
(2016) 02 BOM CK 0144
In the Bombay High Court
Case No : Second Appeal No. 431 of 1994

Maratwada Wakf Board

APPELLANT

Vs

Vibhawari and Others

RESPONDENT

Date of Decision : 26-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, Section 100, Section 100(5),
Section 96
Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1963 — Section 3

Citation : (2016) 3 BCR 357 : (2016) 3 Civil LJ 451 : (2016) 3 ICC 174 : (2016)
3 Mh LJ 753

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

Bench : Single Bench

Advocate : Masood Shareef and Aadil Mirza, for the Appellant; C.S. Kaptan,
Senior Counsel, P.S. Chavan and R.S. Kalangiwale, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Chandurkar, J.—1. This appeal under Section 100 of the Code of Civil Procedure (for short, the Code) takes exception to the judgment dated 16.09.1994 passed by the first appellate Court allowing the appeal filed by the respondent nos. 1 to 4 and setting aside the judgment and decree passed by the trial Court.

2. Facts found relevant for deciding the second appeal are that according to the appellant there was a Dargah and graveyard admeasuring about 350 ft. X 250 ft. in Survey No. 153 at Rajura Tahsil, District Chandrapur. The said Dargah and graveyard was shown as Wakf property in the development plan of Rajura town in 1972. In the Government Gazette dated 06.03.1975 it was shown at Sr. No. 49. According to the appellant the defendant no.1-Deepak Deshpande had encroached an area admeasuring 160 ft. X 170 ft. of said property in the month of May 1974. The defendant no.1 had also sold the portion admeasuring 95 ft. X 80 ft. to the defendant no.2 on 29.06.1976. In this background the appellant

filed Regular Civil Suit No. 4 of 1977 for a declaration that the suit property was Wakf property and sought possession of the encroached portion. The suit was filed on 19.01.1977.

3. The defendant no.1 filed his written statement vide Ex. 101. The case as pleaded was denied by the defendant no.1. It was specifically pleaded that said defendant was the recorded owner of Survey No. 153/2 admeasuring 1 acre 30 gunthas. It was pleaded that said property was purchased in a Court auction in the year 1923. In the southern portion there was a petrol pump of the defendant no.1 and on the northern portion the land was vacant. Taking the advantage of the same, some members of the Muslim Community had sought to bury dead bodies there. Reference was made to proceedings under Section 145 of the Criminal Procedure Code, 1898 in relation to said property.

The defendant no. 2 filed his written statement below Ex. 105. The defendant no.2 claimed title to land admeasuring 90 ft. X 80 ft. on the basis of sale deed dated 20.06.1976.

4. The parties led evidence before the trial Court. By the judgment dated 09.07.1985 the trial Court decreed the suit and held that the suit property was wakf property and that the plaintiff was entitled to possession of the same. It was declared that the sale deed executed by defendant no.1 in favour of defendant no.2 was not binding on the plaintiff.

The defendants being aggrieved filed two separate appeals under Section 96 of the Code. By judgment dated 16.09.1994 the first appellate Court allowed both the appeals and set aside the decree passed by the trial Court. Being aggrieved, the original plaintiff has filed the present second appeal.

5. When the appeal was admitted the following substantial question of law was framed:

(1) That S/6(i) of the Wakf Act of 1954, prescribes the period of one year of publication of notification in the Government Gazette dated 06.03.75 for raising any objections for inclusion and notification of property as a Wakf property, for whom the provision would apply to the plaintiff who among other evidence and factors relied upon the publication of the land as a Wakf land for recovery of possession of the said land or upon the defendant who denies the suit land as Wakf property?

It may be mentioned that the second appeal came to be dismissed on 06.09.2012 by holding that it did not give rise to any substantial question of law. This judgment was set aside by the Hon'ble Supreme Court in Civil Appeal No. 9888 of 2014 by order dated 27.10.2014 and the proceedings were remitted for fresh consideration. After hearing the learned counsel for the parties on 03.12.2015, two more substantial questions of law were framed in terms of the proviso to Section 100(5) of the Code. Said substantial questions of law are as under:

(2) In absence of any issue as regards suit being filed within limitation being framed by the trial Court and in absence of such ground in the memo of appeal, whether the Appellate Court was justified in going into said question?

(3) Whether the appellate Court has failed to consider relevant evidence that was available on record?

The learned counsel for the parties were thereafter heard on all the three substantial questions of law.

6. In support of the appeal Shri Masood Sharif, the learned counsel for the appellant made the following submissions:

(a) The suit as filed was in limitation and the appellate Court was not justified in holding that the suit had been filed beyond the period of limitation. It was submitted that as per the Gazette Notification dated 06.03.1975, property admeasuring 350 ft. x 250 ft from Survey No. 153 was a Wakf property. It was alleged in the plaint that in May 1974, the defendant No. 1 had encroached an area admeasuring 160 ft. x 170 ft. Thereafter on 29/06/1976 the defendant No. 1 had sold area admeasuring 90 ft. X 80 ft. to the defendant No. 2. The suit was filed on 19/01/1977 and hence the same was within limitation. According to him the appellate Court fell into error in holding the suit as filed was barred by limitation under the proviso to Section 6(1) of the Act of 1954. The reference to the Gazette dated 06/03/1975 in which the property was shown as wakf property was only for narrating a historical fact. He therefore submitted that the suit as filed was based on the title of the plaintiff and in view of the provisions of Articles 58 and 65 of the Indian Limitation Act, 1963 the suit was within limitation.

(b) The trial Court had not framed any issue as to whether the suit was barred by limitation. The appellate Court however, framed a point in that regard and proceeded to hold that the suit was barred by limitation. In absence of any such plea being raised in the written statement, the appellate Court for the first time could not have gone into the question of limitation especially when such issue was not framed by the trial Court. In that regard he placed reliance upon the judgment of the Hon'ble Supreme Court in Banarasi Das Vs. Seth Kanshiram and others , AIR 1963 SC 1165. It was therefore submitted that in terms of the provisions of Order XLI Rule 25 of the Code, the appellate Court could have framed the issue of limitation and referred the same to the trial Court for adjudication.

(c) It was then submitted that even on merits the appellate Court erred in dismissing the suit. Various documents filed on record were not considered by the appellate Court. The documents at Exhibits-P-5, P-6, 31 to 35, 129 and 154 were relevant for considering the case of the plaintiffs. By not considering these documents in the proper perspective the suit came to be dismissed. It was submitted that the suit property had been properly described in paragraph 5 of the plaint and by producing the map at Exhibit-129, its location was pointed out. Even the report of the Sub Divisional Officer at Exhibit-154 indicated that the

Revenue Authorities desired to await the outcome of the civil suit. It was then submitted that the witnesses examined on behalf of the plaintiff had proved the case as pleaded. The conclusion that there was no valid gift of Survey No. 153 by Ahmed Baig to the Rajura Committee was incorrect. The appellate Court was not justified in doubting the authority of PW-1 in filing the suit especially when the same was not challenged by the defendants in their written statement. It was therefore submitted that if the aforesaid aspects had been properly considered by the appellate Court, the decree passed by the trial Court would have been maintained. In support of his submissions, the learned counsel relied upon the decision of the Hon''ble Supreme Court in *Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi* , (2009) 3 SCC 287.

7. The aforesaid submissions were opposed by Shri C.S. Kaptan, the learned Senior counsel on behalf of the original defendant No. 1. He made the following submissions :

(a) The appellate Court was justified in going into the question of limitation in terms of Section 3 of the Indian Limitation Act, 1963. It was the duty of the trial Court to have considered the question of limitation even if the same was not specifically urged. He submitted that even in the memorandum of appeal, ground No. 9 had been raised to urge that the suit as filed was barred by limitation. Reliance was placed on the judgment in *M/s. Craft Centre and others Vs. The Koncherry Coir Factories, Cherthala* , AIR 1991 Kerala 83 in that regard. He however, fairly submitted that both the defendants were strangers to the wakf and the proviso to Section 6(1) of the Act of 1954 would apply only when both parties to the suit are interested in the wakf. He submitted that this issue stands concluded in view of the judgment of the Hon''ble Supreme Court in *Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and others* , (1979) 2 SCC 468 which has been subsequently followed in *Punjab Wakf Board Vs. Grampanchayat @ Gramsabha* , (2000) 2 SCC 121 and *Karnataka Wakf Board Vs. State of Karnataka and another* , (2003) 5 SCC 555.

(b) The appellate Court had rightly held against the plaintiffs. There were various documents on record which indicated that the title of the suit property vested with the defendants. According to him in the preliminary order passed under Section 145 of the Criminal Procedure Code, 1898 on 12/05/1970 the defendant No. 1 had been shown in possession. Even the town planning map dated 31/10/1972 showed the possession of the defendant No. 1. Therefore, the case that the defendant No. 1 had encroached on the property in May 1974 could not be accepted. He submitted that neither in the Gazette Notification at P-6 nor in Exhibit-155 were the boundaries of the wakf property mentioned. It had been merely stated that it was situated in Survey No. 153. In absence of identification of the suit property, the title of the plaintiff could not be held to be proved. The trial Court failed to go into the question of identity of the suit property and instead held in favour of the plaintiffs. The 7/12 extract at Exhibit-152 showed the possession of the defendant No. 1 since 1962-63. As regards the evidence

led on behalf of the plaintiffs, it was submitted that none of the witnesses could depose in a manner that could prove the case of the plaintiff and their depositions were not helpful for decreeing the suit. In fact the plaintiff had relied only upon the town planning map at Exhibit-155 and the Gazette Notification dated 06/03/1975. It was submitted that in this background when the appellate Court has recorded a finding of fact that the encroachment had not been proved by the plaintiff, there was no scope to interfere under Section 100 of the Code. In that regard the learned Senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others*, (1999) 3 SCC 722, *Rangammal Vs. Kuppuswami and another*, (2011) 12 SCC 220, *Ramkishore Sen and others Vs. Union of India and others*, AIR 1966 SC 644, *Gurunath Manohar Pavaskar and others Vs. Nagesh Siddappa Navalgund and others*, (2007) 13 SCC 565 and the judgment of the Allahabad High Court in *Gauri Shankar Vs. Emperor*, AIR 1930 Allahabad 26. It was therefore submitted that as no substantial question of law arose in the second appeal, there was no case made out to interfere.

By order dated 21.08.2007, Civil Application No. 5545 of 2007 was directed to be heard alongwith the appeal. Considering the averments made in the application, the learned counsel for the intervenor was permitted to address the Court on the substantial questions of law. Shri S.R. Deshpande, the learned counsel for the intervenor adopted the submissions made on behalf of the respondents.

8. I have heard respective counsel for the parties at length and I have also gone through the documents filed on record. The first substantial question of law as framed is with regard to the aspect whether the suit as filed was barred by limitation in view of the provisions of Section 6(1) of the Act of 1954. Under Section 6(1) of the Act of 1954 if any question arises whether a particular property described as wakf property in the list of wakfs is wakf property or not, the Board or the mutawalli of the wakf or any person interested therein can institute a suit in the civil Court. However, as per the first proviso to Section 6(1) of the Act of 1954, no such suit can be entertained by the civil Court after the expiry of one year from the date of publication of the list of wakfs under Section 5(2) of the Act of 1954. In *Board of Muslim Wakfs* (supra) it was held by the Hon'ble Supreme Court that the provisions of Section 6(1) of the Act of 1954 relate only to those persons who are interested in the wakf. The purpose of Section 6 of the Act of 1954 was to confine disputes between the Wakf Board, mutawalli and the person interested in the wakf. It was held in the aforesaid decision that the Act of 1954 deals with wakf, its institutions and its properties and therefore it would be logical and reasonable to infer that said provisions empower only those who are interested in the wakf to institute suits. The judgment in *Board of Muslim Wakf* (supra) was considered by the Hon'ble Supreme Court in its subsequent judgment in *Punjab Wakf Board* (supra). By following the earlier law, the Hon'ble Supreme Court in *Punjab Wakf Board* (supra) made a clear distinction between a dispute amongst the wakf and the mutawalli or the persons claiming under him and a dispute with a stranger. It is,

therefore, clear that the period of limitation as prescribed by the proviso of Section 6(1) of the Act of 1954 would apply only to those who are interested in the wakf.

9. In the present case the original defendants were not persons who were interested in the wakf. The dispute was between the wakf board and strangers. Thus considering the ratio of the judgment in Board of Muslim Wakf (supra) it will have to be held that the period of limitation of one year commencing from the date of the notification would not be applicable in the present case. The appellate Court though referred to the decision in the Board of Muslim Wakf (supra), it failed to apply the ratio of aforesaid decision in the proper perspective. The appellate Court fell into an error when it held that the plaintiff should have filed the suit within a period of one year from the notification dated 06/03/1975 and as the same was not done, the suit was barred by limitation. The finding recorded by the appellate Court against point no.1 is therefore liable to be set aside. Accordingly substantial question of law no. 1 is answered by holding that the proviso to Section 6(1) of the Act of 1954 would not apply in the present case and the suit as filed was not barred by limitation.

As the finding recorded by the First Appellate Court on the question of the suit being barred by limitation has been set aside, it is not necessary to further delve into substantial question of law No. 2 as nothing would turn even if said question is answered in favour of the appellant.

10. The substantial question of law No. 3 pertains to the failure on the part of the appellate Court in considering relevant material that was available on record while deciding the appeal. Before considering said aspect of the matter it would be first necessary to refer to the scope of interference under Section 100 of the Code by referring to the decisions cited by the learned counsel. In Kondiba Dagadu Kadam (supra) it was held by the Hon"ble Supreme Court that it was not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the first appellate Court which is the last court of facts. Where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court would be binding on the High Court in Second Appeal. It is only if the conclusions drawn are contrary to the mandatory provisions of law or the pronouncements made by the Apex Court or the same are based on inadmissible evidence or arrived at without any evidence that a case for interference would be made out.

In Narendra Gopal Vidyarthi (supra) it was observed that findings of fact could give rise to a substantial question of law in the event such finding is based on no evidence and/or while arriving at said finding the relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration. The general rule that the High Court would not interfere with the findings of the Courts below is not an absolute rule.

11. The suit as filed by the appellant proceeds on the premise that as per the

Notification at Ex. P-6, at Sr. No. 49 it was stated that there was a graveyard admeasuring 350 ft. X 250 ft. in Survey No. 153 at Rajura. The suit further proceeds on the premise that the defendant no.1 had encroached upon the area of 160 ft. X 170 ft. After encroaching said portion, area of 95 ft. X 80 ft. was sold to the defendant no.2. The suit is principally based on the copy of the notification at Ex. P-6, the Town Planning Map dated 31.10.1972 at Ex. P-5 and the sale deed dated 29.06.1976 executed by the defendant no. 1 in favour of the defendant no. 2. The other documentary evidence that was relied upon by the appellant is Ex. 129 which is a map drawn by an Overseer and the report of the Sub Divisional Officer dated 29.03.1978 at Ex. 154.

On the other hand the defendant no. 1 has relied upon the documents at Ex. 221-P and Ex. 221-A. These are the certified copies of the decree along with a map showing the property "Sardar Manzil" that was purchased in an auction by the father of the defendant no. 1. The revenue documents at Exs. 141 and 142 are also relied upon to show the ownership and possession of Survey No. 153/2 by the father of defendant no. 1. The defendants have also relied upon the documents at Exs. 31 and 32 relating to proceedings under Section 145 of the Criminal Procedure Code, 1898. Besides this, the parties have also relied upon oral evidence of their witnesses.

12. A perusal of the document at Ex. P-6 indicates that in said notification there is a reference to the graveyard in the area admeasuring 350 ft. X 250 ft. However, no boundaries have been mentioned to indicate said area in Survey No. 153. It has come on the record that Survey No. 153 was admeasuring 10 acres out of which Survey No. 153/2 admeasuring 1 acre 30 gunthas was purchased by the father of the defendant no. 1 in a Court auction. From the perusal of Ex. 31 which is an order dated 31.12.1971 passed by the Additional District Magistrate in proceedings under Section 145 of the Criminal Procedure Code, 1898 it has been held therein that the defendant no.1 was entitled to remain in possession of Survey No. 153/2 admeasuring 1 acre 30 gunthas. This position is further clarified by the documents at Exs. 141 and 142 indicating the possession of defendant no.1.

13. In so far as the map at Ex. P-5 is concerned the same is the development map of the city of Rajura. This map is dated 31.10.1972 which was drawn by the Town Planning Officer. This map is not prepared as per any scale and the same does not indicate the exact area of Survey No. 153. The map at Ex. 129 dated 10.01.1977 was drawn by P. W. 2-M.M. Ali who was an Overseer. He was examined at Ex. 128 and in his deposition he admitted that he had not seen the survey map showing the exact location of the wakf property. He further admitted that he was not knowing whether the graveyard was existing prior to the road or not. He did not tally the four corners of the Survey Commissioner Map with the actual corners on the spot. This witness also admitted that there was no Dargah in the area and there were only graves existing. From his deposition it is clear that the map Ex. 129 has not been prepared by using any technical skill. Without

seeking the survey map of the entire plot, the map at Ex. 129 has been prepared.

In so far as the other map at Ex. 155 is concerned the same is prepared by the Town Planning Department, Chandrapur. This map was brought on record in the deposition of P. W. 6-Jahid Hussain at Ex. 152. According to him the same was a certified copy of the map which was issued by the Town Planning Department, Chandrapur. In his cross examination he categorically admitted that there was no documentary record in his possession except the town planning map and the Gazette Notification to show the area of the graveyard and the Dargah. The person who had drawn the said map was not examined. Even in said map there are no dimensions of Survey No. 153 being mentioned.

14. In so far as the title of the plaintiff to the property in question is concerned, the plaintiff had examined P. W. 3 Khalilulla Beg at Ex. 132. According to the said witness his father Ahmed Beg was the Pattedar of Survey No. 153 and he had gifted said land to the plaintiff. There is however no evidence whatsoever record to indicate that either Ahmed Beg was the Pattedar of Survey No. 153 or that after executing the oral gift, any mutation entry or other revenue records were prepared by the plaintiff to indicate its ownership. On the other hand the title in respect of Survey No. 153/2 has been proved by the defendant no.1 by relying upon the documents at Exs. 221-P and 221-A. The revenue records at Exs. 141 and 142 also indicate the ownership and possession of defendant no. 1 of Survey No. 153/2.

15. All this evidence was considered by the appellate Court after which it held that the plaintiff had failed to prove that Survey No. 153 was gifted by Ahmed Beg to it. It further held that the maps at Exhibit Nos. P-5, 129 and 155 did not prove the case of the plaintiff as the said maps did not indicate the exact location of the suit property nor were said maps proved in accordance with law. It was found that the evidence of P. W. 2 and P. W. 6 was not sufficient to prove the case of the plaintiff. It is on that basis that the appellate Court held against the plaintiff.

16. From the above therefore it cannot be said that the first appellate Court while holding against the plaintiff has either ignored any relevant admissible evidence or that it has taken into consideration any inadmissible evidence. Ratio of the decision in Narendra Gopal Vidyarthi (supra) would therefore not be applicable to the facts of the present case. On the other hand the observations of the Hon'ble Supreme Court in Kondiba Dagdu Kadam (supra) in paragraph 5 of said judgment would apply on all fours. Further as held by the Hon'ble Supreme Court in Ramkishore Sen & ors. (supra) there can be no presumption in favour of the accuracy of any map drawn under Section 83 of the Evidence Act. It was necessary for the plaintiff to have actually proved the dimensions of the property that was alleged to have been orally gifted to it by Ahmed Beg and thereafter also proved the encroachment to the extent of the area admeasuring 160 ft. X 170 ft. There is no evidence whatsoever on record to prove any such encroachment by the defendant as alleged. On the contrary the defendant no.1

has shown his title to Survey No. 153/2 that was purchased in a Court auction. It is, therefore, a case not being proved by the plaintiff for want of sufficient evidence. Hence, there is no scope whatsoever to interfere with the findings recorded by the first appellate Court. The substantial question of law No. 3 is answered by holding that the appellate Court has not failed to consider all relevant material that was available on record. After considering all the relevant material, the suit has been dismissed.

17. In view of the aforesaid findings, it is held that there is no case made out to interfere with the judgment of the first appellate Court under Section 100 of the Code. No substantial question of law arises so as to upset the judgment of the first appellate Court. The second appeal is therefore liable to be dismissed. The same is accordingly dismissed with no order as to costs.