

(2008) 09 BOM CK 0075

In the Bombay High Court

Case No : Second Appeal No. 65 of 2006

Mr. Mulla Abdul Karim Muzawar through his legal representatives (Since deceased represented through Mrs. Banu Karim Muzawar, Ms. Ashiya Karim Muzawar and Ms. Kulsum Karim Muzawar) and Mr. Mulla Mohammad Saliem Muzawar

APPELLANT

Vs

Mr. Sayed Abdul Razak and Others

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

Citation : (2008) 110 BOMLR 3144

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : M.S. Usgaonkar and Iftikhar Agha, for the Appellant; S. Chopdekar, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—This appeal by original plaintiff Nos. 2, 2(a),(d) and (e) is directed against the judgment of the learned IInd Ad hoc Additional District Judge, Panaji disposing of Regular Civil Appeal No. 112 of 2002. The appellants have taken exception to this judgment on various grounds and have formulated several substantial questions of law including question as to whether the judgment of the appellate Court satisfies the requirement laid down in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., and mandatory requirements of Order XLI, Rule 31 of C.P.C.

2. Notice was issued to all respondents and all respondents have been served. However, only respondent No. 2, has appeared through Advocate Shri Chopdekar. Other respondents are not represented though duly served. I have heard both learned Counsel for the appellants and respondent No. 2.

3. A second appeal is open only on a substantial questions of law. As observed by

the Apex Court in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , the judgment of an appellate Court must reflect its conscious application of mind and recording findings, supported by reasons on all the issues arising, along with the contention put forth or raised by the parties for a decision of the appellate Court. In Santosh Hazari's case, the High Court had refused to entertain second appeal holding that there was no substantial question of law involved. The First Appellate Court is final Court of facts and when it did not discharge the duty cast on it as the final Court of facts, the Supreme Court found that the substantial question of law did arise and remanded the matter back to the High Court.

4. As the discussion to follow would show, the learned Judge of the First Appellate Court, in a cryptic judgment, did not at all consider the issues decided by the Trial Court or the points which he was required to consider. Ordinarily, therefore, in this case, failure of the First Appellate Court to consider the points raised in the appeal before him, would give rise to a substantial questions of law as to whether such judgment would at all amount to an appellate judgment in the eyes of law, in view of judgment in Santosh Hazari's case. It is, therefore, admitted on this question. The course that would normally follow, is to admit the appeal and to let it come up for decision as and when its turn comes. Since, however, the parties would be entitled to have judgment of the first appellate Court on the questions of fact, which have been raised by them, it would be prejudicial to them if this Court were to decide the questions of fact while considering the legality of judgment rendered by the first appellate Court. It would deprive of the parties of their valuable right to have such findings questioned on substantial question of law that may arise. Both the learned Counsel for the appellant and the respondent No. 2 agree that rather than keeping the appeal pending, it may be heard and decided finally at this stage itself, since the appropriate course in this matter, would be to remand the matter back to the District Court for a fresh adjudication after hearing the parties, formulating points for determination and then deciding the matter. It is not necessary to issue notice of final disposal to other respondents, who had not contested the proceedings before the trial court. Hence, by consent taken up for final disposal.

5. The appeal unfolds a very disturbing situation. The appellants herein had filed Regular Civil Suit No. 149/2000 for declaration, permanent injunction and recovery of possession claiming to be descendants of original owners of the property i.e. Mulla M. Hussain Muzawar and Mohammad Sharif Muzawar. Plaintiff No. 3 is stated to be son of Mulla M. Hussain Muzawar, who was son of Mulla Noruddin Muzawar, who was son of Ali Reza Muzawar, who was son of original owner Mulla Hussain Muzawar. Likewise plaintiff No. 1 is said to be the descendant of Mohammad Sharif Muzawar being the son of his son Mulla Ahmed Muzawar. They claimed that certain wrong entries had been taken in the survey record in respect of the property, to which they had raised the objection. Yet they found a board of original defendant No. 2's concern at the property. Defendant No. 2 informed them that he had paid a sum of Rs. 3 Lacs to defendant No. 1

towards the ownership of the properties. The plaintiffs specifically alleged that person through whom defendant Nos. 1 & 2 had claimed properties, had no relation to the original owners Mulla Hussain Muzawar and Mulla Sharif Muzawar and, therefore, all the documents, which led to the conveyance of the property to defendant No. 2, or to the title of defendant No. 1, did not create any title. Plaintiffs, therefore, sought declaration of being co-owners of the property, that the Gift Deeds and Sale Deeds, which led to creation of an interest in defendants were not binding on the plaintiffs, and for recovery of possession of the property with an injunction to restrain the defendants from raising any construction over the property.

6. Defendant No. 2 contested the suit by filing written statement on his behalf as well as on behalf of defendant No. 1. I would not refer to all the pleadings except those which are material for deciding the present proceedings. In response to para 2 of the plaint, where the plaintiffs had pleaded that the property originally belonged to Mulla M. Hussain Muzawar and Mohammad Sharif Muzawar, the defendants merely said that the extracts produced by the plaintiffs show the entries as mentioned in para 2 of the plaint. They, however, denied that the plaintiffs were related to Mulla M. Sharif Muzawar or Mohammad Sharif Muzawar. The written statement does not disclose as to how the defendant No. 1 was related to Mulla M. Sharif Muzawar or Mohammad Sharif Muzawar. It then goes on narrating the facts of Gift and Sale Deeds etc. Since they were presumably not related to the original title holders, in para 13, it was contended that one Shaikh Shabu, through whom they eventually claimed title, was in possession and enjoyment of the property as a owner thereof and adversely against the whole world. They then, prayed for dismissal of the suit.

7. The learned trial Judge framed necessary issues. However, defendants did not participate in the trial and the trial proceeded ex-parte. One of the plaintiffs tendered his affidavit in evidence along with supporting documents.

8. The learned trial Judge dismissed the suit by a short judgment, where the learned trial Judge considered all issues No. 1 to 7 together. The learned trial Judge observed that though plaintiff has deposed at length about his relationship with his ancestors, the original owners, he had not produced any documentary evidence to support the contention. She further observed that the names of the persons through whom the defendants claim, were entered in the revenue record, form Ix14, and that these entries have a presumptive value u/s 105 of the Land Revenue Code. She, therefore, proceeded to dismiss the suit, though the defendants had not cared to contest or challenge plaintiffs' evidence on oath.

9. Upon appeal, the learned IInd Ad hoc Additional District Judge maintained the judgment of the trial Court. The judgment recites the arguments advanced up to para 2 i.e. about first two and half pages of the judgment. The reasons are contained in para 3, which may be usefully reproduced as under:

I have gone through the pleadings of the parties and also evidence produced by

both sides. I have considered the appeal memo and also arguments advanced by both the sides. Appellants submit that originally property belonged to Mulla Hussain Muzawar. The inscription documents shows that suit property is inscribed in name of Mulla Muzawar. Appellants have not produced any documents to establish that they are descendants of Mulla Amrudin Muzawar. The appellants have produced a letter of the year 1981 which reveals that they had asked for correction of survey records of suit properties, however no evidence is produced to show as what efforts they have made in the last 25 years for correcting the survey records. The appellants have admitted the possession of Zulekha Bee and Fatima Bi over the suit properties and it is stated by them that their ancestors had permitted them to do the construction in the suit property.

The respondent No. 1 has claimed title and possession to the suit property through Zulekha Bee and Fatima Bi. It is correct that respondent No. 1 has also not produced any title document to show as how the suit property had devolved upon Fatima Bi and Zulekha Bee. Respondent No. 1 has also failed to prove his title with old documents. The evidence produced shows that respondent No. 1 is in possession of the suit properties. The survey records of survey No. 121/14 admeasuring 850 sq. mtrs. is in the name of Fatima Bi Sheikh and Zulekam Bee and survey No. 121/15 admeasuring 425 being in name of Teshwant Govind Shet Verekar and Mohammad Sharif Muzawar. It is proved that appellants have no right to the suit properties. The lower court was wrong in holding them as co-owners. As survey records being in the name of Fatima Bi Sheikh and Zulekha Bee, right has passed on to respondent No. 1 as he is claiming to have derived right to suit properties by virtue of sale deed executed by Fatima Bi and her husband about half of their share and half he claims to have been gifted to him by Zulekha Bee and her husband Sayed Mohamed. Considering the evidence produced on record specially the survey record this Court has arrived at a finding that appellants have failed to prove their ownership and possession over the suit properties. The lower Court have unnecessarily framed issue No. 5 which is about adverse possession when in fact no adverse possession is claimed by the respondent No. 1 in his written statement.

10. It may be seen from the discussion by the learned Judge of the Appellate Court that he accepts the position that Mulla Muzawar was the original owner of the property, but rejects the plaintiffs' claim because they failed to produce documents to establish that they are descendants of Mulla Amruddin Muzawar. It is not clear as to what documents were expected to be tendered or why in the absence of such documents, plaintiffs' word on oath, unchallenged in cross and un rebutted by failure to tender defence evidence, could be rejected. The learned Judge went on to observe that even respondents had failed to produce documents of their title. Curiously, he held that the trial Judge was wrong in holding the plaintiffs as co-owners. He observed that trial Judge unnecessarily framed the issue of adverse possession when in fact no adverse possession was claimed by the respondent No. 1, which is contrary to the record, since copy of written statement filed on record categorically shows that in para 13, the

defendants had raised the plea of adverse possession. The judgment thus, shows absence of application of mind to the questions, which had been raised before the learned Judge by an elaborate memo of appeal.

11. In this case, the defendants had not cared to cross-examine the plaintiffs, who had tendered his affidavit in evidence and had not themselves cared to tender their own affidavit or stepped in the witness box to rebut the plaintiffs' pleas. In spite of all this, the learned trial Judge seems to have relied on entries in revenue record, which, it is settled, neither create nor extinguish title, but have to be looked into only for the purpose of indicating possession. As far as possession is concerned, the plaintiffs had themselves stated that one of the descendants of the original owners Mulla M. Sharif Muzawar had sold about 69 sq.mtr's portion out of the property to defendant No. 1 Sayed Abdul Razaq by a registered sale deed. Further, since the plaintiffs contended that the property had not been divided amongst the owners, even if defendant No. 1 Sayed Abdul Razaq was held entitled to possess the piece purchased by him jointly with other owners in view of the sale deed in his favour, it cannot defeat the title of other heirs and descendants of original owners. In any case, the defendants having come up with the case of hostile title, it was for them to prove that title, which they had not done. It would be necessary for the learned District Judge to consider all these aspects and record his findings thereon.

12. The substantial question of law would have to be answered in the affirmative. It would be necessary to remit the case back to the learned Judge of the First Appellate Court to hear the parties afresh, formulate points for determination while writing judgment and deal with each of the points so that the parties know as to what the Appellate Judge has decided. The appeal is, therefore, allowed. The impugned judgment and decree is set aside and the matter is remanded back to the learned Judge of the First Appellate Court, who shall hear Regular Civil Appeal No. 112/2002 afresh. Parties shall appear before the Registrar of the District Court on 23.10.2008 to ascertain from the Registrar as to the Court, to which the appeal is assigned for disposal. The learned Judge, to whom the appeal is made over, shall endeavor to dispose it of within a period of 3 months, if necessary after issuing notices to such of the parties as do not appear on their own. Costs as incurred.