to the plaint. The plaintiff No. 1 brought this fact of illegal construction to the attention of Mormugao Municipal Council and by letter dated 07/09/2002 the Council directed the defendants No. 1 and 2 to demolish the said illegal construction. The defendants No. 1 and 2 did not demolish the said construction and the Council did not take further action. The suit portion of the suit property encroached by the defendants No. 1 and 2 was in possession of the plaintiffs prior to its encroachment by the defendants No. 1 and 2 and they have no rights to the said land. While constructing the compound wall on the western side, the plaintiffs had left some holes therein for the flow of monsoon water. In the month of June, 2005, the defendants No. 1 and 2 closed the holes kept by the plaintiffs in the said compound wall on the western side and blocked the same and during monsoon of 2005 which caused

great nuisance to the plaintiffs since the water accumulated in the suit property. The plaintiffs addressed legal notice dated 31/08/2005 to the defendants No. 1 and 2 calling upon them to demolish the portion of their house encroaching upon the suit property and also to open the holes in the compound wall but despite receipt of the notice, the defendants No. 1 and 2 did not comply with the same. Hence, the suit.

6. In their Written Statement, the defendants No. 1 and 2 did not deny the ownership of the plaintiffs over the suit property. They admitted that the plaintiffs constructed compound wall on the northern and southern side of the suit property. However, they denied that the plaintiffs kept 2.10 metres space on the southern side and 1.5 square metres space on the northern side beyond the compound wall. The defendants also denied having encroached in the suit property in May, 2000 and specifically stated that father/father-in-law of the defendants No. 1 and 2 had constructed a structure in the alleged encroached area in the year 1962 with the permission of the defendant No. 3 and since then the structure existed.

7. Following issues were framed by the learned Trial Court:

- (1) Does plaintiffs prove that they are owners of suit property?
- (2) Does plaintiffs prove that in May 2000 defendants trespassed into portion of suit property lying outside compound wall on western side occupying an area of 31 sq. mts.?
- (3) Does plaintiffs prove that defendants blocked holes kept to western compound wall?
- (4) What reliefs? What orders?

8. The plaintiffs examined the plaintiff No. 1 as PW1, Mr. Gurudas N. Morajkar as PW2, Mr. Vishram Palekar as PW3, and Mr. Narshiv Nagvenkar as PW4. The plaintiffs produced various documents on record. The evidence produced by the plaintiffs had gone unchallenged since the suit had proceeded ex-parte against the defendants No. 1 and 2.

9. Upon consideration of the entire evidence on record, the learned Trial Court held that the deed of sale dated 16/08/1985 read with the testimony of PW1 proved that the plaintiffs are the owners of the suit property. The learned Trial Court further found that the oral evidence of PW1 and PW2, which had not been rebutted, duly proved that the defendants had encroached upon the suit property lying out side the western compound wall thereby occupying an area of 31 square meters of the suit property. The Trial Court also held that the evidence of PW1 and PW2 which was unchallenged duly proved the blockade of holes on the western side of the compound wall kept by the plaintiffs for free flow of water. Thus, the issues No. 1, 2 and 3 were all answered in the affirmative. However, the Trial Court further observed that the plaintiffs had sought demolition of constructions alleged to have been carried out by the defendants and hence the

primary relief was of mandatory injunction. Since the suit was filed on 09/01/2006 alleging that the encroachment was done by the defendants in or around May, 2000, the Trial Court held that the prayer for demolition of the construction put up in May, 2000 was barred by limitation since the suit for mandatory injunction was required to be filed within three years from the date of cause of action. Consequently, the suit was partly decreed. The plaintiffs' prayer to restore the possession by demolishing construction was rejected. The defendants, their family members, relatives, agents and labourers were permanently restrained from blocking holes left in the compound wall on the western side of the suit property or from in any way damaging the same. The defendants were also directed to open the holes to the said compound wall so as to permit the free flow of water through them.

10. Being aggrieved by part of the judgment and decree of the Trial Court, whereby the prayer to restore the possession by demolishing construction was rejected, the plaintiffs approached the learned First Appellate Court, in Regular Civil Appeal No. 72 of 2007. The First Appellate Court formulated the following point for determination:

(1) Whether the impugned judgment and decree needs interference to the extent of refusal of relief of restoration of possession, of the suit portion encroached upon by the defendants No. 1 and 2, to the plaintiffs, by demolishing the construction put up by them in the suit portion?

11. The learned First Appellate Court held that though the suit as worded appeared to be one for restoration of possession, but it could not be lost sight of the fact that the possession as claimed vide the said prayer was by demolishing the construction put up by the defendants in the same. The First Appellate Court thus held that the main relief sought vide prayer (a) was for demolition of construction in the suit property and consequently for restoration of the land, beneath the same. The learned First Appellate Court referred to the legal notice dated 31/08/2005 sent to the defendants wherein the plaintiffs had instructed to demolish the encroached portion and to open the blocked holes of the compound wall and there was no mention about restoration of possession of the land by the defendants. The First Appellate Court, therefore, held that the Trial Court was right in holding that the suit claiming mandatory relief had to be filed within three years from the date of cause of action which in this case arose in May, 2000 and, therefore, the suit having been filed in the year 2006 was barred by limitation. The learned First Appellate Court further observed that PW3 in his evidence did not give dimensions of the encroached portion and even the plan at Exhibit P-35 which showed the encroached portion in yellow colour, however, did not mention the dimensions of the same. The First Appellate Court, therefore, observed that even in case of grant of relief sought vide prayer (a), it would not have been possible for the Executing Court to execute decree in the absence of dimensions or the extent of encroached area. The First Appellate Court further observed that in order to bring their case within the period of limitation of 12

years, as provided by Article 65 of the Limitation Act, the plaintiffs had to establish by way of cogent and convincing evidence that the defendants had encroached into their property on a particular date/year, but no such date had been mentioned and even no document had been produced indicating that the encroachment was done by the defendants No. 1 and 2 in May, 2000. The First Appellate Court held that it was essential for the plaintiffs to establish and prove the exact date/year in which the defendants No. 1 and 2 had encroached into their property. The First Appellate Court held that in the absence of required evidence, it could not be said that the encroachment was done by the defendants only in May, 2000 and not prior to it and consequently, it could not be held that the suit for recovery of possession of land under Article 65 of the Limitation Act, was within limitation. The learned First Appellate Court held that merely because the evidence of PW1 and her witnesses did not undergo the test of cross-examination, the same could not give benefit to the plaintiffs of claiming that the cause of action to claim the relief under Article 65 under Limitation Act arose in May, 2000 and the suit filed in the year 2006 was within limitation. Consequently, the appeal has been dismissed by judgment and decree dated 18/02/2008 and the judgment and decree of the Trial Court dated 25/09/2007 has been confirmed.

12. The present Second Appeal, filed against the said judgment and decree of the First Appellate Court, has been admitted for following substantial question of law:

Whether the Courts below fell in error in holding that the suit was barred by limitation and that Article 65 of the Limitation Act applied?

13. Mr. Coelho Pereira, learned Senior Counsel appearing on behalf of the plaintiffs submitted that prayer clause (a) in the plaint was for restoration of possession and accordingly had been valued at Rs. 15,500/- and appropriate Court fee for the same was paid by the plaintiffs. He submitted that part of the prayer which was for demolition of construction was consequential to the main prayer of restoration of possession. He pointed out that Article 65 of the Limitation Act for possession of immovable property based on title to the same provides for limitation of 12 years. He submitted that since the encroachment was done by the defendants in the year 2000, suit for restoration of possession filed in the year 2006 was within the said period of 12 years and, therefore, within limitation. The learned Senior Counsel invited my attention to the plan which is at Exhibit P-35. He submitted that the said plan is to the scale and, therefore, the dimensions could be easily calculated from the said plan. He, therefore, urged that the finding of the First Appellate Court to the effect that the dimensions have not been shown is perverse. He submitted that Article 65 of the Limitation Act does not say that if some structure is constructed, the party is not entitled for restoration of possession. He relied upon the Judgments of Hon''ble Supreme Court in the case of: (1)- Sant Lal Jain Vs. Avtar Singh, and (2)- C. Natrajan Vs. Ashim Bai and Another,

14. I have perused the material on record and considered the submissions made and the judgments relied upon by the learned Counsel for the plaintiffs.

15. The defendants No. 1 and 2, after filing written statement before the Trial Court had abandoned the said suit. Even before the learned First Appellate Court, the said defendants were simply represented by their son Devendra Satardekar. In the present Second Appeal, notices were duly served on both the defendants after admission. However, the defendants have chosen to remain absent.

16. The learned Trial Court, upon appreciation of the evidence adduced by the plaintiffs, specifically held that the said evidence which had gone unchallenged, duly proved that in or around May 2000, the defendants trespassed into the portion of the suit property lying outside the compound wall on the western side occupying an area of 31 square metres. The said finding of the Trial Court was not challenged by the defendants. Therefore, it was not open to the First Appellate Court to hold that in the absence of documentary evidence, it cannot be said that the encroachment was done by the defendants only in May, 2000 and not prior to it. I am of the view that the said finding of the learned First Appellate Court that merely because the evidence of PW1 and her witnesses has not undergone test of cross-examination, the same cannot give benefit to the plaintiffs of claiming that the cause of action to claim the relief under Article 65 of Limitation Act arose in May, 2000, is perverse and not sustainable.

17. It should be kept in mind that in their written statement, the defendants No. 1 and 2 nowhere claimed that the suit was barred by law of limitation. No issue of limitation was framed by the Trial Court. The plaintiffs, in terms of prayer clause (a) had prayed that the defendants No. 1 and 2 be directed to restore possession of the suit portion encroached by them from the suit property and identified in the plan annexed to the plaint of the plaintiffs, by demolishing the construction put up by them, therein. In paragraph 12 of the plaint, the plaintiffs had specifically stated that the portion of the suit property was encroached upon by the defendants No. 1 and 2 and that the defendants No. 1 and 2 had no right whatsoever to the said land of the plaintiffs. Thus, the defendants No. 1 and 2 were specifically alleged to be trespassers having no title or interest to the suit portion. Article 65 of the Limitation Act, 1963, inter alia, prescribes limitation for filing suit for possession of immovable property or any interest therein, based on title to be 12 years and the time from which period begins to run is when the possession of the defendants becomes adverse to the plaintiffs. Thus, only if the defendants had claimed to be in adverse possession of the suit portion and proved that the said adverse possession was for 12 years or more, the suit for possession of the immovable property, based on title, as filed by the plaintiffs, would have been barred by limitation. Neither the Trial Court nor the First Appellate Court has mentioned the provision of the Limitation Act which prescribes the limitation of only three years for seeking the relief of mandatory injunction as sought by the plaintiffs. However, it cannot be any other Article than Article 137 of the Limitation Act which provides for limitation of three years

in any application for which no period of limitation is provided elsewhere in the said division and for which time begins to run when the right to apply aggrieves. It should be kept in mind that Section 137 which is residuary Article comes into force only when no period of limitation is provided elsewhere in the said division. However, in case of restoration of possession as claimed by the plaintiffs, period of limitation is provided to be 12 years under Article 65 which falls in the same division. As rightly pointed out by the learned Senior Counsel, Article 65 does not say that if any construction is made in the immovable property, then the said Article does not apply. In case of a suit for possession of land, 12 years rule of limitation applies and the present suit has been brought within said period of 12 years. Therefore, the suit for possession as filed by the plaintiffs is not barred by time and the prayer for demolition of the construction is only an ancillary relief which necessarily follows the delivery of possession. Since, the defendants are the trespassers having no interest or title to the property and further since they did not even claim to be in adverse possession, Article 65 of the Limitation Act, 1963 is applicable.

18. In the case of "Sant Lal Jain" (supra), the Hon"ble Supreme Court has observed thus:

In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.

19. In the case of "C. Natrajan" (supra), the Apex Court has held that if the plaintiff has filed a suit claiming title over the property, in terms of Articles 64 and 65 of the Limitation Act, 1963, the burden would be on the defendant to prove that he has acquired title by adverse possession and if the plaintiff is to be granted a relief of recovery of possession, the suit could be filed within a period of 12 years.

20. The learned Trial Court specifically held that in May, 2000 the defendant trespassed into the portion of the suit property lying out side the compound wall on western side thereby occupying an area of 31 square metres. The said finding of the Trial Court was not challenged by the defendants. The observation of the learned First Appellate Court that the provision of Order VII Rule 3 of CPC was not complied with is perverse and not sustainable since the plaintiffs had produced on record and proved the plan of encroachment which is at Exhibit P-35 and the same is to the scale and, therefore, the dimensions of

encroachment can be easily ascertained.

21. In the circumstances above, the substantial question of law as framed gets answered in favour of the plaintiffs. The impugned judgment and decree of the First Appellate Court dismissing the appeal is erroneous. The plaintiffs are entitled to the relief of restoration of possession of the said land encroached upon by the defendants No. 1 and 2 by directing the said defendants to demolish the said encroachment.

22. In view of the above the appeal is allowed.

(a) The impugned judgment, order and decree dated 18/02/2008 passed by the learned First Appellate Court in Regular Civil Appeal No. 72 of 2007 is quashed and set aside.

(b) In addition to the reliefs already granted by the Trial Court, the plaintiffs are further entitled to the relief as prayed for in prayer clause (a) of the plaint. The defendants No. 1 and 2 shall restore the possession of the suit portion encroached by them from the suit property and identified in the plan Exhibit P-35 to the plaintiffs, by demolishing the construction put up by them, there upon.

(c) Decree accordingly.