
(2015) 04 BOM CK 0181

In the Bombay High Court

Case No : Appeal Against Order Nos. 02 and 08 of 2014

Mahadeorao

APPELLANT

Vs

Nagpur Improvement Trust and Others

RESPONDENT

Date of Decision : 13-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23A, Order 41 Rule 24, Order 43 Rule 1 (u)

Citation : (2015) 4 ABR 620 : (2015) 6 ALLMR 99 : (2015) 4 BomCR 357 : (2015) 5 MhLj 70

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : R.D. Bhuibhar, for the Appellant; R.O. Chhabra, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—Since both the appeals challenge the judgment dated 11.12.2013 passed by the first appellate Court they are heard together.

2. Admit. Heard finally with consent of learned counsel for the parties.

3. The appellant in both the appeals is the original plaintiff who had filed suit for declaration that he was the owner of 0.22 R land in Survey No. 1696 Kh. NO. 12/1A of mouza Babulkheda Nagpur. According to the appellant, the entire agricultural land was initially owned by his father who had sold part thereof to various persons. According to the appellant, the suit property came to be encroached by the defendants in as much as possession thereof was sought to be disturbed by said defendants. Hence, aforesaid suit for declaration and permanent injunction came to be filed.

4. The defendants opposed aforesaid suit by filing separate written statements. The defendant nos. 2 to 11 took the stand that they were owners of the suit property having purchased the same by registered sale deed. A stand was taken

that the plaintiff was concerned with Survey No. 1596 and not Survey No. 1696 which was owned by the said defendants.

5. The original defendant no. 1 also filed its written statement and denied the claim of the plaintiff.

6. The parties led evidence before the trial Court and after considering the entire evidence on record the trial Court recorded a finding that the officers of the defendant no.1 had illegally tried to take possession of the suit property. It further held that none of the defendants had any right, title or interest to interfere with plaintiff's possession in respect of the suit property. On the basis of aforesaid findings, the suit as filed came to be decreed and the relief as sought was granted.

7. The defendant no.1 being aggrieved filed Regular Civil Appeal no. 155 of 2005 while defendant nos. 2 to 11 filed Regular Civil Appeal No. 174 of 2005. Both the appeals were heard together. The first appellate Court held the suit as filed to be tenable on the ground that plaintiff had sought declaration of his lawful possession and suit in said form was tenable. The first appellate Court thereafter proceeded to consider the evidence on record and found that there was a dispute with regard to identity of the suit property. It observed that the trial Court had not considered the question as regards identity of the suit property and the evidence on record had not been properly appreciated. The first appellate Court was of the view that additional issues were required to be framed as regards the ownership of the suit property as well as identity of the same. Hence, by order dated 11.12.2013 the first appellate Court remanded the suit for deciding the same afresh after framing the additional issues as stated in para 28 of its judgment. Said judgment is under challenge in the present appeals.

8. Shri R.D. Bhuibhar, learned counsel appearing for the appellant-original plaintiff submitted that the first appellate Court erred in remanding the proceedings for fresh adjudication. According to him the material available on record was sufficient for deciding the appeal. Said evidence should have been considered by the appellate Court itself while deciding the appeal on merits. He submitted that no grievance was made by either of the parties regarding lack of opportunity to lead relevant evidence nor was any grievance raised with regard to the issues framed by the trial Court. According to him, the requirements of provisions of Order 41 Rule 23A of the Civil Procedure Code (for short the Code) were not satisfied in the present case so as to sustain the order of remand. In support of his submissions the learned counsel relied upon the decisions of the Supreme Court in P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., AIR 2002 SC 771 : (2002) 5 JT 5 : (2002) 1 SCALE 447 : (2002) 2 SCC 686 : (2002) 1 SCR 586 : (2002) AIRSCW 417 : (2002) 1 Supreme 357 as well as decisions of learned Single Judge in Balkrishna Dattatraya Butte, Since Deceased by his Legal Heirs and Others Vs. Dattatraya Shankar Mohite and Others, (1998) 2 ALLMR 740 : (1998) 100 BOMLR 88 and Karbhari and Others Vs. Mr. Devidas, Mr. Kishor, Sau. Meerabai and Mr. Harishchandra, (2014) 5 ABR 113 : (2014) 6 ALLMR 859 :

(2014) 4 BomCR 637 . He, therefore, submitted that the appellate Court ought to have decided the appeals on the basis of material available on record.

9. Shri A. Dhore, learned counsel appearing for the original defendant Nos. 2 to 11 in both the appeals supported the impugned judgment. He submitted that the entire property owned by the appellant's father had been sold which included said 0.22 R land. According to him, the identity of the suit property was the main issue of dispute between the parties and the same itself had not been decided by the trial Court. He submitted that the entire claim of the parties was based on revenue records and hence the first appellate Court was justified in framing the additional issues and remanding the matter for fresh adjudication. He also submitted that the issue of ownership of the suit property was relevant. He relied upon the findings as recorded by the first appellate Court with regard to insufficiency of evidence on record. In support of aforesaid contentions, he placed reliance upon decisions of the Supreme Court in State of U.P. Vs. Abdul Karim and Others, (2007) 9 JT 572 : (2007) 9 SCALE 395 : (2007) 13 SCC 569 : (2007) 9 SCR 540 , REMCO Inds. Workers House Bldg. Coop. Soc. Vs. Lakshmeesha M. and Others, AIR 2003 SC 3167 : (2004) 97 CLT 83 : (2005) 11 JT 360 : (2003) 6 SCALE 789 : (2003) 11 SCC 666 : (2003) AIRSCW 4513 : (2003) 6 Supreme 655 and Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, AIR 2008 SC 2033 : (2008) 3 CLT 23 : (2008) 4 SCALE 718 : (2008) 4 SCC 594 : (2008) AIRSCW 4959 . While supporting the impugned judgment, he also submitted that no prejudice would be caused to the original plaintiff if the opportunity was granted to lead the evidence and record findings in that regard. It was also submitted that the original defendant nos. 2 to 11 in their written notes of arguments filed before the appellate Court had sought remand of the proceedings.

10. Shri R.O. Chhabra, learned counsel appearing for original defendant no. 1 in both the appeals also supported the impugned judgment. According to him it was necessary for the original plaintiff to have proved his title as well as location of the suit property. He, therefore, submitted that there was no reason to interfere with the impugned order.

11. As the appeals arise under provisions of Order 43 Rule 1 (u) of the Code the substantial question that arises is:

Whether the order passed by the appellate Court is in accordance with provisions of Order 41 Rule 23A of the Code?

12. I have carefully considered the submissions as urged and I have also gone through the material placed on record. The trial Court on the basis of the evidence available on record held in favour of the original plaintiff. The appellate Court however found it fit to direct framing of additional issues and to remand the suit to the trial Court. While doing so the first appellate Court held that there was no finding given by the trial Court regarding location of City Survey No. 1696 and whether Kh. No. 12/1K or Kh. No. 12/1D was the suit property. It has further

held in para 22 that the trial Court did not consider the evidence minutely and that there was no proper appreciation of evidence. Similarly in para 25 it observed that there was no inquiry, discussion or appreciation of evidence in the correct manner. It therefore was of the view that additional issues were required to be framed and that the confusion as regards identity of property was required to be resolved.

13. As aforesaid directions of remand have been issued by the first appellate Court in a suit that was disposed otherwise on a preliminary point, it would be necessary to consider whether the requirements of provisions of Order 41 Rule 23A of the Code have been satisfied. For purposes of remand under said provisions the decree passed by the trial Court is required to be reversed and retrial is considered necessary. Before considering said aspect it would be necessary to refer to the law as laid down by the Supreme Court in *P. Purushottam Reddy and another (supra)*. It has been observed by the Supreme Court in aforesaid decision that if the superior Court finds that the judgment in appeal has not been decided by the trial Court in a satisfactory manner and hence is not a judgment in the eye of law then after setting aside said judgment the matter can be sent back for reconsideration. It has also been observed that the Court should be circumspect in directing remand especially when both the parties have led evidence before the trial Court and that they were fully aware about the issues on which said evidence was to be lead.

14. The observations made by the first appellate Court while directing remand of the suit is mainly in respect of location of City Survey No. 1696 and whether the field in question was field Survey No. 12/1K or 12/1D. On the basis of evidence available on record as noted above the trial Court had arrived at a conclusion that the plaintiff was entitled to relief. If the first appellate Court was of the view that the evidence available on record did not support the case of the plaintiff then it was open for it to proceed to decide said point in that regard. One of the requirements of provisions of Order 41 Rule 23A of the Code is that a retrial should be considered to be necessary. The first appellate Court however has not arrived at any finding that the trial as conducted was not in accordance with law and hence retrial was considered necessary. In absence of this vital ingredient it was not justified in remanding the proceedings for fresh trial. Moreover, there is no finding recorded by the appellate Court that the judgment of the trial Court is not a judgment in the eye of law.

15. The relief sought by the plaintiff was with regard to declaration and permanent injunction. The declaration sought was on the basis that he was owner of 0.22 R land and in possession thereof. It was not necessary for the first appellate Court to frame additional issue regarding ownership of aforesaid City Survey No. 1696, Kh. No. 12/1K in as much as entitlement of the plaintiff to the relief of declaration took into its compass the aspect of ownership. While deciding the aspect regarding declaration, the appellate Court could have considered the evidence available on record to come to the conclusion regarding ownership.

Similarly as regards identity of the suit property, it is to be noted that the plaintiff was satisfied with the evidence led in that regard before the trial Court. There was no grievance made regarding any lack of opportunity to lead evidence in that regard. In absence of such grievance being made, the remand of proceedings was uncalled for. Hence considering the law as laid down by the Supreme Court in P. Purushottam Reddy (supra) in the facts of the present case the order of remand passed by the first appellate Court does not appear to be justified. Similar view taken in Balkrishna Dattatraya (supra) and Karbhari Abaji Lodhe (supra) support the submissions made on behalf of the appellant.

16. As regards the submission made on behalf of defendant nos. 2 to 11 regarding there being a cloud on the plaintiff's title, said aspect will have to be considered on merits by the appellate Court. If said defendants are successful in proving that the plaintiff had no title to 0.22 R land then their defence could be accepted resulting in consequential dismissal of the suit. Similarly, the submission that the case of the plaintiff was based purely on revenue records and presently said records stand in favour of said respondents is also a submission to be considered on merits. In Remco Industrial Workers (supra) it was found that the material document going to the root of the matter had not been considered. It is in that light that the Supreme Court found it fit to remand the proceedings for retrial. Such is not the case in the present matter. The evidence available on record is sufficient to decide the controversy either way. Hence ratio of said decision cannot be made applicable to the facts of the present case. Merely because evidence has not been properly appreciated cannot be a ground for remanding the proceedings to the trial Court. Similarly non-consideration of evidence also cannot justify remand of the proceedings. Moreover, the appellate Court can always take recourse to the provisions of Order 41 Rule 24 of the Code in an appropriate case.

17. In view of aforesaid discussion, the order passed by the first appellate Court remanding the proceedings was not justified. The appellate Court ought to have decided the appeals on the basis of evidence available on record. It is to be noted that the original plaintiff is not aggrieved by the order of remand which indicates that he is satisfied with the evidence led before the trial Court.

18. Hence the following order is passed:

1. The judgment dated 11.12.2013 passed in Regular Civil Appeal No. 155 of 2005 and Regular Civil Appeal No. 174 of 2005 is set aside.
2. Both the appeals are directed to be reconsidered by the first appellate Court in accordance with law and on their own merits. The appellate Court shall not be influenced by any observations made in this ao2 and 8.14 order.
3. Both the present appeals are allowed in aforesaid terms. No costs.
4. As both the appeals pertain to the year 2005, the appellate Court is directed to decide both the appeals expeditiously and by the end of October 2015. Order

accordingly.

Learned counsel for the parties undertake to appear before the first appellate Court on 29.04.2015.