

(2015) 01 BOM CK 0262

In the Bombay High Court

Case No : Second Appeal No. 94 of 2006

Pandharinath V. Borkar and Others

APPELLANT

Vs

Gajanan Uskaikar and Others

RESPONDENT

Date of Decision : 16-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2015) 6 ALLMR 132

Hon'ble Judges : F.M. Reis, J.

Bench : Single Bench

Advocate : S.D. Padiyar and Adish V. Halankar, Advocates, for the Appellant;
S.M. Singbal, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri S.D. Padiyar, learned Counsel for the appellants and Shri S.M. Singbal, learned Counsel for the respondents. 2. The above appeal came to be admitted by an order dated 14/06/2007 on the following substantial question of law:

- i) Whether the Courts below misconstrued the sale deed dated 20.5.1982 at Exhibit DW. 1/E in holding defendants (present respondents) to be exclusive owners of the suit property thereby affecting the result of the suit ?
- ii) Whether in the facts and circumstances of the case, the point for determination framed by the first appellate Court whilst deciding the appeal in respect of a relief for permanent injunction claimed on the basis of ownership as well as exclusive, uninterrupted, peaceful possession over the suit property, cover all important questions involved in the case ?
- iii) When the record of rights prepared under the provisions of Goa Land Revenue Code, 1968 in respect of the suit property show the entry pertaining to the name of original plaintiff in occupants column, thereby attracting presumption under Section 105 of the said Code as regards possession of the property, whether the

Courts below were right in refusing the relief of permanent injunction to the plaintiff, merely on the basis of purported sale deed of the suit property in favour of the defendants and when the defendants had admitted occupation of the house structure in the suit property by the plaintiff before their purported purchase of the suit property ?

iv) Whether in a suit for permanent injunction for resisting interference with possession of the property, plaintiff who sues on the basis of his ownership as well as peaceful, uninterrupted and exclusive possession of the suit property can be denied the relief of permanent injunction sought for only on the ground that he has failed to establish the ownership and/or title to the property ?

v) Whether the findings given by the Court below on the plaintiffs claim as legal heirs of late Pandhari Borkar are not in ignorance of evidence on record particularly death certificate of original plaintiff Vasant Borkar at Exhibit PW1/A which clearly disclosed that the original plaintiff Vasant Borkar was the son of Shri Pandhari Borkar ?

vi) Whether the findings given by the appellate Court that the property which the defendant purchased tallies with the land allotted to the vendor Smt. Kalyani Shirodkar in the partition deed on 1978 is not illegal and arbitrary in as much as the same is rendered on no evidence or without any evidence in support thereof?

vii) Whether in the absence of any issue being framed regarding Pandhari Borkar's second marriage and the original Plaintiffs claim being the son of Pandhari Borkar, can the Courts below render a finding that Plaintiff's failed to prove their links to Pandhari Borkar ?

2. Shri S.D. Padiyar, learned Counsel for the appellants in support of the aforesaid substantial questions of law has pointed out that according to the appellants, he is the co-owner of the disputed property. The learned Counsel further points out that the sale deed pursuant to which the respondents are claiming title is in respect of the property under Survey No. 204/8, whereas the suit property is surveyed under No. 204/10 of Chimbhel village. The learned Counsel further points out that the sale deed itself is null and void, as according to him the vendors of the respondents do not have any exclusive title to the property. The learned Counsel further points out that the appellants are children of the second wife of original plaintiff Pandhari Borkar. The learned Counsel further points out that by excluding the appellants, the property was being partitioned by the other co-owners of the property and, as such, according to him all such transactions are not binding on the appellants and they have an independent right to the disputed property. The learned Counsel further points out that there is a house which is located in the disputed property which is occupied by the appellants for the last over 45 years and, as such, according to him the question of respondents' interfering with the disputed property would not arise. The learned Counsel further points out that both the Courts below have misconstrued the sale deed in favour of the respondents dated 20/05/1982 at

Exhibit DW1/E and, as such, have erroneously dismissed the suit filed by the appellants. The learned Counsel further points out that the possession is established by the appellants on the basis of the survey records which have been in the name of the appellants. The learned Counsel, as such, submits that the substantial questions of law be answered in favour of the appellants.

3. On the other hand, Shri S.M. Singbal, learned Counsel appearing for the respondents has supported the impugned judgment. The learned Counsel has pointed out that both the Courts below upon appreciating the evidence on record have come to the conclusion that the appellants have failed to establish their title and/or ownership or co-ownership over the disputed property. The learned Counsel further points out that even assuming the appellants are in possession of the house existing in the disputed property, nevertheless, such alleged possession is not traceable to a legal title. The learned Counsel further points out that the respondents have disputed that the appellants are the descendents of the original plaintiffs and that the father of the original plaintiff was Pandhari Borkar. The learned Counsel further points out that there is no material produced by the original plaintiff that he was descendant of Pandhari Borkar nor that the fact that the alleged second marriage had taken place. The learned Counsel, as such, submits that the appeal be dismissed.

4. I have considered the submissions of the learned Counsel and I have also gone through the records. Both the Courts below, upon appreciation of evidence on record, have come to the conclusion that the alleged possession of the appellants is not traceable to any legal title. This concurrent finding of fact which has been arrived at upon appreciating evidence on record cannot be re-appreciated by this Court under Section 100 of the Civil Procedure Code. The Courts below have also come to the conclusion that original plaintiff has failed to establish that he was the son of the second marriage of said Pandhari Borkar. This concurrent finding cannot be re-appreciated by this Court in the present second appeal as there is no material on record to hold otherwise. Apart from that the suit filed by the appellants is for injunction simplicitor. Considering that the alleged possession has not been established to be referable to any legal title, the question of interference by this Court in the present second appeal would not arise at all.

5. Shri Padiyar, learned Counsel for the appellants was also contending that the respondents have failed to establish that the property which was subject matter of the sale deed was corresponding to the suit property surveyed under survey No. 204/10. But, however, on perusal of the judgment of the Lower Appellate Court there is a specific finding to the effect that the property which was the subject matter of the sale deed was the plot allotted to the predecessor in title of the respondents pursuant to the deed of partition dated 16/01/1978. In such circumstances, the contention of Shri Padiyar that the identity has not been established cannot be accepted. For the aforesaid reasons, the first substantial question of law is answered holding that the Courts below have rightly construed

the sale deed dated 25/02/1982 on the basis of the material produced on record by the parties.

6. With regard to the contention of Shri Padiyar that point for determination is not framed considering that the suit is for injunction simplicitor, though the point for determination are not happily worded, nevertheless, I find that the learned Judge has considered the material on record to come to the conclusion that the findings of the learned trial Court do not call for any interference. Shri Padiyar does not press for the third substantial question of law.

7. With regard to contention of Shri Padiyar that the document at Exhibit PW1/A has been misconstrued by the Courts below, I find that merely recording the name of the father in the death certificate during the pendency of the suit would not by itself establish that the original plaintiff was the son of Pandhari Borkar. There is no corroborative evidence produced by the appellants to substantiate such ground. In such circumstances, the finding of the Courts below on that ground cannot be faulted.

8. With regard to the contention of Shri Padiyar that issue as to whether the original plaintiff was the son of the second marriage was not framed by the Courts below, I find that this aspect has been gone into by the Courts below essentially on the basis of the pleadings of the original plaintiff that he was the son of late Pandhari Borkar, which was disputed by the respondents. In such circumstances, the said contention of Shri Padiyar cannot be accepted. The substantial questions of law are answered accordingly.

9. On perusal of the Judgment of the learned Trial Judge, I find that the learned trial Court by Judgment dated 01.07.2004 has come to the conclusion that the Appellants have failed to establish that they are the co-owners in possession of the suit property. The learned Judge also found that the Appellants have also failed to establish that the Sale Deed executed in favour of the Respondents is null and void. The learned Judge also noted that the Respondents have proved that the Appellants have no right, title or interest in respect of the suit property. The learned Judge also found that the Respondents have proved that he is the exclusive owner of the suit property. The learned Judge also noted that the Respondents have failed to prove that the structure existing in the suit property was allowed to be occupied temporarily to the Appellant by Babuso Vithal Borkar. These findings of the learned Judge are based on appreciating the evidence on record as well as documentary evidence including the Deed of Partition executed in the year 1978 and the Sale Deed at exhibit Dw. 1/E. The learned Judge further noted that as there are no particulars to grant a declaration as sought by the Respondents, the Counter Claim filed by the Respondents came to be rejected. The Lower Appellate court whilst examining the Appeal preferred by the Appellants has noted that the Appellants have failed to establish their claim of co-ownership in respect of disputed property. The learned Judge also found that the Sale Deed and that the Sale Deed produced by the Respondents tallies with the land allotted to the Vendors Smt. Kalyan Shirodkar in the Partition Deed dated

1978. In such circumstances, the claim of the Appellants that they have a right to the disputed property came to be rejected. Even during the course of the arguments, Shri S.D. Padiyar, learned Counsel appearing for the Appellants, has failed to point out on the basis of the records how the Appellants are the co-owners in possession of the disputed property or that their alleged possession is traceable to any legal title. Admittedly, no declaration has been sought by the Appellants with regard to their claim of right to the disputed property. Apart from that, the claim to the suit property is based on the allegation that they are the owners/legal heirs of late Pandari Borkar who they claim to be their grandfather. It is the contention of the Appellants that late Pandhari had married twice and that the Appellants are the heirs of the late Pandhari Borkar. In fact, the Courts below have noted that there is no documentary evidence produced by the Appellants to show their link with said Pandhari Borkar. In such circumstances, I find that a cloud is raised over the claim of the Appellants over the property in dispute. Admittedly, no Inventory Proceedings were filed upon the death of the Estate Leaver through whom the Appellants are claiming their rights to the disputed property. In the present case, a Sale Deed has been produced by the Respondents in respect of the disputed property which has created a right to the property in favour of a third person. The Courts below have correctly construed the document at Dw. 1/E to hold that the property described therein tallies with the property in the partition document. The alleged possession of the Appellants has not been shown to be lawful and which is traceable to any title over the disputed property. There are serious disputes with regard to the claim of the Appellants over the disputed property which cannot be adjudicated in the suit for injunction simpliciter. The Appellants have not sought any declaration of their title over the disputed property considering the dispute raised with that regard by the Respondents herein. This Court cannot re-appreciate the evidence and arrive at a contrary finding about the claim of the Appellants that they are the descendants of Pandhari Borkar.

10. In such circumstances, there is no infirmity in the impugned Judgments passed by the Courts below. The concurrent findings cannot be re-appreciated by this Court in a Second Appeal as no perversity in such findings have been pointed out by the Appellants herein. All the substantial questions of law are answered accordingly against the Appellants herein. For the aforesaid reasons, I find no merit in the above Second Appeal which stands accordingly rejected.