

(2004) 07 BOM CK 0140

In the Bombay High Court

Case No : Second Appeal No. 51 of 1991

Manoramabai Amrutrao Deshmukh and Another

APPELLANT

Vs

Laxman Atmaram Kathale

RESPONDENT

Date of Decision : 02-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31
Evidence Act, 1872 — Section 67

Citation : (2005) 1 ALLMR 806 : (2005) 2 BomCR 353

Hon'ble Judges : Mohta Anoop V., J

Bench : Single Bench

Advocate : Vishwas and Sameer Sohani, for the Appellant; T.R. Kankale, for the Respondent

Final Decision : Dismissed

Judgement

Mohta Anoop V., J.—Heard. The second appeal has been taken up by the original plaintiff, the appellants herein, and challenged the judgment, and decree in Regular Civil Appeal No. 152/89 dtd. 20th December, 1990 which arose out of judgment dtd. 19th April, 1989, passed in Regular Civil Suit No. 16/89 whereby, the appellant had claimed relief of permanent injunction restraining the defendant, his servants and agents from doing any damage to the western side wall of their house, more specifically shown as letters "E, F, G, J, I, J, D" in the plaint map.

2. The second appeal has been admitted on 19-6-1991 on the following question of law.

"Construction of a document Exh. 29 styled as sale-deed would be a substantial question of law involved in this appeal Status quo as regards the wall in question".

3. There is no dispute that status quo is in operation in the matter since then, even though injunction was not granted by the lower courts.

4. The appellants contended that they are the owner of the adjacent land admeasuring 80 x 80 ft. surrounded by the dilapidated walls. The appellants had purchased this property from one Prabhakar by virtue of sale-deed dtd. 9th April, 1974. The appellants had annexed the map alongwith the said claim. As averred, the respondent (original defendant) was damaging some portion of the wall shown in the suit shop with the letters, though this portion alleged to be exclusively owned by the appellants by virtue of sale-deed dtd. 9th April, 1974. Therefore, the suit for injunction was filed. The respondent/ defendant had resisted by a written statement, the case of the appellants and in fact denied the title in respect of the property, and also denied the sale-deed dtd. 9th April, 1974.

5. The parties had led evidence in respect of their respective case. However, Exh. 29 i.e. sale-deed dtd. 9th April, 1974 could not be proved by the appellants. The respondent has proved the sale-deed Exh. 42, which was executed in his favour. Plaintiffs have examined three witnesses to support his case.

6. The learned Judge after considering the material, as well as, the evidence led by the parties, held that the appellants are not the owner of the site shown with "E, F, G, H, I, J, D" in the map. The respondent not causing damages to the property in a suit. Respondent is the owner of the site on which he started construction of the wall. The respondent is not entitled for compensatory costs. The suit was dismissed in toto.

7. The appellants, therefore, preferred the First Regular Civil Appeal No. 152/89. The Appellate Court by its order dtd. 20th December, 1990 declared that the appellant has failed to prove the title to the suit property and therefore, dismissed the appeal and the judgment/decreed passed by the trial Court was confirmed.

8. The learned Advocate appearing for the appellants submitted that the Appellate Court's order is perverse and contrary to the law and therefore, needs interference. He further contended that in view of Anita M. Harretto Vs. Abdul Wahid Sanaullah, , the learned Appellate Court failed to frame the issues on necessary points and failed to take into consideration all the points for determination, as contemplated under order 41 Rule 31 of the CPC (for short "C.P.C").

9. The construction of a document Exh. 29 styled as sale-deed, as referred to above, is a question of law. There are no other question of law involved in the suit. There is a concurrent findings, so far as merit of the matter is concerned. After considering the evidence, as well as, documents on record including sale-deed (Exh. 29) dtd. 9th April, 1974 both the courts come to the conclusion that the appellant failed to prove the contents of the sale-deed itself, as well as, title of ownership of the wall in question. This finding cannot be said to be perverse and unreasonable and beyond or contrary to the record.

10. One basic fact for consideration is whether Exh. 29, sale-deed in question, is proved by the appellants. Admittedly, as observed and as not disputed, no

evidence was led to prove the said sale-deed. The executant of the said document or scribe of the attesting witnessed was not examined. The law is settled by our Court as declared in Prakash Cotton Mills Pvt. Ltd. Vs. Municipal Commissioner for Greater Bombay and Another, , and Mohammed Yusuf and Another Vs. D. and Another, , it is held that the contents of documents can only be proved by examining the scribe of the document and further that the contents in the documents is hearsay evidence, unless the writer thereof, is examined before the Court. In view of this position of the law, in my view, there is no question of law involved in this matter, as this fact itself goes to the root of the case. If document itself is not proved then there is no question of construction of such document, even though styled as sale-deed. I see there is no reason for interfering in the concurrent findings given by the Court below.

11. It is true that while deciding the suit for injunction or permanent injunction, title of the property is immaterial. The cases which are referred are AIR 1965 Bombay 380, Ekaribhai bhagwandas and Anr. v. Maganlal Haribhau and Anr., M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, , that the party on the basis of possession can resist the action of others. The Apex Court has observed recently in 2004(3) Bom.C.R. 788, Rama Gowda v. M. Varadappa Naidu, as under, while explaining the meaning of phrase "settled possession"-

"9. It is settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner....."

12. As observed above by the courts below also and as appellants failed to prove the ownership or possession of the property which is a basic lacuna in the suit filed by the appellants for such equitable relief of injunction. There is some dispute about the actual possession and title of the property involved, as contended by the appellants. There is no clear finding on the record of a exclusive possession of the said wall, I am of the view that, as suit was filed by the plaintiff/appellant he should make positive averments, so far as the actual and physical possession of the property in question alongwith material to support the same and definitely, to retain the same, if any, based on the sale-deed or such other document. In the present case as observed, a sale-deed itself could not be proved by the appellants, on the basis of which he was claiming ownership of the wall. I see there is no reason to interfere with the findings given by the Court below. One cannot overlook that the defendants on the contrary, has placed on the record the sale-deed (Exh. 29) and proved the same in accordance with the Law. Therefore, considering the material, as well as, reasoning given by the Court below, in my view there is nothing to interfere or to show that the findings is perverse or contrary to the record. There is no question of law involved, in view of above reasonings also,

13. In the present case the Appellate Court, as well as, Court below, had determined the basic issue of grant of injunction in such matters and accordingly passed the orders by confirming the issues framed and decided by the trial Court. The Appellate Court has also framed the basis issue about the title of the

suit wall and after considering the material placed on the record, as well as, reasoning given by the Court below, determined the issue against the appellant. Therefore, on this fact itself the judgment cited in Smt Anita (supra) is inapplicable. There is no dispute about provisions of C.P.C. as referred. According to me, in the present case, the Appellate Court has examined and determined all the important material issues, based on material on the record, which are necessary for adjudicating such appeal. The Apex Court in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, , and the judgment of Bombay Apex Court, reported in Krishna Laxman Bhatkar (since deceased by LRs) and etc. Vs. Vithal Ganesh Athavale, , clinches the issue as under -

"10. The Judgment of the Appellate Court shows that the Appellate Court has applied its mind to all the submissions made, the documents relied upon and the evidence adduced and has given cogent and convincing reasons for accepting or rejecting each of the submissions made by the respective parties and therefore merely because the point for determination were not framed, like framing of the issue that would not itself vitiate the judgment nor that could be a case for remand to the Appellate Court."

14. In view of this the second appeal is dismissed and no order as to costs.