

(2013) 10 BOM CK 0230

In the Bombay High Court

Case No : Second Appeal No. 32 of 2005

Maria Benvinda Severina Dias Costa

APPELLANT

Vs

Lilia Kher and Others

RESPONDENT

Date of Decision : 18-10-2013

Acts Referred:

Citation : (2014) 2 ABR 58

Hon'ble Judges : N.H. Patil, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

Naresh H. Patil, J.—This Second Appeal is filed against the Judgment and Decree dated 5th November, 2004 passed by the IInd Ad hoc Additional District Judge at Panaji in Regular Civil Appeal No. 56 of 2001. The appellant is the original defendant. In the present case, the Plaintiffs filed a suit with substantive prayer clauses:

(a) For a declaration that the Plaintiffs are the owners in possession of the suit property.

(b) For a direction to the Enquiry Officer, City Survey at Panjim, to delete the name of the Defendant from the records maintained by the same officer under the Land Revenue Court and to insert the names of the Plaintiffs in the said records.

2. The plaintiffs contended that they are the owners in possession of a property situated at Alto de Pilotos bearing Chalta Nos. 87 to 91 of P.T. Sheet No. 44 of City Survey of Panjim bounded on the east with the lane of steps, on the West with the hill and property of Leonardo Fernandes and others, on the North with the lane which separates this property from the house of Carmina Fernandes and on the South with the urban property of Antonio D'Souza. The said property bears matriz No. 401 old corresponding to 306 new and this property bears No. 6645 at pages 6 of Book B 18 New.

3. The plaintiffs contended in the plaint that the suit property belongs to Caetano Mariano Fernandes, the father-in-law of the plaintiff No. 1 and on his death, the husband of the plaintiff No. 1, the father and father-in-law of the remaining plaintiffs late Antonio Nery Francisco Fernandes, became the sole owner. The Caetano Mariano Fernandes was married to Ana Florinda George alias Florinda Fernandes. The said Antonio Nery Fernandes expired on 05/06/1976 leaving behind him the plaintiff No. 1 as his co-sharer and the remaining plaintiffs as his heirs.

4. The plaintiff No. 1 had approached the Rent Controller in Case No. Rent/ARC/24/86, and at that time, it came to notice of the plaintiff No. 1 that the records of the same showed the suit property recorded in the name of the Defendant as per the Judgment and order dated 13/06/1986 delivered by Enquiry Officer, City Survey, Panjim. The defendant, thereafter, gathered copies of the documents and then sent a notice to the tenants of the plaintiff Mr. Nareshwar Maralkar informing that the defendant is the owner of the suit property and they should pay rent to him. This letter was issued on 18/02/1996.

5. The plaintiffs specifically contended that the suit property is the property of the plaintiffs and parts of the same have been in possession of the plaintiffs for more than 30 years. The plaintiffs, thereafter, decided to file suit claiming that they are owners of the suit property. The cause of action arose on 18/02/1986 when the tenants of the plaintiffs received letter from the defendant.

6. The defendant filed written statement, in which it was contended that the Deed of Sale dated 04/04/1946, was duly registered in the Notary Office of Fernando Jorge Colaco. Mr. Licurgo Pedro Paula da Costa, purchased from Dr. Joaquim Joao Aleixo do Rosario da Santa Rita Colaco a house property. The said property was registered in the Land Registration Office of Ilhas under number 2177 of Book B 6 New, corresponding to Lote No. 13 and also another property which is one eighteenth part, corresponding to Lote No. 14 of the property known as "Bairro Alto Dos Pilotos", both situated at Panaji, Goa. It is contended that the defendant managed to get the possession of few tenements while few remained with the tenants. The plaintiffs contended that the suit property belongs to them and they are the owners of the said property. The plaintiffs claim regarding ownership was decided by the Deputy Collector.

7. The application under Order VI, Rule 5 of CPC was filed by the defendant on 19/06/1987. Paragraph 5 of the application reads as under:

5. The plaintiffs have pleaded in para 8 that the suit property was the property of the plaintiffs and parts of the same have been in their possession. The Defendant wants to know the following:

(a) Which parts of the suit property have been in possession of the Plaintiffs for well over thirty years.

8. In the reply to the application dated 19/06/1987 filed by the plaintiffs,

paragraph No. 6 reads as under:

6. With respect to the contents of paragraph 5, all the parts of the said property, each part constituting one residence, have been in possession of the Plaintiffs for well over 30 years.

9. The plaintiffs examined Mr. Patrick Fernandes as PW 1, PW 1 deposed that the suit property bears registration No. 6645 at page 6 of Book B 18 new. The suit house is part of the structure bearing cadastral house No. 183 which belongs to grandfather of the plaintiff No. 1. It is deposed that the plaintiff No. 1 entered into an agreement with Chintamani Bhairav Monrelkar. The plaintiffs have been paying house tax. There are four residents in the structure residing in House No. 183. The house tax receipts (26 in number) have been produced in the Court which are at Exhibit P7 (colly). The PW 1 was cross-examined, during which he deposed that the property originally belonged to his grandparents. No Inventory proceeding was initiated after the death of his grandparents. About 14 children were born to his grandparent from which, some of them died. Out of the 14 children he know only his father and his two sisters, who got married. These two sisters had left behind their children. These sisters are not alive, but their children are alive. A deed of succession was made on the death of his parents.

10. The PW1 further deposed that the property bearing registration No. 6645 belongs to his father. The PW1 further deposed that he cannot produce the deed of succession which he had undertaken to produce. He admitted as per the Exh-PI this property was registered in the name of Caitain Marian Fernandes and not in the name of his father.

11. The plaintiffs examined the tenant, who is residing in the suit property as PW 2-Meera Shapurkar. She deposed in cross-examination that she was residing in the house of plaintiff No. 1 but she has not seen the documents of the property. According to the witness, the property belongs to the plaintiff No. 1 only because she pays rent towards it to the plaintiff No. 1. The PW 3 - Dynaneshwar Maralkar who is the tenant, deposed in his cross-examination that he used to pay rent to the plaintiff No. 1 and he did not know who is the owner of the property. The Hill top guest house belongs to defendant No. 1(b). PW 4-Gil D'Souza, who resides at Corte Oiteiro, Panaji deposed that he has not seen the documents of the property. PW 5-Jose Femandes and PW 6 - Hanifa Abraham deposed that they do not know to whom the land on which their house stands, belongs.

12. Defendant No. 1(b) examined himself as DW 1 in the Court. He deposed that he has property in Panaji, which was purchased by his father-in-law Licurgu D'Costa on 04/04/1946. This property is registered in the Land Registration office under Nos. 2177 and 588. Presently, it stands registered in the name of deceased defendant in the land registration office. This property comprises of two plots bearing Nos. 13 and 14, Houses, some coconut trees and some mango trees exist in these two plots. The defendants are the owners of the houses in the disputed property. In his cross-examination, the defendant No. 1(b) has

deposed that it is not true to suggest that one of the boundary owners of his plot is Florinda Fernandes. When he took over the property he did not enter the house in the list of suit property, as some people were residing therein. The defendant No. 1(b) clearly stated in the cross-examination that he does not know to whom these persons are paying rent. He further deposed that there is a case pending before Rent Controller bearing No. 24/86. He admitted that the plaintiff No. 1 and her husband leased this portion to three persons and also to Mr. Marolkar. One of the tenants Mr. Fernandes was residing in the portion of the house. The defendant No. 1(b) further deposed that her mother-in-law never resided in any of the portion of the house. To the suggestion that the property was not forming part of Land Registered under No. 588, the defendant No. 1(b) submitted that he does not know about that. He admitted that as per Exh-DWI/B, the description of the property bearing No. 2177 is bounded on the south by the house of Florida Fernandes. He admitted that he never paid house tax of the house to the Municipal Council. To one suggestion, the defendant No. 1(b) replied, which is recorded by the Court as under:

I never paid house tax on the suit building as I knew that the suit building did not belong to me, I say that you can say so.

13. The defendant No. 1(b) did not dispute that his mother-in-law did not take any steps to recover the rent from the tenants from the suit building during the period from 1968 to 1986. According to the defendant No. 1(b), he was not aware of the above fact. The plaintiffs placed reliance on Land Registration document at page No. 99, which was a certificate in respect of Land Registration documents of 25th September, 1971 produced by the plaintiffs. The plaintiffs also relied upon the plan at page No. 107 along with other documents. The Trial Court framed following issues:

14. By the judgment and decree dated 31/03/2001 the Civil Judge, Senior Division, Panaji-Goa dismissed the suit.

15. The plaintiffs preferred an appeal. The Lower Appellate Court reversed the judgment of the Trial Court and allowed the appeal by setting aside the Judgment and decree of the Trial Court by Judgment and Decree passed in Regular Civil Appeal No. 56 of 2001 on 05/11/2004. The property bears Chalta Nos. 87 to 91 of P.T. Sheet No. 44 of City Survey of Panaji bearing land registration No. 6645. The Lower Appellate Court in its finding stated that the appellants have established their possession over the suit property on the basis of Section 110 of The Indian Evidence Act, 1872. It was observed that in the City Survey records i.e. in Chalta Nos. 87 to 91 the name of respondent No. 1 figures as occupant. The appellants had challenged the order of City Survey Inquiry Officer. The Lower Appellate Court observed that the order of Revenue authorities cannot confirm title.

16. The original Defendants/Appellants preferred this Second Appeal. The Second Appeal was admitted by framing following substantial question of law:

Whether, when the boundaries in the documents produced by the Plaintiffs did not admittedly tally with the boundaries mentioned in the plaint, a declaration that the Plaintiffs were owners and in possession of the suit property can be granted.

17. The learned Senior Counsel appearing for the appellants submitted that the Lower Appellate Court has no jurisdiction to observe that due to passage of time of 100 years boundaries of the suit property have got changed. This observation was made without supportive documentary material. Mere tax receipts do not confers right on the person to claim title. It was submitted that the sale deed of the suit property was executed by father-in-law of the plaintiffs. The said deed was registered with the Land Registration Office. The suit was filed by the third party based on the title which was declared though the present plaintiffs were not parties to the proceedings. The learned Counsel states that pending the proceeding in the Deputy Collector present suit was filed by the plaintiffs. The plaintiffs have neither raised a plea of adverse possession nor the plaintiffs could claim they acquired title by way of right of prescription. The learned Senior Counsel further submitted that the suit land is not in the possession of plaintiffs, but it is in the possession of the defendant. The documents of title do not tally with the boundaries of the suit property. The learned Senior Counsel placed reliance on the following judgments:

1. State of Haryana Vs. Mukesh Kumar and Others,
2. Sayed Muhammed Mashur Kunhi Koya Thangal Vs. Badagara Jumayath Palli Dharas Committee and Others,
3. Smt. Anandi Bhicar Veluskar v. Kustanand Vithu Veluskar and another, 2006 (4) AIR Bom R 88 : (AIR 2006 Bom 241)
4. Maria Margarida Sequeria Fernandes and Others Vs. Erasmo Jack de Sequeria (Dead) through L. Rs.,

18. The learned Counsel appearing for the respondents submitted that Nery Fernandes is the father of the respondent No. 1 herein Caetano Mariano Fernandes was the grandfather of the respondents and Florinda Fernandes was the grandmother. They were survived by Antonio Nery Francisco Fernandes and Maria Lilia Antasia Fernandes (Spinster). The share of the daughter, who was spinster went back to the grandfather and he become absolute owner in respect of the entire property. The learned Counsel submitted that the defendant claims to have purchased the suit property from Mr. Joaquim Santa Rita Colaco in the year 1942 but they neither raised any claim of whatsoever nature, nor proceeded to file the suit for getting declaration of their rights. The concerned deed was got registered after 40 years in the Land Registration Office. This deed does not specify about the boundaries but tallies with the entire suit property. Copy of which is at page 194.

19. According to the learned Counsel, the suit property was purchased by the

grandfather on 30th September, 1985. The entire suit property was purchased and not half, as alleged by the other side. The plaintiffs were in possession of the entire suit property. The learned Counsel referred to the contentions in both the appeals on which both the parties relied upon for showing the boundaries and in support of the claim of title. It was submitted by the learned Counsel that the plaintiffs being in possession for last 30 years and in view of registered documents produced in the Court showing title to the suit property and confirming the boundaries, their claim cannot be discarded by the defendants. The documents of the suit property which are relied upon by the plaintiffs for showing continuous possession in support of the evidence are the Municipal Tax receipts and other voluminous record. The learned Counsel placed reliance on the following judgments:

1. Patinhare Purayil Nabeesumma Vs. Miniyatan Zacharias and Another,

2. Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others,

20. I have perused the pleadings of the parties, relevant documents, deposition of witnesses, judgments of both the Courts below, considered the submissions advanced by the parties and judgments cited (supra).

21. The substantial question of law is framed I as to whether, the boundaries of the suit property is in accordance with the documents produced by the Plaintiffs and tallies with the boundaries mentioned in the plaint.

22. The respondents/plaintiffs had placed reliance on document like deed of registration deposition of the witnesses, who were tenants of the suit property for establishing their claim to the title of the suit property.

23. In the deposition of the defendants, there is no indication that the suit property was possessed by the defendants. The tenants in the suit property were continuously paying rent to the plaintiffs. In respect of the claim raised by the defendants that he had purchased the suit property in the year 1942, surprisingly no claim was put forth by the defendants to establish right to the suit property. However, the explanation is given by the defendants in this regard i.e. the parties were staying out of India and therefore, necessary steps could not be taken for the purpose of claiming possession in respect of the suit property. Considering all the contentions raised and the documents of title on which reliance was placed by the plaintiffs. I am of the opinion that the plaintiffs establish their case in respect of the possession of the suit property, the suit house registration No. 6645 situated in Alto De Pilotos.

24. In the written statement, the defendants have not come out with explanation regarding the boundaries of the suit property. Reliance is placed by both the parties on Section 110 of the Indian Evidence Act, 1872, which reads as under:

110. Burden of proof as to ownership.-- When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not

the owner.

25. Considering the pleadings of the parties and evidence brought on record, I find that the defendants have failed to discharge burden of proving the claim of continuous possession of over 40 years in respect of the suit property. In the facts of the case, I am not inclined to accept the plea raised by the learned Counsel for the appellants that the defendants are in possession of the suit property and the plaintiffs cannot claim to be in possession.

26. The next issue raised by learned counsel for the Appellants/defendants is as to whether the Lower Appellate Court could have directed the Inquiry Officer to delete the name of the defendant from the records maintained under the Land Revenue Code. The Lower Appellate Court has passed order of setting aside the judgment and order of the Trial Court. In view of the settled principles in law, the Revenue Authorities would be entitled to make appropriate entries in the record based on the documents produced before it including the judgment of the Civil Court which is certainly binding on the Revenue Authorities.

ORDER

(a) Appeal is partly allowed.

(b) The suit of the plaintiffs is decreed to the extent that the plaintiffs are declared owner in possession of the suit property. The judgment and decree directing the Revenue Authorities to delete the name of the defendants from the record maintained under the Land Revenue Code is quashed and set aside.

(c) The plaintiffs would be at liberty to resort to appropriate proceedings before the Revenue Authorities for getting their names recorded, in accordance with law.

(d) No order as to costs.